about the future of the sector.

There are some far-reaching proposals that are made by the ANC's SIMS committee that could be game-changing for the Mining Charter if they were adopted. These include the introduction of a State Mining Company and its special status as an empowered entity that could play a critical role in accelerating the achievement of ownership targets for HDSA.

The SIMS proposals also include the establishment of a wealth fund that could perform various functions including promoting the development of mining communities, building new supplier sectors, and accelerating human resource and technology development. These proposals are based on the assumption of higher levels of taxation, resource rent, from the mining industry to go towards transformational objectives.

These debates suggest a need for a more structured dialogue between government, industry and labour to create a new basis for transforming and managing the sector. If the social actors move fast in tackling the challenges in the mining sector, and reposition it as a powerful instrument for transformation, a new social dialogue that resets the tone of engagement is essential. In the absence of this divergent views and conflicting measurements of targets set by the Mining Charter will continue. LB

Mzukisi Qobo is a senior lecturer in the Department of Political Sciences at the University of Pretoria.

Unlocking labour laws

Vulnerable workers and proposed amendments to the Labour Relations Act

Introduction

Cabinet approved the Labour Relations Amendment Bill in March this year. Whilst the Bill is not law, indications from the broad consensus achieved through the National Economic Development and Labour Council (Nedlac) process, suggests that the Bill is likely to be passed into law later this year.

In general many of the amendments are labour friendly and seek to improve the position of vulnerable workers, regulate labour brokers, fast track enforcement of Commission for Conciliation, Mediation and Arbitration (CCMA) awards and strengthen trade union's entitlement to organisational rights.

Strengthening the position of employees placed by labour brokers

One of the key issues addressed in the Bill is the position of vulnerable workers, especially those employed by labour brokers. Labour broking has received much public attention, especially from the Congress of South African Trade Unions (Cosatu), comparing it to modern day slavery and calling for a total ban.

Unions argue that the practice drives wages down, burdens families as workers placed by brokers typically do not enjoy benefits like medical aid and pension funds, and undermines collective bargaining and union organising efforts as workers move around from workplace to workplace. The government has heard these concerns and has in the amendments proposed a range of protections for low income workers and atypical / non-standard workers but has not proposed a ban on the practice of labour broking.

With respect to terms and conditions of employment, employees placed by labour brokers must be paid in accordance with any employment law (e.g. laws setting minimum wages), sectoral determination or collective agreement concluded in a bargaining council applicable to the client. So the terms and conditions of employment must obviously be lawful, but do not have to be similar to those paid by the client to its own employees unless a sectoral determination or collective agreement applies.

Similar terms and conditions do though apply when the client is assumed to be the employer and that occurs if the employee earns

below the ministerial threshold (currently R183,008 per annum) and is employed for longer than six months and the client cannot justify remunerating at a lower rate. The amendments set the basis of differentiation, which may include: seniority, experience, length of service, merit, or the quality or quantity of work performed.

In brief then, low-income employees working for long periods of time at a client will be entitled to similar wages and benefits as those which apply to the client's own employees (unless the client can justify otherwise). A termination by the labour broker to avoid the client attracting the liability of an employer is a dismissal and the employee will have recourse to the CCMA or a council.

A labour broker will now have to provide its employees with written particulars of employment which specify the name and address of the labour broker, a brief job description of the employee, the place of work, hours of work, rate of pay and overtime pay, and the leave to which the employee is entitled.

Labour brokers must also be registered. The applicable legislation regulating labour brokers must still be enacted.

Strengthening the position of low to medium earning employees on fixed-term contracts

These amendments apply to employees earning below the ministerial threshold. Employers may only employ employees on fixed-term contracts longer than six months if the nature of the work is of a limited or definite duration, or the employer can demonstrate any other justifiable reason for fixing the term of the contract. Such a reason could be to replace an employee who is temporarily absent, to deal with an increase in the volume of work, or to perform seasonal work. If the duration of the contract is for longer than six months and the duration is not justifiable then the employee is deemed to be a 'permanent' employee (i.e. the employment is deemed to be of indefinite duration).

The amendments seek to oblige an employer who employs employees for longer than six months to treat those employees on par with permanent employees performing the same or similar work. However, if the employer can justify different treatment, then the different treatment is permissible. If an employee is employed on a project for longer than two years, then upon termination, the employer must pay severance pay – one week's pay for each completed year of the contract.

Strengthening the position of part-time employees earning below the threshold

According to the amendment, a part-time employee is paid by reference to time and works fewer hours than a full-time employee. An employer who employs a part-time employee, who works for longer than six months and that part-time employee earns less than the ministerial threshold then the employee must be treated by the employer on a par with full-time employees unless there is a justifiable reason for different treatment.

A justifiable reason could be, as mentioned earlier, on the basis of seniority, experience, length of service, merit or the quality of work performed. Clearly the intention is to improve the salaries of part-time employees and to provide them with benefits enjoyed by their full-time counterparts. Presumably the salary and benefits would be proportionate to the number of hours worked.

Collective bargaining thresholds for trade unions

The amendments seek to grant wider discretion to a CCMA commissioner considering whether, and to what extent, to grant organisational rights to trade unions at a workplace if employers and unions cannot reach agreement on the matter. The purpose is to strengthen union representation at the workplace.

The CCMA commissioner, now in addition to other factors, may consider the composition of the workforce taking into account the number of employees placed by labour brokers, employees on fixed-term contracts and part-time employees. This is an important amendment which aims to recognise atypical workers (who are difficult for unions to organise) and protect their interests through trade union representation.

The commissioner may also grant a union, which does not have majority representation at a workplace, the right to elect shop stewards if the union already has access rights and receives levies from members at the workplace, and there is no other trade union, which has elected shop stewards at the workplace. The right to elect shop stewards previously only applied to unions with majority representation at the workplace.

If a trade union representing employees of labour brokers seeks to exercise any organisational rights, then the union may exercise those rights at the workplace of either the labour broker or client. Employees of labour brokers are likely to benefit from the increased influence of trade unions representing their interests at workplaces from which they were previously excluded.

IMPROVING ENFORCEMENT OF ARBITRATION AWARDS

Employers have two standard strategies for avoiding compliance with arbitration awards made

against them. The first is just to ignore the award, and the second is to approach the Labour Court by way of review proceedings to have the award set aside. Employees must then arrange to have the award certified by the CCMA, or made an order of the Labour Court, then have a writ issued and then liaise with the sheriff to execute against the employer. This is a complex and cumbersome process, especially for ordinary workers, who reasonably assumed that victory at the CCMA was the end of the litigation process.

If the award orders reinstatement and the employer refuses to comply then, according to the amendments the employee no longer needs to have the award made an order of court and can proceed simply on the face of the award to institute contempt proceedings in the Labour Court. If the award is for money and it is not paid by the employer, then the employee must have the award certified by the CCMA and may then approach the sheriff to execute. The employee no longer needs the Labour Court to issue a writ.

SPEEDING UP REVIEWS IN THE LABOUR COURT AND THE FURNISHING OF SECURITY

Labour disputes are supposed to be resolved quickly, but the experience of litigants (and their lawyers) is that disputes can take years to reach finality. This is frustrating and disheartening. The amendments address the problem in a number of ways. A person seeking to review an award must approach the Labour Court within six months of launching the review for a date of set down. The litigant, usually the employer, may no longer institute review proceedings and then sit on their hands hoping that the application will be lost somewhere in the corridors of the Labour Court.

Furthermore, review proceedings will suspend the operation of the award only if the unsuccessful party (usually the employer) furnishes security either to the value of the compensation ordered, and if no compensation was ordered then 24 months' salary (for e.g. in the situation of reinstatement). Thus presumably if no security is furnished then execution of the award will not be stopped. The amendments don't say who may receive the security (a sheriff, an attorney, the registrar, are all possibilities).

CONCLUSION

The Bill proposes the most comprehensive set of changes since the 2002 amendments to the Act. The amendments impact on the working of the CCMA and the Labour Court. The substantial amendments seek primarily to improve the position of low-paid employees in non-standard employment. An improvement for employees is conversely a cost for employers, and the impact this may have on job creation and the financial viability of marginal businesses remains to be seen. We are likely to see litigation in a new terrain, which will be about non-standard employees and their unions claiming similar terms and condition of employment enjoyed by permanent employees, and employers resisting such advances. LB

Dawn Norton is a director of employment law at Mkhabela Huntley Adekeye Inc.