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AN ANALYSIS OF COLLECTIVE BARGAINING ARRANGEMENTS IN THE CONSTRUCTION INDUSTRY

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LIST OF ACRONYMS

AUBTWSA	Amalgamated Union of Building and Allied Workers of South Africa
BCAWU	Building, Construction and Allied Workers' Union
BCEA	Basic Conditions of Employment Act
BIBC	Building Industry Bargaining Council
BIFSA	Building Industry Federation of South Africa
BWI	Building and Wood Workers International
BWAWUSA	Building, Wood and Allied Workers' Union of South Africa
BWU	Building Workers' Union
CCMA	Commission for Conciliation, Mediation and Arbitration
CETA	Construction Education and Training Authority
CIDB	Construction Industry Development Board
DTI	Department of Trade and Industry
EPWP	Extended Public Works Programme
ILO	International Labour Organisation
LDC	Limited Duration Contract
LOSC	Labour-Only Subcontractors
LRA	Labour Relations Act
MBA	Master Builders' Association
MBSA	Master Builders South Africa
NABCAT	National Association of Building Contractors and Allied Trades
NBV	Noordelike Bouwerkersvabond
NUM	National Union of Mineworkers
NBF	National Bargaining Forum
SASCA	South African Subcontractors' Association
SAFCEC	South African Federation of Civil Engineering Contractors
SAWWU	South African Woodworkers' Union
SBA	Small Builders' Association
SETA	Sector Education and Training Authority
STATS SA	Statistics South Africa
VAT	Value Added Tax
UIF	Unemployment Insurance Fund
VBF	Voluntary Bargaining Forum
ZAR	South African Rand

GLOSSARY

Bargaining council	A bargaining forum established by one or more registered trade unions and one or more registered employers' organisations in compliance with the Labour Relations Act. It must be registered with the Department of Labour and is subject to regulation by the Minister of Labour.
Casualisation	The trend to reduce permanent, full-time employment and use more part-time and temporary employment.
Collective agreement	A written agreement concerning terms and conditions of employment and/or matters of mutual interest concluded by trade unions, on the one hand, and employers and/or employers' organisations, on the other hand.
Collective bargaining	Negotiations between trade unions, on the one hand, and employers and/or employers' organisations, on the other hand, with the objective of reaching agreement on terms and conditions of employment or other matters of mutual interest.
Externalisation	The trend to reduce the number of direct employees by increasing the number of workers engaged via third parties such as labour brokers and labour only subcontractors.
Full-time employment	An employment relationship where the employee works for at least 40 hours per week for the same employer.
Labour broker	Also referred to as a temporary employment service (TES). A person who (for the fee) assigns a specified number of workers possessing specified skills to a client for a fixed period of time. While the labour broker is deemed to be the employer, the worker is subject to the client's control, as the client determines what, how and when the work will be done.
Labour-only subcontractor	A person who undertakes to perform a specified task within a specified period for a client. The labour-only subcontractor retains some discretion as to how the work will be completed and may employ his or her own workers to assist in completing the tasks. These workers are not subject to the client's control.
Part-time employment	An employment relationship where the employee works for less than 40 hours per week for the same employer.

Permanent employment	An employment relationship for an indefinite period of time until either party terminates it by giving notice to the other party.
Temporary employment	An employment relationship where the parties agree that the relationship will last for a fixed period of time or until the employee completes a specified task. Also referred to as "fixed-term" or "limited duration contract" employment.
Voluntary bargaining forum	A collective bargaining forum established by trade union and employer parties. It is not registered with the Department of Labour or subject to the Minister's control, but is regulated by mutually determined rules.

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1 INTRODUCTION

The construction industry covers work falling within the building, civil engineering and manufacturing sectors. The latter relates to the manufacture of materials used in the building and civil engineering sectors. Broadly speaking, the building industry comprises activities involved in the erection, completion, maintenance, alteration and renovation of buildings and structures and the making of articles used for these activities.[1] On the other hand, civil engineering involves the design and construction of public works such as dams, bridges, roads, waterworks, earthworks and other structures excluding buildings. This research mainly focuses on the building and civil engineering sectors as opposed to the manufacturing sector. According to the Construction Industry Development Board (CIDB), public sector spend accounts for only 25 per cent of building works and 80 per cent of civil engineering works.[2]

Statistics South Africa (Stats SA) classifies construction enterprises into four groups according to the value of their turnover. These are large, medium, small and micro enterprises, defined as per the table below:

Table 1: Size of enterprises in the construction industry

Size	Turnover (ZAR)	Percentage of total employment
Large	More than R 26 m	35.6 %
Medium	More than R 13 m but less than R 26 m	23.4 %
Small	More than R 6 m but less than R 13 m	10.2 %
Micro	Less than R 6 m	30.8%

Source: Statistics South Africa, *Construction Industry*, 2007

Stats SA's most recent large-scale Construction Industry Survey reported that large enterprises employ the greatest percentage of people working in the industry. This is followed by micro enterprises, which employ 30.8 per cent of the workforce. Medium and small enterprises employ 23.4 per cent and 10.2 per cent respectively. This shows that small and micro enterprises collectively command a significant portion of the labour force in the industry (41 per cent).

Following a slump in the industry in the 1990s, the construction industry underwent a boom. Statistics South Africa reports that the sector grew by 14,2 per cent in the third quarter of 2007 (Stats SA 2007, 7). Earnings increased from R 6,73 bn in June 2006 to a high of R 9,39 bn in December 2007. After a decline

[1] From the definitions clause of the Bloemfontein Building Industry Bargaining Council collective agreement. Other collective agreements contain similar definitions.
[2] The *CIDB Quarterly Monitor*, October 2008 p 2.

to R8,32 bn in March 2008, earnings increased and peaked at R9,75 bn in September 2008.

Growth in the industry accelerated after 2006, due to 2010 FIFA World Cup construction projects. According to informants in the industry, after peaking in 2008, growth is slowly on the decline as many of the projects are nearing completion. Residential construction has also declined (*Business Report*, 7 February 2008). The boom therefore represents a shift from lower-margin residential building to large-scale infrastructure developments.

The Construction Industry Development Board reports that the large construction companies have been the greatest beneficiaries of the construction boom. Large companies have increased shareholder dividends and experienced share price increases. Four of the largest construction companies in South Africa (the Aveng Group, Murray and Roberts, Group 5 and WBHO) recorded significant growth in their profits post-2006.

Table 2: Construction giants' profits before tax (ZAR millions)

Company	Aveng Group	WBHO	Murray and Roberts	Group 5
2004	170	128	415	118
2005	493	198	523	134
2006	788	305	658	141
2007	7 953	446	1 284	373
2008	3 321	1 081	2 558	666

Source: Calculations by the Labour Research Service, March 2009

Firms have not benefited equally from the boom. The majority of firms are emergent firms that would struggle to ever win a project. A tiny minority of contractors (about 0.2% of the contractors registered with the Construction Industry Development Board) tend to win the big, lucrative government tenders (*Engineering News*, 2-8 November 2007).

Industry reports indicate that activity in the construction industry has been declining since mid-2008. A number of challenges face the industry. Work opportunities are decreasing, and this has resulted in tougher competition to win projects. The impact of the global financial crisis is becoming evident, as some projects are being suspended indefinitely or cancelled as clients review their infrastructure spending. For instance, Murray and Roberts reported the

cancellation of projects worth R10 billion over a three-month period.[3] Demand for construction, particularly in the private sector, has been hampered by slower economic growth and weaker business confidence.[4]

While larger firms are surviving, small construction firms seem to be struggling to cope with these changes in the industry. This trend is confirmed by industry reports that the number of liquidations amongst small construction firms (closed corporations) increased by 54 per cent in 2008.[5] On the other hand, liquidations amongst construction companies reduced by 66 per cent in the same period.[6] In addition, those closed corporations liquidated or insolvent as a percentage of total liquidations increased from 48 per cent in 2007 to 81 per cent in 2008.[7]

There are also concerns about the unequal distribution of the wealth generated in the construction industry. Commentators argue that the bulk of the gains made in the industry are distributed as dividends to shareholders and paid to construction company executives. The average salary increase for directors of large construction firms is said to be in the region of 38 per cent. This is a far cry from the average annual wage increase of about 9 per cent for construction workers. With many of these workers living below the poverty line, there is a sense that they are not adequately compensated for the strenuous work they perform under harsh and dangerous conditions.

The situation of construction workers has received greater attention in the context of South Africa's preparations for the FIFA 2010 World Cup. Workers have embarked on strike action on the sites of all the soccer stadiums being built or renovated for the event. Workers have sought to resolve a number of issues, such as wage increases and bonuses for early completion of work, pay equity for workers of main contractors and subcontractors, and health and safety concerns.

The Building and Wood Workers International (BWI) and its affiliates launched the global Campaign in Support of Decent Work in the Construction Industry in January 2007. Its aim is to challenge construction firms for a fair share of profits and improved working conditions. The 2010 World Cup presented an opportunity to raise the profile of unions operating in the industry and to mobilise and recruit union members. National and international unions and their federations are driving the campaign for decent work for 2010 and beyond. The South African unions involved are the National Union of Mineworkers (NUM), the Building,

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[3] Creamer, T "M &R's order book resilient at R 60 bn, despite project cancellations of R 10 bn", *Engineering News*, 25 February 2009.
[4] "Contractors grappling with rising costs" reported on 4 June 2008 at www.industryinsight.co.za accessed on 20/02/2009.
[5] "Small Construction businesses struggle in cash strapped industry" reported on 26 September 2008 at www.industryinsight.co.za accessed on 20/02/2009.
[6] "Small Construction businesses struggle in cash strapped industry" reported on 26 September 2008 at www.industryinsight.co.za accessed on 20/02/2008.
[7] "Small Construction businesses struggle in cash strapped industry" reported on 26 September 2008 at www.industryinsight.co.za accessed on 20/02/2008.

Construction and Allied Workers' Union (BCAWU) and the SA Building and Allied Workers' Organisation (SABAWO). Understanding how terms and conditions of employment are determined in the construction industry is necessary for the success of such an initiative.

1.1 Objectives of the research

The main objective of this report is to provide a map of the bargaining arrangements in the construction sector. It identifies the various types of bargaining structures in the sector and the levels at which they are situated, as well as the approximate coverage of the different structures. In doing so, it identifies the parties to the bargaining arrangements and the types of issues covered in collective bargaining.

A second objective is to identify the main challenges confronting collective bargaining in the sector, including low levels of union organisation. The attitudes of the parties to collective bargaining, particularly bargaining councils, are also considered.

The third objective is to make recommendations as to how to strengthen union organisation and collective bargaining in the industry, in order to assist unions to develop effective strategies. This includes recommendations to government regarding the appropriate labour market measures to adopt for the sector.

1.2 Methodology

The methodology for this report included a desk review of relevant literature (including all the current collective agreements) and telephonic and face-to-face interviews with 14 key informants in Gauteng and the Western Cape. The interviews were conducted between October 2008 and February 2009. Of the key informants, six were representatives of the building bargaining councils. One was an executive of a regional Master Builders' Association. Seven were from large trade unions organising in the construction industry, namely the National Union of Mineworkers (NUM), the Building Construction and Allied Workers' Union (BCAWU), the Building Wood and Allied Workers' Union of South Africa (BWAWUSA), the Amalgamated Union of Building Trade Workers of South Africa (AUBTWSA) and Building Workers Union (BWU).

In addition to the key informants, interviews were held with 16 building contractors on three building sites. Of these, seven were subcontractors that provide materials, while nine were labour-only subcontractors (LOSCs). Interviews were also held with 18 workers. Eight of them were currently working on site, and ten were seeking work in Cape Town.

1.3 Scope of the research

For the purposes of this research, we consider the construction industry to comprise two broad categories, namely building and civil engineering. Broadly speaking, the building industry comprises activities involved in the erection, completion, maintenance, alteration and renovation of buildings and structures and the making of articles used for these activities.[8] On the other hand, civil engineering involves the design and construction of public works such as dams, bridges, roads, waterworks, earthworks and other structures excluding buildings.

1.4 Structure of the report

The structure of the remainder of this report is as follows: Part 2 outlines the collective bargaining arrangements that are considered in this report; Part 3 examines some topical issues in the construction industry and their impact on collective bargaining; and Part 4 discusses some options for the future of collective bargaining in the construction industry. Part 5 offers a brief conclusion.

2 MAPPING THE DIFFERENT COLLECTIVE BARGAINING ARRANGMENTS IN THE CONSTRUCTION INDUSTRY

One of the key objectives of the Labour Relations Act (LRA) is to "provide a framework within which employees and their trade unions, employers and employers' organisations can engage in collective bargaining to determine wages, conditions and other matters of mutual interest".[9] The underlying premise is that by uniting and bargaining collectively with employers, workers are able to achieve better conditions of employment than they would through bargaining individually with the employer. Proponents of collective bargaining also believe that it secures labour peace, social justice, economic development and employment equity in the workplace.[10]

Generally the LRA favours voluntary and private regulation of collective bargaining and acknowledges that "the recognition of bargaining agents, the choice of bargaining levels and the determination of bargaining are matters peculiar to specific bargaining relationships, and ... best left to resolution by the parties drawing on their bargaining strength".[11] It therefore does not require collective bargaining, but creates mechanisms to facilitate and encourage it.

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[8] From the definitions clause of the Bloemfontein Building Industry Bargaining Council collective agreement. Other collective agreements contain similar definitions.
[9] Section 1 of the Labour Relations Act.
[10] Section 1 of the Labour Relations Act.
[11] Du Toit et al *Labour Relations: A comprehensive Guide* (Durban, Butterworths LexisNexis: 2005) pp 227-8).

Collective bargaining may occur at either the plant level with an individual employer or at an industry level. Industry level or centralised collective bargaining can take place regionally or nationally. It can also take place within or outside the statutory system of bargaining councils. While the Act allows the parties to determine the level of collective bargaining, it has a strong bias towards centralised collective bargaining, and provides several incentives for bargaining in bargaining councils.[12] The most significant is that the parties to a bargaining council collective agreement can have it extended it to non-parties if they represent and employ the majority of workers falling within the scope of the bargaining council.

We now turn to the different collective bargaining arrangements currently in place in building and civil engineering.

2.1 Current collective bargaining arrangements in the construction industry

Historically, the building industry has engaged in centralised collective bargaining in regional bargaining councils. At the height of collective bargaining in the construction industry in the early 1990s, there were ten such regional bargaining councils. Four of these have collapsed, namely the Durban, Pietermaritzburg, Kroonstad and Gauteng Bargaining Councils.

Currently, there are six regional bargaining councils[13] in the building industry, namely the Cape Building Industry Bargaining Council, the North and West Boland Building Industry Bargaining Council, the Kimberley Building Industry Bargaining Council, the Bloemfontein Building Industry Bargaining Council, the Southern and Eastern Cape Building Industry Bargaining Council and the East London Building Industry Bargaining Council.

The Cape Building Industry Bargaining Council was established in the 1920s. Currently the employer members are the Master Builders' and Allied Trades' Association of the Cape Peninsula and the Boland Master Builders' Association. The trade union parties are BCAWU, BWAWUSA, NUM and the South African Wood Workers' Union (SAWWU). Their current collective bargaining agreement was published in July 2007, and will continue to be in force until 31 October 2010.

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[12] For instance, in terms of the LRA trade union parties to a bargaining council are automatically entitled to access and stop order rights in all workplaces within the bargaining council's registered scope, irrespective of their level of representivity at a particular workplace; bargaining council agreements may vary minimum conditions of employment; and parties to a bargaining council may, by collective agreement, establish levels of representivity in respect of certain organisational rights.

[13] These were established in terms of the Labour Relations Act 66 of 1995.

The Building Industry Bargaining Council for North and West Boland has two employer parties and one trade union party. The employer parties are the Master Builders' Association for the North Boland and the Master Builders Association for West Boland, and the trade union party is the BWU. Its current collective agreement came into force on 1 November 2007, and will continue to be in force until the end of 2010.

The Building Industry Bargaining Council for Kimberley comprises the Northern Cape Master Builders' Association on the one hand and the AUBTWSA and the NUM on the other. The current collective bargaining agreement came into effect on 9 September 2008, and continues until 31 July 2011.

The Building Industry Bargaining Council for Bloemfontein consists of the Master Builders' and Allied Trades Association (Free State) and three trade unions, AUBTWSA, Noordelike Bouwerkersvabond (NBV) and NUM. The parties have a collective agreement in place, with effect from 10 March 2008 until 31 October 2009.

The Building Industry Bargaining Council for the Southern and Eastern Cape and the Building Industry Bargaining Council in East London are in a precarious position. Neither of them currently has a collective agreement, due to a deadlock between the parties. Presently both bargaining councils function to administer social security benefit funds, conduct dispute resolution and perform certain secretariat functions. Two voluntary bargaining forums (VBFs) have been established in the Port Elizabeth and Southern Cape areas to determine terms and conditions of work. However, this report does not consider their arrangements in detail.

The research examined the situation in Gauteng, where the Building Industry Bargaining Council collapsed. In 2000, a VBF was established by nine employers (Murray and Roberts Building, Group 5 Building, WBHO, Grinaker-LTA, Basil Read, Concor Construction, Edilcon, Abberdale and Barrow, and Stocks Building). At present, three trade unions – BCAWU, NUM and AUBTW – are parties to this arrangement. These trade unions represent the majority of workers in the employer companies. The MBA also participates in the VBF as a representative of other employers who wish to be bound by the collective agreement. These parties are not parties to the VBF because the unions are not sufficiently representative amongst their employees.

The bargaining forum was established at the initiative of the large employers in 2000. The parties conclude collective bargaining agreements every three years. The collective agreement is revised annually, and the current wages will remain in effect until 1 October 2010.

Centralised collective bargaining in the bargaining councils and voluntary bargaining forums does not cover the entire building industry in the country. Plant

level collective bargaining therefore takes place between individual employers and the representative trade unions in regions falling outside the bargaining councils and VBFs.

Collective bargaining in civil engineering is quite different from that in the building industry. Collective bargaining takes place in a centralised national bargaining forum (the NBF) comprising the South African Confederation of Civil Engineering Contractors (SAFCEC) representing employers, and NUM and BCAWU representing labour. This forum was established in 1996, and enters into wage negotiations every three years. It has wide recognition as it involves the only employer organisation and the two most representative unions in the civil engineering industry.

The parties to the NBF envisage the establishment of a bargaining council for the civil engineering industry to regulate terms and conditions of employment nationally. As an interim measure to provide stability in the industry, the Minister of Labour has issued a sectoral determination which regulates minimum terms and conditions of employment for the whole country.[14] This is revised every three years. While an extensive consultative process involving all stakeholders is conducted to determine the terms and conditions of employment, the collective agreement reached in the NBF is a very important input document in the process.[15] Thus, the agreement is, in this indirect way, extended to cover all civil engineering employees in the country.

Provisions of the collective agreement that are not incorporated in the sectoral determination are only binding between the parties to the NBF. Plant level bargaining about matters covered by the sectoral determination is strongly discouraged in the civil engineering industry as the sectoral determination covers all employers and employees.

Project agreements are also concluded between employers and trade unions to regulate terms and conditions of employment for large building and civil engineering projects. For example, project labour agreements were concluded for the building of World Cup stadia and for the Gautrain project. Project labour agreements are reached for both building and civil engineering work. Terms and conditions of employment agreed at project level may not be inferior to those found in binding collective agreements or the sectoral determination.

Our analysis below shows that there are marked differences between the collective bargaining arrangements in the building and civil engineering

[14] The Minister of Labour has the power to establish sectoral determinations in terms of the Basic Conditions of Employment Act of 1998. The Minister establishes these to regulate wages and conditions of employment in sectors where workers tend to be vulnerable or unorganised, or where collective bargaining is weak.

[15] The Employment Conditions Commission, which advises the Minister on sectoral determinations, expressly acknowledges that it recommends that the sectoral determination legislates the wage levels and structures provided for in the NBF's collective agreements.

industries. One of the most important issues in determining the way forward for collective bargaining in construction is how to rationalise the collective bargaining arrangements and close the gap between the civil engineering and building industries in this regard.

3 CHALLENGES FOR COLLECTIVE BARGAINING IN THE CONSTRUCTION INDUSTRY

Interviewees were asked to comment on their attitude towards current collective bargaining arrangements in the industry. For the most part, the employer organisations were unwilling to comment. Bargaining council and trade union representatives were willing to share their views.

Informants from two out of the four active bargaining councils (Western Cape and Bloemfontein) were very optimistic about the future of collective bargaining in their area. They saw collective bargaining as very important for setting standards on wages and working conditions and eliminating the need for individual firms and trade unions and workers to negotiate these terms. It was also seen as a stabilising force in the industry as it prevented unrest and industrial action.

A trade union informant in Cape Town went as far as to say that he was "ecstatic" about the state of collective bargaining in the region. In his view, collective bargaining was "here to stay, for a very long time, particularly in Cape Town and the Boland". He said the success of collective bargaining was largely attributable to close working relationships between the employers' organisations and the trade unions after a period of hostility and tension in the 1990s.

Two other bargaining council informants were more cautious, saying that the future success of collective bargaining depended on the willingness of parties to comply and the representivity of the trade unions. An informant in Port Elizabeth (where there is no collective agreement in place) indicated that representivity was the major stumbling block to the conclusion of a collective agreement. The prognosis in Kimberley was bleak, with a bargaining council informant there indicating that it may not survive because employees generally do not want to subscribe for benefits as they need cash in their pockets. They would rather have more cash in their pockets for their living expenses and "make a plan" in the case of eventualities such as illness.

All four building bargaining councils with collective agreements reported that their workloads had increased significantly over the past decade. The councils had either maintained or increased their staff levels in that period. The Kimberley bargaining council had maintained the same staff level despite a significant increase in the administrative work. This was because the staff negotiated a pay increase to compensate for their additional workloads in lieu of the council engaging more staff. In Port Elizabeth and East London, where no collective

agreements exist, the bargaining councils had significantly downsized their staff as they only administer benefit funds and conduct conciliation and arbitration.

Despite a generally positive outlook, a number of challenges confront collective bargaining in the construction industry. In this section, we discuss the challenges for trade unions, bargaining councils and employers in the industry. The most pressing issues raised by the stakeholders are the fragmentation of collective bargaining arrangements in the industry, declining levels of trade union representivity, the rise in atypical forms of employment, the extension of collective agreements to non-parties, and the non-representation of the smaller employer parties.

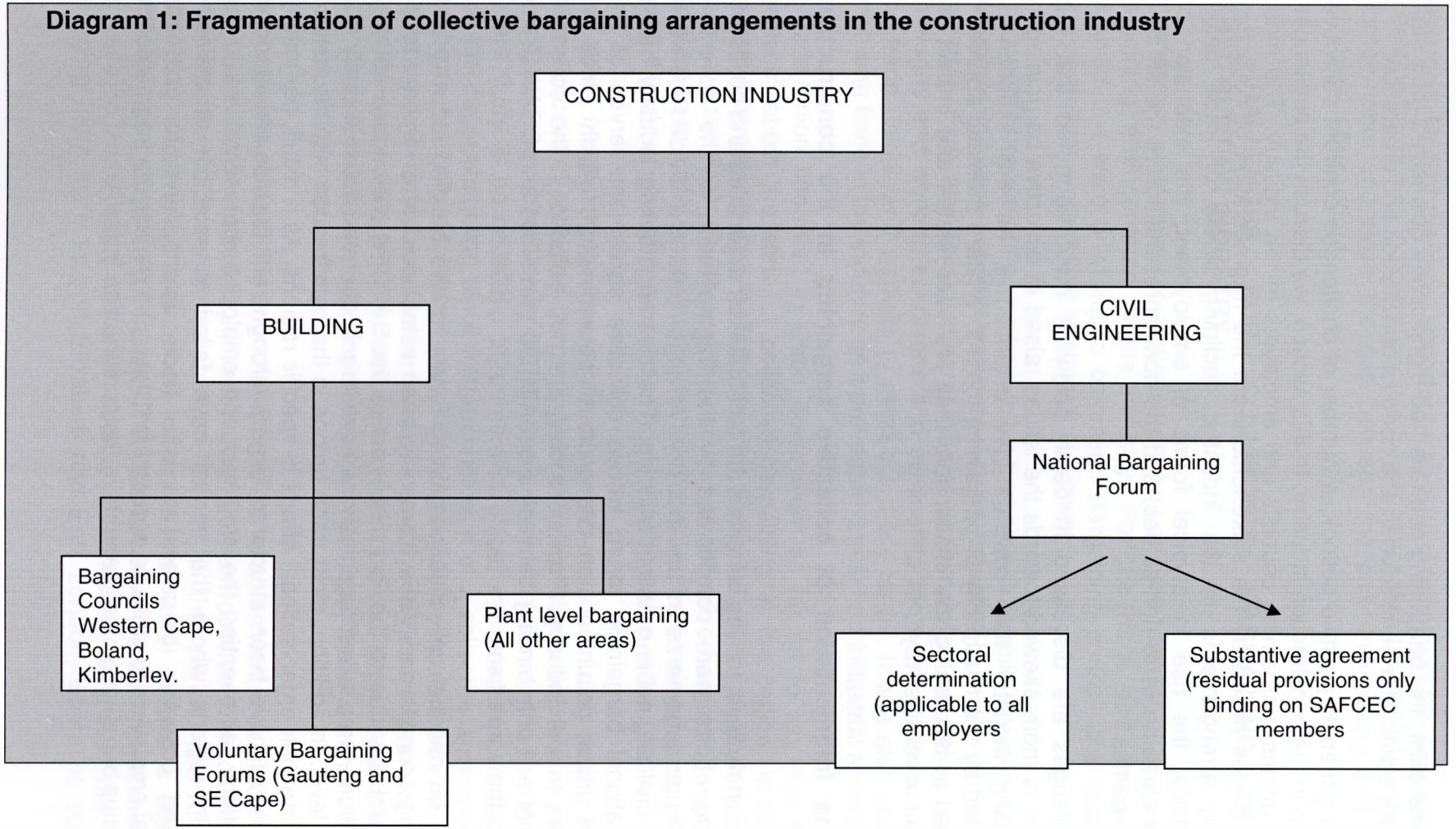
The challenges are discussed in detail below. It must be noted that the discussion is more skewed towards the issues raised in collective bargaining in the building industry than towards civil engineering, as the situation is complicated by the multiplicity of bargaining forums. While a thematic approach is followed in discussing the challenges, they are inter-related and impact on each other in various ways.

3.1 The fragmentation of collective bargaining in the construction industry

Trade union representatives lamented the fact that their organising and collective bargaining efforts were complicated by the fragmentation of the collective bargaining arrangements in the industry. Arrangements are divided between those in civil engineering and in building. The civil engineering industry has a single national bargaining forum whose collective agreement serves as an important input document for the sectoral determination, which binds all employers in the industry. Provisions that are not included in the collective agreement are only binding between the SAFCEC and NUM and BCAWU, the parties to the agreement.

There is no national collective bargaining forum for the building industry and bargaining councils and VBFs have only been established at a regional level. This is probably due to the fact that – unlike the SAFCEC, which is a national organisation – employers' organisations have largely operated autonomously at a regional level. In addition, most trade unions in the construction industry tend to concentrate their organisational efforts in specific regions. As a result, bargaining arrangements have been structured largely through relationships between the organisations representing the employer and employee representatives in the region. In regions where the parties have failed to establish or maintain centralised collective bargaining forums, trade unions have to approach individual employers to strike an agreement. Diagram 1 depicts the fragmentation of collective bargaining arrangements in the construction industry.

Diagram 1: Fragmentation of collective bargaining arrangements in the construction industry



The fragmentation of collective bargaining arrangements (between civil engineering and building, and within the building industry) has created huge disparities in the working conditions of employees in the various regions. As shown in Tables 3 and 4, there are significant variations between the wages and benefits provided to workers at the same level. It is also a challenge for trade unions to negotiate with individual employers which are not bound by a collective agreement or sectoral determination.

Table 3 shows that the income differential between beginners in the various regions is not very wide, ranging from R10.86 to R11.38. General workers in the Boland, Bloemfontein and Gauteng earn in the region of R12 per hour. However, those in the Western Cape earn much more at R17.65 per hour, which is more than twice that earned by the highest paid general worker in Kimberley. There are also huge disparities between the building artisans across the different regions, with the highest paid artisan in Kimberley earning less than half the wage of a Western Cape artisan.

The civil engineering sectoral determination generally provides for higher pay than the building bargaining forums. The Western Cape is an exception, with general workers and artisans in Areas A and B (Cape Peninsula and the Boland) earning more than those in civil engineering. General workers and artisans in Area A of the Western Cape (the highest paying area in the Western Cape) earn 26 per cent more than their counterparts in civil engineering.

Table 4 depicts the different benefit funds provided for in the different collective bargaining agreements, including the sectoral determination. Generally, the bargaining councils administer holiday funds, retirement funds (pension and/or provident funds) and sick leave funds. In most cases, employers are required to contribute to the funds, with employees making a more modest contribution per week. Various criteria determine eligibility for benefits, and in some cases certain categories of workers may be excluded.

Wages

Below is a table showing the basic hourly wages (excluding employer benefit contributions) in the various regions payable in the first half of 2009.

Table 3: Construction industry hourly wages 2008-9

Category of Worker	Western Cape	North/ West Boland	Bloemfontein	Kimberley	Gauteng	Civil Engineering
Cleaner	11.38/ 9.29/ 8.29	9.65	N/A**	N/A**	N/A**	N/A**
Beginner*	11.38/ 9.29/ 8.29	10.86	11.54	N/A**	N/A	N/A**
General worker	17.65/ 14.46/ 12.88	12.07	11.54	6.91/7.35	12.32	14.00
Artisan	38.60/ 32.90/ 29.21	19.64 – 37.52 (8)	24.15	15.18/15.51	N/A***	30.15

Source: Authors' compilation of wages from the collective agreements and civil engineering sectoral determination

Notes
* "Beginner" indicates the category of worker falling below the general worker category, namely a casual worker, beginner general worker and labourer.
** "N/A" indicates that the relevant category of employee is not mentioned in the relevant collective agreement.
*** "N/A" indicates that the wage for artisans in Gauteng could not be established.
Where several classes of workers exist in the same category, a range of hourly wages has been provided, with the number of classes in that category indicated in brackets.

Where wages are included in the alternative, this indicates the minima in each geographical area covered by the collective agreement.

Table 4: Construction Industry Benefits

Benefit	Western Cape	North/ West Boland	Kimberley	Bloemfontein	Gauteng	Civil Engineering Sectoral Det.	Civil Engineering Agreement
Holiday Fund	Yes	Yes	Yes	Yes	Yes	No	No
Provident/ Pension Fund	Yes	Yes	No	Yes	Yes	Yes	Yes
Medical Aid Fund	Yes	No	Yes	No	No	No	Yes
Sick Pay Fund	Yes	Yes	Yes	Yes	No	No	No
Funeral Benefit	No	No	No	Yes	Yes	No	Yes
Bonus Fund	Yes	No	No	No	No	No	No

Source: Authors' compilation of wages from the collective agreements and civil engineering sectoral determination

The Western Cape provides for five benefit schemes, three of which are accessible to all employees. These are the holiday fund, the sick pay fund and the bonus fund. Lower-skilled workers are eligible for the pension/provident fund, but it takes labourers 50 weeks (approximately a year) to qualify. However, only artisans are members of the medical aid scheme.

In the North and West Boland, all categories are eligible for the four benefit funds available. Lower-skill categories are, however, not able to obtain these benefits during their first five days (not necessarily consecutive) of employment. Employees must work at least 25 hours per week for the same employer in order to qualify.

The Kimberley agreement provides for a different benefits structure. While one holiday pay fund caters for all employees, it provides for separate funds for artisans and non-artisans. The non-artisan benefit fund provides for inclement weather and sickness and accident benefits. In addition to inclement weather and sickness and accident benefits, the artisan benefit fund provides medical aid benefits.

The four benefit funds administered by the Bloemfontein Bargaining Council cover most categories of employees. Casual workers are, however, excluded from receiving these benefits. They must work for at least four weeks for the same employer before being entitled to join the benefit schemes.

The Gauteng VBF agreement provides for three benefit funds, which apply to all categories including general workers.

The civil engineering industry sectoral determination requires employers to ensure that employees have retirement benefits. In terms of the determination, employers must either operate their own retirement funds or register employees on the industry's fund, known as the Construction Industry Retirement Benefit Fund (CIRBF). The sectoral determination does not require employers to provide any other benefits.

In 2006, the stakeholders in the civil engineering industry made a proposal for the Minister to legislate a voluntary medical aid scheme in the sectoral determination. The Minister did not rule out this possibility, but declined to do so without a full consultation of the stakeholders including medical aid providers. The substantive agreement reached by the parties in 2006 provides that employers should pay limited duration contract (LDC) employees a gratuity of one week's pay for each year of service on termination of employment. It also requires employers to ensure that LDC employees have funeral cover. The Minister did not incorporate these provisions into the sectoral determination; hence they are only binding between SAFCEC and the unions.

The representatives of the trade unions complained that the separation of collective bargaining between civil engineering and building had serious consequences for many construction workers. They argued that certain skills are interchangeable between the building and civil engineering industries, for instance, bricklaying and plumbing. In addition, unskilled workers can also be used in either civil engineering or building. As most established construction companies have both building and civil engineering divisions, it is common for workers to be moved between the different divisions in response to changing work levels in the departments. There were complaints that, for example, an employee who normally worked in the building department was paid the building rate for work in the civil engineering division. In some cases, this meant lower pay and benefits. They argued that efforts should be made to ensure greater parity between the working conditions in civil engineering and building.

3.2 Trade union membership and representivity

Representivity is critical as it determines the establishment and continued existence of a bargaining forum (bargaining council or voluntary forum), and the extension of collective agreements to non-parties. Employer representivity refers to the percentage of workers in the industry that the employer parties to the bargaining forum employ. Generally, employer representivity in the building industry bargaining councils is well above 50 per cent, with the MBA in Kimberley and in the Western Cape being 80 per cent and 60 per cent representative respectively. Employee representivity refers to the percentage of workers in the industry who are members of the respective trade unions. Union representivity is more volatile and more controversial and is the main focus of this discussion.

The construction industry is cyclical and project-based, features that makes it difficult for employers to retain all employers on a continuous basis. Trade unions organising in the construction industry therefore divide their membership into active members and permanent members. Active members are defined as those who are currently employed and paying subscriptions. Permanent members are those that the trade union retains despite the fact that they are out of employment due to retrenchment or the termination of limited duration contracts. The levels of active and permanent membership constantly fluctuate in line with changes in employment status. Active membership is the most relevant for determining representivity for purposes of collective bargaining.

Besides the challenges presented by the cyclical nature of construction, trade unions reported a general decline in their membership over the past ten years. One of the largest construction trade unions in the industry has seen a decline of approximately 40 per cent. This is largely attributable to the increase in the use of non-standard employment arrangements during this period. The most notable are employment on limited duration contracts (LDCs), labour-only subcontracting

(LOSCs) and the employment of workers through labour brokers. These agreements are discussed in more detail below.

Preparations for the 2010 World Cup in South Africa have had an impact on employment in the construction industry, which in turn has impacted trade union membership. For instance, a representative of BCAWU indicated that membership increased by about 12 500 as a result of 2010 construction projects. Another union informant in the Western Cape said that the majority of jobs created as a result of 2010 projects were of limited duration, and that most of these new entrants had not joined trade unions. This had the effect of reducing the union representivity in the Western Cape. After 2010 building activities peaked in late 2008, many non-permanent workers left the industry, thus raising representivity levels.

As mentioned earlier, union representivity is a key factor determining the existence and stability of centralised collective bargaining in the building industry. This is well illustrated in the cases of the Southern and Eastern Cape and the Western Cape bargaining councils.

In 2001, the East Cape Master Builders' Association sought (amongst other things) to have the Southern and Eastern Cape Council wound up in court on the basis that union representivity was too low. This application was unsuccessful. While the bargaining council continues to exist, it has ceased to function as a collective bargaining forum, as the MBA refuses to bargain with the unions.[16]

In the Western Cape, where the parties are committed to collective bargaining in the bargaining council, union representivity has had an impact on the extension of the collective agreement to non-parties. In 2005, union representivity in the council reached a low of about 30 per cent and the council was informed that the collective agreement could not be extended to non-parties.[17] After a long struggle, the council succeeded in having the agreement extended in July 2007. It was unclear what the level of union representivity was at the time of research at the end of 2008,, but it stood at over 50 per cent.

According to the framework agreement establishing the Gauteng VBF, the unions must collectively represent at least 50 per cent of the employees employed by the employer parties. The Gauteng Voluntary Bargaining Forum includes three trade unions that collectively represent a significant portion of the workers employed by the employer parties, although it was not clear whether they indeed represent at least 50 per cent. There is no expressly agreed threshold of representivity for unions wishing to become parties to the forum. However, no

[16] Godfrey, S, Theron, J, Visser, M, *The State of Collective Bargaining in South Africa: An Empirical and Conceptual Study of Collective Bargaining* DPRU Working Paper 07/130 (Cape Town, DPRU: 2007) p 26.

[17] The parties to a collective agreement must have at least 50 per cent representivity before a collective agreement can be extended to non-parties to the agreement.

other trade union has subsequently become a party, as they are not considered to be sufficiently representative.

In terms of the procedural agreement establishing the civil engineering NBF, the initial trade union parties (NUM and BCAWU) to the forum collectively had to represent 30 per cent of employees in the civil engineering industry. It was envisaged that the unions would increase their representivity to 50 per cent by June 2005. The latter goal is far from being achieved by the unions, and a report by the Employment Conditions Commission in 2007 indicated that the NUM and BCAWU represented substantially less than the 30 per cent. An official at SAFCEC was unwilling to provide current representivity figures, saying that it was a very sensitive issue as the parties were due to enter negotiations.

The procedural agreement establishing the NBF places a 15 per cent threshold for unions wishing to join the forum. Two national unions that represent workers in civil engineering have failed to reach this level, and have been prevented from joining the negotiating forum.

3.3 The rise in non-standard employment relationships

The employment relationship has traditionally been associated with a full-time, long-term or indefinite bilateral relationship between an employee and an identifiable employer. This is often referred to as the standard employment relationship (SER). Commentators writing about the developing and developed world have reported a higher incidence of employment relationships falling outside of this standard in recent decades. These are widely referred to as "atypical employment relationships". Some have even questioned the extent to which the standard employment relationship was in fact the norm, particularly in developing countries, including South Africa.

According to Goldman, the cyclical and project-based nature of the construction industry has largely hindered the normalisation of the standard employment relationship in the industry. While this may be true, there is increasing evidence that construction firms are downsizing their staff levels and moving more and more towards the use of limited duration contracts (LDCs). While these workers are employees of the construction firms, the time limit on their contracts makes them less eligible for benefits and easier to dispense with once they are no longer needed.

There are also moves towards the externalisation of work through the engagement of labour only subcontractors and labour brokers. The externalisation of employment has meant that employers are increasingly employing more of their employees indirectly, thereby avoiding the obligations

that are associated with standard employment. The challenges posed by LDCs and LOSC are discussed in more detail below.[18]

Limited duration contracts (LDCs)

Attracting and retaining membership, particularly amongst employees on LDCs, poses a serious challenge to trade unions in the construction industry. Several trade union representatives said that many workers refuse to join the unions because they doubt that they will reap the benefits of their membership during the duration of their contracts: "Don't take my money because I will not be here for long." Ndungu and Theron argue that LDCs also create division in the bargaining strategies of trade unions. Whilst permanent employers are more keen on building long-term relationships with employers, LDCs focus on short-term gains to "grab as much as they can" for the duration of their temporary employment (Ndungu & Theron, 2008: 125).

Interviewees identified several other problems that the rise in LDC employment pose for collective bargaining. One was that, in many cases, employers were unwilling to register them with bargaining councils and contribute towards benefit schemes on their behalf. In some cases, LDC employees themselves were unwilling to have benefit contributions deducted from their wages as this would further reduce the little income they received. In addition to employer and LDC employee resistance to the deduction of benefit contributions, some funds refuse to register LDC employees because their rules do not allow this. This was reportedly the case in the civil engineering industry where the parties agreed that LDC employees should receive funeral benefits. A representative of BCAWU said this was far from being implemented as most benefit funds were unwilling to cover LDCs employees.

All the trade union representatives interviewed said that despite the challenges in attracting these members, the unions recruited amongst LDC employees. The representative of the BWU said that the union engaged employers to find out how many LDCs they employed and negotiated with them to extend these contracts and eventually convert them into permanent contracts if they were repeatedly renewed. He also said that the Western Cape Bargaining Council was very active in checking whether employees on sites were registered with the council. On finding that certain LDC employees on a particular site are not registered with the council, the compliance agents take their details and register them with the bargaining council. Employers are then informed that these workers are registered with the council and asked to pay levies and benefit contributions for them.

[18] The challenges posed by labour broking are dealt with in a separate report by the authors.

Labour-only subcontracting (LOSC)

Traditionally, the main contractor who tenders and is awarded a project, has done the bulk of the work in construction. Main contractors in the building industry employed people to do all the work, except for a few specialist functions such as those done by electricians and plumbers. These specialist subcontractors were highly skilled and supplied their own materials for the tasks that they undertook.

Increasingly, the practice is for main contractors to engage subcontractors to do the work that they have traditionally done and relegate themselves to a role of "project management". Non-specialist tasks such as bricklaying, plastering, carpentry and partitioning are now being assigned to labour-only subcontractors (LOSCs), who are paid a rate per unit output, for instance 80 cents per brick laid or R100 per square metre plastered. These subcontractors do not purchase the materials required for them to perform their tasks and provide labour only. They usually employ a group or team of skilled, semi-skilled and unskilled workers to assist them to complete a job.

There are two main types of LOSCs. First, there are those who were previously employed by construction companies and either decided to "start their own thing" or were retrenched by employers with a view to engaging them as subcontractors. In some cases, they are individuals who have been employed or involved in business ventures in some other industry. They enter the construction industry because they see it as an industry where they can make "easy money". The typical modus operandi of LOSCs is evidenced by the case study below.

Case Study 1: Labour-only subcontractor

Z owns a close corporation that provides labour only subcontracting services in the building industry. Prior to acquiring the CC from a friend,[19] Z worked as a driver for several years and briefly worked for a friend in a tiling business. He managed to make contacts and obtain information about tenders from building sub-contractors on the building sites where he worked. He registered with the Department of Trade and Industry register of builders, and was referred to X (Pty) Ltd,[20] which assisted him to be appointed as a sub-contractor in a government low-income housing project in the Free State. This required him to relocate from Gauteng where he was based.

[19] His friend had registered a CC with the hope of working as a labour-only subcontractor, but had not been able to commence for a number of reasons.

[20] X (Pty) (Ltd) "specialises in financial management, account administration, project management, and procurement and paymaster services for the low-income housing industry. It combines the skills and expertise of a wide variety of disciplines in providing financial administration and business support services to contractors. It has offices in Bloemfontein, Gauteng, KwaZulu Natal and the Western Cape.

His contract is to build 200 houses on pre-built slabs. This requires a team of four qualified builders and six labourers to complete a house in a day. Z is well behind schedule because "there is too much work but not enough builders". He has had difficulty recruiting builders locally because government housing contractors have a bad reputation in the Free State. Some locals who worked on these projects in the past had a hard time securing payment from contractors.

In order to speed up progress, Z went to Lesotho to recruit qualified workers and assistants. He currently has three teams working on the project, and is due to return to Lesotho to recruit a few more teams. Although most are experienced builders, Z has had to train them and teach them to use the tools and building methods specified for the housing project.

Z pays qualified builders a daily rate of R200 and labourers a rate of R100. He says that this is the rate stipulated in the agreement that appointed him as a sub-contractor, and that this rate is standard for these projects in the area.

Z requires each team to finish building a house in a day, but does not regulate working hours and does not pay overtime if they work longer than nine hours a day. Workers have the option of working on Saturdays and Sundays, but do not get overtime pay. Z is unaware of the provisions of the labour legislation and until he met with the researcher, was unaware of the existence of the bargaining council and its collective agreement, which has been extended to non-parties.

In Z's opinion, he takes "good care" of his workers. He provides them with food and accommodation (at lower than market rates) and assists them when problems arise. For instance, one worker broke a leg while working on site and Z paid for his medical expenses. He also assisted another worker with money to go to bury his wife who had died in Lesotho.

The above case study highlights some problems with the enforcement of collective bargaining agreements and trade union organisation.

Firstly, the government is undermining its own legislation and commitment to collective bargaining by failing to ensure that all contractors and their sub-contractors working on its projects comply with labour legislation and applicable collective bargaining agreements. The DTI merely requires the contractor's basic information and contact details, SARS clearance, employment figures, annual income, asset value and HDI ownership status to register a supplier on the database of approved suppliers.[21]

[21] Information obtained from the form that is used for registration as an approved supplier on the DTI's supplier database, at http://www.dti.gov.za/suppliers/SuppliersDatabaseForms.pdf accessed on 29/12/2008.

In addition, the contract appointing Z as subcontractor did not require that he register with the local bargaining council and comply with its agreement. There was no provision in his contract requiring him to comply with the provisions of the LRA, the Basic Conditions of Employment Act (BCEA) or any other labour legislation. He was merely required to pay the "going rate" (minus benefit contributions), which is substantially less than what is required in terms of the collective agreement. Z admits that he does not comply with the collective agreement or other legislation and is not registered as an employer in terms of the Unemployment Insurance Act or the Compensation for Occupational Injuries and Diseases Act or the Skills Development Act.[22]

Secondly, many of the workers who work for LOSCs are vulnerable, desperate for work and willing to accept it on the conditions offered. In many cases, they are migrants from neighbouring countries and do not have the necessary documentation to work. Having work and earning money is much better than nothing at all, and arguably they earn more than they would earn for similar work back home. As a result, they are less willing to join trade unions and to challenge their employers, for fear of drawing unnecessary attention to themselves. Employers are also unwilling to register these workers with bargaining councils as their status may be brought to light.

Bargaining councils and trade unions are well aware of how LOSCs operate, but they seem powerless to stem the tide. Although all the bargaining council collective agreements cover non-parties (of which LOSCs form the majority), the enforcement activities of the bargaining councils concentrate on employers who are registered with the bargaining council. The level of interaction between bargaining councils and unregistered contractors seems very minimal, with one informant going as far as to say that they "do not deal with those people". The Bloemfontein Bargaining Council representative said that she was willing to engage and assist LOSCs if they approach the bargaining council. She recalled how she wrote a letter to a main contractor on behalf of a sub-contractor, saying that the latter was unable to pay the stipulated wages, because the former was not paying enough on the contract.

The Western Cape collective agreement has a provision that renders the main contractor jointly and severally liable for the non-compliance by a sub-contractor. The new compliance manager is very enthusiastic about this provision, claiming that it works "fantastically". She has worked with the MEIBC and successfully invoked it against employers there. She indicated that it was a relatively new provision and that many contractors are unaware of it and its effect. The compliance team was currently trying to raise awareness about it.

Besides the joint and several liability clause, the compliance team in the Western Cape seemed to adopt a more proactive approach in dealing with LOSCs. A trade union representative reported that compliance agents regularly "cornered"

[22] Acts 130 of 1993 and 63 of 2001 respectively.

these sub-contractors by closing the gates to the site and taking their details down, in order to take further measures against them.

3.4 The extension of collective agreements to non-parties and exemptions

While the application of a collective agreement is restricted to the parties, the Minister may extend a collective agreement reached in a bargaining council to non-parties to the council.[23] This is an illustration of the LRA's bias towards centralised collective bargaining and majoritarianism.

There are several advantages to extending collective agreements to non-parties. One is that of uniformity in a sector or geographical area, prohibiting unfair competition by under-cutting. It also prevents the industrial unrest created by disparities in working conditions. Extending collective agreements also prevents the proliferation of employment negotiations in various bargaining forums and at different levels, thus saving employer and trade union parties' time and costs. It is therefore in the interests of bargaining council parties to secure the extension of a collective agreement to non-parties.

The parties to the bargaining council must apply to the Minister for an extension. The trade unions and employer organisations in the bargaining council must show that they represent and employ the majority of employees falling within the council's area of jurisdiction. However, the Minister has discretion to extend an agreement in the absence of majority representation. This is subject to two qualifications. The Minister must be satisfied that the parties are sufficiently representative and that failure to extend the collective agreement would undermine collective bargaining in the sector.

Because the extension of a collective agreement to parties that did not agree to its provisions has significant consequences for the parties involved, the LRA builds certain safeguards into the process. Firstly, as discussed above, the parties must be representative. Secondly, an agreement can only be extended for a fixed period, and the parties must motivate for the continued extension of the collective agreement when that period comes to an end. Thirdly, the LRA requires each bargaining council agreement to include exemption procedures for non-parties to whom an agreement is extended.

The collective agreements concluded in the building industry bargaining councils have all been extended to non-parties, and therefore bind all employers in the councils' respective jurisdictions. However, the continued extension of collective agreements is not a foregone conclusion, as the Minister has previously refused to extend collective agreements in Bloemfontein and the Western Cape. In Bloemfontein, the extension to non-parties was cancelled in February 2008, due

[23] See section 32 of the Labour Relations Act.

to a drop in union representivity to 37 per cent. Representivity subsequently increased to about 50 per cent and the Minister reinstated the extension later that year.

The Western Cape Bargaining Council struggled to have its agreement extended to non-parties after the Department of Labour refused to recommend that the Minister extend it in 2005. At that point, union representivity was just below 30 per cent and employer representivity was just below 50 per cent. The council made representations motivating the extension of the agreement to non-parties despite the low levels of representivity.[24] It also embarked on a campaign to increase union representivity by encouraging new entrants into the industry to join trade unions. Eventually, representivity increased to a level satisfactory to the department, and the Minister extended the agreement in July 2007.

Given the far-reaching implications of extensions to non-parties and the prevalence of smaller construction firms, one would expect the bargaining councils to be inundated with applications for exemptions.[25] The four building industry bargaining councils reported that they generally receive very few applications for exemptions from the collective agreements. This is because they prefer to "exempt" themselves by not registering with the council. The Compliance Manager of the Bargaining Council in the Western Cape indicated that there were no applications for exemptions in 2008. In the North and West Boland, only two applications were made in 2008 and both were unsuccessful. Only one application has been made in the last three years in Kimberley, and this was unsuccessful on appeal. There were no applications in 2008 in Bloemfontein.

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[24] The Council argued that it had removed onerous terms from the agreement that could prevent the establishment of new businesses or burden existing businesses; that it invited input from organisations representing small employers; that it provided for wage differentiation in the three areas delineated in the agreement, and that the agreement included measures to accommodate small businesses in the industry. See Godfrey, Theron & Visser, pp 23-4.

[25] The main criteria for exemption in the different collective agreements are broadly similar, and are as follows:

- The possible infringement of basic employment rights;
- The fact that a competitive advantage should not be created by an exemption;
- The extent to which the proposed exemption undermines collective bargaining and labour peace in the Industry;
- Any existing special economic or other circumstances which warrant the granting of the exemption;
- The effect of the exemption on any employee benefit fund or training provision in relation to the alternative comparable provision, including cost to the employee, transferability, administration management and cost, growth and sustainability;
- The reality that the majority of employers within the Council's area of jurisdiction as well as the majority of members of the employers party to the Council, represent the category micro to medium enterprises and employ between one and 20 employees.

See clauses 39(4), 23(11), 24(13) and 18(13) of the Kimberley, Western Cape, Boland and Bloemfontein collective agreements respectively.

According to bargaining council representatives, the few applicants for exemptions were mainly small firms. Medium and large firms employing more than 100 people were less likely to apply for exemptions, because they were likely to belong to the Master Builders' Association, which was a party to the agreement. Generally, very small and informal operations do not apply for exemptions at all. This shows that employers that do not wish to (and in fact do not) comply with the collective agreement do not see the need to apply for exemption: they consider the risks of being brought to account for non-compliance as very high.

A number of reasons were given in support of applications for exemptions. Most employers said that they were small operations, and therefore unable to pay the wages stipulated in the collective agreements. In some cases, employers cited demarcation issues, arguing that they did not fall within the jurisdiction of the bargaining council concerned. In the North and West Boland, some employers claimed to have their own pension funds, and did not require the benefits provided by the bargaining council. Interestingly, the Kimberley Bargaining Council representative reported that in most cases the employer claims that the workers themselves did not want to fall under the bargaining council as they do not wish to have benefit contributions deducted from their pay as this would leave less money to take home.

Because of the voluntary nature of the Gauteng VBF, the parties have no legal power to extend the terms of their collective agreements to non-parties without their consent. Strictly speaking, the VBF's collective agreements are only binding on the nine employer parties to the forum. However, the collective agreements have wider application for a number of reasons.

Firstly, the framework agreement provides that employers that are not part of the VBF may subject themselves to terms and conditions of the collective agreements if the Gauteng MBA that negotiates on the forum represents them. There were no current figures of the number of employers represented by the Gauteng MBA, although there were eight in 2005.

Secondly, employers could choose to comply with the terms and conditions of the collective agreement by signing the agreement in their own right. The researcher could not establish how many employers were tertiary signatories to the collective agreements.

Thirdly, union informants noted that some employers outside the forum "kept their ears to the ground" to find out the new terms and conditions agreed upon in the VBF, and chose to apply these.

An informant from AUBTWSA said that the union approached approximately 100 employers who fall outside the forum. About 30 of these (mainly comprising medium to large-scale operations) were willing to pay the rates agreed upon in

the Gauteng forum. It could not be established what proportion of these were secondary or tertiary signatories to the agreement. The union said that it needed to enter into negotiations with the remainder, who were smaller employers that were usually unable to pay the agreed rates. The unions used the VBF's agreement as a standard and tried to persuade these employers to aspire to it. This is known as "pattern bargaining".

Fourthly, the framework agreement prohibits signatories to the collective agreements from reducing rates and conditions of employment for employees transferred outside of Gauteng. Trade union informants said that employers based in Gauteng generally applied the VBF's provisions to their employees working outside Gauteng in areas where no collective agreement existed. Fifthly, trade union parties to the VBF indicated that they used the collective agreement as a benchmark when negotiating with employers operating outside the jurisdiction of the bargaining councils and the VBF. In all these ways, the collective agreements reached in the VBF have a "ripple effect" on other employers in Gauteng and beyond.

As discussed above, the agreements concluded in the civil engineering NBF are only binding on the parties to the agreement and cannot be directly extended to non-parties. The agreement is indirectly extended to non-parties insofar as its provisions are incorporated into the sectoral determination, which applies to the entire civil engineering industry. Thus far, the Minister has incorporated the wages and job grading systems into the determination. Other conditions, such as annual bonuses, have also been incorporated into the determination.

However, the Minister does not indiscriminately extend the terms of the NBF's agreements to the entire industry. For example, the Minister did not incorporate the provisions of the 2006 agreement relating to medical aid and funeral and pension benefits for LDC workers into the sectoral determination. It was deemed necessary to leave some of these issues to be determined by the relevant parties (individual employers, trade unions and the relevant benefit providers). An investigation was to be conducted to determine the application of medical aid benefits. Such provisions of the agreements are therefore only binding between SAFCEC and the trade unions.

The BCEA allows the Minister to exclude or vary basic conditions of employment in a sectoral determination.[26] The Minister may do so in respect of a specified category of employers and employees. In addition, an employer or registered employers' organisation may apply for the exclusion or variation of provisions of a sectoral determination.

There is no evidence of applications for exclusion from or variation of the provisions of the civil engineering sectoral determination. However, the minimum wages gazetted in the sectoral determination of 1999 expressly excluded

[26] Section 50 of the BCEA.

employers employing less than 20 employees, and whose annual turnover did not exceed R500 000; this was clearly a measure to ease the burden of small and emerging contractors who would be unable to pay the same rates as larger contractors. This exclusion clause was removed from the sectoral determination in 2004, presumably to prevent undercutting of wages by smaller contractors.

3.5 Non-compliance with collective agreements

Non-compliance with the provisions in collective agreements was identified as one of the greatest challenges confronting collective bargaining. This was largely exacerbated by the prevalence of informal operators who are not registered, and are difficult to bring to account.

Several areas of non-compliance were identified, with some being more prevalent than others. Bargaining council and trade union representatives noted that some employers did not register their employees with bargaining councils. In most cases, these employers did not pay the stipulated wages. However, the bargaining council representative in Kimberley said that under-payment of wages was not a major problem.

All informants, including employer representatives indicated that the non-payment of benefit contributions to the bargaining councils was the most serious problem. Two main reasons were identified. One (given by a trade union representative) was that in most cases, unscrupulous employers deducted the contributions from the workers' salaries and then neglected to pay them over to the bargaining council, claiming that they did not have the money.

Some bargaining council and trade union representatives indicated that it was the employees themselves who refused to have this money deducted from their wages, as they would rather have cash in hand. An informant in the Western Cape indicated that it was common for workers to bypass the collective bargaining process and reach their own agreements with their employers. The bargaining council representative in Bloemfontein said that many workers tried to "have their cake and eat it", by refusing to have their contributions deducted and then later asking the council to assist them in claiming their benefits from their employer.

The compliance provisions in the bargaining council agreements contain the same essential elements as laid out in the LRA.[27] The collective agreements provide for the appointment of designated agents to investigate contraventions and ensure compliance with the agreement. Agents are granted wide-ranging powers to inspect premises; to seize evidence; to subpoena and question

[27] See clauses 8, 23(6)-(11), 14-5 and 26-7 of the Kimberley, Boland, Bloemfontein and Western Cape agreements respectively and section 33 and 33A of the LRA.

witnesses and issue compliance orders. If these efforts fail, the bargaining councils can refer matters for arbitration.

The Western Cape, which has by far the most sophisticated compliance machinery of all the bargaining councils, can be described as a model of good monitoring and compliance enforcement. The compliance system includes the following features:

- It holds the main contractor jointly and severally liable for non-compliance by sub-contractors.
- Inspections are proactive and plans-driven. The compliance team selects a sample of building plans and goes out to inspect the building sites. They also scan the media reports for new projects and buildings and inspect those building sites.
- The compliance team move around with laptops with 3-G technology, which enables them to tap into the database while on site and check if the employer under investigation is registered and in good standing with the bargaining council.
- They also have a programme known as "finders and minders inspections", where a bargaining council staff member is given a R50 reward for reporting a building site that is found to have unregistered contractors or sub-contractors on it.
- They have targeted institutions that generate the most building work to encourage them to work only with firms that are registered with the bargaining council. They have also approached banks and other loan institutions to do the same. A letter from the regional Secretary of COSATU, which appeals for greater compliance in the industry, has played an important role.
- The council has adopted a positive marketing and educational approach to encourage voluntary compliance. It has attempted to become user-friendly and to offer benefits to registered firms, such as labour relations and entrepreneurial training and seminars on topical issues.

While it has had a dedicated compliance team for many years, the Western Cape Bargaining Council recently appointed a compliance manager "to steer the ship", as one of the trade union representatives put it. Informants from the trade unions and the employers association indicate that this is a positive step that has led to a reduction in non-compliance in the region.

In Bloemfontein, the General Secretary of the Bargaining Council and her assistant first deal with complaints by trying to engage the employer via telephone. If they are unable to reach agreement, they declare a dispute and refer the matter for conciliation and arbitration. The Secretary General and her assistant do not do site inspections, and only visit sites to advise workers about their rights and to inform them of new developments affecting them. They also take this opportunity to find out the workers' grievances and then compile them

and present them to employers to try and help them resolve the grievances. They have found that this approach is more effective than a directly confrontational approach.

The Gauteng VBF does not have special enforcement measures to ensure compliance with its collective agreements. This is partly because all the parties join the forum (or sign collective agreements) on a voluntary basis, participate in the wage negotiations and consent to the outcome. In addition, the framework agreement records that the parties did not intend for expenses to be incurred in the administration of the agreement. Disputes about non-compliance with the agreement must be referred for conciliation and arbitration at the Commission for Conciliation, Mediation and Arbitration (CCMA) in the manner that other collective agreements are dealt with under the LRA. No problems of non-compliance with the VBF collective agreements were identified by trade unions.

Substantial portions of the civil engineering collective agreement are incorporated into the sectoral determination. The enforcement of sectoral determinations falls under the BCEA, which provides for labour inspectors to take measures to secure compliance. Matters can also be referred to the Labour Court, which has exclusive jurisdiction over BCEA matters. Two trade union representatives (erroneously) stated that the correct procedure for the enforcement of sectoral determinations was to refer matters for conciliation and arbitration to the CCMA in terms of the LRA.

It was difficult to gauge the extent to which civil engineering employers were compliant with the sectoral determination or the collective agreement. The representative of BCAWU argued that the sectoral determination was a "weighty document" and that most employers complied with the agreement. He argued that if a trade union approached a non-compliant employer, the matter was resolved quickly because their legal advisors encouraged them to comply with the sectoral determination. On the other hand, a BWAWUSA representative said there was very little compliance with the conditions stipulated in the sectoral determination, which he considered to be a weak instrument. He argued that this was because the labour inspectorate was largely unresponsive to complaints against employers.

3.6 Non-representation of small employers in the bargaining forums

Historically, the construction industry has been dominated by medium and large white-owned firms. However, an increasing number of smaller operations are emerging, many of which are black-owned. While some of these are contractors that tender for projects, many are subcontractors (the majority providing labour only) that depend on large contractors for work. These operations are increasingly employing a greater share of the construction workforce.

The representation and participation of emerging operations in the collective bargaining forums is crucial to ensure their co-operation and compliance with the collective agreements. They have generally been marginalised and excluded from centralised collective bargaining forums. Many refuse to comply with collective agreements entered into by parties that do not represent or consider their circumstances and interests.

In this section, we consider the extent to which small construction firms are represented in the employers' associations that dominate centralised collective bargaining forums in construction, namely the MBAs and SAFCEC. We also examine the organisations that have been established to represent small construction firms and their role in collective bargaining.

The Master Builders' Associations

Regional Master Builders' Associations (MBAs) were established in the early 1900s. Historically, they represented white contractors in the building industry. In 1904, the Building Industries Federation of South Africa (BIFSA) was formed to represent all the MBAs and further their collective interests at a national level. About a century later, it changed its name to Master Builders South Africa (MBSA).

Like its predecessor, MBSA merely plays a coordinating role, and the member associations retain their autonomy to develop their own policies regarding issues such as collective bargaining. There are presently six provincial associations, namely Gauteng, the Western Cape, the Northern Cape, the Free State, Eastern Cape and KwaZulu Natal. There are also two regional associations, one in the North Boland and the other in the West Boland.

Emerging contractors face several barriers to joining the MBAs. One such barrier is formality, which usually entails registration with the revenue services. Prospective members must also demonstrate the quality of their work, which usually requires some previous experience on well-known projects. Costs of membership are also prohibitive for many emerging contractors. Furthermore, the few emerging contractors that could overcome these barriers would probably lack the necessary resources to make themselves available for election as office bearers.[28] While MBAs are largely regarded as representing the interests of white, elite contractors, they have made efforts to market themselves to include black contractors. It is unclear whether these efforts have been successful,

[28] These include office, administrative and support staff, and other management personnel to substitute during their attendance at meetings. Goldman, T *Organising in the Informal Economy: A case study of the building industry in South Africa*, ILO SEED Working Paper Series (Geneva, ILO: 2003) p 54.

SAFCEC

SAFCEC was established over 60 years ago as a national organisation to represent the interests of its members. It claims that its members "were intimately involved in the creation of the infrastructure that became the envy of our continent". Its membership has historically been drawn from white-owned firms. Applicants for full membership must show proof of registration with or for the following:

- Income tax (both as a taxpayer and as an employer),
- The Unemployment Insurance Act
- Skills Development Act
- Compensation for Occupational Injuries and Diseases Act (COIDA)
- Regional Services Council Act
- Value Added Tax (VAT)
- Construction Industry Development Board (CIDB).

These requirements indicate that prospective members must be fairly well established to qualify for membership to SAFCEC. In recognition of these high entry barriers, SAFCEC has developed a special membership category for emerging contractors so as to improve their access to the organisation. Prospective members must be less than five years old, have an annual turnover of less than R5 million and/or a CIDB rating of 1 to 5.[29] Applicants must at least be registered for income tax, VAT and COIDA. An application must be supported by two SAFCEC members, or alternatively the applicant must provide details of clients or partners that they have worked for or with as a company (as opposed to as an employee).

SAFCEC also provides support for emerging contractors with training, tendering, contract management and financing. It also facilitates a structured enterprise development programme in which an experienced contractor coaches, mentors and guides a developing contractor for three to five years. An experienced mentor's participation in the programme counts towards their Black Economic Empowerment scorecard in terms of the Broad Based Black Economic Empowerment Act of 2003. However, this programme is not accessible to all emerging contractors as preference is given to contractors of a CIDB grading of 3

[29] The CIDB was established by an Act of Parliament in 2000 and, amongst other things, is mandated to establish a national register of contractors and of construction projects to systematically regulate, monitor and promote the performance of he industry for sustainable growth, delivery and empowerment. It aims to transform the industry through ensuring consistent and ethical procurement practices. All contractors that tender for contracts for construction works in the public sector must register with the CIDB register of contractors. Its register of contractors represents the capabilities of contractors for procurement reasons, in order to reduce risks for contractors and clients. The CIDB has nine grading levels determined by an assessment of both financial and works capabilities. A contractor with a tender value range of 1 is considered capable of executing contracts of up to R200 000. A contractor with a tender value range of 5 is capable of performing a contract to the value of R6.5 million and a contractor with a tender value range of 9 is capable of executing construction contracts of more than R130 million in value.

and higher. This tends to exclude the majority of emerging enterprises, which fall within the CIDB grading of 1 and 2. The researcher could not get information on the number of emerging contractors registered with SAFCEC or the success of the enterprise development programme.

The above shows that the majority of emerging contractors are still far from being fully integrated into the employers' organisations that dominate centralised collective bargaining forums in both the building and civil engineering industries. It can be assumed that those emerging contractors that are members of these organisations do not have sufficient muscle to influence collective bargaining and ensure that their circumstances are considered in the process.

Some have argued that absorbing these emerging contractors into the MBAs and SAFCEC is unwise, as the latter cannot adequately identify with and meet the needs of these contractors. It is therefore necessary to consider the (actual and potential) role that organisations specifically representing emergent contractors can play in the collective bargaining process.

Generally, the organisation of small employers in the construction industry has been weak or non-existent. The few organisations that have been established over the past decades generally seem to have collapsed before gaining momentum. One difficulty is that emergent contractors lack the resources to start and participate in organisations. For some time, there was disunity amongst the organisations, which tended to view each other as rivals. Lack of legitimacy is another problem, as sceptics have questioned the motives of the leaders of these organisations. Some outsiders believe that these organisations have questioned the "flashy" lifestyles of some leaders, claiming that they merely wanted access to the "perks" of being in the formal net, such as networking, supplier discounts and access to credit.

We now examine three organisations that were established to represent small contractors in construction. Two of these, the South African Subcontractors' Association (SASCA) and the Small Builders' Association (SBA), operated in Cape Town and are no longer operational. The National Black Contractors and Allied Trades is operational, and seems to be the largest association of emerging contractors.

The South African Subcontractors Association (SASCA)

SASCA was born in the midst of the tensions between the trade unions and the Western Cape MBA that rocked the council between 1994 and 2000. During that period, many employers (including large contractors) in the building industry had persuaded artisans to work as LOSCs, thus eroding the membership base of the trade unions. Several times, the MBA had threatened to close the bargaining council.

There was support for the establishment of an organisation to represent the interests of LOSCs in the Western Cape building industry. One of the main objectives was to provide LOSCs with a voice to counterbalance the dominance of the MBA in the bargaining council. A pressing problem identified by LOSCs was that the rates paid by main contractors were inadequate and did not allow them to pay their workers fairly. It was hoped that an association would establish standard rates for specific work to prevent undercutting and establish a uniform level for bargaining with main contractors. Another objective was to set measures in place to prevent the underpayment of employees of LOSCs.

Interestingly, the director of one of the building trade unions initiated the establishment of the organisation. The union hoped that strengthening LOSC operations would enable them to pay workers according to bargaining council rates. This would boost trade union membership. An application was submitted to the Department of Labour in September 2000, and the organisation was registered as an employers' organisation in June 2001. At the time, it had 31 founding members who were collectively employing 1 754 workers. A Chairperson, Vice Chairperson, Secretary, Marketing Manager and two Directors were appointed.

The membership application form required basic information relating to the address, contact details, business registration and previous membership of the relevant member. Members had to indicate the number of workers they were employing. Subcontractors did not have to register a separate business entity, but had to be registered as employers with the bargaining council, the UIF and COIDA. Because SASCA provided information and assistance to prospective members who were not duly registered, no application for registration with the association was rejected. Applicants had to provide a list of projects undertaken within the past year and references to attest to the standard of work and compliance with regulations. This required the co-operation of the main contractors, many of whom belonged to the MBA.

Members were expected to pay annual subscription fees. In return, they would be provided with training and skills, particularly in entrepreneurship and business management, as well as advice on seeking tenders. They would also receive information and assistance with insurance, industrial relations and occupational health and safety matters. They would also have the opportunity to advertise in a directory of subcontractors and be informed of industry developments through newsletters and bulletins. It was also hoped that displaying the SASCA logo would be a good marketing tool for members.

By 2003, SASCA claimed to have a membership of between 300 and 400 LOSCs, of which only one had been established by a white person. Of these, only 23 were registered with the BIBC. In addition, SASCA had one of the ten employer seats in the bargaining council. While this gave them a voice, they probably did not have significant influence in the bargaining council. Relations

with the MBA seemed to be generally hostile. However, some established contractors were co-operative and supportive of the organisation as they felt there was a need for it.

The Department of Labour deregistered SASCA as an employer organisation in 2006 on the grounds that it was no longer performing its functions as an employer organisation. The failure of SASCA was largely due to financial problems. Most of the members were "ordinary people" who worked from their homes, lacked business acumen and managerial skills and were unable to handle their finances and pay their member subscriptions. At the time of deregistration, SASCA had 55 members who were employing just under 2 000 workers.

The Small Builders Association (SBA)

This association was also established in the Western Cape and was a rival of SASCA. The researcher was unable to get much information regarding its establishment and operations. Some informants claim that it was a "one-man show" – the chair remained the same throughout – and was therefore not a "real organisation". It is known that at some stage it had a seat in the Cape BIBC. However, this was withdrawn and by 2006, it only had observer status in the Cape BIBC. Research conducted in 2002 reports that the SBA was "ideologically opposed to centralised collective bargaining" and participated in the BIBC "only to voice its objection to a 'system that raises labour rates above the market level'".[30] At that time it had 12 members employing about 118 employees. The SBA was deregistered by the Department of Labour in 2008.

The National Association of Black Contractors and Allied Trades (NABCAT)

NABCAT was established in 1993 under the direction of the State President's office in terms of the Government's empowerment policies. It was established to respond to the need for an umbrella body to facilitate the admission and participation of black construction and allied trades' enterprises in the mainstream construction economy. It emerged from an amalgamation of the African Builders' Association (ABA) and the National African Federated Chamber for the Building Industry (NAFBI, now called NAFCOC Construction), both of whose national, provincial and regional structures were integrated into the new forum.

NABCAT currently boasts a total membership of about 20 000 construction firms in the nine provinces. Its main areas of support are capacity building through various development programmes, and the provision of support in gaining access to finance, technical and managerial expertise, plant and machinery resources. NABCAT also assists its members to obtain contracts. It represents its members and participates in a number of forums and programmes, such as the National

[30] Goldman, (2003) p 25.

Home Builders' Registration Council, the CETA, the CIDB, the Expanded Public Works Programme (EPWP) and the Construction Sector Charter.

At a glance, NABCAT seems to have a solid foundation and a strong following amongst emerging construction enterprises, although it seems to have a bias towards higher-end formal businesses. It seems to be a credible institution that is playing some role in furthering the interests of these enterprises in the industry. While it would be a potential candidate to represent the concerns of emerging contractors in the various collective bargaining forums, this does not seem to be the case. NABCAT claims that one of its objectives is to "espouse good labour relations within the construction industry and allied trades". However, other than facilitating access to skills development, it does not seem to have a role with regard to labour relations and collective bargaining. It is not registered as an employers' organisation, and has no history of participation in any of the collective bargaining forums in either building or civil engineering.

4 THE FUTURE OF COLLECTIVE BARGAINING IN THE CONSTRUCTION INDUSTRY

A number of challenges facing collective bargaining in the construction industry have been identified and discussed above. What remains is to map the way forward for the future of collective bargaining in the industry.

We begin by discussing the options for bridging the gap between the collective bargaining arrangements in building and civil engineering. We first consider the feasibility of the parties voluntarily establishing collective bargaining arrangements to deal with the fragmentation. One possibility is the formation of a single collective bargaining forum to determine conditions of work for employees in both civil engineering and building. The alternative is the formation of a national collective bargaining forum for the building industry only.

We then consider policy options that could be initiated by the Minister of Labour. The first is the extension of the current civil engineering sectoral determination to the building industry, which has been mooted by the Minister of Labour. The second is the possibility of establishing a separate sectoral determination for the building industry.

Finally, we make general recommendations for the strengthening of union organisation and collective bargaining in response to some of the pressing issues raised above. The implementation of these recommendations would require concerted efforts from trade unions and industry as well as government and other institutions.

4.1 Policy options for bridging the gap in collective bargaining arrangements

A unified bargaining forum or a separate national bargaining forum for the building industry?

The proposal for a national bargaining forum has been mooted by trade unions representing workers in both the civil engineering and building sectors.[31] A unified bargaining forum would include SAFCEC and the MBAs, as well as all trade unions representing workers in building and civil engineering that are sufficiently representative. The unions argue that a unified forum could ensure consistent working conditions when workers are moved between civil engineering and building divisions within the same firm.

There are several objections to the creation of a unified bargaining forum for civil engineering and building. Some of them relate to problems with rationalising the different bargaining institutions and the current terms and conditions of employment in the industry, and are discussed in the section below. It is evident that the greatest stumbling block would be overcoming the resistance of employer organisations, existing bargaining councils and forums and (some) trade unions to bringing the parties together.

While employer organisations were reluctant to state their official position regarding a unified forum, there were indications that they would resist such a proposal. Although there is an overlap in SAFCEC and MBA membership, the organisations regard themselves as representing distinct industries facing different issues and challenges. They have different approaches to collective bargaining, making it a challenge to bring them together to bargain.

Another problem relates to the representivity of the trade unions. Most trade unions concentrate their organising activities in certain areas, and have relied on their regional representivity for participating in regional collective bargaining. In their view, the creation of a unified forum for both industries would create a much bigger bargaining unit. This would further dilute their representivity, making it impossible for most of them to participate in such a forum. These concerns could be addressed by relaxing the representivity requirements for the establishment of a forum, and including less representative trade unions provided they are collectively representative of the employees.

The establishment of a national bargaining forum for the building industry only is less ambitious than the previous option. Nevertheless, it is also presents its challenges. While trade unions generally support this proposal, some believe that employers would resist these moves. The different MBAs are divided on the issue of collective bargaining. Most of them declined to comment, as they felt it

[31] The unions agree that there is a need for a unified forum *in principle*; however, some acknowledge that it would be difficult to implement this in practice.

was a highly sensitive issue. However, the general consensus seems to be that the associations prefer their autonomy in determining their collective bargaining arrangements. They are comfortable with their working relationships with employee representatives in their current arrangements, and see no need for a national collective bargaining forum. MBSA has thus far endorsed the autonomy of the regional MBAs' autonomy to determine collective bargaining arrangements, and appears unlikely to intervene to prescribe a unified approach.

Low national trade union representivity has also deterred the trade unions from persuading employers to come together to bargain in a national forum. It is theoretically possible that the parties could agree to a lower union representivity threshold to establish a bargaining forum, as was the case in the civil engineering NBF. However, given the MBAs' opposition to a national forum, it is unlikely that they would make such a concession. A lower threshold would also fall short of representivity requirements for a bargaining council and exclude the possibility of extending the agreement to non-parties.

Given the experiences in the Western Cape and Bloemfontein, one cannot dismiss the possibility of the Minister refusing to extend a collective agreement on grounds of representivity. This would not rule out the Minister's prerogative to promulgate a sectoral determination for the building industry and use the collective agreement reached in a national forum as an input document.

The above shows that the probability of the formation of a national bargaining council for the building industry is very low. The probability of the parties forming a unified bargaining forum incorporating both the building and civil engineering sectors is even lower. In the absence of some intervention by the Minister, it is likely that the current fragmentation of collective bargaining arrangements will continue to exist. We now consider the possibility of a sectoral determination by the Minister of Labour.

A sectoral determination covering the building industry?

A sectoral determination would be the best way for the Minister to intervene to regulate working conditions in the construction industry. We first consider the possibility of extending the current civil engineering sectoral determination to the building industry, as was mooted by the Minister in a recently published government notice. We then consider the possibility of establishing a separate sectoral determination for the building industry.

In March 2009, the Minister published a notice inviting representations on the review of the civil engineering sectoral determination.[32] The terms of reference of the investigation are to review the wages and conditions of employment in the civil engineering sector and "to establish the feasibility of extending the scope of

[32] Government Gazette Vol. 525 No. 31998 (GN 275) Basic Conditions of Employment Act (75/ 1997) Sectoral Determination 2: Civil Engineering Sector, South Africa.

the application to include the building and construction sectors under Sectoral Determination [sic]".

The Minister's notice signals an intention to apply the terms and conditions of the civil engineering sectoral determination (which is currently determined by stakeholders in the civil engineering sector) to the building industry. A number of concerns would need to be addressed before this would be acceptable to stakeholders in both the civil engineering and building sectors.

One concern is the extent to which representatives of employers and employees in the building industry would be able to influence the Minister in the making of the sectoral determination. As indicated earlier, the Minister currently gives considerable weight to the NBF's collective agreement and the representations of the employers and unions in the civil engineering industry. However, this cannot continue to be the case if the building industry is to be affected by the civil engineering sectoral determination. The participation of the building industry in the consultations would certainly change the current dynamics in the sectoral determination process.

The current fragmentation in the building industry would restrict its ability to play a meaningful role in the process. The need to speak with one voice in this forum could well galvanise the building industry into forming a national forum in which to agree on proposals and strategy for participation in the sectoral determination process. However, as already indicated, this would not be without its problems.

Another challenge would be the need to rationalise the job categories and grading systems, which differ markedly between ,civil engineering and building and within the building industry. Some trade union representatives (while supporting efforts for greater parity between building and civil engineering) argue that the job grading systems in civil engineering and building are incompatible.

There is consensus amongst the representatives of the five trade unions that very few skills are interchangeable between building and civil engineering. However, there is little consensus about what skills are interchangeable. One trade union representative said that bricklaying and plumbing were interchangeable. Another said that steel fixers, scaffolders and shutterhands could work in either sector. Another said plastering, paving and woodwork were interchangeable. Two union representatives said there was very little overlap between the two sectors as the skilled work was quite specialised. They noted that the movement of workers mainly happened at the level of unskilled general workers, a view that was echoed by their counterparts in civil engineering.

A further problem is that the widely differing wages for workers (especially unskilled workers) between the different building collective agreements and the civil engineering sectoral determination would have to be harmonised. Presently, the building industry rates are, with the exception of the Western Cape, lower

than those in civil engineering. Striking a balance in the building industry itself would be highly problematic, given the significant variations between wages within certain bargaining councils and amongst them. Bridging the gap would be resisted both by building employers unwilling to pay markedly higher rates and by civil engineering workers unwilling to receive lower rates.

From the above, it is clear that the proposal to extend the sectoral determination to include the building industry would not be a simple exercise, although it is not impossible. Significant changes would have to be made to accommodate job categories in the building industry that are currently not regulated in the sectoral determination. Extensive consultation of all the parties would be necessary, to ensure that the job grading system chosen adequately represented the realities of the construction industry. Harmonising wages would prove a difficult task, as sacrifices would have to be made to ensure parity between workers, particularly those who are unskilled. It would be unwise to implement drastic changes over a short period of time; a gradual phase-in would be necessary to ensure the accommodation of both employers and employees.

An alternative to the extension of the sectoral determination to cover the building industry is to establish a separate sectoral determination for the building industry. This could create uniformity in the building industry without the added complication of harmonising with the civil engineering industry. Once stability in the building industry was achieved, efforts could be made towards harmonising conditions of work with the civil engineering sector. As in the case of the extension of the civil engineering agreement, a sectoral determination for the building industry could induce the parties to establish a national bargaining forum to reach agreements that would be influential in the process.

Another important challenge would be the regional differences in wages and benefits. Currently, general workers in the Cape Peninsula earn R17.65 per hour, which is 140 per cent more than the Kimberley hourly rate of R7.35. In addition, the availability and eligibility criteria for the benefit funds administered in the different regions differ markedly. It is suggested that the approach in the civil engineering sectoral determination be followed, namely allowing for regional differences and gradually phasing in uniform minimum rates and benefits.

Another question relates to whether the establishment of a sectoral determination (and possibly a national bargaining forum) would eliminate collective bargaining at plant and regional level. There is obviously a need to ensure uniformity across the country to ensure equity amongst all workers in the industry. However, this should not preclude separate bargaining arrangements from providing superior conditions to those regulated in a sectoral determination. This is the case under the current civil engineering sectoral determination, where the provisions of the NBF's agreements that are not incorporated into the sectoral determination continue to be binding between the parties, provided they do not derogate from the rights in the determination.

There are other reasons for allowing for the continued existence of the building industry bargaining councils in certain regions. First, bargaining councils provide important administrative functions, such as the management of benefit funds. They also perform enforcement functions, such as inspections, searches and issuing of compliance orders, which are essential given the ineffectiveness of the Department of Labour's inspectorate. Furthermore, they provide dispute resolution functions that are tailored to the industry and relieve the CCMA's caseload.

The few bargaining councils that are still operating are important institutions, which should be retained at all costs, even if divested of their power to enter into collective agreements. It may be ideal to build on the strengths of these institutions and extend their spheres of influence to other areas while building towards the establishment of a national bargaining council. Sadly, the collapse of four bargaining councils shows that the revival of councils will be a challenge.

This section attempted to map the different options available to bridge the gap between the civil engineering and building industries. It showed that the voluntary establishment of a unified collective bargaining forum or a national building bargaining forum is not impossible, but is not very likely.

What is more feasible is some intervention by the Minister, which may provide stakeholders with the impetus required to form a bargaining forum to influence the outcome of a sectoral determination. The extension of the current sectoral determination to the building industry presents significant challenges, but these are not insurmountable.

What seems more appropriate at this stage is the establishment of a sectoral determination for the building industry, with a long-term commitment to establishing parity with the civil engineering sector. However, in doing so, the resistance of employers' associations, the variations between the different regions and the status of the existing bargaining forums would have to be addressed.

4.2 Recommendations for the better enforcement of labour standards in the industry

Part 3 highlighted some of the challenges confronted by institutions involved in collective bargaining in the construction industry. Options to address the fragmentation of the collective bargaining arrangements have been addressed in section 4.1 above.

This section briefly outlines recommendations to address some of the other challenges identified in Part 3. Most importantly, trade unions need to address

the organisational challenges presented by non-standard forms of employment such as LDCs and LOSCs. Another important challenge is to secure the co-operation and compliance of emergent contractors with labour standards established for the industry.

At present, the five major trade unions in the industry recruit amongst the LDC employees. NUM and BCAWU have gone further and negotiated benefits for LDC employees, namely a gratuity and funeral and pension benefits. This indicates that these unions consider LDC employees to be a significant component of their membership. The problem is that many of the LDC employees do not see the need to join the union, given that they benefit from the efforts of the trade unions regardless of membership. One union has had to resort to the establishment of agency shop agreements with some employers in order to deal with this challenge.

Thus far, efforts in the building industry to ensure the compliance of small contractors and labour only subcontractors have focused on holding main contractors jointly liable for non-compliance. This is true in the building industry. It is necessary to engage with them to ensure that they are involved in bargaining processes that impact upon them and their employees. Unfortunately, efforts to organise small subcontractors have been largely unsuccessful. NABCAT, an organisation that apparently has a large following, could potentially represent emerging contractors, but it has not registered as an employers' organisation with the Department of Labour. It is in trade unions' interests to convince NABCAT to substantiate their claims of supporting fair labour practices by registering as an employers' organisation and participating in these forums.

It is necessary to get institutions that generate construction work to co-operate in restricting the allocation of projects to contractors that comply with the relevant provisions of legislation and collective bargaining agreements. As explained above, government tender criteria do not include labour compliance requirements, and this has led to the violation of labour standards in government projects. It is necessary to engage with government institutions that generate construction work (e.g. the Public Works Department and the Department of Housing), so that they tighten up tender requirements and require that tenderers are registered in terms of relevant labour laws, such as compensation and unemployment insurance.

The Construction Industry Development Board also has an important role to play in ensuring that emergent contractors comply with legislation. Many of these contractors view the CIDB as a gateway to obtaining lucrative contracts in both the public and private sectors. At present, applicants are not required to be registered in terms of labour legislation. There is also no requirement that contractors operating in areas where there are bargaining councils should be duly registered and compliant with those councils. The CIDB has a category of emergent contractors who have the potential to be registered provided they

comply with certain requirements. It is suggested that at a minimum, registration in terms of labour laws and with the relevant bargaining councils be a requirement for full registration.

5 CONCLUSION

This report has outlined the collective bargaining arrangements in the construction industry. It has highlighted the stark contrast between the unified bargaining forum in the civil engineering sector and the fragmented arrangements in the building sector. The most immediate challenge is to address the fragmentation within the building industry itself. This is critical given the disparity of working conditions in the various regions. It has been argued that attempting to unify bargaining arrangements for building and civil engineering would be premature at this stage, but may be a medium- to long-term objective.

Various options for future collective bargaining arrangements have been discussed in this report. It is too early to say what option the stakeholders will choose to address the problems identified. Nevertheless, the future of collective bargaining in the construction industry will to some extent depend on the representivity of the parties, with trade union representivity being the most controversial. Given the low union representivity in the industry, the intervention of the Minister of Labour will be necessary to ensure the extension of collective agreements to all workers in the construction industry, at least in the short-term, until sufficient representivity is reached.

The success of the model adopted depends on the stakeholders' ability to encourage consultation, co-operation and synergy building amongst the different institutions, such as trade unions, employers and their organisations, and state institutions. It will be necessary to create more opportunities for the different stakeholders to come together to debate the issues surrounding collective bargaining and share experiences and best practices.

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List of interviewees

Building Industry Bargaining Councils

Mr. Cecil John Damingo, Southern and Eastern Cape Bargaining Council

Mr. Serfontein, Manager, Kimberley BIBC

Mr. Isaac Strauss, Manager, North and West Boland BIBC

Ms. Michelle Van den Berg, Compliance Manager, Cape BIBC

Mrs. Van Vuuren, General Secretary, Bloemfontein BIBC

Trade union representatives

Mr. Rod Damon, Executive Director, BWU

Mr. Patrick Hlengisa, Regional Co-ordinator for the Western Cape, NUM

Mr. D.K. Kgonyane, BCAWU

Mr. Legoate, Regional Co-ordinator, AUBTWSA

Mr. Modiagane, Regional Organiser for Gauteng, BCAWU

Mr. B. Ngcobo, Regional Co-ordinator for KZN, NUM

Mr. Wilson Poni, Assistant Secretary General, BWAWUSA

Master Builders' Association

Mr. Rob Johnson, Executive Director, MBA

Other interviewees who spoke on condition of anonymity

7 building subcontractors
9 labour-only subcontractors
8 workers on construction sites
10 work-seekers

APPENDIX 1: THE CONDITIONS OF EMPLOYMENT SET OUT IN THE BUILDING INDUSTRY COLLECTIVE AGREEMENTS

The following discussion covers only certain aspects of the many conditions of employment set out in the collective agreements. Firstly, we examine basic hourly wages for different categories of employees across the different regions. Secondly, we examine the different benefit funds established by the bargaining forums, with a focus on the categories of workers that are eligible for the benefits. Next, we examine the daily hours of work stipulated and the provisions relating to overtime work. Fourthly, we consider leave provisions relating to annual leave, sick leave, maternity leave and family responsibility leave.

Following this, we look at the provisions relating to temporary lay-offs, notice of termination of employment and retrenchment provisions. Then we examine safety and security provisions. Finally, we consider provisions relating to training and skills development. We conclude with some general remarks on the provisions in the collective agreements.

Before embarking on a discussion of the conditions of employment in these seven areas, we examine the categories of workers that are covered by the collective agreements, paying special attention to those at the lower end of the spectrum.

Categories of workers covered

All the collective bargaining councils provide for a general worker category and an artisan category, and some have learner/trainee categories, which fall between general workers and artisans. In some cases, there were several classes of artisans in a particular field. In addition, two bargaining councils apply differential wage rates in the different areas covered by the agreements. For instance, the Kimberley collective agreement differentiates between Kimberley and Gordonia. The Western Cape agreement covers three main areas.

Bargaining councils typically have a category of workers who fall below the "general worker" category. In the Western Cape, a "labourer" is a worker entering the building industry for the first time. The collective agreement provides that once the worker has paid 500 daily benefit contributions with the council, a labourer is automatically promoted to a general worker.[33]

The Bloemfontein agreement makes reference to a "casual worker", defined as a worker who has worked for the same employer for "no longer than four

[33] Labourers in the Western Cape must contribute towards two benefit funds, namely the holiday fund and the sick pay fund, so 500 benefits contributions translate into 250 working days or 50 weeks. See definitions clause and clauses 13 and 15 of the Western Cape collective agreement.

consecutive weeks".[34] The North and West Boland collective agreement distinguishes between a "beginner" general worker and a general worker. The "beginner" general worker is defined as a worker who has been registered with the council for the first time and does the same work as a general worker.[35] The worker remains in this category for three months, after which s/he presumably becomes a general worker.

The rationale for these categories is that employers need a "trial period" during which they can assess a new worker's performance and determine whether they would like to engage him/her on a permanent basis.[36] The benefits for the employer are that they can pay these workers less than general workers and do not have to contribute to all (if any) of the benefit funds. [37] However, there are huge disparities as to how long it takes to graduate to the status of a general worker, ranging from four weeks in Bloemfontein to 50 weeks in the Western Cape.

Separate from these sub-general workers are "cleaners", who are responsible for cleaning completed buildings. These workers do not assist with building, generally fall below sub-general workers and usually receive lower wages.

Wages

Table 1 below shows the basic hourly wages (excluding employer benefit contributions) in the various regions at the time of writing. Where several classes of workers exist in the same category, a range of hourly wages is provided, with the number of classes in that category indicated in brackets. Where wages are included in the alternative, this indicates the minima in each geographical area covered by the collective agreement.

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34 Definitions clause of the North and West Boland collective agreement.

35 Definitions clause of the North and West Boland collective agreement.

36 Ironically, the North and West Boland agreement, which already has a beginner general worker category, also provides for a trial period for employees falling within the following categories: cleaner, general worker (beginner), general worker, manufacturing worker, dumper driver and hoist operator, guard, building worker category 4 and building worker category 3. Workers are subject to a 42-hour trial period upon commencing with a new employer. (These hours need not necessarily be consecutive). During this period, they may only earn a cleaner's wage (the lowest wage level), and are not entitled to employer contributions to any benefit fund for the council. All other categories of employees are subject to a probation period of 10 days before confirmation of employment.

37 The Bloemfontein collective agreement is the only agreement that provides that "casual workers" are to receive the same rate as general workers – see clause 8(3) of the Bloemfontein collective agreement. While the Bloemfontein collective agreement expressly excludes casual workers from the benefit funds, the Western Cape allows labourers to contribute towards the sick pay and holiday funds but not to the pension or provident funds. Only the North and West Boland collective agreement allows beginner general workers to join all the bargaining council funds.

Table 1: Building industry hourly wages 2008/9 (Rand)

Category of Worker	Western Cape	North/West Boland	Bloemfontein	Kimberley	Gauteng
Cleaner	11.38	9.65	N/A**	N/A**	N/A**
Beginner*	11.38	10.86	11.54	N/A**	N/A**
General worker	17.65	12.07	11.54	6.91/7.35	12.32
Trainee/Learner	19.18 – 28.69 (3)	13.28 - 18.47 (4)	N/A**	8.21/8.65	N/A**
Artisan	38.60	19.64 - 37.52 (8)	24.15	15.18/15.51	N/A**

Source: Authors' compilation of wages from the collective agreements

Notes
* Denotes the category of worker falling below the general worker category, namely a casual worker, beginner general worker and labourer.
** "N/A" indicates that the relevant category of employees is not mentioned in the relevant collective agreement.

The above table shows that the income differential between sub-general workers in the various regions is not very wide, ranging from R10.86 to R11.38. General workers in the Boland, Bloemfontein and Gauteng earn in the region of R12 per hour. However, those in the Western Cape earn much more at R17.65 per hour, which is more than twice that earned by the highest paid general worker in Kimberley. There are also huge disparities between the trainees and artisans, with the highest paid artisan in Kimberley earning less than half the wage of a Western Cape artisan.

Employee benefits

Generally, the bargaining councils administer holiday funds, retirement funds (pension and/or provident funds) and sick leave funds. In most cases, employers are required to make a substantial contribution to the funds, with employees making a more modest contribution per week. Various criteria determine eligibility for benefits, and in some cases certain categories of workers may be excluded.

This section will examine the different benefit funds administered by the bargaining councils with a view to determining their accessibility to the different

categories of workers, namely cleaners, beginners, general workers, trainees/learners and artisans.

Table 2: Western Cape Benefit Funds

Name of Fund	Eligibility	Exclusions
Holiday Fund (Only employers contribute)	• All categories are eligible, including labourers • Employee must work full number of contracted daily hours	• Employees who have been laid off
Pension/Provident Fund	• Most categories are eligible • Employee must work full number of contracted daily hours	• All labourers excluded • Cleaners working in Areas B and C • Employees who have been laid off
Sick Pay Fund	• All categories are eligible, including labourers • Employee must work full number of contracted daily hours	
Medical Aid Fund	Artisans only	Non-artisans

The Western Cape provides for four benefit schemes, two of which are accessible to all employees. Lower-skilled workers are eligible for the pension/provident fund, but it takes labourers 50 weeks (approximately a year) to qualify. Non-artisans are not entitled to medical aid benefits.

Table 3: North and West Boland Benefit Funds

Benefit Fund	Eligibility	Exclusions
Holiday Fund	• All categories of employees are eligible • Employee must work at least 25 hours per week	The following categories during 42-hour trial period: cleaners, general beginners, general workers, guards, building workers categories 3 and 4.
Pension/Provident Fund	• All categories of employees are eligible • Employee must work at least 25 hours per week	The following categories during 42-hour trial period: cleaners, general beginners, general workers, guards, building workers categories 3 and 4.
Sick Leave and Family Responsibility Fund	• All categories of employees are eligible • Employee must work at least 25 hours per week	The following categories during 42-hour trial period: cleaners, general beginners, general workers, guards, building workers categories 3 and 4.
Stabilisation Fund (Employees only contribute)	• All categories of employees are eligible • Employee must work at least 25 hours per week	The following categories during 42-hour trial period: cleaners, general beginners, general workers, guards, building workers categories 3 and 4.

In the Boland, all categories are eligible for four available benefit funds. Lower-skill categories are, however not able to obtain these benefits during their first five days (not necessarily consecutive) of employment. Employees must work at least 25 hours per week for the same employer in order to qualify.

Table 4: Kimberley Benefit Funds

Name of Fund	Eligibility Criteria	Exclusions
Holiday Fund	• All categories are eligible • Employee must have worked at least three full days per week for the same employer	
Benefit Fund for Artisans Provides benefits in case of: • Inclement weather • Sickness and accidents • Medical benefits	• Only artisans are eligible • Employee must have worked at least three full days per week for the same employer	Non-artisans
Benefit For Non-artisans Provides benefits in case of: • Inclement weather • Sickness and accidents	• Only non- artisans are eligible • Employee must have worked at least three full days per week for the same employer	Artisans

The Kimberley agreement provides for a different structure. While one holiday pay fund caters for all employees, it provides for separate funds for artisans and non-artisans. In addition to inclement weather and sickness and accident benefits, the artisan benefit fund provides medical aid benefits.

Table 5: Bloemfontein Benefit Funds

Name of Fund	Eligibility Criteria	Exclusions
Holiday Fund	Most categories are eligible	Casual workers
Pension/Provident Fund	Most categories are eligible	Casual workers
Wage Guarantee Fund	Most categories are eligible	Casual workers
Funeral benefit	Most categories are eligible	Casual workers

The four benefit funds provide for most categories of employees. However, casual workers are excluded from receiving these benefits. They must work for at least four weeks for the same employer before being entitled to join the benefit schemes.

Table 6: Gauteng VBF Benefit Funds

Name of Fund	Eligibility Criteria	Exclusions
Holiday Fund	All categories	None
Pension/Provident Fund	All categories	None
Funeral benefit	All categories	None

The Gauteng agreement provides for three benefits that apply to general workers. It was unclear from the collective agreement whether there were qualification criteria and periods.

Hours of work and overtime

In the Western Cape, cleaners, labourers and general workers in Area C may not work for more than 41 hours a week, while those in Areas B and C may work a maximum of 44 hours.[38] All other employees in Area A may work up to 40 hours, while those in Areas B and C may work up to 44 hours. The collective agreement provides for flexible working hours in the form of a compressed working week

[38] Clause 8(1) of the Western Cape collective agreement.

and averaging of hours in terms of the BCEA.[39] An employee may work up to three hours' overtime per day on ordinary working days and eight hours on Saturdays and Sundays.[40] The position in respect of public holidays is the same as that of other bargaining councils. Overtime worked from Mondays to Saturdays attracts a rate of time and a third while working on Sundays entitles an employee to double the normal rate.[41]

The North and West Boland collective agreement stipulates a maximum of nine working hours per day for building workers up to a maximum of 45 hours per week.[42] The provisions relating to meal intervals are the same as those in other bargaining councils.[43] Overtime of up to four hours per day from Monday to Friday and eight hours on Saturday and Sunday is permitted.[44] Employees who work overtime from Monday to Friday are entitled to time and a third. Employers must pay time and a half for overtime worked on Saturday before 17:00 and twice the daily rate for overtime worked between 17:00 on Saturday and normal starting time on Monday.[45] The agreement allows for the use of the compressed working week and the averaging of hours in terms of the BCEA, subject to the Council's approval.[46] Public holidays, as proclaimed in terms of the Public Holidays Act, 1994, are to be paid along the same lines as all the other collective agreements.[47]

The Bloemfontein collective agreement complies with the BCEA's[48] provisions in terms of hours of work and overtime.[49] It makes provision for a 40-hour working week from Monday to Friday. Employees are entitled to a premium for working on public holidays.[50] Employees may work up to three hours of overtime per day without the permission of the bargaining council, and any overtime exceeding three hours per day must be authorised by the bargaining council except in an emergency.[51] The total of ordinary and overtime hours may not exceed 55 hours

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39 Clause 8(3) (b) of the Western Cape collective agreement. Section 11 of the BCEA allows for a compressed working week of working days of up to 12 hours. The employee may not, however, work more than 45 ordinary hours a week, more than ten hours overtime a week and more than five days a week. Section 12 provides for averaging of working hours over four months. The employee may not work an average of more than 45 ordinary hours of work in a week or an average of five hours of overtime per week.

40 Clause 8(4) of the Western Cape collective agreement.

41 Clause 9(2) of the Western Cape collective agreement.

42 Clause 9(1) (a) of the North and West Boland collective agreement.

43 Clause 9(2) of the North and West Boland collective agreement.

44 Clause 9(4) (b) of the North and West Boland collective agreement.

45 Clause 10(3) of the North and West Boland collective agreement.

46 Clauses 10(13) and (14) of the North and West Boland collective agreement.

47 Clause 9(5) of the North and West Boland collective agreement.

48 75 of 1997.

49 See Clauses 7 and 8(4) of the Agreement respectively.

50 If the holiday is an ordinary working day (i.e. Monday to Friday), the employer must pay the normal daily rate, plus the hourly rate for each hour actually worked. If the public holiday falls on a Saturday or Sunday, the employer must pay normal overtime rates, that is, time and a half.

51 Clause 8(4) of the Collective agreement.

per week. The overtime rate is time and a half,[52] while any work on a Sunday attracts double the daily rate.

The Kimberley collective agreement[53] provides for the longest working week of up to 45 hours from Monday to Friday. Overtime may not exceed four hours a day from Mondays to Fridays and eight hours a day on Saturdays and Sundays. The provisions relating to working on public holidays are similar to those in the Bloemfontein collective agreement, with the exception that wages for public holidays on 16 December, 25 December, 26 December and 1 January "shall be paid in the form of benefit stamps."[54]

The above discussion shows that Kimberley and the Boland allow for the longest daily working time, that is 45 hours. Provisions relating to public holidays are the same, with the exception that the Kimberley agreement provides for payment for certain holidays in the form of benefit stamps. The Boland and Kimberley agreements allow for the greatest amount of overtime, namely four hours on normal working days and eight hours on Saturdays and Sundays. The Western Cape and Boland agreements specifically authorise the use of flexible working arrangements suggested in the BCEA.

Leave

Employees in the Western Cape are entitled to paid annual leave of 15 working days,[55] paid for by the Council's holiday fund. The collective agreement allows employees up to 13 days' paid sick leave, although they are only entitled to a portion of their daily wage.[56] The BCEA's provisions apply to the maternity leave and family responsibility leave.[57] The sick fund pays an employee taking maternity leave: 33 per cent of the employee's salary for up to 120 days.[58] .

The North and West Boland collective agreement grants employees paid annual leave of up 15 working days, which normally commences in mid-December and ends in the first week of January the following year.[59] The agreement incorporates the provisions of the BCEA in relation to family responsibility and

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52 Alternatively, the employer may also pay the hourly rate plus 30 minutes off for each hour of overtime.

53 Clause 19 of the Kimberley collective agreement.

54 Clause 19(7) (c) of the Kimberley collective agreement.

55 Clause 8(8) of the Western Cape collective agreement.

56 Clause 15(4) of the Western Cape Collective agreement. All employees are entitled to 75 per cent of their daily wage up to the 10th day and 33 per cent of their wage from the 11th to 13th days of sick leave.

57 Clause 8(13) of the Western Cape collective agreement. The relevant provision of the BCEA provides for four months unpaid maternity leave and up to three days' paid family responsibility leave.

58 Clause 15(7) of the Western Cape collective agreement.

59 Clause 9(6) of the North and West Boland collective agreement.

maternity leave.[60] While the agreement authorises the Sick Pay fund to pay the employee for family responsibility leave, [61] it expressly provides that the Sick Pay fund will not pay an employee for maternity leave.[62] It entitles employees to 30 working days' paid sick leave in a 36-month cycle, as stipulated in the BCEA.

The Bloemfontein collective agreement[63] provides for 15 working days' annual leave during the annual builders' holiday, which normally starts in mid-December. Employees are entitled to 15 days' pay for the holiday, plus an additional three-week bonus. These amounts are to be paid from contributions to the Bargaining Council's holiday fund. In addition, employers must pay an incentive bonus of one week's pay to employees who have worked continuously for at least six months without being absent. While the collective agreement provides for family responsibility leave in terms of the Basic Conditions of Employment Act,[64] it is conspicuously silent on maternity leave and sick leave. One can assume that the relevant provisions of the BCEA would apply to the employees.

The Kimberley collective agreement also provides for 15 working days' paid annual leave as stipulated by the Bargaining Council.[65] The Holiday Fund administers pay for annual leave. It provides for up to 12 days' paid sick leave, but makes no mention of maternity and family responsibility leave.

The Gauteng Voluntary Bargaining Forum provides for the 15 days' annual leave.[66] In addition, at the end of 2009, employees in Gauteng will receive a bonus of 120 hours' (15 days) pay.[67] The agreement provides for four months' unpaid maternity leave and three days' family responsibility leave in terms of the BCEA.[68]

All the collective agreements provide for 15 days' paid annual leave with an additional bonus of 15 days' pay. Bloemfontein adds an incentive bonus to reward non-absenteeism. The Western Cape and Kimberley collective agreements provide for more sick leave days than those stipulated in the BCEA – 13 and 12 days respectively. Not all the collective agreements mention maternity leave and family responsibility leave. However, the provisions of the BCEA apply in these cases. The Western Cape is the most progressive in terms of maternity leave, as it is the only council that provides for pay during the four months leave.

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60 Clause 9(12) and 9(11) respectively of the North and West Boland collective agreement.
61 Clause 9(12) (c) of the North and West Boland collective agreement.
62 Clause 9(11) (h) of the North and West Boland collective agreement.
63 Clauses 7 and 11 of the Bloemfontein collective agreement.
64 Section 27(2) provides for three days' paid family responsibility leave per year.
65 Clauses 19(7) (c) and 21(7) of the Kimberley collective agreement.
66 Clause 3.6 of the Gauteng VBF agreement for October 2006 to December 2009.
67 Clause 3.3.2 of the Gauteng VBF agreement for October 2006 to December 2009. The bonus in December 2007 was 100 hours' pay, and for December 2008 was 110 hours' pay.
68 Clause 3.7 and 3.9 of the Gauteng VBF agreement for October 2006 to December 2009.

Temporary suspension of work

The Kimberley collective agreement allows employers to lay off employees temporarily for up to 20 consecutive days. The employer must give at least one day's notice, and need not pay the laid-off employee. Lay-offs are only allowed on account of inclement weather, shortage of materials due to circumstances beyond the employer's control and on account of a temporary lack of work. At the end of the lay-off, the employer may give the employee the option of retrenchment or a further 20-day lay-off. There does not appear to be a limit to the number of times an employee can be temporarily laid off.

Employers in the Western Cape may lay off employees for a period of up to 20 working days due to inclement weather, unavailability of materials or lack of work, subject to a one-day notice period.[69] Before extending the period, the employer must give the employee an option of retrenchment or lay-off for a second period of up to 20 days. This is subject to the employer's obligation to retrench the employee within 10 days of the expiry of the second lay-off period.

The North and West Boland provides for a lay-off period of up to 20 days, subject to a limit of a cycle of two 20-day lay-offs per year.[70] The notice should be given in writing and should indicate the date when the lay-off will begin and when the employee should report for work.[71] It also prohibits an employer from unilaterally suspending an employee from work for any period as a disciplinary measure without giving him/her a fair hearing.[72] This is obviously to prevent employers from using the lay-off provision to disguise unilaterally imposed disciplinary action.

The Bloemfontein collective agreement is the only one that does not provide for temporary lay-offs. The other three statutory councils provide for 20 days lay-off, but the Kimberley agreement does not stipulate an upper limit on the number of lay-offs in a year. In Gauteng, there is no stipulated period, with the only requirement being that lay-offs may only be implemented following consultation between the parties.[73]

Notice periods[74] and retrenchment provisions

Retrenchment provisions are very similar: the employer must give notice and information and must allow the employee(s) or the union to make representations and attempt to reach some agreement. The employer may retrench unilaterally if

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69 Clause 8(9) of the Western Cape collective agreement.

70 Clause 9(9) (a) and (b) of the North and West Boland collective agreement.

71 Clause 9(9) (d) of the North and West Boland collective agreement.

72 Clause 9(9) (c) of the North and West Boland collective agreement.

73 Clause 3.10 of the Gauteng VBF agreement for October 2006 to December 2009.

74 While the discussion of notice periods refers to the employer giving the employee notice, it also applies vice versa.

this fails.[75] The notice period in the Western Cape is five days where the contract has been for up to six consecutive months, and two weeks where the contract is for over six consecutive months.

The North and West Boland agreement provides for similar retrenchment provisions as the other agreements and stipulates severance pay of one week's pay (plus the employer's contributions to the employee's benefit fund) for each year of completed service.[76] This is the only agreement that mentions the payment of the employer's contribution to the benefit funds and it is not clear whether it does so as an exception to the general rule or whether this is the (unarticulated) standard in the other bargaining agreements. Notice of termination of employment is not required during the employee's first 24 hours (or three days) of employment. One week's notice is required where the employee has been working for four weeks or less. Two weeks' notice is required for more than four weeks.[77]

In terms of the Bloemfontein agreement,[78] employers must give five days' written notice of termination to employees who have worked a minimum of 65 days and to supervisory staff who have worked at least 22 days. No notice need be given to employees who have worked for less than the stated number of days. Retrenchments must be effected in terms of the relevant provisions of the LRA.[79] The Bloemfontein agreement is silent on the matter of short-term lay- offs or suspensions.

When proposing retrenchments, employers in Kimberley must provide information to employees and their representatives, who are entitled to make representations. Employers must "attempt to reach consensus" with the trade union(s) and/or employee(s) involved, failing which they can unilaterally implement the retrenchment proposals.

Employers in Kimberley must give notice of termination to employees who have worked for them for at least three consecutive days.[80] Only two hours' notice need be given during the first month of employment. Employees who have worked for more than a month and for up to six months are entitled to a day's notice. After six month's employment, a week's notice must be given.

All the statutory bargaining agreements provide for retrenchment procedures modelled on section 189 of the LRA, and provide for one week's severance pay

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75 Clause 8(10) of the Western Cape collective agreement.

76 Clause 9(10) (f) of the North and West Boland collective agreement.

77 Clause 9(8) of the North and West Boland collective agreement.

78 See Clause 7(8) of the Bloemfontein agreement.

79 Act 66 of 1995, sections 89 and 89A: These provide for consultation and other procedures to be followed by employers wishing to retrench employees. They also require employers to take certain measures to minimise the number of workers affected and mitigate the consequences of retrenchment for those affected.

80 See Article 20 of the Kimberley collective agreement.

per year of service as required in the BCEA. The Cape and Boland agreements comply with the notice period stipulated in the BCEA, namely, one week's notice during the first six months of employment and two weeks' notice after six months. The Bloemfontein and Kimberley agreements fall short of this standard.

Safety and security

All the statutory collective agreements require employers to provide a secure storage place for the employees' tools. The North and West Boland collective agreement requires employers to provide a safe storage place for employees' tools and to insure the tools against fire and theft.[81] In the Boland the employer may be liable for the theft of or damage to an employee's tools due to the employer's omission.[82] The Bloemfontein collective agreement contains elaborate provisions concerning storage facilities for tools and the employer's liability for loss of or damage to an employee's tools.[83] The Western Cape and Kimberley agreements do not require an employer to compensate the worker for loss of or damage to tools.[84]

Dangerous work

The hazardous conditions in which most construction workers work warrant special measures for their protection. However, the collective agreements do not contain substantial provisions in this regard. The Kimberley agreement merely states that employers and employees must comply with the provisions of the Occupational Health and Safety Act.[85] The North and West Boland agreement also requires the provisions of the Occupational Health and Safety Act to be applied.

The Kimberley agreement provides for a 10 per cent premium on dangerous work as defined in any statute, provincial ordinance, municipal by-law or regulation relating to the building industry.[86] The same provision applies in the Western Cape.[87]

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81 Clauses 12(1)-(3) of the North and West Boland collective agreement.
82 Clause 12(4) of the North and West Boland collective agreement.
83 Clause 10(2) of the Bloemfontein collective agreement.
84 Clause 24 of the Kimberley collective agreement.
85 Of 1993. See Clause 26 of the Kimberley collective agreement.
86 Clause 22(5) of the Kimberley collective agreement.
87 Clause 9(5) of the Western Cape collective agreement.

Training and skills development

The Western Cape agreement does not make provision for special wages for learners or trainees. The agreement requires that employers contribute to the Building Industry Skills and Development Trust, which was established in 2001.[88] Further information on the Trust was not available. In a separate provision, the agreement refers to the employment of learners who are registered with the Construction Education and Training Authority (CETA).[89] They are entitled to wages in accordance with their classification according to proficiency.

The North and West Boland collective agreement has separate categories of trainees in its wage and benefit schedule. In addition, a Master Builders' Association training levy is deducted from the wages of all categories of employees including cleaners and beginner general workers. Those wishing to be registered as learner building workers are subject to a 28-day probation period.[90]

The Bloemfontein collective agreement does not refer to training or trainee employees. It does not mention training programmes or provide for the deduction of training levies.

The Kimberley agreement provides for the registration of trainees with the Council and for the payment of wages specific to trainee tradesmen, which falls in between general worker and artisan wage levels. The trainee is to be registered with Building Industries Training Board or any other accredited training institution.[91] On completion of the training period, the trainee shall be re-registered at the appropriate level.[92] The collective agreement also makes reference to Building Industries Training Fund, which was established under the auspices of the Building Industries Federation of South Africa (BIFSA) in 1984, but is no longer operational.

The above highlights disparities in the treatment of trainees and learners, although most agreements provide for special pay levels for them. Some of the bargaining councils need to upgrade their provisions in light of the new skills development regime.

General remarks on the content of agreements

The substantive conditions relating to the conditions of work vary quite widely, particularly with regard to wage levels and access to social security benefit funds.

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88 Clause 20(2) and the definitions clause of the Western Cape collective agreement.
89 Clause 7(4) of the Western Cape collective agreement.
90 Clause 7(2) of the North and West Boland collective agreement.
91 Clause 13(2) of the Kimberley collective agreement.
92 Clause 13(2) of the Kimberley collective agreement.

The outcomes of the process of bargaining between the different parties through which these conditions are agreed depend on their respective power and on local conditions.

There are some similar provisions in the collective agreements, such as those relating to lay-offs and suspensions and exemptions. There are also some relatively standard provisions, such as those incorporating the BCEA provisions on annual leave, maternity leave, retrenchments and severance pay. It is unclear to what extent this is a result of inter-forum co-operation or merely "borrowing and bending" of provisions contained in the collective agreements of other bargaining councils.

Despite some similarities, there are some inconsistencies between the different agreements. It is clear that some bargaining councils review, update and incorporate changes into the main agreement more frequently than others. Some agreements refer to legislation that has long been repealed and to institutions that have been defunct for a long time. An example is Clause 7(2) of the North and West Boland Agreement, which refers to the Manpower Training Act of 1981 a decade after it was repealed by the Skills Development Act. In general, the Western Cape agreement seems to be the most up-to-date, and is the only agreement that refers to the Construction Education and Training Authority (CETA), while other agreements refer to the Building Industry Training Board, which was established under the auspices of the Manpower Training Act. Some differences relate to terminology and definitions of certain concepts.

Furthermore, there is some indication of a low level of interaction between the different bargaining councils on issues affecting the industry. For example, one of the bargaining council informants proudly stated that his bargaining council was to be the first bargaining council to include a "joint and several liability" clause in their collective agreement, so as to improve enforcement against recalcitrant subcontractors, most of whom operate as Labour Only Subcontractors. He was unaware that two other bargaining councils have already included and implemented this clause in their collective agreements. His lack of awareness indicates the loss of an opportunity presented by the failure to share and compare experiences and best practices in dealing with an endemic problem in the construction industry.

In terms of scope of issues covered, the bargaining council agreements follow a traditional approach, addressing only basic conditions of employment: working time, pay and leave, as well as the usual procedural and technical provisions. These are matters traditionally covered in a collective agreement. On the other hand, the Gauteng VBF agreement seems more pragmatic, as it deals with developmental issues affecting the industry.

The Gauteng VBF mentions transformation,[93] which is a sensitive issue in an industry where blacks constitute the majority of workers in lower skilled jobs and the minority in higher skilled and management jobs. The agreement for 2006 to 2009 also acknowledges that HIV/AIDS is "the single biggest problem facing the economy and the Building industry".[94] The Forum commits to developing minimum standards and a common approach to address this challenge. This represents a break from sticking to the issues traditionally dealt with in collective bargaining agreements and a move towards dealing with relevant issues within the industry. Undoubtedly, the bargaining councils address such issues in other forums. However, by including these matters in its collective agreement, the Gauteng VBF has given them more significance and placed them more firmly on their agenda.

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93 See Clause 5 of the Gauteng VBF agreement for October 2006 to October 2009.

94 See Clause 7 of the Gauteng VBF agreement for October 2006 to October 2009.