Reviewing labour legislation

*Government has suggested that labour legislation be reviewed. **Anton Roskam** and **Carla Raffinetti** comment on some of the proposals that are being considered.*

President Thabo Mbeki, in his opening address to Parliament on 25 June 1999, suggested the following areas of labour legislation be reviewed:

- probation;
- remedies for unfair dismissals;
- dismissals for operational requirements;
- the extension of bargaining council agreements;
- 'certain' provisions of the BCEA, which he did not specify.

Labour market flexibility

The review referred to by President Mbeki seems to have been prompted by business's concerns that labour legislation is not flexible enough.

The free marketer's mantra is that South Africa's labour market inflexibility causes unemployment and lessens economic growth. The supporters of 'labour market flexibility' believe that if you repeat the mantra often enough, it will become true.

The ILO's February 1999 briefing report sets out a different view about South Africa's labour market flexibility. It states that:

- labour regulations have been reformed to allow labour market adaptability and employment security;
- South Africa's labour regulations on dismissal, fixed-term contracts and working conditions do not appear to be particularly burdensome when compared to other middle income countries;
- the regulatory environment has not obstructed rationalisation and 'rightsizing', especially in export industries. 'Inflexible' labour markets are therefore not at the heart of the employment problem;
- wages are responding to labour market conditions. There is some association between wages and regional unemployment rates in respect of unskilled workers.

The ILO document maintains that employers believe that the new labour market policies have made it more difficult to employ workers. The document also states that these perceptions are not rooted in reality, although they influence business's behaviour. They manifest in a reluctance to employ new workers. This has negative

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consequences for job creation.

If the ILO is correct when it states that the problem is essentially one of perception, then the appropriate solution is to correct those misconceptions rather than to amend the legislation. The answer does not lie in extinguishing the rights of workers and their organisations.

The debates about labour market flexibility raise important issues that are difficult to balance. The debate should not narrowly focus on how to make the labour market more flexible under the pretext of job creation and economic growth. It should also consider the impact that deregulation may have on:

- ❑ job security;
- ❑ job creation;
- ❑ the debate redressing inequality and discrimination in the workplace.

Finally, it should consider the impact that increased flexibility will have on the capacity of collective bargaining as a means to address these problems.

Ntsika discussion paper

The Ntsika Enterprise Promotion Agency, which is linked to the Department of Trade and Industry, released a discussion paper in March 1999. The paper deals with the areas of labour law that government believes should be reviewed.

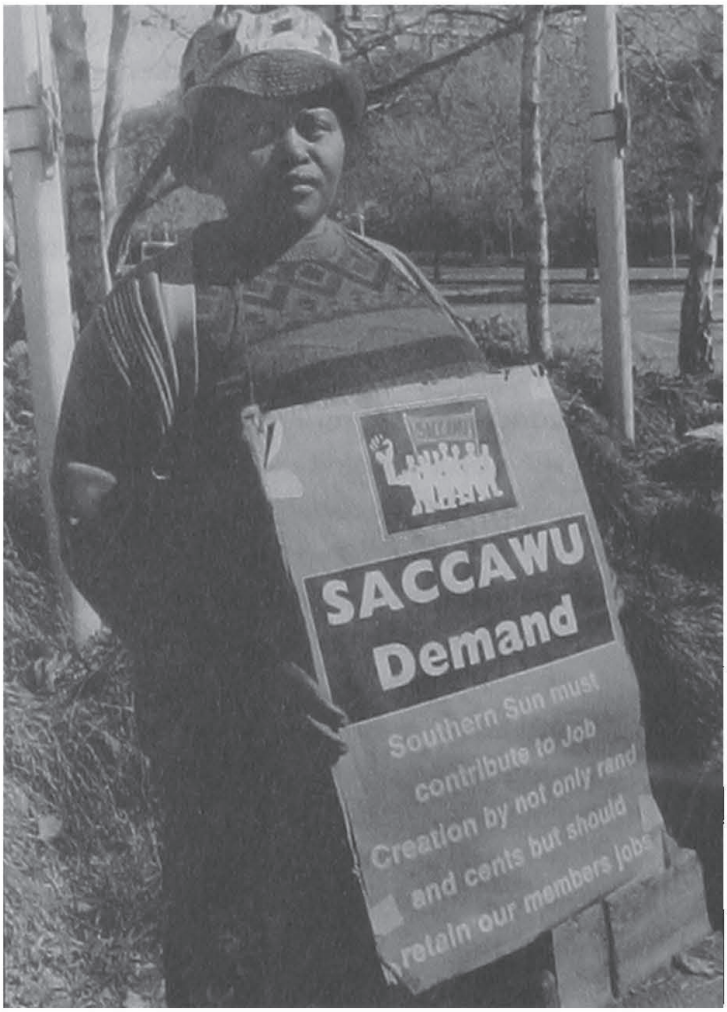
The Ntsika discussion paper is an unhelpful contribution to the debate about legislative reform. The reasons for this include:

- ❑ The discussion paper is biased in favour of small business. It goes on about the 'hassles' that supposedly confront small businesses. The central thrust of the paper is that small businesses should be 'freed' from the constraints of labour legislation – but this is at the expense of workers.
- ❑ The paper does not deal with the implications of exempting small businesses from labour legislation. It ignores the interests of workers in the small business sector. These workers are often highly vulnerable. The paper fails to address the real possibility that medium size businesses will restructure, fragment and possibly downsize to evade the labour laws.
- ❑ The paper suggests that certain basic conditions of employment contained in the BCEA should be eroded. In particular, it targets the overtime rate; the minimum severance pay requirements; the minimum annual, sick and maternity leave provisions; the weekly maximum working hours; the minimum notice periods and the minimum wages to be set by the Employment Conditions Commission (even though some of them have not yet been determined). The paper concludes this less than five months after the new BCEA came into operation and without any empirical evidence.
- ❑ The paper assumes that the deregulation of the labour market in relation to small businesses will create more jobs. However, no empirical evidence is provided to support this.

Recommendations

The key recommendations in the Ntsika paper include:

- ❑ provision for a six-month probationary period during which an employee's right to a procedurally and substantively fair dismissal will be limited. The paper proposes that employers should be able to dismiss probationary employees summarily (ie, without notice);
- ❑ giving the CCMA and the Labour Court greater discretion to determine the amount of compensation to be awarded for procedurally unfair dismissals;
- ❑ allowing the Minister of Labour to refuse to extend bargaining council



It is unacceptable for the law to prevent unions from striking to protect their members' jobs.

agreements to small businesses if the agreement obstructs job creation and fails to accommodate problems facing small and new businesses.

These proposals are difficult to respond to because they are vague. We intend highlighting some of the problems and factors that need to be considered when assessing these proposals. In line with President Mbeki's remarks, we also provide food for thought about retrenchments.

Probation

Ntsika's proposal, as we understand it, is that probationary employees should be excluded from the LRA, or that their rights under the LRA be limited.

This begs the questions: will the proposed curtailment be total or partial. If it is to be partial, which rights would be curtailed? The proposal also raises a number of other questions:

- Is the proposed six-month probationary period appropriate in all sectors?
- Under what circumstances, if any, can the probationary period be extended?
- Will it be possible to dismiss probationary employees without a valid reason?
- What is the reason for wanting to dismiss probationary employees summarily, without notice or notice pay?
- Will probationary employees faced with claims of misconduct or poor performance be given an opportunity to defend themselves against the allegations?
- Will a probationary employee be given the right to appeal against his or her dismissal to the CCMA or Labour Court?
- What powers will the CCMA or the Labour Court have to award re-instatement or compensation?

The discussion paper states that this proposal will encourage employers to 'try out' more employees. However, employing more workers for short probationary periods will not affect the demand for labour, which is the basis of job creation.

Probationary employees are often new job seekers. Should the emphasis rather not be on how to develop these workers' skills while they are on probation? Employers should be encouraged to place probationary employees in structured learnership programmes in order to provide them with valuable work experience.

Remedies for dismissal

The CMMA and Labour Court have very little discretion to determine the amount

of compensation for procedurally unfair dismissals. Section 194 of the LRA fixes the amount of compensation for a procedurally unfair dismissal to the value of the pay that the worker would have received from the date of dismissal to the last day of the arbitration of adjudication, had he or she not been dismissed.

The Labour Appeal Court has held that the arbitrator or court does not have discretion to order a lesser amount. However, an arbitrator or court can decide to order no compensation at all.[1]

A substantial backlog has developed in case allocations in the CCMA and the Labour Court. The delays can be anywhere between eight and 24 months.

Employers often argue that the arbitrator or court should not order any compensation where there is a substantial delay. They argue that the compensation is too high when compared to the seriousness of the procedural defect. They also argue that the unfairness of the procedural defect is lessened where an employee obtains alternative employment soon after his or her dismissal.

Some workers have found themselves in the difficult position of having had to wait for many months as a result of administrative delays in finalising the award, only to receive no compensation at all. Others have received a large amount of compensation.

The proposal is that the LRA should be changed to give judges and arbitrators the discretion to determine the amount of compensation, in line with the seriousness of the procedural defect.

When the new LRA came into operation it was thought that disputes would be resolved more speedily. A possible alternative (although not a mutually exclusive one) to amending the LRA would therefore be to increase the administrative efficiency of the Labour Court and the CCMA.

Either way, it should be remembered that the purpose of section 194 was to prevent procedural irregularities. A lessening of the penalties could result in an increase in procedural irregularities, which is something the legislature should not encourage.

If the LRA gives more discretion to arbitrators and judges, there should be guidelines in the law for determining compensation. The amount of compensation should not be dependent on the subjective whims of the arbitrator or judge.

Extending agreements

The Ntsika document suggests that the extension of bargaining council agreements should be dependent on two additional criteria, namely that:

- the agreement does not hinder job creation;
- the agreement accommodates the problems facing smaller and new businesses.

Yet again, the paper does not contain any empirical evidence to show that extensions of bargaining council agreements since the start of the new LRA have hampered job creation in the small and medium to large business sectors. The paper also fails to set out any reasons why new businesses should be exempt. Neither does it explain what is meant by a new business.

The document does not distinguish between the employment creation prospects of small, and medium to large businesses. It is doubtful whether a distinction based merely on the size of a business could ever withstand constitutional attack.

Moreover, it will be difficult for the Minister of Labour to measure the job creation prospects of a collective agreement without descending into mere speculation.

It is also not easy to understand the

reasons why the present provisions of the LRA do not adequately cater for the needs of small and new businesses:

- Section 30(1)(b) requires a bargaining council's constitution to provide for the representation of small and medium enterprises on the council. The LRA therefore gives small and medium businesses the scope to influence the nature of the collective agreements.
- Section 32(3)(e) allows the minister to refuse to extend a collective agreement (concluded in a bargaining council) to a non-party if the agreement does not establish or appoint an independent body to grant exemptions to non-parties.
- Section 32(3)(f) allows the minister to refuse to extend such a collective agreement to a non-party if it does not contain the criteria that the exemptions body must apply. The criteria for exemptions must be fair and promote the primary objectives of the LRA. It should be remembered that one of those objectives is to promote collective bargaining at sectoral level.

The LRA permits a small enterprise to apply for an exemption from a collective agreement that is too burdensome. The Ntsika document seems to suggest that the very process of applying for an exemption is too onerous. If this is the case, the answer lies in simplifying the exemption application procedures, rather than allowing small and new businesses to circumvent the exemption process altogether. A blanket non-extension to small and new businesses is not sensitive to the varying needs of workers at each enterprise.

The Ntsika document also suggests that it should be the bargaining council's responsibility to show the Minister of Labour that the council's agreement accommodates small and new businesses. This is absurd. The responsibility should be on the persons who have the knowledge of their enterprises.

Retrenchments

The LRA states that an employer can only dismiss for a valid reason. The Act allows employers to dismiss workers for operational reasons. Section 189 sets out the steps that must be followed when dismissing for operational requirements. The safeguards in section 189 are largely procedural and only impose a duty to consult in an attempt to reach consensus. There is no duty to negotiate and to reach agreement.

The Labour Court has interpreted the definition of 'operational requirements' very broadly.[2] Even the mere possibility of increasing profit probably qualifies as an operational requirement that justifies a dismissal.

The courts are reluctant to second-guess management's operational decisions. 'The Labour Appeal Court has chosen to limit the scope of the inquiry to determining the rationality of the employer's ultimate decision on retrenchment, it [is] not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process.'[3]

So long as the decision to dismiss is operationally justifiable, the court will not probe the merits or correctness of the decision. This limits the courts' evaluation of the substantive fairness of dismissals for operational requirements, even where the union has proposed a viable alternative.

The courts' limited powers to investigate the substantive fairness of operational dismissals have also allowed employers to force workers to agree to changes to their terms and conditions of employment (including variations to basic

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conditions of employment). All that employers have effectively done is to threaten to retrench workers who refuse to accept the changes. In so doing, employers have undermined collective bargaining.

To date, the Labour Court has not pronounced upon the inherent unfairness of this. It is unfair because section 187(1)(c) of the LRA prohibits employers from dismissing workers who refuse to give in to the employer's demand.

The LRA should allow the courts to adjudicate the need to retrench and the alternatives to retrenchment. Without this unions will often be left with little option but to strike over the operational decision that gives rise to the need to retrench. We believe that operational decisions are matters over which workers can strike. However, this is a controversial point.

Some will argue that striking in the context of retrenchments is inappropriate and not in the interests of workers and businesses. A strike in such circumstances may worsen the financial plight of the company.

We believe that it is unacceptable for the law to prevent unions from striking to protect their members' jobs, especially where the courts do not comprehensively adjudicate the substantive fairness of operational dismissals. It may be better from a policy point of view to prevent the exercise of power where jobs (and sometimes even the continued viability of businesses) are under threat. However, if this is to be the case, the law should weigh up the need to retrench by not only taking into account the business's operational needs, but also the need for job creation and security of employment. ★

Footnotes

1 *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC)*

2 *Henry v Adcock Ingram (1998) 19 ILJ 85 (LC); FAWU v Simba (Pty) Ltd [1997] 4 BLLR 408 (LC).*

3 *SACTWU & Others v Discreto (unreported Labour Appeal Court Judgement, 1998).*

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