'Stop eroding workers' rights'

Zwelinzima Vavi, general secretary of COSATU, discusses some of COSATU's concerns about the proposed amendments to the LRA, BCEA and Insolvency Act.

Some of the amendments attempt to respond to the misperceptions that South Africa's labour market is too rigid. These are misperceptions that are driven by those that have an ideological agenda to free business from collective bargaining and the rights workers have won after years of bitter struggle.

We cannot allow misperceptions to determine the basic rights and protections that workers should enjoy. Rather we should deal with those misperceptions by educating business and potential investors.

The proposals have also failed to deal with the ease with which employers may and do retrench.

Inadequate amendments

Currently employers are able to retrench very easily. All the employer has to do is consult in terms of section 189. If the union does not agree that there is a need to retrench or agree with the process by which the consultations took place, it may refer a dispute to the Labour Court. In effect the Labour Court does not adjudicate the merits of the dispute. Once there is an operational reason, including increasing profits, it accepts that the retrenchments are substantively fair. The unions are then left arguing about procedures.

COSATU believes that the courts should be compelled to deal with the substantive fairness of the retrenchments; not simply checking whether there is an operational reason or not and whether the employer has followed the consultative procedures.

Most importantly, the process of dialogue between employer and union is to the union's disadvantage. The employers know that at the end of the consultations unions may only refer the matter to the Labour Court. Employers can therefore do whatever they want. If workers want to focus the employer's minds on saving jobs, then the process of dialogue should be negotiations instead of consultation. This means that workers must have the right to protected strike action if there is a dispute about retrenchments. The threat of a strike or a strike itself will persuade employers to focus their minds on saving workers' jobs instead of going through the motions of consultation and pretending to listen to the representations of workers.

Government's proposal is for a facilitated consultation process if more than 500 workers are retrenched in any

12-month period. Besides the fact that the threshold is extremely high, the proposal does not deal with the factors that the Labour Court should consider when evaluating the fairness of a dismissal for operational requirements and the transformation of the process of dialogue from consultations to negotiations, which involves the right to protected strike action.

Transfers of businesses

This section is very technical. The proposed amendment was supposed to clarify the wording of section 197; however, the proposal will in effect downgrade workers' rights.

We are very concerned about the introduction of the concept of 'economic entity'. For a business that is transferred as a going concern to fall under section 197 there must be an economic entity that:

- consists of an organised grouping of resources;
- has the object of performing an economic activity;
- must retain its economic identity after the transfer.

This has been informed by a series of conservative UK judgements.

This probably excludes outsourcing, the most common form of business transfers, and a form of transfer for which workers require protection.

In the business restructuring processes workers may continue to be transferred from one employer to another without negotiations because their consent is not required. Their terms and conditions may be changed (although not less favourably, whatever that means) and they may have their benefits (like pension, provident and medical aid) downgraded. This is highly problematic, especially where a worker is transferred from a resourceful and large employer to some fly-by-night contractor.

Extending collective agreements

The proposals want to force bargaining councils to consult with non-parties before an agreement may be extended to them.

We do not understand why we have to give non-parties an opportunity to make representations. If they want to make representations they should join an employers' organisation that is a party to the bargaining council. They can also form an employers' organisation that becomes a member of the bargaining council.

The alleged reason for this proposal is to cater for small business. But small business is adequately catered for in the LRA. They must be represented on the council. Each council must have an exemption procedure for all employers, including small businesses. We are told that over 80% of exemption applications are granted.

This proposal will undermine sectoral bargaining. It will make it more difficult to conclude collective agreements at a sectoral level. It may even force bargaining councils to re-open negotiations following the conclusion of an agreement. Imagine the effect of this after an industry strike. It will also increase litigation, as non-parties will review bargaining councils and their reasons for rejecting their representations.

Probation and job creation

If an employee is dismissed in the first six months of employment for poor work performance or incompatibility, the employer need only prove that it went through a fair procedure. This reminds us of Thatcher's proposal to exclude workers in the first six months of employment from the protections of labour legislation.

To argue, as some have done, that it will lead to job creation is ludicrous. It will make it easier to dismiss. It is not an incentive to hire more people.

It will make it easier for employers to

dismiss workers who show support for unions because it will be easier to trump up allegations that the worker's performance is below standard. It fails to protect newcomers to the labour market. It will also encourage temporary employment.

Sundays

The proposal to scrap premium pay for Sunday work and remove provisions that encourage employers to make Sundays the rest day are enormously problematic.

Many other countries provide in their laws for premium pay for Sunday work. According to the Ntsika Enterprise Agency report on the BCEA these countries include Norway, Belgium, the Czech Republic, Singapore, Kenya, Botswana, Chile and the Republic of Korea. Others include Columbia, Mexico, and Switzerland. We do not think that workers who work on Sundays should have the size of their pay packets threatened.

Premium pay for Sunday work encourages Sundays as a day of rest. This promotes family life and facilitates sport and recreation functions.

45-hour week

Government's proposal to remove the 45-hour weekly maximum of ordinary hours from the list of non-variable rights does not demonstrate a commitment to the goal of a 40-hour week. It is contrary to one of the union movement's central demands and the government's own commitment to a 40-hour week as set out in Schedule 1 of the BCEA. Employers will now be able to increase ordinary hours and decrease overtime, which will result in reduced wages for employees. Increasing hours of work will mean that fewer workers will be needed. This is contrary to the objective of job creation. The proposal to allow for the increase in the number of hours of overtime is also contrary to the objective of job creation.

Variation of core rights

The proposals provide the minister with the power to vary all non-variable rights, including the:

- regulation of working hours;
- ordinary hours of work (including the 45-hour week);
- requirements that employers must follow in the case of night work;
- prohibition of child labour;
- prohibition of forced labour.

We do not understand why the minister needs these powers. Surely parliament should pronounce upon such drastic variations and not the minister?

Independent contractors

The LRA and BCEA proposals provide guidelines for determining who is an employee and who is an independent contractor. We think this is a good proposal. But it does not deal with all forms of atypical work and the increase in temporary and casual employees. We need to pay urgent attention to these workers who are particularly vulnerable.

Insolvency Act

In principle, the proposed amendments to the Insolvency Act are to be welcomed. However, the wording of the amendments seems to contain real drafting problems. There is a legal argument that the proposed provisions of notification to workers and trade unions about an impending sequestration do not cover the liquidation of companies, close corporations and other organisations like banks, pension funds etc.

What's more is that the amendments do not deal adequately with the ranking of workers' claims against the insolvent estate. This is particularly problematic as many workers lose their wages, contributions to pension and provident funds upon the insolvency of the employer. ★