Labour law future challenges

Does the never-ending debate on labour market regulation take into account the complexity of social issues? **Paul Benjamin**, in the second part of his article, examines the key areas of labour market regulation in SA and argues that policy makers cannot deal with the labour market without addressing social protection and security.

The first democratic reforms saw the enactment of the 1996 Constitution and the new labour legislation framework consisting of the Labour Relations Act (LRA), the Basic Conditions of Employment Act (BCEA), the Employment Equity Act (EEA) and the Skills Development Act (SDA). These laws sought to establish core worker rights, facilitate South Africa's reintegration into the world economy and reform the apartheid labour market, which was marked by inequality, unemployment and low skill and productivity.

The second five-year parliamentary term is a period of review and adjustment. The tone was set by President Thabo Mbeki's opening address to parliament in 1999, in which he announced a review of labour legislation to identify rigidities introduced by the new laws and any unintended consequences for job creation and business. The speech specified probation, remedies for unfair dismissal, dismissals for operational requirements, the extension of the bargaining council agreements and certain unspecified provisions in the BCEA.

The following year, the government published proposals to amend the BCEA, the LRA and the labour provisions in the Insolvency Act. After extensive negotiations, these Acts were amended in 2002. In 2001, a modernised Unemployment Insurance Act was passed and in 2003 the Skills Development Act was amended.

The Department of Labour's Programme of Action and Strategic Plan for 2004-9 emphasises the need for monitoring and evaluating the impact of legislation. The programme emphasises the need for labour market policy to be in harmony with government policies on job creation. The connection between labour market regulation and other aspects of government policy has been emphasised. The programme also stresses the need to ensure the effective implementation of the present framework. This period has also seen a highly significant report on the informalisation in the labour market, which has triggered an important debate on developing an appropriate response.

KEY CONCERNS AROUND THE LRA

There are fears that the LRA is imposing too much regulation on the labour market to include workplace forums, collective bargaining and the extension of bargaining council agreements. The extension of bargaining council agreements continues to be raised as a constraint on the growth of small business.

It has been suggested that extending bargaining council agreements may make unemployment worse by encouraging more capital-intensive production. But it is important to bear in mind the limited coverage of bargaining councils within the private sector. It is estimated there are only 300 000 employees employed by non-party employers to whom council agreement could be extended.

Another area of concern relates to security of employment especially in relation to unfair dismissal and the speedy resolution of disputes. Many employers have not adjusted their disciplinary procedures and still apply the more formal old approach. Significantly arbitrators tend to apply a stricter standard than that required by the code.

The significance of the level of dismissal cases is not yet understood and requires further study.

The Explanatory Memorandum to the 2000 LRA Amendment Bill contained a range of provisions designed to speed-up dismissal procedures. While these amendments were not included, not enough is known about disputes concerning dismissals. An indication of the extent of the problem is that in a mature labour market, Australia which has roughly seven million workers, there are approximately 7 000 dismissal cases annually. In SA an estimated 100 000 dismissal cases are referred to the CCMA annually.

WHAT ABOUT THE BCEA

The Act sought to allow for greater labour market flexibility by removing restrictions, enabling, for example, the more productive

use of working time and variations through collective bargaining. It is not only in the area of working hours that the Act seeks to accommodate various interests but also in relation to small business and minimum wages.

Hours of work

Despite demands for a 40-hour week, the BCEA only introduced a modest standardisation of the working week to 45 hours. A procedure to reduce working hours, through collective bargaining, is included in a schedule. Initial reports on reducing working hours do, as yet, not provide a clear picture. However, it did record that in sectors with long hours such as mining, security and health care, the BCEA had been a factor in leading to a reduction of hours of work. There was evidence to suggest that reducing working hours could lead to job creation, but where this had occurred additional casual workers had been taken on.

BCEA and small business

In November 1999, a year after the Act came into effect, the minister issued a determination varying the application of the Act in relation to small business (those employing less than 10 employees). This determination came in the wake of an impact assessment of the Act on the economy. The study concluded that the impact on the economy would be marginal but small business would have difficulty in complying with certain areas. The determination allows employees to work up to 15 hours overtime per week, reducing overtime pay for the first 10 hours to time and a third, permitting averaging of working hours by individual agreement, and allowing family responsibility leave to be dispensed with by agreement.

ECC, bargaining councils and minimum wages

Labour laws provide two mechanisms for setting minimum wages and other conditions of employment. These are extending bargaining council agreements and the establishment of minimums in sectoral determinations. While these two forms of wage setting existed in earlier legislation, the new Acts introduced significant changes to the process of wage setting.

The Employment Conditions Commission (ECC) was established by the 1997 BCEA to advise the minister on making sectoral determinations establishing minimum wages and conditions of employment for sectors of the economy without organised collective bargaining.

The operation of ECC has considerably increased the reach of minimum wage regulation. Minimum wages have been set

for the first time in sectors such as domestic and farm workers and taxi drivers with forestry workers being announced soon. Agriculture has caused the most controversy and many requests for variations to the minimum wages has been received.

THE FLEXIBILITY DEBATE

Bezuidenhout & Kenny suggest that the debate about flexibility in labour market regulation is 'more about positioning interests than realities'. They suggest the term is used generally and uncritically to undermine worker interests. The 1999 ILO country study concludes that the South African labour regulatory environment is not particularly onerous when compared to other middle-income countries, but accepts that perceptions that it is more onerous are influencing labour market behaviour.

In contrast, the most recent World Bank study refers, without substantiation, to the limited labour market flexibility as a factor increasing the cost of doing business in South Africa.

INFORMALISATION IN SA

As the survey of international debates indicates the question of who should receive the protection of labour law has become central to the future direction of labour market regulation. This issue was not raised during the negotiation of the LRA, which focused on establishing a single legal framework applicable to all employees, including previously excluded groups such as domestic workers, and covering both the public and private sector. Hence, the key definition of an employee was imported virtually unchanged from its apartheid-era predecessor.

The labour department's green paper on employment standards dealt with the rise of non-standard employment and its consequence for labour protection. Despite this, although some provision was made for part-time workers, the regulation of atypical work was not addressed.

The 2000 draft amendments to the LRA and the BCEA introduced a series of presumptions of employment. While these amendments did not change the definition of employee, they were justified on the basis that they would assist vulnerable workers to assert their rights as employees. The presumptions can be seen as a direct response to the practice of 'converting' employees into independent contractors to avoid labour legislation. Commentators welcomed the amendments but said they did not go far enough.

The Growth and Development Summit (GDS) in June 2003 noted the need for 'measures to be taken to promote decent work and to address the problem of casualisation'. Research by the labour department concluded that the growth of non-standard employment had eroded the quality of labour protection and that there was a need for a reappraisal of polices and legislative provisions.

These findings are likely to have a very significant impact on the future direction of labour law debate and reform.

OTHER REGULATORY INTERVENTIONS

Equality and empowerment

The EEA was designed to achieve equity in the workplace by prohibiting unfair discrimination and by requiring affirmative action.

The Act is confined to employees while independent contractors and other persons not covered by labour law are protected against discrimination by Promotion of Equality and Prohibition of the Unfair Discrimination Act (PEPUDA). The obligation to implement affirmative action measures is restricted to employers employing more than 50 employees and certain other categories of designated employers.

The legislative schemes promoting affirmative action are highly self-regulatory. Legislation does not set targets for employing or training members of designated groups. The speed of implementation has been criticised on many occasions while recent court cases have led to uncertainty as to the nature of an employer's obligation to apply affirmative action when filling vacant posts.

Inordinately high levels of income inequality remain a key feature of the post-apartheid landscape. The ability of anti-discrimination litigation, and in particular the EEA, to achieve greater levels of equality is a matter of concern.

The Broad-Based BEE Act

The Broad-Based Black Economic Empowerment Act (BBBEE Act) is the centrepiece of the government's economic strategy for transforming the economic inequality that is a hallmark of the South African economy. The inclusion of the term 'broad-based' indicates the intention that empowerment should benefit all black people, not only a wealthy elite. The Act emphasises the need to facilitate ownership and management of enterprises by black women, rural communities and cooperatives. This has resuscitated debates concerning employee ownership as a vehicle for transformation.

The BBBEE Act creates a framework for promoting and measuring empowerment. The Act also seeks to leverage the state's economic power to promote and encourage empowerment and transformation within the private sector. The Act promotes the development of sectoral charters to promote and measure empowerment within particular sectors. While the charters are voluntary, the Act enables the state to issue codes of practice and make compliance with charter targets binding criteria for the evaluation of tenders. The charters have adopted the balanced scorecard as a basis for measuring the following core elements of empowerment:

- direct empowerment through ownership and control of enterprises and assets;
- human resources development and employment equity;
- indirect empowerment through preferential procurement and enterprise development.

The inclusion of targets concerning the employment of black employees and learners dramatically enhances the incentives for

employers to meet targets for employing and training black personnel. It has been suggested that the adoption of sector scorecards offers a 'lifeline' for employment equity and argues for an alignment of the employment equity process with the empowerment framework to ensure an integrated and comprehensive approach.

Skills Development

The SDA and the Skills Development Levies Act (SDLA) create a framework for developing skills. The Act's institutional infrastructure consists of the National Skills Authority, Sectoral Education and Training Authorities (SETAs), the National Skills Fund and the Skills Development Planning Unit and labour centres within the Department of Labour.

The 2003 Amendments to the SDA have significantly increased the state's leverage over SETAs. These amendments are a response to the mismanagement of certain SETAs.

A number of incentives exist for employers to engage learners. The Sectoral Determination for Learners published in June 2001 provides a simplified framework for employing unemployed persons as learners and prescribes minimum allowances. The GDS commitments set a target of 80 000 learnerships. The employment of black learners is a factor in the transformation scorecards and, as with employment equity, this is likely to increase the focus on skills development.

Occupational Health and Safety

The principal responsibility for occupational health and safety legislation lies with the labour department, which administers the country's main laws, the Occupational Health and Safety Act and the Compensation for Occupational Injuries and Diseases Act. The Department of Minerals and Energy Act administers the Mine Health and Safety Act, 1996 (MHSA) which seeks to prevent occupational accidents and diseases in the mining industry. A number of specialist regulators have responsibility for safety regulation in specific sectors of the economy (railways, aviation) or in respect of specific hazards such as the nuclear hazard.

The absence of a consistent national institutional structure and policy in respect of OHS has been a concern of government policy documents since the start of the democratic era.

The Committee of Inquiry into a Comprehensive System of Social Security identified the major problems in the provision of compensation for occupational injuries and diseases as:

- the exclusion of large numbers of persons such a domestic workers, independent contractors, persons in the informal sector and self-employed persons;
- the absence of any compulsory rehabilitation or vocational training programmes;
- the failure by the compensation system to promote prevention;
- the lack of linkage with other social insurance and social assistance schemes. This results in the duplication of payments (double-dipping), which seriously undermines the financial soundness of the respective funds and serves as a disincentive to return to the labour market.

Social security

South Africa's workplace-based social safety net consists of a mixed economy of statutory funds and contractual schemes. The principle statutory institutions are the Unemployment Insurance Fund and the Worker's Compensation Fund. The most significant post-apartheid social insurance enactment was the passage of Unemployment Insurance Act 2001. The Act modernised the existing system of benefits of unemployment, maternity and illness benefits but remains a scheme providing temporary relief to the unemployed. The Act's scope was extended to high wage earners as well as to include domestic workers, which has resulted in some 600 000 private employers registering with the fund. The Act's extension to public service employees is still under discussion. The Act introduced a new system for collection of contributions, which has contributed to the improved solvency of the fund.

Despite its updating, the Act still reflects its origins as an Act designed to deal with cyclical unemployment in the 1940s. The leading legal text on social security has criticised the Act for failing to provide benefits for the partially employed, to provide measures to integrate and reintegrate the partially employed and to provide measures to promote employment. Employees who resign may not claim benefits. This was introduced to stop abuse but it means employees resign to undergo further education or training cannot claim benefits.

The Taylor Committee argues that social protection has to be more comprehensive to minimise the negative effects of unemployment on social cohesion. Its recommendations include the extension of social insurance where administratively feasible, social grants and indirect social protection through the facilitation of favourable labour market transitions.

It is also worth recalling at this stage that a proposal high on the early post-apartheid agenda to establish social plans to protect workers facing retrenchments have not been translated in legislative form.

Pension and Provident funds

Contributory pension and provident funds are a significant aspect of the workplace-based social safety net. The coverage of these funds within the formal sector is extremely widespread. A significant development has been the establishment of provident funds in the security industry and in contract cleaning through sectoral determinations. The ECC has recommended that further funds be established in agriculture, domestic service and the taxi sector.

National Treasury has issued a discussion paper on retirement fund reform as a basis for initiating a discussion process before the enactment of new legislation. The paper notes that international experience has shown that the cost of

participation in contributory retirement funds can be a disincentive for employers in the informal sector to enter the formal sector. It proposes a new regulatory framework for retirement funds.

The paper proposes establishing a contributory National Savings Fund, which would be accessible to those outside formal employment.

CONCLUSION

Despite the intensity of labour law reform since 1994, the massive changes within the labour market and the world economy ensure that ongoing evaluation and adjustment is required.

The new Acts, introduced since 1994, were constructed primarily on a foundation of the conventional employment relationship. Trends towards informalisation, already present by 1994, have accelerated and a very significant proportion of the workforce earns their livelihood through insecure and unprotected work in which employer power is unrestrained. This poses a range of challenges. Effective regulation and protection will have to be built on an understanding of the new forms of segmentation amongst the workforce. The new models of the employment relationship development in the context of the developed world do contain significant insights into the possibilities of enhancing security and assisting workers to enhance their employability. This raises a range of issues: how should labour law be extended to protect workers in non-standard employment, particularly those in triangular employment relations who are deprived of any employment security? How can a social insurance scheme such as the UIF be adapted to support an active labour market policy aimed at improving employability and productivity?

The interaction of labour market regulation with broader government policy dealing with the social safety net raises the prospect of enhancing stability and security for workers in formal and informal sectors. This will require that debates are not confined to the 'box' of a single statute and that the intersection of labour law with adjacent areas of regulation is explored. The next few years will see a range of policy initiatives in adjacent areas such as corporate law, social protection and insolvency which have the potential to enhance or undermine the level of security in both the formal and informal sectors of the labour market. It is important that debates about labour market regulation intersect with these processes. President Thabo Mbeki has repeated the call for the negotiation of a broad social pact. International experience has shown that agreements of this type need to take account of the level of protection and flexibility both inside and outside of the labour market and across several areas of regulation. The adoption of greater levels of 'protected flexility' in both developed and some developing countries offer lessons as the type of trade-offs involved in creating the conditions for the negotiation of social pacts.

The enactment and revision of the new legislation has not brought closure to a range of issues on which the social partners positions remain significantly different. The public emergence of a debate over labour market regulation within the ANC is an indication that the debates that dominated the second Parliament are likely to be revised in the near future. However, it is essential that these debates are informed by an accurate assessment of the social and economic impacts of the different aspects of labour law.

The legislative framework contains a variety of regulatory strategies. The great pace of reform has meant that these were developed in isolation from each other. Levels of enforcement and compliance with labour standards remain too low and that implementation is now a major stated priority of the State. This raises questions as to the efficacy of the regulatory regimes and strategies. International literature shows that incentive-driven regulation can improve compliance in areas such as occupational health and safety compliance and employment equity. The high profile accorded to the BBEEA raises the issues of whether incentive-driven 'contract-compliance' schemes could be utilized to drive a wider range of outcomes in SA. LB

This is the second part of an edited version of a paper drafted by Benjamin who is an adjunct professor at the University of Cape Town and director of Cheadle, Thompson & Haysom Inc. Attorneys.