Legal Notes

The Labour Relations Decrees of the Ciskei and the Transkei

The CENTRE FOR APPLIED LEGAL STUDIES (CALS) assesses new labour laws in the bantustans

Most of the independent and self-governing homelands have their own labour law. In the independent homelands, a major purpose of this legislation has been to prevent South African trade unions operating in their territories. This is still true of Bophuthatswana.

However, the military governments in the Transkei and Ciskei, which overthrew the unpopular regimes of the Mantanzimas and Sebes, have accepted that South African trade unions can operate in their territories. Both homelands have experienced widespread labour unrest recently.

Both territories' laws are less complicated than the South African Labour Relations Act. Each contains innovations not found in the South African Labour Relations Act, but also contain significant flaws. The Ciskei legislation is interesting because some of its provisions are drawn from the COSATU/NACTU/SACCOLA agreement. This note concentrates on those areas where the laws differ from South Africa's.

Ambit of the laws

The Ciskei Labour Relations Decree excludes farmworkers, domestic workers and public servants (including teachers and other educators in state-funded institutions) from its cover. In addition, it does not protect workers employed in small businesses with less than 20 employees.

The Transkei law, on the other hand, covers all employees but gives the government the power to exclude certain employees from its operation. The government has used this power to exclude public sector workers from the protection of the law. This is a significant omission as a very high proportion of employees in homelands (up to 70%) are employed by the government.

The protection of farm and domestic workers in the Transkei is a significant development. Unlike South Africa, the Transkei also has a wage determination which sets minimum wages and conditions of employment for farming and forestry workers.

Certification and registration

The Ciskei law has a simplified process of certification for trade unions. Trade unions must apply for certification within 30 days from the time they started to operate in the Ciskei.

Trade unions registered in South Africa may obtain certification by submitting their constitution, the address of their office in the Ciskei and certain other information to the Registrar. All trade unions operating in the Ciskei must apply for certification.

The registration procedure in the Transkei Labour Relations Decree is much simpler than in the South African system. It is, in essence, a formal requirement provided that the necessary information, including the constitution, and application forms are submitted to the Registrar.

However, the Registrar may refuse to register a trade union if its constitution is, in its view, contrary to the law or unreasonable. An unregistered trade union in the Transkei cannot make use of the structures (the Industrial Court etc.) created by the Decree.

The unfair labour practice

The Ciskei Decree utilises the definition of the unfair labour practice contained in the COSATU/NACTU/SACCOLA Agreement. This definition, using the same wording as the pre-1988 South African definition, gives the Industrial Court a wide jurisdiction to determine unfair labour practices.

In addition, the definition of an unfair labour practice deals explicitly with unfair dismissals. An employer may only dismiss workers on one of three grounds:

- incapacity (inability to do the job);
- misconduct;
- operational requirements (retrenchment).

In the case of incapacity and misconduct, the worker must be given a hearing before the dismissal. In retrenchments the employer must consult in good faith in an effort to reach an agreement with a trade union about the retrenchment. In the absence of a trade union, the employer must give notice to and consult with a works council or other body representing employees and, if they do not exist, each employee to be retrenched.

Like the pre-1988 South African definition, the Ciskei definition of an unfair labour practice excludes strikes and lock-outs. This is also the case in the Transkei, although it does allow for a sympathy strike, regardless of its legality, to be declared an unfair labour practice. Otherwise the definition is in wide terms and gives the Industrial Court a wide discretion to determine unfair labour practices.

The Industrial Court

Both the Transkei and Ciskei laws establish industrial courts. In the Ciskei, the members of the court, other than the president, are lawyers who must be nominated jointly by the major trade unions and employers' organisations because of their knowledge of labour law.

This provision is significantly better than the South African law where trade unions play no part in the nomination of court members. By contrast, members of the Industrial Court in the Transkei are appointed by the government.

Both the Transkei and Ciskei courts provide for urgent interim proceedings to challenge unfair labour practices as well as final unfair labour practice determinations.

In the Ciskei, the unfair labour practice application must be brought within 180 days of the event giving rise to the dispute; in the Transkei it must be brought within a reasonable period. Both courts are able to expand their resources by making use of the services of arbitrators who are not members of the court. In the Ciskei, these persons are referred to as adjudicators, and are nominated jointly by employers and trade unions.

Conciliation Boards and Industrial Councils

The Transkei Act makes use of the South African structure of conciliation boards and industrial councils. In the Ciskei however the Act does not make provision for the establishment of industrial councils and all disputes requiring conciliation are dealt with through conciliation boards.

This is a recognition of the fact that no industrial councils have been established in home-

lands.

In neither the Transkei nor the Ciskei is it necessary to apply for the establishment of a conciliation board (or to refer the dispute to an industrial council) before making application to the industrial court for an unfair labour practice determination.

However, the court may direct that the dispute be the subject of conciliation before it hears the matter. In all other disputes, it is necessary to refer the dispute to statutory conciliation, so as to stage lawful industrial action. The referral procedure is simpler than in South Africa and neither territory has the requirement of a letter of deadlock.

In the Ciskei, the application for a conciliation board must be made within 180 days of the dispute arising, although the industrial court has the power to condone a late application. In the Transkei, the application must be made within a reasonable period.

Mediation

Both Acts encourage the use of mediation as a method of resolving disputes. In the Ciskei, the parties to a dispute can appoint a mediator who will thereafter preside over conciliation board meetings in an attempt to settle the dispute. In the Transkei, the Minister may on request of the parties appoint a mediator who is acceptable to them. He may also appoint a mediator, even if not requested to do so, where he considers that it will assist the parties in settling the dispute.

Strikes

Both Decrees extend the definition of a strike so as include the refusal to work voluntary overtime. This is to avoid the problem raised in the well known *SA Breweries v FAWU* case in which the Appellate Division held that it was not a strike to refuse to do voluntary overtime. Both territories also prohibit local authority and essential service sector workers from engaging in industrial action and disputes in these industries are resolved by compulsory arbitration as in South Africa.

The Transkei Public Security Act also makes it a criminal offence for employees involved in the supply of light, power, water or sanitary or transport services to breach their contracts if that could have the consequence of depriving members of the community of that service.

Both Industrial Courts are empowered to interdict unlawful strikes; i.e. those staged during the currency of an agreement, award or determination binding on the parties to the dispute, those in industries subject to compulsory arbitration or before the completion of statutory conciliation at an industrial council or conciliation board. In the Transkei however there are two further situations in which otherwise lawful strikes can be prohibited by the industrial court. These are:

- where the strike is a sympathy strike directed at an employer not involved in the dispute causing the strike;
- if, in the court's view, it is likely that the strike will endanger the life, personal safety or health of the community or a part of the community. Such a strike would also be an offence in terms of the homeland's Public Security Act.

Both laws require the holding of ballots before a lawful strike and contain an indemnity against civil actions arising out of lawful strikes similar to that in the South African law before the 1988 amendments. The Ciskei Act introduces a requirement that trade unions must give 24 hours notice of strike action (a similar provision applies to lock-outs).

It also provides that where workers go on an unlawful strike, the employer will be able to lock them out in response to the strike without going through the statutory procedures and vice versa.

Worker rights

Both laws outlaw victimisation of employees for trade union membership and have a freedom of association provision preventing employers from stopping workers joining a union. The wording differs between the two and in Ciskei, it would appear that the law also prohibits the operations of closed shop arrangements.

It also places an obligation on employers to make stop order deductions for subscriptions for representative trade unions once a written request for deductions has been lodged by the union on behalf of employees. ☆