The social partners strike a new deal

The amendments to the Labour Relations Act come into effect later this year. ***Dawn Norton, Anton Roskam*** *and* ***Mandy Taylor*** *outline the changes and their implications for workers and employers.*

The Labour Relations Act,1995 (the Act) has undergone a fourth set of amendments since Parliament passed the Act seven years ago. The latest amendments (the '2002 amendments') arise from a review of the labour market. The 2002 amendments aim to improve the application of the Act and in this regard: correct practices that subverted the Act; streamline dispute resolution processes; strengthen enforcement mechanisms; manage the process of large-scale retrenchments and regulate the transfer of contracts of employment arising from the sale of businesses.

Dealing with the subversives

Employees/Independent contractors: People who are considered to be genuine 'independent contractors' are not employees and they are thus not protected by this Act (or by other labour legislation). Some unscrupulous employers have, in the past, simply informed their employees that they have become 'independent contractors' even if the employment relationship has not changed or have persuaded their employees to sign contracts that state they are no longer 'employees' but 'independent contractors'.

The 2002 amendments to the Act have clarified the issue further by providing that where a particular factor is present in the relationship between a worker and the person for whom he or she works, the worker is presumed to be an 'employee', unless the employer proves the opposite.

These factors are whether or not a person:

- falls under the control or direction of the employer;
- works hours that are subject to the control of another person;
- forms part of an organisation;
- has worked for another person for an average of at least 40 hours per month over the last 3 months;
- is economically dependant on the employer;
- is provided with tools of trade or equipment; or
- only works for one employer.

Bogus union and employer organisations:
In the past, some businesses or consultancies formed bogus trade unions and employers' organisations. The Department of Labour has become aware that some of the organisations force members to sign agreements which entitle the union to all benefits due to the member upon his/her death. Furthermore, some charge excessive or disproportionate fees for representing the member at the CCMA or Labour Court. Now the registrar of labour relations has the power not to register (or to withdraw the registration of) a trade union or an employers' organisation if the registrar is satisfied that the applicant is not a genuine trade union or employers' organisation.

Dealing efficiently with labour disputes

Enquiries into allegations about an employee's conduct or capacity: Prior to the amendment to the Act there was extensive duplication between internal hearings conducted at the workplace

Column contributed by Cheadle, Thompson and Hayson

and arbitrations conducted at the CCMA. To deal with this problem of duplication, employers and employees may agree that an arbitrator will conduct an enquiry at the workplace concerning an employee's conduct or capacity and that the decision of the arbitrator in this inquiry is final.

The advantage of the 'once off' arbitration for: employers, is a speedier process leading to finalisation of the dispute; employees, is an independent presiding officer at the workplace to hear the dispute; and the CCMA, is less disputes to process and cost savings as the employer carries the cost of the arbitrator.

Con-arb: Previously the LRA required all disputes to be referred to conciliation before they could be referred to arbitration. As a high proportion of disputes are resolved in conciliation, it was anticipated that this would speed up dispute resolution and reduce the number of cases proceeding to arbitration. In practice, however, many employers do not attend conciliations, and simply wait for the arbitration process to present their case.

An important innovation in the 2002 amendments to the Act is that the CCMA may now resolve disputes by 'con-arb'. In 'con-arb' the arbitration starts immediately after the end of the conciliation if the dispute is not settled. 'Cob-arb' must be used in: disputes about probation; dismissals for misconduct or incapacity, unless a party objects.

Enforcing awards and orders

Certifying an arbitration award: It is not uncommon for an arbitrator to make an award in favour of an employee and for the employer to then refuse to comply with the award. Previously, in those circumstances the employee's recourse was to apply to the Labour Court to enforce the award (ie to make the arbitration award an order of the Labour Court). This entailed extra expense and a delay in the implementation of the award. The 2002 amendments simplify this. A party may apply directly to the director of the CCMA to have an arbitration award certified. A certified award may be enforced in the same fashion as a Labour Court order. If the award is for money, the employee may request the Sheriff of the Court to seize the employer's goods and sell them to raise the money.

Enforcement of collective agreements by bargaining councils: Prior to the 2002 amendments designated agents had powers that were similar to the powers of CCMA commissioners when conducting conciliations and arbitrations. However, in reality the role of designated agents more closely resembles that of labour inspectors.

The powers of designated agents have been strengthened to encourage parties to comply with the provisions of collective agreements. A council may refer any unresolved dispute concerning compliance with any provision of a collective agreement to the CCMA for arbitration. An arbitrator conducting the arbitration may make an appropriate award including ordering a person to pay any amount which is owed, imposing a fine, or by confirming, varying or setting aside a compliance order.

An arbitration award is final and binding and may be enforced as if it were an order of the Labour Court (unless it is an advisory arbitration award). The minister has published a notice setting out the maximum fines that may be imposed by an arbitrator for a breach of a collective agreement.

Managing retrenchments

The 2002 amendments make a distinction between retrenchments of individuals, retrenchments at small-scale businesses, and retrenchments at large-scale businesses. The main changes introduced by the amendments are that:

- individuals who are retrenched may now refer a dispute either to arbitration by the CCMA or a council or to the Labour Court for adjudication;
- the consultation process in large-scale retrenchments may be facilitated by a person appointed by the CCMA; and
- employees involved in a large-scale retrenchment may either strike or may refer a dispute over the substantive fairness of the retrenchments to the Labour Court.

The referral of a dispute by a single employee: A single employee who has been retrenched may now choose to refer a dispute either to arbitration or to the Labour Court. Prior to the amendment, all individual retrenchment disputes were referred to the Labour Court and about 50% of cases that went to trial dealt with individual retrenchments. The amendment is likely to significantly reduce the case load of the Labour Court.

The referral of a dispute by employees at a small-scale business: Employees may refer a dispute over the substantive and/or procedural fairness of retrenchments to the Labour Court, if section 189A, which deals with large-scale retrenchments, is not applicable. This is the case if the employer has less than 50 employees or if the number of dismissals contemplated is less than the threshold figure set out below.

The process for large-scale retrenchments: The 2002 amendments introduced a new section (section 189A) to improve the effectiveness of consultations in large-scale retrenchments. This new section applies to workplaces where an

employer employs more than 50 employees and where the number of retrenchments contemplated meet a certain minimum threshold. This threshold is reached if the employer contemplates the retrenchment of more than the specified minimum, or if the number of retrenchments that have taken place in the preceding 12 months plus the number contemplated exceed the specified minimum.

The written notice: When an employer contemplates a dismissal for operational reasons, the employer must issue a written notice inviting the other consulting parties to consult with it and must disclose all relevant information including the reasons for the dismissals, the alternatives considered, the number of employees likely to be affected, etc.

The employer must allow the other consulting parties to make representations about these and any other matters. The employer must consider and respond to any representations that are made. If they are made in writing, the employer must respond in writing.

The appointment of a facilitator: The employer or the consulting parties may request the appointment of a facilitator from the CCMA to assist the parties during the consultation process. If the employer makes the request, it must accompany the notice calling on the other parties to consult (s189(3)). If the other consulting parties make the request, it must be within 15 days of the employer issuing the notice to consult.

The minister has made regulations dealing with the facilitation process. The facilitator may chair the meetings of the parties or direct them to meet on their own. The facilitator must assist the parties to resolve disputes over the disclosure of information and can arbitrate unresolved issues on this matter. The facilitator may meet up to four times with the parties. The director of the CCMA may extend the number of facilitation meetings.

When a facilitator is appointed, the employer may not issue notices of termination for 60 days after giving the notice to consult. If 60 days have passed from the date on which notice to consult was given, the employer may give notice terminating the contracts of employment and the registered trade union or the employees concerned may either give notice of a strike or may refer a dispute to the Labour Court concerning whether there is fair reason for the dismissal.

If there is no facilitator: If neither party requests the CCMA to appoint a facilitator, a party may not refer the dispute to a council or the CCMA for 30 days from the date of the notice to consult. Once the period for conciliation is finished (30 days or when a certificate is issued), the employer can give notice of termination and the union or employees can give notice of a strike.

The election to strike or to refer a dispute to the Labour Court: In large-scale retrenchments, employees may elect to strike over their dismissals or to have the Labour Court adjudicate the substantive fairness of the dismissals. Employees may not do both – ie refer a dispute to the Labour Court and strike.

The test for substantive fairness: If a consulting party chooses to challenge the substantive fairness of the dismissals in the Labour Court then the test for substantive fairness is limited to whether-

- the dismissal was to give effect to an operational requirement;
- the dismissal was justifiable on rational grounds;
- there was a proper consideration of alternatives; and
- the selection criteria were fair and objective.

Disputes over procedural fairness: In a large-scale retrenchment, disputes over the procedural unfairness of a dismissal are dealt with separately from disputes over the substantive fairness of a

Hiccups around the implementation of labour law amendments

The amendments to the Labour Relations Act and Basic Conditions of Employment Act have yet to come into effect. The amendments were initially scheduled to come into effect in May, then the date changed to July. A new date has yet to be set. Meanwhile, the committee, set up to facilitate the implementation of the amendments faced a number of problems. These related to the negotiations of some regulations, which had to be finalised so that the amendments could come into effect.

- The negotiations around the rules for the CCMA.
- The negotiations around the regulations stipulating the definition of remuneration also proved rather difficult.
- The regulations governing the facilitation of retrenchments as envisaged in section 189A have not been finalised. As a result this section will only come into effect later this year.

Finally, some confusion arose around the move by the Department of Justice to publish amendments to the Insolvency Act without the legislation having been referred back to Nedlac. It is now understood that the amendments, drafted by Justice, are not in line with the agreement reached between labour, government and business in Nedlac.

dismissal. Whether employees choose to strike or to refer a dispute on the substantive fairness of a dismissal, does not effect their right to approach the Labour Court if an employer does not comply with a fair procedure. The Labour Court can compel an employer to comply with fair procedures and can grant an interdict preventing an employer from dismissing until it has complied with a fair procedure. A challenge to the employer's procedure must be brought on application (affidavit) no later than 30 days after the employer gave notice of termination.

Regulating the transfer of a business as a going concern

Automatic transfer of employment contracts: Prior to the amendments there was considerable uncertainty regarding this aspect of the Act. The 2002 amendments seek to clarify the situation. When a business is transferred as a going concern, the new employer takes over the employees' contracts of employment from the old employer. This happens automatically on transfer of the business unless there is an agreement to the contrary between the employers and the appropriate employee representatives.

An employee's continuity of employment is not interrupted by the transfer of the business. The new employer must employ the employees on terms and conditions which are on the whole not less favourable than those which employees enjoyed with the old employer. The purpose of this provision is to allow for flexibility in the total package provided by the new employer. However, if the terms and conditions of employment of the transferred employees are determined by collective agreement, the collective agreement continues to apply.

Employees who do not wish to transfer to the new employer may resign. They will not, however, be entitled to severance pay. If their new service conditions are substantially less favourable than their previous service conditions, they may resign and bring a claim for constructive dismissal.

Agreements between the parties

The old employer must reach agreement with the new employer as to a valuation on the date of transfer of the transferring employees' -

- accrued leave pay;
- severance pay, if the employees were entitled to severance pay;
- any other accrued entitlements (eg bonuses).

The agreement must also specify which employer is liable for paying these amounts and what provision has been made for the payment of those amounts.

For a period of 12 months after the date of transfer both the old employer and the new employer are liable to any employee who becomes entitled to a payment as a result of being dismissed for operational requirements or as a result of the employer's liquidation or sequestration.

Obligations of the new employer: The old employer's obligations in respect of trade union organisational rights or recognition agreements are transferred to the new employer. This facilitates the continuity of collective bargaining.

Unless the parties agree otherwise the new employer is bound by any existing arbitration award or collective agreement.

The new employer becomes liable for any unfair dismissal, unfair labour practice or act of discrimination committed prior to the transfer by the old employer. These provisions place a burden on the new employer and the new employer should factor into the purchase price the potential financial costs of transferring employees.

Dismissals and transfers of businesses: An employee cannot be dismissed merely because a transfer takes place but an employee can be dismissed if the transfer creates operational requirements that justify dismissal. A dismissal due to a transfer that cannot be justified in terms of operational requirements, is regarded as automatically unfair.

Regulating the transfer of contracts of employment in circumstances of insolvency: Prior to this Act, employees' contracts of employment would automatically terminate when a business became insolvent. In these circumstances employees often lost severance pay and did not have a right to be reinstated if the business revived. The Act deals with this problem by providing that when a business becomes insolvent and a scheme of arrangement is entered into to avoid the winding-up or sequestration of the business, employees' contracts of employment transfer from the old employer to the new.

The new employer is automatically substituted in the place of the old employer but all the rights and obligations between the old employer and its employee at the time of transfer remain with the old employer. This is in contrast to when a business that is not insolvent is transferred.

When an employer is facing financial problems that may result in the business becoming wound up or sequestrated, the employer must advise the employee representatives of that fact. An employer who applies to be wound up or sequestrated must provide the employee representatives with a copy of the application. LB