

# Fiddling with the labour laws

## cure or curse

Would the poor and those that find themselves in the Second Economy benefit from a move to 'deregulate' the labour market? **Les Kettle** argues that the labour market alone is not responsible for the problems in the economy.



Important questions are being raised about the suitability of the country's labour laws, particularly in the light of high unemployment and the presence of a large Second Economy. A debate has begun on how to ease labour regulations to create jobs and eliminate accidental damage to groups such as youth, women and small business.

In its Fifteen Point Programme the Department of Labour committed itself to:

- '...ensure that our legislative programme is implemented mindful of the nature of the labour market and economy,
- pay greater attention to monitoring the impact of our laws so that gaps between our legislative intention and the reality, as well as unintended consequences, are speedily identified;
- where problems with our approach have been identified be proactive in establishing an appropriate response, including legislative amendments if required. This needs to be done with social partners'

This planned workshop will play an

important part in guarding against the tendency for reactionary forces to hijack labour reform processes.

### LABOUR REGULATION IN THE PROGRESSIVE ERA

When the government came to power in 1994 it inherited a distorted and unequal labour market characterised by chronic unemployment, adversarial labour relations, racially skewed earnings, and lack of skills amongst workers.

Ten years later, workers have much to celebrate, but it has to be conceded that many of the problems, such as high levels of unemployment and inequality, are still there. The labour market problems are compounded by the impact of globalisation and unintended consequences of policy reform and implementation.

### REGULATED FLEXIBILITY

The new labour market regulatory framework that was established by the ANC-led democratic government rested on two pillars described as 'regulated

flexibility' and 'voice regulation'.

'Voice regulation', or the role of bargaining between workers (and their unions) and employers (and their associations) in many aspects of the employment relationship, was viewed as charting a course that avoids either 'bureaucratic regulation' or an over-reliance on market forces in the labour market. The 1996 Labour Market Commission emphasised the role that 'voice regulation' could play in balancing the twin imperatives of 'flexibility' and 'security' in the labour market.

'Regulated flexibility', as a policy of government was basically outlined in Gear as a strategy to 'extend the protection and stability afforded by existing labour market regulations to an increased number of workers'. However, there was also recognition that this would be done in a manner that takes into account 'voice regulation' and the needs of particular sectors and regions of our country.

A discussion of the origins of the current labour market regulatory



framework would be incomplete without reference to the misleading manner in which popular labour market debates are being presented today.

- Firstly, there is the erroneous notion that the labour market suddenly became 'inflexible' after 1994. As we have indicated above, this is factually incorrect as those familiar with the job reservation, and a host of other regulations that limited the utilisation of the country's African labour force, would confirm.
- Secondly, the attempt to present the new labour laws as contributing to some 'duality' or some workers benefiting more than others, can also mislead, particularly when one considers where we are coming from as a country. The approach of addressing this challenge through 'voice regulation' and 'regulated flexibility' would seem appropriate especially when the Freedom Charter also unequivocally stated that 'miners, domestic workers, farm workers, and civil servants shall have the same rights as all others who work'. Today this is realised through the Basic Conditions of Employment Act

(1997), which provides a floor of rights for ALL workers. The only workers excluded are those in the army and security and intelligence agencies.

A key question today would seem to be whether 'voice regulation' and 'regulated flexibility' are as relevant as they were a decade ago.

There is a view that the move by many firms to employ 'atypical' workers, such as temporary or casual workers, workers supplied by labour brokers, part-time workers, and home workers, is a sign of the inappropriateness of the legislation and policy frameworks.

However, casualisation and outsourcing are a worldwide phenomenon and there is no reason why voice regulation and regulated flexibility should not serve as a guide to reduce the worst vulnerabilities and insecurities that occur whilst allowing firms the opportunity to use labour flexibly.

#### LABOUR LEGISLATION AND SMALL BUSINESS

The concern for a balance between 'flexibility' and 'security' in the labour market has led to considerable efforts to take into account the needs of small businesses during the formulation of labour policies. The Labour Market Commission (1996) raised the issues related to small businesses being given a greater voice in bargaining councils in 1996 and since then most of the legislation has introduced some 'variations' related to small businesses but the most important intervention was the introduction of a Ministerial Determination for Small Business in 1999.

The impact of the labour legislation on small businesses is not easy to discern. Anecdotal evidence tends to suggest that small businesses find the labour laws to be burdensome and an administrative nightmare. Yet survey evidence also exists and points to the market place and access to capital being the most determining factors for small businesses in their decisions to employ workers. At the same time we are all aware of the difficulty of enforcing labour laws among small businesses, particularly the survivalist sectors.

The section below presents a summary outline of how the different labour legislation is taking into account the needs of small business:

#### The Ministerial Determination for Small Business

This determination, in terms of the BCEA, covers firms employing less than ten employees and seeks to 'vary' the floor of rights provided to workers under the Act. The main areas covered relate to overtime, annual leave and the averaging of hours, in response to the needs of sectors that were experiencing difficulties with compliance with the BCEA such as general dealers, private security firms, transport companies and service stations.

The determination provides for employees to work no more than 15 hours overtime per week and to be paid at least one and a third times the employee's wage for the first ten hours of overtime per week (above this the normal BCEA rate of one and a half times applies). It also provides for the averaging of hours and the possibility for employers and employees to

reduce an employee's entitlement to annual leave by the number of days of family responsibility leave.

#### The Labour Relations Act

Amendments to the Labour Relations Act (66 of 1995) contain features that are helpful to small businesses including those covering bargaining council agreements.

In terms of the amendments promulgated in 2002, a collective bargaining agreement may not be extended to non-parties unless the minister is satisfied that

- 'the non-parties specified in the request fall within the bargaining council's registered scope';
- 'provision is made in the collective agreement for an independent body to hear and decide, as soon as possible, any appeal brought against the bargaining council's refusal for a non-party's application for exemption from the provisions of the collective agreement, or the withdrawal of such exemption by the bargaining council;
- the collective agreement contains criteria that must be applied by the independent body when it considers an appeal, and that those criteria are fair and promote the primary objects of the Act;
- the terms of the collective agreement do not discriminate against non-parties.

Section 49 of the Act provides for bargaining councils, having a collective agreement that has been extended, to inform the Registrar of Labour Relations (Department of Labour) annually on:

- the number of employees who are employed by small enterprises that fall within the registered scope of the council and the number of employees of those enterprises who are members of trade unions;
- the number of employees employed by small enterprises that are covered by a collective agreement that was concluded by the council and extended by the minister;
- the number of small enterprises that are members of the employers organisations that are parties to the council; and
- the number of applications for exemptions received from small enterprises and the numbers that were

granted or rejected.

The LRA, as amended in 2002, also eased procedures on dismissals in a manner that should favour small businesses.

#### LABOUR LEGISLATION AND THE SECOND ECONOMY

There is an emerging question related to the implication of the current labour market regulatory framework for the section of our economy that is 'mainly informal, marginalised, unskilled, populated by the unemployed and those unemployable in the formal sector' - the Second Economy.

The suggestion is that the current labour laws are 'worsening' the position of those in the Second Economy. Even if there were grounds for this argument, it would seem implausible that the solution would lie in 'deregulating' the labour market so that market forces alone would improve the lives of our people by giving them access to jobs.

The problems of the Second Economy are a mirror of the problems of growth and development that our country faces. Many of the problems in the labour market can be attributed to the structure of our economy and how it has evolved. The enclave nature of the economy implies that there are structural market failures or discontinuities that are mutually reinforcing and lead to the low employment absorption capacity and other problems in the labour market.

These structural distortions include; the nature of economic sectors (distribution of economic activities among primary, secondary and tertiary activities) and the degree of diversification of the economy, the structure of trade, the structure of the labour market, the structure of financial markets, the structure of income distribution and poverty and the structure and quality of institutions.

As a result, many of the problems in the labour market cannot be addressed in the absence of development strategies aimed at restructuring the economy so that it is also more inclusive of the majority of the population. What is clearly needed is a package of broader policies aimed at resolving many of the problems manifested in the labour market, but not necessarily and primarily caused by the labour market,

nor restricted to it.

Our approach to the question of the Second Economy should be one that posits the challenge as essentially a 'development' problem underpinning the quest for sustainable development in our country. As such it requires a comprehensive strategy that includes the harmonisation of all social and economic policies.

#### OLD WINE IN NEW BOTTLES? AN ASSESSMENT OF RECENT CRITICISMS OF LABOUR LEGISLATION

It needs to be recognised that many of the arguments that are increasingly levelled at the post-apartheid labour legislation are not necessarily new and that despite government's efforts to address them through the necessary legislative interventions, they will always be there.

At the same time the labour market reform mantra is a global phenomena that is being prescribed for any country facing unemployment problems in developed and developing countries alike. Spain and Germany are two countries that immediately come to mind, as does the entire OECD labour market reform process. However, what we need to guard against is an almost 'mechanical reproduction of ideas originating years earlier in industrialised countries'. We need to ask if the objective and material conditions are the same and whether the proposed solutions are applicable in our case.

During the early and mid-1990s there was a lot of World Bank and IMF sponsored research that, in the true footsteps of the neoclassical tradition, blamed unemployment on wage levels earned by African workers. This research lobbied



strongly against 'aggressive national minimum wage policies' and 'job security' legislation. Peter Moll's work focused on the role of bargaining councils as wage setting institutions that were responsible for the high wages earned by African workers thus limiting their employment levels. The roots of the stories about insider-outsider divides were thus firmly planted without any consideration of the 'extended family' nature of most African households.

Fast forwarding to 2005, many of the criticisms of labour legislation focus on the regulatory burden facing small businesses, the impact of bargaining council agreements when extended to non-parties, dismissal costs, and the infrastructure for education and skills.

Apart from the almost universal consensus about improving the implementation and impact of the national skills development strategy, there is no body of knowledge that can inform significant policy changes with regard to the other areas of the policy debate. Little is known also about the impact of the small business friendly amendments that have recently been effected.

However, there will always remain those sections of the population that will have a problem with many aspects of the labour legislation due to the manner in which they have empowered workers to

access basic rights and to take charge of their own destinies both at the workplace and in individual communities where they live.

### TOWARDS A PROGRESSIVE PRO-POOR LABOUR MARKET REFORM AGENDA

The employment and poverty challenges facing our country are immense and deserve dedicated attention and intervention by all stakeholders.

The question at this point should be how labour market regulation can contribute to this pro-poor and developmental agenda.

It is widely recognised that labour market regulation can affect both the quantity and quality of employment.

With regards to the quantity of employment, the Department of Labour can contribute to the creation of a small business friendly regulatory environment. The department does not yet have dedicated resources for assisting small businesses in ways that help them to comply with the existing legislation and this could be introduced along with regular monitoring of the impact of various regulations on levels of investment and employment by small businesses.

Increasing absorption of the unemployed labour force into the labour market will depend on the appropriate harmonisation of labour market policies and other policies such as the macro, industrial and social policies.

However, there needs to be monitoring of the impact of the labour legislation. Such monitoring would be in line with the historical mandates derived from both the Freedom Charter and the Reconstruction and Development Programme.

On the quality of employment, the evidence is not yet available to suggest that the poor and unskilled will benefit from radical changes to any of the labour legislation, by moving to the First Economy. Deregulation in the labour market, as proposed by many critics of the existing legislation would tend to introduce greater inequalities and lower wages, as was seen in the many countries where this route was followed. Therefore

rather than reduce the Second Economy it could actually perpetuate and worsen it.

At the same time it would seem premature to consider the possibility of lowering the floor of rights for groups of workers, whether according to region or age. Given the difficulties of implementing 'regional' minimum wages this may not necessarily be the best model. Growing casualisation and outsourcing is also affecting certain groups of workers more than others. It is unclear whether a move to accentuate these developments would be ideal.

We would propose that the best way to respond to the challenges of 'youth' unemployment or the position of women in the labour market would be through 'targeting' such groups through the use of 'active labour market policies'. The proposed active labour market policies would provide a package of interventions covering counselling, training, placement, entrepreneurial education and access to finance (the UK's New Deal targeted policies are a good example).

### CONCLUSION

Labour market problems facing the country are considerable but not insurmountable. There is a need to continuously monitor the existing labour legislation in order to assess its impact. However, it is unclear how the poor and those finding themselves in the Second Economy would benefit from a move to 'deregulate' the labour market.

It can be possible to introduce better marketing and education, implementation, and most critically monitoring.

Active labour market policies are the appropriate response to target youth and women for employment and not necessarily deregulation.

The labour market alone is not responsible for all the problems and it cannot be blamed for emerging dualisms whether real or imagined.

*Kettledas is the deputy director general for the Department of Labour. This is an edited version of a paper he presented during the ETC workshop. This paper was presented in his personal capacity.*

### HOW RESPONSIVE ARE BARGAINING COUNCILS TO THE NEEDS OF SMALL BUSINESS?

- Total number of applications for exemptions received: 7 373
- Total number of applications received from SMMEs: 4 344 (59%)
- Total number of exemptions granted: 5 670
- Total number of exemptions granted to SMMEs: 3 407 (60%), only 797 rejected
- % of bargaining councils reporting on representation of small business in councils and on exemption bodies of councils: 75,86%

Source: Department of Labour, 2005