Workers' world

Labour Relations Act

ten years on – Ideals v Reality

The Labour Relations Act, which came into force in 1995, has been seen as one of the crowning achievements of the post-apartheid dispensation. ***Norma Craven*** *and* ***David Cartwright*** *argue that while many gains have been made, the Act's central pillars – collective bargaining and effective dispute resolution – have helped employers rather than protected the rights of workers.*

PHOTO: COSATU

The Labour Relations Act gave flesh to the vision that the new South Africa is based on transformation and a redress of the balance of power which existed during apartheid. It was a recognition that workers had rights which should be protected against the onslaught of capitalism.

The Act has many provisions which are not only progressive in establishing workers' rights but are unknown in many western countries. An example is the provision dealing with organisational rights which grant right of access, time-off for union office bearers and facilities for shop-stewards. The protection of workers when a business is sold and the rights of consultation over retrenchments are enormous gains.

Central to the Act is collective bargaining and the exercise of power by workers and employers through strike action or lock-out. This pre-supposes that the state leaves it to the parties to resolve disputes either through negotiations or power.

Linked to this was the idea that where the state did intervene it would be through institutions where all stakeholders were involved such as Nedlac, the CCMA (which ushered in Alternative Dispute Resolution mechanisms as being central to dispute resolution) and even the Labour Court. These mechanisms would be based on the ideals of fairness and equity so that it became a collective system that stakeholders felt an attachment to and where consensus ruled.

The Act therefore attempted to resolve conflict both through collective bargaining and legal processes and separates the issues by clearly drawing a line between the issues resolved in the respective fora. But the reality has been somewhat different. The legal system has sought to regulate the very collective bargaining which is central to the Act's provisions. This has been most blatantly seen in the provisions on the right to strike.

Right to strike undermined

The right to strike is enshrined in the Constitution without qualification. This is an acknowledgement that in the last analysis the only bargaining tool a worker has is his labour. Yet in the Act, the right to strike and the right to participate in a solidarity strike are limited. Not only are workers told what they may strike about, they are also told how to go about making

their strike legal. The dispute must be conciliated and then notice given before a strike can commence.

If this was the only limitation then at least it could be seen as a means towards orderly collective bargaining. But law is not just what is set out in a statute. After that comes the interpretation, and in a legal system where judgments become precedent and are therefore followed in subsequent similar cases, the law as it appears in the statute can be diluted and changed by such judgments. In this manner the gains of the struggles of the working class are eroded.

The Labour Court has been prepared for instance to interdict strikes where the strike notice does not set out the precise time that workers will embark on strike action. More importantly the courts have now found that workers on a protected strike can be dismissed. This attacks the very core of workers' rights and the power element in collective bargaining. The point of a strike is that it has an economic impact on the employer. The employer can either come to terms with the workers or ride out the strike. If an employer can dismiss striking workers by claiming that his business is suffering and he has an operational requirement to dismiss, the whole right to strike becomes a nullity.

The Labour Appeal Court in Numsa v Fry's Metals has further undermined the right to strike – which was never the intention of those who conceived and negotiated the Act on behalf of workers. Embarking on secondary strikes is now almost impossible. The court insists that there has to be a relationship between the company where the primary strike is and the companies where workers want to take solidarity action. This is not the case internationally and in some for instance, mineworkers have taken part in support of strikes by firefighters or nurses. The strong and organised use their industrial strength to support those with less industrial strength.

These fetters are now so far reaching and are so tightly tied that there is little need for an employer to ever exercise power through a lock-out as all it has to do is threaten workers with retrenchment. Only workers have to exercise power to win their case – the balance has been tilted in favour of employers.

Dispute resolution

The new, improved, dispute resolution mechanisms have also reached an impasse. Conciliation and arbitration form part of what is known throughout the world as methods of Alternative Dispute Resolution, distinct from the formal legal system. The idea of both conciliation and arbitration is that both parties buy into the process which is less formal, quicker and cheaper than the road of litigation.

That was the ideal – but it has unfortunately been whittled away by the encroachment of the legal profession and the lack of will and capacity of the institutions and some of those who act as commissioners.

The CCMA for example requires formal applications to be made where a worker may be late in processing his dispute or wants to join another party to his dispute. The CCMA and some bargaining councils are now also awarding costs against the party who loses. The inevitable result is that the system is becoming rigid and legalistic and more and more workers need attorneys to negotiate the system successfully. The idea that an unrepresented worker would be able to navigate himself through the system is becoming a thing of the past.

Employers often instruct attorneys to represent them, a luxury, not open to most workers and in particular the least organised. In effect only those workers who belong to strong trade unions (and those are still a minority of the total workforce) are likely to have proper representation. The Act however, makes no allowance for this.

Conclusion

While there have been notable gains and the law offers many protections to workers, problems have emerged. The two central pillars of the Act – collective bargaining and dispute resolution – have shown in action and through interpretation by the CCMA and the courts, that they exist to prop up employers rather than to protect the rights of workers.

How has an Act which has its origins in the need to promote transformation now become in some cases the very tool which retards this transformation? We believe there is a dichotomy between the idealism of the Act and the views of some of the commissioners and judges who have not bought into the ideas that underpin both the Act and the Constitution.

They have not been able to embrace a new mindset which requires them to treat workers and employers as equals and often unconsciously harbour a bias in favour of employers and a fear of organised workers. What is clear is that workers will resist attempts to further erode their rights and the role of trade union legal officers is to defend these hard fought for gains.

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