South Africa’s Bargaining Councils and Their Role in Dispute Resolution

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Introduction

The settlement of disputes is a pivotal component of any system of industrial relations. South African legislation envisages that the country’s bargaining councils will play a key role in this regard. However, despite its importance, the practice of dispute resolution in South Africa is under-researched. This study initially began with an interest in examining the work and efficiency of the Commission for Conciliation, Mediation and Arbitration (CCMA), and it immediately became evident, that little is known about the system of labour dispute resolution in South Africa, and less still about the manner in which bargaining councils operate and their involvement in dispute resolution. The study on which this paper is based, was an attempt to fill a recognisable gap on theoretical and descriptive information relating to bargaining councils.

Firstly, in order to depict the current bargaining council system, the starting point would be to trace the Industrial Conciliation Acts. This analysis is useful as it indicates both the necessity, and importance, of a shift to superseding industrial councils with bargaining councils. At the same time, from the literature, some initial warnings for labours participation in the bargaining council system are flagged. Secondly, an investigation around the responsibilities of these bodies in dispute settlement examines the extent to which bargaining councils are different from the industrial councils that they replace. The factors that increase the likelihood of successful case completion are also probed. This is an important enquiry, not only to decipher the different approaches of parties to councils with regards to dispute resolution, but also to note if initial optimism around the Labour Relations Act (LRA) of 1995 is, in fact, manifested in practice. Thirdly, in trying to fill an apparent void of information on the operation of bargaining councils, it is clear that other important concerns are raised in terms of councils that have some consequences for the labour relations environment. These issues include the council’s relationship to the CCMA, as well as an increase in the number of employer exemptions from councils. Finally, the paper concludes with some policy recommendations that could benefit the overall dispute resolution system. Prior to these discussions, first, an outline of the research design is provided.
Research strategy and methods

The selected findings that are presented in this paper are drawn from information that was collated in a number of ways\(^1\). A survey and case study method, and, within the case study, semi-structured, in-depth interviews with key informants, were the primary means of data collection. This characterises a ‘multi-method’ approach to research, where ‘data is accumulated by different methods but bearing on the same issue’ (Gillham 2000: 13), or ‘triangulation’ as it is more commonly called. Part of the rationale in choosing a multiple approach to an investigation of bargaining councils is due to the definite lacuna in information on this topic. The research design can be likened to a ‘zoom’ approach, which worked in the following manner. At the outset, a wide angle was utilised to determine the broad functions and organisation of registered councils. In part, this was achieved through the use of primary data, including acts, annual reports, official guidelines and documents, as well as press statements. More indicative of the structure and functions of councils, however, was an investigation of constitutions of councils that were made available by the Department of Labour. Of the 113 registered councils’ constitutions that were applied for, a total of 41 were made available. It is interesting to note that for the majority of the constitutions that were not made obtainable, these councils exist in the public sector.

Then, to clarify an aspect of these constitutions, dispute settlement, the focus of the study was narrowed down. This entailed a survey of questionnaires that were initially posted, and later faxed, to every registered bargaining council for which contact details were provided for. The questions that this second survey included were based on those that the survey of constitutions was unable to answer, as well as specific dispute questions that demanded a closer investigation. The survey questionnaire, primarily, probed three main themes that related to, firstly, the structure of the bargaining council,

\(^{1}\) This paper discusses selected findings from a Masters dissertation of the same title. The information that is presented here has been significantly condensed. Appendices, provided for in the dissertation, furnish full details on: accredited councils according to the CCMA; councils that are registered with the Department of Labour; from this a breakdown of contact details, and race and gender of secretaries of bargaining councils; the questionnaire administered to bargaining councils; and, the compiled questionnaire data indicating the councils’ year of establishment, the number of people employed, the level of accreditation, the employment of agents, the use of the CCMA, and the number of employers and employees covered.
secondly, a description of the dispute resolution structures, and, finally, problems, if any, that the council encountered. In total, 48 bargaining councils responded to the survey (of which four responses were invalid).

To enlarge on these findings, the lens was extended one more time, by looking at a single council as a case study. This was the Clothing Industry Bargaining Council (Northern Areas) (hereafter referred to as the Clothing Industry Bargaining Council, or CIBC). While Burawoy (2001:24) used case studies to ‘accommodate its empirical findings to wider contexts of determination’ in order to modify a theory, the use of the case study in this research aimed to accomplish a similar goal, but in a way which modified generalisations from surveys rather than theories. For this reason, the use of both a survey and a case study method proved valuable. Finally, the key informants were drawn from the case study council itself, the CIBC, and its parties, the South African Clothing and Textile Workers’ Union (SACTWU) and the Traansvaal Clothing Manufacturers’ Association (TCMA). Overall, the aim of this multi-method approach is not to quantify various tenets of bargaining councils, nor is it to describe the nature of the clothing industry, but to understand bargaining councils, as they currently exist in the industrial relations sphere in terms of broad trends found in constitutions and surveys, and supported by a close investigation of one council.

This essay compiles some findings from the analysis of the constitutions, the survey data approach and the case study, and presents these in relation to the literature available on this topic. The end result provides an indication of how these councils function with respect to dispute settlement, as well as their relative importance in South African industrial relations.

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2 On completion of this research, there has been a modification in the character of the Clothing Industry Bargaining Council. The clothing industry formed a National Bargaining Council for the Clothing Industry on 14 May 2002, and all regional clothing bargaining councils now fall under the national council. This study has not been able to take this change into account. Importantly, the general argument about the CIBC is still applicable.
From the ICA of 1937 to the LRA of 1995

In order to locate bargaining councils in the current industrial relations system, it is essential to look at the historical setting through which councils have unfolded. The Industrial Conciliation Act (ICA) of 1924 created a basis for a racially determined system of industrial relations. ‘Pass-bearing natives’ were excluded from the operation of this act, an outcome of the definition of an ‘employee’, where an employee included most non-African workers, i.e. Indian and coloured as well as white workers, but excluded most African workers (Alexander 2000: 11). The 1924 act also provided for industrial councils, which institutionalised voluntary centralised collective bargaining. It was envisaged that the functions of these councils should be to ‘endeavour by the negotiation of agreements or otherwise to prevent disputes from arising and to settle disputes that have arisen or may arise’ (Du Toit 1981: 214). Parties to the councils were encouraged to settle their own disputes through conciliation. Where no industrial councils existed, ad-hoc conciliation boards were set up for both bargaining and conciliatory dispute settlement (Du Toit et al 1998: 4)

The ICA of 1937 replaced the 1924 act and the 1937 act, with a series of amendments, continued to secure the positions of skilled employees, and semi or unskilled white workers relative to African workers (Du Toit et al 1998: 6). The 1937 act still maintained the dual industrial relations system, but, following a recommendation made by the van Reenen Commission of 1935, pass-bearing African workers were given representation in industrial council meetings by an inspector of the Department of Labour (Du Toit et al 1998: 6-7).

Under apartheid, the National Party government of 1948 installed a number of policies of which the purpose was to reinforce the segregation that was put in place prior to 1948. The ICA of 1956 extended the dual system by continuing to keep African workers apart from other workers, and, in addition, also isolating Indian and coloured workers from white workers. The bargaining framework preserved the industrial councils and, under the 1956 act, when a dispute was declared it was referred to an industrial council. In addition, it allowed for the appointment of industrial tribunals that would bear the responsibility for voluntary or compulsory arbitration.
Within industrial councils, conciliation served as the first port of call in terms of dispute settlement. Conciliation is a formal approach towards dispute resolution and is envisaged as the means of developing a consensus-seeking system, through fact finding or through recommendations made by the conciliator (Brand and Steadman 1997a: 58). Further, if the industrial councils or conciliation boards were unable to resolve the dispute, it was then referred to arbitration. In arbitration, unlike mediation or conciliation, the arbitrator has the power to make a decision that is legally binding.

Although councils were encouraged as the first dispute resolution body, the use of alternative bodies for dispute settlement was a problem within this too. As Horn (1988: 11) considered: ‘industrial councils may not have the structures and frameworks available to cope with the resolving of disputes effectively or they may in fact not be willing to engage in this function and see themselves as an administrative body.’ Horn continued to draw on ‘black unions’ criticisms of the industrial council system. The first objection that he cites is that unionists felt that the councils were not representative of the majority of workers, because of the highly bureaucratised nature of the council system. Secondly, councils also removed negotiation away from the shopfloor, and undermined the influence of the majority of workers (Horn 1988: 13).

In a broader industrial relations framework, the ‘racially exclusive industrial system’, through its repressive machinery, created the impetus for widespread formal and informal resistance against the apartheid state, led mainly by the African working class (Du Toit et al 1998: 8-9). This was especially pronounced in the wake of the Durban strike wave of 1973, where the number of unregistered unions grew in response to constraints exercised by the government. The Wiehahn Commission reported, in 1979, that African workers should be allowed to join registered unions and also be given direct representation on industrial councils and conciliation boards. With other recommendations - such as the replacement of industrial tribunals with industrial courts for arbitration - a series of amendments to the 1956 act culminated in the Labour Relations Act of 1981 (Du Toit et al 1998: 10). The new black unions were, initially, however, reluctant to join industrial councils because of fear of cooptation, and preferred bargaining to take place at plant level.
When the South African government and state changed in 1994, there were numerous challenges that were faced as a result of what Webster and Adler (1998: 58) refer to as the ‘double transition’. They use this concept to refer to the situation where, on the one hand, the government was consolidating democracy and, therefore, required a strong interventionist state, and on the other hand, was trying to liberalise the economy for successful global competition, for which minimal state interference was needed. This clearly reflects the way the balance of power is shifting in relation to the state. The LRA of 1995 professes to limit state control of labour relations (Christie and Madhuku 1996: 3). Whether the structures that have been created under the new act mirror this trend of a less interventionist state will, perhaps, become evident in the years to come. But, the law also had to be transformed to be consistent with, both, international labour legislation and labour standards and, also, the new constitution (Du Toit et al 1998: 23). Additionally, amendments had created incoherence and lack of clarity, especially with regard to dispute resolution. The dispute settlement mechanisms were highly technical, costly and, importantly, were a reflection of, and perhaps even intensified the adversarial workplace culture (Baskin and Satgar 1995: 1, Du Toit et al 1998: 25-26). As Baskin and Satgar (1995: 1) note, the old law, and we can add to this its institutions, like industrial courts and councils, were ‘seen as archaic, ineffective and biased against organised labour.’

Under the LRA of 1995, bargaining councils have replaced the industrial councils of the old LRA. This act encourages the voluntary establishment of bargaining councils to co-ordinate collective bargaining at the industry and sectoral level (Brand and Steadman 1997b: 68). According to the CCMA (1999: 21, 38), a sector describes a broad area of the economy that an employer may be involved in, while an industry is a fairly specific reference to an area of economic activity. The new LRA (1995: Section 28) stipulates the powers and functions of bargaining councils as follows: the conclusion and enforcement of collective agreements; to prevent and resolve labour disputes; to establish and promote education and training schemes to carry out these functions; and to establish and administer benefits. Industrial councils were responsible for some of these very functions, i.e. the enforcement and conclusion of collective agreements, as well as the prevention and resolution of labour disputes. The question that arises in this context is
whether or not the new act and its agencies mark a break away from the older industrial relations system.

The new act was indeed regarded, by many, as promising in altering the labour relations environment. As Mischke (1997: 16) noted, the act ‘has been hailed as a watershed in the development of labour law and labour relations in South Africa, a total change in paradigm in the conduct of industrial relations, and, by those eternally optimistic, as a panacea for all our labour problems.’ Such optimism about the act does, however, meet with some opposition. This is particularly on the basis that by maintaining the institutions and practices of the old LRA, albeit in revised forms, the basic tenets of the system are still intact. Further, the current realm of collective bargaining opens up some challenges for labour and these are worth mentioning as this allows us, firstly, to indicate where the balance of power lies through an analysis of the law’s position on collective bargaining, and, secondly, to examine the potential problems that can arise in bargaining councils as industry level collective bargaining agents.

The voluntarist nature of collective bargaining is a contentious issue. The principle of voluntarism in collective bargaining was evident even in the ICA of 1956, which created numerous schisms between plants within an industry, between industries within a region, as well as between stronger and weaker unions. More than four decades later, problems are still being evidenced through the still voluntarist nature of collective bargaining in South Africa. For example, the act does not compel employers to enter into bargaining agreements with the respective trade unions at a centralised industrial level (Du Toit et al 1998: 156). Neither does the act stipulate levels of bargaining, bargaining units, or bargaining subjects.

Moreover, trade unions may find themselves facing new kinds of strains that can be attributed to the change in issues that they deliberate over, as well as their tactics of engagement with employers and the state, and these require a more sophisticated bargaining agenda (Baskin 1996, Bezuidenhout 1999, Ray 1999, Adler 2000). Some writers also express concern about the brain drain that trade unions have experienced since the democratic transition (Baskin 1996, Buhlungu 1994, 1997, 1999, Bezuidenhout 1999). This contributes to, and exemplifies, the severe capacity problems that unions, as negotiating parties, are confronting (Adler 2000: 21-22, 26). Buhlungu (2000: 189-195)
shows that labour needs to build power resources and capacity - administrative, structural and organisational, strategic and financial - to enjoy the opportunities that co-determination, the institutionalised relationship between the state and labour, offers for labour. The same argument might also be applied to unions taking advantage of the benefits associated with bargaining councils. In summation, while taking cognisance of these complexities, especially as they apply to labour, it can be understood why a change in an exclusionary and fragmented dispute framework was required. As collective bargaining agents, the discussion also points out the structure and functions of bargaining councils.

Continuity or change?

Does the change in the law, though, necessarily imply that the structures and functions of industrial and bargaining councils are fundamentally different? The following discussion deals with this question by researching the manner in which councils currently execute their dispute work. According to a list of registered councils supplied by the Department of Labour, in 2001, there were 113 bargaining councils, of which 29 existed in the public sphere. From the survey responses, 34 of 44 bargaining councils were old industrial councils, six of which were formed under the ICA of 1924. The bulk of councils seem to have been established after the ICA of 1937. Slightly more than half of the councils surveyed, 51% (n=20) are more than 47 years old. At least five councils were created after the installation of the new LRA. The majority of councils, therefore, have a long history.

Table 1. Councils formed during periods consistent with amendments to the ICA and the LRA

<table>
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<tr>
<th>Periodisation according to amendments in the ICA and LRA</th>
<th>Number of councils established</th>
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<tbody>
<tr>
<td>1924-1936</td>
<td>6</td>
</tr>
<tr>
<td>1937-1955</td>
<td>14</td>
</tr>
<tr>
<td>1956-1981</td>
<td>9</td>
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<tr>
<td>1982-1994</td>
<td>5</td>
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<tr>
<td>1995-current</td>
<td>5</td>
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In the survey, councils were asked about the number of people that were employed within them. Surprisingly, ten bargaining councils had no employees. Officials within respective state departments administer the functions of these councils where they exist in the public sphere, and for the remaining councils, a possible explanation could be that council’s services are contracted out. The largest number of employees within a council was recorded for Motor Industry Bargaining Council (MIBCO), 586 in total. The Public Services Coordinating Bargaining Council (PSCBC) employed ten people, and, there were, in addition, 136 ‘part-time dispute resolvers.’ The number of workers that were covered by the council, 1.1 million, may render it necessary that the council employs many people to handle dispute cases. After the PSCBC, the highest in terms of the number of workers covered was the Metal and Engineering Industries Bargaining Council, which had 220,000 workers. The council also had 9,000 employers under it. The most number of employers covered, was, however, noted for MIBCO at 18,000. This council also had the third highest number of workers - 200,000. The large coverage of workers explains why the council had 586 employees. Clearly, some bargaining councils seem to be operating with large bureaucracies, and this can be linked to the number of employers and workers that are covered by the council.

Returning to the question of whether the new act’s replacement of industrial councils with bargaining councils is an indication of a measure of continuity between the old and the new order, some positive answers are discerned. The research findings pointed out that bargaining councils are not mere replacements of old industrial councils. Instead, they have specific features, which differentiate them from industrial councils. What are the principle elements that mark off the two types of councils?

Whilst there is continuity in terms of some of their functions, there is a substantial shift in relation to their role in dispute resolution. Bargaining councils have a wider ‘playing field’ in terms of their dispute work, and this, primarily, is a consequence of the new arbitration capacity that councils are equipped with. Their position in the collective bargaining framework, as well as their involvement in settling a wider range of labour disputes, makes these bodies essential in South African industrial relations. The councils’ constitutions reflect this importance, and, so too, does the case study. The contrast between the two kinds of councils also fits in with the differences between the old LRA
and the current piece of legislation. The LRA of 1995 promulgates a role for councils in the ambit of arbitration, and under previous labour laws, arbitration fell only within the jurisdiction of the industrial court. The implication is that the arbitration capacity of bargaining councils is new.

Do the parties to the councils perceive that bargaining councils mark a shift away from the past industrial council system? In comparing the two types of councils, Athol Margolis, the CIBC’s labour disputes officer noted that, ‘[t]he area that I would highlight where there has been the most change is in dispute resolution. Under the old industrial councils regimes . . . the playing field was a much smaller one.’ Moreover, according to Sonnyboy Masinga, the then regional officer of SACTWU: ‘[t]here is [more] positiveness than the old situation, because . . . people see the LRA as their own document. People see the CCMA as their own creation. People see the bargaining council . . . as their own structure . . . So there is a lot of positiveness and the feeling of ownership.’ Masinga further explained that, ‘[y]ou might understand that the industrial councils then, some of them were like, you know, what do you call, sorry to use the words, ‘puppets of the state’.

Now, the visible extent of the shift between an industrial and bargaining council may be dependent upon the level of accreditation. Bargaining councils are accredited by the CCMA to carry out the dispute function, which would otherwise be the sole responsibility of the commission (Brand and Steadman 1997b: 66). Accreditation allows the councils to perform conciliation and arbitration according to the established norms and standards of the CCMA (LRA 1995: Section 127 (4)). In terms of a council’s dispute work, if a dispute arises where one party is not a party to the council but the party falls within the registered scope of the council, dispute resolution must still be attempted by the council (LRA 1995: Section 51 (2) (b)). If, however, these conditions are not fulfilled, then the dispute is referred to the CCMA (LRA 1995: Section 51 (4)). Perhaps the fundamental understanding of the settlement of disputes within a bargaining council is that parties to the councils must attempt to resolve any dispute as outlined within the constitution. A bargaining council that is accredited for both conciliation and arbitration would be considerably distinct from an industrial council, than one that would be accredited for conciliation only.
Though, according to the CCMA, in 2001, only 20 councils were accredited for arbitration. The survey responses provided testimony to the small number of bargaining councils that were accredited, especially for arbitration. While 34 were accredited for conciliation, only 14 bargaining councils were accredited for arbitration. Interestingly, the survey of the questionnaires pointed out that the presence of a strong union may be linked to accreditation of councils. SACTWU, for example, is party to eleven of 34 councils that are accredited for conciliation, and, of the 14 councils that are accredited for arbitration, four have SACTWU as the main union operating within them. Therefore, in other sectors where unions are strong, similar accreditation levels may apply. More councils need to be accredited for arbitration in order for its respective parties to take advantage of the new opportunities for engagement, and importantly, to accrue the benefits of resolving disputes through bargaining councils. These advantages, gleaned mostly from the CIBC, can be identified as follows.

Firstly, the caseload of the CCMA is reduced as councils carry out their own dispute work. The commission can, as a result, suitably serve the needs of workers in less organised sectors, and, in sectors where bargaining councils do not exist. Secondly, the speedier resolution of cases is also encouraged within a bargaining council as opposed to the CCMA, and case outcomes are likely to be more acceptable to parties. Thirdly, bargaining councils can benefit from the R450 subsidy from the CCMA for every case resolved. With regards the issue of this cost, there is, additionally, an advantage to the commission. On average, a case conciliated at the CCMA can cost about R750, and an arbitrator could charge around R2,000 per day for his services. The costs to the CCMA for settling disputes, far exceeds the subsidy of R450 that it pays to bargaining councils. There is, therefore, a financial incentive for the commission’s promotion and establishment of bargaining councils, and, their accreditation too. For example, councils that covered a sizeable number of employers, and workers especially were accredited for conciliation and arbitration (PSCBC and MIBCO). The large Metal and Engineering Bargaining Council, however, was only accredited for conciliation. Therefore, arbitrations are handled outside of this council, which is presumably costly, particularly if 220,000 workers are covered, which increases the propensity of disputes being declared. Fourthly, if the recurring nature of some kinds of disputes can be linked to certain
agreements within specific sectors, then, a bargaining council could fashion improved agreements in problematic areas. Finally, by isolating difficult agreements, the introduction of new agreements also provides an opportunity to upgrade working standards. In summation, especially on the basis of evidence from the CIBC, it is apparent that dispute resolution through bargaining councils is a positive system, because it has wider advantages for industrial relations.

Successful dispute settlement

Judging from the importance of bargaining councils generally, and the dispute function that they are accorded with more specifically, the study has been able to clarify some of the determinants of a council’s ability to resolve cases successfully. While it is complicated to define ‘success’, one of its indicators is, case completion. Case resolution in the CIBC, is, in part, promoted by the presence of precise procedures that outline how disputes should be handled, and the guidelines mirror those of the CCMA and the Labour Court. In his analysis of ‘successful’ and ‘less successful’ industrial councils, Horn (1988) made a distinction between the two kinds of industrial councils, primarily on the basis of a councils’ effectiveness in resolving disputes. An effective dispute settlement system was determined by the presence of detailed procedures that outlined routes to resolution, because, by implication, there would be consistency in the application of rules. The absence of defined dispute proceedings was attributed to the fact that the industries were very diverse in their structures, and parties to the councils believed that set procedures would impose a rigidity on dispute resolution mechanisms, which, to be effective, must be flexible (Horn 1988: 66). The more successful industrial councils had a consistent approach to resolving disputes, while the less successful councils displayed too much flexibility and, hence, appeared disorganised, adding to their ineffectiveness (Horn 1988: 71). The findings of the bargaining council study, instead, reveal that Horn’s conceptualisation of success on this basis alone, is narrow. Horn may be correct in emphasising the importance and usefulness of distinct procedures. As according to the CIBC, rules imply, firstly, a greater uniformity in the manner in which disputes are handled, and, secondly, it encourages cases to be settled promptly (Theresa Daniels,
General Secretary of the CIBC). The uniformity in procedures allows for an effective interface with the CCMA and the Labour Court, because standard rules are applied throughout. However, the case study simultaneously pointed to a number of other key factors that determine the outcome of councils’ dispute settlement work, which is where this study diverges from Horn. The additional features that influence dispute resolution include the relationship between parties, and, the manner in which the council is funded.

In its long existence, parties to the CIBC have managed to build important relationships amongst themselves, as well as to the council. In the CIBC, the council, and especially the trade union, regard these relationships as fundamental in order for councils to work efficiently, and for cases to be resolved effectively. The importance of relationships within a council is apparent in an observation from another council, the Bargaining Council for the Laundry and Dry Cleaning Trade, where Chiman, its chair, also commented on the importance of ‘a good relationship’ between employers and trade unions in facilitating timeous settlements. He noted that, as an employer, ‘If I sit and want to talk to the guys from the union, I can sort this [dispute] out in a day. I know of establishments that . . . see the union as trouble and they don’t look at the union as a friend, but as an enemy.’ Except, perhaps, where there are deep divisions between unions and employers, the usefulness of amicable relationships between parties and to the councils, can be applied to other councils too, more so, in well-established industries where relationships have been built over time, as would apply to the majority of the surveyed councils. There are further opportunities for relationships between parties, and to the council, to develop if a council does not refer cases to the CCMA. The extent to which parties can take advantage of this opportunity is, however, dependent upon the level of accreditation of the bargaining council.

But, it is extremely important to heed the warning that very close, and, even social relationships between the parties, and to the council, could be detrimental to workers, because trade unions, in particular, may become less representative of the rank and file. This potential may lead to worker dissatisfaction with the leadership that represents them. This outcome of becoming less representative of membership may also be true for the relationship between employers associations and its employers. While taking cognisance
of this warning, the importance of different kinds of relationships should not be discounted.

In addition to marked procedures, as well as established relationships, the ability of the CIBC to conduct dispute resolution successfully depends on continued funding. For the CIBC, its own council fee, which is a levy paid to the council by every employer and worker covered, is of marginal importance. The council’s income comes, primarily, since the establishment of the CCMA, from a subsidy that the commission provides for every case that the bargaining council is able to settle and through the administration of various social funds. The long presence of the council, 69 years to be precise, has allowed the bargaining councils to accumulate financial ‘reserves’ over the years. These reserves are significant because they serve as a ‘cushion’ against a series of pressures that the council may face, for example, an increase in employer exemptions (Margolis). Now, the CIBC may, therefore, be able to sustain the stresses on its financial capacity, and its main functions such as dispute settlement, are unlikely to be unfavourably altered as a result. The CIBC is the third oldest council of those surveyed, and nearly all other councils would have had less time to accumulate reserves. But, at least 20 bargaining councils are at least 47 years old, and these, at least, have probably accumulated considerable reserves. Newer and less well resourced bargaining councils, would, in contrast, probably be more dependent on council fees to build their financial resources, initially at least. But, if the CIBC benefits from the CCMA subsidy, then all councils accredited for conciliation and/or arbitration should be in the same position to gain from the commission.

The issue of finances is, nonetheless, an important one, for two reasons. Firstly, in their questionnaire responses, eleven bargaining councils indicated financial constraints as one of their main problems. Secondly, as in the clothing industry, the changing global market context introduces certain pressures, particularly financial ones on the industry and its actors. Changing trade agreements that have allowed for cheaper imports to enter into the country, as well as the increase in the illegal trading in clothing, are negatively affecting businesses, and in turn, are causing a loss in jobs, of which, the impacts trickle down to different levels of the council’s work, and its parties. According to Masinga, trade agreements negatively affect the union. He explained: ‘firstly, we experience job
losses. It also affects our membership in terms of members belonging to this organisation.’

Adv Ernst Loyson who is involved in dispute work for the TCMA, less explicitly, also referred to downturns in business, the result of which is manifested in the form of ‘a huge increase in employer exemptions’ from bargaining councils. He noted that ‘[i]nherent in a request for an exemption is that obviously the employer cannot comply with a certain part of the agreement. 99 per cent of the time, it’s got to deal with the issue of wages. And, inherent in that is the fact that obviously business is not good.’ Inadvertently, Daniels also raised the issue about the reduction of employees in the industry, a consequence of which has been the amalgamation of other councils that fall within the industry. According to Daniels: ‘[b]ecause things are not looking too good, there is a major reduction in the numbers of workers in the industry . . . For economic purposes we want to merge these [different councils within the industry] and just include them under one agreement.’

It is likely that cuts in employment or working hours will not be particular to the clothing industry. Yet, despite the clothing industry being most harshly affected by the impacts of globalisation, it is still successful with regards dispute resolution. Bargaining councils in other industries, which may be affected by globalisation to a lesser extent, may turn out to be even more successful than the CIBC. Also, the declining industries appear to be older industries, and are likely to have more reserves. An industry that is deteriorating, furthermore, could possibly follow the same path as the clothing industry where, a national bargaining council could be formed through council mergers.

The CIBC, given the above-mentioned factors - detailed procedures, established relationships, and accumulated funds - does then appear to be relatively successful in its ability to settle disputes. Importantly, the case shows that dispute resolution through bargaining councils is beneficial, and councils can be proficient at dispute settlement.

**New opportunities and challenges**

Effective dispute settlement is, however, dependent on the work of the CCMA, and for this reason, the commission deserves more mention. The CCMA and bargaining councils
co-operate with each other because they both conduct dispute tasks, and because the CCMA is responsible for accreditation. The CCMA’s success is often portrayed through comparisons with the settlement rate of previous dispute resolution structures. King (1995: 15) shows the low rates of dispute settlement prior to 1994, where industrial councils displayed a 26 per cent settlement rate and the resolution rate for conciliation boards in 1994 was a mere 12 per cent (King 1995: 16). Compared to this, the CCMA, in 2001, boasted a settlement rate of 81 per cent of the cases that were referred to the commission (CCMA 2000/01: 2). This increase in resolution is within the context of a 16 per cent hike, from 2000, in the total number of cases that were referred to the commission. However, are these fair, and/or adequate indicators of the effectiveness of the CCMA?

Brand (1998) warns us that awards are being made in ways that facilitate quick resolution for case completion, which significantly undermines the quality of the service provided. If service is compromised for efficiency, which implies high settlement rates, surely this reflects on the effectiveness and the success of the CCMA? Is equity really an outcome, if, for expediency, quality is a trade-off? Additionally, reflecting on the CCMA’s effectiveness often overlooks other real problems, such as that unions may lose control over the resolution process by opening it up to third party intervention, leaving them (unions) disempowered.

Ideally, ‘effective dispute resolution systems [should] recognise and encourage an interdependence and integration of statutory and private dispute resolution agencies’ (Brand 1998: 89-90). But, there are serious impediments that exist in the path of this. Currently, accreditation of bargaining councils for conciliation, and especially arbitration, by the CCMA is too slow, and hence there are fewer councils available for dispute management than are necessary. Therefore, for bargaining councils to be part of the dispute settlement system, they would need to augment their capacity in order to be accredited. Once accredited, there is still a potential for parties to refer cases to the commission. Over time, this could be undesirable for unions’ strategic participation and influence.

Another problem that can affect unions’ involvement in dispute settlement relates to the increase in small businesses applications for exemptions from councils. Moleme
(2001: 103-104), in his investigation of the effects of collective bargaining on small businesses in the metal sector in Gauteng, found that there is growing discontentment from small businesses with agreements determined at industry level. The main argument that small businesses wage against industry-wide agreements is that they (small businesses) cannot afford the working conditions that are negotiated at the level of the industry. This especially applies to wage agreements that can be beyond the financial capabilities of small enterprises (Moleme 2001: 16, 18). Even if a company is not party to a bargaining council, but it falls within the registered scope of the council, then the main agreement, according to the LRA (1995: Section 32 (5)), can be extended to these non-parties too. While this certainly encourages uniformity across the industry, at the same time some establishments cannot necessarily afford the determined wages. This leads to the application for exemptions. For employers to apply for exemptions from bargaining councils, and have them granted, is a legal and relatively straightforward procedure.

However, for trade unions, that parties can opt out of bargaining councils is a clear impediment. Satgar (1997) and Klerck (1998) note that, as long as employers can and do apply for exemptions, gains for workers will be minimal. While there are different levels of exemptions, the negative result, Masinga explained, is that ‘you will have this unbalanced industry where fairness in terms of the competition won’t prevail.’ Moreover, as the following comment will show, workers feel that bargaining councils do represent them, and exemptions from councils deny workers this representation. Masinga outlines the benefits accrued to workers and at the same time, provides support for the bargaining council system. He argues that workers ‘really feel that it is very profitable to be represented . . . [A]ll of the companies outside of the scope, outside of the bargaining councils . . . you will find that there is no proper, you know, health and safety measures being applied . . . Now, if you have a bargaining council, those issues get protected one way or another.’ These aspects of voluntarism and exemptions are important to consider as they can have implications for workers access to bargaining councils.
Policy recommendations

Lastly, in light of these and on the importance of bargaining councils, this study concludes with some policy recommendations. The establishment of bargaining councils should be encouraged in sectors where they do not, at present, exist. By implication, trade unions and employers’ associations would have to be organised within these sectors too. For the new bargaining councils, because resources would not have been accumulated over time, these councils would need additional financial support. In general, existing bargaining councils must also increasingly apply for accreditation. If a council is not accredited, then dispute settlement could increasingly fall outside the council’s tasks. It is plausible that accreditation may be determined on the basis of the unions’ ability to justify capacity and ability to conciliate and/or arbitrate cases. Accordingly, union capacity needs to be enhanced in order to be effective, and importantly, so that bargaining councils could be accredited. In addition, the more bargaining councils that are accredited, the more positive the spin-off for the CCMA. On the whole, the consequence is a more expeditious, efficient, and successful dispute settlement system.

Conclusion

The discussion has shown that the shift to a bargaining council system was necessary. Given the numbers of bargaining councils that exist, as well as the importance of the extension in its dispute functions, the shift can, certainly, be regarded as significant too. This finding goes towards closing a noteworthy theoretical and descriptive gap on research related to bargaining councils, especially that on how councils work in general, and, in particular about their role in dispute resolution. More specifically, the study has provided an opportunity to seriously appreciate the shift from industrial to bargaining councils. Neglect in this regard, up to this point, had precluded the possibility of critically evaluating whether the transition was either necessary or significant.

This research has, therefore, helped to fill a significant gap in the literature on South African labour relations in a number of ways. A bargaining council’s ability to conduct arbitration is important, and this function, fundamentally, sets them apart from
industrial councils that they replace. For the LRA’s expectations around bargaining councils to be manifested in practice, additional councils would need to be accredited for conciliation, and, many more for arbitration. Importantly, bargaining councils, in general, may be regarded as being successful in carrying out this essential dispute settlement role. Finally, the success of bargaining councils has a direct bearing on labour relations in South Africa as they contribute to the form and character of labour relations. This is achieved, in particular, through their role in dispute resolution, which, as a consequence of legislative changes made in 1995, has been significantly strengthened. This is especially true in those cases where councils are accredited for arbitration, as well as conciliation. Given adequate support, bargaining councils will occupy an increasingly important place in South African labour relations.
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