Labour law amendments

a serious attack on workers' rights

Mlamuli Makhubo and Phillemon Motlhamme assess the impact the proposed labour law amendments will have on trade unions.

The current labour law amendments come against the backdrop of the chorus of 'unintended consequences' and 'inflexible labour market policies' sung by government and business. The Ministry of Labour is at pains to convince everyone within earshot that the proposed amendments represent a balance between the interests of workers, business and society.

However, we hold the view that on the whole, these proposed amendments represent a serious attack on workers' rights – gained through hard fought battles. Through this article we will attempt to show that:

- some of the proposed amendments, if implemented, will reverse the major gains achieved over many decades of struggle; and
- other amendments do not go far enough in addressing the concerns they purport to.

LRA

The Labour Relations Amendment Bill, 2000 seeks to amend certain key provisions of the LRA. This article will deal with the proposed amendments that will impact negatively on trade unions.

Extending agreements

The bill aims to give employers who are not parties to bargaining councils an opportunity to make representations about collective agreements which could be extended to them. Government thus attempts to relieve SMMEs of what it terms 'onerous obligations imposed by bargaining council agreements'. This, government thinks, will result in job creation.

We submit that government has bought business' argument that legislation is responsible for the lack of job creation. This is ironic when viewed against government's repeated assurances that it does not subscribe to this view. For us, the real problem is the investment strike, which can be traced back to the '70s, long before our present labour law regime. It is therefore misleading to suggest, even by implication, that 'flexible' labour market policies will result in job creation.

The effect of this amendment will be to open floodgates for employers to apply for exemption from bargaining council agreements. In terms of the proposed new section 32, the minister may not extend a

collective agreement to non-parties unless he/she is satisfied that employers who are not party to the council have been given an opportunity to make representations. If the minister decides not to extend a collective agreement because of the representations made, this will amount to exemption by default. If this happens, many workers will run the risk of being stripped of even the most basic rights. This will have catastrophic consequences for workers.

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The explanatory memorandum to the bill claims to seek to address the concern that employers and their collectives as well as trade unions are not granted the right to make representations. Yet the amendment extends this right exclusively to employers. We can safely conclude that employers are the sole and exclusive beneficiaries of this amendment.

CCMA arbitration fees

Presently the CCMA may not charge fees for conducting arbitrations. Section 25 of the bill seeks to alter this situation by allowing the CCMA to charge a fee for conducting arbitrations involving employees who fall within a certain income bracket. According to the explanatory memorandum to the bill this is meant to discourage so-called high-income earners from referring matters to the CCMA. If this amendment is effected these workers or their unions will have to either refer matters for private arbitration or pay CCMA arbitration fees. If they refer to private arbitration they will have to jointly foot the bill with the employer as is currently the case. This would be very costly for workers and for trade unions, especially since the earning thresholds are not defined and will probably be set by the minister by proclamation.

It is unfair to punish workers on the basis of their income. It would also be a travesty of justice if the workers, whose taxes are already being used to fund the CCMA, were expected to pay again in order to use that institution's services. This proposed amendment also negates the philosophy behind the founding of the CCMA, namely, cost effective, friendly and accessible dispute resolution.

The net effect of this amendment is that it will undermine organising efforts by trade unions and thus weaken the labour movement.

Unfair dismissals

Section 41 of the bill proposes two of the most drastic changes to the LRA. These changes, if implemented, will take us back by decades.

The first seeks to set the probation period at six months, unless the parties specifically agree to a shorter period. The effect is that a probation period is set by default. Since in practice agreements at the beginning or in contemplation of the employment relationship happen at the instance of the employer, the default period will probably apply in most cases.

Workers gained their rights through hard fought battles.

This will expose newly employed workers to a lengthy period of uncertainty about their future and does not augur well for workers and their rights.

The second amendment on unfair dismissals elevates procedure over substance in dismissals for poor work performance or for incompatibility. In fact the amendment seeks to do away with the requirements for substantive fairness in these types of dismissals.

Currently, in cases of dismissal for poor work performance, substantive fairness means that:

- the employee failed to meet a performance standard,
- the performance standard is reasonable and was known to the employee at the relevant time;
- the employee was given a fair opportunity to meet the performance standard;
- the sanction of dismissal was appropriate punishment for failure to meet the required performance standard.

The effect of the proposed amendment is that an employer will not be required to prove any of the above elements Since there can be no inquiry into the reason for the dismissal, this would mean that in most cases the mere allegation by the employer that the employee was dismissed for poor work performance or for incompatibility will be accepted as fact. The potential for abuse in this situation is self-evident. At the very least this proposed amendment is sloppily drafted and will lead to problems of interpretation and applications. Many employers already flout procedural and substantive fairness principles. It is frightening to contemplate the extent of violations that will be ushered by this amendment.

As if this is not enough, the bill goes on to define fair procedure within the context of conduct-related and capacity-

related dismissals. It provides that fair procedure shall mean an opportunity for the employee to put a case forward with the assistance of a shopsteward or co-employee. It then exempts employers from following this procedure, but does not define the circumstances when exemption is allowed. Employers are also exempt from the requirements of a formal hearing.

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The proposed new section 188 is, in our opinion, not likely to pass the constitutionality test as it infringes on the right to fair labour practices conferred by section 23 of our Constitution. It should be obvious that any law that allows for the dismissal of employees without going into the merits of such dismissal and without giving them an opportunity to put their case on merit is inconsistent with the guarantee in section 23. In terms of section 2 of the Constitution, any law that is inconsistent with the Constitution is invalid. The amendment is also contrary to the principles of natural justice, particularly the right to be heard.

Retrenchments

Section 42 of the bill seeks to impose a duty on employers to give notice to the minister before they dismiss 500 or more employees in any given 12-month period. The section also empowers the CCMA to appoint a facilitator to assist the parties in the retrenchment consultation, and spells out the powers and functions of such facilitators. We believe that the requirement of 500 is too high and if 499 employees are retrenched they receive no protection under this amendment.

We submit that the major problem with section 189 is not so much whether there should be consultation or negotiation about retrenchment. In our view the real problem is the definition of operational requirements in section 213. The definition is so broad that an employer can retrench for any reason on earth.

Employers have been known to use this definition to retrench for reasons as flimsy as 'non-core business', amongst others. This definition of operational requirements needs to be tightened to guard against abuse.

Right of representation

Sections 26, 27, 28 and 37 of the bill seek to amend the provisions of the LRA dealing with the right of representation in conciliation, arbitration and the Labour Court. The proposed amendment is on two levels. First it proposes that a director or employee of a holding company be allowed to represent a subsidiary company and vice versa, at CCMA and Labour Court proceedings.

While this amendment is not necessarily prejudicial to the labour movement, we suggest that the same underlying consideration be extended to the labour movement in the interests of fairness. Federations and their affiliates respectively, are the labour movement equivalents of holding companies and subsidiary companies. Employees of a federation should be allowed to represent an affiliate in any of these proceedings and vice versa.

The second aspect of the amendment seeks to limit trade unions' right to

represent workers at conciliation, arbitration and the Labour Court, by providing that trade unions can represent only those workers who were members of the trade union when the dispute in question arose. The current LRA does not have this proviso, so for example, workers can join a trade union after being dismissed but before making a referral to the CCMA or the Labour Court. The union would have the right to represent such workers. The Labour Court has also held that a member need only have been a member at the time that the referral is made and not when the dispute arose.

NACTU's national education officer, Phillemon Motlhamme.

The effect of the proposed amendment is to alter this situation and entitle unions to represent only those workers who were members prior to their disputes arising. This will have the unfortunate results that one of the most valuable organising tools is taken away from trade unions. It is a well-known fact that trade unions have been using CCMA cases to tap the unorganised sections of our workers. Most workers join unions because they have problems at that time.

Workplace forums

Section 17 of the bill seeks to allow minority unions and non-unionised workers to form workplace forums. The current position is that workplace forums can only be initiated by a majority trade union or by minority trade unions who jointly have a majority. This can be done only in workplaces employing more than 100 employees.

If this amendment were effected, non-unionised employees would be allowed to trigger the formation of workplace forums, even in small workplaces. Some employees and employers could collude to keep trade unions out of their workplaces, which could lead to union bashing. Trade unions have for good reason, been reluctant to embrace the concept of workplace forums. Some of these reasons are:

- Very few issues are the subject matter of joint decision-making (section 86); most issues are for consultation (section 84). This means that the employer makes the final decision on these issues. This makes the whole consultation process a sham.
- The issues for consultation are a priority only to employers, (for

example, mergers and transfers, exemptions from collective agreements, merit increases, plant closures, workplace restructuring etc). There is a real danger that workers, and by implication trade unions, are likely to be used to rubber stamp management decisions on these crucial issues.

- There is also the concern that the workplace forums will usurp the functions of authentic bargaining forums and structures.
- To the labour movement, the workplace forums look like something akin to the old liaison committees.

In general, workplace forums will tend to weaken the trade union movement and undermine any attempt to strengthen them.

Costs awards

The bill seeks to give CCMA commissioners the power to order a party or his/her representative to pay costs. The grounds for issuing such costs orders are so general that virtually all unrepresented workers and most shopstewards will not escape falling victim to these proposed new provisions. This provision will intimidate a large number of would-be claimants from referring their matters to the CCMA. This goes against the founding philosophy behind the formation of the CCMA, namely, accessibility. Furthermore, giving CCMA commissioners the discretion to determine such costs and make the orders maximises the potential for abuse.

BCEA

The Basic Conditions of Employment Bill, 2000 (the BCEA bill) proposes to amend the law regarding Sunday work and paying for it. The position at present is that an employee:

- can work on Sundays only by agreement;
- must be paid double the ordinary wage for Sunday work, or one and a half times if he/she ordinarily works on a Sunday.

In terms of the proposed amendments, an agreement will no longer be required for an employee to work on Sundays and they will only be paid their ordinary wages. If the government should go ahead with these two amendments, they will have gone too far and will be selling out workers who voted them into power.

Determinations and variations

A disturbing and distasteful proposed amendment grants the minister unrestricted powers to vary all the conditions of employment (including core rights that are currently protected). He/she can do this by sectoral determination and/or variation determinations. The hardships that will result from this amendment need not be mentioned, save to say that the most vulnerable of workers will lose their protection against abuse they currently enjoy. There is no doubt that employers will take advantage of this lack of protection.

The memorandum to the bill claims that there are sufficient safeguards in the Act to protect core rights, since the minister 'must consult with the Employment Conditions Commission before issuing a sectoral determination – as well as the fact that all determinations are subject to review by the Labour Court'. What the memorandum conveniently omits to mention is that workers who are not happy with a variation or determination have to apply at considerable cost for a review. One cannot imagine unorganised farmworkers affording this, especially since our litigation-prone government is certain to oppose any application for review.

Also not mentioned is the fact that the said Commission can only advise the

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minister, who may or may not follow the advice, and probably will not. Once government has made up its mind with regard to any issue, consultation becomes a mere formality.

Insolvency Act

The Insolvency Amendment Bill seeks to amend certain provisions of the Insolvency Act. The bill's purported intention is to 'regulate the substantive consequences of insolvency for employees in a more equitable manner'. We do not see how this intention will be achieved with the proposed amendments as they stand. The proposed amendments are confined largely to procedural issues without conferring any substantive relief to the affected employees. For example, sections 1, 2 and 3 of the bill give workers and trade unions the right to be notified in advance of any impending sequestration. This is clearly a procedural issue and nothing else. It gives little comfort to those workers who are faced with job losses without any compensation. Furthermore, there is no penalty for failure to comply with these requirements, which renders the proposed provisions toothless.

In addition, the requirements for consultation will give rise to the same problem as is experienced with regard to dismissals for operational requirements under the 1995 LRA – consultation does not confer any rights or powers on workers or their trade unions. As with retrenchments, workers are not given any power regarding the substance of sequestrations/liquidations.

Conclusion

It is clear from the above that some of the proposed amendments represent an abdication of responsibility by government, and a reversal of the hard earned rights of South Africa's workers. It would be a very sad day for this country if these amendments were passed. ★

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