TITLE

COLLECTIVE BARGAINING, MINIMUM LABOUR STANDARDS AND REGULATED FLEXIBILITY IN THE SOUTH AFRICAN CLOTHING MANUFACTURING SECTOR: AT THE LEVEL OF THE NATIONAL CLOTHING BARGAINING COUNCIL'S WESTERN CAPE SUB-CHAMBER.

BY

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DECLARATION

I declare that Collective Bargaining, Minimum Labour Standards and Regulated Flexibility in the South African Clothing Manufacturing Sector: at the level of the National Clothing Bargaining Council's Western Cape Sub-Chamber is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete reference.

Jakobus William Groenewald May 2006.

Signed: 

DEDICATION

This work is dedicated to my parents, the late Monica Groenewald (who died on 23 June 2005) and Jurie. I am indebted to them for the good upbringing they gave me. My father was the one who advised me as a child not to allow the policy of apartheid to restrict my independence of thought. My late mother always encouraged me as a child to try to fulfil my ambitions in life. As a family unit, we firmly believed that one can move mountains with the help of the Lord. From there came our motto in life: *Nisi Dominus Frusta*[2].

So, it was the Lord who not only gave me (whilst in a state of bereavement) the strength to complete this research, but also blessed me with parents who understood the pressure brought about by working full-time and studying part-time. Not once did they ever level any criticism against me for neglecting them. On the contrary, they were always prepared to assist financially when an academic book needed to be purchased. This gesture (on their part) I will never forget, because I am mindful of the fact that such financial assistance had to be budgeted for out of a pension. Thus, I can only say: Thank you Lord, for such parents.

[2] If this phrase is rendered in English, it means: 'Without God everything is in vain'.

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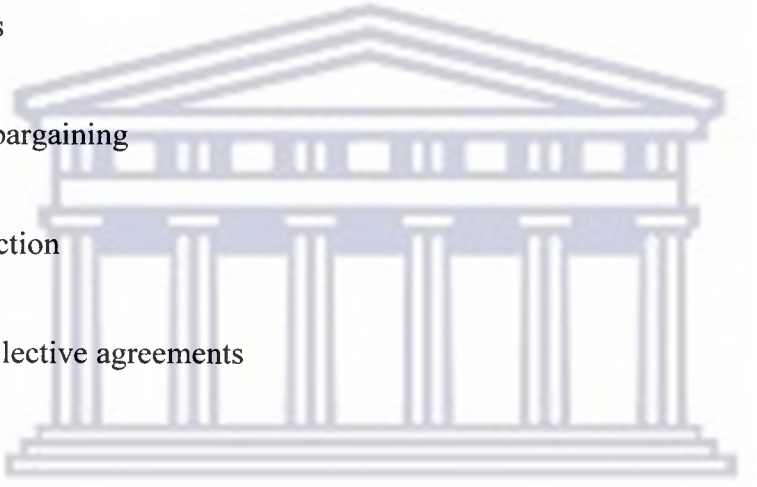
ABSTRACT

In the context of a society in which there is an urgent need to create jobs, this research considers, firstly, whether the current labour regulatory environment is flexible enough to allow for an employment scenario that is conducive to job creation. The research then considers what is meant by the policy of 'regulated flexibility' and considers how flexibility operates in practice at NBC level. It is argued that the concept of flexibility is a misnomer – since it creates more problems than it solves. The research concludes with a call for real flexibility that will allow for increased investment and a greater supply of jobs.

KEYWORDS

1. SA economic policy
2. Job creation
3 Labour regulatory environment
4. Regulated flexibility
5. Exemptions
6. Collective bargaining
7. Industrial action
8. Sectoral collective agreements
9. Flexibility
10. NBC



ABBREVIATIONS

AD	*Appellate Division*
ANC	*African National Congress*
BBQ	*Black Business Quarterly*
BCEA	*Basic Conditions of Employment Act*
BLLR	*Butterworths Labour Law Report*
BEE Com	*Black Economic Empowerment Commission*
BEE	*Black Economic Empowerment*
CCA	*Cape Clothing Association*
CCMA	*Commission for Conciliation Mediation and Arbitration*
CDE	*Centre for Development and Enterprise*
CIBC (Western Cape)	*Clothing Industry Bargaining Council (Western Cape)*
CMT	*Cut, make and trim*
COSATU	*Congress of South African Trade Unions*
DOL	*Department of Labour*
DTI	*Department of Trade and Industry*
EE	*Employment Equity*
EEA	*Employment Equity Act*
FAWU	*Food and Allied Workers Union*
FGWU	*Food and General Workers Union*
GDP	*Gross Domestic Product*
GDS	*Growth and Development Summit*
GEAR	*Growth, Employment and Redistribution*
GEM	*Global Entrepreneurship Monitor*
GG	*Government Gazette*
GN	*Government Notice*
HSRC	*Human Sciences Research Council*
ICCI (Cape)	*Industrial Council for the Clothing Industry (Cape)*
IDLL	*Institute of Development and Labour Law*
ILJ	*Industrial Law Journal*

ILO	*International Labour Organisation*
IRASA	*Industrial Relations Association of South Africa*
JTP	*Journal of Theoretical Politics*
LAC	*Labour Appeal Court*
LC	*Labour Court*
LDD	*Law Democracy and Development*
LFS	*Labour Force Survey*
LRA	*Labour Relations Act*
NBC	*National Bargaining Council for the Clothing Manufacturing Industry*
NBF	*National Bargaining Forum*
NCOP	*National Council of Provinces*
NEHAWU	*National Education of Health & Allied Workers Union*
NUMSA	*National Union of Metalworkers of South Africa*
RDP	*Reconstruction and Development Programme*
SA	*The South African Law Reports*
SA	*South Africa*
SACOB	*South African Chamber of Business*
SALB	*South African Labour Bulletin*
SACCAWU	*South African Commercial Catering & Allied Workers Union*
SACP	*South African Communist Party*
SAJLR	*South African Journal of Labour Relations*
SACTWU	*Southern African Clothing and Textile Workers Union*
SCA	*Supreme Court of Appeal*
SMMEs	*Small, medium and micro-sized enterprises*
TGWU	*Transport and General Workers Union*
THRHR	*Tydskrif vir Hedendaagse Romeins-Hollandse Reg*
TURP	*Trade Union Research Project*
UCT	*University of Cape Town*
UN	*University of Natal*

UNISA	*University of South Africa*
UP	*University of Pretoria*

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[3] They are: representatives of 'organisations of community and development interests', 'organised labour', 'organised business' and 'the state' (see s 3(1) of the National Economic, Development and Labour Council Act (Act no. 35 of 1994)).

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Chapter 1: Introduction, research question and layout

1. Introduction

The decision to participate in a Masters Programme, which in turn led to the writing of this thesis, was not taken lightly. It was a calculated decision, after realizing that –

> [w]here previously labour was, second to capital, the most important production input, it now gets substituted by knowledge. 'Knowledge-workers' – people with special skills and specialized knowledge – became the elite-workers of a globalised labour market. Worldwide there is an acute shortage of such people. Gone are the days when workers were paid for their 'presence'. Now one gets paid according to what one can do. In order to enter the new labour market, one needs to have a proven background of competence – or a certificate which clearly stipulates competence on certain cardinal areas.[1]

The topic of this thesis was developed after reading that 'a labour standard cannot be created by individual employment relations between workers and employers. It can only be inaugurated by law or collective agreement'[2] and that '[d]omestic business and industry ... have consistently cited ... binding industry wide collective bargaining agreements and minimum wages as impediments to job creation.'[3]

Due to the fact that the writer's job primarily involves seeking compliance with collective agreements concluded at sectoral level,[4] the focus of this research is on regulated flexibility in the South African clothing manufacturing sector: at the level of the National Clothing Bargaining Council's Western Cape Sub-Chamber. Why the clothing

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[1] Muller, P., 'Arbeidsmark het nou "kenniswerkers" nodig' *Die Burger*, 6/01/2004 at 9.
[2] Sengenberger, W., 'Protection – participation – promotion: The systemic nature and effects of labour standards' *Creating Economic Opportunities – the role of labour standards in industrial restructuring* (ILO publication, 1994) at 48.
[3] Boyle, B., 'Economic overhaul under way' *Sunday Times, Business*, 22/05/2005 at 8.
[4] The question which arises in this regard is what does the term 'sectoral collective agreement', as defined in s 213 of the LRA, means? A sectoral collective agreement can best be described as subordinate legislation (S v Prefabricated Housing Corporation (Pty) Ltd and another 1997 (1) *SA* 535 (AD) at 540A-B; see also Fouché, M.A., 'Contract of employment' *Legal principles of contracts and negotiable instruments* (Butterworth Publishers (Pty) Ltd, 1999) at 249).

manufacturing sector? The ANC-led government considers, among others, the clothing manufacturing sector to be 'a strategic industrial sector'.[5]

2. Research question

This research examines whether (a) the National Bargaining Council for the Clothing Manufacturing Industry (NBC) is flexible in its approach towards agreement enforcement and (b) there is any special dispensation for small, medium and micro-enterprises (SMMEs) in relation to minimum wages, funds, etc or in terms of size.

This question needs to be considered within the following context: The parties to the NBC concluded collective agreements which cover all non-metro regions,[6] certain 'country' regions,[7] and specific metro regions in South Africa.[8] Furthermore, it must also be noted that the latter two collective agreements were the outcome of collective bargaining negotiations between the parties to the NBC's Western Cape Sub-Chamber, i.e. the CCA (a registered employer organization[9]) and SACTWU (a registered trade

[5] Address by the Deputy President of the Republic of South Africa to SACTWU's National Congress which was held at the International Convention Centre in Durban on 9/08/2001. See Zuma, J., SACTWU National Congress, 2001.

[6] See for example the Consolidated Main Collective Agreement for the Non-Metro Areas, published under GN R 1001 in *GG* No 25197 of 25/07/2003. This collective agreement was extended and made binding on non-parties with effect from 28/07/2003 to 30/06/2005.

[7] See for example the Consolidated Country Areas Collective Agreement for the Western Cape Region, published under GN R 234 in *GG* No 24385 of 21/02/2003. This collective agreement was extended and made binding on non-parties with effect from 22/09/2003 to 30/06/2004 and thereafter to 30/06/2005 (see GN R 508 in *GG* No 26279 of 30/04/2004). These government notices were subsequently cancelled (see GN R 1186 in *GG* No. 26878 of 15/10/2004) and an amended collective agreement was re-enacted and extended to non-parties (see GN R 1187 in *GG* 26878 of 15/10/2004, corrected by GN R 1312 in *GG* 26963 of 12/11/2004 and by GN R 24 in *GG* 26168 of 21/01/2005).

[8] See for example the Consolidated Main Collective Agreement for the Western Cape Region, published under GN R 322 in *GG* No 24967 of 7/03/2003. This collective agreement was extended and made binding on non-parties with effect from 30/06/2003 to 30/06/2004 and thereafter to 30/06/2005 (see GN R 510 in *GG* No 26279 of 30/04/2004). These government notices were subsequently cancelled (see GN R 1184 in *GG* No 26878 of 15/10/2004) and an amended collective agreement was re-enacted and extended to non-parties (see GN R 1185 in *GG* 26878 of 15/10/2004, corrected by GN R 1367 in *GG* 27007 of 26/11/2004 and by GN R 24 in *GG* 26168 of 21/06/2005).

[9] In terms of the definition of 'employer organisation' in s 213 of the LRA it means: '[A]ny number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and employees or trade unions.'

union[10]). The latter is an affiliate member of COSATU.[11] This trade union federation is, in turn, not only a member of the tripartite Alliance[12] but also one of the representatives of organised labour at NEDLAC. The latter is 'a national-level bargaining forum'[13] and its functions are inter alia to 'seek to reach consensus and conclude agreements on matters pertaining to social and economic policy' and to 'promote the formulation of co-ordinated policy on social and economic matters'.[14] That said, it is also of interest to note that '[t]his wording contains the potential for placing a very wide range of policy issues within the competence of Nedlac'.[15] For example, NEDLAC dealt with a very wide range of policy issues at the 2003 Growth and Development Summit (GDS) which was held at the Galagher Estate in Midrand. It was at this summit that the four constituencies of NEDLAC[16] reached agreement on an aspect such as '[s]mall business promotion'.[17]

To complete this section, it is submitted that the latter point prompts one to consider whether there is a need for small business promotion in the South African clothing manufacturing sector. Before moving on to consider this question, it is important to bear in mind that this question cannot be addressed without making reference to the number of employer organisations (which have seats on the NBC) and the percentage of small, medium and micro enterprises (SMMEs) which are members of these employer organisations. From this perspective, the South African clothing manufacturing sector can be said to be in need of small business promotion, because ten employer organisations from the nine provinces in the country have seats on the NBC and 80 percent of those ten

[10] In the same section of the LRA 'trade union' is defined as meaning: '[A]n association of employees whose principle purpose is to regulate relations between employees and employers, including any employers' organization.'
[11] Interview by writer with Mr. R. Alexander: Project co-ordinator of SALRI, 9/11/2001.
[12] The tripartite Alliance consists out of the ANC (ruling party), the SACP and COSATU. Since April 1994 the SACP and COSATU took part in general elections under the banner of the ANC. It can thus rightly be said that the ANC, SACP and COSATU are Alliance partners.
[13] Maziya, M., 'Contemporary labour market policy and poverty in South Africa' *Fighting Poverty: Labour Markets and Inequality in South Africa* (UCT Press, 2001) at 206.
[14] S 5(1), National Economic, Development and Labour Council Act (Act no. 35 of 1994).
[15] Pretorius, L., 'Relations between State, Capital and Labour in South Africa: Towards Corporatism?' *JTP* (1996) Vol. 8 Part 2 at 267.
[16] They are: representatives of 'organisations of community and development interests', 'organised labour', 'organised business' and 'the state' (see s 3(1), National Economic, Development and Labour Council Act (Act no. 35 of 1994)).
[17] *Cape Times*, 9/06/2003 at 11.

employer organisations' membership are SMMEs.[18] This picture is no different at regional level.[19]

3. Layout

This research is organised in six chapters, in addition to chapter 1.

Chapter 2 sets the context for this research by examining current government economic policy. The ANC-led government seeks to encourage investment, yet the labour regulatory environment is viewed as the main 'constraint on investment and therefore [economic] growth and therefore on job creation'.[20] Yet without job creation, the high unemployment rate will continue unabated. The solution, it will be suggested, is to allow for flexibility in the labour regulatory environment, thus encouraging investment which will lead to job creation. In this chapter, the emphasis is also put on the fact that '[t]he rate of job creation lags well behind the growth in job seekers'.[21] This fact, coupled with the understanding that the ANC-led government considers the clothing manufacturing sector to be 'a strategic industrial sector,'[22] prompted this research to raise the question as to whether there is a need for job creation in the South African clothing manufacturing sector. It is in this regard that this research argues that there is a need for job creation in the sector.

In chapter 3, an overview of the labour regulatory environment (applicable to South African clothing manufacturers in the Non-Metro Areas) is given. The statutes examined include the EEA, the BCEA and the LRA. Other relevant subordinate legislation and policy are: the Consolidated Main Collective Agreement for the Non-Metro Areas and

[18] Swart, C.S., 'Eerder boete as ledegeld – Ally' *Die Burger, Sake*, 1/09/2005 at S2.
[19] For example, in the Western Cape metro region the number of SMMEs which are members of the CCA (the latter and SACTWU are parties to the NBC's Western Cape Sub-Chamber) is 70 percent (Van Zyl, G., 'Bargaining Councils from an Employer Organisation's perspective' at 2. A speech delivered at an IRASA panel discussion which was held on 9/11/2005 at the Century Restaurant, Western Province Cricket Club, Newlands.
[20] Bhorat, H., 'The Roundtable'. A debate on the challenges of job creation, which was held on 10/02/2005 on SABC 3.
[21] Hudson, J., 'From wall to gentle slope' *Mail & Guardian*, 8 to 14/08/2003 at 24.
[22] *Supra* (note 5).

BEE. The chapter also focuses on the following question: Is this labour regulatory environment applicable to a small business in the non-metro areas of the South African clothing manufacturing sector and does it make provision for flexibility? This question is vital, because it is this research's considered opinion that it is only by way of a flexible labour regulatory environment that SMMEs can develop. The conclusion is made that this regulatory environment does apply to small businesses in the South African clothing manufacturing sector. Furthermore, this regulatory environment does make provision for flexibility. However, the onerous nature of the Consolidated Main Collective Agreement for the Non-Metro Areas (i.r.o. minimum wages) leaves small clothing manufacturers with little option than to seek relief in the form of formal exemption applications.

Chapter 4 deals with collective bargaining, the setting of minimum wages at sectoral level (with specific reference to the South African clothing manufacturing sector) and industrial action. Minimum wages and conditions of employment are established through a process of collective bargaining. The latter is examined in this chapter to provide context to the discussion of flexibility that follows in the next chapter. In doing so, attention is also paid to the extension of sectoral collective agreements to non-parties and the rationale behind the extension of sectoral collective agreements to non-parties. This is followed by a discussion on the setting of minimum wages at sectoral level (with specific reference to the South African clothing manufacturing sector). The discussion also focuses on wage-related industrial action in the Western Cape metro region of the NBC. Industrial action is considered in the final part of this chapter, because industrial action and collective bargaining are dependent on one another and the right to strike is the employees' most effective means of forcing employers to bargain with them.[23] It is within this context that reference is made to strikes and secondary strikes and the rules and case law which regulate the strike process.

In chapter 5, the meaning of flexibility and how it is built into the LRA of 1995 and the BCEA of 1997 are examined. The chapter also explores the policy of 'regulated

[23] Etu-Seppälä, M., *Duty to bargain: in the absence of statutory duty to bargain, is there an obligation to that effect to be found in the LRA?* Unpublished LL.M Dissertation, Faculty of Law, UCT, 1999 at 59.

flexibility'. This is followed by an overview of and a discussion on the application of the three components of this policy (i.e. voice regulation, variable application of labour standards and flexible collective bargaining structures) at the level of the National Clothing Bargaining Council's Western Cape Sub-Chamber. In exploring the 'voice regulation' policy component, the concept will be more clearly defined and discussed in chapter 5. This chapter will also explore two 'voice regulation' themes namely (a) whether 'voice regulation' is a feature of the policy of 'regulated flexibility' and (b) whether 'voice regulation' has been formally endorsed as a policy directive of the ANC-led government. Another theme that this research explores is: what does the concept of 'voice regulation' imply?

With reference to the 'variable application of labour standards' policy component, particular attention is paid to the meaning of the term 'labour standard' and the fact that labour standards can only be introduced by law or collective collective agreement.[24] This research then moves away from the meaning of a 'labour standard' and its introduction to reflect on the function of sectoral collective agreements. This is followed by a brief discussion on the CIBC (Western Cape) Main Collective Agreement. The discussion also focuses on clause 19 Part B of this sectoral level agreement, because it allows the parties to the NBC's Western Cape Sub-Chamber to compress a working week or average hours of work through 'ordinary' collective agreements concluded at plant level. Under the 'flexible collective bargaining structures' policy component, reference is made to the NBC's exemptions system. This is followed by a discussion on the overall performance of the NBC's Western Cape Sub-Chamber with regards to exemptions. Simple examples are used to illustrate to what extent the exemptions system is providing flexibility. The discussion also focuses on policy, procedure and individual cases. Decisions by the NBC's Independent Exemptions Board (IEB) are considered in the final part of this chapter and in doing so reference is made to three unpublished ruling awards which were handed down by different panelists of the NBC's IEB.

Chapter 6 consists of a summary and conclusion.

[24] *Supra* (note 2).

Chapter 2: South Africa's economic policy

The ANC-led government adopted the economic policy entitled GEAR, on 14 June 1996[1] and it 'was a structural adjustment policy, self-imposed, to stabilise the macroeconomic situation [and to deal with] the realities of an unmanageable budget deficit, high interest rates and weak local and foreign investor confidence'[2] which existed at the time. The adoption of the GEAR policy led to disputes within the tripartite alliance. COSATU, one of the Alliance partners,[3] was keen to resolve these disputes at the 2003 Growth and Development Summit (GDS) which was held at the Galagher Estate in Midrand.

2.1. 2003 Growth and Development Summit (GDS)

The idea of the summit was first proposed by the Congress of SA Trade Unions and SA Communist Party in a bid to end disputes within the tripartite alliance over government's macroeconomic policies.[4] However, a debate did not take place on this issue, because COSATU could not convince the ANC-led government to redraft its GEAR policy.[5]

In order to understand COSATU's desire to have the GEAR policy rewritten, one should be aware of the fact that when 'the ANC-led government formally embraced conservative, neo-liberal economic policies in the form of GEAR'[6] it gave up, 'the official policy framework of the ANC Alliance,'[7] i.e. the Reconstruction and Development Programme (RDP). Furthermore, it must be understood that although GEAR had a positive reception in the national and international business and financial

[1] *Growth, Employment and Redistribution: A Macroeconomic Strategy* (Department of Finance, 1996) at 1 of 10. Reported on internet at http://www.polity.org.za/govdocs/policy/growth.html. Retrieved on 6/03/2002.
[2] Netshitenshe, J., 'A Social Partnership is Required for Growth in the Next 10 Years' *Sunday Times*, 4/04/2004 at 21.
[3] The other two are: the ANC and the SACP.
[4] Dlamini, J., 'ANC Meets to Prepare for growth Summit in May' *Business Day*, 14/03/2003 at 3.
[5] Petros, N., 'Summit of mixed fortunes for Cosatu' *Business Day*, 9/06/2003 at 3.
[6] Ntsebeza, L., 'Rural governance and citizenship in post-1994 South Africa: democracy compromised?' *The State of the Nation: South Africa 2004-2005*. (HSRC publication, 2005) at 77.
[7] Terreblanche, S. *A History of Inequality in South Africa, 1652-2002*. (UN publication, 2002) at 111.

arena,[8] literature suggests that it created problems within the ANC.[9] For example: 'Cosatu dismissed GEAR as "conservative" and biased in favour of the private sector.'[10]

It is opined that COSATU is correct when it says that the ANC-led government's macro-economic policy is biased in favour of the private sector. This cannot be otherwise, seeing that one of GEAR's main aims was to promote economic growth through exports and investment.[11] Importantly for those who have an interest in investment, it appears as if the ANC-led government was unable to attract significant foreign direct investment since its acceptance of the GEAR policy in 1996:

> South Africa has been attracting only a small share of the overall pool of foreign direct investment (FDI) directed to emerging markets.[12]

Thus it is clear that there are constraints on investment; the crucial question therefore seems to be what the main constraint on investment is.[13]

[8] Roux, A., *Everyone's Guide to the South African Economy* (Zebra Press, 2002) at 168.
[9] Barber, J., *Mandela's World* (James Currey Ltd, 2004) at 123.
[10] Ibid.
[11] *Supra* (note 1) at 5 of 10. See also Landsberg, C., *The Quiet Diplomacy of Liberation* (Jacana Media (Pty) Ltd, 2004) at 204.
[12] Lewis, J.D. *Promoting Growth and Employment in South Africa* (World Bank, Economic Policy and Prospects Group, *Africa Region Working Paper Series 32*, 2002) at 4. Reported on internet at http://www.worldbank.org/afr/wps/wp32.pdf. Retrieved on 13/10/2003.
[13] We will not penetrate deeply into this question here, except to point to a 2005 programme entitled 'The Roundtable' with John Perlman which was screened on SABC 3 on Thursday, 10/02/2005. In this programme Tony Leon (leader of the Democratic Alliance (the official opposition in parliament)), Charles Maisel (director of the 'men on the side of the road project), Ebrahim Patel (general secretary of SACTWU) and Dr Haroon Bhorat (director of UCT's Development Policy Research Unit) debated the challenges of job creation. Speaking on the programme, Bhorat said that 'if you ask both foreign and domestic investors what do they see as the key constraint on investment and therefore [economic] growth and therefore job creation, the first is the labour regulatory environment'. He also said, adding: 'The other two are crime and HIV Aids'.

2.1.1. An agreement reached between NEDLAC's four constituencies[14] to intervene in SA economy

The four constituencies of NEDLAC reached agreement at the 2003 GDS (already referred to above) 'that a range of immediate interventions [was] required'[15] in the South African economy.

According to a lecturer in labour law at UCT, 'the SA economy has features of developed economies in that it has a large financial and consulting services sector compared with the manufacturing sector.'[16] However, the aforesaid features are not the only characteristics of the SA economy. This point is clearly illustrated by the fact that South Africa has two[17] economies, i.e. (a) the advanced and more affluent part of the country's economy (also called the 'first economy'[18] or 'formal economy'[19]) and (b) the marginalised and less affluent part of the country's economy (also called the 'second economy'[20] or 'informal or peripheral economy'[21]). Some elaboration on the first and second economy is in order at this point: 'The First Economy is modern, produces the bulk of [South Africa's] wealth, and is integrated within the global economy;'[22] whereas, '[t]he Second Economy ... is characterized by underdevelopment, contributes little to the GDP, contains a big percentage of [South Africa's] population, incorporates the poorest of [the country's] rural and urban poor, is structurally disconnected from both the first

[14] They are: representatives of 'organisations of community and development interests', 'organised labour', 'organised business' and 'the state' (see s 3(1) of the National Economic, Development and Labour Council Act (Act no. 35 of 1994)).
[15] *Cape Times*, 9/06/2003 at 11. It is submitted that such interventions are in line with the concept of corporatism because, 'corporatism is concerned with intervention into the economy as a whole (macro), intervention into individual sectors or markets (meso) and into the individual firm (micro)' (Williamson, P.J. *Corporatism in Perspective: An introductory guide to corporatist theory* (SAGE Publications Ltd, 1989) at 218).
[16] Van Voore, R., quoted by Petros, N. 'Jobless youth a challenge for summit' *Business Day*, 5 June 2003 at 2.
[17] Leon, T., 'Only growth will put SA to work' *Business Day*, 29/01/2004 at 7.
[18] Mbeki, T., Address to NCOP (The Presidency, 11/11/2003) at 1 of 7. Reported on internet at http://www.gov.za/search97cgi/s97_cgi?action=View&VdkVgwKey=%2E%2E%2Fd. Retrieved on 25/11/2003.
[19] *Supra* (note 17).
[20] *Supra* (note 18).
[21] *Supra* (note 17).
[22] *Supra* (note 18).

and the global economy, and is incapable of self-generated growth and development.'[23] Having said that, though, it is clear that 'on its own, [the second economy] is unable to attain the rates of growth that would ultimately end its condition of underdevelopment.'[24] Furthermore, it is opined that the second economy can only be uplifted through resources generated by the first economy. Equally it follows that the first economy can only produce more resources than it currently does, if it grows and develops further. This view is also borne out by President Mbeki's address to the nation at the opening of the 2004 session of parliament. In his speech Mbeki argues:[25]

> [W]e must continue to focus on the growth, development and modernization of the First Economy, to generate the resources without which it will not be possible to confront the challenges of the Second Economy.

2.1.2. A commitment by NEDLAC's four constituencies to halve SA unemployment rate by 2014 and an undertaking by the same role players to create jobs and stimulate economic growth

At the 2003 GDS representatives of 'organisations of community and development interests', 'organised labour', 'organised business' and 'the state'[26] made a commitment to halve unemployment in South Africa by 2014,[27] and they also '[signed] a "Marshall Plan" to create jobs and stimulate economic growth.'[28]

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[23] *Supra* (note 18).

[24] African National Congress National General Council, *Discussion document: Development and underdevelopment learning from experience to overcome the two-economy divide* (ANC publication, 29/06/2005-3/07/2005) at 7 of 14. Reported on internet at http://www.anc.org.za/ancdocs/ngcouncils/2005/2economydivide.html. Retrieved on 24/05/2005.

[25] Mbeki, T., *State of the Nation Address at the opening of Parliament* (The Presidency, 6/02/2004) at 9 of 11. Reported on internet at http://www.gov.za/search97cgi/s97_cgi?action=View&VdkVgwKey=%2E%2E%sFd. Retrieved on 23/02/2004.

[26] *Supra* (note 14).

[27] NEDLAC *Growth and Development Summit (GDS) Agreement* (NEDLAC publication, 7/06/2003) at 4 of 28. Reported on internet at http://www.info.gov.za/issues/gds/gdsagreement03.htm. Retrieved on 9/01/2006.

[28] Msomi, S and R. Munusamy., 'Summit vows to halve jobless rate' *Sunday Times*, 8/06/2003 at 4.

2.1.2.1. **SA unemployment rate**

According to a 2005 labour market survey,[29] the unemployment[30] rate in South Africa – in terms of the expanded definition[31] – has increased to 39,5 percent,[32] which is much higher than the official unemployment rate of 26,5 percent. This high unemployment rate will continue unabated if no jobs are created. The solution, it is suggested, is to allow for flexibility in the labour regulatory environment, thus encouraging investment which in turn will not only lead to growth in SA economy but also job creation.

2.1.2.2. **Growth in SA economy**

Education, employment and investment can be seen together as the 'golden triangle' of economic growth. In the era of globalisation there have been different responses to globalisation, and successes in adjusting to it have varied from country to country based on cultural, economic and political diversity.[33] The President of South Africa's viewpoint is that '[n]o economy can meet its potential if any part of its citizens is not fully

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[29] Which was conducted by Stats SA. See Statistics South Africa *LFS (March 2005)* (Stats SA, 2005). Reported on the internet at http://www.statssa.gov.za. Retrieved on 8/11/2005.

[30] Roux explains the term 'unemployment' as follows:

> In essence, a person is unemployed if he or she would like to be working but is unable to find a job. More specifically, unemployed persons are normally defined as those persons who:
> - are 15 years and older (but normally below the age of 65 years); and
> - are not currently employed; but
> - are available for employment; and
> - have taken specific steps during the last four weeks to find employment.
>
> According to this definition, therefore, a person younger than 15 years cannot be unemployed. Similarly, a person older than 15 years is not unemployed if he or she is engaged in full-time studies (at school, college, technikon or university), or if that person is a full-time housewife. And a person is not unemployed if he or she is not actively seeking employment (Roux, A., *Everyone's Guide to the South African Economy* (Zebra Press, 2002) at 50-51).

[31] The expanded definition of unemployment is defined as 'including those who are unemployed and who want to work but who are totally discouraged [in finding employment] ...' (Brits, E., 'Ekonomie en arbeidsmag groei, maar werkverskaffing staan stil' *Die Burger, Sake*, 31/01/2004 at S7).

[32] Discouraged work seekers: 13 percent (*supra* (note 29) at xviii, figure 11) plus official unemployment rate: 26,5 percent (*supra* (note 29) at 6, point 2.3.1) equals expanded definition of unemployment.

[33] Mills, G., *The Wired Model: South Africa, Foreign Policy and Globalisation* (Published jointly by the South African Institute of International Affairs, Johannesburg and Tafelberg Publishers Ltd, Cape Town, 2000) at 135.

integrated into all aspects of that economy.'[34] In this context of people being integrated into the economy, employment equity (EE) becomes a core element of black economic empowerment (BEE).[35] The latter appears as a policy in the ANC-led government's Reconstruction and Development Programme (RDP).[36] BEE is defined in the Black Economic Empowerment Commission's report as 'an integrated and coherent socio-economic process'[37] and its aim is to transform not only the South African economy (by deracialising 'business ownership and control'[38]) but also to benefit those still excluded from the country's economy. On the face of it, it would appear, then, that BEE is a means to an end, the end being to expand the output of the SA economy.

2.1.2.3. **Job creation**

In 2003 a news reporter[39] asserted that '[t]he rate of job creation [from a South African point of view] lags well behind the growth in job-seekers'.[40] Thus, the question can be raised as to whether there is a need for job creation in the South African clothing manufacturing sector. In order to answer this question, one has to start by looking at the number of job losses which the South African clothing manufacturing sector experienced between 2003 and 2005: 55 575 jobs were lost during this period.[41] This figure then demonstrates that there is a need for job creation in the South African clothing manufacturing sector.

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[34] Mbeki, T., *State of the Nation Address at the opening of Parliament* (The Presidency, 14 February 2003) at 13 of 18. Reported on internet at http://www.info.gov.za/speeches/2003/030214125210001.htm. Retrieved on 9/01/2006.

[35] See Burger, D., *South African Yearbook 2003/04* (Government Communication and Information System, 2003) at 196.

[36] See ANC., *Reconstruction and Development Programme* (Umanyano Publications, 1994) at 93, point 4.4.6.3.

[37] Ramaphosa, C et al *BEE Com* (Skotaville Press, 2001) at 1 of 3. Reported on internet at http://www.bmfonline.co.za/bee_rep.htm. Retrieved on 4/04/2002.

[38] *Supra* (note 36).

[39] Hudson, J., 'From wall to gentle slope' *Mail & Guardian*, 8 to 14/08/2003 at 24.

[40] For purposes of this research, the term 'job-seekers' is taken to mean: those people who are unemployed and seeking work. '[J]ob creation,' on the other hand, is described in the *Oxford Advanced Learner's Dictionary of Current English 6th Edition* (University Press, 2000) to mean 'the process of providing opportunities for paid work, especially for people who are unemployed' (at 462).

[41] Loxton, L., 'Clothing sector accused of lacking innovation', *Cape Times, Business Report*, 20/10/2005 at 15.

Let us assume that the only way to stem the flood of job losses caused by closures and/ or liquidations is to create 'an enabling and flexible [labour regulatory] environment which contributes to the development of SMMEs'[42] in the South African clothing manufacturing sector. By developing SMMEs 80[43] percent of the clothing manufacturers in South Africa (which are not only affiliated to employer-organisations which have a seat on the NBC but also enjoy SMME status) will have better prospects to take on additional orders. In order to handle these bigger volumes of work, capacity needs to be built by way of employing more people to do the work, thus creating jobs so desperately needed in the South African clothing manufacturing sector.

Having now explored a number of issues about the South African economy, it is clear that the ANC led government has established an economic path for the country. The key elements of this economic policy are a reduction in unemployment, economic growth and job creation. Policy directives and regulatory frameworks including sector level agreements must take account of these key elements of the South African economy. The clothing manufacturing sector is in no way exempt from all the imperatives highlighted above.

[42] Van der Walt, D., 'Bargaining Councils – Meeting the labour market challenges of the 21st century' at 10. An unpublished discussion document which was presented to a bargaining council transformation workshop. This workshop took place at the CCMA head office in Johannesburg on 13/04/2000.
[43] Swart, C.S., 'Eerder boete as ledegeld – Ally' *Die Burger, Sake*, 1/09/2005 at S2.

Chapter 3: The labour regulatory environment: a critical review of the South African clothing manufacturing sector

This chapter will explore the labour regulatory environment with specific reference to the EEA, the BCEA and the LRA. Other relevant subordinate legislation and policy will also be covered namely, the Consolidated Main Collective Agreement for the Non-Metro Areas and BEE. A special emphasis will be placed on determining whether or not the regulatory environment is applicable to a small business[1] in the non-metro regions of the South African clothing manufacturing sector and if so, whether its applicability is flexible.

3.1. Employment Equity Act (EEA)

The EEA[2] deals with equity[3] in the workplace. This Act not only contains a provision which prohibits unfair discrimination[4] but also places an obligation on a designated employer[5] to give effect to some statutory duties.[6]

3.2. Basic Conditions of Employment Act (BCEA)

The BCEA[7] gives effect to and regulates the constitutionally guaranteed right to fair labour practice[8] and provides for minimum labour standards (read: basic conditions of employment). The Act also empowers the Minister of Labour to make a sectoral

[1] For an explanation on what the term 'small business' means, please go to *infra* (under the heading in this research entitled 'glossary of definitions, terms and concepts').
[2] Act no. 55 of 1998.
[3] This is how the 4th edition of *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1951) defines equity: 'Fairness' (at 402).
[4] *Supra* (note 2), s 6(1).
[5] In terms of s 1 of the EEA, a 'designated employer' is one who employs 50 or more employees or one who employs less than 50 employees but whose annual turnover is equal to or more than that of a small business as defined in schedule 4 of the EEA.
[6] They are: (a) the implementation (*supra* (note 2), s 13(1)) of affirmative action measures, (b) the preparation (*supra* (note 2), s 13(2)(c) read with s 20(1)) and implementation (*supra* (note 2), s 20(1)) of an employment equity plan, and the submission of employment equity reports to the Director-General of the DOL (*supra* (note 2), s 20(1)).
[7] Act no. 75 of 1997.
[8] *Supra* (note 7), s 2(a). For more information on the constitutional guaranteed right to fair labour practice, please go to *infra* (under the heading in this research entitled 'glossary of definitions, terms and concepts').

determination 'for one or more sector and area'.[9] One such sectoral determination which the Minister of Labour made was Sectoral Determination No. 4: Clothing and Knitting Sector, South Africa[10] and it covered all employers and employees in the sector.[11] This sectoral determination was replaced[12] by the Consolidated Main Collective Agreement for the Non-Metro Areas.[13] What is noteworthy, however, is the fact that the replacement of Sectoral Determination No. 4 does not necessarily imply that it has been withdrawn by the DOL. The reason it remains on the statute book is that in the case where the Consolidated Main Collective Agreement for the Non-Metro Areas expires and the parties to the NBC do not renew it, the provisions as set out in Sectoral Determination No. 4 will apply.[14]

3.3. **Consolidated Main Collective Agreement for the Non-Metro Areas**

This sectoral collective agreement of the NBC replaced the sectoral determination for the clothing industry[15] and requires that every clothing manufacturer shall within seven days of starting a business register with the NBC.[16] Secondly, it makes provision for minimum wages.[17] For example, the qualified rate of pay for a clothing machinist (in the magisterial districts of Paarl, Stellenbosch, Camperdown, Umzinto and Uitenhage) is R 371, 95. In all the other magisterial districts (excluding those 'covered by the scopes of the Bargaining Councils which amalgamated on 23 May 2002 to establish the current [NBC]'[18]) the rate of pay is R 282, 76. Thirdly, it provides for a 45-hour working week (i.e. Monday to Saturday).[19] Fourthly, it states that the permitted maximum number of

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[9] *Supra* (note 7), s 55(1).
[10] Published under GN R. 1007 in *GG* 21643 of 13/10/2000.
[11] Ibid.
[12] Godfrey, S. et al 'On the outskirts but still in fashion – Monograph No. 2', *Development and Labour Monograph Series*, IDLL, UCT, 2005 at 43 fn 20.
[13] See GN R 1001 in *GG* No 25197 of 25/07/2003. This collective agreement was extended and made binding on non-parties with effect from 28/07/2003 to 30/06/2005.
[14] Telephonic interview with Ms M. Bergman, DOL: Pretoria, on 19/02/2004.
[15] *Supra* (note 12).
[16] *Supra* (note 13), clause 29.
[17] *Supra* (note 13), clause 4(1).
[18] *Supra* (note 13), clause 1(1)(b).
[19] *Supra* (note 13), clause 8(2)(a).

overtime hours in any week is ten hours[20] or three hours on any day.[21] Insofar payment for overtime is concern, the Agreement is clear: overtime payment must be at least one and a half times an employee's hourly wage.[22]

3.4. **Labour Relations Act (LRA)**

The LRA[23] gives primacy[24] to collective agreements[25] concluded at bargaining council level[26] and makes provision for the extension of such collective agreements to non-party employers[27] by the Minister of Labour.

3.5. **Black economic empowerment (BEE)**

At the time of writing this research, the South African clothing manufacturing sector had no charter on BEE in place which could serve 'as a guideline for a more systematic, clear and realistic program of black economic empowerment'.[28] BEE is a process designed to 'increase the level of participation by black people [from the second] into the [first] economy'[29] of South Africa. In order to meet this economic prerogative, the ANC-led government placed the Broad-Based Black Economic Empowerment Act (BBBEEA)[30] on the statute books. 'The underlying philosophy is,' as one academic has noted, 'that in various economic, industrial and business sectors, "charters" would be constructed, e.g. a

[20] *Supra* (note 13), clause 8(6)(b).
[21] *Supra* (note 13), clause 8(6)(a).
[22] *Supra* (note 13), clause 8(7).
[23] Act no. 66 of 1995.
[24] Basson, J in *Mthimkhulu v CCMA & another* (1999) 20 *ILJ* 620 (LC) at paragraph 26.
[25] For a definition of collective agreements, see *infra* (chapter 4, point 4.1 of this research).
[26] It may be informative to mention here that once a collective agreement is concluded at sectoral level, it binds the parties who signed it (*supra* (note 23), s 31). By implication it means that party-employers need to give effect to the new substantive conditions of employment (including minimum wages) which were negotiated by the parties to a bargaining council from the date when the Agreement was signed.
[27] The extension of centrally bargained collective agreements to non-parties is regulated by s 32 of the LRA. For more information on the extension of collective agreements concluded at sectoral or bargaining council level, go to *infra* (chapter 4, point 4.1.1.1 of this research).
[28] Leuvennick, J., 'Nuwe handves kom' *Die Burger, Sake*, 17/12/2002 at S13.
[29] Ndumo, J., 'How to integrate and comply with Broad-based, Black Economic Empowerment and the Codes of Good Practice' at 4. A speech delivered at an IRASA (WC) seminar which was held on 11/04/2006 at the UCT Graduate School of Business, Breakwater Campus, Waterfront, Cape Town.
[30] Act no 53 of 2003. In terms of this Act, 'Black' is defined as including so-called 'Coloureds', Asians and Africans (see s 1).

Mining Charter, Financial Services Charter, etc.'[31] He further tellingly points out that '[e]ach charter would be monitored by "agencies" who would score the BEE credentials of companies working under the various charters.'[32] With regards to the BEE 'score' of a business, '[a] "balanced scorecard" is used to measure performance'.[33] Scorecards are 'issued as ... Code[s] of Good Practice'[34] by the Minister of Trade and Industry.[35] This brings us to the intention of the codes, which are twofold. Firstly, these codes are designed to promote the BEE process[36] and, secondly, to guide businesses that do not have sectoral charters on BEE.[37]

3.6. Is this labour regulatory environment applicable to a small business in the non-metro regions of the South African clothing manufacturing sector and does it make provision for flexibility?

3.6.1. EEA

The EEA[38] deals with equity in the workplace. Section 6(1) of the Act prohibits unfair discrimination. This provision is applicable to every large and small business in the South African clothing manufacturing sector. Section 13(2)(c) read with section 20(1) of the Act also require that designated employers (i.e. clothing manufacturers) prepare EE plans, while section 21(1) compels them to implement EE plans that will ensure reasonable progress towards achieving employment equity in the workplace and to submit EE reports to the DOL.

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[31] Van Zyl Slabbert, F., *The other side of history: An anecdotal reflection on political transition in South Africa*. (Jonathan Ball Publishers (Pty) Ltd, 2006) at 137.
[32] Ibid.
[33] See Plaatjes, H. 'Black economic empowerment – Are we getting it right' *BBQ* Vol. 7, No. 2 (Fourth Quarterly) (Cape Media, 2004) at 31.
[34] See Burger, D., *South African Yearbook 2003/04* (Government Communication and Information System, 2003) at 197.
[35] *Supra* (note 30), s 9. This section of the Act authorizes the minister, by notice in the *Government Gazette*, to issue Codes of Good Practice on BEE.
[36] Msomi, S., 'BEE codes "not made to punish"' *Sunday Times, Business*, 22/05/2005 at 1.
[37] Paton, C., 'The smaller you are, the harder it becomes' *Financial Mail* Vol. 181, No. 2 (BDFM Publishers (Pty) Ltd, 2005) at 21.
[38] *Supra* (note 2).

To assess whether the EEA makes provision for flexibility, it is essential that the facts relating to one of the obligations of small businesses in the Act (i.e. to submit EE reports) be first ascertained. A designated employer employing between 50[39] and 150 employees needs to submit an EE report to the DOL only every second year;[40] whereas a designated employer employing 150 employees or more needs to report annually on the first working day of October.[41] The conclusion can therefore be made that the EEA draws a distinction based on the size of a designated employer's workforce. The requirement, i.e. to only report to the DOL every second year (in the case where between 50 and 150 employees are employed) instead of annually, reduces the compliance costs of designated employers. Yet it appears as if a reduction in compliance costs does not necessarily guarantee compliance with the procedural requirements of the EEA.[42] This fact is borne out by a recent investigation which was conducted by the DOL. The latter found that 62 out of a total of 86 designated employers in the clothing manufacturing sector (Cape Town metropole) did not comply with it in November 2003; whereas 24 did.[43]

3.6.2. **BCEA**

The BCEA[44] gives effect to the constitutionally guaranteed right to fair labour practice.[45] In South Africa, all clothing workers and employers enjoy the protection of such a constitutional right, irrespective of whether the business is large or small. The Act also makes provision for basic conditions of employment. Flexibility is built into the BCEA in that certain basic conditions of employment may be varied. The Act's variation provisions are dealt with in more detail in chapter 5[46] of this research, but for present

[39] Please note: employers with less than 50 employees and a certain turnover are excluded from the affirmative action provisions of the EEA. From this perspective, the exclusion in the Act can be said to give effect to the policy of regulated flexibility, because one of the latter's features is 'the selective application of legislative standards or requirements' (Cheadle, H. 'Regulated flexibility and small business: Revisiting the LRA and the BCEA', Unpublished mimeo, UCT, 2005 at 10).
[40] *Supra* (note 2), s 21(1)(b).
[41] *Supra* (note 2), s 21(2)(b).
[42] Interview by writer with Ivan Polson of DOL: Cape Town, 27/02/2004.
[43] DOL (RSA) *Report on the Employment Equity inspection blitz* Unreported report (Provincial Office Western Cape, 2004) at 6.
[44] *Supra* (note 7).
[45] *Supra* (note 8).
[46] Point 4.2.2.

purposes it should be noted that certain basic conditions of employment can be varied by individual agreements,[47] 'ordinary' collective agreements,[48] collective agreements (concluded at sectoral or bargaining council level)[49] and Ministerial Determinations (issued by the Minister of Labour).[50] One such ministerial determination issued was the Ministerial Determination: Small Business.[51] This determination is applicable to the whole of South Africa,[52] and also varies the application of the BCEA and certain sections of Sectoral Determination No. 4[53] for employers whose workforce are less than ten[54] and supersedes Wage Determinations still in existence.[55] In general, the Ministerial Determination: Small Business provides for the following:

(a) A maximum of 45 ordinary hours of work in a week.[56]

(b) An increase in the maximum number of overtime hours worked in a week, i.e. from ten to 15 hours.[57]

(c) Cheaper overtime rates, i.e. one and one third times the employee's hourly rate for the *first* ten hours of overtime worked in any week;[58] and one and one half times the employee's hourly rate for any overtime *in excess* of ten hours worked in any week[59] (own emphasis).

[47] *Supra* (note 7), s 9(2); s 10(1), (3) and (4); s 11; s 14(5)(a) and (b); s 15(2) and (3); s 16(3) and (6); s 18(1); s 20(10); s 21(2)(b) and s 22(6)(a).
[48] *Supra* (note 7), s 12(1); s 49(2); s 27(7) and s 37(2).
[49] *Supra* (note 7), s 49(1).
[50] *Supra* (note 7), s 50(1)(a).
[51] Published under GN R. 1295 in *GG* 20587 of 5/11/1999.
[52] *Supra* (note 51), clause (1)(1.1).
[53] *Supra* (note 10).
[54] Department of Labour (RSA) *Annual Report 1999* (DOL, 2000) at 1.
[55] Interview by writer with Nerine Khan, the then Executive Manager: Labour Relations of the DOL, at a presentation by the DOL and the CCMA on the amendments to South African Labour Laws which was held in Cape Town's City Hall on 5/09/2002.
[56] *Supra* (note 51), clause 3(3.2)(a).
[57] *Supra* (note 51), clause 2(2.1).
[58] *Supra* (note 51), clause 2(2.2)(a).
[59] *Supra* (note 51), clause 2(2.2)(b).

(d) Working time arrangements, i.e. averaging of hours of work.[60]

For all practical purposes the determination does away with family responsibility leave.[61] The balance of the conditions of employment with which a clothing manufacturer needs to comply are those contained in Sectoral Determination No. 4.[62] This was the legal position until the parties to the NBC negotiated the Consolidated Main Collective Agreement for the Non-Metro Areas.[63] Thereafter all clothing manufacturers in the non-metro regions who employ six or more workers were required to comply with the stipulated conditions of employment (including minimum wages) as set out in the NBC's extended main collective agreement for the non-metro regions.

3.6.3. **Consolidated Main Collective Agreement for the Non-Metro Areas**

As pointed out already, the NBC's extended main collective agreement for the non-metro regions is applicable to all party and non-party clothing manufacturers who are not covered by the scope of the NBC's metro agreements.[64] They therefore need to comply with the prescribed minimum wages and conditions of employment set out therein. The only clothing manufacturers who are excluded are those who employ five or less workers and as a result thereof qualify for an automatic exemption.[65] It is not clear why the parties

[60] *Supra* (note 51), clause 3(3.1). Having said that, though, it is important to bear in mind that averaging of hours of work can also be introduced by individual agreements (*supra* (note 7), s 9(2)), 'ordinary' collective agreements (*supra* (note 7), s 12(1)), sectoral collective agreements (*supra* (note 7), s 49(1)) and ministerial determinations (*supra* (note 7, s 50(1)(a)).

[61] *Supra* (note 51), clause 4(4.1). The reasoning upon which this exception was founded was this: 'Family responsibility leave, more than other conditions, was regarded by firms interviewed [in a study] as having the most severe impact' (Godfrey, S and J. Theron, 'Labour standards versus job creation? An investigation of the likely impact of the new Basic Conditions of Employment Act on small businesses', *Monograph No. 1*, IDLL, UCT, 1999 at 53-54).

[62] *Supra* (note 10).

[63] *Supra* (note 13).

[64] *Supra* (note 13), clause 1(1)(a).

[65] *Supra* (note 13), clause 1(3)(b). Once exempted, these clothing manufacturers had to comply with the Ministerial Determination: Small Business (*supra* (note 51)) and those provisions of Sectoral Determination No. 4 (*supra* (note 10)) which were not varied by the ministerial determination. Here this research chooses to highlight only one provision, i.e. minimum wages. The qualified rate for a machinist in the magisterial districts of Paarl, Stellenbosch, Hammersdale, Camperdown, Umzinto and Uitenhage is R 319, 95. In all the other areas of South Africa (excluding the magisterial districts of Hammersdale, Camperdown, Umzinto, Paarl, Stellenbosch and Uitenhage) the rate of pay for a qualified machinist is R 236, 76 (*supra* (note 10), clause 3(1)).

to the NBC continue to use five or less workers as the criterion to determine which clothing manufacturers qualify for an automatic exemption.[66] Such an approach reserves flexibility (as provided for in the Ministerial Determination: Small Business) to only those clothing manufacturers who employ five or less workers and not to those who employ nine or less workers. This does not make sense, seeing that five or less workers in employment points to micro-enterprises;[67] whereas ten or less workers in employment indicates a very small firm.[68]

Having said that, though, it is clear that in the case of very small businesses employing six to nine workers[69] the NBC's extended main collective agreement for the non-metro regions not only bestowed on these clothing manufacturers higher minimum wages[70] than those prescribed in Sectoral Determination No. 4, but also family responsibility leave.[71] It

[66] The writer attended a labour affairs manager workshop at Salt Rock in KwaZulu-Natal from 9/02/2005 to 12/02/2005 at which Leon Deetlefs, the National Compliance Manager of the NBC for the Clothing Manufacturing Industry, was asked why the parties to the bargaining council have maintained with the five or less threshold insofar automatic exemptions were concerned. 'Oh,' he said, 'the five or less threshold is (a) a practice in the industry and (b) mentioned in the BCEA.'

It is opined that the above statement is only partly correct. The fact that 'the [bargaining] council had, for many years, granted an automatic exemption' (Inggs, M., 'Call for moratorium on small business prosecutions' *Cape Times, Business Report*, 2/09/2005 at 19) to clothing manufacturers who employ five or less workers points to a practice in the sector and vindicates the first part of the statement. The second part of the statement is incorrect, because no mention is made in the BCEA of a threshold of five or less, although the Act does refer to a four or less threshold (see *supra* (note 7), s 28(2)(a)). In terms of this section of the Act employees are excluded and employers not required to observe ss 29(1)(n), (o) and (p), and ss 30, 31 and 33 which 'deal with certain written particulars of employment, the duty to inform employees of their rights, keeping of records and information about remuneration that must be given to an employee' on each payday (Fouche, M.A., 'Contract of employment' *Legal principles of contracts and negotiable instruments* (Butterworth Publishers (Pty) Ltd, 1999) at 228 fn 148)). Furthermore, it is opined that, as far as these administrative obligations are concerned, the BCEA merely lowers the onus of proof (which is on the employer). These administrative obligations are not core rights nor do they preclude the parties to the NBC for the Clothing Manufacturing Industry from varying the threshold upwards.

[67] See schedule in National Small Business Act (Act no. 102 of 1996) at 20.

[68] Ibid.

[69] Roskam, A., 'Assessing labour market legislation since 1994', *SALB*, Vol 29 No. 2 (Umanyano Publications CC, 2005) at 42.

[70] *Supra* (note 17). It is an open question, however, whether all clothing manufacturers in the non-metropolitan region comply with these minimum wages. In an effort to determine compliance with the wage component of the NBC's extended main collective agreement for the non-metro region the following is provided: 90, 71% or 283 of the 312 (total number of clothing manufacturers in the non-metro region) are not paying the prescribed minimum wages (Interview by writer with Leon Deetlefs, National Compliance Manager of the NBC for the Clothing Manufacturing Industry, on 7/12/2005).

[71] *Supra* (note 13), clause 17.

also limited overtime to three hours per day,[72] but not more than ten hours per week[73] and payment for overtime was increased to that of 'one and a half times [a clothing worker's] hourly wage.'[74]

Turning to whether the Consolidated Main Collective Agreement for the Non-Metro Areas makes provision for flexibility, it is worth noting that its provisions which permit the averaging of working hours[75] and the compressing of a working week[76] are sources of flexibility. Yet, evidence suggests that since 25 July 2003 (i.e. the date on which the Consolidated Main Collective Agreement for the Non-Metro Areas was published) to 31 October 2005, no 'ordinary' collective agreements were concluded at plant level between the parties to the NBC's Western Cape Sub-Chamber, i.e. clothing manufacturers in the non-metro regions who are members of the CCA and representatives of SACTWU, and registered with the NBC,[77] in order to compress a working week or average hours of work.[78] This means that during the period in question the parties to the NBC's Western Cape Sub-Chamber did not use clauses 10 and 11 of the NBC's extended main collective agreement for the non-metro regions at all.

3.6.4. **LRA**

We have seen that the LRA[79] not only gives primacy[80] to sectoral collective agreements, but also makes provision for and regulates the extension of such collective agreements to non-parties[81] by the Minister of Labour. Once a sectoral collective agreement has been extended to non-party employers, the latter (large and small) are required to comply with the terms and conditions of employment (including minimum wages) set out in the

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[72] *Supra* (note 21).
[73] *Supra* (note 20).
[74] *Supra* (note 22).
[75] *Supra* (note 13), clause 11.
[76] *Supra* (note 13), clause 10.
[77] Once a plant level collective agreement has been registered with the NBC, it enjoys the same status as that of a sectoral collective agreement.
[78] NBC's Western Cape Sub-Chamber data base (2005).
[79] *Supra* (note 23).
[80] *Supra* (note 24).
[81] *Supra* (note 27).

sectoral collective agreement unless they have been granted an exemption in terms of the centrally bargained collective agreement or if the agreement is set aside by the Courts.[82]

Based on the outcome of the LAC decision, it is reasonable to conclude that binding sector-wide collective bargaining agreements are onerous on non-party employers; and that the only way a non-party employer can seek relief from the provisions of a sectoral collective agreement is to contest the bargaining council's extended collective agreement in Court or to apply for an exemption. The route to be followed in obtaining exemption from a bargaining council's extended collective agreement is to approach the council for exemption and if the request is refused, to follow the appeal procedure as provided for in its extended collective agreements. In critically reviewing whether or not the LRA makes provision for flexibility, it is worth noting that section 32 (3)(e) [83] of the LRA provides the legal framework for an exemption process to be implemented. Only if this process is followed and the decision of the exemption body is positive, then this becomes a source of flexibility.

3.6.5. BEE

BEE is applicable to all large and small businesses and no provision is made for flexibility.[84] Furthermore, there is no charter on BEE in place in the South African clothing manufacturing sector which could serve as a guideline for a good programme of black economic empowerment.[85] The result is that clothing manufacturers were left to interpret and give effect to BEE as they deemed fit. For example, some factory owners

[82] *Kim-Lin Fashions CC v Brunton & another* (2001) 22 ILJ 109 (LAC).

[83] Sub-section 3(e) requires that provision be made in a collective agreement for an independent body to hear and decide any appeal brought against a bargaining council's refusal of a non-party's application for exemption from the provisions of a collective agreement.

[84] This fact is borne out by an article which Loxton, a newspaper reporter, has written. It quoted Lionel October, the deputy director-general of the DTI, as saying:

> [P]resent policy is that there is no generalized exemption [from BEE] ... (Loxton, L., 'BEE applies to foreign and local firms – dti' *The Mercury, Business Report*, 10/02/2005 at 6).

[85] *Supra* (note 28).

empowered their employees by allowing them to start their own businesses;[86] whereas others tried to benefit previously disadvantaged groups (i.e. females and unemployed people) through an empowerment initiative.

A key requirement of the empowerment initiative was that previously disadvantaged groups (i.e. females and unemployed people) should not only conclude a partnership agreement with one another, but also had to enter into a commercial contract with the factory owner (who designed the empowerment initiative). By entering into a commercial contract (also called 'Service Contract'[87]) the so-called 'partners' contracted out of the LRA.[88] Such action by the so-called 'partners' was not permissible in law.[89] This explains why the NBC instituted legal proceedings against the factory owner and the so-called 'partners'. During the arbitration proceedings the legal officer of the NBC's Western Cape Sub-Chamber probed the legal relationship which existed between the factory owner and the so-called 'partners' by (a) attacking the commercial contract[90] and (b) arguing that the so-called 'partners' only worked for or rendered services to one person and therefore they can be presumed to be employees.[91] This approach was

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[86] In return, these former employees were under an obligation to (a) produce garments from the cut-lay which was provided to them by the factory owners (who initiated the empowerment deal) and (b) sell such finished garments to the same factory owners (who initiated the empowerment deal) on a weekly basis (Hawker, D., 'Empowerment good for business' *The Cape Argus, Argus Money*, 28/02/2005 at 16).

[87] This 'Service Contract' prohibited the so-called 'partners' to enter into an agreement with any other party to do work for another party. This meant that the so-called 'partners' only worked for or rendered services to one person, i.e. the factory owner (who designed the empowerment initiative). The so-called 'partners' can therefore be presumed to be employees, because even if this 'Service Contract' between the factory owner (who designed the empowerment initiative) and the so-called 'partners' indicates that the latter are independent contractors, and any one of the 7 factors listed in s 200A(1) of the LRA is present, then the so-called 'partners' are presumed to be employees.

[88] *Supra* (note 23).

[89] S 199, LRA. See also *Building Bargaining Council (Southern and Eastern Cape) v Melmons Cabinets CC and Another* (2001) 22 *ILJ* 120 (LC) at paragraph 8.

[90] See *LAD Brokers (Pty) Ltd v Mandla* [2001] 9 *BLLR* 993 (LAC). In that case Van Dijkhorst AJA said (at paragraph 15):

> ... The legal relationship between the parties is to be determined primarily from a construction of the contract between them (cf *SA Broadcasting Corporation v McKenzie* (1999) 20 *ILJ* 585 (LAC); *Niselow v Liberty Life Insurance Association of South Africa Ltd* (1998) 19 *ILJ* 752 (LAC) at 754C.

[91] S 200A(1)(g), LRA.

successful because the arbitrator ruled in the NBC's favour.[92] In the absence of a firm and definitive charter for the clothing manufacturing sector, it is likely that this case, which represents a spurious attempt to implement black economic empowerment, may become the 'yardstick' for other maverick clothing manufacturers to willingly fail to comply with BEE requirements. Assuming that the above-mentioned impression is correct, then all indications are that a need exists for a clearer focus on measurement of clothing manufacturers' performance on BEE. The measurement of choice should be the DTI's 'balanced scorecard'[93] which measures three core elements, namely direct empowerment, indirect empowerment and human resource development and employment equity.[94]

The DTI provides the framework for sectors to develop their own charter. Within the context of the clothing manufacturing sector, the bargaining council structure is one forum where dialogue on this matter can take place between the parties. A bargaining council will in general deal with minimum conditions of employment including the setting of minimum wages, through the process of collective bargaining.

[92] See unreported ruling award by Arbitrator Bhana in *NBC for the Clothing Manufacturing Industry: Cape Chamber (Western Cape Sub Chamber) and Tradelink Services (Pty) Ltd & 3 others* (Case no 179-04, dated 3/05/2005). After having considered the evidence and legal arguments put forward at the arbitration proceedings and based on the facts of this case, Arbitrator Bhana expressed the opinion that the legal relationship between the factory owner (who designed the empowerment initiative) and the so-called partners was one of employer-employee and the so-called partners were controlled and supervised by the main respondent. He also added:

> It is clear that [the so-called partners] were essentially carrying on the business of the main respondent and their set up is analogous to that of a department of the main respondent's company, in that they in reality put their personal labour at its disposal. The sad part is that these so called partners wanted to believe that they were independent, but all had to admit at some point during the arbitration that they were utterly at the mercy of the main respondent. The main respondent might have been genuine in his desire to create independent entities, but the factual situation showed the opposite. I therefore find that the [so called partners] were indeed employees of the main respondent, albeit under the guise of independent contractors (at 15).

[93] *Supra* (note 33).
[94] *Supra* (note 34) at 196.

Chapter 4: Collective bargaining, the setting of minimum wages at sectoral level (with specific reference to the South African clothing manufacturing sector) and industrial action

4.1. Collective bargaining

The term 'collective bargaining' is defined in the ILO Convention No. 98 of 1949 as 'voluntary negotiation between employers' organizations and workers organizations, with a view to the regulation of terms and conditions of employment by collective agreements.' [1] The latter is defined in the LRA of 1995 as meaning:

> ... a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand –
>
> (a) one or more employers;
>
> (b) one or more registered employers' organizations; or
>
> (c) one or more employers and one or more registered employers' organizations.[2]

The forum where one or more registered trade unions and one or more registered employers' organizations negotiate and conclude collective agreements at sectoral level is called a bargaining council.[3]

4.1.1. Sectoral collective agreements and their legal force

Such collective agreements bind only the parties to a bargaining council unless the Minister of Labour extends the agreement to non-party employers within the registered

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[1] Convention No 98, article 4. (Source: ILO *International Labour Conventions and Recommendations: 1919-1981* (ILO publication, 1982) at 7-8).

[2] S 213, LRA.

[3] For an explanation on what the term 'bargaining council' means, see heading in this research entitled 'glossary of definitions, terms and concepts'.

scope of the council.[4] The extension of sectoral collective agreements to non-parties and the rationale behind such extension will now be considered.

4.1.1.1. **Extension of sectoral collective agreements to non-party employers**

Section 32 of the LRA regulates the extension of sectoral collective agreements to non-parties. A bargaining council may approach the Minister of Labour and request him/ her to extend a sectoral collective agreement to specific non-parties which fall within a bargaining council's registered scope[5] if the union or unions 'whose members constitute the majority of the members of the trade unions that are party to the bargaining council'[6] and the employer's organization or organizations 'whose members employ the majority of the employees employed by the members of the employers' organizations that are party to the bargaining council'[7] vote for such an extension. In terms of section 32(2) of the LRA the Minister of Labour must, within 60 days from receipt of a request by a bargaining council to extend a sectoral collective agreement to non-parties, extend such agreement if the parties constituting a bargaining council are sufficiently representative.[8] There are three ways to measure representivity: (i) The number of employees at party firms as a proportion of all employees; (ii) The members of party trade unions as a proportion of all employees. (These are the measures used in the LRA for considering the extension of agreements.); and (iii) The number of party employers as a proportion of all employers.[9] Having said that, though, it is clear that the term 'sufficiently representative' (which is not defined in the LRA[10]) is not the only criterion which the Minister of Labour needs to take into account. Section 32(3) of the LRA sets out specific provisions and requirements that must be present before the Minister of Labour may make a

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[4] S 31, LRA. This is done by way of publication in the *Government Gazette*. Furthermore, it is clear that their force and effectiveness against non-parties is dependent upon having been properly promulgated in terms of the relevant legislation.
[5] Botha, H. *The guide to the new Labour Relations Act, 1995* (Practition IR Publications CC, 1996) at 37.
[6] S 32(1)(a), LRA.
[7] S 32(1)(b), LRA.
[8] Bhorat, H. et al, 'The South African labour market in a globalizing world: Economic and Legislative considerations' *Employment Paper, 2002/32* (ILO publication, 2002) at 48.
[9] Godfrey, S., 'Critical issues facing Bargaining Councils: representivity, extensions, exemptions and compliance'. An unpublished paper delivered at an IRASA panel discussion which was held on 9/11/2005 at the Century Restaurant, Western Province Cricket Club, Newlands.
[10] Buchler, L. et al. 'Centralised collective bargaining' *Know your LRA* (DOL publication, 2002) at 25.

determination to extend the terms of a sectoral collective agreement to non-party employers in a sector.

This system whereby sectoral collective agreements are extended by the Minister of Labour to non-party employers in a sector has been criticized. For example, it is argued that it could lead to loss of jobs in small businesses.[11] On the other hand, it has also been noted that:

> Without an extension mechanism, it becomes expedient not to belong to an employers' organisation because, by belonging, individual employers become bound by collective agreements concluded by their employer organisation while their competitors are not.[12]

To contextualize the current debate in the clothing manufacturing sector on the extension of the NBC's main collective agreement it is essential that the effect of the extension mechanism in section 32 of the LRA be penned down, i.e.: non-party employers are for all intents and purposes turned into party employers, 'regardless of whether they are parties to the [collective] agreement or not,'[13] and therefore duty bound (whether they can afford it or not) to comply with the minimum wages applicable in the sector and other statutory deductions such as bargaining council levies and contributions to the bargaining council's social funds. From this perspective, it is clear why the extension of bargaining council agreements is deemed to be controversial. Such controversy, it is argued, 'is partly shaped by the failure to craft framework agreements at sectoral level' and 'the automatic nature of the extension if the parties to the agreement are representative or the semi-automatic nature of the extension if the parties to the agreement are only sufficiently representative.'[14] Bargaining councils 'made up of sufficiently representative parties will [however] be in a position to argue on compelling policy grounds that the failure to extend an agreement in many instances will undermine collective bargaining

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[11] Nattrass, N., 'Growth, employment and economic policy in South Africa: a critical review' *CDE Working Paper No. 2* (UCT, 1998) at 36.
[12] Cheadle, M.H., 'Labour' *Fundamental Rights in the Constitution – Commentary and Cases*. (Juta & Co, Ltd, 1997) at 225.
[13] Cheadle, H. 'Regulated flexibility and small business: Revisiting the LRA and the BCEA', Unpublished mimeo, UCT, 2005 at 42.
[14] Ibid.

and that the concerns relating to non-part[ies] … can be suitably catered for through [its] exemption procedure.'[15] Turning to the current debate in the clothing manufacturing sector on the extension of the NBC's main collective agreement.

On 4 May 2005 the 'Cut, make and trim (CMT) clothing operators from KwaZulu-Natal and the Western Cape formed a two-year alliance [in order] to fight the extension of the national bargaining council's [2005/ 2006 substantive agreement] to non-parties.'[16] The fight played itself out in the form of protest action and an attack on the NBC's legitimacy. Starting with the former. On 22 June 2004 some sort of protest action took place in front of the NBC's head office in Salt River when about 200 members of the Western Cape's CMT Employers' Association protested outside Industria House[17] and its chairman was reported in the local newspaper as saying:[18]

> [His] association members were finding it difficult to sustain themselves under the Clothing Bargaining Council's collective agreement and Sactwu's demands for higher wages.

In relation to the latter, the general secretary of the CMT Employer's Organisation in KwaZulu-Natal[19] and the chairman of the Western Cape's CMT Employers' Association[20] were of the view that 'the bargaining council had lost its legitimacy as it no longer represented a majority of employers in the industry.'[21] This is however not the case. Point is, the Minister of Labour did publish and extend the NBC's main collective agreement to non-parties with effect from 19 December 2005 to 31 August 2006.[22] The Minister of Labour could only have done so if the parties to the NBC's main collective agreement were representative. The fact that he did extend the bargaining council's main collective agreement, must serve as an indication that the NBC did not lack representivity and secondly, that the viewpoint of the leaders of the CMT Employer's Organisation in

[15] Du Toit, D et al *Labour Relations Law: A comprehensive guide* (Butterworth Publishers (Pty) Ltd, 2000) at 215.
[16] Inggs, M., 'CMT employers join hands on wage rates' *Cape Times, Business Report*, 6/05/2005 at 21.
[17] Ndenze, B., 'Bosses blame clothing imports for job losses, staff blame bosses' *Cape Times*, 23/06/2004 at 6.
[18] Ibid.
[19] Cyril Govender.
[20] Zyad Ally.
[21] *Supra* (note 16).
[22] See GN R 1154 in *GG* No 28280 of 15/12/2005.

KwaZulu-Natal and the Western Cape's CMT Employers' Association was incorrect. Still on the subject of the NBC's legitimacy, with specific reference to the CCA: This Western Cape employer organization, which not only has 'a strong metro base'[23] but also 'represents 50 percent of the votes in the [NBC]'[24] was criticized by a labour consultant[25] for its role in the extension of the bargaining council's main collective agreement to non-party clothing employers in the Western Cape. It appears as if the labour consultant did not like the idea that 'CCA member companies employ by far the majority of the workers in the industry in the [Western Cape] region'[26] and is therefore a representative employer association. To achieve a less representative employer association, the consultant had the following advice for clothing manufacturers in the Western Cape:

> Companies should resign as members of the representative employers association, thus making [it] no longer representative.[27]

He then went on to contend that by not being representative anymore, the bargaining council 'would no longer be able to extend [its] main [collective] agreement to non-parties' nor force unnecessary costs on CMT's.[28]

Disagreeing with the advice given by the labour consultant, the executive director of the CCA, said:[29]

[23] Inggs, M., 'Most clothing employers issued with compliance orders over wages' *Cape Times, Business Report*, 29/03/2005 at 16.
[24] Inggs, M., 'Sactwu and employers in a wage deadlock' *Cape Times, Business Report*, 12/06/2006 at 14.
[25] Anthony Carsten.
[26] Van Zyl, G., *The Clothing Link* (Published by the CCA, 2005) at 15.
[27] Carsten, A.E., 'The real reason the clothing industry is shedding jobs' *The Cape Argus*, 17/03/2005 at 25.
[28] Ibid. The latter part of the consultant's explanation is substantiated by a similar account from a CMT owner in a letter which was addressed to the NBC's Western Cape Sub-Chamber, then called the Clothing Industry Bargaining Council (Western Cape). It reads:

> By joining the Bargaining Council B2B would increase its costs and this increase would be further compounded in the quiet times when the same levies and [contributions] have to be paid out of a smaller turnover. This would push the unit costs of garments up at precisely the same time we need to drop prices in order to get the orders (see correspondence from member of B2B Clothing CC, dated 18/10/2001).

[29] *Supra* (note 26).

> A more representative Employer Association will have a stronger voice at the [NBC] in its engagements with SACTWU. Mr Carsten's [advice] that members of the Association should resign to make the organization unrepresentative is contradictory and quite frankly futile. ... Non-party firms should rather grab the opportunity to become members [of the Association] to influence a labour dispensation from within.

The deputy general secretary of SACTWU also disagreed with the consultant's contention regarding unnecessary costs incurred by CMT's. According to him the labour consultant's 'deliberately refrain[ed] from stating that these costs are also paid by clothing workers and that, in any event, the costs paid by employers come from the total labour cost increases negotiated each year and therefore constitute deferred wages.'[30]

4.1.1.2. The rationale behind the extension of sectoral collective agreements to non-parties

In 2001 the LAC (*per* Zondo J.P., whose judgment was concurred in by Mogoeng J.A. and Joffe A.J.A) said:[31]

> The rationale behind the extension of collective agreements by the Minister of Labour in terms of s 32(2) is to prevent unfair competition which employers who are not party to collective agreements concluded in a bargaining council may pose to their competitors who are bound by collective agreements.

The learned judge then went on to say:[32]

> This is because a collective agreement concluded in a bargaining council lays down minimum wages and other terms and conditions of employment to be observed in respect of employees.

One question that arises for consideration is: What can a non-party employer do if the minimum wages and other terms and conditions of employment, as published in the

[30] Kriel, A., 'Slanderous, silly campaign against bargaining council' *The Cape Argus*, 23/03/2005 at 21.
[31] *Kem-Lin Fashions CC v Brunton & another* (2001) 22 *ILJ* 109 at paragraph 20.
[32] Ibid.

government gazette,[33] are too onerous to comply with? An employer may apply for an exemption.[34] This research now turns to address the setting of minimum wages at sectoral level, because 'bargaining councils set minimum wages at an industry level through a process of collective bargaining'.[35]

4.2. The setting of minimum wages at sectoral level (with specific reference to the South African clothing manufacturing sector)

The Labour Market Commission[36] recommended that minimum wages should be set at sectoral level through a process of collective bargaining. This process creates the threshold from which plant level negotiations can also take place. Furthermore, the dynamics of this process (which includes the right to strike[37] and lock-out[38]) would become applicable at plant level. Having said that, though, it does not mean this right is only applicable to plant level bargaining, because this right is also available at sectoral level should negotiations reach deadlock. The final point to be made by general comment is this: In the South African clothing manufacturing sector, minimum wages are set at not only sectoral (i.e. NBC) level but also plant level. This practice inevitably leads to wage variations across regions and in metropolitan and non-metropolitan areas. The general

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[33] The publication of minimum wages and other terms and conditions of employment (which the parties to a bargaining council agreed to) is vital, because it is only from a stipulated date in the government gazette, that a non-party employer is required to comply with the new minimum wages and other terms and conditions of employment which were extended to him/ her by the Minister of Labour. Still on the subject of publication, with specific reference to the Minister of Labour, it is important to note that the Minister of Labour has the power to back-date the date from when a non-party employer is required to comply with the new minimum wages and other terms and conditions of employment.

[34] See unreported appeal ruling by ombudsman Louw in *Antina General Dealers and 30 others (the Appellant) v NBC for the Clothing Manufacturing Industry: Northern Chamber (the Respondent)*; decided on 25/02/2005.

[35] Hayter, S. et al *South Africa: Studies on the social dimensions of globalization* (ILO publication, 2001) at 82.

[36] Presidential Commission to Investigate Labour Market Policy *Restructuring the South African Labour Market* (DOL publication, 1996) at 66.

[37] S 213 of the LRA defines a 'strike' as follows:

> [T]he partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this section includes overtime work, whether it is voluntary or compulsory.

[38] For a definition of a secondary strike, please refer *infra* (note 63).

secretary of SACTWU's comment (about wage variations in the South African clothing manufacturing sector) is equally apt for an analysis of minimum wages, from the point of view of a sewing machinist:

> In clothing, weekly minimum wages range from R 220 for a sewing machinist in Botshabelo (the qualified rate is a low R 282, 76 per week) to R 398 in the Cape Town metro area (qualified rate R 516, 50), a wage variation seldom seen, even under plant-level bargaining.[39]

Some elaboration on the qualified minimum wage of a sewing machinist is in order at this point, because the minimum wage differs from region to region in the sector. For example: A qualified machinist in the non-metro area gets paid R 282, 76 per week, whereas the same person receives a minimum wage of R 520, 00 in the metropolitan area of KwaZulu-Natal, R 489, 30 in the Northern Areas, R 516, 60 in the Western Cape and R 485, 85 in the Eastern Cape. Such regional wage differentiation in the sector is one example of flexibility. However, it is opined that this flexibility is woefully inadequate because this research has already pointed out that 90, 71 percent or 283 of the 312 (total number of clothing manufacturers in the non-metro region) are not paying the prescribed minimum wages. The situation is no different in the metro areas. This is borne out by the fact that 405[40] clothing manufacturers are in contravention of the NBC's gazetted wages for specific metro regions in South Africa. The above statistics are an indication that non-compliance with the NBC's prescribed minimum wages is 'rife'[41]: Clothing

[39] Patel, E. 'Job crisis misdiagnosed' *Financial Mail* Vol. 182 No. 1 (BDFM Publishers (Pty) Ltd, 2005) at 29.

[40] This figure can be broken down as follows:

Chamber	Number of non-compliant factories	Compliance orders for minimum wages	Percentage of non-compliance with minimum wages
KwaZulu-Natal	362	342	94, 48%
Northern Areas	57	19	33, 33%
Western Cape	143	41	28, 67%
Eastern Cape	6	3	50%

(Source: A confidential NBC's report entitled 'National compliance summary for the quarter ending 1/03/2006'. Prepared by the NBC's national compliance manager for director of the CCA and supplied to the labour affairs managers of the different sub-chambers for information purposes only. The embargo on this information was lifted on 17/05/2006 after the writer requested and was granted permission by the NBC's national compliance manager to use the information in this research).

[41] *Supra* (note 24).

manufacturers who comply with the NBC's prescribed minimum wages are unable to compete against non-compliant employers who, as the human resources director[42] of SA Clothing Industries[43] in Durban was reported as saying, '[increase] their market share by not complying with the minimum wage agreed at the national bargaining council.'[44] This unfair advantage that non-compliant employers have over compliant employers[45] and the large numbers of cheap imports, 'against which the local industry cannot compete on a price basis,'[46] are becoming a major threat to compliant employers' ability to compete successfully abroad. To counter such threat, the human resources director of SA Clothing Industries had argued that 'it was imperative for [the company] to reduce its unit cost price'[47] by reducing wages.

4.2.1. **Wage-related industrial action in the NBC's Western Cape metro region**

Strike action, which is often embarked upon to attain wage demands set at collective bargaining, is not a common feature in the Western Cape metropolitan region of the NBC. This fact is borne out by the following statistic: 'In 1996, clothing workers in the Western Cape embarked on the only wage-related industry wide strike in the [seventy] year history of the [NBC Cape Chamber (Western Cape Sub-Chamber)]'. [48]

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[42] Keith Robson.

[43] This company is a subsidiary of Seardel, the 'largest clothing manufacturer in South Africa' (Inggs, M., 'Seardel's stock takes a knock' *Cape Times, Business Report*, 18/03/2005 at 22).

[44] Inggs, M., 'Clothing firms say it's a case of relocate or die' *Cape Times, Business Report*, 18/06/2004 at 5.

[45] A complying employer is an employer whose company or concern is fully registered with the NBC or a regional bargaining council which amalgamated to form the NBC for the Clothing Manufacturing Industry, who has given effect to the applicable Council Main and Benefit Fund Collective Agreements in each of its establishments or who has received due exemption therefrom, who is up to date with the Council and any Benefit Fund contributions, Trade Union and Employer Subscriptions, wage payments to employees including any arrears (back pay) obligation and statutory contributions, and who has registered all permanent and contract employees with the Council (see Circular No. NBC/03/2004 at 1).

[46] Inggs, M., 'Seardel subsidiary seeks cheaper labour' *Cape Times, Business Report*, 4/06/2004 at 3.

[47] *Supra* (note 44). Agreeing with this argument, Gert van Zyl, the director of the CCA, said that '[t]he biggest factor that makes local manufacturers more expensive than China and India is overall imput costs, of which labour costs form a big part thereof (Wasserman, H., 'Vele faktore rig die lot van klerebedryf' *Rapport, Sake Rapport*, 2/07/2006 at 2).

[48] See letter dated 21/03/2005 entitled 'Slanderous, silly campaign against bargaining council'. This letter, written by André Kriel (assistant general secretary of SACTWU), appeared in The Cape Argus' letter page (*The Cape Argus*, 23/03/2005 at 21) and was in response to Anthony Carsten's letter entitled 'The real reason the clothing industry is shedding jobs' which was published in the 17/03/2005 edition of *The Cape Argus*.

What the above-mentioned quotation fails to highlight is the fact that during the 2002 annual plant level wage negotiations for textile knitting, the knitting workers at Puma Textiles[49] embarked on a protected strike[50] after (a) the issue in dispute[51] had been referred to the CIBC (Western Cape), (b) an outcome certificate had been issued[52] which stated that the dispute remained unresolved and (c) Sherco (Pty) Ltd had been given 48 hours' notice of the commencement of the strike. What is interesting, though, is that Sherco (Pty) Ltd was not only confronted by a strike which involved knitting workers at Puma Textiles, but it also had to deal with a secondary strike[53] at Pastel Clothing Manufacturers (Pty) Ltd. This secondary strike was legitimate because there was a connection between the two divisions of Sherco (Pty) Ltd.[54] It is also of note to mention here that SACTWU called upon its members (employed at Canterbury International South Africa (Pty) Ltd) to embark on a secondary strike in support of the strike at Sherco (Pty) Ltd. Canterbury International South Africa (Pty) Ltd applied to the Labour Court in Cape Town for an interdict in order to prevent the proposed secondary strike from taking

[49] Puma Textiles is a division of Sherco (Pty) Ltd. The other division is Pastel Clothing Manufacturers (Pty) Ltd.

[50] A protected strike is described in s 67(1) of the LRA as 'a strike that complies with the provisions of [Chapter IV]' of the Act.

[51] The issue in dispute was wage related because Sherco (Pty) Ltd demanded a shift pattern of four rotational twelve-hour shifts excluding the then operative premium payments for shifts. SACTWU, in turn, saw the company's demand as nothing more than an erosion of their own position (held throughout the negotiations), i.e. a premium payment for the 168 hour shift system per week (around the clock). When asked to comment on the company's position during the 2002 annual wage negotiations at plant level, the then Human Resources Director for Sherco (Pty) Ltd, had this to say:

> From the perspective of globalisation, as well as from the perspective of becoming competitive, Sherco (Pty) Ltd considered its demand, i.e. the implementation of a 168 hour shift system (based on four shifts on and four shifts off in any eight-day cycle) excluding the then operative premium payments for shifts an essential one. That said, it would appear as if SACTWU considered the company's demand as reducing their members income (Interview by writer with F.A. Crafford: the then Human Resources Director for Sherco (Pty) Ltd, 15/09/2005).

[52] See certificate of outcome in the matter between SACTWU (obo Members) and Sherco (Pty) Ltd, Case no. CCCA 185, dated 8/04/2002.

[53] In terms of s 66(1), in s 66 of the LRA, a secondary strike means:

> [A] strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees have a material interest in that demand.

[54] Basson, J in *Sealy of SA (Pty) Ltd & others v Paper Printing Wood & Allied Workers Union* (1997) 18 *ILJ* 392 (LAC) at 395.

place. The company was successful in its application for an interdict for two reasons. They were: (a) SACTWU's strike notice (dated 5 September 2002) did not comply with section 66(2)(b)[55] of the LRA;[56] and (b) the applicant and Sherco (Pty) Ltd had no business dealings with each other which would justify a secondary strike at Canterbury International South Africa (Pty) Ltd.[57]

4.3. **Industrial action**

The issue of industrial action needs to be considered, because industrial action and collective bargaining are dependent on one another and the right to strike is the employees' most effective means of forcing employers to bargain with them.[58]

4.3.1. **The right to strike**

In South Africa, workers have a constitutional right to strike[59] and 'the Labour Court has been inclined to uphold the right to strike once the procedural formalities are complied with'[60]. The question that arises for consideration here is what those 'procedural formalities' are. Section 64 of the LRA prescribes certain procedural formalities which must be complied with before employees may embark on a strike.

Before dealing with two procedural formalities, i.e. 'conciliation' and 'notice', it is appropriate to point out that an 'issue in dispute' is defined in section 213 of the LRA of 1995 as meaning:

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[55] S 66 of the LRA deals with secondary strikes. In terms of s 66(2)(b), in s 66 of the LRA, '[n]o person may take part in a secondary strike unless the employer of the employees taking part in the secondary strike or, where appropriate, the employers' organization of which that employer is a member, has received written notice of the proposed secondary strike at least seven days prior to its commencement'.

[56] See *Canterbury International South Africa (Pty) Ltd v SACTWU & others*, unreported, Labour Court order (Case no: C 955/ 02, dated 11/09/2002).

[57] Ibid.

[58] Etu-Seppälä, M., *Duty to bargain: in the absence of statutory duty to bargain, is there an obligation to that effect to be found in the LRA?* Unpublished LL.M Dissertation, Faculty of Law, UCT, 1999 at 59.

[59] S 23(2)(c) of the 1996 Constitution.

[60] Pillay, D. 'Giving meaning to workplace equity: the role of the courts' (2003) 24 *ILJ* 55 at 65.

> [I]n relation to a strike or lock out, ... the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out[61];

and when 'referred to the CCMA or to a bargaining council [the issue in dispute] must be the same issue in dispute that is the subject-matter of the strike or lock-out'[62].

An employer may not lock out[63] workers that are on a protected strike on an issue that did not form the basis of the original strike.[64]

4.3.1.1. **Procedural requirements of the LRA**

(a) **Conciliation**

[61] For case law support, see *Country Fair Foods (Pty) Ltd v Food & Allied Workers Union & others* (2001) 22 *ILJ* 1103 (LAC). The Labour Appeal Court (*per* Zondo JP, whose judgment was concurred in by Goldstein AJA and Davis AJA) said:

> It is clear from this definition that an issue in dispute concerns a matter of substance which forms 'the demand, the grievance or the dispute' (at paragraph [14]).

And, in *Coin Security Group (Pty) Ltd v Adams & others* (2000) 21 *ILJ* 924 (LAC) at paragraph [16], Conradie JA held:

> It is the court's duty to ascertain the true or real issue in dispute: *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building & Allied Workers Union & others (2)* (1997) 18 ILJ 671 (LAC); *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union & others (1)* (1998) 19 ILJ 260 (LAC). In conducting that enquiry a court looks at the substance of the dispute and not at the form in which it is presented (*Fidelity* at 269G-H; *Ceramic* at 678C). The characterization of a dispute by a party is not necessarily conclusive (*Ceramic* at 677H-I; 678A-C). There is in my view no difference in the approach of these decisions. In each case the court was concerned to establish the substance of the dispute. The importance of doing this lies in s 65 of the Act which provides that no person may take part in a strike if 'the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act'.

[62] Cheadle, H., 'Strikes and Lockouts' *Current Labour Law 1998* (Juta & Co, Ltd, 1998) at 23. See also *FGWU & others v The Minister of Safety and Security & others* [1999] BLLR 332 (LC).

[63] 'Lock-out' is defined in s 213 of the LRA as meaning:

> [T]he exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion.

[64] *Kgasago & others v Meat Plus CC* [1999] 5 *BLLR* 424 (LAC) at paragraph 17.

Revelas J ruled in *National Union of Furniture & Allied Workers of SA v New Era Products (Pty) Ltd*[65] as follows:

> (...) Before a protected strike can be embarked upon, *all that is required is a reference of the dispute which exists between the parties to the CCMA and that it should be conciliated thereafter.* (Emphasis added.)

The mere notice to the Commission for Conciliation, Mediation and Arbitration (CCMA)[66] and, it is submitted, to a bargaining council by a trade union merely informing the bargaining council of the existence of a dispute without seeking the intervention of the bargaining council does not amount to a referral in terms of section 64 of the LRA.[67]

It is also necessary that the bargaining council or the CCMA issue an outcome certificate to reflect that the dispute remains unresolved.[68]

(b) **Notice**

Section 64(1)(b) of the LRA requires that, in the case of a proposed strike, the employer must be given at least 48 hours' notice of the commencement of the strike. The reasoning upon which this proviso was founded is this:

> The section's specific purpose is to give an employer advance warning of the proposed strike so that an employer may prepare for the power-play that will follow. That specific purpose is defeated if the employer is not informed in the written notice in exact terms when the proposed strike will commence. [69]

[65] (1999) 20 *ILJ* 869 (LC) at paragraph 41.
[66] For more information on the CCMA, go to heading in this research entitled 'glossary of definitions, terms and concepts'.
[67] *Columbus Joint Venture t/a Columbus Stainless Steel v NUMSA* [1997] 10 *BLLR* 1292 (LC) at 1296 C-D.
[68] *Mbaru & others v Snacktique (Pty) Ltd* [1997] 6 *BLLR* 767 (LC) at 768 E-F.
[69] Froneman, DJP in *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union* (2) (1997) 18 *ILJ* 671 (LAC) at 677.

If it is not done, the proviso in section 64(1)(b) of the LRA would not have been complied with.[70]

(c) **Exceptions to the general rule**

Where the issue in dispute which is the subject-matter of a strike is a matter which relates to a collective agreement to be concluded in a bargaining council, non-party employers need not be given individual notice of the commencement of a strike where the bargaining council has been notified.[71]

4.3.1.2. **When do the procedural requirements of the LRA not apply?**

Section 64(3) of the LRA reads:

> The requirements of subsection (1) do not apply to a strike or a lock-out if –
>
> (a) the parties to the dispute are members of a council, and the dispute has been dealt with by that council in accordance with its constitution;
>
> (b) the strike or lock-out conforms with the procedures in a collective agreement;
>
> (c) the employees strike in response to a lock-out by their employer that does not comply with the provisions of [Chapter IV];
>
> (d) the employer locks out its employees in response to their taking part in a strike that does not conform with the provisions of [Chapter IV]; or
>
> (e) the employer fails to comply with the requirements of subsections (4) and (5).

From the aforesaid, it is evident that section 64(3)(e) is conditional upon non-compliance with section 64(4) and (5) of the LRA. That being the case, this research now turn to a brief examination of section 64(3)(e), after stating the contents of section 64(4) and (5).

(a) **Section 64(4) of the LRA**

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[70] Ibid.

[71] *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v NUMSA & others* (1999) 20 ILJ 677 (LC) at paragraph 18.

The essence of s 64(4) of the LRA is that: An employee or trade union may (in its referral to a bargaining council of a dispute about an unilateral change to terms and conditions of employment in the workplace) ask the employer not to implement unilaterally the change to terms and conditions of employment'[72] or 'if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.'[73] Sub-section (4) also provides that such a request (by an employee or trade union) to an employer may be, for a 30-day period[74] or 'any extension of that period agreed to between the parties to the dispute'.[75]

(b) **Section 64(5) of the LRA**

Section 64(5) of the LRA states:

> The employer must comply with a requirement in terms of subsection (4) within 48 hours of service of the referral on the employer.

This brings us back to section 64(3)(e) of the LRA which states that '[t]he requirements of [section 64] subsection (1) do not apply to a strike or a lock-out if the employer fails to comply with the requirements of subsections (4) and (5).' A good case in point is *Western Cape Local Government Organisation v SAMWU.*[76] In this case the applicant applied to the Labour Court for an interdict to be handed down against the union on the basis that the strike was unprotected. The Labour Court ruled in the applicant's favour. Waglay J said:[77]

> In this matter the unilateral change in terms and conditions which respondent alleges applicant will implement is to take effect no sooner than 5 December 2000. Applicant referred the dispute on 6 November 2000, that is 30 days before the intended implementation of the policy complained of by the respondent. Whilst it is correct that section 64 entitles a party to embark upon a strike after 48 hours have expired from the time the matter is referred to Council or Commission, this is only

[72] See s 64(4)(a), LRA
[73] See s 64(4)(b), LRA.
[74] S 64(1)(a)(ii), LRA.
[75] Ibid.
[76] Case no: C 824/ 2000, Unreported, Labour Court, dated 15/11/2000.
[77] At paragraph 9 – 11.

> if the employer implements the unilateral change not when, as in the present matter, it cannot do so for a period of 30 days being the period within which the Commission or Council is required to conciliate the dispute. That is, the right envisaged by section 64(3) is only exerciseable if, after referral and before conciliation or the 30 day period has expired within which the conciliation is to take place, the employer decides to implement the unilateral change.
>
> Clearly the employer in this case has not implemented the change and cannot do so until 5 December. In the circumstances the respondent is not entitled to the rights envisaged by section 64(3) and embark upon the strike as it intends to do tomorrow.

4.3.2. **The right to secondary strike**

The right to a secondary strike flows from the right to strike.[78] A secondary strike is in support of a strike by other employees against their employer[79] and those who participate in a secondary strike 'do not have a dispute with their own employer'.[80]

4.3.2.1. **Prescribed requirements for secondary strikes in the LRA**

As in the case of strikes, there are prescribed requirements in the LRA which in turn place certain limits on the right to embark on a secondary strike. Section 66(2) of the LRA states:

> No person may take part in a secondary strike unless –
>
> (a) the strike that is to be supported complies with the provisions of sections 64 and 65;
>
> (b) the employer of the employees taking part in the secondary strike or, where appropriate, the employers' organization of which that employer is a member, has received written notice of the proposed secondary strike at least seven days prior to its commencement; and
>
> (c) the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.

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[78] Landman, J in *Samancor Ltd & another v NUMSA* (1999) 20 *ILJ* 2941 (LC) at 2943.
[79] S 66(1), LRA.
[80] Van Wyk, M.W., 'Strikes and Lock-outs', *A Practical Guide to Labour Law* (LexisNexis Butterworths, 2002) at 363.

Some elaboration on '[t]he requirement that a secondary strike must be "reasonable"[s 66(2)(c)]'[81] is in order at this point. Such requirement 'means that there must be some nexus or relationship between the primary and secondary employers real enough for the proposed strike to have a possible direct or indirect effect on the business of the primary employer'[82]. In *Sealy of SA (Pty) Ltd & others v Paper Printing Wood & Allied Workers Union*[83] Basson, J said:

> I am of the view that there must be some relationship or nexus between the primary employer and the secondary employer(s) for the proposed strike at the businesses of the secondary employer(s) to have a *possible* direct or indirect effect on the business of the primary employer in such a way as to make the nature and extent of the secondary strike 'reasonable'. (Emphasis added.)[84]

About the above-mentioned quotation, the following question can be raised: what does the word 'possible' mean? The meaning of the word 'possible' is best set out in the words of Pillay, J., in the case of *Hextex & others v SACTWU & others*:[85]

> The word 'possible' means: '1. capable of existing, taking place, or proving true without contravention of any natural law. 2. capable of being achieved ... 3. Having potential ... 4. feasible but less than probable.'[86]

> The word 'possible' is semantically ambiguous.[87] If it means, in the context of the subsection, 'likely' or 'capable of existing, taking place', the effect will be less restrictive of the right to participate in the secondary strike (the 'first interpretation'). It pitches the threshold for compliance fairly low. It is also the ordinary meaning of the word in the context.

> However, if it were to be substituted with the synonym 'potential', the powerfulness of the effect would be brought into the equation (the 'second interpretation'). The second interpretation sets a

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[81] Grogan, J *Workplace Law* (JUTA Law, 2003) at 333.
[82] Ibid.
[83] *Supra* (note 54).
[84] Please note: The Labour Court, *per* Pillay J, held that '[i]f there is no nexus then there cannot be any effect on the primary employer and that would be the end of the inquiry' (*Billiton Aluminium SA Ltd v NUMSA* [2002] 1 *BLLR* 38 (LC) at paragraph 3).
[85] (2002) 23 *ILJ* 2267 (LC) at paragraphs 21-23.
[86] *The Collins Dictionary and Thesaurus* 1987.
[87] Devenish, G.E. *Interpretation of Statutes* (Juta & Co Ltd, 1992) at 59.

> higher standard of compliance. The powerfulness of the effect of the secondary strike on the business of the primary employer must be assessed. That calls for a value judgment.

This chapter provides the explicit and detailed regulatory framework for collective bargaining, setting of minimum wages, and industrial action. The latter is a key aspect of collective bargaining and often embarked upon to achieve a wage demand tabled at the start of annual wage negotiations. Industrial action can also be instrumental in the setting of minimum wages in a sector where non-party employers are not covered by a sectoral collective agreement because it has expired.[88] To counter such a risk, the trade union(s) whose members represent the majority of employees in a bargaining council may, before the sectoral collective agreement is due to expire, table a demand at a bargaining council meeting that 'the employer members of the employers' organization(s) that are a party to the council [and] employ the majority employees'[89] agree to vote in favour of an extension to non-parties of the gazetted terms and conditions of employment (including minimum wages) already applicable in the sector. If 'the employer members of the employers' organization(s) that are a party to the council [and] employ the majority employees'[90] agree to vote in favour of the extension, then the bargaining council may request the Minister of Labour to extend the sectoral collective agreement to non-parties.[91] In the case where they refuse to comply with the demand, the majoritarian trade union may resort to industrial action in support of its demand.[92] The next chapter will explore the central question of flexibility at the level of the National Clothing Bargaining Council's Western Cape Sub-Chamber, taking account of the regulatory framework explored in this chapter.

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[88] When this happens a bargaining council faces the risk that it cannot enforce its main collective agreement to non-party employers nor will it be able to regulate minimum wages to all employers (party and non-party) in the sector for which it was established.

[89] Olivier, M.P., 'Statutory employment relations in South Africa' *Managing Employment Relations in South Africa*, Service Issue 6 (LexisNexis Butterworths, 2004) at 5-202 to 5-203.

[90] Ibid.

[91] For statutory support, see s 32(1), LRA and more specifically ss 32(1)(b).

[92] See *African National Security Employers Association v TGWU and Others* (1998) 4 *BLLR* 364 (LAC). In this case the Labour Appeal Court held that a strike is not prohibited during the currency of a collective agreement if the issue in dispute relates to terms and conditions applicable after its expiry. The court also found that where the issue was related to a wage demand in respect of the following year, a collective agreement regulating wages for the current year did not regulate that issue, and employees were not prohibited in terms of s 65(3)(a)(i) of the LRA from striking in support of their demands.

Chapter 5: Flexibility: challenges for the NBC's Western Cape Sub-Chamber

Chapters two, three and four provide the setting and context within which the central question of flexibility will be addressed with specific reference to the NBC's Western Cape Sub-Chamber.

5.1. The meaning of flexibility

Flexibility has been described as follows:

> Flexibility typically means something different for employers and for workers, and something different for government policy-makers, for whom flexibility may be the degree to which variation from a norm is allowed or encouraged. At a general level, for employers flexibility means a capacity to make change speedily and at relatively less cost.[1]

From the above-mentioned quotation it is clear that employers stand to benefit from flexibility. For workers flexibility means less job security:

> [T]rade unions see flexibility as a device for increasing managerial control and workers' insecurity.[2]

Despite the fact that employers and trade unions have their own interpretation of the concept of flexibility, it can be argued that organized business and labour cannot, to use the former Minister of Labour's phraseology, 'afford to be simplistic about flexibility.'[3] This point is borne out by the fact that '[o]ne person's rigidity may be another's job security.'[4]

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[1] Standing, G. et al., *Restructuring the labour market: The South African challenge* (ILO publication, 1996) at 6.
[2] Malan, T., 'Labour market flexibility', *SALB*, Vol. 23 No. 2 (Umanyano Publications CC, 1999) at 42. Also see Ntuli, D., 'Union gears up for a fight', *Sunday Times*, *Business*, 22 May 2005 at 9.
[3] Mboweni, T., Speech at the SACOB direct members' dinner (Department of Labour, 19/03/1997) at 2 of 7. Reported on internet at http://www.info.gov.za/speeches/1997/051613797.htm. Retrieved on 12/06/2006.
[4] Ibid.

5.2. The question of how flexibility is built into the LRA and BCEA

5.2.1. LRA

The LRA provides for flexibility in that a non-party employer may appeal to an independent body against a bargaining council's decision to refuse to grant him/ her exemption from the provisions of a sectoral collective agreement which was extended in terms of section 32 of the Act.[5]

5.2.2. BCEA

The BCEA makes provision for flexibility. The latter is provided for by way of individual agreements, 'ordinary' collective agreements, sectoral collective agreements and Ministerial Determinations in respect of certain provisions of the Act. Thus, it is to a brief discussion on certain provisions of the Act which can vary basic conditions of employment that this research shall now turns.

In terms of sections 9, 10, 11; 14; 15; 16; 18; 20(10); 21(2)(b) and 22 of the BCEA certain basic conditions of employment may be varied downwards by way of individual agreements. These conditions include: ordinary hours of work;[6] overtime limits;[7] compressed working week;[8] meal intervals;[9] daily and weekly rest periods;[10] payment for

[5] See s 32(3)(e), LRA.

[6] Ordinary working hours may, in the case where the employee's duties include helping the public, be increased by up to 15 minutes on a day but not more than 60 minutes in a week (see s 9(2)).

[7] Overtime is voluntary and limited to 10 hours per week. It is also worth noting that overtime can only be worked once the employer and employee have entered into an agreement (see s 10(1)). The employer and employee may also enter into an agreement on overtime pay (see s 10(3) and (4)). In terms of these sub-sections, it would be permissible to pay the employee a normal rate of pay for overtime worked if he/ she is granted in addition thereto at least 30 minutes paid time off on full pay for every hour of overtime so worked.

[8] The implementation of a compressed working week is permitted, provided the employer and employee have concluded a written agreement to that effect.

[9] A written agreement between the employer and employee may (a) reduce a meal interval to not less than 30 minutes (see s 14(5)(a)) or (b) do away with a meal interval if the working day is 6 hours or shorter (see s 14(5)(b)).

[10] A written agreement between the employer and employee may also reduce the daily and weekly rest periods. Starting with the former. Daily rest periods may be reduced to 10 hours in the case of an employee who (a) lives on the premises of his/ her workplace and (b) whose meal intervals lasts for at least 3 hours

work on a Sunday;[11] public holidays;[12] payment for annual leave[13] and sick leave payments.[14]

'Ordinary' collective agreements can (in addition to those employment conditions which can be varied by individual agreements) also vary certain basic conditions of employment downwards. Employment conditions that can be varied by way of 'ordinary' collective agreements are: averaging of hours of work 'over a period of up to four months'[15] (s 12 of the BCEA); night work (s 17 of BCEA); family responsibility leave (s 27 of BCEA) and notice of termination of employment (s 37 of BCEA). Still on the subject of variation, with specific reference to sections 49(1) and 50(1)(a) of the BCEA: Section 49(1) permits the variation of basic conditions of employment by way of sectoral collective agreements, provided they do not (a) contravene the stated purpose of the Act[16] and (b) reduce the core labour standards in the Act.[17] Section 50(1)(a), on the other hand, permits the Minister of Labour to vary certain basic conditions of employment as provided for in the Act. In terms of this sub-section, '[t]he Minister may issue a determination varying the application of one or more basic conditions of employment to any category of employers or employees.'[18]

(see s 15(2)). In the case of the latter, it should be noted that weekly rest periods may be reduced to (a) a rest period of at least 60 hours every 2 weeks or (b) a rest period of 8 hours a week provided the rest period (in the following week) is extended equivalently (see s 15(3)).

[11] The employee may, by agreement, be granted paid time off instead of payment for work on Sunday (see s 16(3)). An important criterion of the section in the Act which regulates Sunday work is that the employee must receive the paid time off within 1 month of him/ her becoming entitled to it (see s 16(6)).

[12] Work on a public holiday may only be done by agreement between an employer and employee (see s 18(1)).

[13] The employer must pay his/ her employee annual leave before the leave period starts or, by agreement, on the employee's normal pay day (see s 21(2)(b)).

[14] The employer and employee may agree to reduce the daily sick leave payments by up to 25%, provided there is a commensurate increase in the amount of paid sick leave days (see s 22(6)(a)).

[15] Godfrey, S and J. Theron., 'Labour standards versus job creation – the impact of the BCEA on small business', *SALB*, Vol. 23 No. 5 (Umanyano Publications CC, 1999) at 28.

[16] That is: the advancement of economic development and social justice with reference to giving effect to and regulate the constitutional right to fair labour practices (see s 2(a)).

[17] They are: 1. the maximum ordinary hours of work (see s 49(1)(a)); 2. protection to those employees doing night work (see s 49(1)(b)); 3. a minimum of two weeks annual leave (see s 49(1)(c)); 4. the entitlement to maternity leave (see s 49(1)(d)); 5. the entitlement to sick leave (see s 49(1)(e)); 6. the prohibition of child labour (see s 49(1)(f) read with s 43) and 7. the prohibition of forced labour (see s 49(1)(f) read with s 48).

[18] Benjamin, P., 'Basic Conditions of Employment Act 75 of 1997' *South African Labour Law Volume One* 2 ed, Revision Service No. 43. (Juta Law, 2002) at BBI-32.

5.3. The policy of 'regulated flexibility'

The policy of 'regulated flexibility' refers to a policy which is aimed at regulating 'the labour market in a manner that allows for flexible collective bargaining structures, *variable application of [labour] standards* and *voice regulation.*'[19] (Emphasis in original.) For a fuller treatment of the policy of 'regulated flexibility', see 2005 mimeo entitled 'Regulated flexibility and small business: Revisiting the LRA and the BCEA'.[20] In this unpublished mimeo the author writes[21] that '[t]here are several mechanisms that characterize regulated flexibility'. He then goes on to explain these mechanisms as follows:[22]

> [a] The first is 'voice regulation' – namely social dialogue (at national or regional level), collective bargaining (at sectoral or workplace level), workers' participation (at the level of the enterprise) and employee consultation (at the level of the workplace). The balance is struck by accommodating the interests that each party brings to bear; [b] The second is administrative discretion bounded by clear guidelines on how the discretion is to be used. An example is the independent body to hear exemptions from sectoral collective agreements in accordance with established criteria based on fairness and the objects of the LRA;[23] [c] The third is administrative determinations made by the Minister in the form of ministerial determinations in respect of any category of employees or employers or any particular employee or employer on application by the parties[24] and sectoral determinations for any sector or area;[25] [d] The fourth is what is called 'soft law'. The LRA authorizes the publication of Codes of Good Practice. Codes do not impose duties but set standards of behaviour. Deviation from those standards does not give rise to any penalty but may lead to an adverse finding in the CCMA or the Labour Court unless the deviation can be justified. The primary mechanism is voluntary compliance and the secondary mechanism depends

[19] See *Growth, Employment and Redistribution: A Macroeconomic Strategy* (Department of Finance, 1996) at 6 (Part 2). Reported on internet at http://www.polity.org.za/govdocs/policy/growth.html. Retrieved on 6/03/2002.
[20] Cheadle, H. 'Regulated flexibility and small business: Revisiting the LRA and the BCEA', Unpublished mimeo, UCT, 2005.
[21] At 9.
[22] *Supra* (note 20) at 9-10.
[23] Section 32(3)(e) of the LRA.
[24] Section 50 of the BCEA. Ministerial determinations have been made in respect of the small business sector; welfare sector; special public works program and the hotel trade (February 2003). See http://www.labour.gov.za/legislation/sectoral_index.jsp.
[25] Section 51 of the BCEA. Sectoral Determinations have been made in respect of the contract cleaning sector; civil engineering sector; clothing and knitting; learnerships; private security sector; domestic workers; farm workers; retail and wholesale sector; children in the performance of advertising artistic and cultural activities; taxi sector. See http://www.labour.gov.za/legislation/sectoral_index.jsp.

on the exercise of a discretion by the CCMA or the Labour Court in applying the code in assessing fairness, for example in respect of a dismissal; [e] The fifth mechanism is to set floors and ceilings within which the operational requirements of different enterprises can be accommodated. Averaging hours of work in the BCEA is one example.[26] The framework nature of sectoral collective agreements envisaged for bargaining councils would be another and [f] the sixth mechanism is the selective application of legislative standards or requirements. The exclusion of employers with less than 50 employees from the affirmative action provisions of the Employment Equity Act[27] ('the EEA') is one example.[28] The exclusion of upper echelon employees from some of the provisions of the BCEA is another.[29]

5.3.1. **Voice regulation**

As is evident from the discussion above (see paragraph 5.3. on 'The policy of "regulated flexibility"), it would seem that voice regulation is not only a feature of the policy of regulated flexibility but 'it also recognizes the need for flexibility'.[30] What is noteworthy, however, is the fact that '[t]his notion [of voice regulation], which has been advocated strongly by the ILO Country Review,[31] has officially been endorsed[32]' and it essentially implies 'the regulation of basis conditions of employment through collective bargaining'.[33] Still on the subject of voice regulation, literature suggests that this notion

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[26] Section 12 of the BCEA.
[27] Act 55 of 1998.
[28] Section 1 definition of 'designated employer' read with section 20.
[29] For instance, section 6 provides that Chapter 2 which regulates working time does not apply to senior management.
[30] Macum, I and E. Webster., 'Recent developments in South African industrial relations and collective bargaining: Continuity and change' *South African Journal of Labour Relations* Vol. 22 Issue 1, UNISA, 1998 at 46-47.
[31] *Supra* (note 1) at 486-502; quoted by Olivier, M., 'Extending labour law and social security protection: The predicament of the atypically employed' *ILJ* Vol. 19, Page 669, 1998 at 684.
[32] See Report of the Presidential Commission to Investigate Labour Market Policy *Restructuring the South African Labour Market* (DOL publication, 1996) at 191-209.
[33] Barker, F.S., 'On South African Labour Policies' *The South African Journal of Economics* Vol. 67 No. 1, UP, 1999 at 4. One major such condition of employment is the setting of minimum wages at sectoral level which, in turn, explains why the setting of minimum wages is a core focus of this research. The setting of minimum wages was dealt with in more detail above (see chapter 4 paragraph 4.2. on 'The setting of minimum wages at sectoral level (with specific reference to the South African clothing manufacturing sector)'), but for present purposes it must be stressed that it is in the interest of SACTWU that minimum wages are determined at sectoral level by the parties to the NBC. In this regard, a statement by Patel, the general secretary of SACTWU, will suffice:

can only be effective if it 'draw[s] on four key resources.'[34] As the Director and Deputy-Director of the Sociology of Work Unit at the University of Witwatersrand have observed:[35]

> To be effective, regulation of the labour market through collective bargaining needs to draw on four key resources. Firstly, it requires relative cohesive interest representation. That is, the parties need to be well organized and representative of their respective constituencies so that they can bargain knowing that the agreements that they reach will have legitimacy and will be workable. Secondly, there needs to be coordination within the bargaining process. Agreements reached at national level have to set meaningful parameters for bargaining at other levels, whereas bargaining at sectoral and enterprise levels has to be responsive to market signals. Thirdly, bargaining has to be capable of moving beyond a simple distributive framework to encompass what Walton and McKersie[36] have called integrative bargaining. Distributive bargaining serves to resolve conflict of interest, whereas integrative bargaining functions with a view to common interests and problem solving. 'Voice regulation' has to be able to generate solutions to the problems faced by firms, efficiency problems and productivity problems, and to do so in ways that obviate the need for state or market regulation. Integrative bargaining is, therefore, more likely to achieve regulation by 'voice' and it, in turn, requires a certain level of cooperation and trust in the bargaining process. Finally, 'voice regulation' can only be effective where the parties interact with 'the shadow of the future lingering over their deliberations.'[37] This means that the parties must recognize that they will have to deal with each other repeatedly over time and that they, therefore, will have to avoid short-term behaviour that may disadvantage the other party. For management, this also means an avoidance of unilateralism, which would facilitate a return to union militance.[38] From unions it requires a recognition that losses and gains will have to be shared and that worker representatives will be required to act with efficiency in mind.

> ... the [NBC] will allow the union to regulate wages for the estimated 120 000 workers in the sector (Inggs, M., 'Clothing and Textile makers will have to vasbyt' *Cape Times, Business Report*, 21/01/2003 at 2).

[34] *Supra* (note 30) at 46.
[35] Ibid.
[36] Walton, R and R. McKersie., *A behavioural theory of labour negotiations* (McGraw-Hill, 1965) at 4.
[37] Standing, G. et al., *Restructuring the labour market: The South African challenge* (ILO publication, 1996) at 10.
[38] Streek, W., 'The uncertainties of management in the management of uncertainty: employers, labour relations and industrial adjustment in the 1980s' *Work, Employment & Society* Vol. 1 No. 3, 1987 at 296.

5.3.2. **Variable application of labour standards**

The term 'labour standard,' literature suggests, 'has two distinct meanings. The first refers to the actual terms of employment, quality of work and the well-being of workers at a particular location and point in time. … The second use of the term … is a normative or prescriptive one.'[39] It is also worth noting that labour standards can only be introduced by law or collective agreement.[40] Still on the subject of collective agreements, with specific reference to the function of sectoral collective agreements: They set minimum standards in a sector[41] and may vary certain basic conditions of employment – provided they do not (a) contravene the stated purpose of the BCEA and (b) reduce the core labour standards (read: basic conditions of employment) listed in section 49(1)(a)-(f) of the Act. Individual employers and trade unions cannot do the same. As the DOL's Green Paper, then called the proposed Employment Standard Act, pointed out:[42]

> There are issues on which it is appropriate to permit bargaining councils to vary [labour] standards but on which it may not be appropriate to permit individual employers and trade unions to do so. For instance, it is not consistent with the purpose of the [BCEA] for individual employers to seek to compete with each other through extending the ordinary working day or reducing the overtime rate. Bargaining council agreements, however, should be entitled to do just this, not only because it sets a floor for competition, but also because it is in keeping with the goal of the LRA which has as one of its primary objects the promotion of collective bargaining at sectoral level.

It is within this context that this research now turns to the CIBC (Western Cape) extended main collective agreement.

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[39] Sengenberger, W., 'Labour Standards: An Institutional Framework for Restructuring and Development' *Creating Economic Opportunities – the role of labour standards in industrial restructuring* (ILO publication, 1994) at 3.
[40] Sengenberger, W., 'Protection – participation – promotion: The systemic nature and effects of labour standards' *Creating Economic Opportunities – the role of labour standards in industrial restructuring* (ILO publication, 1994) at 48.
[41] *Supra* (note 20) at 43.
[42] DOL (RSA), *Green Paper: Policy proposals for a new Employment Standard Statute*. Ministry of Labour, 1996. Published under GN R 156 in *GG* 17002 of 23/02/1996 at 33.

5.3.2.1. **CIBC (Western Cape) Main Collective Agreement**[43]

This collective agreement was the outcome of collective bargaining negotiations between the parties to the CIBC (Western Cape), i.e. the CCA and SACTWU. Furthermore, one needs also to know that the CCA and SACTWU used section 49(1) of the BCEA to reduce a clothing worker's entitlement to sick leave by writing certain limitations into clause 26(13)(a) [44] of its extended main collective agreement. They erred in doing so because such a variation is in conflict with section 22[45] of the BCEA and also rendered the Council's extended main collective agreement invalid. This point was confirmed in an unreported ruling award in *NBC for the Clothing Manufacturing Industry: Cape Chamber (Western Cape Sub-Chamber) and Kinross Clothing (Pty) Ltd.*[46] In his award Arbitrator Field said:[47]

> [A] bargaining council agreement which purports to prejudicially vary an employee's rights in relation to sick leave pay as set out in the BCEA would be in violation of the provisions of Section 49(1) and would not be permissible. Accordingly, only bargaining council agreements which deal

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[43] Published under GN R 628 in *GG* 20082 of 28/05/1999. This sectoral collective agreement not only binds parties to the Agreement for the period: 25/03/1999 to 30/06/2002 (see *GG* No. 20547 (R 1258) dated 22/10/1999; *GG* No. 22360 (R 535) of 15/06/2001 and *GG* No. 22658 (R 873) of 14/09/2001), but it also binds non-party employers and their employees in that the terms and conditions of the Agreement were extended to non-parties with effect from 7/06/1999 to 30/06/2002 in terms of the following Government Gazettes: *GG* No. 20082 (R 628) dated 28/05/1999; *GG* No. 20547 (R 1258) dated 22/10/1999; *GG* No. 21994 (R 85) dated 26/01/2001; *GG* 22360 (R 535) of 15/06/2001 and *GG* 22658 (R 873) dated 14/09/2001. When this sectoral collective agreement expired on 30/06/2002, the parties to the NBC (Western Cape Sub-Chamber) negotiated a new sectoral collective agreement, i.e. the Consolidated Main Collective Agreement for the Western Cape Region.

[44] Clause 26(13)(a) of the Council's Main Collective Agreement states that during a 3 year sick leave cycle any employee who works a 5 day week is entitled to 30 working days sick leave and any other employee is entitled to 36 working days sick leave. What is noteworthy, however, is the fact that during the first 12 months of employment, sick leave accumulates as follows: (a) an employee working 5 days a week is entitled to 1 days sick leave for each completed period of 5 weeks of employment and (b) any other employee is entitled to 1 day sick leave for each completed month of employment. It must also be noted that the maximum sick leave entitlement during a 3 year sick leave cycle is (a) 10 days per annum in the case of a 5 day working week and (b) 12 days per annum if an employee works more than 5 days per week. In practice it means that the balance of sick leave (not taken in 1 year) cannot be forwarded from 1 year to another.

[45] S 22, BCEA is headed 'Sick leave'. It makes provision for a sick leave cycle of 3 years 'with the same employer' (s 22(1)). Secondly, no balance is carried forward from one sick leave cycle (36 months) to another (s 22(1)(b)). Thirdly, an employee's sick leave entitlement (a) during the first 6 months of employment is 1 days's sick leave for every 26 days worked (s 22(3)) and (b) 6 weeks paid sick leave in a period of 36 months.

[46] Case no. 1/02, dated 26/02/ 2003.

[47] At 35, paragraph 5.3.4.

> with sick leave in a manner consistent with the purpose of the BCEA and which do not reduce an employee's entitlement to sick leave would be valid.

(a) Clause 19 Part B of the CIBC (Western Cape) Main Collective Agreement

Clause 19 Part B of the CIBC (Western Cape) Main Collective Agreement makes provision for plant level collective agreements to be concluded between party employers and trade union representatives only. This provision means that flexible collective agreements could be concluded at plant level on a compressed working week and averaging of hours of work[48] and;

> [a] Individual wage variations and transfer in occupations; [b] Variations to lunch and tea breaks; [c] Shift work/ Night work; [d] Overtime; [e] Working through annual leave periods; [f] Swapping public holidays; [g] Working time in at ordinary rates of pay for days off; [h] Atypical forms of employment contracts e.g. Fix term contracts, Work/ training contract; Part-time work.[49]

The term 'wage variation' is misleading in that minimum wages cannot be varied at plant level. They can only be varied at sectoral level through a formal application for exemption. Therefore, this term refers to the number of instances whereby remuneration (payable to employees at a particular week-ending) was reduced due to deductions for staff loans, purchase of goods and transfer of occupations. Secondly, a strict interpretation of the term 'working through annual leave' could be misleading. Factories never work through the entire annual leave period. It is rather the case that the factories either closed early in December (due to lack of production) or opened early in January of the following year (due to excessive work load). In the latter case, the balance of the annual leave is carried forward into the New Year with the proviso that employees shall take such leave before June of that particular year.

From the preceding discussion on flexible plant level collective agreements it is evident that parties to the NBC's Western Cape Sub-Chamber, i.e. clothing manufacturers in the

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[48] Bernickow, R., 'Regulated Flexibility at Sectoral Level: Challenges for Bargaining Councils', Unpublished paper presented to the 12th Annual Law Conference which was held in Durban, 1999 at 55.
[49] Opcit at 55-6.

metro region who are members of the CCA and representatives of SACTWU, could conclude 'ordinary' collective agreements at plant level in order to compress a working week or average hours of work. The only condition attached was that such plant level collective agreements need to be registered with the NBC. Once a plant level collective agreement has been registered with the NBC, it enjoys the same status as that of a sectoral collective agreement. So the question remains: how many 'ordinary' collective agreements were concluded at plant level during the period 1 June 2002 to 31 October 2005 in order to compress a working week or average hours of work. By answering this question, this research hopes to determine the extent to which the parties to the NBC's Western Cape Sub-Chamber used sections 11[50] and 12[51] of the BCEA to compress a working week or average hours of work. This research now turns to answer this question.

During the period 1 June 2002 to 31 October 2005, clothing manufacturers in the metro regions (who are members of the CCA) and SACTWU representatives concluded no 'ordinary' collective agreements at plant level to compress a working week. However, 17 clothing manufacturers in the metro regions (who are members of the CCA)[52] concluded during the same period 188 'ordinary' collective agreements at plant level with SACTWU representatives in order to average working hours.[53] Meaning that, during the period in question, the parties to the NBC's Western Cape Sub-Chamber (i.e. clothing manufacturers in the metro region (who are members of the CCA) and SACTWU

[50] S 11, BCEA is entitled 'Compressed working week' and refers to '[w]orking –week hours which are rearranged to fit into fewer days so as to allow employees to plan and balance work and family responsibilities, eg compressing a five day, fourty-hour working week into four ten-hour work-days' (Barker, F.S. and M.M.E. Holtzhausen *South African Labour Glossary* (Juta & Co, Ltd, 1996) at 28).

[51] S 12, BCEA is entitled 'Averaging of hours of work'. According to this section of the BCEA, normal hours of work permitted by s 9 of the BCEA or by any agreement in terms of s 11 or 12 of the BCEA, as well as overtime (i.e. the time that an employee works on a day or during a week in excess of normal working hours) may be varied by way of averaging over a 4 month period on condition that this is done in terms of a collective agreement.

[52] They are: Brimstone Clothing Corporation (Pty) Ltd t/a House of Monatic; Cadema Industries (Pty) Ltd; Chelsea West CC; Kinross Clothing (Pty) Ltd; K-way Manufacturers (Pty) Ltd; Pastel Clothing Manufacturers (Pty) Ltd; Maxmore, A division of Ninian and Lester (Pty) Ltd; Longmile Ltd t/a Raoul & Caviar Fashions; Pepclo Ltd; Polo Manufacturing (Pty) Ltd; Read Seal Clothing (Pty) Ltd; Seardel Group Trading (Pty) Ltd t/a Bibette; Seardel Group Trading (Pty) Ltd t/a Cape Underwear Manufacturers; Seardel Group Trading (Pty) Ltd t/a Charmfit; Seardel Group Trading (Pty) Ltd t/a Cygnet Manufacturing Co; The Arwa Consortium (Pty) Ltd and Sweet-Orr & Lybro (Pty) Ltd.

[53] NBC: Western Cape Sub-Chamber data base (2005).

representatives) used section 12 of the BCEA 188 times in order to average hours of work.

5.3.3. **Flexible collective bargaining structures**

This sub-section deals with exemptions, which are 'the only manner in which a [bargaining council] can effectively regulate flexibility'.[54] This research, therefore, now turns to discuss briefly the overall performance of the NBC's Western Cape Sub-Chamber with regards to exemptions. Over the period January 2005 to December 2005, 1036 exemption applications were received. Of these, 1028 were approved, 7 were refused and 1 is still under consideration.[55] That said, it would be misleading to deal with

[54] *Supra* (note 48) at 49.
[55] This figures can be broken down as follows:

Disciplines	**Application Received**	**Exemptions granted**	**Exemptions refused**	**Closing balance as at 31/12/2005**
(a) Full exemption (clothing manufacturer employing 5 or less employees)	23	23	0	0
(b) Wage exemption	80	75	4	1
(c) Deduction from wages (loans, insurance, burial savings and purchases of goods)	3	3	0	0
(d) Electronic banking	1	1	0	0
(e) Working nightshift	9	9	0	0
(f) Working overtime	117	117	0	0
(g) Working on Saturdays and/ or Sundays	586	586	0	0
(h) Working on public holiday	17	17	0	0
(i) Working in time	22	22	0	0
(j) Dispense with afternoon tea break	1	1	0	0
(k) Change annual closing period	15	15	0	0
(l) Carry over leave to next year	1	1	0	0
(m) Carry over wages to next year	0	0	0	0
(n) Fixed term contracts	0	0	0	0
(o) Ordinary hours of work	0	0	0	0
(p) Change of grade	0	0	0	0
(q) Exceeding 10 hours				

exemptions without paying attention to certain aspects of the bargaining council's exemptions system. Here this research chooses to focus on policy, procedure and individual cases. It is to these aspects that this research now turns.

5.3.3.1. **The NBC's exemptions policy**

It is standard practice in the South African clothing manufacturing sector that businesses employing 5 or less employees will enjoy an automatic exemption from the NBC's extended collective agreements. This means that the terms and conditions of employment (as set out in the NBC's extended collective agreements) are no longer applicable on such clothing manufacturers. In the case where a clothing manufacturer does not qualify for an automatic exemption, the NBC's exemptions policy dictates (*as per* Williams[56]) that it needs to comply with all the terms and conditions of employment (including minimum wages) in the NBC's extended collective agreements before the Council's exemptions committee will consider an application for exemption. A good example is the application for exemption by a clothing manufacturer called High Quality Clothing (Pty) Ltd t/a Blue Belle Clothing. The latter was situated in George and paid its workforce an average monthly wage of R 350, 00.[57] High Quality Clothing (Pty) Ltd t/a Blue Belle Clothing applied[58] to the NBC to be exempted from all the provisions (including minimum wages) of the Consolidated Country Areas Collective Agreement for the Western Cape Region.[59]

overtime	154	154	0	0
(r) From paying across-the-board increase)	2	1	1	0
(s) To pay half the annual bonus	1	0	1	0
(t) Not to pay annual leave pay	1	1	0	0
(u) To change shift work	3	2	1	0
Total	**1036**	**1028**	**7**	**1**

(Source: letter from Mr W.A. Robers (general secretary of the NBC) to DOL, dated 18/10/2005).

[56] Mr J Williams is the labour affairs manager of the NBC's Western Cape Sub-Chamber.

[57] If this amount is compared with R360, 00 (i.e. the prescribed minimum weekly wage for a machinist in George and Worcester (the two Magisterial Districts covered by the NBC's Country Areas Collective Agreement for the Western Cape Region)) then it is clear that High Quality Clothing (Pty) Ltd t/a Blue Belle Clothing underpaid its workforce.

[58] See NBC Exemption Application form, dated 4/11/2004.

[59] Published under GN R 234 in *GG* No 24385 of 21/02/2003. This collective agreement was extended and made binding on non-parties with effect from 22/09/2003 to 30/06/2004 and thereafter to 30/06/2005 (see GN R 508 in *GG* No 26279 of 30/04/2004). These government notices were subsequently cancelled (see

The exemptions committee of the NBC's Western Cape Sub-Chamber heard the application on 16 November 2004. It turned down the application for exemption, because High Quality Clothing (Pty) Ltd t/a Blue Belle Clothing was not complying with the provisions of the Consolidated Country Areas Collective Agreement for the Western Cape Region.[60] In his correspondence to the clothing manufacturer, Williams (the Labour Affairs Manager of the NBC's Western Cape Sub-Chamber) also commented:[61]

> A prerequisite for considering the granting of an exemption is that you are compliant with the Council's Country Area Agreement which you are deemed not to be.

It is the researcher's considered opinion that Williams' comment is very questionable. How can compliance with a sectoral collective agreement be a pre-requisite for considering an exemption application, if the main reason for an exemption application is to seek relief from the provisions of a sectoral collective agreement which an employer alleges are too onerous on him/ her? If an employer complies with 'all the provisions of the Council's Country Agreement'[62] then there would be no reason to apply for an exemption in the first place.

5.3.3.2. **Exemption applications**

An application for exemption is conditional upon a clothing manufacturer complying with clause 28[63] of the Consolidated Main Collective Agreement for the Western Cape Region.[64] An example may illustrate this point: In an unreported ruling award *NBC for the Clothing Manufacturing Industry: Cape Chamber (Western Cape Sub-Chamber) and*

GN R 1186 in *GG* No. 26878 of 15/10/2004) and an amended collective agreement was re-enacted and extended to non-parties (see GN R 1187 in *GG* 26878 of 15/10/2004, corrected by GN R 1312 in *GG* 26963 of 12/11/2004 and by GN R 24 in *GG* 26168 of 21/01/2005).

[60] See Council's letter, dated 19/11/2004.

[61] Ibid.

[62] See Council's letter, dated 12/04/2005.

[63] The clause is entitled 'Registration of employers'.

[64] Published under GN R 322 in *GG* No 24967 of 7/03/2003. This collective agreement was extended and made binding on non-parties with effect from 30/06/2003 to 30/06/2004 and thereafter to 30/06/2005 (see R 510 in *GG* No. 26279 of 30/04/2004). These government notices were subsequently cancelled (see GN R 1184 in *GG* No. 26878 of 15/10/2004) and an amended collective agreement was re-enacted and extended to non-parties (see GN R 1185 in *GG* 26878 of 15/10/2004, corrected by GN R 1367 in *GG* 27007 of 26/11/2004 and by GN R 24 in *GG* 26168 of 21/06/2005).

Design Stitch Embroidery Services CC[65] Arbitrator Mofsowitz, ruled[66] that registration (as an employer with the NBC) is a statutory requirement. Clothing manufacturers who fail to give effect to this statutory requirement are in contravention of the NBC: Western Cape Sub-Chamber's extended main collective agreement. A good case in point was where Mr Ally, a CMT[67] owner, was ordered by Arbitrator Mofsowitz to comply with this statutory requirement and also to complete the NBC's registration form in the unreported ruling award *NBC for the Clothing Manufacturing Industry Cape Chamber (Western Cape Sub-Chamber) and Z Ally Fashions*.[68] Mr Ally refused to comply with this arbitration award, leaving the NBC's Western Cape Sub-Chamber with no other alternative than to apply to the CCMA to have the arbitration award certified in terms of section 143(3) of the LRA. Once the arbitration award was certified,[69] it enjoyed the same status as a court order. Notwithstanding this fact, Mr Ally still elected not to register with the NBC. This prompted the NBC's Western Cape Sub-Chamber, in an effort to secure compliance with the arbitration award, to approach the Labour Court and apply for a contempt order (as contemplated by section 143(4) of the LRA).

The matter between *NBC Cape Chamber (Western Cape Sub-Chamber) and Z Ally t/a Ally Fashions*[70] was heard by Nel, AJ who issued the contempt order. Paragraph one of this Court Order found Mr Z Ally guilty of contempt (as contemplated by section 143(4) of the LRA). Paragraph two of this Court Order provided for Mr Z Ally's prison sentence to be suspended on condition that he complied with paragraph B[71] and C[72] of the

[65] Case no 46/04, dated 29/07/2004.
[66] At 2.
[67] The term 'CMT', Godfrey et al said, 'refers to "cut, make and trim", which is an operational distinction between firms that only cut, assemble and pack garments, and those that also design and market them' (Godfrey, S. et al 'On the outskirts but still in fashion – Monograph No 2', *Development and Labour Monograph Series*, IDLL, UCT, 2005 at 42 fn 8).
[68] Unreported, case 67/03, dated 17/05/2004. In this matter the council had issued a compliance order against Z Ally Fashions to register with the bargaining council and comply with the various council agreements. The company failed to comply and an arbitration award was made against the company.
[69] See correspondence from CCMA, dated 14/10/2004.
[70] Unreported, case no. C304/05, dated 26/08/2005.
[71] Paragraph B of Ms. Mofsowitz' arbitration award required Mr Z Ally t/a Ally Fashions to pay the NBC: Western Cape Sub-Chamber by no later than 31 May 2004 the sum of R 4000, 00. This amount is included in the capital sum owed.
[72] Paragraph C of Ms. Mofsowitz' arbitration award required Mr Z Ally t/a Ally Fashions to pay the costs of the arbitration and the award fee totaling R 1400, 00 by 31 May 2004. This amount is also included in the capital sum owed.

arbitration award handed down by Ms. Hillary Mofsowitz on 17 May 2004. Paragraph two of this Court Order also entitled the NBC's Western Cape Sub-Chamber to not only calculate the provident fund contributions and bargaining council levies payable by Mr Z Ally t/a Ally Fashions but also to set the terms of payment. The Council's assessment in regard to paragraph 2 was R 53 395, 22. Mr Z Ally was requested to settle the amount of R 53 395, 22 by close of business on 3 October 2005. This request prompted Mr Z Ally to propose a thirty-day payment plan. The Council's response was that Mr Z Ally should put such proposal in writing and confirm the thirty-day period, which he did do.[73] This written proposal was accepted by the parties to the NBC.[74] This meant that Mr Z Ally had from 30 September 2005 to 7 November 2005 to comply with the terms set out in paragraph 2 of the Labour Court order dated 26 August 2005.[75] Mr Z Ally failed to pay the full sum of R 53 395, 22 within the given period. He had only made part payment of a total of R 28 100, 00 and was therefore in contempt of the Labour Court's Order of 26 August 2005 in this respect, leaving a shortfall of R 25 295, 22 (excluding interests and legal costs). Further legal action was instituted against Mr Z Ally on 14 November 2005, i.e. to request the Labour Court to issue a warrant for Mr Z Ally's arrest. However, before the warrant of arrest could be executed, Mr Z Ally paid the shortfall of R 25 295, 22 (excluding interest and legal costs) to the NBC's Western Cape Sub-Chamber.[76]

(a) Duty of the NBC's exemptions committee (Western Cape Sub-Chamber)

The NBC's Western Cape Sub-Chamber exemptions committee is duty bound to consider and determine an application for exemption in accordance with the 'restrictive criteria'[77]

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[73] See letter from Mr Z Ally to NBC's Western Cape Sub-Chamber, dated 30/09/2005.
[74] See letter from the NBC's national compliance manager to Mr Z Ally, dated 27/10/2005.
[75] Paragraph 3 of this Court Order is not in dispute because the NBC has learned from the Registrar of the Labour Court on 13/09/2005 that Mr Z Ally did make payment to the Registrar of the fine of R 5000, 00. The same goes for paragraph 4 of this Court Order. The NBC has been advised by its attorneys of record that they have not as yet been able to draft their bill of costs and therefore it cannot be said that Mr Z Ally is in breach of the Court's Order of 26/08/2005 in respect of the NBC's attorneys' costs as yet.
[76] See letter from Ms B. Rossouw (credit controller of the NBC's Western Cape Sub-Chamber) to Mr Z. Ally, dated 17/11/2005.
[77] Van Zyl, G., 'Bargaining Councils from an Employer Organisation's perspective' at 1. A speech delivered at an IRASA panel discussion which was held on 9/11/2005 at the Century Restaurant, Western Province Cricket Club, Newlands.

set out in the Consolidated Main Collective Agreement for the Western Cape Region,[78] within 45 days from the date of the lodging of the application with the General Secretary of the Regional Chamber.

One of the criteria set out in sub-clause 19 Part A(7)(c) of the Consolidated Main Collective Agreement for the Western Cape Region is that the applicant shall satisfy the exemptions committee (NBC: Western Cape Sub-Chamber) that he/ she 'is not in arrears with respect to payment of Bargaining Council levies or employer or employee contributions and/ or trade union/ employer subscriptions and/ or levies, or, if so, an agreed payment plan exists in respect of any such outstanding moneys'. Given the aforesaid, it is thus clear that an exemption application would be turned down by the exemptions committee (NBC: Western Cape Sub-Chamber) if the applicant is in arrears with bargaining council levies and contributions and no agreed repayment plan on arrear levies and contributions is in place. What is unclear, though, is whether the exemptions committee (NBC: Western Cape Sub-Chamber) would be prepared to accommodate the applicant, if the main reason for an exemption application is to seek relief from the provisions of the NBC's extended main collective agreement for the Western Cape Region which the applicant alleges are too onerous on him/ her. This point is well illustrated by the following example: The NBC's Western Cape Sub-Chamber exemptions committee considered on 20 July 2004 Cheef Prop CC t/a New Start's application for exemption from all the clauses of the NBC's extended main collective agreement for the Western Cape Region. Van Zyl, the executive director of the CCA, recommended at the meeting that the application for exemption be granted in respect of (a) employer portion of health care fund contributions, (b) bargaining council levies, (c) industry protection fund contributions and (d) HIV Aids Project contributions, but went on to say that the application for exemption be declined in respect of (a) provident fund contributions, (b) collective bargaining and dispute resolution levies and (c) trade union capacity building fund contributions. Such recommendation by the CCA was subject to SACTWU reverting back to the Secretariat of the NBC's Western Cape Sub-Chamber by

[78] See sub-clauses 19 Part A (7) and (8) of the Consolidated Main Collective Agreement for the Western Cape Region.

23 July 2004 on whether it supported the CCA's recommendation or not. SACTWU reverted back to the Secretariat of the NBC's Western Cape Sub-Chamber on the day in question and advised that the application for exemption was declined because Cheef Prop CC t/a New Start had, in the language of the NBC's Minutes, 'wilfully operated underground without attempting to follow procedures on legislation'.[79]

This research now turns to an applicant's right to be advised as to whether his/ her application for exemption was rejected or partially approved and the right to appeal to the NBC's Independent Exemptions Board (IEB).

(b) An applicant's right to be advised as to whether his/ her application for exemption was rejected or partially approved

This right is vested in clause 18.2.2 of the NBC's Constitution read with clause 19 Part A sub-clause (4)(f) of the Consolidated Main Collective Agreement for the Western Cape Region. Thus, if the application for exemption is rejected or partially approved, the NBC's Western Cape Sub-Chamber exemptions committee is duty bound to notify the applicant with a decision within seven days. Failure to do so would be frowned upon by the legal profession. In *NBC for the Clothing Manufacturing Industry: Cape Chamber (Western Cape Sub-Chamber) and Mogamad Rashied Cloete t/a AC Clothing manufacturers*[80] advocate Van Staden said:[81]

> ... I am not persuaded that this fact [the turning down of the exemption application] and the effect thereof were adequately relayed to Respondent to entitle it to take such steps as it deemed prudent. Respondent has stated throughout that it wished to appeal to higher authority to consider its application. In my view, it ought to be accorded an opportunity to do so. I am of the view that the arbitration proceedings against Respondent be stayed and that Respondent be directed to file an appeal to the independent appeal body established by Applicant.

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[79] See extract of the NBC's minutes of the Exemptions Committee: Western Cape meeting which was held in Industria House, Salt River on 20/07/2004.
[80] Case no 64/04, dated 16/11/2004.
[81] At 5-6.

(c) The right to appeal to the NBC's Independent Exemptions Board (IEB)

An applicant has a right to appeal – in terms of clause 18.4 of the NBC's Constitution and clause 19 Part A sub-clause (5)(a) of the Consolidated Main Collective Agreement for the Western Cape Region – against the decision of the NBC's Western Cape Sub-Chamber exemptions committee to the NBC's Independent Exemptions Body (styled Exemptions Board). A case in point is the unreported ruling award in *NBC for the Clothing Manufacturing Industry Cape Chamber (Western Cape Sub-Chamber) and Cheef Prop CC t/a New Start.*[82] The facts of this case were relatively simple. Cheef Prop CC t/a New Start was, after the NBC's exemptions committee (Western Cape) turned down its application for exemption, in contravention of two extended collective agreements, i.e. the Consolidated Main Collective Agreement for the Western Cape Region and the Consolidated Provident Fund Collective Agreement for the Western Cape Region.[83] This explains why a charge sheet was formulated. Mr J Williams, the Labour Affairs Manager of the NBC's Western Cape Sub-Chamber, then ordered that the matter be set down for arbitration. At the same time he also advised Cheef Prop CC t/a New Start in writing of its right to appeal to the NBC's Independent Exemptions Board by not later than 27 August 2004.[84] It was within this context that the legal officer of the NBC's Western Cape Sub-Chamber requested advocate Field to postpone the arbitration proceedings *sine die* in relation to all counts on the charge sheet except count one[85] in order to allow Cheef Prop CC t/a New Start to exercise a right, i.e. to appeal against a decision of the NBC's

[82] Case No 19/ 2004, dated 26/08/2004.

[83] Published under GN R 231 in *GG* No. 24382 of 28/02/2003. This collective agreement was extended and made binding on non-parties with effect from 10/03/2003 to 30/06/2004 and thereafter to 30/06/2005 (see GN R 1293 in *GG* No. 25456 of 19/09/2003 and GN R 503 in *GG* No. 26279 of 30/04/2004). These government notices were subsequently cancelled (see GN R 1176 in *GG* 26878 of 15/10/2004) and an amended collective agreement was re-enacted and extended to non-parties (see GN R 1177 in *GG* 26878 of 15/10/2004, corrected by GN R 1366 in *GG* 27007 of 26/11/2004).

[84] This date was two days after the arbitration was due to take place. This state of affairs placed the legal officer of the NBC's Western Cape Sub-Chamber in the invidious position where he had to ask for an adjournment of the arbitration proceedings in order to ascertain whether Cheef Prop CC t/a New Start would like to exercise its right to appeal to the NBC's IEB. The reasoning upon which the request for an adjournment was founded was this: counts two to nine on the charge sheet (which deals with outstanding bargaining council levies and contributions) were, from a formulation point of view, premature.

[85] This count dealt with wage claims.

Western Cape Sub-Chamber exemptions committee. Such a request for postponement, Field found, was 'reasonable, over and above being an agreed position'.[86]

5.3.3.3. Decisions by the NBC's Independent Exemptions Board (IEB)

In this sub-section reference is made to three unpublished ruling awards which were handed down by different panelists of the NBC's IEB.

(a) Ruling where IEB panelist did not have any jurisdiction to consider an exemption application

For an example where an IEB panelist declined to hear an exemption application, one only needs to turn to an unreported ruling award handed down by the NBC's IBE, i.e.: In the matter of Cheef Prop t/a New Start and NBC for the Clothing Manufacturing Industry Cape Chamber (Western Cape Sub-Chamber).[87] The hearing was conducted on 23 June 2005 and Cheef Prop CC t/a New Start was represented by Mrs V Cupido. In delivering his ruling award, Panelist Zietsman said that Cheef Prop CC t/a New Start was informed at the start of the appeal hearing that in terms of the Final Interim Appeal Guidelines of the Independent Exemptions Board, Cheef Prop CC t/a New Start was required to comply in full with all the terms and conditions of the NBC's Consolidated Main Collective Agreement for the Western Cape Region before any representations regarding the appeal hearing could be heard. That being the case, he concluded that he had no jurisdiction to hear the appeal application and therefore the matter be referred back to the NBC.[88]

(b) Rulings where IEB panelists did have jurisdiction to consider an exemption application

Two unreported ruling awards handed down by panelists of the CIBC (Western Cape) IEB are of interest in this regard: (a) In the matter between Maxmore, A Division of

[86] *Supra* (note 82) at 4, point 4.1.
[87] Case no: 3/6, dated 3/08/2005.
[88] Ibid.

Ninian and Lester (Pty) Ltd and SACTWU[89] and (b) In the matter between Towels Edgar Jacobs (Pty) Ltd and SACTWU.[90]

(b.1) In the matter between Towels Edgar Jacobs (Pty) Ltd and SACTWU

Towels Edgar Jacobs (Pty) Ltd, a manufacturer of knitwear, decided to restructure its business.[91] Due to the fact that changes to agreed terms and conditions of employment cannot be implemented unilaterally,[92] the company made certain proposals to SACTWU that formed the basis for further consultations on the matter. It was common cause that TEJ (Pty) Ltd and SACTWU could not reach consensus at plant level over the proposed changes to terms and conditions of employment. It is important to note that the company did not implement a lock-out in order to compel those employees affected by the proposed retrenchment to accept new conditions of employment (i.e. a new shift system).

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[89] Case no: 2/01, dated 2/10/2001.
[90] Case no: 1/01, dated 15/06/2001.
[91] In the Labour Court decision of *Van Rensburg v Austen Safe Co* (1998) 19 *ILJ* 158 (LC) the Labour Court (*per* Revelas, J) remarked in relation to an employer's decision to restructure its business that:

> The respondent was entitled to restructure its business activities. If the need to retrench arises out of such a situation and provided the employer followed a fair procedure, it cannot be criticized by this court. A court should be mindful not to interfere with the legitimate business decisions taken by employers who are entitled to make profits and even better profits if this can be achieved (at 168).

[92] For an extended discussion on this position in a labour law context, see Roskam, A. and H. Ngcobo., 'Varying terms and conditions of employment', *SALB*, Vol. 24 No. 3 (Umanyano Publications CC, 2000) at 6. It reads:

> In law, an employer has no right to unilaterally change terms and conditions of employment. The worker must agree either:
>
> - explicitly, by for example, concluding a collective agreement; or
> - implicitly through their conduct.
>
> If an employer wants to bring about a change it can approach the issue in two ways:
>
> - it can argue that the workers' consent to the change is not needed because the change does not vary their terms and conditions of employment;
> - it must seek the workers' consent if the change clearly varies terms and conditions of employment.
>
> If workers refuse to accept the changes proposed by the employer, the employer must try to force workers to agree to the change by using methods recognised by collective bargaining (for example, lockout).

Instead, the company opted to submit an application for exemption to the Council in order to implement a seven-day shift system. As Sue Wright, the then Human Resources Executive of Towels Edgar Jacobs (Pty) Ltd, said:[93]

> An exemption is required to average 53,5 hrs over a 12 week cycle.[94]

The application for exemption was refused by the CIBC (Western Cape's) Labour Affairs Committee. This resulted in the matter being referred to the CIBC (Western Cape's) Independent Exemptions Body for consideration. SACTWU argued that the implementation of the shift system amounted to a substantive change to terms and conditions of employment of its members and that the matter was therefore one of mutual interest. As such, the matter should have been properly negotiated and if consensus was not reached, the parties would have been able to follow the power play route. On this basis the union argued that the panel did not have jurisdiction to rule on the change to terms and conditions of employment.

The company argued in response that the panel had the jurisdiction to vary or amend the Main Agreement and that the Bargaining Council would in turn be obliged to enforce the ruling of the panel.

(b.1.1) **The ruling**

The Independent Exemptions Body held the view that the arguments of the parties were not mutually destructive. It found that neither the body, nor the Bargaining Council, was empowered to impose new terms and conditions of employment on parties who had not reached consensus on the terms and conditions of employment. It was, however, empowered to partially grant or reject the application for exemption. It was for the parties to resolve how the exemption was implemented. The panel therefore ruled that it had

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[93] In her letter to the CIBC (Western Cape) dated 1/03/2001.
[94] What is noteworthy, however, is the fact that Ms S. Wright overlooked one important aspect and that is: in an interest dispute the parties can resort to powerplay.

jurisdiction to consider the application for exemption, but not to impose a new shift system on the parties.

(b.1.2) The significance of the ruling

It is significant that the panelists (a) categorised the matter between the parties as that of a mutual interest dispute;[95] (b) limited the powers of the IEB to that of granting or rejecting an application for exemption in respect of a new shift system, and not to impose a new shift system on parties if the latter failed to reach consensus on such new terms and conditions of employment; (c) did not interfere with the process of collective bargaining and upheld the constitutional right to engage in collective bargaining and (d) left the implementation of their ruling to the parties to implement – even if the end result is industrial action. It is to points (b) and (d) that this research now turns.

(b.1.2.1) Powers of IEB panelists limited to that of granting or rejecting an application for exemption only and not to impose new terms and conditions of employment on parties if they failed to reach consensus on such new terms and conditions of employment

[95] Please note: our labour legal system draws a distinction between disputes of right and disputes of interest. This point is well explained in Jordaan, B., 'Collective Bargaining' *Juta's Annual Labour Law Update 2002* (Juta Law, 2002). At 53 the learned author states:

> Disputes between employer and employee fall into two broad categories, ie disputes over the alleged infringement of rights established in terms of collective agreement, individual agreement between employer and employee, common law or legislation (generally referred to as disputes of 'right'), on the one hand, and so-called disputes of 'interest', ie disputes over demands for changes to the status quo, on the other (eg workers demanding a wage increase or improved benefits, or an employer wanting to reduce benefits). Both of these categories fall under the broad heading of what the LRA refers to as disputes over 'matters of mutual interest between employer and employee'. (See *Juta's Annual Labour Law Update 2001* at 42-3.) The LRA is not concerned with all disputes of right, eg disputes about breach of contract, infringement of privacy rights, enforcement of restraints of trade or discrimination claims. These must be resolved in terms of the principles of law of contract, delict or the provisions of the relevant statute under which the claim falls (eg the Employment Equity Act). Where disputes fall within both the ambit of the law of contract and, eg the LRA, an employee has a choice of causes of action and forums in which to pursue the matter. Nothing, in principle, prevents the employee from pursuing more than one opion at the same time. For an example of a successful claim for breach of a fixed-term contract, see *Fedlife Assurance Ltd v Wolfaard* (2001) 22 *ILJ* 2407 (SCA).

We have seen that in the matter of *Towels Edgar Jacobs (Pty) Ltd versus SACTWU*[96] the CIBC (Western Cape's) IEB said that it 'is not empowered to impose new terms and conditions upon parties who have not reached consensus on those terms and conditions of employment.' The reasoning upon which the two panelists' ruling was founded was this: Changes to terms and conditions of employment are mutual interest matters that 'should be properly negotiated in a joint consensus seeking approach. Should consensus not be possible, the parties would have to follow the legal route open to them in terms of power play inherent to collective bargaining.'[97]

(b.1.2.2) IEB ruling award left to parties to implement – even if the end result is industrial action

In the matter of *Towels Edgar Jacobs (Pty) Ltd versus SACTWU*[98] the two panelists of the CIBC (Western Cape's) Independent Exemptions Board left the implementation of their ruling to the parties; which was done in the following way.

On the 22 June 2001 Towels Edgar Jacobs (Pty) Ltd issued the employees in the Fully Fashioned Knitting Department with a notice, demanding that they should work the three-times twelfth hour shift pattern in accordance with the provisions as laid out in the granted exemption of the Independent Exemptions Panel. This prompted SACTWU to declare a dispute against the company on 25 June 2001. The nature of the dispute was listed on the CIBC (Western Cape's) referral form as follows:

> The unilateral introduction of 12 hour shifts over a 6 day shift cycle (i.e. 4 days on and 2 days off) inclusive of weekends when your shift cycle so falls.

Jordaan[99] (then a CIBC (Western Cape) panelist) attempted to conciliate the alleged unfair labour practice dispute, but with no success.[100] The result was that the dispute

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[96] *Supra* (note 90) at paragraph 15.
[97] *Supra* (note 90) at paragraph 10.
[98] *Supra* (note 90).
[99] Barney Jordaan is a director of Jordaan Stander (Pty) Ltd and a specialist on employment law and labour relations.

remained unresolved as at 4 July 2001. SACTWU then proceeded to conduct a ballot amongst their members in the Fully Fashioned Knitting Department in terms of section O 22.3.14 of the trade union's Constitution and section 67(7) of the LRA. According to Rogers[101] the outcome of the ballot was as follows:

(a) Eighty-two members participated in the ballot;
(b) Seventy-four voted against the three options that the company proposed that would change their present working conditions relating to shift work;
(c) seven voted in favour of the options that the company could change their shift system and
(d) one ballot paper was spoilt.

This mandated SACTWU to issue a written strike notice[102] to Towels Edgar Jacobs (Pty) Ltd whereby the trade union gave the company 48 hours' notice of its intention to proceed on a protected strike as from 11 July 2001 at 07H00. On 9 July 2001 Towels Edgar Jacobs (Pty) Ltd responded to the intended strike by issuing a written lock-out notice to SACTWU whereby the company gave the trade union 48 hours' notice of its intention to proceed on a protected lock-out with effect from Wednesday, 11 July 2001 at 17H00. This industrial action lasted three weeks, and also cost the company R1 million.[103] Such costs and industrial action could have been avoided if only Towels Edgar Jacobs (Pty) Ltd had case law to rely on, which in turn could have permitted the company to give effect to an operational requirements dismissal.[104]

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[100] See certificate of outcome in the matter between SACTWU (obo members) and Towels Edgar Jacobs (Pty) Ltd (Case no: CCCA 70, dated 4/07/2001).
[101] Interview by writer with David Rogers, the then organiser at SACTWU, on 16/11/2001.
[102] Per fax dated 7 July 2001.
[103] Interview by writer with Sue Wright, the then Human Resources Executive of Towels Edgar Jacobs (Pty) Ltd, 3/03/2004.
[104] See *Fry's Metals (Pty) Ltd v NUMSA & others* (2003) 24 *ILJ* 133 (LAC), at paragraph 34. There the Labour Appeal Court (*per* Zondo JP, with whose judgement Nicholson JA and Hlophe AJA agreed) said:

> It was also argued on behalf of the respondent that, since, on the respondents' argument, the appellant was not entitled to dismiss the second and further respondents for operational requirements in this case, it was obliged to resort to lock-out. This argument is also without substance. Firstly, the recourse to a lock-out that s 64 of the [LRA] makes provision for is not an obligation but it is a recourse which an employer is free to resort to when faced with circumstances in which the [LRA] permits the institution of a lock-out. Secondly, the argument

The above discussion highlights the significance of the Supreme Court of Appeal judgment in the *Fry's Metals* case. This judgment allows for an employer to commence negotiations to introduce legitimate operational changes, and to warn that if a deadlock is reached in the negotiations, the employer may embark upon operational requirement terminations. Notice of termination of employment would be subject to the condition that the employees would not be dismissed if the employees accepted the proposed change.[105]

It is argued that the *Fry's Metals* judgment undermines the constitutional right of workers to engage in collective bargaining, since management now has a precedent for defining their collective bargaining demands as operational requirements, thereby opting out of bargaining and threatening operational requirements terminations.[106]

(b.2) In the matter between Maxmore, A Division of Ninian and Lester (Pty) Ltd and SACTWU

In the matter between Maxmore and SACTWU,[107] the CIBC (Western Cape's) Independent Exemptions Body (comprising of two panelist) had to consider an application for the implementation of a 3 – shift system – 24 hours, 7 days per week. These two panelists agreed to the granting of the exemption application but could however not come to a consensus position on how the approved exemption was to be implemented. The lack of consensus on the detail concerning the implementation of the exemption application resulted in the two panelist actually writing separate rulings.

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proceeds on the assumption that, in dismissing the employees, the appellant was seeking to compel them to accept the proposed changes. This does not follow.

It was on this basis that the Labour Appeal Court rejected the respondent's argument and upheld the appeal. NUMSA appealed against the LAC judgment to the Supreme Court of Appeal, but the SCA upheld the decision of judge president Zondo. See *NUMSA v Fry's Metals (Pty) Ltd* [2005] 5 *BLLR* 430 (SCA) at 450, paragraph 64.

[105] Stelzner, S. 'Workplace change' *Juta's Annual Labour Law Update 2003* (Juta, 2003) at 88.

[106] Gaibie, S., 2005, quoted by Pile, J., 'Work conditions may be varied' *Financial Mail*, Vol. 181 No. 3 (BDFM Publishers (Pty) Ltd, 2005) at 23.

[107] *Supra* (note 89).

(b.2.1) **The ruling and the significance thereof**

Both Anderson and Field granted the application for exemption. However, in his ruling Field ordered that the granting of the exemption should not be construed as permitting the Respondent to unilaterally implement the proposed three shift system without the embarking upon a process of collective bargaining. In the event of the parties reaching agreement on the proposed three shift system, the effect of the exemption would be that the Respondent would not be guilty of transgressing the Main Agreement.

The significance of the above ruling is that in not mentioning the requirement for collective bargaining one must assume that Anderson was of the opinion that it was implied that collective bargaining would be a requirement for a change to terms and conditions of employment subsequent to the granting of the exemption, whereas Field was of the opinion that the requirement of collective bargaining subsequent to the granting of the exemption was necessary as part of the ruling. If, however, the rationale of Anderson had been that the effect of the exemption was to change terms and conditions of employment and no collective bargaining was required, it would signify a significant departure from the ruling of Field. Furthermore, it would contradict the position as set out in the matter of *Towels Edgar Jacobs*.[108] In light of the prominent position that collective bargaining has in the South African labour dispensation, it is opined that the argument that an exemption has the effect of changing terms and conditions of employment undermines the right to bargain collectively and has no merit.

Taking a broader perspective, what has been demonstrated is that the NBC's Western Cape Sub-Chamber has structures (as required by the LRA and its sectoral collective agreement) in place to facilitate flexibility. However, it appears as if the parties to the NBC's Western Cape Sub-Chamber (represented on these structures) do not give effect to the notion of flexibility as illustrated by the above-mentioned cases.

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[108] *Supra* (note 90).

Chapter 6: Summary and conclusion

This research commenced, in chapter 2, with some observations about the ANC-led government's current economic policy and considered the agreements reached within NEDLAC on means of intervening in the South African economy: NEDLAC committed itself to halving the SA unemployment rate, creating jobs and stimulating economic growth. With reference specifically to the South African clothing manufacturing sector, the first chapter concluded with some statistics and research findings that clearly indicate that there is an urgent need for job creation. These observations were intended to set the context for the remainder of this research.

In chapter 3, this research considered whether the labour regulatory environment is, firstly, applicable to small businesses in the non-metro regions of the South African clothing manufacturing sector. It noted that the EEA, the BCEA, the LRA and the Consolidated Main Collective Agreement for the Non-Metro Areas are applicable to every large and small business in the SA clothing manufacturing sector. The same can also be said about the policy of BEE. Yet, there is no charter on BEE in place which can provide guidelines to clothing manufacturers in the application thereof, with the result that clothing manufacturers are left to interpret and give effect to BEE as they deem fit. All indications are that there is a need in SA for a clearer focus on the measurement of clothing manufacturers' performance on BEE.

Secondly, as to whether the EEA, the BCEA, the LRA, the Consolidated Main Collective Agreement for the Non-Metro Areas and the policy of BEE make provision for flexibility, the research showed that the legislation does allow for flexibility, while the policy of BEE does not. What is noteworthy, though, is the fact that although the Consolidated Main Collective Agreement for the Non-Metro Areas does allow for flexibility, it does not mean that this piece of legislation is not onerous on clothing manufacturers. Drawing on the evidence provided by the national compliance manager of the NBC, it is clear that the Council's extended main collective agreement for the non-metro regions is (from a minimum wage point of view) onerous, because the majority

(90, 71%) of clothing manufacturers in the non-metropolitan regions do not pay the prescribed minimum wages.

In chapter 4, this research looked at sectoral collective agreements and their extension to employers who are not parties to a bargaining council.[1] Such extension is arguably justified by the need to prevent unfair competition. The research then went on to discuss the setting of minimum wages at sectoral level, one of the key issues in the process of collective bargaining, and looked specifically at the minimum wage of a clothing machinist in South Africa which is determined at sectoral level.[2] On this score the writer's impression is that the regional wage differentiation in the clothing manufacturing sector points to an example of flexibility. However, this research found that 71, 30% or 405 of the 568 (total number of non-compliant clothing manufacturers in specific metro regions in South Africa) are not paying the prescribed minimum wages. This result and the finding (in chapter 3 above) that 90, 71% of clothing manufacturers in the non-metropolitan regions also do not pay the NBC's gazetted wages, suggests that the NBC's wage dispensation is out of step with market realities.

This research then focused on wage-related strike action in the Western Cape metro region of the NBC. Strike action (during the course of annual wage negotiations) can be said to be unusual in the Western Cape metro region of the NBC because, in the 70 year history of the NBC's Western Cape Sub-Chamber, only two were experienced – one at sectoral or NBC level (in 1996) and the other at plant level (in 2002). In relation to the latter, this research noted that the strike (at a textile knitting plant) also involved a secondary strike at one of its divisions. This secondary strike was legitimate because (a) there was a nexus or relationship between the textile knitting plant (the primary employer) and one of its divisions and (b) the nexus or relationship was real enough for

[1] The extension of bargaining council agreements is controversial and has led to a debate in the clothing manufacturing sector on the extension of the NBC's main collective agreement to non-parties, as more fully discussed in chapter 4 (see paragraph 4.1.1.1. on 'Extension of sectoral collective agreements to non-party employers').

[2] See chapter 4, point 4.2: A qualified clothing machinist's minimum wage varies from R 282, 76 per week in the NBC's non-metro regions to R 516, 50 per week in Cape Town. The latter is situated in a metro region of the NBC.

the secondary strike to have a 'possible' direct or indirect effect on the primary employer's business.

Finally, the research not only considered certain requirements that need to be complied with before a party may embark on industrial action but also pointed out that industrial action can be instrumental in the setting of minimum wages in a sector where non-party employers are not covered by a sectoral collective agreement because it has expired.[3] To counter such a risk, the trade union(s) whose members represent the majority of employees in a bargaining council may, before the sectoral collective agreement is due to expire, table a demand at a bargaining council meeting that 'the employer members of the employers' organization(s) that are a party to the council [and] employ the majority employees'[4] agree to vote in favour of an extension to non-parties of the gazetted terms and conditions of employment (including minimum wages) already applicable in the sector. If 'the employer members of the employers' organization(s) that are a party to the council [and] employ the majority employees'[5] agree to vote in favour of the extension, then the bargaining council may request the Minister of Labour to extend the sectoral collective agreement to non-parties.[6] In the case where they refuse to comply with the demand, the majoritarian trade union may resort to industrial action in support of its demand.[7]

In chapter 5, this research not only looked at the meaning of flexibility but also how it is built into the LRA of 1995 and the BCEA of 1997. The chapter also explored the policy of 'regulated flexibility' and in doing so it discussed the application of the three components of the policy.[8]

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[3] When this happens a bargaining council faces the risk that it cannot enforce its main collective agreement to non-party employers nor will it be able to regulate minimum wages to all employers (party and non-party) in the sector for which it was established.

[4] Olivier, M.P., 'Statutory employment relations in South Africa' *Managing Employment Relations in South Africa*, Service Issue 6 (LexisNexis Butterworths, 2004) at 5-202 to 5-203.

[5] Ibid.

[6] For statutory support, see s 32(1), LRA and more specifically ss 32(1)(b).

[7] See *African National Security Employers Association v TGWU and Others* (1998) 4 *BLLR* 364 (LAC).

[8] They are: voice regulation, variable application of labour standards and flexible collective bargaining structures.

Under the 'voice regulation' policy component, this research explored the following themes, i.e.: (a) whether 'voice regulation' is a feature of the policy of 'regulated flexibility' and (b) whether 'voice regulation' has been formally endorsed as a policy directive of the ANC-led government. Both these themes were answered in the affirmative. Another theme that this research explored was: what does 'voice regulation' imply? In short: It implies 'the regulation of basic conditions of employment through collective bargaining'.[9] Mention was also made of the fact that the 'voice regulation' policy component 'recognises the need for flexibility'[10] and can only be effective if it 'draw[s] on four key resources,'[11] as more fully discussed in chapter 5 (see paragraph 5.3.1. on 'Voice Regulation').

With reference to the 'variable application of labour standards' policy component, consideration was given to the term 'labour standards'. The latter can only be inaugurated by law or collective agreement.[12] With specific reference to the function of collective agreements concluded at sectoral or bargaining council level, this research noted that sector level agreements may vary certain basic conditions of employment – provided they do not (a) contravene the stated purpose of the BCEA and (b) reduce the core labour standards (read: basic conditions of employment) listed in section 49(1)(a)-(f) of the Act.

Despite the fact that core labour standards may not be varied by sector level agreements, the parties to the NBC's Western Cape Sub-Chamber (then called the CIBC (Western Cape)) used section 49(1) of the BCEA to vary a clothing worker's entitlement to sick leave by writing certain limitations into clause 26(13)(a) of its extended main collective

[9] Barker, F.S., 'On South African Labour Policies' *The South African Journal of Economics* Vol. 67 No. 1, UP, 1999 at 4.
[10] Macum, I and E. Webster., 'Recent developments in South African industrial relations and collective bargaining: Continuity and change' *SAJLR* Vol. 22 Issue 1, UNISA, 1998 at 47.
[11] Opcit at 46.
[12] Sengenberger, W., 'Protection – participation – promotion: The systemic nature and effects of labour standards' *Creating Economic Opportunities – the role of labour standards in industrial restructuring* (ILO publication, 1994) at 48.

agreement. Such a variation of sick leave was in conflict with section 22 of the BCEA and also rendered the CIBC (Western Cape) Main Collective Agreement[13] invalid.

The parties to the NBC's Western Cape Sub-Chamber were also allowed (in terms of clause 19 Part B of this sector level agreement) to conclude 'ordinary' collective agreements at plant level in order to compress a working week or average hours of work. It is within this context that this research also examined how many 'ordinary' collective agreements were concluded at plant level during the period 1 June 2002 to 31 October 2005 and registered with the NBC's Western Cape Sub-Chamber in order to compress a working week or average working hours. It found that during the period in question, no 'ordinary' collective agreements were concluded at plant level between party employers and SACTWU representative in order to compress a working week. However, the same cannot be said about averaging of hours of work: 17 CCA members concluded 188 'ordinary' collective agreements with SACTWU representatives in order to average working hours.

This research can thus confidently conclude that during the period 1 June 2002 to 31 October 2005 the parties to the NBC's Western Cape Sub-Chamber achieved to a sufficient extent flexibility in the workplaces of 17 CCA members.

Under the 'flexibile collective bargaining structures' policy component, reference was made to the NBC's exemptions system. This was followed by a discussion on the overall performance of the NBC's Western Cape Sub-Chamber with regards to exemptions. Empirical analysis carried out in this research shows that over the period January 2005 to December 2005, 1036 exemption applications were received. Of these, 99, 23 were approved, 0, 68% were refused and 0, 10% is still under consideration. It would appear, then, that the NBC's exemptions system is providing flexibility in terms and conditions of employment (excluding minimum wages). Some explanation on the latter point is in order at this point: 7, 72% or 80 of the 1036 (total number of exemption applications

[13] This sector level agreement preceded the NBC's Consolidated Main Collective Agreement for the Western Cape Region and was, in terms of the provisions contained in s 32(2) of the LRA and by ministerial proclamation declared to be binding on non-parties in terms of s 31 of the LRA.

received) was for wages. However, this figure is misleading in that it refers to the number of instances whereby wages were reduced through a formal application for exemption as a consequence to a change in grade or occupation. Still on the discussion on the overall performance of the NBC's Western Cape Sub-Chamber with regards to exemptions. Attention was also paid to policy, procedure and individual cases. It is to these aspects that this research now turns.

The NBC's exemptions policy dictates that when a clothing manufacturer does not qualify for an automatic exemption,[14] it needs to comply with all the terms and conditions of employment (including minimum wages) in the NBC's extended collective agreements before the Council's exemptions committee will consider an application for exemption. In other words, full compliance with the NBC's extended collective agreements is a pre-requisite for considering an exemption application. This point is well illustrated by High Quality Clothing (Pty) Ltd t/a Blue Belle Clothing's application for exemption. In this matter the applicant applied for an exemption from all the provisions (including minimum wages) of the Consolidated Country Areas Collective Agreement for the Western Cape Region, but was unsuccessful because it did not comply with the latter, to paraphrase the words of the labour affairs manager of the NBC's Western Cape Sub-Chamber.

With regard to procedure, this research noted that an application for exemption is conditional upon a clothing manufacturer being registered with the NBC. This is so because registration with the NBC is a statutory requirement. Failure to do so means that a clothing manufacturer is contravening the NBC's extended main collective agreement for the Western Cape region.[15] In an effort to secure compliance with the council's main collective agreement, the NBC's Western Cape Sub-Chamber had to apply to the CCMA to convert the arbitration award into a court order. When the defaulting clothing manufacturer elected not to register, the NBC's Western Cape Sub-Chamber had to

[14] In order for a clothing manufacturer to qualify for an automatic exemption, he/ she needs to meet one requirement only and that is to employ 5 or less workers.
[15] See unreported ruling award *NBC for the Clothing Manufacturing Industry Cape Chamber (Western Cape Sub-Chamber) and Z Ally Fashions* (Case no 67/03, dated 17/05/2004).

implement the next step and that was to lodge an application for contempt of court. This research also found that it is almost impossible for the NBC's exemptions committee (Western Cape Sub-Chamber) to grant an exemption in respect of bargaining council levies and contributions, because the exemptions committee is duty bound to consider and determine an application for exemption in accordance with the 'restrictive criteria' set out in the NBC's extended main collective agreement for the Western Cape region.

By referring to three NBC awards, the research found that two factors limit the ability of the NBC's IEB panelists to give effect to flexibility. They are: (a) jurisdiction, i.e. whether an IEB panelist has jurisdiction to consider an appeal against a decision (by the Council's exemptions committee) to decline an exemptions application and (b) powers, i.e. whether an IEB panelist is empowered to impose on an employer and his/ her employees new terms and conditions of employment if they have not reach consensus on those terms and conditions of employment during the course of collective bargaining negotiations.

It will now be considered whether (a) the NBC is flexible in its approach towards agreement enforcement and (b) there is any special dispensation for small, medium and micro-enterprises (SMMEs) in relation to minimum wages, funds, etc or in terms of size.

The NBC's approach towards agreement enforcement is that all clothing manufacturers (large and small) are required to comply with the terms and conditions of employment (including minimum wages) set out in its extended collective agreements. The only clothing manufacturers who are excluded are those who employ five or less workers and therefore qualify for an automatic exemption.

The parties to the NBC continue to use five or less workers as the criterion to determine which clothing manufacturers qualify for an automatic exemption. However, there is no justification in policy documents of the NBC nor in the BCEA, of why the threshold of five or less has been used. Such action (by the parties to the NBC) reserves flexibility in terms and conditions of employment (as provided for in the Ministerial Determination:

Small Business) to only those clothing manufacturers who employ five or less workers and not to those who employ less than ten workers.[16] Since nine or less workers in employment is indicative of a very small firm,[17] the exclusion of those employers who employ nine or less workers does not make sense.

With regard to the second question regarding special dispensations for SMMEs the answer is in the negative. The NBC has no special dispensation for the larger SMMEs that employ ten or more people and do sub-contract work for larger firms.[18] In the South African clothing manufacturing sector such sub-contractors are called CMTs. The latter are required, in terms of the NBC's sectoral collective agreements, to pay the same minimum wages as the businesses for which they work.[19] Notwithstanding these minima, some small clothing manufacturers in the NBC's non-metro regions pay their qualified clothing machinists a mere R 220, 00 per week instead of the prescribed minimum R 282, 76 per week. Likewise, some small clothing manufacturers in Cape Town pay their qualified machinists a mere R 398, 00 per week whereas the prescribed minimum rate of pay is R 516, 50. It therefore appears as if the council's minimum wages are too onerous for small clothing manufacturers (especially non-parties) to comply with. This does not mean that small clothing manufacturers cannot seek relief in the form of a formal application for exemption. However, this research suggests that such applications for exemption would be unsuccessful.

With regard to funds, this research found that if an applicant is in arrears with bargaining council levies and contributions and no agreed repayment plan on arrear levies and contributions is in place, it is almost impossible for the NBC's exemptions committee (Western Cape Sub-Chamber) to grant the exemption application.

[16] Department of Labour (RSA) *Annual Report 1999* (DOL, 2000) at 1.
[17] The classification of a very small business (according to size) is provided for in legislation. A very small business passes muster if it has less than 20 workers in its employ. See schedule in National Small Business Act (Act no. 102 of 1996) at 20.
[18] This is so, notwithstanding the fact that the evidence in this research suggests that the number of SMMEs which are members of employer organisations and which in turn have seats on the NBC is 80 percent.
[19] Theron, J and S. Godfrey 'Protecting workers on the periphery (Part 1) – Monograph No 1', *Development and Labour Monograph Series*, IDLL, UCT, 2000 at 25.

The size of a firm (five or less workers) is the determining factor (second to registration with the NBC) insofar as automatic exemptions are concerned. As pointed out in this research, the NBC's exemptions policy makes provision for an automatic exemption provided a clothing manufacturer is registered with the council and its employment strength does not exceed five workers. Having said that, though, it is clear that this policy is limited, in the sense that the policy reserves flexibility (as provided for in the Ministerial Determination: Small Business) to micro-enterprises only and not to clothing manufacturers who employ between six and nine workers.

In sum, then, the NBC is inflexible in its approach towards agreement enforcement and there is not any special dispensation (other than the granting of an automatic exemption provided the applicant qualifies) for small, medium and micro-enterprises (SMMEs) in relation to minimum wages, funds, etc or in terms of size. A more flexible approach towards agreement enforcement and exemption applications will surely encourage compliance with sectoral agreements, instead of avoidance. This approach is supported by an ILO study where it was stated that 'non-compliance rather than application for exemption seems to be the preferred route of small businesses.'[20]

It is against this background that this research would like to propose that the parties to the NBC adopt an approach whereby clothing manufacturers which employ nine or less workers enjoy an automatic exemption from the NBC's extended collective agreements. Such an approach will introduce a measure of flexibility in respect of minimum wages, the maximum number of overtime hours per week and the rate of overtime payment. This should contribute to small business stimulation and improved sustainability of SMMEs in a global economy of which the formal part of the two-tiered South African economy is an integral part. The parties to the NBC should also adopt the policy of 'regulated flexibility'. This policy makes provision for the reasonable variation of conditions of employment that takes into account local, regional and operational realities[21] and is, since 1996, the ANC-led government's official policy on managing the South African labour

[20] Hayter, S., Reinecke, G and R. Torres *South Africa: Studies on the social dimensions of globalization* (ILO publication, 2001) at 88.
[21] Parsons, R., 'Building an employment-friendly nation', *The Star, Business Report*, 20/01/1999 at 2.

market. However, this policy has not been used to facilitate flexibility in the South African clothing manufacturing sector. On the contrary, the policy has been used for political purposes to constrain flexibility. A call is therefore made for real flexibility in the South African clothing manufacturing sector that will allow for increased investment and a greater supply of jobs.

GLOSSARY OF DEFINITIONS, TERMS AND CONCEPTS

Apartheid

The word 'apartheid' means 'apartness'.[1] Apartness in the sense that the system of apartheid 'divided all SA citizens into race categories and each race (in theory) had its own neighbourhoods, schools, recreation facilities and places of worship'.[2]

Arbitrator

An arbitrator's job is to adjudicate on an issue in dispute, after having given both parties the opportunity to state their cases at an arbitration hearing. Thereafter he/ she makes a decision in the form of an arbitration award. On this score it is important to note that an arbitrator is not the only person who writes an arbitration award. Conciliators, whose job it is to assist parties to reach agreement, sometimes also need to make a ruling award when one of the parties at the conciliation process raise a point *in limine*.[3] Such ruling award enjoys the same status as an arbitration award.[4]

Bargaining council

Previously, under the old 1956 LRA, a bargaining council was called an 'industrial council,'[5] but was renamed by the Ministerial Legal Task Team[6] when the latter was asked to overhaul the SA labour regulatory environment. A bargaining council is a forum where one or more registered trade unions and one or more registered employers' organisations negotiate and conclude collective agreements at sectoral level. This brings us part of the way to understand the purpose of a bargaining council which is 'the

[1] Bradley, C., *The End of Apartheid* (Published by Raintree Steck-Vaughn Publishers, 1996) at 72.
[2] Weideman, E. '10 years of democracy', *You* (Published by Media 24, 15/04/2004) at 90.
[3] If this phrase is rendered in English, it means: 'at the outset.'
[4] See Khan, N. et al., *CCMA training course for commissioners and bargaining council conciliators: Conciliation Part 2* (CCMA publication, 2002) at 26.
[5] See page 124 of the Explanatory Memorandum which accompanied the draft Labour Relations Bill. Published in GN R 97 in *GG* 16259 of 10/02/1995.
[6] Appointed in July 1994 by the then State President of the Republic of South Africa, Mr N.R. Mandela.

determination (by agreement between the employer and trade union parties to the council) of minimum terms and conditions of service for the sector for which it has been established and registered, as well as the resolution of disputes in that sector'.[7] For purposes of this research, the term 'disputes' is taken to mean: Disputes about the interpretation or application of sectoral collective agreements.[8]

Cape Clothing Association

The Cape Clothing Association (CCA) was formed seventy-two years ago and has played a vital link between clothing manufacturers, the trade union called SACTWU, government and various organisations dealing with labour and trade union issues in the clothing manufacturing and related industries.[9]

CCMA

The Commission for Conciliation, Mediation and Arbitration (CCMA) was established by section 112 of the LRA and 'replaced the Industrial Court as a dispute resolution body.'[10] It is independent from the State, any political party, trade union, employer, employers' organisation and federation of trade unions or federation of employers' organisations.[11]

Clothing Industry Bargaining Council (Western Cape)

As pointed out above, the Clothing Industry Bargaining Council (Western Cape) (hereafter 'CIBC (Western Cape)') replaced the Industrial Council for the Clothing

[7] Jordaan, B and S. Stelzner., *Labour Arbitration* (Published by Siber Ink CC, 2002) at 5.
[8] A dispute about the interpretation of a collective agreement would include for example what a particular clause or provision means and the application of a collective agreement obviously deal with how it is to be applied (Interview by writer with John MacRobert of Attorneys Herold Gie, 27/02/2004).
[9] Interview by writer with Gert van Zyl: Executive Director of the CCA, 18/10/2001.
[10] Petros, N., 'ILO plans to set up organs to boost social dialogue' *Business Day*, 29/08/2002 at 6.
[11] S 113, LRA.

Industry (Cape).[12] Some elaboration on the CIBC (Western Cape) is in order at this point, i.e.: After the 23rd May 2003 the CIBC (Western Cape) underwent a name change to that of NBC for the Clothing Manufacturing Industry: Cape Chamber (Western Cape Sub-Chamber). This name change came about because six regional bargaining councils in the clothing manufacturing sector amalgamated to form the NBC. [13]

Collective bargaining

The ILO Convention[14] relating to the right to Organise and to Bargain Collectively defines collective bargaining as:

> [V]oluntary negotiations between employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by collective agreements.

Conciliation and arbitration

From a process point of view, conciliation[15] is different to that of arbitration. The difference between these two terms turns largely on the role of the arbitrator and conciliator. Starting with the latter. A conciliator's role during the conciliation hearing is to assist the parties to reach a settlement agreement and not to impose a solution on them; whereas, an arbitrator, 'has the power to make [at the arbitration hearing] what section 143 of the LRA refers to as a "final and binding award".'[16]

[12] This Council was established in 1935 and formally registered on 24/02/1936 under the Industrial Conciliation Act (Act No. 11 of 1924). See Rosenberg, A.M., *Chairperson's Annual Report* (ICCI publication, 1985) at 4.
[13] For more information on the NBC, see *infra* under the heading 'NBC'.
[14] No. 98 of 1949.
[15] Conciliation is a compulsory hearing (see s 133(1) of the LRA) which arises out of the formal declaration of a dispute. It is important to note that '[a]t a conciliation hearing, a commissioner (or a conciliator, in the case of a [Bargaining] Council or Private Agency) meets with parties, either jointly or separately, and explores ways to settle the dispute to the satisfaction of both parties' (CCMA., *CCMA Information Services: Glossary of terms & what to do 5th Edition* (CCMA publication, 1995) at 14).
[16] Van Niekerk, A., *Unfair Dismissal* (Published by Siber Ink CC, 2004) at 102.

Constitutional guaranteed right to fair labour practice

The right to fair labour practice is vested in the 1996 Constitution.[17] The term 'fair' is described by the Labour Appeal Court to mean:

> '[A] value judgment.'[18]

'[L]abour practice,' on the other hand, 'is not defined in the [1996] Constitution but embraces the right to job security.'[19]

Corporatism

Corporatism, 'is a system in terms of which the state, business and labour negotiate and agree on the rules that govern labour'.[20]

Designated agent

A designated agent is an employee of a bargaining council and not, as one commentator has noted 'a government official'.[21] The main function of a designated agent is to 'police the council agreement and take steps against any persons who are contravening the agreement'.[22]

[17] S 23(1), 1996 Constitution.
[18] Conradie, J A, whose judgement was concurred in by Froneman, DJP and Nicholson, JA, in *SACCAWU & Others v Irvin & Johnson Ltd* (1999) 20 *ILJ* 2302 (LAC) at paragraph 29. This view was supported by the Constitutional Court in *NEHAWU v UCT & Others* (2003) 24 *ILJ* 95 (CC) at paragraph 33, where the Court held:

> [W]hat is fair depends upon the circumstances of a particular case and essentially involves a value judgment.

[19] Landman J in *Netherburn Engineering CC t/a Netherburn Ceramics v Robert Mudau & others*, unreported, Labour Court judgement (Case no: J 2953/2003, dated 31/08/2003) at 31.
[20] Rautenbach, F., *Liberating South African Labour from the Law* (Tafelberg Publishers Limited, 1999) at 87.
[21] Dewar, K., *A Guide to Employment Law* (Butterworths: Professional Publishers (Pty) Ltd, 1991) at 91.
[22] Godfrey, S. 1992, 'Statutory Institutions for Centralised Collective Bargaining in South Africa, 1997-1992' in *Industrial Council Digest*, Department of Sociology, UCT, 1992 at 8.

Global economy

The 'global economy' has been defined as 'the increasing absorption of national economies into a tightly integrated worldwide economy that is governed by global rules'.[23]

Globalisation

Globalisation, an academic said, 'is a contemporary buzzword in law and politics which implies *inter alia* the lowering and removal of trade barriers between countries as well as monetary unions.'[24] She then goes on to explain:

> One of the important results of this process is the gradual phasing out of cultural and other differences between different peoples and nations, and it is often said that the world is consequently becoming a 'global village'.[25]

It is submitted that the results of globalisation are not limited to the aforesaid. As one commentator has noted, globalisation 'can ... lead to rising inequality and labour market insecurity'.[26]

NBC

The National Bargaining Council for the Clothing Manufacturing Industry (NBC) was formed on 23rd May 2003 after six bargaining councils amalgamated.[27] This followed a 2002 agreement between SACTWU and all the employer associations in the South

[23] Isaacs, S et al., *South Africa in the Global Economy: Understanding the challenges – Working towards alternatives*, Centre for Industrial, Organisational and Labour Studies, UN, 1997 at 21.
[24] Van der Berg, R. 'The influence of free and foreign trade on the development of Roman law' *THRHR* Vol. 65 No. 3, Department of Jurisprudence, UNISA, 2002 at 373.
[25] Ibid.
[26] Hayter, S., 'The social impact of globalisation' *SALB*, Vol. 23 No. 2, (Umanyano Publications, 1999) at 62.
[27] They are: Bargaining Council for the Clothing Industry (Eastern Cape); Clothing Industry Bargaining Council (Free State and Northern Cape); Bargaining Council for the Clothing Industry (Natal); Clothing Industry Bargaining Council (Northern Areas); Knitting Industry Bargaining Council (Northern Areas) and Clothing Industry Bargaining Council (Western Cape). See Government Notices R. 790 and R 791 in *GG* No. 23450 of 31/05/2002.

African Clothing Manufacturing Industry to set up a national bargaining council which consists of three chambers, i.e. the Northern Chamber, Kwa-Zulu Natal Chamber and Cape Chamber.[28]

Regulated flexibility

The Labour Market Commission, also known as the Presidential Commission, introduced the concept of 'regulated flexibility' in its 1996 report[29] and on the face of it this was done in, what one commentator called, 'acknowledgement of differentials within one regulatory system'[30]. The ANC-led government incorporated this concept in its macro-economic policy, GEAR, with the result that since 1996 '[t]he government ... pursue[d] a policy of *regulated flexibility* in managing the labour market.'[31]

Small business

A small business is defined as follows:[32]

> [A] separate and distinct business entity, including co-operative enterprises and non-governmental organizations, managed by one owner or more which, including its branches or subsidiaries, if any, is predominantly carried on in any sector or sub-sector of the economy mentioned in column 1 of the Schedule and which can be classified as a micro-, a very small, a small or a medium

[28] Please note: By amalgamating the different bargaining councils, the NBC extended its scope nationally to all clothing manufacturers and their employees in the sector (Interview with W.A. Roberts, the then Chairman/ Facilitator of the NBF for the Clothing Manufacturing Industry, on 31/05/2002).
[29] Presidential Commission to Investigate Labour Market Policy, *Restructuring the South African labour* market (DOL publication, 1996) at 59. See also Bezuidenhout, A. and B. Kenny., 'The language of flexibility and the flexibility of language: post-apartheid South African labour market debates' at 11. An unpublished paper delivered at the 1999 annual IRASA conference.
[30] Baskin, J., 'Introduction' *Against the current: Labour and economic policy in South Africa* (Ravan Press (Pty) Ltd, 1996) at 16.
[31] See *Growth, Employment and Redistribution: A Macroeconomic Strategy* (Department of Finance, 1996) at 6 (Part 2). Reported on internet at http://www.polity.org.za/govdocs/policy/growth.html. Retrieved on 6 March 2002.
[32] S 1, National Small Business Act (Act no. 102 of 1996). This Act creates the regulatory framework needed for the promotion of SMME's (see Rosenthal, T., and K. Gostner, 'Progress on all fronts' *SALB* Vol. 20, No. 4 (Umanyano Publications CC, 1996) at 49).

enterprise by satisfying the criteria mentioned in columns 3, 4 and 5 of the Schedule opposite the smallest relevant size or class as mentioned in column 2 of the Schedule.[33]

What is noteworthy, however, is the fact that 'it was argued in GEM 2001, [that the groupings according to size and class (see column two of the Schedule)] incorporate such a wide variety of businesses and entrepreneurs that they are not helpful for targeted policy making'.[34] So the question remains: What is a small business? The answer to this question is to be found in a local newspaper report. In the report, Dr. Alistair Ruiters, the then Director-General of the Department of Trade and Industry (DTI) was quoted as saying:

> We realize now that we have to distinguish between the different groups within the small business sector. There are three levels in the pyramid which clearly can be marked out. The first is the seller at the street corner, on second level are businesses which for example employ three to five employees and are governed by a tradesman and which apply for a loan of R 10 000-00. The third group is the more sophisticated small businesses which employ several people and do sub-contract work for larger firms. [35]

[33] For ease of reference, this research quotes the full schedule as it appears in the Act (at 20):

'

Column 1	**Column 2**	**Column 3**	**Column 4**	**Column 5**
Sector or sub-Sectors in accordance with the Standard Industrial Classification	**Size or class**	**Total full-time equivalent of paid employees**	**Total annual turnover**	**Total gross asset value (fixed property excluded)**
		Less than	**Less than**	**Less than**
Manufacturing	Medium	200	R40.00 m	R15.00 m
	Small	50	R10.00 m	R 3.75 m
	Very small	20	R 4.00 m	R 1.50 m
	Micro	5	R 0.15 m	R 0.10 m'

[34] Foxcroft, M., et al *GEM 2002: South African Executive Report*, Centre for Innovation and Entrepreneurship of the Post-Graduate School of Business, UCT, 2002 at 8.

[35] Du Toit, J., 'Handel en Nywerheid gaan op informele sektor fokus' *Die Burger, Sake*, 9/02/2002 at S 18.

Southern African Clothing and Textile Workers' Union

The Southern African Clothing and Textile Workers' Union (SACTWU) was formed on 16-17 September 1989[36] and this trade union '[o]rganises workers in the clothing, textile, leather, footwear, distribution and allied industries.'[37]

[36] Interview by writer with Ralph Alexander: Project co-ordinator of the SALRI, 9/11/2001.
[37] Visser, R and C. Aprill, 'Retrenchments in the Clothing and Textile Industry in the Western Cape Province' Paper presented at a Ditsela seminar, SALRI, Salt River, 2004.

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