DEBATING THE LRA

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looks into the future to see what the draft LRA will mean for workers

Rights and power:

failings of the new Labour Relations Act

Episode one — the "protected" strike

July 1996 — the Bill is now law. NUMSA and SEIFSA can't agree on a wage increase, and NUMSA members countrywide are on a legal strike. They are thankful that no balloting was necessary — only a 30-day mediation period and 48 hours notice.

Metalworkers are smug — their strike is the first national strike under the new LRA, the first in South Africa's history which is protected by law.

Enter the management of Boart Hard Metals — an Anglo-American company notorious for dismissing legal strikers under the old regime. Boart bosses wait a week or two, then say to the strikers: "This strike is causing irreparable harm to our business. If you don't return to work, we'll dismiss you. So please won't you come to a consultation meeting, because we want to discuss your possible dismissal."

Workers laugh scornfully. They wave the LRA in the bosses' faces. "You can't dismiss us for striking — this is the new South Africa." The bosses are aghast. "We would never dismiss you for striking," they say. "As part of the Anglo group, we have always upheld the right of workers to strike. But the law does allow us to dismiss for economic, technological or structural reasons — even during a strike. And this strike is causing enormous economic damage to us!"

"Well," our confident strikers reply, "we are glad to hear that, because that is just exactly what we aim to do, by striking. What use would our strike be, if it did not cause you economic harm? It pleases us greatly to know that, even though the law has allowed you to hire scabs, you still suffer. But remember, it is not only you who suffer during this dispute — think about us! We have now gone three weeks without wages; furni-

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ture is being repossessed, husbands and wives are quarrelling, workers are getting bored with toyi-toying. As for meeting us to discuss all this, that is impossible. This is a national dispute between NUMSA and SEIFSA. Go and tell your negotiation team at SEIFSA to hurry up and settle this dispute so we can all get back to normal!"

This is enough backchat for the Boart bosses. They return to their boardrooms, send out a written notice of a consultation meeting, wait a few days, dismiss all the strikers and begin training their new workforce.

NUMSA's lawyers arrive, in a buoyant mood, at the labour court to argue for the reinstatement of the legal strikers. The court examines the facts, then examines the Act, and decides that the bosses were right. The strike was indeed causing economic damage. And the strikers were even so unconcerned that they refused to consult over this problem! So a good couple of hundred workers are now officially (and probably permanently) unemployed.

Furious workers besiege the union office. During the long hours in which they hold the general secretary, organisers and administrative staff hostage, they point out that they were told that they had the right to strike. This means the right to strike without dismissal. It is in the Workers Charter. It is in the Interim Constitution. And it was supposed to be in the new LRA.

It is only in the early hours of the morning that the answer to the puzzle dawns on the general secretary. He tries to explain it to his angry members. It is perfectly true that the law protects the right to strike. But the law does not protect strikers.

You cannot be dismissed for striking. But you can be dismissed for the result of your strike — economic damage to your company. The law giveth and the law taketh away. The workers of Boart Hard Metal might be forgiven for believing that their salvation will only come in the next life.

Comment

It is not rights which require protection (as in "protecting the right to strike"). It is, rather, strikers who need this protection. This "protection" is no protection at all, if there are gaps which allow bosses to dismiss strikers.

There is a simple solution — remove from the Bill the right of employers to dismiss for "economic, technological or structural reasons" — or any other reasons whatsoever — during a procedural strike.

Episode two — the "unprotected" strike

Workers at P... are striking procedurally. There has been a disagreement over a transport allowance. Workers demanded an allowance because a new shift system necessitated a changeover at 10pm. Transport at this hour has to be specially arranged, and it is expensive. Management refused to give an allowance. So the workers notified the Commission of the dispute. The Commission sent someone to the factory to mediate, but it did not help.

Two weeks into the strike, the workers and management reach an agreement, which they write down and sign. The agreement is that two of the company's old kombis will be repaired, and used for fetching and delivering workers at their homes, around the 10pm shift change.

Workers resume work. A week later the two kombis are sold to a scrapyard. Within half an hour of this news being circulated, it's tools down again, as workers accuse management of violating the agreement.

The boss points out that this is an unprocedural strike, and threatens to dismiss them unless they return to work within 24 hours (his consultant told him that the Bill says to allow the workers time to reflect on what they are doing).

The workers refuse to go back to work. This is the same issue they struck on before, they say, and it obviously is not solved yet. It is ridiculous to expect them to go through the whole procedure again, referring the dispute, sitting through mediation, waiting 30 days and ending up in arbitration, when they already signed an agreement which the boss is blatantly ignoring!

Kentucky strike: new LRA offers little protection for strikers

Unfortunately, again our workers get dismissed, and again they — not the employer — are the ones who are in the wrong. It is not even worth going to court — there is no case, because the strike was unprocedural What were they supposed to do? Well, the Bill says that this dispute, where someone reneges on an agreement, is a dispute about the "interpretation of an agreement". You are not allowed to strike on it. You are supposed to go for compulsory mediation, followed by compulsory arbitration if the mediation fails.

In this way our workforce is provoked into taking "unprocedural" action and by this means is cheated out of the results of their procedural strike by a dishonest employer, and nothing and nobody is going to protect them

Comment

Things are going to be very tough for "wildcat" strikers under the new law. Suppose management does something outrageous (not so unusual); for example, the department head pulled a knife on the CNC operator. No need to get in a huff, just refer it on and wait 30 days for the Commission to show up. The old days when the Industrial Court (things are bad when you long for the Industrial Court) would look at whether or not the employer provoked the wildcat strike, in deciding whether dismissal was fair, are over. The Bill makes it clear — wildcat striking "can constitute a fair reason for dismissal".

Right, so no matter what the provocation, workers are going to have to calmly follow procedures in order to be able to strike. But hold on — can we strike on this issue at all?

In fact, far from entrenching a right to strike, the Bill removes the right to strike in all sorts of instances. Instead it prescribes compulsory mediation and arbitration. Chief shopsteward dismissed? No strike allowed Unfair, selective retrenchment? No strike. Management reneging on an agreement? Sorry. Got a dispute over something which is a "joint decision-making" issue in the workplace forum? Keep on working. Work in an "essential service"? Keep those machines rolling. In dispute over a "right" — like management refuses to pay you for June 16? Cannot strike. And if you do strike, on any of these things, rest assured that you will be dismissed.

But perhaps the Bill has a point here. It is saying something which is not unreasonable; many bloody strikes and battles are over quite minor things, which could be sorted out quickly and effectively by a trained, fair and competent third party.

Enter the Commission, which will intervene to resolve unnecessary disputes quickly and without strikes, scabs, dismissals, picket lines, press coverage, armed guards and AK47 attacks.

Reinstatement will be the primary remedy for unfair dismissal (unless it is "not reason-

ably practicable" — just rub that out again please). Disputes of right will be pronounced upon and the offending party brought into line. Skilled mediators will assist disputants to find creative solutions to their problems. Small issues will be nipped in the bud before they explode into massive conflicts.

There are just two problems with this Commission.

Who will staff it?

Will it actually be capable of providing the competent intervention necessary to deal with the roots of conflict? Who are the skilled, creative and insightful people who are going to staff the Commission? Surely not the current dispute officers at the Industrial Councils and Conciliation Boards (we all know how effective they have been at resolving disputes), or the Presiding Officers from the Industrial Court (we all know how competent, gracious and independent they are). At best, it will take a long time and pots of money to train these new professionals. What happens to disputes in the meantime?

Is it different from today's Industrial Court?

When the Bill uses the word "arbitration" it misleads workers, who understand by arbitration something quite specific. At present arbitration takes place under the auspices of IMSSA. Parties choose an arbitrator together and agree on the terms of reference. In this way the quality of arbitrators on the panel is kept consistently high.

That our labour reps at NEDLAC have some say on the appointment of judges and Commission members is no substitute for direct choice at plant level.

The Bill envisages that strikes will be cut down, but this is not likely, because South African workers are not disposed to stop striking because they are told that they are not being 'procedural'.

Unions, afraid of damages suits from companies, may increasingly send their organisers down to the factory gates to tell unprocedural strikers to go back to work, and this would alienate workers from their unions.

It may well be possible to significantly increase the success rate of conciliation and arbitration procedures. It may also be possible to increase the proportion of disputes that are resolved without strike action. But the method of doing this must be voluntary. It must be achieved by building a reputation amongst workers and bosses for successful and fair mediation/arbitration. The attempted coercion in the Bill can only backfire.

Episode three — the lockout

It is time for annual wage bargaining again. B... is a small factory owned by one of those employers who like to think of his workers as his family, the union as a betrayal of trust, and the employment contract as a favour to poor people.

It is in this factory that workers demand a 15% increase. The employer loses his temper. He has always treated his workers like his children. He even gives them loans (at prime interest rate) when they ask for them. But all workers do is complain, demand more money, and fail to increase output when asked to do so. So his reply to the wage demand is to insist that workers take a pay cut, and make up the difference by working on weekends, otherwise the factory is not going to survive.

Workers refuse. So the employer declares a dispute, sends it for compulsory mediation and, when the mediation fails, he gives the workers 48 hours notice and locks them out.

The next day he hires a new workforce and continues with production — on weekends too. What shall we say to the workers sitting outside the gate week after week?

Comment

This is all entirely procedural and the lockout is protected by the law.

It has become a kind of conventional wisdom that the lockout is the employer's equivalent to the workers' right to strike. People have begun to think of "strike" and "lockout" much the same way they think of dresses and trousers — one belongs to girls,

one to boys; one to workers, one to bosses.

Our story demonstrates the absurdity of this proposition. When the employer locks out, he can continue to operate his business with a scab labour force. Striking workers have no alternative source of income.

As if that in itself is not enough, the Bill protects the employer from losses during a strike by allowing him to dismiss workers for "economic reasons". The Bill offers no 'equivalent' final weapon to workers suffering economic hardship.

When a business suffers losses during an industrial dispute it is permitted to dismiss. When workers suffer losses during such disputes it is merely an incentive for them to return to their senses — and their machines. Any pretence at equivalence evaporates.

There is no 'fair' argument for protecting lockouts. The Bill is extremely narrow in its interpretation of the constitutional right to strike — in effect removing that right on many issues. Perhaps it should be equally narrow in defining the right to lockout. Let the right to lockout be protected, but not those who lock out.

Episode four — the workplace forum

May 1996: the Bill is now law.

Shopstewards at F..., a plant employing 450 workers, are discussing the introduction of teams, and consequent restructuring of the work process, in the workplace forum. Teamwork will mean more responsibility, a greater range of skills, and changed relations amongst workers. It will also mean a massive increase in productivity and hence in company profits.

Workers accept the team concept provided there is no retrenchment, and propose the parallel introduction of skills training and an overall wage increase. Management reacts to this proposal with surprise: the workplace forum is no place to raise vulgar matters such as money and conditions; these matters are discussed in the bargaining forum! Surely it has been made abundantly clear to workers that the workplace forum is a place where production is discussed — not workers' money and benefits. Management tells the shopstewards to call in the union education department to explain the Act again to workers who do not seem to want to learn how to be co-determinative.

Comment

The Chapter on workplace forums gives us the key to understanding the philosophy of the whole Bill. The Bill creates a division between the struggle over wages and working conditions on the one side and the actual business of producing on the other. It calls the struggle over wages and working conditions a "distributive" matter. It hopes that the business of production, restructuring, productivity etc will all become a "co-determinative", co-operative matter.

This is the reason for the structural separation which the Bill creates between bargaining forums (whether centralised or plant-level) which deal with "distributive" matters and workplace forums which deal with "co-operative" matters.

There is a vision:. General harmony in the plants as workers, realising that productivity is the key to international competitiveness and therefore their jobs, collaborate willingly with management; punctuated by occasional set-piece battles over the sordid (but entirely separate) matter of what they get paid and under what basic conditions they work.

The vision can now be read back through the rest of the Bill. Strikes are unprocedural for all except distributive issues. You can strike in support of a demand that the employer bargain, and also over the material results of that bargaining. Nothing else shall interrupt production. Disputes over dismissals, rights, agreements — they will all be settled by third party intervention.

Wishing away class struggle

This separation of the arena of "distribution" (the price of labour power) and "production" (the putting to work of labour power) is the mystification which underlies the capitalist system. It is by this trick that workers are alienated from their product — once they have been hired at an agreed price, what they produce belongs to the boss. No relation is

drawn between the price of labour power and the value which labour creates. Value-added belongs to the bosses — their profit.

If workers would just accept this system without complaint (which is what the Bill hopes to achieve) life would be plain sailing for capital. But workers try to interrupt this division by linking their demands for a higher price for their labour power to their ability either to withdraw from production or to 'passively resist' increases in productivity by working below *optimum capacity*. This is the class struggle which gives capital a headache. And it is this headache which the Bill seeks to wish away.

NUMSA members on strike at Boart, Springs, 1992

Removing bargaining from the bargain

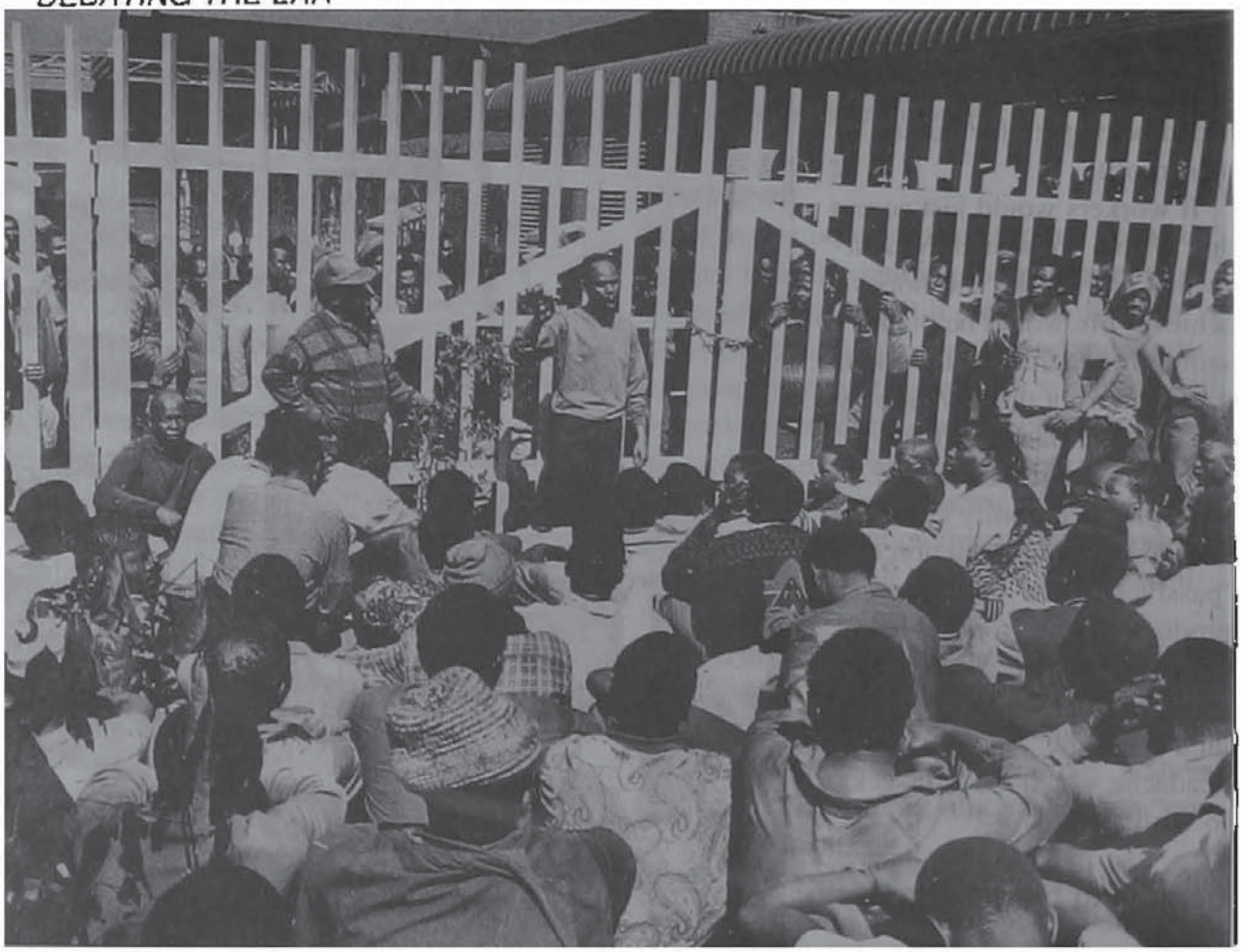
The truth of the matter is that 'productivity' and 'efficiency' are not simply technical issues. They are, fundamentally, social issues. Increases in productivity can cause workers pain, whether from harder work or job loss or both. Those same increases can give bosses greater profits. Workers cannot, will not and should not suffer this pain quietly in a cosy and co-operative workplace forum with the bosses and then negotiate its price in a harsh and bitter bargaining forum somewhere else.

Productivity negotiations are about trading — we'll co-operate with some of your schemes for re-organising our work if we get something in exchange (training, guaranteed employment, more money, shorter hours, whatever). That trading relationship is ruptured by the organisational split between the two forums. Such a rupture can only benefit capital.

Forums without end ...

This theoretical and practical division of course accounts for what is, at first sight, a surprising omission by the Bill. There are extensive provisions for the setting up of workplace forums, but no way of closing them down. After all, there is no end to the need for co-operative relations in the workplace, so why should there be an end to their institutional form? The Catholic Church will undoubtedly approve — lots of marriages but no divorces... and of course without unregulated conflict ...

Within the marriage the Bill recognises



Under the new LRA the lockout is protected by law

that there will be hiccups, moments of disagreement. But let's not spoil the relationship by having a fight — we'll bring in an arbitrator to sort the matter out. S/he will decide who is right. Right about what? Will these disputes be technical matters — the workplace forum has one view about the best way to improve productivity and management has another? Of course not. The disputes will be about social issues — how do the workers' and management's proposals affect the other side?

Let us imagine, for example, a proposal by the employer to introduce a three-shift system in order to meet export orders. Suppose the workers reject this because of the dangers of travelling at night to meet the new shift system. A dispute of this nature will then be referred to arbitration. On what basis is an arbitrator to judge such an interest dispute? Whose interests are paramount — those of the workers for safe travelling time, or those of the bosses for an export order? What will be the terms of reference for the arbitrator? Is it not safe to assume that the brief of the Commission will be that the interests of production are paramount — the bosses will benefit, not the workers? ... and certainly without unions

Yes, it is true, workplace forums can only be set up at the initiative of majority unions. But, once these marriage brokers have completed this task, they fade out of the picture. Their job is to bargain wages and conditions. Meanwhile the forum representatives are getting paid time off for training, facilities to hire experts, increased access to information. Is this not a little bit like a competition with loaded dice?

There are other contentious issues within the Bill which we have not covered.

- Essential Services and Maintenance Services are but two of those where neat theoretical proposals are put which will have considerable difficulty living in the complex social reality of South African

labour disputes. Can you imagine a minority of workers walking cheerfully through peaceful picket lines during a strike?

- ❑ The absence of a legislated duty to bargain, whilst consistent with the Bill's intention to leave 'distributive' matters to power struggle, is actually a retreat from the current LRA as interpreted by the Courts.

But more details aside, the fundamental problem of the Bill is its attempt to coerce workers into tribunals and away from collective action. The Bill prescribes two areas: rights and power, and insists that the two are mutually exclusive. Where you have rights you may not exercise power, and when you are permitted to exercise power, the Bill declines to give any rights. Why can't workers have protection under the law, and also be allowed to choose whether to pursue their interests through the law or through industrial action?

Changes

In this light, the changes which we would propose for the Bill are:

- ❑ Remove any right of employers to dismiss during a strike — the protection for strikers must be absolute or it is no protection at all
- ❑ Remove the restrictions on the issues on which protected strikes are possible; replace these restrictions with the incentive of a demonstrably effective and impartial dispute resolution mechanism
- ❑ Remove any meaningful protection for lockouts.
- ❑ Remove the workplace forums and give their powers and responsibilities to bargaining forums with the right to strike on all issues.
- ❑ Legislate the duty on the part of the employers to bargain collectively, at both plant and industry level ☆