Worker Voice in South Africa: Exploring alternatives to collective bargaining


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1. Introduction

Trade unions in South Africa have, even prior to 1994, demanded greater democracy in the workplace although some employers had already taken initiatives to involve employees in decision-making. Rights such as the freedom of association as well as the rights to organise and to strike are afforded to employees and recognised by both the Constitution of the Republic of South Africa, 1996 and the Labour Relations Act 66 of 1995 (LRA). Other rights such as the freedom of trade, occupation and profession are also provided for by the Constitution. Before the enactment of the LRA employee (worker) participation and voice was a much-debated topic not only locally but also internationally. This position is presently still the same. It must however be noted that the purpose of the LRA is also “to advance economic development, social justice, labour peace and the democratisation of the workplace” and that some of the primary objects of the LRA is to promote employee participation in decision-making in the workplace and the effective resolution of labour disputes. The Labour Relations Act 28 of 1956 made no significant provision for employee participation in any form. The need thus existed for a model of statutory-supported employee participation, which would give employees a greater voice in organisations. A strong

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argument was made in South Africa that some form of co-operative decision-making on the shop floor should be introduced. One of the new mechanisms introduced to provide workers with a voice in the workplace in the 1995-LRA is the so-called workplace forum. The Companies Act 71 of 2008 also grants employees greater voice by means of employee participation. It is submitted that employee participation is, however, much wider than the establishment and functioning of workplace forums and the process of collective bargaining. It could also be realised by means of compulsory conciliation, information-sharing and other normative and procedural entitlements. The purpose of this paper is to explore collective bargaining as a method of employee participation in South Africa as well as the failure of workplace forums as a supplementary process to collective bargaining. It will also explore other avenues of worker voice, which is now extended from the company law realm as well as the recognition of new rights granted to workers by the Companies Act. This paper will attempt to find some synergy between the functions of labour law and the models of corporate law especially with regard to the recognition of worker voice.

2. General

Centrally, labour law is about power-relations as it is concerned with relations between the employer, on the one hand, and trade unions on the other, as well as with the decision-making power of the employer in the enterprise and the employees' countervailing power. Therefore, it appears that the main goal of labour legislation is to compensate the inequality in bargaining power. The language of a "contract" between an employer and an employee is often used although the individual relationship between an employer and an employee is based not on contractual equality (or proportionality) of bargaining power, but on subordination. The contract of employment tends to "re-establish" (and not destroy) the unequal status between an employer and an employee in that it

1 Collins Employment Law 4.
2 Davidov and Langille Labour Law 71.
3 Wedderburn 1993 ILJ (UK) 523.
specifies the rights of the worker and the obligations of the employer: the rights of the employer and the obligations of the worker, at least in principle, remain "open", "diffuse" or "status-like".4

From a labour law regulation perspective the following core aspects are important:5 (i) labour not being a commodity, (ii) personal dependency (as a characteristic feature of the employment relationship), (iii) the endangering of human dignity and (iv) the inter-relatedness of different labour law aspects “labour law cannot be perceived as merely law for the employment relationship but has to cover all the needs and risks which have to be met in an employee’s life, including the law on creation of job opportunities”.6 The first three factors are closely linked and are core aspects of the same phenomenon: they explain why the employment contract is not merely one type of contract among others: it establishes a relationship sui generis.7

The Constitution, as well as the enabling legislation, such as the LRA, BCEA and EEA, play an important role in the protection not only of the right to fair labour practices but also with regard to rights to freedom of association, freedom of expression, privacy and equality. The purpose of the LRA is expressly set out in the Act: namely, to advance economic development, social justice, labour peace and the democratisation of the workplace through the promotion of: (i) orderly collective bargaining, (ii) at sectoral level, (iii) employee participation in decision-making in the workplace and (iv) the effective resolution of labour disputes.8 These objectives are quite evident from and informed by the provisions of the Constitution which, for example, provide for the right to fair labour practices, the right to strike, freedom of association and organisation and the promotion of a collective bargaining framework.9

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4 Wedderburn 1993 ILJ (UK) 523.
5 Davidov and Langille Labour Law 71.
6 Davidov and Langille Labour Law 71.
7 Davidov and Langille Labour Law 71.
8 S 1 of the LRA.
9 S 23(1)-(5) of the Constitution.
Collective bargaining is important from a social justice perspective: it promotes a special form of dialogue for workers by which they exercise collective power. It is evident, as discussed in this paper, that, with the change to a democratic dispensation in South Africa, changes to workers’ rights and the promotion of workplace (industrial) democracy resulted. Worker participation is one of the innovations that flowed from the new democratic dispensation. The protection of workers and workers’ “voice” in the decision-making process was regarded as being of such importance as to result in the LRA being one of the first pieces of legislation placed on the law books after the arrival of a constitutional dispensation. Trade unions, and in particular majority trade unions, were granted more power and influence, not only in the enterprise but also in the political, economic and social spheres.

From the general developments it becomes evident that socio-economic conditions became important for workers in the context of labour relations, especially in advancement of their rights within enterprises. Socio-economic rights, such as protest action;\(^{10}\) ownership control or changes in undertakings;\(^{11}\) access to housing,\(^{12}\) to health care,\(^{13}\) to water,\(^{14}\) to food and to education; as well as work hours (work-life balance)\(^{15}\) and social security, including social assistance,\(^{16}\) came to the fore, and, coupled with unhappiness with local government service delivery, unsurprisingly, these issues spilled over into the workplace and collective bargaining domain. These issues, as well as others, such as the advancement of economic development, social justice, labour peace and the democratisation of the workplace, are important to address in correcting the imbalances of the past and to recognise the role and importance of labour

\(^{10}\) S 77 of the LRA.
\(^{11}\) S 197 and 197A of the LRA.
\(^{12}\) See s 26 of the Constitution as well as Government of RSA v Grootboom 2001 1 SA 46 (CC) and Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 3 SA 454 (CC) in this regard.
\(^{13}\) See s 27 of the Constitution as well as Soobramoney v Minister of Health (Kwazulu-Natal) 1998 1 SA 765 (CC) and Minister of Health v Treatment Action Campaign (2) 2002 5 SA 721 (CC) in this regard.
\(^{14}\) See s 27 of the Constitution and Mazibuko v City of Johannesburg 2010 4 SA 1 (CC).
\(^{15}\) S 9 of the BCEA.
\(^{16}\) See Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 6 SA 505 (CC).
within the political, social and economic spheres. They are of special importance
in South Africa where workers were not guaranteed the same protections and
privileges pre-1996.

In order to address issues pertaining to equality and “voice” in the workplace a
stable and productive environment should be created. This requires not only
empowerment of workers but also greater co-operation between labour and
capital: a form of compromise must be worked out. Conflict between the parties
should be resolved in orderly and less disruptive ways and the parties should be
able to utilise ways that promote co-operation and joint decision-making rather
than cause long-term damage to the relationship that ultimately may result in
job losses or the closure of the business.

The lawmakers regard the role of employees as important, not only because
they are valuable resources in organisations, who contribute to the financial
wealth of enterprises, but also because of their role in the wider social,
economic and political spheres. Because work plays an important part in the
well-being of individuals, it is submitted that it is important that work is
organised in such a way that decent and fair work is promoted through an
active role for employees in decision-making.

Traditionally, corporate law was unconcerned with the interests of employees.
Corporations primary concern was the promotion of shareholder interests and,
occasionally, other relationships such as those with creditors or suppliers.
Primarily, company law regulates the actions of companies in the market,
therefore, labour law and employees are usually excluded. On rare occasions,
corporate law directly and expressly considers the interests of employees: the
provisions governing the relationship between employers and employees,
primarily, are governed by labour law.
An important question in company law remains: *In whose interest should the company be managed?* Shareholders are the most important stakeholders of a company: it is evident from evaluation of the contracts (with various stakeholders) that shareholders “hold sway” and the company ultimately operates to serve their interests. The analysis illustrated that corporate law bestows legal personality on businesses which allows them to enter into bilateral employment contracts with workers, whereas labour law subjects the corporation’s actions in establishing, conducting, and terminating such employment relationships to its norms and standards.

However, there is a synergy between corporate and labour law, especially with regard to corporate governance and labour management: for example, both create a framework in which whistle-blowing is promoted; both recognise the importance of information-sharing, albeit under different circumstances; both recognise the fact that employees and their well-being are important and that their “voice”, relating to social as well as economic rights, should be enhanced and that human rights should be promoted; and both recognise the role that business (employers) plays in society.

Labour law provides structures but also limits what management may do in its relations with employees: labour law curbs the managerial prerogative. Central to the theme is that the managerial prerogative is important, both in corporate and labour law: employees, and their representatives, can restrict such a prerogative by acting in concert and making use of collective bargaining structures to “level the playing field” and to avoid exploitation by the employer. It does not mean that the employer’s prerogative is extinguished: it is still expected of employees to render personal service and to act in good faith and the employer still has the right to direct and allocate work.

The notion of “industrial democracy” is a useful tool which provides workers with a say in what goes on in the corporation. The result is that employees do

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17 My emphasis.
not have to accept demands made by the employer (for example with regard to changes in conditions of employment). However, although labour law protects employees with regard to unilateral changes to their employment contracts, employers are still entitled to change work practices unilaterally: the managerial prerogative grants employers this power.

Collective bargaining, consultation and the accompanying rights and freedoms (the right to strike, freedom of association, as well as freedom of organisation) as aspects of industrial democracy give employees valuable tools and influence to circumscribe the inherent inequality in the management-labour power struggle. These rights and freedoms are central elements to enable industrial and economic democracy. The rights enable workers to gain access to the job market and freely to make their services available in the labour market. If one views participation in decision-making as a continuum, the disclosure of information and consultation are at one end of that continuum, whereas joint-decision-making is at the other. The right to strike, it is submitted, usually would be utilised in order to achieve a form of participation that is further along the continuum if employees do not have a legal right, as such, to participate in decision-making.

The right to strike plays an important role in South Africa, not only because it has the status of fundamental right in the Constitution but, in more practical terms, it provides employees with a powerful economic tool in the collective bargaining process. Its role is of particular significance if there is a deadlock in the negotiation process between the employer and employee parties. The central aim of participation is to allow employees to exercise influence over their work and the conditions under which they are expected to work. For example, workers can voice their concerns if an employer introduces a shift system that would mean that they have to work overtime, or introduces short-time or requires increased productivity. Employees, ideally, should participate in these decisions in order to effect a mutually beneficial goal.
Labour law has failed to provide workers with proper participation rights in decision-making structures in corporations. Thus, it is important to look at corporate law in order to offer decision-making powers to employees. The modern approach to company law has changed the role of employees as stakeholders in companies (and the workplace): the pursuance of true democratisation of the workplace and of decision-making structures is the ultimate goal of such an endeavour. The German model successfully illustrates employee participation in labour and corporate law: and is seen as a highly developed model of worker participation in that it creates a “dual channel” of representation by which employees are active on supervisory boards and on works councils. Co-determination\(^\text{18}\) in Germany takes two forms, namely, supervisory co-determination and social co-determination.

3. Proposed Model for Employee Participation in South Africa

As a starting point it is emphasised that a better synergy is needed between labour law and corporate law. Labour and corporate law legislation creates frameworks for employee participation at different levels in different forms, but these frameworks lack real or meaningful forms of participation in decision-making that are effective in practice. The current corporate law dispensation has moved away from focusing primarily on shareholders and includes employees as important stakeholders, but it does not provide for full participation rights by employees in corporate decision-making. Labour law largely is concerned with the protection of the rights and interests of employees and has also failed to realise actual participation in decision-making through workplace forums. Consultation, joint decision-making, and disclosure of information are issues that labour law covers in this context, outside the traditional collective bargaining arena. In general, the LRA enjoys preference over other statutes and, therefore,

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18 Employee participation at supervisory board level is “equated with ‘management codetermination’, whilst employee participation at shop-floor level, through works councils, safety committees, productivity committees, job classification committees and so on are classified as forms of ‘social codetermination’” (Du Plessis et al German Corporate Governance 151).
has be kept in mind whenever employees are involved. The Companies Act failed to provide a platform for better integration between the provisions of the LRA and the Companies Act, especially in dealing with issues such as employee participation in decision-making, and includes employee input in operational and strategic policies, strategies and direction.

### 3.1.1 Company Law

#### 3.1.1.1 General

It has been argued that the role of companies as members of society has changed. Shareholder wealth creation no longer is the only concern of companies: evident from developments in corporate law and corporate governance jurisprudence. These developments clearly articulate that shareholder primacy is out-dated and that note should be taken of other stakeholders of companies. The Companies Act empowers employees, as stakeholders in the company, not only granting them access to information under certain circumstances but giving them access to the statutory derivative action.

Companies must take due cognisance of the triple bottom line (social, economic and environmental aspects), as well as communicate with stakeholders noting their legitimate interests and expectations. These are vital issues in the new corporate law regime. Corporate reputation has become important for companies, in particular, its treatment of employees, its footprint in the environment, and similar reputational issues.

Company law, at least to an extent, addresses the social component of the relationship between employees and companies. These principles are further

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19 S 200A of the LRA regarding the presumption as to who is an employee; s 213 of the LRA regarding the definition of an employee as well as s 210 of the LRA regarding the application of the LRA when in conflict with other laws.
enhanced in that the *Companies Act* acknowledges the significant role of enterprises within the social and economic life of the nation. The *Companies Act* aims to balance the rights and obligations of shareholders and directors within companies and it encourages the efficient and responsible management of companies. Moreover, companies obtain certain benefits, such as the recognition of a separate legal personality, as well as the regulatory framework within which they operate. Companies have access to a customer base that enables them to sell their products and become profitable. In return companies have corresponding obligations towards society, such as to comply with human rights imperatives. The “social contract”, in exchange for these benefits, requires that companies, for example, “do no harm”; they may be required to take positive steps to improve the society in which they operate by facilitating social benefits.

The social benefits include refraining from human rights abuses, including abusive labour practices, environmental damage or violations of the fundamental rights to equality, dignity and freedom. Such transgressions constitute an infringement of the negative duty not to cause harm. They also infringe the positive duty to improve the socio-economic conditions not only of workers but of the larger community. The latter duty includes investment in education, access to clean water, payment of fair wages, and so forth.

That companies must note not only economic benefits but also social benefits indicates the importance of CSR in corporate governance. The benefits of CSR extend to employees and to the community in general in which corporations operate. The demand by society that corporates must act in a responsible manner and be good corporate citizens is evident in the new corporate law regime. Issues such as integrity, accountability, and sustainability are fundamental components of this new regime and how directors exercise their

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20 Corporate governance and social responsibility programmes play a significant role in the establishment and enforcement of basic labour rights: enhancing labour market regulation; establishing of minimum labour standards, and promoting collective-bargaining to the extent that basic labour rights, such as freedom of association, the rights to organise and to bargain collectively, are included in a legislative framework.
duties. These obligations on companies and directors clearly benefit employees and increase the participatory role of employees in the company.

The pluralist approach (although the enlightened shareholder approach is preferred in the Companies Act) emphasises that employees, as stakeholders, have an important role to play in advancing the interests of the company as a whole. A reading of various reports on corporate governance in South Africa, as well as the Companies Act, supports this approach. From a social and economic perspective it is in the interest of employees to further the interests of the corporation they work for because it not only benefits them economically but also results in social betterment if a corporation invests in social upliftment programmes, training, infrastructure, and so forth, as a result of increased efficiency and profits.

In short, companies no longer reach decisions without taking note of the protection and rights granted to employees by legislation, including the rights afforded to employees by the Companies Act itself. It is submitted that if the living conditions of employees are appalling the company or employer should intervene as a social partner and act more responsibly. Companies in South Africa, unlike employees, are hugely powerful and thus they have direct access to political leaders and other business people that could assist these employees.

3.1.1.2 New rights afforded by the Companies Act

The Companies Act affords new rights to employees.\footnote{The Companies Act provides for the following rights: (i) it enables worker representatives or trade unions to be involved in the formation of a company; (ii) they can propose an amendment of a MOI (allowing for an alternative arrangement which can be interpreted that worker representatives or trade unions can propose such an amendment) but they are not allowed to vote on such a proposal unless they are shareholders of the company; (iii) the company can be restricted by a trade union from doing anything inconsistent with the Companies Act by applying to the High Court for an order to that effect; (iv) the trade union can gain access to financial statements of the company for purposes of initiating a} Previously, employees were not recognised in company law as stakeholders and had to utilise the
protection conferred by labour law to (indirectly) enforce any rights against companies (in the capacity of their employer). Although these developments are positive and enable employees to participate in diverse ways by exercising different rights and enforcing various duties on the company, the *Companies Act* fails to grant employees a real voice when it comes to decision-making. The *Companies Act* introduced significant changes to the corporate law landscape in South Africa (employees are more visible in corporate law and issues such as human rights are now recognised as important and relevant for companies) but it does not go far enough in the realisation of a true industrial democracy. For example, the *Companies Act* addresses the issue of worker participation in the instance of the formulation of a business rescue plan, but it fails to extend this participation to the approval of the plan as employees cannot vote on the issue. It would be more meaningful if the *Companies Act* granted trade unions sufficient participation rights regarding the approval of the business rescue plan. Similarly, the social and ethics committee (see discussion below), as proposed by the model for employee participation, could be made more effective as its functions and scope could be expanded.

3.1.1.3 Specific participation rights

The *Companies Act* brought about major changes to governance with regard to employee participation, as is evident from provisions in the *Companies Act* that, briefly, are highlighted.

3.1.1.3.1 Formation of a company

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business rescue proceeding; (v) the trade union can apply to the High Court for an order in order to set aside a resolution of the board to stop the commencement of business rescue proceedings on the grounds that the company is not financially distressed; (vi) worker representatives or trade unions are granted *locus standi* to apply for a court order placing a director under probation or declaring a director delinquent. Other rights include the utilisation of alternative dispute resolution mechanisms to resolve a dispute, to gain access to financial assistance by the company to acquire shares in the company, as well as benefitting under an employee share scheme.
Section 13 of the *Companies Act*, for example, allows trade unions as representatives of the employees, to be a party to the formation of a company. By this innovation employees are viewed as important stakeholders.

3.1.1.3.2 Amendment of the MOI

Section 16 of the *Companies Act* deals with the amendment of the MOI by means of special resolution. It is left to the board of the company, or shareholders entitled to exercise at least 10 percent of the voting rights that may be exercised on such a resolution to introduce an amendment. It appears that a MOI can allow a trade union or worker representatives (which will include a workplace forum) to propose an amendment, but the *Companies Act* does not allow employees to vote on such a proposal unless they are shareholders. It is proposed that workers should be able to vote on an amendment and not merely make proposals for an amendment. This change will show serious commitment by the legislator and enhance the significance of the role employees play in companies. Not only will the participation of employees be ensured, but transparency is promoted and will ensure that companies take not only their economic partners into consideration but also their social partners. Therefore, it is suggested that if workers are granted voting rights that a formula is applied: if a company employs, for example, more than 500 employees, then one worker representative should be allowed to vote in favour or against the amendment of the MOI; if the company employees more than 2000 employees, then workers are allowed to have two representatives present, and so forth. The workplace composition provides the threshold for worker representivity and voting rights.

3.1.1.3.3 Business rescue

Part 6 of the of the *Companies Act* deals with business rescue proceedings. Sections 31(3), 128, 129 and 131 of the *Companies Act* provide as follows: a trade union must (1) be given access to a company’s financial statements for purposes of initiating a business rescue process. The trade union representing
employees, or employees who are not represented, (2) may apply to court to place a company under supervision and commence business rescue proceedings. The interests of employees to be informed and to participate in the formulation of the business rescue plan are recognised here.

Employees are recognised as unsecured creditors for any wages owed to them by the company prior to the commencement of the business rescue proceedings. Employees, however, cannot vote on the approval of the business rescue plan, except to the extent that they are also creditors. Thus, employees are ranked lower than other stakeholders, such as creditors. This omission is a shortcoming: employees would have real participation rights if they could vote on the approval of a business rescue plan and they would have greater voice. This goal could be achieved by either gaining a weighted vote in accordance with the number of employees in the company or by providing a veto right to employee representatives with the result that the matter is resolved by adjudication or by means of an alternative dispute resolution. Employees remain employees of the company during the company’s business rescue proceedings on the same terms and conditions unless changes occur in the ordinary course of attrition or the employees and the company, in accordance with the applicable labour laws, agree to different terms and conditions. Any retrenchment of employees contemplated in the company’s business rescue plan is subject to the provisions of sections 189 or 189A of the LRA and other applicable labour legislation.

As creditors of the company employees have the following rights: (i) the right to form a creditors’ committee which is entitled to be consulted by the business rescue practitioner during the development of the business rescue plan; (ii) attend and vote at creditor meetings and (iii) vote on the proposed business rescue plan; and (iv) if the business rescue plan is rejected also propose and vote on the amendment of the business rescue plan or apply to court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on grounds that it was inappropriate or make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan. See in this regard s 128(1)(g), 128(2), 145(2)(b)(i) and (ii), 145(3), 147(3), 152(2), 153(1)(b)(i)(aa) and (bb) and 153(1)(b)(ii) of the Companies Act.
3.1.1.3.4 Sale of business and mergers

In the case of a sale of business or of a merger worker involvement is not contemplated in the *Companies Act*, rather it is left to the process of consultation in terms of the LRA. Section 197 and 197A of the LRA contain the provisions regarding a transfer of business as a going concern and the automatic transfer of employment contracts in these circumstances. The transferee’s right to retrench employees due to a transfer as a going concern is regarded as a dismissal in terms of section 186 of the LRA and an automatic unfair dismissal in terms of section 187. An employer, however, may retrench the transferred employees later if an operational reason can be advanced, in which case consultation must take place with the trade union representatives or other worker representatives (including workplace forums).

Neither section 197 nor section 197A provides for disclosure of information or consultation regarding the envisaged transfer of an undertaking. This omission should be addressed as a matter of urgency. Further, it is recommended that a section be included in the *Companies Act* to make provision for consultation and disclosure of information in the event of the transfer of an undertaking as a going concern or merger. Such a provision not only adheres to the current solvency and liquidity requirements that must be met in the case of a merger, which primarily protects creditors, but would extend protection to workers and provide them with an opportunity to access the information relating to a merger and give an input prior to the merger. It is suggested that provision should be made for a notice period to be given to trade unions or worker representatives, as well as allowing workers to vote/make known their opinion (on the approval) of the transaction.\(^{23}\)

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\(^{23}\) However, trade unions or workers representatives would not be able to void such a transaction as the right to trade, the managerial prerogative, as well as the right to property, do not prevent an employer/company from merging or selling its business. In this regard the following is noted: the decision-making power of employers (and thus corporations who are employers) is upheld in the free market economy by four notions: (i) the right to property, which enables the owner to dispose of his property as he wishes in order to obtain benefit from it; (ii) freedom of commerce and industry, by which every citizen obtains the freedom to engage in commerce, profession, craft or industry; (iii)
Similar conditions apply in cases of a scheme or arrangement or when takeovers and offers (in parts B and C of chapter 5 dealing with fundamental transactions, takeovers and offers) are proposed in the *Companies Act*. It is recommended that workers be provided with information, a right to consultation and voting rights in instances which affect not only the job security of workers but also the business operations and direction of the company. The extent of the voting rights should be as follows: the trade union or employee representatives, after they have been provided access to relevant information and been consulted by the company, should vote on whether they support a merger, sale of business, scheme, arrangement or takeover. By allowing such a vote the company grants employees the opportunity to make an input prior to the vote taking place and, if the workers do not agree with the direction the company intends taking, they can make their voice heard. Their input could be a consideration put forward at the general meeting of shareholders which decides whether the company should go forward with a merger, sale of business, scheme, arrangement or takeover.

3.1.1.3.5 Associated rights

The *Companies Act* contains a number of associated rights: a registered trade union or another representative of employees may apply to court for an order declaring a director delinquent or under probation in the circumstances provided by the statute.

Section 20(4) of the *Companies Act* provides that a trade union representing employees of the company may apply to the High Court for an appropriate order to restrain the company from doing anything inconsistent with the Act. The Act abolishes the common-law derivative action; section 165(2)(c) of the *Companies

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freedom of association, which enables an individual to combine his resources in a trade or industry with that of others and form a corporation in order to share profits; and (iv) obtaining power over people: a worker has the freedom to enter into an individual labour contract with an employer he selects and the employer has the power to command the employee (Blanpain 1974 *ILJ* (UK) 6). See also *BTR Dunlop Ltd v National Union of Metalworkers (2)* 1989 10 *ILJ* 701 (IC) regarding the "managerial prerogative".
Act substitutes it with a statutory derivative action. Thus, a registered trade union that represents the employees of the company or another representative of employees of the company is empowered to bring the statutory derivative action.

The issue of delinquent directors recently has been placed in the spotlight in the Aurora Empowerment matter; the question of the effectiveness of the measure in protecting the interests of the company arose:

The Aurora case involves a R1.5-billion damages claim brought against four directors of a defunct mining start-up, Aurora Empowerment Systems. The directors include Khulubuse Zuma, and Zondwa Mandela. In 2009, Aurora put in a bid for two mines under provisional liquidation which were owned by Pamodzi Gold. Aurora took over management of the mines through an Interim Trade and Management Contract. That contract is at the centre of the case being heard: the Pamodzi liquidators allege that Aurora committed fraud in signing the agreement. One of the most contentious issues in the case is whether or not Aurora could afford the mines at the time of completing the bid. The Pamodzi liquidators, who have taken the case to court, argue that Aurora did not have the R600-million it offered for the Pamodzi mines and therefore committed fraud. However, Aurora directors Zondwa Mandela and Thulani Ngubane have hit back, saying the company would have secured the required funding if not for a strike by workers in March 2010, which scared off a major investor. When Pamodzi Gold was liquidated, liquidators managed it for four months. Aurora Empowerment Systems took over the mine after making a R600-million bid. It was at this point that workers’ lives changed. First, salaries weren’t paid, though the mineworkers extracted gold from underground. The mine was placed under “care and maintenance” – meaning only essential staff were kept on. During the time that Pamodzi was operational, during the period the mine was run by liquidators and for the six months of Aurora management - provident fund deductions were made from workers salaries. However, an enquiry into the Aurora management period has revealed that Aurora did not pay the monies deducted from workers’ salaries to the provident fund administrators. Workers lost out on salaries for that period and, likely, will see that money again only if a lengthy court battle goes in their favour. There are major disputes of fact when it comes to the reason behind the destruction of mine property, which the liquidators have blamed on Aurora. In close to two years, the Pamodzi mines were stripped of assets including mine shafts and underground mining equipment. The Pamodzi liquidators have included the loss of these assets in their R1.5-bn claim. It appears that a number of problems existed with the mines before Aurora took them over; one of them being the conduct of the Pamodzi liquidators, some of whom have been removed from the liquidation process. Meanwhile Khulubuse Zuma has separated his fate from that of his fellow directors after an inquiry into the Pamodzi-Aurora deal cleared him of any knowledge of fraud. The report,
completed by Advocate Wayne Gibbs, recommends that Mandela and Ngubane be investigated for fraud along with Solly and Fazel Bhana, who acted as consultants for Aurora. Bhana, his son Fazel, some of their family members and business associates are accused of having irregularly received R35-million from Aurora. Aurora has been liquidated and its directors have gone to court to get their money back. The court ruled that R15m of that money should be paid back, but Bhana and his associates are fighting that ruling.24

From the facts of Aurora a trade union (or other employee representative body or even a workplace forum, if a workplace forum is granted legal status) would have had legal standing to protect the “legal interests” of the company against the delinquent behaviour of its directors. This provision could have been utilised by a trade union effectively to protect their interests in the Aurora matter, rather than the employees’ plight becoming known through the media. It is recommended that these associated rights are made known to workers and their representatives through education awareness initiatives.

3.2.1.3.6 Whistle-blowing

In the effort to promote good corporate governance principles the Act grants employees, who blow the whistle, subsequent protection for such disclosure(s). This type of protection is granted to employees by the PDA and thus, is merely an extension of the protection already granted. Section 159 of the Companies Act protects other stakeholders, such as shareholders, directors, company secretaries, prescribed officers, registered trade union representatives of the employees, suppliers of goods and services to the company or employees of a supplier.

3.1.1.3.7 Alternative dispute resolution

The Companies Act provides for alternative dispute resolution mechanisms in that a dispute can be referred to conciliation, mediation or arbitration to the

tribunal, accredited entity or any other person\textsuperscript{25} stipulated in the Act.\textsuperscript{26} The concept “dispute” is not defined by the \textit{Companies Act}. Disputes between, for example, a trade union or workplace forum and the company can be referred for alternative dispute resolution if the trade union or workplace forum is entitled to apply for relief or file a complaint in terms of the \textit{Companies Act}.\textsuperscript{27}

Wage disputes, however, are not be covered and have to be resolved in terms of the LRA. It would be useful if the \textit{Companies Act} provided for specific disputes between the company and worker representatives or trade unions to be dealt with in terms of the Act itself. There is no specific provision in the \textit{Companies Act} regulating the position how to deal with disputes regarding the formation and amendment to a MOI; access to information related to directors’ remuneration; financial statements of the company, especially in cases of financial distress or to institute business rescue proceedings; corporate restructuring such as sale of business, mergers, schemes of arrangement and takeovers and offers. It is proposed that the \textit{Companies Act} should be amended in this regard and that disputes dealing with these issues be dealt with under the auspices of the \textit{Companies Act}. An amendment would avoid a scenario such as a trade union or workers representatives declaring a dispute in terms of the LRA, which, potentially, could land in the Labour Court for determination, thus placing the dispute in the domain of a labour dispute. Potentially, it addresses the issue of determining jurisdiction between the Labour Court and High Court or other tribunals.

However, it is important to point out that these issues affect, in particular, job security, as well as preferent payments to employees during business rescues or dismissals in terms of sections 189, 189A, 197 and 197A of the LRA. Wage

\textsuperscript{25} In terms of section 156(a) of the \textit{Companies Act} a person with standing may attempt to resolve any dispute with or within a company through alternative dispute resolution. This includes disputes regarding an alleged contravention of the \textit{Companies Act}, or enforcement of any provision of the Act, or rights in terms of the \textit{Companies Act}, a company’s MOI or rules, or a transaction or agreement contemplated in the \textit{Companies Act}, MOI or rules.

\textsuperscript{26} S 166(1) of the \textit{Companies Act}.

\textsuperscript{27} S 166(1) of the \textit{Companies Act}.
disputes are specifically excluded from the ambit of the *Companies Act*, as well as dismissals in terms of sections 189, 189A, 197 and 197A of the LRA, which specifically are linked to a sale of business or merger. In this regard cognisance must be taken of section 210 of the LRA especially in cases where the application of the LRA is in conflict with other laws.\(^2^8\)

3.1.1.3.8 Social and ethics committee

Another innovation in the *Companies Act* is the introduction of a social and ethics committee. The committee must comprise at least three directors or prescribed officers of the company but no employee representative. Functions of the social and ethics committee include the monitoring of the company’s activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice relating to matters such as:

(i) social and economic development: issues covered here include the EEA; and the BBBEE Act;

(ii) good corporate citizenship: issues covered here include the promotion of equality, prevention of unfair discrimination and the reduction of corruption; contribution to the development of communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and record of sponsorship, donations and charitable giving;

(iii) the environment, health and public safety, including the impact of the company’s activities and its products and services;

(iv) consumer relationships, including the company’s advertising, public relations and compliance with consumer protection laws;

(v) labour and employment: included here are issues such as the company’s standing in terms of the ILO Protocol on decent work and working conditions; and the company’s employment relationships, and its contribution toward the educational development of its employees.

\(^2^8\) S 210 of the LRA provides as follows: “If any conflict, relating to matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail”.

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That employees are not represented on the social and ethics committee is a lost opportunity on the part of the drafters of the *Companies Act*, as it would have provided employees with the opportunity to have an input on issues such as health and safety and labour and employment; matters which affect employees directly. Also, it have provided them with the opportunity to have a greater voice in a formal company structure, thus expanding their participation rights within a company.

Social and economic development issues, especially the EEA and the BBBEE Act, affect employees and their input could be of value: the legitimacy of decisions relating to such development issues could be considerably improved through their input. Issues, such as good corporate citizenship relating to the promotion of equality, prevention of unfair discrimination, and the reduction of corruption, as well as a contribution to the development of communities in which the corporation predominantly conducts its business activities, should be dealt with in the same way. Issues, such as the environment, health and public safety, as well as labour and employment issues such as the company’s standing in terms of the ILO Protocol on decent work and working conditions, the company’s employment relationships and its contribution toward the educational development of its employees, all call for giving a greater voice to employees. The workings of the social and ethics committee would be meaningful if it not only gave considerations to the welfare of employees but if they participated in decision-making by the committee: such a reimagined committee would grant employees a meaningful voice in the company.

Participation by employees on the committee will give legitimacy and authority to its activities and decisions, as the committee will not have merely a monitoring and administrative function. By granting it more authority the social and ethics committee can play a supervisory role (similar to that of the supervisory board in Germany) and, thus, force companies to take the decisions
of the committee seriously and promote compliance with its decisions and directions.

The supervisory function of the social and ethics committee could evaluate management decisions with regard to non-compliance with the EEA or the BBBEE Act or the company’s actions in promoting equality. The powers of the committee would be enhanced to make representations to the general meeting of shareholders at which they vote on decisions made by the board of directors, especially if the board did not have access from information from a director or prescribed officer, or receive an explanation as to why the board did not follow through on recommendations made by the committee. The social and ethics committee, thus, has reporting, supervisory and enforcement functions, especially in cases where there is an overlap between topics of decision-making and collective bargaining.

It is proposed that the *Companies Act* should be amended with regard to the social and ethics committee should be amended as follows:

- Currently the committee comprises at least three directors or prescribed officers of the company. At least one of them must be a non-executive director who was not involved during the previous three financial years in the day-to-day management of the company’s business.\(^\text{29}\) It is not specifically stated that each member of the committee must be a director but merely that at least three must be directors; it seems in view of the non-director requirement, that employees, for example, can be members of the committee.\(^\text{30}\) It is recommended that the provision pertaining to the composition of the directors is maintained but that the committee should be expanded to include employee representatives in the same ratio as directors or prescribed officers. It is proposed that half of the committee should comprise employee representatives and the other half directors or prescribed officers. This system is similar to the “quasi-parity co-

\(^{29}\) Regulation 43(4) of the Companies Regulations.

\(^{30}\) Esser 2007 *THRHR* 326.
determination” in Germany which can be found in certain industries: shareholders and employees can appoint an equal number of representatives on the supervisory board.  

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• Currently, the committee is not a board committee and is appointed by the company (shareholders). The committee, as such, is a separate organ of the company. It is proposed that the committee should maintain its monitoring function with regard to the issues mentioned earlier but that the committee be given more authority: the board must take the recommendations of the committee seriously. This will result in the committee not merely supervising or monitoring the activities of the board regarding the issues listed above but also that they approve a decision made by the board regarding these issues. The impact would be that the committee could intervene in cases where the company's interests are seriously affected or where non-compliance of legislation has taken place (see comment above).

• As mentioned, the existence of a workplace forum could create an overlap, especially relating to labour and employment issues, educational development of its employees, social and economic development (issues covered here include the EEA and the BBBEE Act), promotion of equality, prevention of unfair discrimination, and so forth. In these instances the powers of a social and ethics committee should be limited. It is possible (depending on the size of the company) that a workplace forum is best suited to deal with these issues. The committee (as pointed out above) would have reporting, supervisory and enforcement functions, especially in cases where there is overlap between topics of decision-making and collective bargaining. It is conceivable in small establishments that neither

31 Du Plessis, Hargovan and Bagaric Principles 349-350. See also Wooldridge 2005 Amicus Curiae 21 and Addison and Schnabel 2011 Industrial Relations 356-357 regarding parity and quasi-parity.

32 Delport New Companies Act 88.
a workplace forum nor social and ethics committee are best suited. In this case it is suggested that specialised committees should be investigated.

- It is proposed that a social and ethics committee’s functions (if a workplace forum is not in place) cover issues of consultation and joint decision-making in terms of sections 84 and 86 of the LRA. When considering the matters included for consultation (with a workplace forum) in section 84 of the LRA it includes restructuring of the workplace (including the introduction of new technology and work methods); changes in the organisation of work, export promotion; job grading, education and training, product development plans, partial or total plant closures, mergers and transfers of ownership in so far as they have an impact on the employees, the dismissal of employees for reasons based on operational requirements, exemptions from any collective agreement or any law, and criteria for merit increases or the payment of discretionary bonuses. It is possible to include some of these non-distributive issues in the work of the social and ethics committee as it already covers many of these matters. Matters that require joint decision-making include disciplinary codes and procedures; measures designed to protect and advance persons disadvantaged by unfair discrimination; rules for the proper regulation of the workplace, other than work-related conduct; and changes to rules of employer-controlled social benefit schemes by the employer or employer-representatives on the trusts or boards governing such schemes. Different options are possible: employee representatives, workplace forum representatives, or both workplace forums and trade unions could represent employees on the social and ethics committee. Such a committee should complement and enhance the functions of a statutory workplace forum. A provision, included in the LRA and the Companies Act, should be to the effect that if a workplace forum is in existence, the ethics and social committee cannot make decisions concerning those issues and their role is limited to the reporting,

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33 S 86(1) of the LRA.
supervision and enforcement of decisions made by the workplace forum. The result would be to establish a complementary system to workplace forums. Such a committee (in the absence of a workplace forum) can exist in conjunction with a trade union as the trade union’s functions would be limited to wage issues and non-wage issues would be dealt with by the social and ethics committee.

However, although there is a drive for a more inclusive and pluralist approach and a recognition of stakeholder rights, it is evident that the enlightened shareholder approach is still preferred in the Companies Act and more work needs to be done in this regard (see suggestion above).

3.2.2 Labour Law

3.2.2.1 Workplace forums and collective bargaining

Inequality is a major problem in South Africa, and is not just a social reality but also an economic one. As indicated (under the corporate law discussion) it is evident that corporations, in terms of the legal framework, find ways to address inequality to ensure labour peace. The same can be said of labour law. In South Africa workers have a greater voice since the inception of the Constitution and the LRA (and other legislation), especially in the domain of the workplace. The LRA recognises a collective bargaining framework as well as the establishment of workplace forums. Consultation rights and joint decision-making powers by employees were absent in the pre-1995 LRA-era, but through the current LRA the legislator introduced workplace forums as a means to promote employee participation in workplace decision-making. Workplace forums were introduced as part of a series of progressive labour law reforms and were intended to create a “second channel” of industrial relations or representation to act not as an alternative to collective bargaining but rather as a supplement to it.
The potential conflict between the items on the agenda of collective bargaining and those that are set aside for workplace forums exist because the legislation allows for an overlap. Clear parameters have not been set for which matters or issues are the subject of the collective bargaining process and which issues are earmarked for workplace forums only.

Collective bargaining, by its very nature, is adversarial. It is submitted that in South Africa collective bargaining is the primary means of negotiating with employers to determine working conditions and terms of employment, as well as regulating the relationship between employers and employees. To counter the adversarial nature of collective bargaining and its consequences the legislator introduced workplace forums to complement the collective bargaining system. It was anticipated that it would grant workers participatory decision-making power and a voice and would deal with production/non-wage issues at workplace level. As shown above, this sensible endeavour, regrettably, was spectacularly unsuccessful.

Workplace forums are similar to the works council systems that are found in European countries, such as Austria, Belgium, Germany and the Netherlands. The South-African workplace forum system is largely based on consultation and some issues are subject to joint decision-making. The limitations, in terms of real decision-making, are evident as the issues listed for joint-decision making (and even for consultation) are restricted in terms of the legislative framework. Although it is possible to extend the list of issues through negotiation, in terms of section 23 of the LRA the support of the established trade union would be required in order for the agreement to have binding effect as a collective agreement. A further limitation that predates the former is that the statutory system depends on trade unions approval for the establishment of a workplace forum. The fear on the part of trade unions that workplace forums will make inroads into their bargaining power (with few benefits immediately visible to them in exchange) means that workplace forums remain unpopular and unsuccessful in South Africa.
Although the LRA, in sections 84 and 86, clearly identifies the issues that form the subject-matter for consultation and joint decision-making, the back door was left open for trade unions to approve these matters, in any case, in the collective bargaining domain. Clearly, collective bargaining covers issues listed in section 84 and 86 of the LRA, and the topics form part and parcel of trade unions’ standard list of demands that, generally, are the subject of negotiations with employers. The results envisaged by the legislature have proved to be unsuccessful. Significantly, the nature and status of any agreement reached between the employer and workplace forum is not addressed in the LRA. Another problem evident from the current regulation, in particular regarding the establishment of workplace forums, is that it is subject to the control of trade unions.

It is suggested that for a dual system to work the following far-reaching changes should be implemented, after buy-in is obtained from the social partners:\textsuperscript{34}

- Workplace forums should be recognised as a legitimate forum in which to address the non-distributive issues identified in sections 84 and 86 of the LRA, as well as those identified by learning from comparative experiences.

- The status and legal nature of workplace forums should be spelled out clearly and the agreements entered into between the workplace forum and the employer should have the same legal effect as a collective agreement otherwise entered into between a trade union and the employer. A legally

\[\textsuperscript{34}\text{The manner in which social partners behave should be relooked at. For example, both capital and labour should apply principles of corporate governance, such as integrity, discipline and so forth, as well as apply principles of social responsibility and instil values of good citizenship. Trust is central in how parties consult, negotiate and reach joint-decisions and thus information-flow is very important. Education, on the side of both capital and labour, is important, especially for understanding the socio-economic conditions, background and respect for each other’s point of view. A call for the return of good faith bargaining is made, where capital and labour bargain towards a mutual benefit and the use of industrial action is not to cause harm or damage to the other party. It is proposed that long-term commitments and agreements should be advanced rather than short-term monetary agreements.}\]
binding effect and application similar to works agreements in Germany should be attached to agreements entered into between an employer and a workplace forum.

- The power of trade unions over the establishment of workplace forums should be relinquished after 20 years. It appears to be a major contributor to the failure of workplace forums. From the recent amendments in the 2014-Amendment Act, it is evident the legislator is attempting to move away from unbridled majoritarianism, for example, giving an arbitrator the power to grant minority unions (who meet certain conditions) access to the organisational rights that were available only to majority trade unions.\(^{35}\) The same principle should be applied to the establishment of workplace forums: the requirement for majority trade unions to be party to the establishment of a workplace forum thus falls away. In addition, it is proposed, if the dual system of collective bargaining and workplace forums continues, that there be an amendment regarding the representivity of trade unions on workplace forums. A compromise model could grant trade unions with a number of seats on the workplace forum: employee representatives would have 50% representation on such a forum and trade union representatives the remaining 50%; the casting vote in the case of a deadlock would be by an independent elected chairperson. These measures will ensure, when the workplace forum consults or engages with an employer on issues of joint decision-making and a vote is taken, that it results in a smoother process. At least, there should be significant agreement from the side of the trade unions. Another consequence would result in production issues being limited to the domain of workplace forums and non-productive issues to collective bargaining. The model is based on the German model of “quasi-parity co-determination”, which can be found in certain industries and refers to the arrangement whereby “shareholders and employees can appoint an equal number of representatives on the supervisory board, but the right to appoint the chair belongs to the

\(^{35}\) See s 21(8A) and 21(8C) of the 2014-Amendment Act.
shareholders – thus tilting the power balance slightly in favour of shareholder representatives”. The model is adapted to establish representation on the workplace forum without tilting the favour in the direction of either employee representatives or trade union representatives by appointing an independent chairperson. Such a model attach greater legitimacy to the process, as well as reassuring trade unions that they are not redundant or that their role in the workplace is usurped by the workplace forum.

• It is suggested that in order for the complementary system intended by the LRA to work effectively that clear boundaries be set between issues that fall within the power of workplace forums and issues that fall within the realm of collective bargaining. The non-distributive issues covered in sections 84 and 86 of the LRA fall squarely within the power of workplace forums: wage issues are restricted to the parties partaking in collective bargaining. This system is a mixed system that allows all workers greater decision-making influence and power, as well as adversarial participation power for trade union members. It is suggested that the “merger” between the issues covered by the social and ethics committee and those of workplace forums, if employees are granted participation on the social and ethics committee could be addressed to some extent. However, this is dependent on the following: as suggested above, a provision is included in the LRA and the Companies Act to the effect, if a workplace forum is in existence, that the ethics and social committee not make decisions in concerning those issues and that their role be limited to the reporting, supervision and enforcement of decisions made by the workplace forum. This provision would result in the establishment of a complementary system to workplace forums and unnecessary duplication would be avoided. If no workplace forum is in place, then the functions of the social and ethics committee can be extended to cover issues that would have

36 Du Plessis, Hargovan and Bagaric Principles 349-350. See also Wooldridge 2005 Amicus Curiae 21 and Addison and Schnabel 2011 Industrial Relations 356-357 regarding parity and quasi-parity.
been covered by a workplace forum. Such a system would be dependent on the restriction of distributive/wage/non-productive issues to the domain of collective bargaining. The size of the workplace (company) is a factor that needs to be considered: a social and ethics committee is not always the best-suited solution and a workplace forum would be the better alternative. The type and size of the company (the workplace) plays a role in whether a social and ethics committee or a workplace forum should be the designated body dealing with production issues (which will complement the collective bargaining system). An amendment to both the LRA and the Companies Act is called for to enable such a framework. Also, the dependency for the establishment of a workplace forum on the agreement of a majority representative trade union (see above) should be scrapped.

It is a concern that industrial action is possible after the consultation process (in terms of section 84 of the LRA) has failed. Thus, retaining the right to strike reflects a serious doubt as to whether the distinction between distributive issues (reserved for bargaining and strikes) and non-distributive ones (for workplace forums) realistically can be maintained. The right to strike exists in respect of matters for consultation once there is an issue in dispute in terms of section 64 of the LRA. Strike action is possible in respect of the employer’s proposal itself and not in respect of alleged procedural defects in the consultation process (which must be referred to arbitration in terms of section 94 of the LRA).\(^\text{37}\) The inclusion of the right to strike in the latter instance has been criticised as straining the co-operative relationship: not only could it ruin the whole endeavour but also introduce adversarial elements into the relationship between workplace forums and employers.\(^\text{38}\) It is proposed that a position similar to that in Germany is adopted whereby the works council and the employer are required to seek to reconcile their interests as well as negotiate a social plan. Another possibility, having regard to Art 2(1) of the Information and

\(^{38}\) See in this regard Slabbert et al Managing Employment Relations 5-266.
Consultation Directive, which defines consultation as follows: “the exchange of views and establishment of dialogue between the employees' representatives and the employer”. In this regard the following requirements set by the directive are useful:

(i) the appropriateness of the timing, the method and the content must be ensured;

(ii) the employees' representatives [workplace forum] are entitled to formulate an opinion based upon the relevant information that is supplied by the employer;

(iii) consultation must also take place in such a way that the employees' representatives [workplace forum] are entitled to meet with the employer and to obtain a response as well as the reasons for that response, to any opinion they may formulate; and

(iv) an attempt has to be made in case of decisions within the scope of the employer's management powers to seek prior agreement on the decisions covered by information and consultation.

• In addition it is suggested that workplace forums be allowed to initiate the consultative process by submitting proposals to the employer (unlike under the current dispensation by which the employer alone has this power).

This is a departure as it allows the workplace forum to raise issues in respect of matters listed in section 84 of the LRA and, thus, would be in line with the German position whereby works councils and employers enjoy equal statues in raising matters for consultation and joint-decision-making.

It is proposed that section 85 of the LRA should be amended to call for consultation “in good time”, as is the position in Germany, currently the provision does not specify when the employer must consult with the workplace forum. For the change to meaningfully affect the way in which employers consult with workers, it should shift from merely

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39 Art 4(4) of the Information and Consultation Directive.

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


notifying the forum of any proposal to considering legitimately and in good faith suggestions the workplace forum makes. The demand is for a committed process in which “voice” of the workplace forum is taken into consideration and its proposals are taken seriously: a change which calls for better regulation.

- On the other hand, it is suggested, if matters in terms of section 84 of the LRA were maintained then the option of strike action would either be limited and the dispute subjected to mediation and possibly arbitration after mediation. Immediate strike action would fall away as these issues would not be “strikeable” in terms of the limitation of section 65(1)(c) of the LRA as it would be considered a “rights dispute”. This will thus force the parties⁴³ to continue with mediation (possibly followed by advisory arbitration) when consultation is unsuccessful or there is a dispute regarding reaching consensus. The situation would be dealt with in similar manner as when a refusal to bargain takes place. A dispute concerning an alleged refusal to bargain⁴⁴ is subject to advisory arbitration. It is proposed that in cases where consultation in terms of section 84 of the LRA is unsuccessful that the dispute should be referred to compulsory mediation where an independent mediator would facilitate the process which is then up to the parties to reach an agreement. Further, it is proposed that when mediation is unsuccessful the parties should then refer the dispute to advisory arbitration. The position is similar to the arbitration committee found in the German system. It should be noted that strikes are not ideal after unsuccessful section 84 consultations but in context of fundamental

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⁴³ If a workplace forum is in place, the LRA should be amended regarding the resolution of disputes by limiting the right to strike regarding issues that are the subject of consultation and joint decision-making. If it is a social and ethics committee that is in place a provision should be inserted in the Companies Act that limits the right to strike to issues that are covered by the social and ethics committee and provide that the preferred method of resolving such a dispute is an alternative dispute resolution.

⁴⁴ See s 64(2) of the LRA in this regard. Refusal to bargain is defined as including (a) a refusal to recognise a trade union in a collective as a collective bargaining agent, or to agree to establish a bargaining council; (b) a withdrawal of recognition of a collective bargaining agent; (c) a resignation of a party from a bargaining council; (d) a dispute about appropriate bargaining units or appropriate bargaining levels or bargaining subjects.
rights and existing suspicion/opposition of trade unions it is proposed that the right to strike should only be allowed after mediation and advisory arbitration has proven to be unsuccessful. An advisory award should be obtained from the CCMA (similar to refusal to bargain cases) before notice of a proposed strike or lock-out is given. In the case of section 86-matters the employer may not unilaterally implement a proposal and the right to strike over such issues also does not exist. The parties are subject to an alternative dispute resolution to settle disputes concerning matters with reference to joint decision-making. It is proposed, in order to address the inclusion of the right to strike in consultation matters, that the limitation (as set out above) should be applied to consultation matters (with regard to the use of strike action). Currently the level of dispute resolution is different when it comes to matters relating to consultation and joint decision-making. Strikes should be limited in cases of consultation after consultation: after consultation was unsuccessful a dispute should also be referred to mediation and if the parties cannot reach an agreement be referred to advisory arbitration, only after advisory arbitration the parties can give notice of industrial action.

3.2.2.2 Industrial action, labour peace and dispute resolution

With regard to industrial action, labour peace and dispute resolution it is suggested that the objectives of the LRA should be enforced more strictly, especially labour peace and dispute resolution.

45 The major difference between consultation and joint decision-making is the fact that the employer must seek to reach consensus with the workplace forum in the case of consultation whereas, in the case of joint decision-making, the employer must consult with the workplace forum and actually reach consensus (in respect of the matters listed in section 86 of the LRA) before implementing a proposal. If consultation produces no consensus, the workplace forum or employer may resort to unilateral action whereas, in the case of joint decision-making, “If a workplace forum disagrees with an employer’s proposal and thereby prevents its implementation, the employer’s only remedy is to refer the matter to arbitration and abide by the arbitrator’s award”. The level of dispute resolution, therefore, is different (Du Toit et al Labour Relations Law (2015) 403).
For purposes of this discussion it is important to reflect on the consequences of strike action in recent years:

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<th>2008</th>
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<th>2010</th>
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<th>2012</th>
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<tr>
<td>Number of work-</td>
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<td>51</td>
<td>74</td>
<td>67</td>
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<tr>
<td>Working days</td>
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<td>1,526,796</td>
<td>20,674,737</td>
<td>2,806,656</td>
<td>3,309,884</td>
<td>1,847,006</td>
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<tr>
<td>Loss of wages</td>
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<td>ZAR 235,458m</td>
<td>ZAR 407,082m</td>
<td>ZAR 1,073,109m</td>
<td>ZAR 6,666,109m</td>
<td>ZAR 6,732,108m</td>
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</table>

Source: Department of Labour Annual Industrial Action Report (2012 Figures 1, 2 and 5 and Figures 1, 2 (2013))\(^{46}\)

From the above table strikes clearly are not only disruptive but have huge economic impact. Note the frequency and high level of strike activity, coupled with accompanying violence, has led to the call for the reintroduction of strike ballots.\(^{47}\)

The reintroduction of strike ballots could resolve some of the issues raised in the workplace as to whether workers want to strike or in instances when the trade union’s interests conflict with those of their members. The opportunity to address the prevalence of unprotected strikes which negatively impact on employer-employee cooperation has been missed. Strike balloting would also support the introduction of the “ultima ratio” (proportionality) principle found in German and EU labour law into the domain of South African labour relations. It is submitted that its introduction would increase the legitimacy of the process of calling strikes, as well as force trade unions to listen to the wishes of their members. In other words, if a strike is called without complying with the ballot requirement, the strike will be unprotected because a procedural requirement was not adhered to by the trade union. It has been suggested that the period


\(^{47}\) See Rycroft 2015 *ILJ* 18-19.
for the commencement of a strike should be increased as well as the introduction of a secret strike ballot. The increase in the notice period could result in the resolution of the dispute by means of conciliation and can possibly be viewed as a “cooling-off” period. For example, an extension of a 14-day notice period could bring about changes in how conciliation, as a process, is utilised in the South African labour framework. It is proposed that the manner in which conciliation is viewed as a dispute resolution process utilised as a mere box-ticking exercise and that parties to a dispute should show a serious intention and commitment to resolve the dispute rather than merely comply with an initial stage in the process in order to obtain a required result (the dispute remains unresolved).

The challenges experienced in the past relating to technical non-compliance, arguably, may be addressed with careful regulation. The constitutional framework now ensures that the right to strike is entrenched. Regulation also ensures that trade unions adhere to notice periods when calling a strike action and guarantee that the use of strike action is a last resort. Stricter enforcement by the CCMA and the labour courts is required, especially in cases of a strike which has lost its purpose and has carried on for a long period without achieving anything. It is suggested, in such an instance, that the Labour Court should intervene and force the parties to resolve their dispute by means of compulsory arbitration. Compulsory arbitration would be necessary if a strike is no longer functional, is violent or relates to issues in terms of section 84 of the LRA that are not “strikeable” in terms of section 65 of the LRA, and would be considered

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48 Brand, for example, proposes that, the notice period for a strike should be increased to 14 days, creating a longer period for conciliation and the introduction of a right to a secret strike ballot within the 14 days' notice period (Rycroft 2015 ILJ 18-19). “Adherence to this requirement can be rewarded with strike protection under the following circumstances: if (a) the ballot is called by any one of the social partners in a workplace; (b) the ballot is conducted by the CCMA or a suitably accredited independent body; (c) the ballot is conducted among the categories of workers who wish to participate in a strike in a workplace; (d) the quorum for the ballot is 50% plus one of those workers who wish to participate in the strike; (e) 50% plus one of those workers who vote, vote in favour of the strike; and (f) the ballot is conducted within the 14-day notice period before a strike, then the ballot will be deemed to be valid for the purposes of any urgent interim court relief sought by any party. A further ballot may be called after 30 days from the date of a previous ballot” Rycroft 2015 ILJ 18-19).
a “rights dispute”. This system would be similar to the one found in Germany which involves an arbitration committee in dispute resolution if there is deadlock between the employer and the works council.

It must be stressed that the parties to the bargaining table should try to facilitate the flow of information between them; a prerequisite for smooth negotiations.

It is recommended that, usefully, the German system could be explored in relation to co-determination rights, information and consultation rights, especially with reference to works councils and the separation of workplace councils in terms of consultation and decision-making as they relate to social, personnel and economic matters. Full disclosure of information is needed versus what is currently considered relevant information in the context of the South African framework. Such a bold move, in essence, calls for trust between trade unions and employers; unfortunately it is lacking in South African labour relations. A disclosure obligation structured in this way enhances the rights granted to trade unions/workplace forums in sections 16, 84, 86, 189, 189A, 197 and 197A of the LRA. The submission is for an extension of the disclosure-obligations of employers to other parties if there is no trade union or workplace forum in place, as well as to the scope of information to be disclosed in certain circumstances.

The disruptive effect of strike action should be re-examined, especially the long term and adverse effects it has on the well-being of the workers and the corporation. The right to strike should not be abolished or unjustifiably limited, but the parties to the bargaining table should find alternative ways of addressing issues other than the use of industrial action (especially in instances which industrial action was utilised in the previous negotiation cycle). Currently, the conclusion of long-term agreements prevails only in certain industries. It is recommended that the Minister of Labour is granted the power to intervene in certain industries in which strike action is prevalent and compel the bargaining
parties to conclude long-term agreements spanning two or three years; collective agreements that are binding on both the employer and the workers. If workers then have problems with the agreement, they should resort to other means of dispute resolution: strike action would be barred in these instances.

Unfortunately the system has failed: 48% of all strikes embarked on in 2013 were unprotected strikes.\textsuperscript{49} It was mentioned that stricter measures should be implemented to curb the regular occurrence of unprotected strikes and their effects. Such measures would place a moratorium on strikes in the case of a trade union embarking on unprotected strike action, or of protected strike action becoming violent, or of strike action being dysfunctional. Stricter liability for trade unions by which they can be held civilly liable or even criminal sanctions may be implemented: the court in \textit{SA Transport and Allied Workers Union v Garvis}\textsuperscript{50} held that a trade union could escape liability only if the act or omission that caused the damage “was not reasonably foreseeable”, and if it took reasonable steps within its power to prevent that act or omission.\textsuperscript{51}

Parties show their commitment and good faith to the resolution of wage disputes in a particular negotiation cycle by agreeing that in the following cycle an embargo would be placed on industrial action and that disputes would be resolved, for example, by means of arbitration if negotiation fails. The reason that unprotected strikes and unnecessary protracted or violent strikes must be better addressed is that the consequences spill over into the cooperative relationship between employers and workers and negatively influence worker voice in decision-making.

In Germany the right to strike is conditional on the “capacity to bargain collectively”: the right to strike is guaranteed only insofar as that right is understood as being necessary to ensure proper collective bargaining. It is suggested, when a deadlock is reached and the matter is referred to compulsory

\textsuperscript{49} Department of Labour 2013 \url{http://www.labour.gov.za}.
\textsuperscript{50} \textit{SA Transport and Allied Workers Union v Garvis} 2012 \textit{ILJ} 1593 (CC).
\textsuperscript{51} \textit{SA Transport and Allied Workers Union v Garvis} 2012 \textit{ILJ} 1593 (CC) para 42.
arbitration that a limitation should be placed on embarking on strike action and that workers would return to work. The definition of a strike in South Africa entails the following:

the partial or complete concerted refusal to work or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers for the purpose of remedying a grievance or resolving a dispute over any matter of mutual interest between employer and employee, and every reference to ‘work’ in this definition includes overtime work, whether it is voluntary or compulsory.\(^\text{52}\)

From the prevalence of strike action in South Africa, in most instances, strikes are used not to remedy a grievance but to force the employer to concede to the demands of trade unions. Sometimes these demands do not relate to the negotiations or fall outside wage issues. It was proposed that a greater commitment should be attached to conciliation as a dispute resolution process before strike action can be embarked on. It is further proposed that issues about which workplace forums should be consulted over in terms of section 84 of the LRA should be limited and be dealt with in a similar manner as regard to the issues listed in section 86 (see discussion above).

Because workplace forums have been hugely unsuccessful and matters listed in sections 84 and 86 of the LRA fall within the domain of collective bargaining and, by implication, within matters of mutual interest, strike action is called upon if these issues fall outside what are called “disputes of right”. It is recommended that the issues listed in sections 84 and 86 of the LRA, specifically, be mentioned as a limitation if they were subject to collective bargaining, especially in the absence of a workplace forum. It is also possible to amend the sections on strikes by specifically excluding inter-union disputes: they are not for the purpose of remedying a grievance or dispute between employers and employees. Another possibility (as indicated) is the introduction of the “ultima ratio” (proportionality) principle in section 64 of the LRA by which strike action may be exercised only as a last resort. In this regard, as pointed out

\(^{52}\) S 213 of the LRA.
earlier, the Labour Court should intervene when it appears that the strike is no longer functional or that the trade union has no interest in trying to resolve the dispute and reach an agreement.

### 3.3.3 Other considerations

It is possible for industrial democracy to facilitate greater worker participation, also decision-making as well, in the workplace through the empowerment of workers, firstly, by enhanced access to company information. The empowerment of workers influences not only the structure but also the process of decision-making. The quality of working life would be enhanced by gaining access to channels previously not available to have a greater voice concerning decisions that affect them. Employee empowerment provides employees with the freedom to question the way their jobs, goals and priorities are structured, their roles and how to reorganise their work and become more efficient.

For empowerment to be successful it is not necessarily dependent on a formalised legal framework, it also is possible when it is initiated as a voluntary process which is the result of negotiation and co-operation between employee and employer parties within an enabling environment.\(^5\) It must be stressed that empowerment does not merely refer to economic empowerment: the promotion of financial, rather than participative-democratic, forms of employee involvement is not, in the general sense, empowerment as employees are not granted the opportunity to have a say regarding the strategy or operations of a company. Economic empowerment, nonetheless, is also important and now is facilitated by various statutory frameworks in South Africa.

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53 In South Africa empowerment takes place mainly in terms of black economic empowerment, the BBBEE Act. It is possible for empowerment to take place through ESOPs. Empowerment is possible when rights such as freedom of association, are advanced, as well as when organisational rights are exercised by trade unions. These enable workers to have a voice in organisations.
In terms of the *Companies Act* employees can participate as shareholders through the issue of shares or a consideration for shares. The *Companies Act* also provides for financial assistance for the subscription of securities and employee share schemes. ESOPs have become important in the demand by employees for share ownership and economic inclusion in corporations as they provide a means of financial participation by employees through the ownership of shares in the company. Employees, through financial participation, especially ESOPs, share in the costs and benefits associated with the company’s financial well-being and prosperity. Importantly, as shareholders, they obtain direct participation in decision-making by exercising their vote at a general meeting of shareholders.

In addition, through ESOPs, a more universal economic empowerment can be promoted by redistributing wealth to previously disadvantaged individuals and communities in which employees live and are socially integrated. This is an indirect way for companies to fulfil positive duties regarding the improvement of the society in which they operate. "Apartheid", the resultant economic exclusion and the imbalances created by such exclusion, has made the empowerment of previously disadvantaged black South Africans a priority for government, and resulted in the BBBEE Act. Broad-based black economic empowerment forms an integral part of national transformation: it encourages the redistribution of wealth and opportunities to designated categories of persons; the rank and profile of workers, arguably, are an important part.

These forms of empowerment target certain categories of workers (for example black workers) and are viewed as promoting participation or the voice of employees as they now are granted access to economic resources which, previously, was denied them. Various economic empowerment options are open to black people. With reference empowerment, including economic empowerment, participation must be effective and meaningful and, in the case of equitable income distribution, cognisance must be taken of the constitutional right to equality: participation (as envisaged by the *Constitution*) is not simply
procedural but also substantive. Further fine-tuning of regulations and their implementation is necessary in order to ensure that the empowerment initiative is broad-based has the greatest possible effect on employee “voice” in the workplace. This matter, unfortunately, is too wide in its scope to consider in this paper.

The elimination of unfair discrimination in the workplace (specifically taking note of the EEA) requires the development, or empowerment, of previously disadvantaged designated groups: black people, women and persons with disabilities. The measure for advancement of the designated group is affirmative action in employment, which is not discussed at length in this paper: the Constitutional Court has provided guidelines.\(^{54}\)

Further, the SDA is relevant in dealing with empowerment because it creates a framework for the development, training and education of the workforce. Through skills development, previously-disadvantaged workers gain access to opportunities that enable them to attain new and improved skill levels and may result in further transformation of their role organisations.

It is suggested that social co-determination in South Africa in the absence of workplace forums is a viable option and can be enhanced by the introduction of shop-floor level health and safety committees, productivity committees, job classification committees and employment equity committees in terms of the OHSA and EEA. These committees amplify worker “voice” and enhance worker participation by dealing with specific issues that may be specifically excluded from the collective bargaining table. In Germany, works councils, have consultation and information rights (as pointed out above) that specifically deal with social, personnel and economic matters.

\(^{54}\) See *South African Police Service v Solidaiy obo Barnard* 2014 10 BCLR 1195 (CC) and *Minister of Finance v Van Heerden* 2004 12 BLLR 1181 (CC) in this regard.
It is not suggested that the establishment of such committees keep out trade unions but rather that they assist them and the employer to focus on wage issues relevant to the bargaining table. Production (non-distributive/non-wage) issues, such as the restructuring of the workplace (including the introduction of new technology and work methods), changes in the organisation of work, education and training, the dismissal of employees for reasons based on operational requirements, and so forth, would be dealt with by the specialised committees. Collective bargaining is concerned with issues regarding the terms and conditions of employment and matters of mutual interest, which include dispute resolution on issues such as improved conditions of employment, higher wages or changes to existing collective agreements. The committees would provide structure and context to policies that employers have in place and legitimise decisions as they require input by the workers. The committees would be able to function in conjunction with trade unions if a social and ethics committee or workplace forum is not in place. Such committees could assist the trade union(s) and employer in limiting issues to be discussed at the bargaining table to wage issues: agreement would have been reached regarding the issues the committees cover or will still be negotiated.

4. Concluding remarks

The role of employees in corporate decision-making is an important issue in both company and labour law. From the discussion above, a few concluding remarks are made regarding employee “voice” and participation in South Africa:

• The aims of economic democracy coincide with some of the objectives of industrial democracy: continuity consists in the fact that any participation in the economy of the enterprise requires a certain degree of participation in management decisions: evident by reference to the different forms of participation, the different levels, the nature, the status and appropriate regulation of participation. Participation include not only the disclosure of information, consultation and issues pertaining to joint decision-making but
should extend to the domain of company law so that employees have a meaningful voice in companies.

- Both “strong” and “weak” forms of employee participation grant employees with “voice” in companies. The degree of voice depends on the circumstances, the role-players involved and the type of participation that is present. It is clear “participation” and “voice” are problematic terms and no consensus exists exactly as to what they entail or should entail. However, what is clear are the rights to be informed and to be consulted. It is possible to effect small amendments (such as to section 16 of the LRA relating to information which must be disclosed) that might have a significant impact on a social plan. There are varying levels of disclosure of information, consultation and joint decision-making. Unfortunately, a lack of trust impacts directly on the type of information disclosed by capital to labour, as well as on the commitment level in consulting or achieving joint decision-making.

- The two-tier board system is not necessarily the answer to addressing the lack of participation of employees in companies in South Africa. However, it has been suggested that the existing framework should be enhanced to provide employees greater “voice” and participation: first, through providing workers with seats on the social and ethics committee, enhancing new rights provided for in the companies act (such as notification, information and voting rights when it comes to mergers, schemes and arrangements and so forth), as well as granting the social and ethics committee more functions and authority that add to its legitimacy. Second, the amendment of current workplace regulation as indicated above should take place. Third, improving the general environment for cooperative workplace decisions by limiting the unintended and undesirable consequences of too adversarial collective bargaining. In the fourth instance, the manner in which strike action and conciliation is utilised should be addressed, as well as non-compliance with
the procedural requirements for strikes and the behaviour of the parties when embarking on industrial action.

- Both labour and company law in South Africa require fixing: in some instances small amendments, in other instances it requires major changes. Proper integration is the key, not only with regard to labour legislation but also regarding corporate and insolvency law where these pertain to employees. At face value it appears that the *Companies Act* has granted employees substantial rights regarding business rescues and so forth: from the above discussions their role and voice in decision-making are still severely limited and lacking. The same can be said about the LRA: since 1994 no changes have been implemented regarding integrating the workplace forum system within or alongside the collective bargaining framework. Were the positive consequences of employee participation in cooperative structures and processes to be strengthened, it might be a solution to adversarial bargaining in South Africa as parties would try to achieve greater co-operation and a mutually beneficial agreement.

- The objectives of the LRA should be reinforced, especially with regard to orderly collective bargaining and the enhancement of labour peace. In order to achieve this calls for a re-evaluation of how both capital and labour bargain, the perspective they bargain from as well as whether good faith, trust and mutual respect are present. Present in the regulatory framework in South Africa (as suggested above) are good elements regarding both social and management co-determination. What now should happen is the establishment and fostering of a unitary framework that makes provision not only for employee participation in corporations but integrates and enhances the various remedies and protections available.

It has been accepted (in this paper) that the primary goal of employee voice is to grant employees access to participation rights within the different levels of
decision-making (from shop-floor level to company level). Employees are indispensable resources of and stakeholders in any organisation and are important stakeholders in a company. With the granting of access by employees to structures and processes in corporations it is important to note that both labour and company law should be “in sync” and should facilitate a strict adherence to statutory measures in the event of non-compliance or an abuse.

Bringing company and labour law into line would enhance the existing rights granted to employees and would strengthen the remedies available to employees. Unfortunately, both labour and corporate law disappoint employees as regards facilitating true democratisation and “voice” in companies. The workplace forum framework will have to be amended (as proposed above) in order for such a system to work in conjunction with collective bargaining. The adversarial element of collective bargaining should be limited and characteristics such as trust, integrity, discipline and good faith, to mention a few, should be evident in the behaviour of the bargaining parties.

The dispute resolution process should be utilised for the intended purpose: resolving a dispute and not merely as a means to reach the next stage in the dispute resolution process. At company law level the rights granted to employees also be enhanced by providing workers with voting rights regarding business rescue proceedings or providing them with proper channels to offer input in the case of a merger or sale of the business. The social and ethics committee can provide a meaningful voice in corporate decision-making by allowing employees not only access to such a committee but also by their input into the issues discussed at the committee.

It is suggested that the proposed changes should be effected as a matter of urgency. They would result not only in the streamlining of provisions in the LRA and the Companies Act when it comes to employee decisions in corporations but would result in the proper integration of labour and corporate law frameworks. It is clear that corporations no longer can ignore employees or the principle that
labour is not a commodity: corporations must have regard to the social component of the employment relationship in addition to economic principles. The value of employees in achieving the triple bottom-line, as well as their input in decisions that directly and indirectly affect them are important items on the agenda of corporations. South Africa is ready to articulate and deliver a tailor-made regulatory framework (which will then have to be rolled out to the shop floor) in which both social and supervisory co-determination issues are provided for in an integrated fashion.