

**Freedom of association and social dialogue with informal economy
workers in Lesotho – a study of unwaged street vendors.**

By: Mrs. Regina Sehapi - Kulehile
Lecturer at Law
National University of Lesotho
Faculty of Law

Email address: matsepokul@yahoo.com

Work Telephone: (+266) 22340 601 Ext. 3778

Cell phone: (+266) 58700408

Fax: (+266) 22 340 000

Postal address: National University of Lesotho
Faculty of Law
P.O. Roma 180
Lesotho

Abstract

The article looks into the question whether unwaged workers enjoy freedom of association, and are involved in social dialogue with the state to promote interests of workers. It establishes the connection between the concepts of freedom of association and social dialogue. The article revolves around unwaged street vendors of Lesotho. International standards of International Labour Organization, and statutes of Lesotho are examined. The examination reveals that the unwaged vendors do not enjoy freedom of association, nor are they involved in social dialogue. This is due to Lesotho's Labour Code which caters for employees alone and excludes unemployed workers, hence rights of workers are not extended to them; again, there are inappropriate statutes and frameworks which lead to non recognition of legitimate associations of unwaged workers, and there are no structures that cater for social dialogue with this group of workers. The article recommends amendment of the Labour Code for it to extent right to freedom of association to all workers, including unwaged workers; removal of inappropriate frameworks which cloud recognition of workers unions, without recognition of associations, social dialogue becomes ineffective. The state must also establish structures which develop and promote social dialogue. Without recognition of these concepts, unwaged workers remain trapped in poverty.

- Where Lesotho case law is lacking, reference to South African case law is made to support or interpret the provisions of law in Lesotho in this paper. Authority to do so derives from the General Proclamation 2B of 1884, Lesotho which provides that the law applicable in Lesotho shall be the same as the law applicable in the Cape Colony of Good Hope. The position of Lesotho will only be different from South Africa where customary law of Lesotho is involved, or where a statute is enacted providing differently.

Introduction

The informal economy¹ is characterised by occupations which are not subject to any standard labour legislation, social protection, taxation or entitlement to a number of employment benefits.² Workers³ in this category often fall out of the scope of collective representation.⁴ This exclusion may be either by law or occur in practice. As a result, workers in the informal sector of the economy are characterised by precariousness and vulnerability to poverty.

This paper deals with the vulnerability of those who engage in unwaged work in the informal sector of the economy, with particular reference to street vendors operating from the streets of the City of Maseru, Lesotho.⁵ It is aimed at establishing whether these self-employed

¹ The informal economy is defined as

‘...a sector [which] comprises of private unincorporated enterprises (enterprises owned by individuals or households that are not constituted as separate legal entities independent of their owners) and for which no complete accounts are available that would permit a financial separation of the production activities of the enterprises. In addition, they must produce some of their goods and services for sale or for barter, the employment size of the enterprise must be below a certain minimum and the enterprise should not be registered under specific legislation.’

United Nations Organisation cited in footnote 2 of K Sankaran ‘Protecting the worker in the informal economy: the role of labour law’ in J Davidov and B Langille (eds) *Boundaries and frontiers of labour law: Goals and Means in the Regulation of Work*, (Hart Publishing Oxford and Portland, Oregon, 2006) 205.

² K Sankaran (ibid) 205.

³ In its 2002 Resolutions Concerning Decent Work, the ILO recently established that the word ‘worker’ includes both waged and unwaged workers in the informal economy, (Clause 4).

⁴ J. Fudge ‘The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection’ in J. Davidov and B. Langille (eds) *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (2006) 296.

⁵ The streets are Kingsway Road, Main South One Road and Main North One Road in Maseru, the capital city Lesotho, located in Southern Africa. At least 76 per cent (76%) of vending operations in Maseru are predominantly run by their owners as proprietorships, with the rest run by either an employee, relative or as a partnership. Where a vendor employs persons in his enterprise, such persons do not exceed the number of two. 86 percent

street vendors enjoy the right to freedom to association and whether they are included by government in social dialogue. Freedom to association, on the one hand, is amongst fundamental principles and rights of work whose recognition lead to decent work and alleviation of poverty.⁶ Social dialogue on the other hand, is a process through which workers engage with state to formulate national policies on issues of common interest, whether the issues are economic or social affairs.⁷ Poverty poses a threat to prosperity every where, recognition of freedom of association complimented by engagement in social dialogue can lead to alleviation of poverty of self employed workers in Lesotho.

The objective of the paper will be achieved by looking into the definition and nature of freedom of association and social dialogue; elaborating the connection between these two concepts, and establishing their significance in industrial relations. The paper further looks into

(86%) of the operations are concentrated in the category of sale of fruits and vegetable, and at least seventy-four per cent (74%) of the street vendors rely on street vending as their primary source of income.

The statutory authority entrusted with the governance of, and management of public spaces in Maseru, inclusive of spaces utilized by street vendors for running their enterprises, is the Maseru City Council (MCC). The MCC is part of the Ministry of Local Government, it was established under the Urban Government Act (UGA), 1983 which was subsequently repealed and substituted by the Local Government Act No.6 of 1997 (LGA). However, powers vested in the MCC by the UGA remained unaltered by the LGA. Specific functions of regulation, control and supervision of public spaces for purposes of street vending are regulated by the MCC through the office of a Market Master, with the use of Market Regulations of Lesotho, No. 13 of 1971.

⁶ ILO Declaration of Philadelphia, Annex, Declaration concerning the aims and purposes of the International Labour Organisation, I (b) states that: 'The Conference reaffirms the fundamental principles on which the organisation [ILO] is based and, in particular, that: ... (b) freedom of expression and association are essential to sustained progress.'

⁷ See pages 10 – 13 below for further discussion of social dialogue and benefits attributed to it.

recognition of the concepts of freedom of association and social dialogue by the law of Lesotho,⁸ and by international instruments. Particular reference is made to standards set by the International Labour Organisation (ILO) and its Recommendations which affect self employed persons in the informal economy. It subsequently identifies whether self employed street workers are able to enjoy the two concepts, both in law and practise. Where there are hindrances to access of the two, seek to identify solutions to the problem.

The concept of freedom of association

The right to freedom of association is a general freedom which relates to a number of purposes such as ‘the right to associate for social, political, religious, commercial or industrial purposes’.⁹ The discussion herein focuses on the right to associate for commercial and industrial purposes. Freedom of association has been expressed in several ways. In fact, lack of a precise definition of the concept has left the concept as one which is still subject to debate. While there is no comprehensive and conceptually coherent definition of freedom of association, certain authors have tried to define it in general terms. Prondzynski for example,

⁸ These will include the Constitution of Lesotho, 1993, Labour Code Order 1992 and other relevant instruments.

⁹ Creighton W.B. ‘Freedom of association’ in R. Blanpain *et al.* (eds) *Comparative Labour Law and Industrial Relations in Industrial Market Economies*, (Kluwer Law and Taxation Publishers, Deventer – Boston, 1990) 17.

defined the concept as ‘a shorthand expression for a bundle of rights and freedoms relating to membership of associations’ of employers and workers.¹⁰ Others view it as a non-functional guarantee protected for securing a clearly defined purpose, namely, some equilibrium of bargaining power between employers and workers.¹¹

The most appropriate definition of freedom of association in industrial relations was captured by Kirkland. He defines freedom of association as ‘the right of ordinary people who share common interests to form their own institutions in order to advance those interests and to shelter them against the arbitrary power of the state, the employer and other strongholds of self interest.’¹² Such persons, whether employed or unemployed, have common interests and concerns and they come together in order to maintain such industrial interests or advance them where necessary.¹³ Freedom of association can also be expressed as the legal and moral rights of workers and/or employers to form unions, to

¹⁰ Ferdinand von Prondzynski, *Freedom of association and Industrial Relations: a comparative study*, (London, 1987) 13 cited in Creighton W.B. ‘Freedom of association’ (*ibid*) 19.

¹¹ Ferdinand von Prondzynski, *Freedom of association and Industrial Relations: a comparative study*, (London, 1987) 225 cited in Budeli M., Kalula E. & Okpaluba C. ‘Freedom of association and trade unionism in South Africa: From apartheid to democratic constitutional order’ Monograph 2/2008 UCT Faculty of Law, Institute of Development and Labour Law.

¹² Kirkland L. ‘Promoting democracy: Labor’s Enduring Commitment’ cited in Budeli (*ibid*) 11.

¹³ Landman A.A. ‘Statutory Inroads into trade union’s right of dissociation’ 1997 (18) *ILJ* 13-25 at 13.

join unions of their choice and the right to demand that their unions function independently.¹⁴

Components of freedom of association

It is submitted that the concept of freedom of association consists of three separate elements.¹⁵ The first element of freedom of association is the entitlement of individuals to come together to form a union,¹⁶ which is free to organise and coordinate its activities without interference from the employer, state or any external force.¹⁷ The second element relates to an individual's freedom to join a union of his choice, a union he feels speaks to his issues and represents him best.¹⁸

¹⁴ Olivier M.P. 'Statutory employment relations in South Africa' in Slabbert et al (eds) *Managing Employment Relations in South Africa*, 1999, p5-60, cited in Budeli M. (op cit) 11. See also The International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 8(1) (a).

¹⁵ Summers C.W. 'Freedom of association and compulsory unionism in Sweden and the United States', 112 *University of Pennsylvania Law Review* 647 (1963-1964).

¹⁶ The union contemplated herein is not limited to trade unions of workers, but includes groups or associations of different persons which come together to pursue their common interests.

¹⁷ See Article 23(4) of the Universal Declaration of Human Rights (UDHR), 1948.

¹⁸ See Article 22(1) of the International Covenant on Civil and Political Rights (ICCPR) which makes reference to the right 'to form and join trade unions for the protection of his interests' as an unambiguous expression of 'the right to freedom of association with others.' See also *NUMSA & others v Bader Bop (Pty) Ltd & another* [2003] 24 *ILJ* 305 (CC) or (2003) 2 *BLLR* 103 (CC) at paras 29-30; *MWASA v Die Morester & Noord-Transvaler* [1990] *ILJ* 703; [1991] *ILJ* 802; *Nomaqumbe v Multi Office (Pty) Ltd* [1992] 13 *ILJ* 152. Olivier M.P. & Potgieter O. 'The right to associate freely and the closed shop' *TSAR* 1994 (2) 290.

The third element relates to an individual's right not to join a union.¹⁹

Street vendors who run their enterprises from the streets of Maseru have formed at least two associations amongst themselves, namely, *Khathang Tema Baitis'okoli* (KTB) and *Atamelanang Baitis'okoli* (AB).

On the face of it, this seems evidence that such vendors have the freedom

¹⁹ See African Charter on Human and Peoples' rights, 1981 (Article 10) and Additional Protocol to the American Convention on Human Rights, 1988 (Article 8) which both refer to the right not to join a union. See also Article 20 of the UDHR 1948; Albertyn C.J. 'Freedom of association and the morality of the closed shop' [1989] *ILJ* 985; Olivier M.P. & Potgieter O. (*ibid*) 300.

The right not to join a union is however a relatively controversial issue and a topic of extensive debate. Several different views have been posted for and against the right. One viewpoint is that right not to associate necessarily flows from the freedom of association as a negative right and therefore has to receive extensive protection without limitation, for example, see the position of Great Britain in *Young, James and Webster v. United Kingdom* (1981) *ECHR* 13 August 1981, 28 of judgement, and its Trade Union and Labour Relations (Consolidated) Act of 1992, ss 137-222. See also Germany, where closed shops are considered as violation of one's freedom not to associate. Article 9 of Basic Law for the Federal Republic of Germany, *Grundgesetz* GG is interpreted to include both freedom of association and freedom not to associate, (see Olivier M.P. *et al.* 'The right to associate freely and the closed shop' *TSAR* 1994 (3) 444, fn 122 and 123).

The other view point is that freedom of association and the right not to associate and are two separate issues of unequal standing. The individual's right not to associate is considered secondary to a union's freedom to associate. As a result, the right not to associate can be limited either through adoption of the closed shop and or agency shop phenomena. These two concepts imply that an employee may be compelled to be a member of a union, or alternatively, be compelled to pay a certain fee with respect to services rendered by a union at his work place. In terms of this view point, such closed shop arrangements are not considered as contrary to freedom of association. See Olivier M.P. *ibid* 460 -461. Closed shops are permitted in South Africa, see s 26 and 25 of the Labour Relations Act 66 of 1995. The legislation of Lesotho is silent on this matter; the judiciary has not been challenged with a matter concerning the issue.

It should be noted that ILO Conventions regarding freedom of association do not specifically refer to the right not to associate. This has been interpreted to mean that the ILO leaves it to each state to decide whether it is appropriate to guarantee the right not to associate to its workers or not. See Report of the Committee of Experts on the Application of Conventions and Recommendations 1959, Report III, Part IV 109.

to come together to form associations. The two associations are free to organise and coordinate their internal activities without interference from an external party. Although it would seem that the first element of freedom of association is recognised and put in to practice here, further investigation into the matter reveals the opposite of what seems to be.

Members of KTB and AB associations are faced with a challenge relating to the second element of freedom of association, namely, an individual's freedom to join an association of his choice. Vendors are subjected to constant victimization for their membership to these two unions. Reprisal here is in the form of denying the associations access to engagement in negotiations with Maseru City Council (MCC)²⁰ on development and regulation plans that directly affect vendors, thus denying such vendors access to infrastructure and any form of assistance by MCC in relation to the safety of their property. This applies to members trading from the streets as well as those who trade within market areas designated by MCC. Due to this treatment, *Atamelanang Bait'sokoli* steadily lost the majority of its members and is currently dying a silent death, whilst KTB is at risk of the same loss. Members indicate that other street vendors are apprehensive of joining the latter two associations for fear of reprisal by MCC. This indicates that vendors

²⁰ The statutory authority entrusted with the governance of, and management of public spaces in Maseru, inclusive of spaces utilized by street vendors for running their enterprises, in terms of Local Government Act No.6 of 1997 (LGA).

are not free to join associations of their choice as this exposes them to acts of anti unionism. The implication is that the right of the vendors to come together to form a group, which is the first element of freedom of association is also hampered. Consequently, they cannot enjoy their freedom of association fully. The third element of freedom of association will not be discussed due to its irrelevance for purposes of this paper.

‘Complementary element’ of freedom of association

It is submitted that the elements of freedom of association should not be limited to the three tiers stipulated above. Instead, the elements should be extended to incorporate another element. That is, a workers association’s right to regulate its affairs with employer/state through either collective bargaining or policy concentration.²¹ ‘Collective bargaining has always been regarded as a fundamental aspect of [or inferred from] the principles of freedom of association in general.’²² This is because both freedom of association and collective bargaining²³ have a common goal of balancing of the unequal bargaining position of

²¹ Anderman S.D. *Labour Law: management decisions and worker’s rights*, (Butterworths, London, 1993) 260.

²² Greighton, (*supra*). 38.

²³ Collective bargaining is defined as a process of negotiations between individual employers or representatives of their organisations, and representatives of trade unions with the purpose of determining working conditions, wages, regulation of relations between the two parties and settlement of disputes. These negotiations lead to concluded agreements which will be binding on groups represented by the signatories. See Cardova E. ‘Collective Bargaining’ in R. Blanpain *et al.* (eds) *Comparative Labour Law and Industrial Relations in Industrial Market Economies*, (Kluwer Law and Taxation Publishers, Deventer – Boston, 1990) 151.

employers and employees, thus putting the two on an equal footing.²⁴ In an effort to place self employed workers at par with workers in an employment relationship in their enjoyment of freedom of association, it is submitted that the process of policy concentration under *social dialogue*, comes into play in place of collective bargaining, and ought to be developed between self employed workers and the state.

Social dialogue

Social dialogue is defined as the involvement of workers, employers and government in the formulation and implementation of national policy on issues of common interest relating to social and economic affairs or any other issues that affect workers.²⁵ Involvement may be in the form of negotiation, consultation or simply exchange of information and views between representatives of workers, employers

²⁴ Olivier M.P. & Potgieter O. (*supra*) 293

²⁵ Junko Ishikawa, *Key features of national social dialogue: a social dialogue resource book*. (International Labour Office, Geneva, Switzerland, 2003), 3.

The definition of social dialogue is not limited to involvement of the above mentioned parties alone, but encompasses a large category of parties or representatives of different groups of persons working together to formulate policies on issues of common interest. In his paper prepared for the ILO Regional Office for Arab states, W. Simpson adequately puts it as follows, '[Social dialogue is] any kind of interaction within society, carried out among all or some segments of society to formulate decisions that will be in the best interests of the society in question. The dialogue can cover subjects of any nature, but often concentrates on societal issues such as economy, health, education and employment or any issue that affects that part of society. The parties to the dialogue are determined by their interests or competence in the issues on discussion and their capacity to do so.' Social dialogue and tripartism: Prerequisites for Economic and Social Development, 2000, available at <http://www.shebacss.com/docs/soesr008-09.pdf>, [accessed on 10 August 2012]. An example can be of social dialogue between children and adults outside the family context on issues that affect the children either as individuals or as a group, such as child care, education, and treatment.

and government.²⁶ Collective bargaining and policy concentration are interpreted as the two dominant methods of negotiation.²⁷

Since self employed workers' associations cannot engage in collective bargaining with the state due to lack of an employment relationship between the two, both parties are to engage in policy concentration. *Policy concentration* is defined as 'the codetermination of public policy by governments...and workers' representatives, [whereby they] develop a reflex for acting in a concerted multifaceted manner to address all major economic and social policy issues by seeking consensus.'²⁸ The negotiations results in social pacts.²⁹

Through engagement in social dialogue, workers are able to pursue their occupational interests by bargaining or lobbying policy-makers on issues such as access to infrastructure, skills development and social protection.³⁰ Social dialogue is also a process that reduces social conflicts, whether between workers and state, or between more parties. It eases

²⁶ Junko Ishikawa (*ibid*),3.

²⁷ Junko Ishikawa, (*ibid*),3.

²⁸ Junko Ishikawa, (*Ibid*),3.

²⁹ A social pact is a social agreement or contract between parties engaged in social dialogue which the parties intend to honour. It often contains the definitions of policy issues, targets, means to achieve the targets, and tasks and responsibilities of the signatories. See E. Colombo, P. Tirelli and J. Visser on 'Reinterpreting social pacts: theory and evidence' available at <http://dipeco.economia.unimib.it/persona/colombo/papers/socpacts.pdf>, [accessed on 10 August 2012]. Social pacts guarantee social peace and stability for long periods of time. W. Simpsom, *op cit*.

³⁰ Clause 17, ILO Conclusions concerning decent work and the informal economy 2002, available at <http://www.streetnet.org.za/English/page10.htm>, Streetnet International, [accessed on 28 April 2008].

tensions during economic hardships or transition periods that affect stakeholders, and often results in policy making and effective economic and social progress.³¹ It therefore ‘ensures a system that is responsive to the needs of workers.’³² Social dialogue can be summarised as a process that realizes that ‘labour relations, practices and changes are managed through bargaining between representatives of potentially conflicting interests.’³³ This process can only be effective if government recognises the legitimacy and constructive functions of the participating associations in policy making.³⁴ As a result, social dialogue is fully observed when freedom of association is recognised and exercised. In fact, freedom of association is regarded as an indicator of, or condition for constructive social dialogue.³⁵

The rationale behind the inference that freedom of association also consists of a right to collective representation in social dialogue with state, is that the right of workers to form, join associations and organise

³¹ Baffi S. ‘Social Dialogue, ILO Conventions and Recommendations’, Social Dialogue Technical Programme. Available at http://actrav.itcilo.org/courses/2008/A3-01023/resources/sb-Social_Dialogue.ppt#256,1,SocialDialogue,ILOConventions&Recommendations (accessed on 30th October 2011).

³² Junko Ishikawa, (*supra*),3.

³³ Horn P. ‘Voice regulation on the informal economy and new forms of work’, Global Labour Institute, available at http://www.streetnet.org.za/English/voicepaper.htm_1, (accessed on 20 August 2008).

³⁴ There should also be social acceptance of social dialogue, political will and commitment to engage in social dialogue by all parties. Take note that both KTB and AB associations are legitimately registered at the Law office of Lesotho with one of their objections as promotion and protection of members’ interests.

³⁵ In fact social dialogue plays an active role in achieving one of ILO’s objectives, namely advancing opportunities for workers to obtain decent and productive work in conditions of freedom, equality, security and human dignity. See ILO, ‘Social dialogue’ available at <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/social-dialogue/lang--en/index.htm> (accessed on 30 October 2011).

will be of no effect and benefit, thus meaningless to workers if organising is all it can achieve.³⁶ For the right to freedom of association to be effective and able to protect, maintain and promote interests of members, it ought to enable workers to bargain with the employer or state. Such an exercise is secured by engagement of associations in policy concentration in social dialogue with state. When both parties have successfully bargained, an agreement/social pact resulting from such negotiations will be secured.

Exclusion of vendors from social dialogue

Although street workers of Maseru have formed associations and are free to elect representatives to speak or bargain on their behalf, KTB and AB associations are challenged with the inability to regulate their affairs with state through social dialogue. The state often fails to include these vendors in negotiations where vendors' issues of interests are discussed. One of the factors leading to this exclusion is that MCC does not recognise the legitimacy of KTB and AB associations for purposes of engaging them in negotiations.³⁷ The main cause of non recognition is the majority of KTB and AB members trade on undesignated zones without

³⁶ Olivier M.P. & Potgeiter O. 'The right to associate freely and the closed shop' *TSAR*, 1994- 2, 289-303, p293.

³⁷ This is despite the fact that the associations are registered as representative organs of vendors in the Deeds Registry of Lesotho.

trade licences contrary to the Market Regulations.³⁸ Consequently, government often makes unilateral policy decisions relating to administration and management of street vending, to the disadvantage of the vendors.

A recent illustration of exclusion of vendors from negotiations by MCC was observed in 2003 where MCC constructed markets³⁹ for vendors working from the streets of Maseru without consulting them on the do's and don'ts of the markets. These included the location of the markets, size of working space for each vendor within the market, storage of property, and security issues. It was only after the complete construction of the new markets that MCC demanded that the vendors operating from Kingsway Road (members of KTB and AB) relocate to the new market. The vendors refused to move on grounds that business

³⁸ This is brought about by the fact that Market Regulations require stringent requirements to be fulfilled before a vendor can be granted a licence to trade. For example, a licence to trade can only be granted to a vendor who trades within the designated market zones. However these markets are not economically viable to the vendors as they are situated away from pedestrians who constitute the essence of their market. See also page 30 for further discussion on the issue.

See *Regulation 4(1)* of the Market Regulations, 1971: any person desiring to hire a plot, stall or floor space at a market shall apply to the Market Master and shall furnish any particulars as required from time to time. And *Regulation 14* Market Regulations provide that: No person other than a licensed trader or registered cooperative society shall sell or offer for sale or barter any goods whatever at any place except with the written authority of the Town Council or the District Secretary and subject to any conditions which he may impose.

Regulation 8 of Market Regulations: A person who erects any building, tent, booth, shelter or any structure in any town premises without the written permission of the Town Council or District Secretary shall be guilty of an offence. See similar provision in *Regulation 4 (6)* thereof.

³⁹ The Old Local Government Market.

conditions in the markets were unfavourable.⁴⁰ But they were forcefully moved by Police and placed in the Markets.

The displacement of vendors led to a dispute that came before the High Court of Lesotho⁴¹ in *Khathang Tema Baitsokoli v. MCC & Others*.⁴² Members of *KTB* association alleged that their right to life, protected by Section 5(1) of the Constitution of Lesotho 1993 was violated by the MCC. They contended that their removal from Makhetheng Area and Kingsway Street where they trade from denied them their only and basic means of livelihood, which constitutes in the sale of goods in the streets of Maseru. The applicants further contended that the act of removing them from the streets and refusing them permission to trade along Kingsway Road was *ultra vires* the Respondents' power under the Urban Government Act (UGA).⁴³ They

⁴⁰ Vendors raised a number of issues before MCC during an 'overdue consultation' which were not attended to and thus made the new markets unfavourable. To highlight a few salient ones, no provision was made for public transport taxis to pass through the market as the market was obscurely located, hence the potential of loss of income was real since the vendors' enterprise depended on large populations of transient pedestrians, the markets were not economically viable for their enterprises; it had been agreed in an earlier meeting with the Market Master that the working space allocated to each vendor in the market stall would be 2 meters, but each vendor had only been allocated 1 meter, hence could not operate properly in the small spaces; one of the markets had no stall tables or shelters to work from, and no lockers for safe keeping of goods overnight, it was therefore inconvenient and would expose them to harsh effects of the weather. The vendors indicated that they were willing to move into the new markets if their requests were met. But this did not take place as their consultations with the MCC were fruitless for the markets had already been completed.

⁴¹ The dispute was not referred for arbitration because, as will be indicated later, the legislature of Lesotho limits 'workers' to persons in employment relations, hence self employed vendors are not recognised as 'workers' in Lesotho and cannot seek relief under labour law structures.

⁴² CONST/C/1/2004 reported in [2005] *LSHC* 25 available at <http://www.saflii.org/ls/cases/LSHC/2005/25.html>

⁴³ Section 9 of Schedule 1 to the UGA, 1983.

applied for a declaratory order under the Constitution for the grant of permits to trade along the streets, and a declaration that their removal from the streets was unconstitutional.

The High Court held that the right to life guaranteed by *section 5(1)* of the Constitution refers to the protection of the physical biological existence of a human being rather than its well being, happiness or welfare. The latter is the right to livelihood. The right to life was not extended to include right to livelihood, which is evidently what the vendors attempted to protect.⁴⁴ As a result, the court held that the removal of the vendors did not violate their right to life under *section 5* of the Constitution; the removal was therefore not unconstitutional. It held further that the Respondents were vested with the power to regulate and control markets in Maseru, including the power to designate location of market places. This is in terms of the *Schedule 1* of the UGA,⁴⁵ read together with *Regulation 8 and 14* of the Market Regulations.⁴⁶ Thus the removal was not *ultra vires* the powers of the MCC.

⁴⁴ *Khathang Tema Baitsokoli v. MCC* (CONST/C/1/2004) p 2.

⁴⁵ *Schedule 1 of the UGA*: “Duties which the Council [MCC] may perform

9. (1) To establish, regulate and control markets, to regulate and control trade therein, to let stands or plots in such markets and wherever such markets are established to prohibit, regulate and control trade elsewhere in commodities which are sold at established markets.

⁴⁶ *Regulation 8 of Market Regulations 1971*: A person who erects any building, tent, booth, shelter or any structure in any town premises without the written permission of the Town Council or District Secretary shall be guilty of an offence and liable on conviction to the penalty prescribed in Regulation fifteen.

Regulation 14 Market Regulations: No person other than a licensed trader or registered cooperative society shall sell or offer for sale or barter any goods whatever at any place except with the written authority of the Town Council or the District Secretary and subject to any conditions which he may impose.

The court however noted that proper consultation and proper ventilation of the ideas in issue in a democratic forum could have produced an all-round solution or compromise.⁴⁷ The court safely assumed that the MCC acting through the Town Clerk could exercise its powers in ‘a democratic fashion, [that is], consult, give fair opportunity for proper representations to be made [by both vendors and MCC], give notices where necessary before taking any action that adversely affects the livelihoods of the residents of [the] city.’⁴⁸ This is especially so since the Government has a duty to take all reasonable measures to address concerns of street hawkers and vendors through fair negotiation and consultation,⁴⁹ in order to promote social dialogue and socio economic development of individuals.⁵⁰ Thus, the court advised that the decision to remove vendors must be fairly and reasonably reached with empathy.

The judgment of the High Court was upheld by the Court of Appeal of Lesotho.⁵¹ The Court of Appeal noted that although the right to livelihood did not fall within *section 5* of the Constitution, (right to life) it was still catered for in the Constitution of Lesotho as a socio economic

⁴⁷ At para 65(b); See also *Matatiele Municipality & others v President of Republic of South Africa & others* [2007] 1 BCLR 47.

⁴⁸ *Khathang Tema Baitsooli v. MCC* (CONST/C/1/2004), p 30, at para 68.

⁴⁹ *Khathang Tema Baitsooli v. MCC* (CONST/C/1/2004), p 3.

⁵⁰ *Section 29 (2) (c) of the Constitution of Lesotho 1993*: Lesotho shall adopt policies aimed at achieving steady economic, social and cultural development under conditions safeguarding fundamental political and economic freedom of the individual.

In terms of *Section 29 of the Constitution*, these State Principles are not enforceable by courts of law, but form part of public policy of Lesotho. They are to guide the authorities of Lesotho in the performance of their functions, with a view of progressively achieving full realisation of the principles, by way of legislation or otherwise.

⁵¹ C. of A. (CIV) No. 4 /2005 reported in (2004) *AHRLR* 195 (LeCA 2004).

principle to be safeguarded under *Principles of State Policy*. The relevant provision here is *Section 29* of the Constitution.⁵² It reads that ‘Lesotho shall endeavour to ensure that every person has the opportunity to gain his living by work which he freely chooses or accepts.’

Although KTB’s application was not well constructed, resulting in loss of the case, the court did take cognisance of the value of consultation and debate between vendors and MCC in social dialogue. Despite loss of their case of 2004, members of KTB and AB associations continue to trade along pavements of the streets of Maseru. They claim they continue to do so not out of disrespect for existing laws, but out of necessity.⁵³ Evidently, these associations are unable to organise their affairs with state, have limited access to social dialogue, and their freedom of association is inhibited.

With these in mind, it is prudent to look into recognition of the right to freedom of association and social dialogue by the laws of Lesotho.

⁵² C. of A. (CIV) No. 4 /2005, Para 18-20.

⁵³ As indicated earlier, vendors resist these displacements on the basis that the markets they are urged to operate in are not economically viable for their enterprises as they are not proximate to pedestrians. Vendors also refuse to leave the streets because the markets constructed for them by government do not have access to infrastructure (for example Makhetheng Market), whilst other existing markets are already saturated by other vendors, hence they cannot work from them. These issues are never adequately deliberated upon due to MCC’s failure to include these vendors in its policy formulations process, and the tendency to execute decisions affecting vendors without proper consultation with same. See note 40 above, p 16.

Freedom of association and social dialogue in the labour law regime of Lesotho

The right to freedom of association in Lesotho is established by the Constitution of Lesotho 1993, which is the supreme law of the land.⁵⁴ *Section 16* of the Constitution provides that every person shall be entitled to, and not be hindered from his enjoyment of the freedom to associate freely with other persons for labour purposes. In addition to this, *section 19* of the Constitution provides that every person shall be entitled to equality before the law and to equal protection of the law. The freedom to associate and right to equality guaranteed by the Constitution fall within fundamental human rights and freedoms of every person, which are enforceable before courts of law.⁵⁵

The Labour Code Order⁵⁶ of Lesotho (referred to as the Labour Code) on the other hand, is the legislation that gives effect to the Constitution on labour matters. *Section 6* of the Labour Code provides that freedom of association is guaranteed to all workers, employers and their respective organisations in accordance with provisions of the Labour Code. *Section 168* of the Labour Code also provides that:

⁵⁴ *Section 2* of the Constitution of Lesotho provides that the Constitution is the supreme law of Lesotho and any law that is inconsistent with it shall be void to the extent of the inconsistency.

⁵⁵ *Section 22* of the Constitution of Lesotho provides that if any person alleges that any of the provisions stated in chapter II of the Constitution (Fundamental Human rights and Freedoms) has been, is being or is likely to be contravened, then that person may apply to the High Court for redress. See also Greighton W.B. (*supra*) 19.

⁵⁶ No. 24 of 1992.

‘Workers and employers, without any distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation of the Government.’

It should be noted that the word ‘worker’ in the Labour Code is defined under section 3 as an ‘employee.’ The same section goes on to define an employee as ‘[a]ny person who works in any capacity under a contract with an employer...’ The Labour Code further provides that no provision of the Code or rules and regulations made under it should be interpreted or applied in such a way as to derogate from International Labour Conventions which are in force in Lesotho.⁵⁷ If there is any ambiguity in the legislation, then provisions of the Labour Code shall be interpreted in a manner that closely conforms to Conventions and Recommendations of ILO.⁵⁸

In spite of the guarantee of freedom of association by both the Constitution of Lesotho and the Labour Code, *section 16(2)* of the Constitution of Lesotho restricts availability of the right to a certain extent. The section stipulates that nothing done under the authority of any

⁵⁷ Section 4 (b) of the Labour Code.

⁵⁸ Section 4 (c) of the Labour Code. See also pages 28 - 29 for suggestions on interpretation of the word ‘worker’ in the Labour Code in conformity with ILO instruments such as Resolution Concerning Decent Work and the Informal Economy of 2002, which covers both employed and unemployed persons in its definition of a worker.

law shall be rendered inconsistent with *section 16(1)* of the Constitution⁵⁹ provided the law in question makes provision, among others, in the interests of defence, or for purposes of imposing restrictions upon public officers.⁶⁰ The power given to state to restrict the freedom of association is not absolute. It is also qualified by *section 16(3)* of the Constitution. In terms of this section the Government can only restrict the rights and freedoms guaranteed by *subsection 16 (1)* provided the abridgement of the rights is not ‘greater in extent than is necessary in a practical sense in a democratic society.’

The abridgement of freedom of association was enunciated in the case of *Lesotho Union of Public Employees v The Speaker of the National Assembly and Others*.⁶¹ In this case Applicants sought an order declaring *sections 31(2) and 35* of the Lesotho Public Service Act 1995 unconstitutional. The provisions in issue prohibited public officers from joining trade unions registered under the Labor Code, and excluded public officers from provisions of the Code. The argument of Applicants was that by prohibiting them to join trade unions, the sections of the Act

⁵⁹ *Section 16 (1)* of the Constitution of Lesotho: Every person shall be entitled to, and not be hindered from his enjoyment of the freedom to associate freely with other persons for labour purposes.

⁶⁰ *Section 16 (2)* of the Constitution of Lesotho provides: ‘Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-
(a) in the interests of defence, public safety, public order, public morality or public health;
(b) for the purpose of protecting the rights and freedoms of other persons: or
(c) for the purpose of imposing restrictions upon public officers.’

⁶¹ 1997 (11) *BLLR* 1485

deny public officers freedom of association guaranteed by *section 16* of the Constitution. They further argued that the abridgement of the freedom was not necessary to protect rights of a larger society as required by *section 16 (3)* of the Constitution. Since the Constitution is the supreme law of the state, any law inconsistent with the Constitution, (*sections 31(2) and 35* of the Public Service Act in this case), shall be void to the extent of inconsistency, hence be declared unconstitutional.

The High Court of Lesotho held that though trade unions for public officers were forbidden; freedom of association of public officers had not been eliminated.⁶² In terms of *sections 31(1) and 32 (1)* of the Public Service Act, public officers are free to establish and join staff associations under the Societies Act of 1966. The Act further makes provision for the establishment of a negotiating forum called *Public Service Joint Advisory Council*.⁶³ Consequently, their freedom of association had not been taken away.⁶⁴ As *sections 31(2) and 35* of the Public Service Act struck a

⁶² Public officers are free to form associations whose methods of bargaining are regulated by appropriate legislation such as the Societies Act 1966. In its *obiter dictum*, the court noted that abridgement imposed by the Public Service Act on freedom of association of public officers was necessary in the practical sense and in line with *subsection (3)* of the Constitution. Primarily, trade unions are confrontational in nature, thus permitting public officers to join trade unions would mean that the Government will be faced with unreasonable demands such as higher wages which it cannot meet, followed by industrial actions. These would depress the economy of the state which is already not rosy. As a result, it is necessary that the right be abridged for preservation of a sound economy of the larger society of Lesotho. At 1493-1495.

⁶³ Objects of this forum include, among others, to secure co-operation between the government and the general body of public officers, where discussion of matters of interest can be carried out, grievances dealt with, and different points of view from representatives of different departments addressed.

⁶⁴ See ILO: Freedom of association and collective bargaining: General Survey of the reports on the Freedom of Association and the Right to Organise Convention (No.87), 1948, and

balance between general public interests of preserving a sound economy, and the interests of public officers of forming associations, it could not be said that the sections contravened *section 16* of the Constitution. Hence the sections in question were not declared unconstitutional.⁶⁵ This is a landmark case which elucidates the only circumstances under which freedom of association may be abridged in Lesotho.

Acts of anti unionism against union members on the one hand are covered by *section 196* of the Labor Code. It states that discrimination against union members, or any similar practice amounts to unfair labor practice.⁶⁶ Social dialogue with self employed workers on the other hand is a concept that is not established or covered by any legislative instrument in Lesotho.

Freedom of association and social dialogue under the ILO

the Right to Organise and Collective Bargaining Convention (No. 98), 1949, Report III (Part 4B), International Labour Conference, 81st Session, 1994, Geneva, Para 49. The Committee of experts emphasised that public employees are covered by the conventions along with other workers and stated that ‘all public servants and officials should have the right to establish occupational organisations....’

⁶⁵ At p1495.

⁶⁶ *Section 196 (1) & (2)*: Any person who discriminates as respects conditions of employment which he/she offers another person, because that person is a member of a trade union; or who seeks, by intimidation, threats, imposition of a penalty or other means to persuade one refrain from or continue to be a member of a union shall commit an unfair labour practice.

Freedom of association is recognised and protected internationally as a human right by a number of instruments,⁶⁷ and as a fundamental labour right by the International Labour Organisation (ILO).

In terms of the Declaration of Philadelphia, 1944 incorporated into the ILO Constitution, freedom of association is necessary for the achievement of decent work for all workers.⁶⁸ Freedom of association coupled with social dialogue is essential to sustained progress.⁶⁹ Consequently, the ILO adopted a convention which secured freedom of association and the right to organise, namely Freedom of Association and Protection of the Right to Organise Convention No.87 of 1948. Article 2 of Convention 87 provides that:

‘Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.’

⁶⁷ See *Article 20(1)* of the UDHR, 1948: ‘everyone has a right to freedom of peaceful assembly and association.’ *Article 22(1)* ICCPR, 1966: ‘everyone has the right to freedom of association with others including the right to form and join trade unions for the protection of his interests.’ See also: *Article 8(1)* ICESCR; European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, *Article II*; *Articles 5 & 6* of the European Social Charter 1961; the American Convention on Human Rights 1969, *Article 16*; and the African Charter on Human and Peoples Rights, 1981, *Article 10*.

⁶⁸ ILO Constitution Declaration of Philadelphia Annex I (b).

⁶⁹ Amnesty International, ‘Fact sheet on the International Labour Organisation (ILO)’1. Available at <https://www.doc.es.amnesty.org/cgibin/ai/BRSCGI/I4200402.EXT?CMD=VEROBJ&MLKOB=19307822626>

This was not the last time the ILO ratified a standard setting instrument for the protection and promotion of freedom of association.⁷⁰ In its *Article 11*, Convention 87 further provides that each member for which the Convention is in force undertakes to provide measures that will enable workers exercise the right to organise freely.⁷¹ The right to organise entails, among others, the right of an association to access employer's premises or a negotiating party's premises; and the right to information for bargaining purposes.⁷² It is aimed at assisting unions gain sufficient power to persuade another party to negotiate. *Article 8 (2)* of Convention 87 further indicates that the national law of a member state shall not be used in such a way that it impairs rights under this Convention.⁷³

In an effort to protect members of an association from acts of anti unionism, the ILO further adopted the Right to Organise and Collective Bargaining Convention No. 98 of 1949.⁷⁴ It later on also adopted the

⁷⁰ For example, Rural Workers and their Role in Economic and Social Development Convention (No.141) of 1975 *Articles 3, 4 & 5(1)*. The convention restates principles of freedom of association with regard to rural workers and facilitates formation of independent organisations for the workers. *Article 2(1)* defines 'Rural worker' as any person engaged in agriculture, handicrafts or related occupation in a rural area, whether as a wage earner or... as a self employed person....'

⁷¹ See also *Article 2* of Convention 87: 'All workers and employers, without distinction whatsoever, have the right to establish...organisation[s]....'

⁷² Du Toit and Bosch C., *Labour Relations Law: A comprehensive guide*, 5th ed, 2006, 215.

⁷³ See also *Article 8(3)* of the ICESCR, 1966; *Article 22(3)* of the ICCPR, 1966 and *Article 5* of the European Social Charter, 1961.

⁷⁴ See *Article 1*: Workers are to enjoy adequate protection against acts of anti-union discrimination at the time of hiring, during employment, and in relation to termination. The Convention also protects and facilitates the right to organise and collective bargaining.

Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking Convention, No. 135 of 1971.⁷⁵

Freedom of association and the right to organise were subsequently declared as fundamental or 'core' rights of work by the ILO in the Declaration on Fundamental Principles and Rights of work of 1998.⁷⁶ Freedom of association was declared as a prerequisite for and an indispensable element of social dialogue.⁷⁷ Taken together, the ILO Convention 87, Convention 98 and the Declaration have played and continue to play a central role in the international protection of freedom of association for trade union purposes.⁷⁸

In 1966, Lesotho ratified Conventions 87 and 98 of the ILO. Provisions of the Constitution of Lesotho and the Labour Code previously discussed are an indication of Lesotho's domestic legislation enacted to incorporate ILO standards into its legal regime.⁷⁹

⁷⁵ Convention 135 is concerned with protecting workers' representatives' against acts of anti-unionism on the basis of their status as representatives or as union members. See also *Article 4* of The Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service Convention No. 151.

⁷⁶ The Declaration embraces seven core Conventions of the ILO, namely: Freedom of Association and Protection of the Right to Organize Convention 87 of 1948; Right to Organize and Collective Bargaining Convention 98 of 1949; Forced Labour Convention 29 of 1930; Equal Remuneration Convention 100 of 1951; Discrimination (Employment and Occupation) Convention 111 of 1958; Minimum Age Convention 138 of 1973; and, Worst Forms of Child Labour Convention 182 of 1999.

⁷⁷ International Labour Standards Department, International labour office, 'Rules of the game: a brief introduction to international labour standards' Available at <http://www.ilo.org/norms> [accessed on 26 March 2008].

⁷⁸ Creighton W.B. 'Freedom of association' (*op cit*) 25.

⁷⁹ For example *section 168(1)* of the Labour Code which adopted *Article 2* of Convention 87, verbatim.

In addition to the above instruments, in 2002 the ILO adopted a Resolution consisting of several conclusions concerning rights of workers in the informal economy; these were rights to decent work.⁸⁰ The instrument is termed Resolution Concerning Decent Work and the Informal Economy (Resolution Concerning Decent Work).

It is in this Resolution Concerning Decent Work that the ILO officially recognised the status of self employed workers in the informal economy for the first time.⁸¹ The Conclusions Concerning Decent Work and the Informal Economy (Conclusions Concerning Decent Work) of the Resolution Concerning Decent Work above points out that *the informal economy is inclusive of wage workers and own account workers* (my emphasis).⁸²

Further, in the Conclusions Concerning Decent Work, the ILO provides that the Declaration on Fundamental Principles and Rights at work and its Follow-up, together with its core labour standards, are as applicable to workers in the formal economy as well as to workers in the informal economy.⁸³ To reinforce this recognition, the Conclusions provide that

⁸⁰ The Conclusions were adopted in an effort to make decent work a reality for all workers irrespective of where they work, and to affirm everyone's right to conditions of freedom and dignity, of economic security and equal opportunity in terms with the Declaration of Philadelphia.

⁸¹ NEDLAC community constituency position paper, 'Impact of Labour Market Policy on the informal economy - Analysis and Recommendations.' 26 June 2006. Available on www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-25res.pdf (accessed on 28/02/2008).

⁸² Clause 4: Conclusions concerning decent work.

⁸³ Clause 16: Conclusions concerning decent work.

‘All workers, irrespective of employment status and place of work, should be able to enjoy, exercise and defend their rights as provided for in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up and the core labour standards.’⁸⁴

Thus, freedom of association and the right to organise guaranteed by Convention 87 and Convention 98 in the Declaration, together with other labour standards,⁸⁵ are formally extended to all workers, including self employed vendors in the informal sector of the economy.

On the other hand, the ILO has previously adopted a number of instruments in recognition of social dialogue;⁸⁶ however, the concept was recognised with respect to self employed workers for the first time in the ILO Conclusions concerning decent work.⁸⁷ Recognition and promotion of social dialogue in this regard reinforces the fact that vendors have a right to lobby with governments.

⁸⁴ *Clause 22: Conclusions concerning decent work.*

⁸⁵ These include among others, the Rural Workers and their Role in Economic and Social Development Convention No. 141 of 1975.

⁸⁶ For example ILO Declaration of Philadelphia II (f) (*op cit*); see also Tripartite Consultation (International Labour Standards) Convention No. 144, 1976; Labour Administration Convention No. 150, 1978; the Consultation (Industrial and National levels) Recommendation, 1960; and ILO: Industrial and Employment Relations Department (DIALOGUE) Available at <http://www.ilo.org/global/topics/lang--en/index.htm> [accessed on 03/ 05/ 2011], where ILO declared social dialogue as one of its core objectives which enables workers to bargain with states where necessary.

⁸⁷ See *Clauses 2, 35 and 36(b).*

Foundations of and remedies for limitation of freedom of association and social dialogue

Without the fundamental elements of freedom of association, namely, right to join a union of one's choice without fear of reprisal, which directly affects the right to come together to form a group, coupled with exclusion from social dialogue with state on issues concerning interests of vendors, the fact that the vendors have formed two associations becomes a futile exercise, hence infringement of their freedom of association. It should be noted that neither of the limitations on the enjoyment of freedom of association stated in *Section 16 (2)* of the Constitution of Lesotho, nor in Convention 87 are applicable to self employed street vendors.

The main source of the infringement of freedom of association for self employed workers in Lesotho is brought about by the definition of the word 'worker' in the Labour Code of Lesotho, which means an 'employee.'⁸⁸ The Labour Code is the legislation that gives effect to standards of the ILO in Lesotho. Since the scope of the Labour Code is limited to persons in an employment relationship, self employed vendors are excluded from beneficiaries of rights and freedoms guaranteed by the Code and its subsidiary legislation, including the freedom to associate.

⁸⁸ *Section 3* of the Labour Code 1992.

The second factor that contributes to deprivation of freedom of association for unwaged vendors and their exclusion from consultations relates to non recognition of their associations by state. Non recognition is brought about by stringent procedural regulations which regulate the exercise of street vending, in particular, the Market Regulations. These Regulations require formalities of application and grant of trade permits to vendors *provided* a vendor trades within a designated market zone.⁸⁹ Lack of possession of such trade permits, is one of the factors hindering recognition of KTB and AB associations from engaging in social dialogue with MCC. Consequently, the procedural regulations also constitute a stumbling block towards exercise of the right to freedom of association.

As indicate earlier, *Section 16* of the Constitution guarantees the right to associate to ‘every person’. ‘Every person’ includes self employed vendors; hence they have the right to associate as guaranteed by the Constitution. It is contended that the Labour Code is flawed in excluding self employed persons from its scope of application. As the Labour Code fails to make reference to unwaged workers, it is submitted that one of the solutions to the problem is that unwaged workers should rely directly on provisions of the Constitution to secure their freedom association.

⁸⁹ See *Regulation 4 (1)* of Market Regulations 1971.

Again, the use of the word ‘worker’ in ILO Conventions and Recommendations indicates that the rights vested in the instruments are not limited to common law employees per se, but extend to all workers regardless of their employment status.⁹⁰ In fact the clarification set out by ILO in its 2002 Conclusions on the meaning of the word ‘worker’ removes the blurred understanding of this word.⁹¹ It is therefore submitted that all ILO standards are applicable to self employed workers in the informal economy whether they are expressly included in the Labour Code or not.

Moreover, the Constitution of Lesotho, as the supreme law of the land, maintains that any law inconsistent with the Constitution shall be rendered void to the extent of its inconsistency.⁹² It is argued that the Market Regulations limit the vendors’ rights to freedom of association in their effect, which freedom is guaranteed by the Constitution. As a result, the Market Regulations should be rendered unconstitutional to the extent that they limit the vendors’ freedom to associate.

⁹⁰ See Convention 141, Rural Workers and their Role in Economic and Social Development, 1978 which defines rural workers as ‘any person...whether...a wage earner or... as a self employed person...’ *Article 2(1)*. See also: Du Toit, *Labour Relations Law: A Comprehensive Guide*, (*supra*) 184; *SANDU v Minister of Defence & another* [1999] 20 ILJ 2265 (CC) where the Court held that the word ‘worker’ in Convention 87 included persons working in the armed forces. See also Sankaran K. (*supra*) 211 who indicates that some legislation that regulate trade union registration in India use the words ‘engaged in an industry’, thus permitting self employed persons to register trade unions and benefit from trade union rights.

⁹¹ See *Clause 4* of ILO Conclusions Concerning decent Work which states that informal economy workers include wage earners and self employed who all deserve protection under labour law.

⁹² Section 2 of the Constitution of Lesotho 1993.

In addition to these, it would be unjust to omit mention of a number of issues arising from the predicament of self employed workers in Maseru. The word ‘organisation’ has been defined in *Article 10* of Convention 87 as ‘any organisation of workers or of employers for furthering and defending interests of workers or of employers.’ Thus, exclusion of an organisation of workers from consultations and negotiations, which deprivation denies the organisation its functions to the extent that it no longer corresponds with the definition of organisation under the Convention, results in an effect contrary to *Article 2* of the Convention.⁹³

It must be noted that the principle of joining an association of one’s choice is critical to freedom of association, and in terms of *Article 2* of Convention 87, a worker is free to join an organisation of his choosing. Subjecting members of KTB and AB associations to victimisation on the basis of membership to the associations is contrary to the principle of free choice of an organisation, thus contrary to *Article 2* of Convention 87.

The ILO further indicated that states must ensure that informal economy workers have the ability to exercise the right to associate without fear of reprisal or intimidation on their part, irrespective of how and where they work. Thus, acts of anti-unionism, victimisation or discrimination on basis of union membership are not permitted as they

⁹³ Swepston L. ‘Human Rights Law and freedom of association: Development through ILO supervision’ (1998) 2 *International Labour Review*, 183.

constitute an infringement on freedom of association.⁹⁴ For this reason, the element of victimisation of members of KTB and AB associations, which is in the form of thwarting and forceful displacements by MCC from places of operation, coupled with denial of services, should be eliminated. These practices by MCC on legitimate and transparent associations are unacceptable and should be discontinued.

Moreover, *Article 8(7)* of Convention 87 provides that national legislation of a member state shall not be used in such a way that it impairs the rights under the Convention. As a result, the Market Regulations should be amended where they impair freedom of association in their application.

The ILO pointed out that inappropriate legal and administrative frameworks do not guarantee or protect the right to freedom of association, thus make it difficult for workers to organise. Where organisations exist, they are often excluded from, unrecognised or under-represented in social dialogue processes,⁹⁵ thus, such frameworks should be appropriately dealt with. It stated that,

⁹⁴ See *Article 2* of Convention 98; see also The Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service Convention No. 151, 1978, *Article 4* which stipulates that there should be adequate protection against acts of anti-unionism; *Article 1* of the Protection and Facilities to be Afforded to Workers Representatives in the Undertaking Convention No. 135 of 1971 concerned with protecting workers representatives against prejudicial treatment based on their status as union representatives. See also *Ceramic Industries Ltd t/a Betta Sanitaryware & another v NCBWU* (2) [1997] 18 ILJ 671 (LAC); *Nkutha & others v Fuel Gas Installations (Pty) Ltd* [2000] 21 ILJ 218 (LC); *Kroukam v SA Airlink (Pty) Ltd* [2005] 26 ILJ 2153 (LAC).

⁹⁵ *Clause 17: Conclusions concerning decent work.*

‘Without organisation and representation, those in the informal economy generally do not have access to a range of other rights at work. They are unable to pursue their employment interests through collective bargaining or to lobby policy-makers on issues of access to infrastructure, property rights, taxation and social security.’⁹⁶ Thus ‘[o]bstacles to the recognition of legitimate, democratic, accessible, transparent and accountable membership-based organizations of workers...in the informal economy must be removed so that they are to participate in social dialogue structures and processes.’⁹⁷

It is worth noting that the Conclusions on Decent Work indicate that workers who engage in production and sale of legal goods and services which are not criminal in nature nor subjects of criminal law, but fail to observe certain procedural requirements for operation of their enterprises should be excused. Workers who fail to conform to such procedural requirements should rather be afforded appropriate regulation or protection under labour or commercial law.⁹⁸ Thus, although members of KTB and AB trade without permits, do not pay fees for hire of working space, and have placed themselves along the city streets, such

⁹⁶ *Clause 17: Conclusions concerning decent work.*

⁹⁷ *Clause 24: Conclusions concerning decent work.*

⁹⁸ *Clause 5: Conclusions concerning decent work.*

acts are only procedural improprieties. Their job of production and sale of goods is non criminal in nature. Thus, they do not warrant exclusion from fundamental rights and freedoms, the workers still need to be afforded protection under the law. Consequently, non recognition of vendors' associations (KTB and AB) for social dialogue on the basis that members of the associations do not comply with Market Regulations that require vending permits, should be eliminated. This is especially so if MCC will not grant vending permits in areas which are not designated for vending, but are necessary locations for successful vending operations.

In addition to its status as a standard of the ILO, freedom of association is also a constitutionally entrenched right that ought to be protected, and that can be enforced in a court of law. It has been submitted that a person's right to freedom of association does not enjoy protection only against an employer, but as was held in *Theron & others v FAWU & others*,⁹⁹ 'once the right exists, the protection against infringement of the right operates against anyone who might infringe it.'

As a recognised fundamental human right at an international level,¹⁰⁰ freedom of association is available to all human beings, including self employed vendors, thus the freedom ought to be observed, respected and promoted by states, rather than taken away by the state without justification.

⁹⁹ [1998] 5 *BLLR* (LC) 530.

¹⁰⁰ See footnote 67 above.

It is contended that the state itself is entrusted with the responsibility to bring about positive change in realisation of rights and principles of work where there seems to be an infringement and/or inappropriate legal and administrative frameworks for realisation of fundamental freedoms.¹⁰¹ Although *sections 29(2)(c) and 31* of the Constitution of Lesotho are unenforceable in a court of law, they are principles of state policy whose purpose is to guide state authorities in the exercise of their functions, with a view of achieving the realisation of the principles by way of legislation or otherwise.¹⁰² Thus, the state is responsible for enacting legislation and/or amending existing legislation in realisation of its duty to ensure protection of the freedom to associate and promotion of social dialogue, and in so doing, to ensure that every person has an opportunity to make a living with a job of his choice.¹⁰³

To remedy present stand point, it is recommended that the definition of a ‘worker’ that was elaborated by ILO Conclusions on Decent Work to include both waged and unwaged workers should be incorporated in to the Labour Code of Lesotho together with its subsidiary legislation. By doing so, all self employed vendors in the informal economy will be covered under Lesotho labour legislation and

¹⁰¹ *Section 29(2) (c)* of the Constitution provides that Lesotho shall adopt policies which work towards achieving steady economic and social development under conditions which favour fundamental economic freedoms to the individual. It is through the realisation of the right to associate that economic development of workers and the state may be achieved, hence the responsibility of state to safeguard freedom of association.

¹⁰² *Section 25*: Constitution of Lesotho.

¹⁰³ *Section 29(1)*: Constitution of Lesotho.

benefit from its provisions, and all rights envisaged in the Declaration on Fundamental Principles and Rights of work will be extended to them. As indicated earlier, *section 4* of the Labour Code provides that the Labour Code shall be interpreted and applied in line with Conventions and Recommendations of the ILO. Adopting the clarified definition of worker by ILO will be doing just that.

Alternatively, new legislation may be drafted for self employed workers which will establish and regulate their rights of work, including the freedom of association vested on the workers. And as previously indicated the extension of the freedom to this category of workers will derive directly from the Constitution of Lesotho,¹⁰⁴ and the new legislation will implement ILO instruments concerned with the concept of freedom of association for self employed workers.

Because social dialogue cannot be effective without state recognising participants in the policy making process, the state must set aside inappropriate legal and administrative frameworks that cloud recognize KTB and AB associations. The state is also challenged with a duty to draw up and establish structures which develop and promote social dialogue. This is where public authorities will include all informal economy workers' representation from their respective legitimate and independent organisations in formulation and implementation of policies,

¹⁰⁴ See 32-33 above.

public policy debates and specific laws; and thus allow them to participate in social dialogue structures and processes where they are intended beneficiaries.¹⁰⁵ As indicated earlier, it is through the mechanism of social dialogue with responsible authorities that informal economy workers can lobby access to infrastructure such as proper and safe market structures, storage facilities, availability of water, sanitation and refuse collection in workplaces, and entitlement to their other rights.

Recognition of the vendors' freedom of association will also protect them from unjustified or discriminatory eviction, and acts of anti unionism.¹⁰⁶ The right to equality before the law provided by the Constitution¹⁰⁷ must be born in mind at all times.

Conclusion

Without the freedom of association, vendors become vulnerable to mistreatment or alienation by state. Denial of the freedom and participation in social dialogue inhibits the economic growth and development of both the state and unwaged vendors working from the streets. It shreds vendors of their fundamental rights and political and economic freedoms provided by the Constitution of Lesotho and the ILO. Consequently, unwaged vendors in the informal economy remain

¹⁰⁵ *Clause 21: Conclusions concerning decent work.*

¹⁰⁶ *Clause 24: Conclusions concerning decent work.*

¹⁰⁷ *Section 9: Constitution of Lesotho.*

insecure and vulnerable as they lack protection, rights and representation, thus remain trapped in poverty.

One of the objectives of workers' associations is to extend representation through out the informal economy and bring them into social dialogue processes.¹⁰⁸ It is submitted that this objective, together with decent working conditions and development for the benefit of all cannot be achieved without the realisation of freedom of association and corporation of all parties in social debate.

¹⁰⁸ *Clause 31: ILO Conclusions on decent work.*