THE UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

GLOBALISATION AND WORK REGULATION IN SOUTH AFRICA

RESEARCH PAPER SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR LLM DEGREE IN LABOUR LAW

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DECLARATION

I declare that *Globalisation and Work Regulation in South Africa* is my work, that it has not been submitted before any degree or examination at any other university, and that all the sources I have used or quote have been indicated and acknowledged as complete references

RAYMOND AWA FOMOSOH NOVEMBER 2009

SIGNED:----------

DEDICATION

To Mr. Kan Elroy Moses Payne

ACKNOWLEDGEMENT

The realisation of this work would not have been possible with out the grace and guidance of the Almighty God- His name will be glorified forever

In addition, the lecturers of the university of the western cape who did a wonderful work, , I wish to extend special thanks to my supervisor, Prof Darcy Du Toit, for his comments and criticism on the content and form of this paper which have not only helped to add value to it but will remain a life asset in my academic life. For that, I will always remain grateful to you

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CHAPTER ONE

THE IMPACT OF GLOBALISATION ON WORK.

1.1 General Introduction

The term "globalisation" is not easy to define given the fact that in most instances the definition has been contextualised. For the purpose of this work, the following definition will be helpful:

"…increase in cross-border economic interdependency resulting from a greater mobility of factors of production and of goods and services has established linkages over a broader geography of location. This trend is reflective of an increasing economic liberalisation and falling tariff barriers, modern communications, free flow of capital and modern technologies, integrated financial markets and corporate strategies of multinational companies that operate on the premises of homogenous world market"[1]

What is evident from the above definition with regard to production is that globalisation has greatly altered the manner in which the production of goods is being done. Hitherto, the production process was organised in such a way that the industralised countries produced manufactured goods while the developing or non-industralised countries supplied raw materials and acted as markets for the products of the industralised countries[2]. The production process has undergone an ongoing transformation from the large-scale production techniques which were based on the assembly line models, to the more flexible methods of production: the result being the emergence of a global division of labour in production which is characterised by the fragmentation of the production process and its subsequent geographical relocation on a global scale in a way that cuts across national boundaries.[3]

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[1] Harbrige, R et al. "Globalisation and Labour Market Deregulation in Australia and New Zealand, Different Approaches, Similar Outcome" (2002) *24* Employee Relations Journal at p424.
[2] Dicken *Global Shift* 3ed (2003) p9.
[3] Ibid.

Changes in the production process as a result of globalisation have had significant impact on labour relations.

First, they have adversely affected the unskilled workers, while the skilled workers, on the other hand, are benefiting from the spoils thereof.[4] Today, as a result of globalisation, skilled employees are able to be relatively more mobile and command higher wages because in most cases they are in the managerial and technical positions which require greater knowledge than unskilled or illiterate employees[5] who lack the knowledge required in our new technologically driven world of work. Furthermore, the unskilled employees usually form the bulk of the subcontracted labourforce, who are poorly paid and whose jobs are not only unstable but also fall outside the scope of collective representation or traditional labour regulation.

Secondly, globalisation has resulted in a decline in wages and conditions of employment as states engage in a "race to the bottom". As a result of international competition, states have been engaged in deregulation of the labour market in a bid to attract foreign investors.

Furthermore, unemployment rates as well as poor quality jobs especially in the informal sector have also increased as a result of globalisation.

1.2 The South African Context

Prior to the last three decades, employment patterns were based on a full-time permanent basis. Today, as a result of globalisation, and the employer's quest for flexibility, the result has been the emergence of non-standard work arrangements. Globalisation has promoted the development of non-standard employment patterns through international networks of enterprises, which favour a diversity of contractual arrangements between

[4] Jenkins et al "The Quest for a Fair Globalisation Three Years On; Assessing the Impact of the World Commission on the Social Dimension of Globalisation" (2007) p17.

[5] Baskin, J "South Africa's Quest for Job, Growth and Equity in a Global Context" (1998), *19*ILJ *986-1001*. p967

capital and labour. The re-entry of South Africa into the global economy meant that it will not be left out of the global market and its resultant consequences[6].

The rationale for employers resorting to non-standard employment arrangements is simply to enhance enterprise flexibility and also to avoid the obligations associated with a standard employment contract: resorting to non-standard employment arrangements will reduce an employer's labour costs as social benefits, such as, medical aid and pension fund, will no longer be the obligations of the employer.

The problem with a non- standard employment pattern is largely that those employed under such contracts in most cases fall outside the regulatory net of traditional labour law. Some, however, do fall within the traditional regulatory net of labour law, but the nature of their job is so informal that it becomes difficult for them to be recruited into any collective organisation or to benefit from the protection of the law.[7]

Traditional labour law does not adequately protect atypical employees for two reasons. First, traditional labour law was based on a model of fulltime life-time employment with one employer, which is ill-suited to atypical employment patterns. Secondly, the various forms which atypical employment take mean that some workers, like independent contractors, cannot be considered as employees and as such cannot benefit from the protective reach of traditional labour law[8].

This chapter examines the different forms of employment patterns that have emerged as a result of globalisation as well as the mechanisms that have been used by the legislator to accommodate those in non-standard employment relationships.

[6] Hepple, B. "Labour Relations Act and Global Competitiveness" (2005) *9* Law, Democracy and Development 135- 145 at p137.
[7] Cheadle, H. "Regulated Flexibility, Revisiting the LRA and the BCEA" (2006) 27 ILJ 663 at p699.

[8] Ibid.

1.2.1 *Globalisation and the changing nature of employment patterns*

The traditional model of employment patterns based on a model of fulltime life-time employment with one employer has also felt the pinch of globalisation. Today we see the growth of non-standard employment patterns due to casualisation, externalisation and informalisation of work[9].

1.2.1.1 Casualisation

Casualisation refers to the use of part-time[10] and temporary workers[11] and leads to the reduction in the number of fulltime employees[12]. Over the past two decades there has been an increase in the use of casual labour in the South African workforce. In recent years not less than 82.5 % of firms in South Africa have employed casuals[13].

Casualisation is a problem for various reasons. It fragments the labour force into permanent and non-permanent employees. The latter group of employees is usually poorly paid[14], and have little or no training and development opportunities. A study by the ILO reveals that while about 69.1 % of standard workers are covered by pension funds, only about 23.5 % of part-time and 8.9% of temporary employees are covered by such funds; the percentage for medical schemes stands at 74.9 %, 30.3% and 11.9 % respectively[15]. Furthermore, these employees have little or no industrial protection because their interests are not usually represented by trade unions. Unions are usually reluctant to represent this category of employee because they believe that their focus and source of income lie with those with standard employment relationships[16]. Finally, casualisation is also characterised by employment insecurity, as approximately 55 % of

[9] Ibid.
[10] This refers to work which is not full time.
[11] A" Temporary work" refers to an employment relationship based on a contract for a definite period of time and which comes to an end when the period expires.
[12] Fenwick,C et al. "Labour Law; A Southern African Perspective" (2007) p19.
[13] Standing G et al "Restructuring the Labour Market; the South African Challenge" (1996).
[14] These employees are usually poorly paid compared to standard workers and rarely benefit from non-wage company benefits.
[15] Makino, K. "The Changing Nature of Employment and the Reform of Labour and Social Security Legislation in Post Apartheid South Africa." (2008) IDE Discussion Paper.
[16] Fenwick,C et al op cit, p20. It is also very difficult for unions to recruit and organise casuals due to the nature of their job.

firms that employ this category of employee on a contractual basis usually end up not renewing the contract[17].

Casualisation can be explained by three factors.

First, employers prefer this form of employment pattern to the standard employment pattern because of their desire for flexibility in the labour market[18], such as, the extension of working hours during peak periods to increase productivity, to reduce labour costs[19], and to increase efficiency.

Furthermore, the increase in the use of these employees can also be explained by the high rate of unemployment in the country which forces people to engage in less desirable employment patterns.

Finally, such form of employment pattern is seen as a bridge to standard employment in the future.[20] Employees engage in such casual labour so as to acquire the necessary experience that will enable them to get fulltime employment.

1.2.1.2 Externalisation

This refers to the process whereby employment is regulated by a commercial contract instead of a contract of employment[21]. Thus, these workers are described as externals because they fall outside the organisation that is making use of their services.[22] A remarkable feature of this form of employment pattern is that it reduces the number of workers employed by the core business and as such limits the application of labour law.[23]

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Externalisation is usually justified on the ground that firms should concentrate on their core functions; those activities in which they have gained comparative advantage.[24]

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[17] Standing et al. op cit. Non-renewal of such contract were the employee reasonably expects its renewal will constitute unfair dismissal under the LRA.

[18] "Flexibility" here refers to numerical flexibility which entails little or no cost in hiring and firing of workers.

[19] Bondibe, O. "The Extent and Effects of Causualisation in Southern Africa; Analysis of Lesotho, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe" (2006). NALEDI. at p10.

[20] Standing et al, op cit.

[21] Fenwick,C et al op cit. p 20.

[22] Owen C et al "Strategic Alliances and the New World of Work."

[23] Fenwick,C et al op cit p 20.

[24] Ibid.

However, the real motive behind such arrangement is that employers want to avoid the responsibilities associated with standard employment patterns, such as, the payment of social benefits[25]and the cost involved in the event of a dismissal claim.

Externalisation has various facets.

There is outsourcing were the employer retrenches employees performing non-core functions[26] of the enterprise and enters into a contract with another firm for it to perform the non-core functions[27]. By contracting out such services, the employer shifts responsibility for bargaining entitlement and common law rights to the contractor[28]. Given the level of union density[29] in the country, firms will prefer to outsource so as to avoid the high cost of unionised labour.

Externalisation also occurs through the use of labour brokers. Here, the employer of an enterprise gets its labour through a commercial contract with a third party.[30] Labour brokering is distinguishable from other form of externalised labour in two ways: it involves the provision of a temporary worker to a client, and also work is usually being done on the premises of the client[31]. Labour brokers have been criticised for violating minimum labour standards, like hours of work and minimum wages an employee is supposed to receive, and also for conspiring with the client because they obtain cheap and easily disposable labour for their use.[32]

Franchising also is another form of externalisation, which involves the franchisor authorising the franchisee to operate a business using the franchisors' trade mark, and the franchisee in turn employs workers to assist him to operate the business. The franchisor,

[25] Fenwick,C et al. op cit, p 21.
[26] Fenwick et al op cit. p20.
[27] *NEHAWU v. University of Cape Town & Others (2003) 12 BCLR 154 (CC*).
[28] Owen C et al "Strategic Alliances And The New World Of Work". Such practices are believed to improve service delivery.
[29] Bhorat, H. et al. *The South African Labour Market in a Globalising World; Economic and Legislative Consideration* (2002). Unionisation rate stands at about 34%. This figure is relative high given that the average unionisation rate for developing countries is approximately 18 %.
[30] Theron, J. "Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship". (2005) 26 ILJ 618 at p618.
[31] Ibid.
[32] Standing et al op cit p 96.

however, has power over the business with regard to employment and labour related matters. The recruitment of workers, however, is left in the hands of the franchisee[33].

Home-work or outwork is also an activity which is usually brokered through an intermediary. The intermediary in such a situation has no intention of providing the work himself, rather he employs workers to do the job since it will be comparatively cheaper than if it were done at the core business[34]. A case in point can be found in the clothing industry were home workers are used.[35]

From the foregoing it is apparent that externalisation usually involves triangulation[36] and usually involves situations in which the real employer does not control the employment relationship.[37] What is strange about this scenario is that, under the law, the user enterprise or core business is considered as the third party, thus sending the message that the employment is existing only between the intermediary and the worker[38]. This is at odds with common knowledge because it is the client who determines what quantity of labour it needs and in most cases work is usually being done at the client's premises, thus giving him a prominent role in the relationship. Basically, the designation of the client as a third party implies that in a situation where the intermediary becomes insolvent, the workers might end up not being paid.

1.2.1.3 Informalisation

Informalisation is a situation whereby an employee who is covered by the law cannot enforce his rights or where activities take place outside the scope of formal regulation[39].

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[33] Theron, J op cit p 620.
[34] Ibid.
[35] Ibid.
[36] Fenwick,C et al, op cit p21.Triangulation involves a process whereby the client or better still the core business enters into a commercial contract with an intermediary for work to be done on behalf of the client. The intermediary in turn employs workers to perform the job for the client.
[37] Benjamin, P. "Labour Market Regulation: International and South African Perspectives" (2005) *HSRC*.
[38] Theron, J op cit. p 619.
[39] Theron, J "Informalisation From Above, Informalisation From Below; What Are The Options For Organisation". (2007). http://blogs.uct.ac.za/gallery/679/Informalisation%20from%20above,%20informalisation%20from%20below_jt_4_03_2008.pdf. (Accessed on 18 April 2009).

The driving force behind this process of informalisation has been the quest of employers to achieve flexibility so as to remain competitive in the global market. This has been achieved either by changing the internal organisation of the labour force, changing the work process, or changing the employment status of the workforce.[40] Informalisation in some cases involves small businesses that are not registered and are run from street pavements and in other informal arrangements[41].

Informalisation also involves the use of independent contractors. The employer uses a person's services through a contract of service rather than through the common law contract of employment[42]. In order to avoid the responsibilities associated with being an employer, employers nowadays convert employees into independent contractors or contract out work formerly done by employees.[43] In practice the distinction between an employee (one who benefits from the protection of labour law) and independent contractor (one who is not entitled to labour law protection) seems to be that easy. The main difference between the two is that an employee works for an employer and is under the employer's control and supervision unlike an independent contractor who performs a service for a fee, does not work for a single employer and consequently is not under the supervision and control of an employer.[44] However, in some circumstances to distinguish an employee from an independent contractor at times is very complex. Because of the complexity that may arise in the distinction of these sets of workers, several criteria have been used to differentiate an independent contractor from an employee.

The first of such tests is the control test which looks at the extent to which an employee is subordinated to an employer in terms of the common law contract of employment. According to this test an essential ingredient in an employment relationship is the power

[40] Fenwick,C et al op cit p 18.
[41] Pillay, D. "Globalisation and The Informalisation ff Labour; the Case Of South Africa" p 6. http://www.nottingham.ac.uk/shared/shared_scpolitics/documents/gwcprojectPapers/South_African_Labour.pdf , (Accessed on 18 April 2009).
[42] Cheadle,H et al. *South African Constitutional Law, the Bill of Rights*. (1997) at p18-7. A person who provides services under a contract of work can not be regarded as an employee except in special circumstances.
[43] Du Toit et al ,*Labour Relations Law, A Comprehensive Guide* (2003) p 77
[44] Du Toit et al , *Labour Relations Law, A Comprehensive Guide* (2006) p 75. See p 10.

that an employer has to choose what work is to be done but also the manner in which it should be done. *R V. AMCA Services Ltd*[45] . Where an employer exerts this power an employment relationship will be deemed to exist.

There is also the organisation or integration test which looks at whether the person works as part and parcel of the organisation or whether the work done for the business is not integrated into the business but merely an accessory to the business. *Bank voor Handel en Scheepvaart NV v Slatford*[46] Where the work done is just an accessory to the business, an employment relationship will not be found to exist.

Finally, there is the dominant impression test. This test takes no single factor as decisive but looks at the relationship as a whole to arrive at a dominant impression to see if there is an employment relationship or if it is just a contract to perform an independent service.[47]

1.2.2 Accommodation of non-standard employees under the South African labour dispensation and its limits

Conventionally, employees' protection was based on the notion of an employment relationship which differentiated between employees and independent contractors.[48] The emergence of non-standard employment relationships necessitated the reconstruction of the initial framework of labour law so as to accommodate those in an atypical employment relationship. The South African legislator has devised various means to extend labour law protection to those in a non-standard employment relationship.

First, in an attempt to broaden the safety net so as to accommodate the needs of those in an atypical employment relationship, the legislator, instead of amending the definition of

[45] *1959 (4) SA 208 (A*). What is required here is not absolute control, but simple immediate and recurring control.
[46] *(1953) 1QB 248 (CA).*

[47] *Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A).*
[48] Benjamin, P. op cit p9.

"employee", has introduced a rebuttable presumption which if activated, shifts the burden onto the employer to prove that the worker is not an employee. The listed grounds which activate the presumption are set out in s200A of the Labour Relations Act (LRA)[49] and s83A[50] of the Basic Conditions of Employment Act (BCEA).[51] A worker who succeeds in proving just one of such factors is presumed to be an employee irrespective of the form of the contract[52]. This provision of the law offers great protection for those in de facto employment relationships because where one or more of the listed grounds is proven the burden shifts to the employer to challenge the presumption that the worker is in fact not an employee. Besides, the provision is laudable because it applies to all contracts of employment irrespective of the form[53] that the contract might take. Although the courts are required to go beyond the words of the contract in determining the existence of an employment relationship[54], an employer can be able to rebut the presumption and thus leave the worker unprotected. Thus, the presumption may at times not be able to offer protection to workers that need it most. A further limit to the presumption is to be found under the provisions of s 200 A (2) which provide that the presumption does not apply to any employee who earns more than the limit set by the Minister in terms of s6 (3) of the BCEA. Finally, the effectiveness of the presumption remains in doubt because the problem with disguised employment patterns is one of enforcement of the law[55].

The protection of employees employed by a Temporary Employment Service (TES) also is a major challenge. This difficulty arises from the fact that employees of a TES usually work for a client, who purchases labour from the TES. This difficulty has been regulated

[49] Act 66 of 1995.
[50] They include; "The manner in which the person works is subject to the control or supervision of another person, the persons' hour of work is subject to the control or supervision of another person, in the case of a person who works for an organisation, the person is part of that organisation, the person has worked for that other person for at least 40 hours per month over the last three month, the person is economically dependent for that other person for whom that person works or renders services, the person is provided with tools of trade by the other person, the person only works for or render services to the one person".
[51] Act 75 of 1997. Though under a service contract, independent contractors may be deemed employees as per the provision of this section.
[52] *Wyeth SA (Pty) Ltd V. Manqele* (2005) 26 ILJ (SA) 749 LAC. The mere fact that an employee needs to provo only one of such factor before being considered an employee kind of give him enough shield against an employers' claim.
[53] Du Toit et al op cit p79.
[54] Eg, *Medical Association of SA V. Minister of Health* (1997) 18 ILJ 528 (LC).
[55] Fenwick,C et al, op cit. p 23.

in s 198 of the LRA and s 82 of the BCEA. These sections provide that a person who works for the client is the employee of the TES and the TES is thus his employer. The implication of this provision is that in case of any problem the employee will raise the protection offered to employees against the TES, and not against the client[56].

Such legislative provision does not accord adequate protection to the employees by designating the TES as employer. First, by designating the TES as employer, it implies that the client is a third party in the relationship and as such gives the impression that the primary relationship is between the TES and the worker, despite the fact that it is the client who determines the amount of labour that it needs. Besides, if the client does not want the service on offer, an employment relationship will not exist between a TES and the employee, although the work is being done at the client's workplace.[57] Furthermore, the fact that the work is being done at the client's workplace suggest that he has powers over the worker who the law does not consider it's employee. By designating the TES as employer, the law does in fact fail to adequately protect the worker. Another loophole of such a provision is also evidenced by the fact that the terms of the contract (commercial) between the TES and the client are usually not disclosed to the employee. Hence, it is difficult to think that employees can improve working conditions through the process of collective bargaining between employer and employees, except in cases where the TES is able to advance its demand with the client by varying the content of the contract[58]. From what has been said so far, one sees that by designating the TES as employer leaves employees with little or no protection. Except in the case of unfair dismissal, s198 (4) of the LRA provides that the TES and the client will be jointly and severally liable where the TES breaches the terms and conditions of employment provided for by a collective agreement, an award or the provisions of the BCEA.

Section 57 (1) of the Employment Equity Act (EEA)[59] provides that where a TES places a worker to a client indefinitely or for more than three months, the worker is deemed to

[56] Ibid
[57] Theron, J. (2005) op cit p619.
[58] Theron, j. op cit p629.
[59] Act 55 of 1998.

be the employee of the client[60] for purposes of affirmative action; section 57 (2), on its part provides that the TES and the client will be jointly and severally liable where the TES commits an act of unfair discrimination on the instruction of the client. This provision is laudable because it at least makes the client liable and as such will force him to comply with labour regulations. This provision impliedly accepts the fact that the client has control over the workplace and as such directly or indirectly influences the terms and conditions of employment on which the employee is recruited. However, given the precarious nature of workers in temporary employment agencies and the low level of unionisation among them, workers in this category find it difficult to benefit from this protection offered by the law. Furthermore, the law does not make the client liable in case of unfair dismissal, although the continuance of an employment relationship depends on the decision of the client who is usually the one to initiate the decision to terminate the employment relationship.[61] Besides, the reason for dismissal by the TES will obviously be the one that the client must have forwarded to the TES.

Section 83 of the BCEA gives the Minister of Labour the power to deem certain categories of workers to be employees for the purposes of the Act or any other employment law. Section 51 of the BCEA likewise gives the Minister the power to deem certain categories of workers as employees when making a Sectoral Determination. These sections of the law have not yet been applied by the Minister.[62]

Finally, s 32 of the LRA provides for the extension[63] of collective bargaining agreements to non-members of a bargaining council. Though seen as a limitation on freedom of association, the extension of bargaining council agreements to non-members of a council is one of the ways of protecting atypical and unorganised employees who by the nature of their work cannot engage in collective bargaining. Such extension will mean that atypical

[60] This is limited to purposes of chapter 3 of the Employment Equity Act.
[61] Theron, J. op cit p 637. The TES will scarcely want to terminate the employment relationship because it is in its interest, at least financially, that the relationship continues.
[62] Vettori, M "Alternative Means To Regulate The Employment Relationship In The Changing World Of Work" (2005) at p243
[63] This provides that were an agreement has been reached in the bargaining council of an industry, the outcome of that agreement can be extended to other members of that industry who were not party to the agreement.

employees who are not members of a bargaining council will be covered by agreements concluded at the bargaining council. An example of a bargaining council agreement which has been extended to non-members of the council can be seen in the bargaining council agreements for the restaurant, catering and allied trades which are binding not only on employers and employees who are members of the council but also on all employers and employees in those trades[64]. Even where such agreements have been extended, it has not been easy for bargaining councils to control the enterprises[65].

To conclude, the emergence of non-standard employment relationships has rendered the protection of such employees a difficult task. The legislator has extended protection to some categories of atypical employees with the exception of genuine independent contractors[66] and employees working less than twenty four hours a month[67]. Even where such protection is extended, there are usually grey areas in the law which the employers often exploit to the detriment of atypical workers, an example being the designation of a TES as employer.

[64] Department of labour. http://www.info.gov.za/view/DownloadFileAction?id=87201. (Accessed on 16/ o5/ 09).
[65] Vettori, M op cit. p242.
[66] This category of workers cannot benefit from the protection accorded to employees because South African labour law is premised on the notion of a contract of employment. Where the relation between an independent contractor and an employer is not based on a contract of employment, the said individual can not benefit from the protection of the law.
[67] This is so because ss 6 (c), 19, 28 and of the BCEA does not cover employees working less than 24 hours a month for an employer.

CHAPTER TWO

GLOBALISATION AND FLEXIBLE WORKING CONDITIONS.

Globalisation has impacted on industrial regulation throughout the world. Some of these changes are visible in the present state of working conditions of employees. Globalisation has pushed states around the globe to be engaged in what has been termed "a race to the bottom", in an attempt to make national industries more competitive in the global market. This so-called "race to the bottom" implies a flexible, and at times an outright deregulation of the, labour market; signaling of course an erosion of working conditions of employees. The South African labour market has of course not been left out of this global race.

2.1 The Notion of Flexibility

The concept of flexibility has been given different meanings by employers, employees and even the government. To an employer the notion of flexibility entails the power to make changes easily and at little or no cost so as to meet up with market demand[68]. To employees the concept of flexibility means the ability to easily adjust working time and also push forward their demands[69]. Employees, however, view flexibility as having an implication of insecurity[70]. They thus see legislation as a means of enhancing security. It should also be noted that there is a nexus between flexibility and unemployment: where unemployment is high, flexibility could easily be attained and vice versa. For the government flexibility refers to the extent to which variation of a rule is permitted[71].

That said, it would be worthwhile at this point to discuss the different forms of flexibility. Employment flexibility refers to the ability to change employment levels cheaply and quickly. There is wage flexibility which refers to the freedom to change wage levels

[68] Benjamin, P. *Labour Market Regulation, International and South African Perspectives* (2005) at p 21.
[69] G, Standing et al op cit p 6.
[70] Benjamin, P. ibid.
[71] Ibid.

without any restriction and includes individulisation of wages and the different forms of performance-linked wages. Functional flexibility refers to the ability to alter working conditions, work processes, etc easily and cheaply.[72]

In its attempt to reform the labour market so as to align it with the demands of globalisation (flexibility in the labour market), the South African legislator opted for what has been termed "regulated flexibility'[73] taking into account the employers need for flexibility and the employees' need for security. The legislator had to satisfy both the employers and employees who criticised the 1983 BCEA as being inflexible, in that it granted for very little scope for the regulation of working time to suit particular needs[74]. At the heart of this concept of regulated flexibility is the acceptance of the fact that the labour market is dynamic and diverse – thus, it gives room for employers and employees to set rules which are compatible with their sector or workplace[75].

2.2 Flexibility in working time

Flexibility in working time refers to the extent to which the law gives room for employers and employees to alter the standard working time to suit their operational needs. Employees demand flexibility in working time arrangements so as to be able to achieve a better work/life balance[76]. To this end, we are going to examine how globalisation and the resultant quest for flexibility in the labour market have led to the emergence of non-standard working time arrangements and how the law permits variation of the standard working time model so as to permit employers to arrange their working time to suit their operational demands and as such stay competitive in the global market.

[72] Ibid.
[73] Cheadle, H. "Regulated Flexibility; Revisiting the LRA and the BCEA" (2006) 27 ILJ P669. This concept is characterised by various mechanisms such as: voice law, administrative discretions guided by guide lines as to how this discretion is to be used; administrative determination; and finally soft law like a Code of Good Practice.
[74] Du Toit et al, op cit p 509.
[75] Op cit p669.
[76] Benjamin, P. op cit p 22.

2.2.1 *The Emergence of Non-Standard Working Time Arrangements*

Prior to the advent of globalisation, work was arranged based on the standard working time model. Under such model, employees were expected to work for a forty-six hours per week[77] mostly from Monday to Friday. The normal working hours were during the day; work performed at night[78] and during week-ends was subject to a premium payment to the employees. Overtime work also attracted a premium.

Today, things seem to have taken a different turn as can be seen from the provisions of the BCEA[79] which regulates working time. The quest for a flexible working environment has given room for the distortion of the standard working time model. This has been achieved in the BCEA through various means as seen below.

2.2.1.1 Compressed Working Week and Averaging Working Hours

Sections 11 and 12 of the BCEA provide for the compressing and averaging, respectively of an employees' working time. The rationale for such provisions is to enable an employer to adjust working time to suit his fluctuating needs, and as such improve productivity.[80]

Section 11 provides for employees' working hours to be compressed. Under this mechanism, employees' ordinary working hours may be varied either by collective agreement or written individual agreement to enable the employee to work a compressed working week. An employee may thus work for up to twelve (12) hours a day (including meal interval) without receiving over-time pay, provided that the maximum weekly working hours (45 hours) remain unchanged. Any overtime worked as a result of the compression of the working week does not attract any premium, except in cases where the employee had worked for more than the statutory maximum in a week or the

[77] This is the provision of the 1983 BCEA.
[78] The 1983 BCEA allowed women to do night work, which hitherto had been forbidden.
[79] Act. 75 of 1997
[80] Du Toit, D et al, *Labour Relations Law, A Comprehensive Guide* (2006) p525.

maximum period agreed in a collective agreement. An employee whose weekly hours have been compressed is not expected to work for more than forty- five ordinary hours and ten hours overtime in a week.

Flexibility has also been achieved through the averaging of working hours through collective agreement as per the provisions of s12 of the BCEA. This section permits the averaging of an employee's maximum ordinary hours and overtime hours for a period longer than one week but not exceeding four months. Employees' average ordinary hours worked per week should not exceed forty-five hours per week, or overtime of more than five hours a week on average. The advantage of such model to employers is that it provides medium term flexibility to firms where there are fluctuations in demand for work on monthly or seasonal bases[81]. The disadvantage of the averaging system to an employee is that it reduces an employee's period of overtime which is usually paid for.

2.2.1.2 Night work and Shift work

Night work[82] was first regulated in South Africa by the 1983 BCEA.[83] Night work can be performed if agreed (S17) by the parties either individually or collectively. Although the Act provides for the payment of an allowance for night workers, it does not stipulate the amount but, leaves it for the parties to agree upon.[84]

Although the law regulates shift work, it does allow the number of shifts to be regulated contractually by the parties. Furthermore, whether the shifts are organised during the day or at night is left to the discretion of the parties.

From the above one realises that the standard working time model has greatly been altered so as to meet the needs of the employer.

[81] Du Toit, D et al, *Labour Relations Law, a Comprehensive Guide* (2006) p525.
[82] Section 17 (1) BCEA defines "night work" to mean work performed after 18h00 and before 06h00
[83] The Factories, Machinery and Building Work Act 22 0f 1941 prohibited night work by women but such provision was repealed by the 1983 BCEA
[84] The Green Paper, however, proposed an allowance of 20 % of the employees' remuneration.

2.2.2 *Variation of Ordinary Hours of Work*

The BCEA regulates working time by setting the maximum hours an employee is supposed to work per week and per day (ss9 a,b and c), as well as the premium for work done during the night and for overtime work (s10). These provisions (s9 and s10), however, are not hard and fast rules as the Act gives room for these legislative provisions to be varied and thereby archieve flexibility. Variation of some of the legislative norms with regard to working time arrangements can be obtained by agreement between the parties, collective agreement or Ministerial determination.

2.2.2.1 Agreement[85] between the parties

With regard to working time, s 9(2) permits parties to extend the ordinary hours of work for up to fifteen (15) minutes a day and not more than sixty (60) minutes a week in the case of employees serving members of the public to enable them continue work after the completion of the ordinary hours of work .

Section10 (3) and s16 (3) on their part allow the parties to agree for equivalent pay time off, rather than payment at a premium rate for overtime work and Sunday work.

2.2.2.2 Written agreement

Section 15 (2) allow the parties to reduce the daily rest period to ten hours for employees who live on the premises of the workplace. Section 14 (5) allows the parties to reduce the meal interval. While S 10 (4) (b) allows the parties to extend the period for equivalent pay time off for overtime and Sunday work.

2.2.2.3 Collective agreement

The 2002 amendment of the BCEA gives employers and registered unions the power to extend weekly maximum overtime hours from ten to fifteen hours a week provided it does not apply for more than two months in any twelve month period {s10 (6) (b).}

Section 10(3) permits the parties to agree on equivalent paid time off rather than payment at a premium rate for overtime work and Sunday work.

[85] "Agreement" in this sense includes a verbal agreement

2.2.2.4 Bargaining council agreements

A collective agreement concluded in a bargaining council can replace, exclude or alter any basic condition of employment provided it is inline with the aims of the BCEA[86] and does not reduce the protection afforded by the "core rights".[87]

2.2.2.4 Ministerial Determination

The Minister has been given the power to vary certain basic standards laid down in chapter two of the Act on working hours taking into consideration health and safety of certain categories of employees (s13), to exclude certain categories of employees from working time protection, and to deem some categories of workers as employees (ss 6 (c), 19 and 28).

2.3 Wage Flexibility

Here the focus is on how wage regulation is being arranged and the extent to which such regulation provides for flexibility. Before going to examine how flexibility has been built into wage regulation, it should be noted that the BCEA does not set a national minimum wage that applies to all the sectors. Wages are usually set by collective agreements or Ministerial Determination for those sectors where no collective agreement exist.

2.3.1 *Wage Flexibility and Collective Bargaining*

Section 1 (d) (ii) of the LRA promotes centralised bargaining as part of its objectives with regard to terms and conditions of employment of which wage arrangement is part. Flexibility in wage arrangement in such centralised forums will be examined with due regard to the extent to which such forums give room for supplementary wage negotiation

[86] The aims of the BCEA which is to advance economic development and social justice , s2

[87] The core rights as in s49 (1) include: a 45 hour working week, an employers obligation to arrange working time with due regards to the health and safety and family responsibility of the employee, the protection of the health and safety of night workers, maternity and sick leave entitlement, minimum of two weeks annual leave, the prohibition of child labour and the regulation made by the minister with regard to maximum permitted hours of work and in the interest of health and safety.

at plant level, and the extent to which provide for exemption from application of the sector wide agreements. All things being equal, an employer is not supposed to pay less that what has been collectively agreed. However, he is allowed to pay more than the agreed rate. The above proposition that an employer cannot pay less than the collectively agreed rate acts like a limit to the notion of flexibility and at the same time shows that it is flexibility in one direction[88]- an upward trend.

2.3.1.1 Exemption from application of sector wage wide norm at company level

Section 30 (1) (f) of the LRA requires a bargaining council constitution to provide for a procedure for exemption from bargaining council agreements. This means that an employer in a bargaining council or one who is not a member but to whom a collective agreement has been extended in terms of s 32 has the right to apply for exemption so as not to be bound by a minimum wage rate and other working conditions adopted in the council. Where such exemption is granted, the employer will have the right to bargain with employees at company level to determine wage levels which may be lower than those concluded in the bargaining council. One sees flexibility built into the system, of not being bound by collective agreements concluded at sectoral level through the exemption mechanism. In most cases, exemptions from council agreement are usually granted to small firms.[89]An exemption may be full, partial or temporary[90].

2.3.1.2 Additional bargaining at plant level

Some bargaining council's agreements contain clause which permits plant level bargaining to determine wage rates and other working conditions. In such instances, minimum wage rates are usually set at central level while actual wage rates are negotiated at plant level. The leather bargaining council, for example, permits such additional bargaining at company level[91] .Downward variation can be accepted in circumstances

[88] Cheadle in Hayster, S et al " Regulated Flexibility; The Impact of South African Labour Law and Labour Market Policy in a Global Context" (2000) p10
[89] Du Toit et al op cit p282.
[90] Ibid.
[91] Godfrey, S. et al 'The State of Collective Bargaining in South Africa, an Empirical and Conceptual Study of Collective Bargaining" (2007) *Development Policy Research Unit*

where the minimum wage set at sectoral level may cause an employer substantial detriment. The national Motor Industry Bargaining Council for the automobile industry gives room for such variation from sector wide arrangements.[92]

2.3.2 Wage Flexibility and Minimum Wage Standards

Under South African law the BCEA does not lay down minimum wages but gives room for the Minister of Labour to set down such minimum wages through Sectoral Determinations[93] in terms of s 55 (4) .

Minimum wages are usually set for those groups of workers who by the very nature of their job lack the skill and strength to bargain effectively with the employer[94] or in those sectors that are unorganised or where no collective agreement applies. In making such determination the Minister is expected to take into account the peculiarity of each sector[95]; the result of such an approach is that, as in wages set through collective agreement, different minimum wage rates apply in the various sectors of the economy.

Flexibility in minimum wage rates has also been achieved by allowing departures from sectoral determinations. Section 55 (5) of the BCEA states that a sectoral determination may apply to all or some employers or employee in a particular sector. This means that an employer or employees may apply to be exempted from a sectoral determination from the Minister under certain circumstances. Furthermore, an employer may make upward variations with regard to minimum wages.

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[92] Ibid.
[93] Du Toit et al. op cit Sectoral Determinations have come to replace the wage determination in terms of the Wage Act p524.
[94] Rychroft et al op cit. p311f.
[95] Some of the sectors in which minimum wages have been set by the Minister include the transport sector, the private security sector, domestic workers sector.

2.4 Termination of employment.

Globalisation has resulted in fierce competition amongst firms. This competition has resulted in the need for constant adaptation, which at times may lead to the dismissal of employees. Section 188 (1) of the LRA gives employers the right to terminate the services of employees when operational needs[96] require. Thus, it will be fair for an employer to dismiss employees to increase efficiency, competitiveness and profitability. Barriers to the dismissal of employees, when operational requirements dictate, will not only discourage employers from increasing their workforce and make others uncompetitive, but can also increase labour costs.

The law has made it possible for firms to easily hire workers during peak periods and fire them when demand declines. To this end, it is possible for a firm to resort to fixed-term contracts[97] and hire employees during peak periods and state in the contract form that there is no expectation of renewal. Such a provision will be taken into account by the court in a dismissal claim. However, to protect the interests of employees', s186 (1) (b) of the LRA regards the non-renewal of a fixed-term contract or renewal on different terms as dismissal when the employee expected renewal on the same or similar terms. The limitation on the use of fixed term contracts is that an employer cannot retrench employees on fixed-term contracts for operational reasons[98]. It should however be noted that globalisation did not lead to the emergence of fixed-term contracts, it has rather led to the frequent use of such contract as a means of obtaining flexibility in the labour market[99].

Furthermore, the law does not prohibit an employer from employing casual workers on separate one day contracts or to work only on week-ends or special shifts[100]. Thus, an employee who has been employed for such a short period can not claim dismissal.

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[96] Section 213 of the LRA defines operational needs as economic, structural or similar needs of an employer.
[97] This is a contract in which the duration is determined in advance by agreement of the parties.
[98] *Buthelezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC).
[99] Cheadle in Hayster, S et al op cit p9.
[100] Ibid.

It is evident from what has been discussed to this point, that the advent of globalisation has meant the gradual erosion of working conditions of employees under the pretext of keeping local firms competitive in the global market. First, the distortion of the standard working time model has meant that employees will under certain circumstances have to work Sundays as well as some overtime work without receiving any premium, but equivalent paid time off. Furthermore, the drive towards a flexible working environment has also been accompanied by laws which make it easier for employees to be dismissed.

CHAPTER THREE

COLLECTIVE BARGAINING AND TRADE UNION MEMBERSHIP

Kahn-Freund had been acute in noticing the inequality of power in a bargaining context when he said that the power relationship between an employer and an employee in a sector context is "typically a relationship between a bearer of power and one who is not a bearer of power".[101] From this standpoint, the main function of labour law was to ensure that there exists some degree of equality of power exists between the bargaining partners.

Generally, globalisation has been accompanied by moves towards deregulation and decollectivisation of the labour market with the aim of creating a business friendly environment and, consequently, attracting foreign investors. The effect of such moves has weakened trade union power in the bargaining forum and consequently constituted a challenge to the traditional function of labour law. This chapter examines the framework of collective bargaining[102] and trade union membership in South Africa in an era of globalisation.

3.1 Collective Bargaining

3.1.1 Framework of Collective Bargaining

The quest for labour market reforms and deregulation in the face of globalisation has been noted. The re-entry of South Africa into the global market in the mid 1990s was accompanied by steps by the newly elected government to reform the labour market. In carrying out this reform it was guided by the principle of regulated flexibility as developed by Paul Benjamin[103].

[101] D, Du Toit, "What is the Future of Collective Bargaining and Labour Law" (2007) 28 ILJ 1405 p 1406.
[102] Collective bargaining can be defined as a process whereby employers or employers organisations negotiate with employee representative to reach agreement on terms and conditions of employment.
[103] Cheadle, H. "Regulated Flexibility; Revisiting the LRA and the BCEA" (2006) 27 ILJ 663 p668.

3.1.1.1 A constitutional right to collective bargaining

The Constitution in s 23 (5) entrenches the right to engage in collective bargaining premised on the notion of "fairness"[104]. The constitutional right to engage in collective bargaining should not be interpreted as a duty to bargain. Thus, the constitutional right to engage in collective bargaining should be interpreted to mean freedom to, as opposed to a positive right to, bargain[105]; this line of reasoning is supported by the fact that s23 (5) envisages that it will be the duty of the legislature to determine "the form, process, institution and the complex balance of power that forms part of any collective bargaining regime".[106]

3.1.1.2 A voluntarist approach to bargaining

The LRA clearly promotes a voluntary system of collective bargaining without restoring the historical form of a duty to bargain at times imposed by the industrial courts[107]under the previous LRA. Although voluntary, the legislator has designed means through which either an employer or employee can be brought to the bargaining table. This has been done in the Act by entrenching union organisation in the workplace (ss 11to 16), the right to strike as well as the right to lock-out (s64).

3.1.1.3 Levels of bargaining

With regard to the level of bargaining, the current LRA designed a two tier system of bargaining: it provides an organisational platform for bargaining at workplace level as well as structures for bargaining at the level of the industry (sectoral level). Under the previous LRA such coherence in bargaining levels was never well established. In enforcing the duty to bargain the question was whether a court could order bargaining at plant level in preference to industry level. The court concluded that in the absence of

[104] Section 23 (1) of the 1996 Constitution of South Africa states that "Every one has the right to fair labour practice".
[105] *SANDU v. Minister of Defence & Others (2003) 24 ILJ 1495* .
[106] Du Toit et al op cit p244.

[107] Du Toit, D "What Is the Future of Collective Bargaining and Labour Law" (2007) ILJ 1405 p1419. The industrial courts at the time imposed a duty to bargain in cases where it deemed it was fair that this should occur. *FAWU V Spekenham* (1998) 9 ILJ 628 (IC).

unfairness the choice of bargaining level should be left for the parties to decide[108]. Thus, where both parties were members of an industrial council and had the opportunity of bargaining, it was not unfair for one party to refuse to bargain at plant level[109]. However, where a trade union was not a member of a bargaining council but was not sufficiently representative of employees in a bargaining unit, it was unfair to refuse to bargain at plant level[110]. The current LRA allows for the level of bargaining to be determined by the parties in the absence of a duty to bargain[111]. The Act promotes centralised bargaining with multiple employers within a sector (s1 (d) (ii)), over plant level bargaining by granting enormous benefits to employers and unions who are members of a bargaining council. The Act encourages centralised bargaining through various means, such as:

a) Trade unions that are party to a bargaining council are automatically entitled to access and stop order rights in all the workplaces within the bargaining council's jurisdiction irrespective of their representativity (s19)

b) Councils have the power to determine by collective agreement matters which may not be an issue in dispute for the purpose of industrial action (s19)

c) Bargaining council agreements may vary minimum conditions of employment (s49 BCEA).

To this end, the LRA provides for the establishment of bargaining councils (s27)[112] and statutory councils (s39).[113] In promoting collective bargaining over individual employment contracting, the Act provides for the extension (s32) of a collective agreement to non-members of a council within the sector.

[108] *Besaans du Plessis (Pretoria Foundries) (Pty) Ltd v. NUSAW* (1990) 11 ILJ 690 (LAC).
[109] *PPWAWU v SA Printing and Allied Industries Federation* (1990) 11 ILJ 345 (IC).
[110] *UAMAWU v S Thompson* (Pty) Ltd (1988) 9 ILJ 266 (IC).
[111] Du Toit et al op cit p 234 .
[112] Section 27 of the LRA provides that a bargaining council can be established when one or more trade unions and employer organisations agree on its establishment in a particular sector.
[113] As per s 39 of the LRA, such councils are formed when a representative trade union or employer organisation applied for its formation in those sectors where there is no bargaining council. The Minister of Labour may compel parties to be members of a statutory council and as such force them to bargain; hence, statutory council is an exception to the rule that bargaining cannot be compelled.

The LRA promotes collective bargaining and the observance of International Labour Organisation Convention 87 1948 and Convention 98 on The Right to Organise and Bargain Collectively[114].

3.1.1.4 Bargaining conduct

As pointed out earlier, the LRA unlike the Industrial Court does not impose a duty to bargain. However, the Act's objective of orderly collective bargaining implies that bargaining should take place in good faith. Furthermore, good faith bargaining could also be secured by granting to unions the right of access to the employers' premises (s 12) and also the right to disclosure of information (s16) [115] during consultation and collective bargaining s16 (3). The duty to disclose, albeit having its limits,[116] requires that the employer to disclose to a representative trade union all relevant information that will allow the union to engage in effective bargaining, even though the parties are not obliged to arrive at an agreement. Under the previous LRA, the duty to disclose was an element of the right to good faith bargaining[117] and ceased to operate when there is a deadlock in the bargaining forum. Conversely, under the current Act, the duty to disclose may extend beyond a formal bargaining deadlock except in circumstances where further disclosure will have no impact on finding a lasting solution[118].

3.1.2 Collective Bargaining In an Era of Globalisation

Globalisation has had significant impact on collective bargaining structures. Globalisation has led to the fragmentation of the production process across national boundaries.[119] At times the fragmentation of business units may take the form of externalisation whereby the non-core functions of a company are outsourced to satellite

[114] Convention 98 was ratified by South Africa in 1996.
[115] Ibid. p235.
[116] An employer is not supposed to disclose information that is legally privileged,(s16 (5)(a)), private information concerning an employees except the employee consent to its disclosure (16 (5) (c)), that is confidential and if disclosed will cause substantial harm to an employee or employer (16 (5) (d))
[117] *MAWU v Natal Die Castings Co (Pty) Ltd* (1986) 7 ILJ 520 (IC).
[118] Du Toit et al. op cit p 240.
[119] Dickens *Global Shift* 3rd ed p9.

companies and as such dismantles the workplace into smaller self-contained business units, separated from the mother plant. This decentralised system of work organisation has had a significant impact on collective bargaining; the demarcation of an industrial union has become increasingly difficult. For instance, in a mining operation, security, drilling, catering and cleaning which were previously seen as part of the mining operation have been outsourced to satellite companies to provide the services to the mother plant. The end result of such a scenario is that union bargaining power has severely been weakened due to the fact that organising workers to join a union has become increasingly difficult.

Although the LRA favours centralised bargaining, the cold wind of globalisation has undermined the institution of centralised bargaining. This partially explains the decline in bargaining coverage in the private sector. Bargaining at the central level gives union greater leverage as they are able to represent a larger number of workers[120]. Bargaining at company level, on the other hand, gives room for flexibility for employers as they are not bound by the terms and conditions of employment concluded at the central level except in cases where such agreements have been extended.

3.1.3) Extent Collective Bargaining Coverage

Notwithstanding the above stated impact of globalisation on collective bargaining, collective bargaining in South Africa seems to be on the increase[121]. This is a strange phenomenon given the fact that union membership is on the decline[122] . One would have expected that the decline in union density will also signify a decline in collective bargaining. However, the number of employees covered by bargaining council

[120] Du Toit, D "The Right To Engage in Collective Bargaining" http://elearn.uwc.ac.za/index.php?module=context&nodeid=gen15Srv44Nme26_8573&action=content. (Extracted on 15- 09- 2009).
[121] Du Toit, D. "What Is the Future of Collective Bargaining (and Labour Law) in South Africa" (2007) 28 ILJ 1405 p1420.
[122] Ibid.

agreements has increased from 15 % (approximately 1.2 million workers) in 1995 to 32 % (about 2.5 million workers) in 2005.[123]. Many reasons account for its increase in.

The most important reason for the increase in collective bargaining in South African has to the extension of collective bargaining to the public sector and the institutional support for compulsory bargaining in terms of the creation of the Public Service Coordinating Bargaining Council, unlike in the private sector where there is no such organ.

The extension mechanism has also played a minimal role in increasing the rate of collective bargaining. The LRA creates room for the extension of bargaining council agreements to non- members of a council within a sector. The reason for extending such agreement is to prevent unfair competition within an industry and also to use the extension mechanism as a tool to achieve centralised bargaining[124] The percentage of employees covered by extended agreements stands at approximately 4.6 %[125].

However, if one has to remove the percentage of employees covered by collective bargaining in the public sector, one would realise that the extent of collective bargaining in the private sector has witnessed a decline from an estimated level of 15 % employees in 1995[126] to 13 % employees in 2005[127]: thus an estimated decline of about 2% employees from 1995-2005. The decline in collective bargaining in the private sector is, however, being mitigated by the fact that the BCEA applies to all employees and sectoral determinations promulgated to protect vulnerable workers play a major role in determining wages and working conditions of employees.[128]

[123] Bhorat, H. et al "Analyzing Wage Formation in the South African Labour Market; The Role of Bargaining Councils" (2009) *Development Policy Research Unit* p26.

[124] Du Toit et al, op cit p279 .
[125] Finnemore, M. *Introduction to Labour Relations in South Africa* 2006 p176 .
[126] Bhorat, H. op cit. Prior to 1994 no formal bargaining took place in the public sector. Conditions of work were determined by a commission. p15.
[127] Bhorat, H. (2009) op cit.
[128] Finnemore, M. op cit p 177.

3.2 Trade Union Membership

During the 1980s and 1990s, trade union membership in South Africa witnessed an unprecedented rise[129]. The reason for such a speedy increase was as a result of the deracialisation of the industrial relations system and also the extension of trade union rights to public sector employees[130].

This sharp increase in union membership slowed down in the last half of the 1980s and by 1993 unionisation in the private sector started experiencing a downtrend, with the union density rate standing at about 34 % workers in 1999[131]; a record contraction of 24 % compared to the unionisation rate of the first quarter of the 1980s. Trade union membership declined from 3 939 075 members in 2001 to 2 935 864 members in 2005[132]- a record loss of 1003211 members.

3.2.1 Reasons for the decline in trade union membership

This decline in union membership has been the result of structural, cyclical and institutional factors.

3.2.1.1 Structural factors

Structural changes in the economy, such as, the emergence of non-standard employment as a result of the fragmentation of the production process, coupled with the growth of the service sector, which is not union friendly, to the detriment of other sectors which were comparatively friendly to union activities in terms of organising workers, have negatively impacted on union membership[133].

3.2.1.2 Cyclical factors

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[129] Kaia, P , et al. 'Impact of Globalisation on Industrial Relations on Europe and other Major Economies' European foundation for the improvement of living and working condition. (2007) p14

[130]

[131] Bhorat, H. et al. "The South African labour market in a Globalising world; Economic and Legislative Consideration" (2002).

[132] D, Du Toit. op cit p 1420.

[133] Ibid. p1412.

Cyclical factors[134] are also impacting on trade union membership. It should be noted that South African firms faced stiff competition from international firms as a result of the liberalisation of the economy. The impact of such competion is that some domestic firms find it difficult to survive in the face of global competition and thus have no other option than to close up or retrench some workers so as to reduce labour costs. It is common knowledge that an unemployed person cannot be a trade union member. Examples of trade unions which lost membership as a result of unemployment are the National Union of Mineworkers (NUM) and National Union of Metalworkers (NUMSA), in whose industries large scale retrenchments [135] had taken place.

3.1.2.3 Institutional factors

Some legislative provisions, such as, the deduction of union membership[136] dues and the voluntary system of bargaining, have had adverse effects on union membership. Tighter regulations governing the registration of trade unions also explain the reason for the decline in trade union membership.[137]

From the foregoing it can be seen that the advent of globalisation has been accompanied by the erosion of the institution of centralised bargaining as well as trade union membership. Albeit that there is institutional support for a system of centralised bargaining, which gives unions greater leverage and grants them the opportunity to represent greater numbers of employees, the impact of globalisation on bargaining institutions has undermined such intended outcome as seen in the decline in the extent of collective bargaining. This outcome shows that the present legislative framework which favours centralised bargaining is unsustainable or at odds with globalisation. Thus, new avenues need to be explored under which terms and conditions of employment will be negotiated other than at the sectoral level. The present legal framework of workplace forums is not a suitable one as it is limited only to production related matters.

[134] "Cyclical factors" refers to the so impact of unemployment on trade union membership.
[135] Woo, G."South African Trade Unions in a Time of Adjustment" (2001). http://www.historycooperative.org/journals/llt/47/06wood.html (accessed on 08/ 03/ 2009).
[136] D, Du Toit. Op cit p 1413.
[137] Kaia, P, et al. op cit. p 15.

CHAPTER FOUR

Public Sector Arrangements

Just as in the private sector, globalisation has pushed the government to carry out reforms in the public sector so as to reduce the size, and cost of, and consequently increase efficiency in, the public sector. South Africa's restructuring programme resulted in structural changes in employment patterns in the public sector. The main reason for this is the introduction of private sector corporate management techniques in the running of the public sector[138] in place of the bureaucratic model.

Prior to 1993 labour relations laws were applicable only to employers and employees in the private sector, while those in the public sector were excluded from the Act. Terms and conditions of employment of those in the public sector were unilaterally determined by the employer (the state).[139] The restructuring of the public sector with the advent of globalisation resulted in the extension rights similar to those enjoyed by employees and employers of the private sector to their counterparts in the public sector[140]. A good example is the right to collective bargaining. Thus, in 1993 several pieces of labour legislation were passed to regulate labour relations in the public sector: the Public Service Labour Relations Act and the Education Labour Relations Act[141]. In 1995 these various pieces of legislation which governed employees in the public sector were abolished and the Labour Relations Act of 1995 came into force which covered all categories of employees previously excluded or governed in terms of other legislation.[142] As will be seen, although governed under the same laws, the impact of globalisation with regard to

[138] Van Der Walt, L et al " Globalisation And The Outsourced University In South Africa: The Restructuring Of Support Services In The Public Sector Universities In South Africa, 1994- 2004" (2002)
[139] Patel, I. in Adler, G et al *Public Service Labour Relations in a Democratic South Africa* p129
[140] Du Plessis, JV et al *A Practical Guide To Labour Law* .(2000) p389
[141] The Public Service Labour Relations Act of 1993 regulated labour relations in the public service while the Education Labour Relations Act of 1993 regulated labour relations in the education sector.
[142] Section 2 of the LRA states that the Act does not apply to employees of the National Defence Force, National Intelligence Agency and the South African Secret Services. Employees such as those in the south African police force and the parliamentary service do not have the right to strike but have the right to engage in collective bargaining because they fall under the category of those providing "essential service".

work regulation in the public sector shows differences to that of the private sector especially with regard to bargaining outcomes.

4.1 Globalisation and the Emergence of Atypical Employment in the Public Sector

Employment patterns in South Africa's public sector, as in the private sector, were based on the standard permanent fulltime employment with one employer. However, the re-entry of the country into the global economy was accompanied by the restructuring of the public sector. The state restructuring programme of the public sector led to change in the size, role and functions of the state. Measures, such as, the privatisation of state owned enterprises as well as commercialisation[143] of state entities, were implemented so as to reduce the size of the public sector, reduce public expenditure, increase efficiency, and, consequently, curb the budget deficit.[144] The impact of privatisation and the use of non-standard employment patterns in the public sector has seen the sector losing about 200 000 employees from 1995 to 2000[145]. Today employment patterns in the public sector mirror those of the private sector; a mixture of standard fulltime employment and the use of non-standard employment arrangements.

4.1.1 Externalisation (outsourcing) in the public sector

Under the process of outsourcing, the non-core functions of the public sector are contracted out to private firms while the public entity focuses on its core activity. This trend is driven by the desire for a smaller public sector as a result of a decline in finance due to contraction in government subsidies.[146] Unlike in the private sector where employers resort to outsourcing as a means of avoiding the responsibilities associated with being an employer, outsourcing in the public sector is motivated by the desire for efficiency and of course the move towards the commercialisation of the public sector[147].

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[143]Finnemore, M. *Introduction to Labour Relations in South Africa (*2006) Butterworth p152.
"Commercialisation " is a process whereby public entities are designed to operate in a commercial manner, and usually involves the transfer of government work to the private sector.
[144] Bodibe, O. "The Extend and Effect of Casualisation in Southern Africa; Analysis of Lesotho, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe" (2006) NALEDI p8.
[145] Pillay, D "Globalisation and the informalisation of Labour: the case of South Africa" p 7.
[146] Van der Walt, L et al op cit p23.
[147] Ibid p13.

The sectors which have experienced the process of outsourcing include education, health-care and public works. In the education and healthcare sectors, for example, support services, such as, cleaning and security, have been outsourced.[148] The justification for this is that the core functions of, say, a hospital is to provide healthcare and thus will concentrate on providing just that. Outsourcing of the non-core functions is viewed as being cost effective compared to fulltime employment.[149]

Outsourcing has negative effects on the working conditions of employees. First, working conditions of outsourced employees are comparatively poorer compared to when they where employed by the said public sector entity. Work security of employees of the outside service provider is usually less: declining work safety, lack of job security, and of course lack of trade union representation in the new company[150] are common amongst employees of the outsourced entity.

4.1.2 *Casualisation*

The use of part-time and temporary workers is also prevalent in the public sector today. Individual employment contracting is also taking place in the public sector, such as the use of teachers in public owned institutions and the use of consultants. The public sector is also making use of fixed-term and temporary employment contracts. Fixed-term contracts are often resorted to when the public sector is experiencing fluctuating changing operational demands[151]. In the education sector, for example, there has been the increasing use of fixed-term contracts as a preferred option for recruiting lecturers.[152] Such contracts are usually negotiated with the individual employee. Temporary employment contracts, on the other hand, are used for short term and adhoc work requirements[153], such as, the supply of stationery for offices. They are often resorted to as a result of budgetary constraints.

[148] Bondibe, O. op cit p8, *NEHAWU v University Of Cape Town* (2003) BCLR 154 CC.
[149] Ibid.
[150] Van Der Walt, L et al op cit p 29
[151] Erasmus, et al *South African Human Resource Management For The Public Sector* (2005) p 258,
[152] Van Der Walt, L et al op cit p14.
[153] Erasmus et al op cit.

4. 2 Collective Bargaining In the Public Sector

Before looking at bargaining in the public sector, it would be important for us to note that before 1993 there was no formal bargaining in the public service: wages and working conditions were decreed by the central government[154]. The pre-1993 public service was fragmented into eleven government and four provincial administrations; each had separate provisions regulating labour relations within its jurisdiction[155]. Public administration at the time was modelled on a centralised system of personnel management: the powerful and independent Public Service Commission, which later became the Commission for Administration, was at the centre of the system[156] and it decreed the terms and conditions of employment.

The LRA entrenched centralised bargaining in the public sector with the provision of the Public Service Coordinating Bargaining Council (PSCBC) in s35 LRA. Unlike in the private sector where bargaining is voluntary, s36 (1) of the LRA obliges the creation of the PSCBC. The PSCBC is empowered to designate sectors in the public service for the establishment of a sectoral council (s37 (10). The PSCBC can conclude agreements on matters that apply across the public service, on terms and conditions of employment that apply to two or more sectors, and, finally, on matters that are assigned to the state as employer with regard to the entire public service and attributed to the state in any particular sector[157].

At the sectoral level, councils are designated by the PSCBC in line with its constitution. Each sectoral council is an independent body and has exclusive jurisdiction over matters that are peculiar to that sector (s37 (5)). Presently, four sectoral bargaining councils have been created in the public service:

The Education Labour Relations Council;

The Public Health and Welfare Sectoral Bargaining Council;

[154]Van Der Walt, L et al op cit.
[155] Ibid p129.
[156] Ibid.
[157] Section 36.

The Safety and Security Sectoral Bargaining Council And;

The General Public Service Sectoral Bargaining Council.

The PSCBC performs the functions of a bargaining council with regard to: matters relating to terms and conditions of employment that apply to two or more sectors; relating to uniform rules, and standards that apply across the public service; and finally matters that apply to the state as employer with regard to the public service as opposed to those assigned to the state as employer in a particular sector (s36 (2) LRA). Collective agreements concluded at the PSCBC bind the sectoral councils.

4.3) Extent of collective bargaining and trade union membership.

4.3.1) Extent of Collective Bargaining

Collective bargaining in the public sector, unlike in the private sector, has witnessed an increase. A study shows that collective bargaining for those in formal employment in 1995 stood at about 15 % of employees, this figure, however, more than doubled by 2005 to approximately 32 % of employees[158]. The reason for the increase in bargaining coverage is due to the extension of labour rights, especially the extension of the right to collective bargaining to employees and employers in the public sector. Of the 32% employees covered by bargaining councils agreements by 2005, 19 % of the employees were from the public sector, while the remaining 13 % were from the private sector[159].

Another reason for this high rate of collective bargaining in the public sector in the face of a decline in the private sector is due to the fact that s37 of the LRA obliges the creation of the PSCBC, which acts as a forum for institutionalised bargaining in the public sector[160], unlike in the private sector where there is no such body to facilitate bargaining.

[158] Bhorat, H. et al "Analyzing Wage Formation in the South African Labour Market; The Role of Bargaining Councils" (2009) Development Policy Research Unit p26.
[159] Ibid.
[160] Ibid p4.

Since collective bargaining remains the primary basis for wage setting in the public sector as opposed to the private sector, where collective bargaining as well as individual employment contracting is used as a base for wage setting, the result has been loss of wage relativity with the public sector. Public sector wages are relatively higher than those in the private sector[161]- the difference being as much as 90% more for those in public sector bargaining councils[162].

4.3.2 Trade Union Membership

While private sector trade union membership is on the decline, the reverse seems to be the case with the unionisation rate in the public sector. Of the approximately 1.1 million employees in the public sector, 1.0 million are union members[163]- that is a unionisation rate of more than 90 %.

The reason for the high rate of unionisation in the public sector is because of the fact that it is easier to organise workers in the public sector to join unions. Their workplaces are usually larger making it conducive for a higher rate of unionisation than in the private sector where the workplace is usually smaller[164]and in some cases fragmented. Furthermore, the fact that the employer is the State and has a duty to uphold the law[165] is another reason for high union density in the public sector, unlike in the private sector in where employers may resort to various tactics to discourage employees from joining unions. Finally, the fact that employees here have relatively stable job also explain the reason for this high union membership.[166]

Globalisation has resulted in a sea change in labour relations in South Africa's public sector. The extension of labour rights to employees and employer in the public sector as

[161] Ibid p 36.
[162] Ibid.
[163] Makgetla, N. op cit http://www.cps.org.za/pol8.htm (accessed on the 5/ o5/ 2009).
[164] Tregena, F "Contracting Out Of Service Activities and the Effects Of Sectoral Employment Pattern in South Africa" (2009) p12.
[165] Ibid p14.
[166] Bezuidenhout, A "Towards global social movement unionism? Trade union responses to globalisation in south Africa" (2000) p13

well as the privatisation and commercialisation of state corporations have transformed labour relations in the public sector. Furthermore, the drive towards a flexible working environment as a result of budgetary constraints has resulted in the use of standard and non-standard labour in the public sector.

CHAPTER FIVE
CONCLUSIONS AND RECOMMENDATIONS

From the above, one realises that globalisation has had a tremendous impact on work regulation and that assessing the extent and effect of such impact has not been easy. The one thing which is clear from the above is that it has led to flexibility in, and deregulation of, the labour market. This in turn has had unimaginable consequences on industrial relations in South Africa. The emergence of non-standard forms of workforce has put some categories of employees out of the regulatory net of labour law or, even if they are within its scope, they will need to prove that they are in fact employees, so as to benefit from the protection of labour law accorded to employees. Thus, it would be much wiser to examine mechanisms that can be used to curb the adverse effects of globalisation on employees while at the same time being mindful of employers' needs if we need to remain part of the global economy.

Trade union membership as seen in the private sector is experiencing a downward trend. This is largely due to the fragmentation of the production process across various sectors and the growth of atypical employment as a result of globalisation. Since unions draw their bargaining strength from their control of the labour force, the result of such decline is that unions' bargaining position has become weakened. Thus, it will be better to look for ways through which unions can boost membership. One possible strategy for unions to use boost their membership is to disseminate information regarding their work so as to create trust amongst employees[167] as well as educating members on the importance of joining unions and participating in their activities. This can be achieved through the publicsing of their work and its results, and also to organise press conferences to educate employees of their activities.

[167] Karnite, R "*Trade Union Seek to Boost Membership*" (2006)

Collective bargaining in the private sector, as seen in the previous chapter, has contracted. This decline indicates that the system is moving more towards individual employment contracting. Such a move is not favourable to employees given the imbalance with regard to the power relationship that exists between an employer and an employee when it comes to negotiating terms and conditions of employment. Although the LRA favours a system of centralised bargaining, globalisation has come to undermine such centralised system, as seen in the decline collective bargaining coverage, albeit that there is institutional support for a centralised system of bargaining. This is due to the fact that employers in their quest for flexibility have rather resorted to plant level bargaining which is characterised in most cases by a drop in the number of employees covered by a collective agreement.

The decline in collective bargaining, despite institutional support for centralised bargaining which normally is associated with a high rate of bargaining indicates that the law regulating the institution of collective bargaining needs to be overhauled. To achieve this, I recommend that the law regulating the institution of collective bargaining be amended so as to favour plant level bargaining, and so to align it with global practice. This could be achieved by amending the law regulating workplace forums as provided for under the LRA, so as to give unions the power to be able to represent workers, and as such able to negotiate terms and conditions of employment. This will mean a transformation of a workplace forum from an organ which is limited to solving production related matters to one which will include negotiating terms and conditions of employment.

Such a move will be beneficial to employers in that it will not only grant them the much desired flexibility which they need in order to be competitive in the global market, but will also mean that collective agreements will be concluded taking into consideration the specific needs of the company, which would not have been the case where agreements are concluded at central (sectoral) level. As regards the employees, such decentralised organs with regard to bargaining will meet the aspirations of those in non-standard employment patterns as their participation will be facilitated: since workplace forums promote the interests of all employees and not only union members.

At international level globalisation has resulted in the fragmentation of the production process across national boundaries. As a result of internationalisation of production patterns, employees' power to bargain collectively has been greatly diminished as employers often threaten to relocate in those countries where labour is cheap. The transnational nature of some companies is also adversely affecting the bargaining power of employees. To reduce such adverse impact, I recommend as another viable solution to the problem of declining collective bargaining that trade unions should reinforce their strategy on international collective bargaining. There are several steps that can be taken by trade unions in this regard[168]. The co-ordination of bargaining internationally between international trade union structures and international employer organisation should be promoted[169]. Framework agreements between multi-national companies (MNCs) and international trade union federations should be encouraged. Such international agreements between international trade unions and international employer organisation are commendable in today's declining working conditions as a result of globalisation, because they oblige MNCs to respect most of the ILO core labour standards, guarantee certain rights to workers and even provide a mechanism for monitoring[170]. Such moves, if promoted by unions, I believe will further improve the working conditions of employees and will also discourage the behaviour of employers who threaten to relocate production units in those countries where bargaining is not adequately protected by the law or where union power is weak.

In the first chapter it was seen that globalisation has led to the emergence of non-standard forms of employment which traditional labour law cannot adequately regulate. This problem is further compounded by the fact that it is difficult for those in atypical employment relationships to form and join trade unions that can defend their interests

[168] Du Toit, D "What is the Future of Collective Bargaining (and Labour Law) in South Africa" (2005) 28 ILJ 1405 p1429.
[169] Ibid. A good example of such collective agreement is the one signed between the International Transport Workers Federation and International Maritime Employers' Committee.
[170] Ibid.

during the bargaining process[171]. In order to solve this problem i recommend that the LRA and the BCEA, be amended so that Sectoral Agreements or Ministerial Determinations go beyond the scope of contracts of employment to include those in work relationships which are "akin" to an employment relationship. The criteria for extending such labour rights should be based on the personal and economically dependent nature of the service. Hence, to benefit from the protection of the law, the solution should not lie on the bipolar distinction between the common law contract of employment and the contract for service, but rather, the distinction between dependent workers and the self-employed (genuine independent contractors)[172]. The extension of labour rights beyond the contract of employment is in line with modern labour law practice, for example, in Germany where labour rights have been extended to "employee like work contracts"[173].

The designation of the TES as employer (s198 LRA) is problematic with regard to the protection of employees in such an employment relationship. Employees in such employment relationship find it difficult to exercise most of the rights[174] accorded to employees in a standard employment relationship. To close this legislative loophole, I recommend that reforms be implemented so that every TES be registered.[175] Such a process will not only facilitate the definition of a TES, but will also provide adequate information about them.

Furthermore, the law relating to the granting of organisational rights contained in ss 12 and 13 of the LRA needs to be reformed so that organisational rights are easily acquired

[171] Cheadle, H "Regulated Flexibility, Revisiting the LRA and the BCEA". (2006) 27ILJ P 702. It should be noted that to benefit from the protection of the law, an employee must prove the existence of a contract of employment under the common law. However, the various contractual as well as institutional forms which atypical employment relationships take, means that they fall outside the scope of the common law contract of employment, and as such cannot benefit from the protection of the law. Some do fall within the protective reach of the law, but the nature of the employment make it difficult for them to join a trade union.

[172] Cheadle, H et al "South African Constitution, The Bill Of Rights" p18-6.

[173] Ibid p 18-4.

[174] Theron, J. "Intermediary or Employer? Labour Broker and the Triangular Employment Relationship" (2005). ILJ. Examples of such rights include: the right not to unfairly dismiss; organisational rights; etc. The designation of the TES as an employers makes the exercise of such rights ineffective.

[175] Theron, J. "Intermediary or Employer? Labour Broker and the Triangular Employment Relationship" (2005). p646. It should be noted that the LRA does not require that TESs register, the only provision requiring those "providing employment services for gain" is under the Skills Development Act (SDA) 1998.The purpose for registration under the SDA is not to regulate employment practice, but to regulate the activities and practice like the fees job seekers should be charged.

by those in a triangular employment relationship. The present state of affairs gives workers in a standard employment relation an advantage when it comes to the exercise of organisational rights. The rationale for this is that, if we go by the definition of a "workplace",[176] a TES cannot grant access to a trade union in the workplace where its employees work, because it is usually on the premises of the client where work is being done.[177] Thus, reforms should be designed in such a way that the determining criteria for acquiring organisational rights for unions should be based on its membership in the workplace.[178]

Finally, there is a need for a code of good practice with regard to the activities of TES[179]. Such code should be able to grant employees benefits, such as, entitlement to sick leave, family responsibility leave, etc.

Another possible remedy to the problem of declining working conditions of employees in the face of globalisation could lie in the concept of Corporate Social Responsibility (CSR). It is a concept whereby multinational companies are called upon to accept their responsibility not only to their shareholders but also to their employees and the communities in which they operate[180].To this end CSR guidelines such as the United Nations Global Compact and the ILO Tripartite Declaration, have been drawn up. Some of these guidelines, like the ILO Tripartite Declaration, contain clauses, inter alia, which encourage MNC to bargain with trade unions protecting the interest of their employees, as well as which require MNCs to provide workers' organisations with all the facilities to enable them to engage in effective bargaining.[181] Besides this, some companies have developed CSR rules for the conduct of their business activities. For example, Shell's General Business Principles describe its obligations to its employees as amongst others:

"To respect the human rights of employees and to provide them with good and safe working conditions, and competitive terms and conditions of employment".

[176] "Place or places were the employee of an employer works…" s213.
[177] Theron, op cit. p 647.
[178] Ibid.
[179] Ibid p628.
[180] Du Toit, D. op cit p1429ff.
[181] Ibid p 1430.

From the foregoing CSR guidelines one can see that if implemented the working conditions of employees will be improved because such guidelines encourage the protection of employees' interest. However, the voluntary nature of CSR rules means that where its principles are not adhered to by a particular MNC, no action can be taken against that corporation. However, CSR guidelines remain one of the major sources through which working conditions of employees can be improved given the fact that they require MNCs to provide more than what the laws stipulates.

To conclude, the advent of globalisation has witnessed a call for labour market flexibility. The drive towards a flexible industrial relations system in South Africa has resulted in a sea change in labour regulation: in the private sector, collective bargaining is fast giving way to a system of individual employment contracting, on the one hand, and also a system which mixes standard and atypical employment patterns, on the other. This is pointing towards a decline in both the extent of collective bargaining as well as trade union membership in the private sector. However, with remedial policies such as reforming the law governing the institution of collective bargaining to favour plant level bargaining, extending Ministerial Determinations or Sectoral Determinations to include work relationship which are "akin" to employment relationship, CSR rules etc, i believe that the protection of employees in an era of globalisation, characterised with declining working conditions, will be strengthened. The picture in the public sector on its part is not that bleak: reforms in the sector have, unlike in the private sector led to an increase in the extent of bargaining. Also, the use of standard and non-standard employment pattern in the public sector has resulted to the emergence of public-private partnership.

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