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South African Labour Law: A Twenty-Year Assessment

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SOUTH AFRICAN LABOUR LAW: A TWENTY-YEAR ASSESSMENT

Paul Benjamin (assisted by Carole Cooper)

Abbreviations

AMCU — Association of Mineworkers and Construction Union
ANC — African National Congress
BCEA — Basic Conditions of Employment Act 75 of 1997
BMF — Black Management Forum
BSA — Business South Africa
BUSA — Business Unity South Africa
CAPES — Confederation of Associations in the Private Employment Sector
CCMA — Commission for Conciliation, Mediation and Arbitration
COFESA — Confederation of Employers of South Africa
COSATU — Congress of South African Trade Unions
DOL — Department of Labour
EEA — Employment Equity Act 55 of 1998
ESC — Essential Services Committee
FEDSAL — Federation of South African Labour
FEDUSA — Federation of Unions of South Africa
ILO — International Labour Organisation
LAC — Labour Appeal Court
LRA — Labour Relations Act 66 of 1995
MLC — Millennium Labour Council
NACTU — National Council of Trade Unions
NDP — National Development Plan 2013
NEDLAC — National Economic Development and Labour Council
NUM — National Union of Mineworkers
RDOs — Rock Drill Operators
RIA — Regulatory Impact Assessment
SCA — Supreme Court of Appeal
SDA — Skills Development Act 97 of 1999
TESs — Temporary Employment Services

Introduction

Labour law is the product of the balance of political and economic forces in a society. The election of South Africa's first democratic government created the conditions under which a progressive labour law framework, reflective of international standards, was enacted. However, the absence of economic transformation, in particular, rising levels of unemployment and inequality, have dominated dialogue over the need to revise these laws. This paper examines the different phases of the legislative development of labour law in post-apartheid South Africa, highlighting the positions articulated by the different social partners.

The introduction of a new framework for labour market regulation has been cited as one of the most significant achievements of South Africa's post-apartheid government. The process of social dialogue over labour legislation that emerged late in the apartheid era was institutionalized through the creation of the National Economic Development and Labour Council (NEDLAC) in 1994. NEDLAC became the forum for negotiations on a quartet of labour laws: the Labour Relations Act of 1995 (LRA); the Basic Conditions of Employment Act of 1997 (BCEA); the Employment Equity Act of 1998 (EEA); and the Skills Development Act of 1999 (SDA). The overall goal of these laws was to establish core worker rights, facilitate South Africa's reintegration into the world economy and transform a labour market marked by high levels of inequality and unemployment, and low levels of skill and productivity. The International Labour Organisation (ILO) has described the process of social dialogue development over these laws as intense, constructive and effective.

This was followed by a period of review and adjustment. President Mbeki announced, in his opening address to Parliament in 1999,[1] a review of labour legislation to identify rigidities introduced by the new laws and any unintended consequences for job creation and business. The following year, the government published proposals to amend the BCEA, the LRA and the labour provisions in the Insolvency Act. Many of the proposals were criticised as being excessively pro-employer,[2] and the Congress of South African Trade Unions (COSATU) gave notice to NEDLAC of its intention to call a general socio-economic strike as part of a programme of action in protest againt the amendments. Negotiations at

[1] www.anc.org.za/show.php?id=4240.

[2] 'Labour Law Amendments: Defend Workers' Rights' in *The Shopsteward* 9 (3) September 2000. Available at http:///www.cosatu.org.za/show.php?ID=2201, accessed 9 March 2016.

NEDLAC on the Bill deadlocked but a parallel process emerged with the formation of the Millennium Labour Council (MLC) in July 2000, comprising business and labour, with informal discussions occurring bilaterally with government, which led finally to an agreement. There was a shared recognition between business and labour that the country faced a crisis of poverty, unemployment and inequality, and whatever the differences which divided business and labour, the national reality needed seriously to be addressed.

After extensive negotiations, these Acts were amended in 2002 with organised labour having achieved it goals of blocking many of the proposed reforms. In 2001, a modernised Unemployment Insurance Act was passed, and in 2003 the SDA was amended.

The Department of Labour's Programme of Action and Strategic Plan for 2004-2009 stressed the continuity of labour market polices. It highlighted the need for the impact of legislation to be monitored and evaluated, for increased capacity to be devoted to implementing and enforcing existing laws, and for harmonisation of labour market policy with broader government policies on job creation.

In his 11 February 2005 *State of the Nation* address, President Mbeki returned to the theme of review and adjustment. He announced that following a review of the regulatory framework applicable to small, medium and micro-enterprises, the government would introduce 'a system of exemptions for these businesses with regard to taxes, levies, as well as central bargaining and other labour arrangements'.

This approach continued with the publication of an ANC policy paper (2005), arguing for a two-tier labour market in which businesses with fewer than 200 employees would be exempted from the bulk (exactly how much is not specified) of the labour laws (ANC 2005) so as to increase flexibility for smaller employers and encourage employment and economic growth. After a high profile debate which began within the press and ANC policy-making circles, both these initiatives were temporarily shelved pending further investigation and research. During this debate, it emerged that the regulatory review referred to by the President only dealt with the red-tape requirements of labour law and did not attempt to measure the benefits of labour regulation.

A 2004 report published by the Department of Labour showed that increased levels of informalisation, in particular the practice of labour broking, had eroded labour law protection for South Africa's workers. The report, which was tabled in NEDLAC in October 2004

suggested that labour law had unintentionally provided the opportunity for this growth. It proposed an extensive package of possible legislative and institutional responses and acknowledged that any changes had to take account of relevant costs and benefits to employers, workers and society. The NEDLAC process produced a consensus that atypical forms of employment were on the increase and that improved enforcement of existing laws was needed to deal with abuses (NEDLAC 2004). Further research on labour broking commissioned by the government in 2007 showed that labour brokers did not necessarily create employment and that the employees of labour brokers were subject to exploitation. In 2009, as a result of this research, the Minister of Labour announced that the government intended to ban labour broking. Union federations COSATU and the National Council of Trade Unions (NACTU) which supported the banning of labour brokers campaigned for legislation to be amended to effect this.

In 2010 the Department of Labour (DOL) announced its intention to amend South Africa's labour laws and issued four Bills: the Labour Relation Amendment Bill, the Basic Conditions of Employment Amendment Bill, the Employment Equity Amendment Bill and a new piece of legislation, the Employment Services Bill. They had been subject to a regulatory impact assessment (RIA) which had suggested that the jobs of as many as 2.13 million temporarily employed South Africans would be jeopardised if the Bills were implemented in their original form. The Bills were ill received and the department conceded they were badly drafted and they were withdrawn. After further negotiations in NEDLAC between the social partners, especially protracted and contested in the case of the LRA and BCEA, the Bills were submitted to Parliament and eventually enacted in 2014 and 2015. The focus of a number of amendments was to address the challenges posed by the employment of non-standard (atypical) workers.

The issue of the country's high unemployment and the need for concerted job creation were targeted as issues needing attention in the government's new National Development Plan (NDP) published in 2013. While agreeing with some points in the plan, COSATU criticised the NDP because it projected many more jobs to be created by small business than in the services sector; it ignored the New Growth Path and the Industrial Policy Action Plan; and it called for job creation through reducing the rights of existing workers. Business's response to the plan was positive.

In 2013 the Treasury-driven Employment Tax Incentive Act was promulgated, coming into effect in 2014. The Act, which reduces the cost to employers of hiring young people, with the government paying half of the costs, aims to encourage business to employ the youth — the group hardest hit by unemployment in the country. COSATU opposed the Act, arguing that it would see older workers displaced by young people whom employers would hire at a fraction of the cost of older workers. The Treasury noted that this point was dealt with in the legislation itself. Although the Southern African Labour and Development Research Unit at the University of Cape Town found that the impact of the incentive was 'at best, small in magnitude' in the first six months of its existence (Ranchhod & Finn 2014), the Treasury stated, after the scheme had been in existence for a year, that it had led to 270 000 people being employed, with 29 000 employers claiming from the scheme. It said it would monitor the implementation of the incentive and had not ruled out changing it, should any 'unintended consequences' arise (Marrian 2015).

Institutions

Bargaining councils

Sectoral bargaining councils are established in terms of sections 27-34 of the LRA 1995. They perform collective bargaining and dispute resolution functions in certain economic sectors covering some 2.5 million workers. Bargaining councils established for national, provincial and local government cover approximately 1.3 million workers (Godfrey et al 2010). The establishment of bargaining councils is voluntary and bargaining councils cover some 15% of workers in the private sector. However, the extension by the Minister of Labour of collective agreement concluded by bargaining councils within the private sector to non-parties remains a matter of considerable controversy and there has been a plethora of legal challenges to the process of extension.

Commission for Conciliation, Mediation and Arbitration

The key labour market institution established in the post-apartheid era is the Commission for Conciliation, Mediation and Arbitration (CCMA). It was established in terms of sections 112-126 of the LRA. Its functions include dispute resolution, dispute management and institution

building and training within the labour arena. It also regulates the performance of dispute resolution functions by bargaining councils and private dispute resolution agencies (Benjamin 2013).

The CCMA is independent and governed by a tri-partite governing body. The governing body consists of an independent chairperson, three representatives from the government, organised business and organised labour respectively, and the CCMA director. The members of the governing body (including the independent chairperson) are appointed by the Minister of Labour from nominations by NEDLAC.

The governing body appoints the director and commissioners as well as accrediting and subsidising bargaining councils and private dispute resolution agencies. The governing body has remained an effective institution for social dialogue. A major contributing factor is that the social partners have appointed senior representatives to serve as its members. A key strength of the structure is the willingness of members, on many occasions, to divorce themselves from the interests of their own constituencies and act in accordance with the CCMA's organisational interests.

The governing body operates by consensus. While this has prevented decisions that may have been strongly opposed by any of the constituencies, it has also had a limiting effect on certain policy decisions. For example, the CCMA did not accredit any private dispute resolution agencies until 2005, although this is a significant aspect of the approach to dispute resolution articulated in the LRA. This was because of opposition from representatives of organised labour who feared that it would lead to a decrease in funding for the CCMA.

The governing body's members and regional representatives of social partners interview and recommend candidates for appointment as commissioners on the basis of consensus. The representatives of business and labour strongly favour the involvement of constituency representatives in appointments, sharing the view that appointments by consensus enhances the legitimacy of the CCMA.

An unresolved concern is a lack of clarity over the role that the CCMA should be allowed to play in policy formulation on matters of labour market regulation, particularly on issues where it impacts directly upon its operation. The CCMA has not participated directly in negotiations concerning the reform of labour legislation at NEDLAC, even though these discussions have a direct and significant impact on its operation.

The Explanatory Memorandum (Explanatory Memorandum 1995) accompanying the LRA describes the CCMA's 'main function' as the 'attempt to resolve disputes by conciliation so as to reduce the incidence of industrial action and litigation'. The CCMA is required to conciliate all disputes referred to it. This poses two distinct sets of challenges. On the one hand, it is required to provide expeditious conciliation in a very large number (currently in vicinity of 125,000 annually) of 'rights' disputes that may, if not settled, be referred to arbitration or, in certain instances, adjudication by the Labour Court.3 The majority of these cases (a remarkably consistent figure of approximately 80% annually) are unfair dismissal disputes. In addition, the CCMA is required to mediate unresolved collective bargaining disputes ranging from disputes involving single employers to disputes arising out of sectoral bargaining in major sectors of the economy.

Department of Labour

The labour inspectorate, located in the Department of Labour, is responsible for promoting, monitoring and enforcing basic conditions of employment, including minimum wages established under sectoral determinations. There is general consensus that the capacity of the labour inspectorate to enforce and promote compliance with minimum standards requires significant strengthening (Benjamin 2011).

Labour Court

The Labour Court is a specialist court with the same status as the High Court. It has the power to review arbitration awards (but not to consider them on appeal) by the CCMA and bargaining councils and this enables the court to supervise the conduct of these institutions. It hears, as a court of first instance, more complex dismissal cases, claims of unfair discrimination and applications to interdict unprotected industrial action. These cases may involve individual issues arising out of contracts of employment, as well as collective disputes such as the dismissal of striking workers and mass retrenchments. NEDLAC plays a significant role in the appointment of Labour Court judges.

[3] The figures for the CCMA are for the 12 months ending 31 March 2014 and were provided by the CCMA.

Labour Appeal Court

The Labour Appeal Court (LAC) hears appeals from judgments of the Labour Court. At the time of the enactment of the LRA it was envisaged that the LAC would be the final court of appeal in labour matters (except in constitutional labour matters in which the Constitutional Court was the final court of appeal). Contrary to what was intended in the LRA, the Constitution set the Supreme Court of Appeal above the LAC and thus the SCA heard appeals from the LAC in respect of labour matters.

In 2003, the Department of Justice published proposals to abolish the labour courts and transfer their authority to the High Court. This proposal was jointly resisted by organised business and labour and was withdrawn. In 2013 the Superior Courts Act read together with the Constitution Seventeenth Amendment Act reinstated the LAC as the court of final instance in labour matters as originally provided, except in respect of the Constitutional Court which is now the apex court in all matters.

National Economic Development and Labour Council

The National Economic Development and Labour Council (NEDLAC) was established in 1994 as a forum for social dialogue and tripartite negotiation over labour market policies and legislation. The establishment of NEDLAC formalised an era of intensive social dialogue that had emerged in the period of the enactment of Labour Relations Act of 1995 which is generally considered to be NEDLAC's most significant achievement. Negotiations over legislation in subsequent years have shown a diminishing level of consensus over many key aspects of labour market regulation.

The South African Model of Regulating Collective Bargaining

One of the express objects of the 1995 LRA is to promote orderly collective bargaining, particularly at sectoral level. The statute was designed to introduce a greater level of coordination into the fragmented pre-1994 collective bargaining system that consisted of statutory industry level bargaining at industrial councils that had been in place since 1924 and workplace level bargaining which had been driven by the rapid growth of the independent trade union movement in the last two decades of the apartheid era. A further problem was the

lack of an 'orderly distinction' between the regulation of collective labour relations and the individual employment relationship, exacerbated by the Industrial Court's assumption of power under its unfair labour practice jurisdiction to intervene in collective disputes.

The LRA created a sophisticated model of collective labour law that both limits the potential for judicial intervention in determining the level and subjects of collective bargaining while clarifying the legal status of collective agreements. On the one hand, there is no legally enforceable duty to engage in collective bargaining nor does the law promote judicial intervention in the conduct of collective bargaining through a concept such as good faith bargaining. In its place, a system of statutory organisational rights was introduced to promote the recognition and effective operation of representative trade unions. This system, coupled with a protected right to take industrial action (strike or lockout) after a dispute has been referred to conciliation, constitutes the primary legal mechanisms for promoting collective bargaining. In effect, the duty to bargain was 'organisationally enforceable' rather than judicially.

Duty to bargain

The rationale for rejecting a legally enforceable duty to bargain — ie a statutory duty to bargain which is judicially enforceable —with the consequent determination by the judiciary of levels of bargaining, bargaining partners and bargaining topics is that it was perceived to be too rigid and counter productive in a labour market that needed to respond to a changing economic environment (Explanatory Memorandum1995).

Moreover, the juridification of collective bargaining under the old system had created uncertainty and confusion for parties as the court had adopted an inconsistent stance in determining appropriate bargaining partners and bargaining topics. The court-sanctioned 'duty to bargain' had increasingly became a basis for attacks on majoritarian trade unionism as the court carved out bargaining units for minority and craft trade unions. The drafters argued that a legally enforceable duty to bargain would undermine the Act's goal of promoting collective bargaining at sectoral level (Explanatory Memorandum1995).

The courts have accepted that the absence of a legally enforceable 'duty to bargain' does not violate the constitutional right to engage in collective bargaining.[4]

[4] *SA National Defence Union v Minister of Defence & others* 2007 (1) SA 402 (SCA); (2006) 27 *ILJ* 2276 (SCA).

The lack of a duty to bargain was strongly criticised by the labour movement, which argued for a duty to bargain at both plant and industrial level with representative trade unions, including statutorily imposed collective bargaining institutions for each industry. This agenda was pursued unsuccessfully in the negotiations on the 1995 Bill in NEDLAC by COSATU, NACTU and the Federation of South African Labour (FEDSAL). The government has consistently rejected the imposition of a duty on employers to bargain at sectoral level on the basis that this would violate the right of employers to elect not to bargain in concert with other employers in the sector, which is generally regarded as being protected by the constitutional principle of freedom of association.

Late in the negotiation process, a concession to this demand was introduced with the provision for statutory councils to be established (on application by a union or unions acting jointly or similarly by employers' organisations with at least 30% membership in that sector and area) with a limited bargaining agenda (Du Toit et al 2015, 26). While this institution sought to bridge the gap between the principle of voluntarism and the union demand for compulsory centralised bargaining, statutory councils have not become a significant feature of the collective bargaining landscape.

Bargaining councils

The Act's approach to collective bargaining has been described as tilting towards centralised bargaining while retaining voluntarism (Baskin 1996). Industrial councils, which had served as structures for industry-wide negotiation since 1924, were transformed into modernised bargaining councils with enhanced powers and responsibilities including the conciliation and arbitration of disputes of right within their sector. Membership of a bargaining council allows trade union parties to acquire access and stop order rights in all workplaces within the scope of the council, irrespective of their representativeness in any particular workplace.

While there has been some consolidation of regional councils into national institutions in some sectors, there has been no substantial growth in the number of bargaining councils. In the period since the Act came into effect relatively few bargaining councils have been formed and fewer than ten per cent of workers in the private sector are covered by bargaining councils, indicating that employers have by and large taken advantage of the voluntarism to

resist sectoral bargaining.[5] Sectoral level collective bargaining continues to operate in a number of sectors in which bargaining councils have not been established. These include coal and gold mining and the motor manufacturing sector.

This resistance and a preference for plant level bargaining, because employers view it as more flexible and responsive to their individual needs, was clearly expressed in negotiations on the 1995 Act. Clive Thompson, a prominent labour lawyer, commented that 'the South African system flies in the face of global market forces. Collective bargaining is on the rise, strongly encouraged and supported by a bargaining friendly statute' (Thompson 2004). The major controversy concerning the operation of bargaining councils has focussed on the Minister of Labour's power to extend bargaining council agreements to non-party employers and employees. Small employers have been vociferously opposed to provisions in the Act which allow the Minister to extend bargaining council agreements to non-parties on the grounds that such agreements discriminate against them and negatively affect their ability to function effectively by imposing economic standards which they are unable to meet. The 1995 Act obliges the Minister to extend an agreement concluded by employer and trade union parties who are representative of the sector as a whole, provided it does not discriminate against non-parties. For the purpose of determining representativeness, employers are measured by reference to the number of employees in their employment. If the parties who concluded the collective agreement do not constitute a majority of the sector the Minister has a discretion to extend the agreement, if the failure to do so would undermine collective bargaining at industry level, and provided that provision was made for the speedy granting of exemptions by an independent body on the grounds of undue hardship. There has been ongoing litigation challenging the extension of bargaining council agreements to employers who have elected not to register with the council in the sector in which they operate.[6] While certain of these cases have succeeded, they have primarily related to irregularities in either the Minister's or bargaining council's decision-making process. A high profile challenge to the 'automatic extension' provision brought by the Free Market Foundation was heard in

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[5] In 2014 there were 44 registered bargaining councils covering some 2,5 million workers (Du Toit et al 2015, 51). Over 60% of these workers fall within the five public service bargaining councils. The largest council in 2004 was the Metal & Engineering (272 796), followed by Motor (154 655); Clothing (116 949); Chemical (64 242) and Road Freight (53 019) (Godfrey, Theron and Maree (2005)).

[6] See, for instance, *NEASA v Minister of Labour* [2012] 2 BLLR 198 (LC); *Valuline CC v Minister of Labour* [2013] 6 BLLR 614 (KZP).

February 2016 and a full bench of the High Court rejcted the argument that this provision violated the Constitution.[7] Despite the high profile nature of this dispute, extension applications affect a small proportion of the workforce.

Driven in part by concerns that the law was undermining job creation, a proposed amendment to the Act in 2002 provided that the Minister could refuse to extend bargaining council agreements to non-parties if all employers, in particular small businesses, in a specific industry had not been consulted. COSATU opposed this, stating that it could seriously undermine the collective bargaining system and threatened 'to unravel a lengthy and carefully negotiated compromise between the parties aimed at protecting the integrity of the collective bargaining system'. It contended that the arguments about the negative effects of the provision on small business had completely ignored the provisions in the Act for the representation of small business on bargaining councils, as well as provisions for exemption (which according to surveys were granted in over 80% of cases) (COSATU 2000). The MLC agreement withdrew the proposed amendment, but additional industrial support for small business was provided in the amended Act (COSATU 2001).

Ongoing concerted opposition by sections of business to the extension of bargaining council agreements led to further amendments in 2014 designed to improve the efficiency of bargaining councils' exemption systems as well as the fairness and impartiality of the exemption appeal process. When considering whether to grant a discretionary extension applied for by a bargaining council that does not have majority representation, the Minister is required to invite comments on the proposed extension, and may only extend the agreement after considering all comments received. The amendments, however, also targeted recalcitrant employers, including small employers, who failed to implement bargaining council agreements by enabling bargaining councils to enforce their agreements by means of arbitration.

Organisational rights

Under the 1995 Act trade unions that are sufficiently representative in a workplace are entitled to obtain basic organisational rights: those requiring the employer to deduct and pay over union subscriptions and grant reasonable access by union officials to the employer's

[7] *Free Market Foundation v Minister of Labour* case no 13762/2013.

premises to conduct union business. Trade unions may acquire such rights individually or acting together. If a dispute about acquiring organisational rights cannot be resolved at conciliation before the CCMA, the trade union may refer it to arbitration or call a strike. The Constitutional Court has ruled that trade unions, which do not meet the threshold of sufficient representivity and would therefore not acquire organisational rights through an arbitration process, can strike in support of a demand for organisational rights.8

Trade unions with majority representation in a workplace are entitled to have their elected trade union representatives recognised by the employer; for office-bearers to have time off for union business and training; and to receive information for collective bargaining. In addition, they may conclude a collective agreement with the employer setting the threshold at which trade unions can obtain basic organisational rights, and conclude agency shop agreements requiring non-members who benefit from collective bargaining to contribute to the union.

The threshold for the obtaining of these rights has been a contested issue. There have been two primary areas of contention: the meaning of the term 'sufficiently representative' and the concept of a 'workplace' which serves as the reference for determining representivity for the both the acquisition of organisational rights and the extension of collective agreements.

The draft Bill had proposed that there be definite thresholds for certain organisational rights, but left this for the NEDLAC negotiators to determine. The Explanatory Memorandum explained this approach in the following terms: 'Low thresholds would assist in the organization of the unorganized, while the majoritarian criterion (50%+1) would avoid a proliferation of unions and provide stability and a neutral and simple standard against which to test the competing claims of trade unions' (Explanatory Memorandum1995).

This approach was supported by the union federations which proposed thresholds that varied between 30% and 50%+1 according to the organisational right. Business, on the other hand, was opposed to 'hard' thresholds, arguing instead for the more flexible concept of sufficient representativeness (Du Toit et al 2015, 25). In NEDLAC, a compromise was reached between business and labour when it was agreed that the threshold for the basic organisational rights should be sufficient representativeness, and that this level could be achieved by unions acting

[8] See *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* 2003 (3) SA 513 (CC); (2003) 24 *ILJ* 305 (CC).

jointly. This also constituted a compromise within the labour caucus between COSATU and NACTU, which were in favour of a majoritarian system, and FEDSAL, which wished to protect smaller unions (Du Toit et al 2015, 27).

Although the Act does not attach a percentage to the concept of sufficient representativeness, a conventional wisdom is that a threshold of 30% should be used. However, a closer scrutiny of CCMA practice shows that organisational rights are often granted at levels of representation lower than 30% and arbitrators are generally unsympathetic to employers who resist reasonable demands for such rights. Despite the centrality of organisational rights to the statutory bargaining regime, there remains uncertainty about the application in principle. The decline of COSATU's dominance has led to an increasing instance of disputes, litigation and strikes over the acquisition of organisational rights (as well as the extension of collective agreements). The Act requires commissioners to minimise the proliferation of trade union representation in a workplace by encouraging a system of a single representative trade union, and to take into account the nature and organisational history of the workplace, organisational rights sought and, since the 2014 amendments, the composition of the workforce, taking into account non-standard employees.

The Act permits an employer and a registered union which represents more than 50% of employees in the workplace (see above) or the parties to a bargaining council to conclude a collective agreement setting the thresholds regarding rights of access, stop orders and time off for union activities. In practice collective agreements setting this threshold at 50% have become common with the result that there are many workplaces in which one only trade union can have any organisational rights at all. These agreements have undermined the balance between inclusivity and stability that the initial model sought to achieve and allow employers and trade unions effectively to collude to protect a majority trade union against competition from rivals. This not only contradicts the purpose of the LRA but exacerbates inter-union rivalry. It also may prevent trade unions which represent specific groups of workers within a workplace from acquiring organisational rights. For example, the Lonmin mine and the National Union of Mineworkers (NUM) concluded a threshold agreement in respect of the mine's estimated 40 000 employees, thus making it more difficult for other unions to acquire organisational rights.

Concern about the destabilising consequences of threshold agreements emerged before the Marikana strike in August 2012. A provision allowing an arbitrator to override a threshold agreement was included in the draft Amendment Bill tabled in Parliament in early 2012 and came into effect at the start of 2015. This concept had been raised the previous year at NEDLAC by the Federation of Unions of South Africa (FEDUSA) and had been accepted by the government and subsequently the other trade union federations.

When evaluating a dispute of this type, the arbitrator must take into account the factors applicable to the adjudication of organisational rights disputes (mentioned above), as well as whether the trade union seeking the rights represents a significant interest, or substantial number of employees in the workplace. Significantly, BUSA opposed this amendment both in NEDLAC and in Parliament arguing that it diluted the majoritarian principle. BUSA likewise opposed a second amendment which allows an arbitrator to grant the rights to elect trade union representatives or disclosure of information to the most representative union in a workplace in which no union has majority support (BUSA 2012).

Many commentators have called for legal reform to ensure that collective bargaining structures do not deprive minority groupings and smaller trade unions of a voice in the collective bargaining process. However, much of this commentary ignores the limited role that legal compulsion plays in the collective bargaining framework. Significantly, although the LRA promotes the emergence of a single representative trade union, it does not compel it. Employers remain free to set lower recognition thresholds that allow for more than one union to participate in the collective bargaining process.

The then director of the CCMA, Nerine Kahn, suggested that the LRA's endorsement of majoritarianism was no longer appropriate in today's labour relations environment: 'This winner-takes-all approach was developed and adopted when there was a fair degree of union stability, a growing consolidation within the trade union movement, and a strong commitment to social dialogue and inclusive solutions within the government, labour, business and civil society. But much has changed since then' (Kahn 2012). In the aftermath of Marikana, a Framework Agreement for the Mining Industry was adopted in 2012 containing a tripartite commitment by the big players in the mining sector to re-evaluate the principle of majoritarianism but this is yet to be reflected in any legislation.

The elastic concept of the workplace

Organisational rights are granted for a workplace. The definition of workplace for the private sector is – unless the context indicates otherwise — the place(s) where employees of an employer work. The Act states further: 'If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organization, the place where employees work in connection with each independent operation, constitute the workplace for that operation.' However, what constitutes a workplace may be determined in the parties' collective agreement on organisational rights, in which case this would override the statutory definition.

There are a number of criticisms of this approach to promoting collective bargaining.[9] The definition of a workplace is sufficiently elastic to allow large national employers (for instance, a major national chain store) to argue that its entire business constitutes a single workplace. It also does not take account of bargaining units within a workplace making it difficult for unions, such as craft unions, that represent limited categories of workers to establish their presence in a workplace. There is also uncertainty as to the threshold at which trade unions will be granted basic organisational rights.

The impact of this is evident in recent litigation concerning the extension of collective agreements in sectoral bargaining in the gold mining sector. In 2013 a dispute broke out between the Association of Mineworkers and Construction Union (AMCU) and the Chamber of Mines, which is the non-statutory collective bargaining agent for the mining industry. Each employer operated several mines. Since 2001, collective agreements concluded in this

[9] The ILO (1996-2013 *Labour Legislation Guidelines* ch 3) recognises that 'the determination of the *representativeness* of organisations can be a difficult issue, particularly in countries where there exist a multiplicity of trade unions and where bargaining generally takes places at the enterprise level, but also in cases where bargaining takes place at the industrial branch and national levels'. The issue is discussed in more detail in Casale G, *Union Representativeness in a Comparative Perspective* (ILO/CEET, Report No. 18, 1996). The *Labour Legislation Guidelines* state further that in relation to 'the adoption of legislation establishing procedures for the determination of the representative status of a party for the purposes of collective bargaining, the ILO has recognised the concept of the *most representative* organisations for the purposes of representation in ILO bodies, by article 3, paragraph 5 of the ILO Constitution. However, the ILO's Committee of Experts has indicated that, in order to avoid any opportunity for partiality or abuse, where procedures of this kind exist, they should be based on objective and pre-established criteria' (General Survey, para 240. See also Paragraph 3**(b)** of Recommendation 163).

manner have been applied by the chamber's members, party to the agreement, to employees who are not members of the party unions, regardless of whether they belong to another union or not.

After wage negotiations in 2013, followed by a strike by one of the four recognised unions, the chamber's revised offer was accepted by three of the unions, but not by AMCU. The agreement would bind all members of the four unions for two years. The members of the three signatory unions constituted a majority of employees in the workplaces of each of the three employers. However, AMCU represented a majority of the employees and was recognised at five mines. AMCU argued that each mine represented a single workplace, the chamber that all the operations of a single employer constituted a single workplace.

In the Labour Court in 2014 AMCU further argued that the provisions of the LRA permitting the extension of collective agreements concluded with majority trade unions to a defined minority of employees within a workplace were unconstitutional. Binding employees without their consent to a collective agreement concluded by unions with majority support violated the Constitution, in particular the right to engage in collective bargaining and the right to strike of employees in the relevant workplaces.

The Labour Court ruled that the definition of a workplace requires a court to focus exclusively on whether those operations carried on by the employer in different places are 'independent' of one another. Independence must be determined only by reference to the size, function or organisation of the operations concerned, as stated in the definition; extraneous considerations such as trade union representativeness are irrelevant. Once the identity of the employer is established, the places where its employees work, even if geographically disparate, constitute the workplace unless they are shown to be independent by reason of size, function or organisation. In finding against AMCU, it also stated that the majoritarian principle which underlies section 23(1)*(d)* can result in a minority being bound by the decision of the majority. This was 'patently democratic' and promotes orderly collective bargaining, a legitimate purpose of the LRA. The court pointed out that section 23(1)*(d)* both applies the principle of majoritarianism by permitting the will of the majority to prevail, but also protects the interests of the minority by imposing constraints on the extent to which a collective agreement can be extended. [10]

[10] *Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co Ltd & others v*

The long shadow of Marikana

The wide terms of reference of the Farlam Commission of Inquiry[11] into the causes of the Marikana massacre created an expectation that the commission's report would contribute to policy debates on the future of collective bargaining and labour law in South Africa (Marikana Report 2015). Ultimately, that expectation was not fulfilled as the commission was able to do little more that untangle the events of 16 August 2012 and the days immediately preceding the massacre.

As the commission noted, the course of events that led to the unprotected strike at Lonmin during which the massacre occurred can be traced to a dispute at the neighbouring Impala Platinum mine (see also Stewart 2013; Theron et al 2015). In December 2011, that mine's management had granted an increase to certified miners. This occurred after the conclusion of a collective agreement between Impala and the NUM concluded in October 2011 to regulate wages until June 2013 and outside of the recognised bargaining process.

At the start of 2012 rock drill operators (RDOs) at Impala embarked on an unprotected strike in support a demand for a basic wage of R9 000. This escalated into a two-month strike occasioned by violence, much of it directed at the NUM, and the mass dismissal of 17 200 employees, the vast majority of whom were reinstated. The strike was resolved by a settlement in April 2012, extending increases to employees in all job grades. RDOs were promoted from grade A4 to B1 and the cumulative effect of this regrading, coupled with the general wage increases, increased the total guaranteed pay for RDOs from R6 540 to R9 991 per month.

The NUM had concluded a wage agreement at Lonmin in December 2011 covering the period until September 2012. At the time the NUM had majority membership at Lonmin

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Association of Mineworkers & Construction Union & others (2014) 35 *ILJ* 1243 (LC). This judgment was confirmed by the Labour Appeal Court in 2016.

[11] The Marikana Commission of Inquiry under former judge Ian Farlam was appointed by the President in terms of section 84(2)*(f)* of the Constitution of the Republic of South Africa of 1996, on 23 August 2012. Its mandate as per the Terms of Reference promulgated on 12 September 2012 was to investigate matters of public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana, in the North West Province which took place on about Saturday 11 August to Thursday 16 August, 2012 which led to the deaths of approximately 44 people, more than 70 persons being injured, and approximately 250 people being arrested.

and the terms of the collective agreement were extended to all employees in the bargaining units for which the NUM was recognised. By this time, the NUM had already ceased to be the majority trade union at one of the Lonmin shafts (Karree) and AMCU had acquired organisational although not collective bargaining rights at that shaft. However, as a NUM official giving evidence at the commission conceded, the conclusion of the agreement at Impala had led to the expectation that an unprotected strike would led to significant wage increases. The same official conceded that the union had adopted the approach that it was unable to assist employees to raise further disputes about wages because this would be in breach of the peace obligations contained in the collective agreement of December 2011. The unprotected strike continued after the massacre and eventually culminated in significant wages increases. In 2014 after the failure of centralised bargaining in the platinum sector, workers at Lonmin engaged in a prolonged protected strike which again culminated in the granting of significant wage increase.

The commission is critical of the conduct of Lonmin, the NUM and AMCU. It is critical of Lonmin's refusal to meet with representatives of workers, other than the NUM, the recognised trade union. In the light of the 'special circumstances' of the increase granted by Impala, Lonmin should have been willing to meet with employees when they expressed the view that they had lost confidence in the recognised majority trade union at the mine. It is likewise critical of the NUM for advising the dissatisfied RDOs that their collective agreement prevented them from raising the dispute. It is further critical of AMCU for failing to exercise control of its members, although it accepts that the president of AMCU tried to persuade employees to leave the koppie, but that his endeavours were undermined by Lonmin's refusal to meet with the representatives of the strikers.

Right to strike

The 1995 Act, for the first time, grants workers the right to strike. Employers do not have a right, but merely a 'recourse', to a lockout. This is consonant with the Constitution which grants employees a right to strike but no equivalent right to a lockout to employers on the basis that employers already have other means at their disposal to counter the effects of a strike, and to accord them a right to lockout would lead to an imbalance in power between employees and employers.

The previous regime had been plagued by a high incidence of strikes, many of them illegal and violent.12 The roots of this are not hard to find: frustration with complex and technical pre-strike procedures, including onerous ballot procedures, which previously had rendered protection of strikers largely theoretical; the non-acceptance by employers of employees' right to strike; the frequent presence of police at strikes; levels of poverty of the majority of the population; and the lack of political power for the majority which rendered strikes a means of political expression (Explanatory Memorandum 1995).

A central aim of the new Act, apart from the rights-based purpose above, is to reduce the number of unprocedural and violent strikes by obtaining buy-in by employees. It gives effect to this aim by protecting strikes which are in conformity with the Act's substantive provisions and simplified procedures — conciliation of a dispute of interest by the CCMA, a bargaining council or in accordance with a collective agreement, followed by a notice to employers of an intended strike — which make it much easier to hold a protected strike. Compliance with these requirements protects striking workers from dismissal, breaches of contract and civil and criminal liability (Du Toit et al 2015, 333; Explanatory Memorandum 1995). Non-compliance is no longer a criminal offence as previously; however, it can lead to a dismissal as long as the dismissal follows the Act's requirements of fairness, as well as opening a union and its striking members to civil liability. A downside of the simple procedures, however, is that many disputes are referred to conciliation without extensive negotiation between the parties; in addition, there is a tendency for trade unions to give strike notices before exhaustive bargaining has taken place. There is also a marked trend for the certification of a dispute (after the mandatory conciliation period) to be regarded as a 'tactical measure' as many parties obtain a certificate and threaten industrial action in order to strengthen their bargaining position. Roughly 72% of disputes in which certificates are issued at the end of the statutory conciliation period culminate in settlements without strike action.

In furtherance of giving expression to the right to strike together with the aim of reducing illegal strikes, the Act adopts an inclusive stance, protecting a broad range of industrial action, including go-slows, overtime bans, secondary strikes, and picketing which

[12] In 1987, at 'the height of the struggle against apartheid', around 9 million working days were lost due to strike action; while during the early 1990s an average of 4 million working days were lost a year (Du Toit et al 2015 at 60).The inadequacy of the dispute resolution system — fewer than 30% of disputes being settled by bargaining councils and 20% by conciliation boards— contributed to the high incidence of strikes (Du Toit et al 2015 at 22).

has the effect of bolstering employees' right to strike, while at the same time ensuring that these forms of action are regulated. The memorandum of objects accompanying the 2012 Bill stated that the intention in re-introducing the balloting provisions was to prevent industrial action being staged if it enjoyed only minority support because violence and intimidation were more likely to occur under these circumstances.

Statistics on strike action reveal that the LRA has largely been effective in achieving its purpose of reducing the number of strikes. Around the time of the promulgation of the LRA, the number of working days lost by strikes was about 4 million. This figure decreased significantly to 650 000 in 1997. Significant peaks of increased working days lost occurred in 2006/7 (9.5 million) and in 2010 when working days lost amounted to a staggering 20 million, followed on both occasions by a decrease to low levels (Du Toit et al 2015, 60). Both the peaks in 2006/7 and 2010, however, were due to two significant large public sector strikes. While only employing approximately 10% of all employees, the public sector was the source of 90% of working days lost due to strikes in those two years. The CCMA does not have jurisdiction to conciliate in these disputes, as the entire public service is covered by bargaining councils. The enormous growth in union membership within the public service and the fact that bargaining in the sector is centralised means that any breakdown in negotiations may lead to a large strike. It has been suggested that this problem could be addressed by 'some devolution of bargaining to the main sectors within the public service' (Du Toit et al 2015, 61 fn 342). Further peaks in working days lost occurred as a result of the strikes on the platinum mines: 2012 saw an increase in working days lost to 3.3m which declined to 1.8m in 2013 (Department of Labour 2013).13 The majority of strikes are over wage demands (77%) (Tokiso 2011) and strike action tends to be concentrated in the middle of the year when the most important wage negotiations (particularly in the metals and mining industries and the public sector) take place, setting a trend for settlements in other sectors.

[13] Overall, compared with other industrialised countries, however, South Africa's average strike intensity (calculated as the number of strikers per 1000 workers) for the period between 1998 and 2009 is modest. On average, only 28 out of 1,000 workers were involved in strike action on a par with countries like Austria and Finland (both 24 per 1,000 workers), or Denmark (25), and far below Argentina (307 per 1,000 workers), Israel (226), Spain (73), Italy (66) and others (Bhorat H & Tseng D (2014)).

A number of strikes have been marked by significant violence and lawlessness, for instance the 2006 security industry strike, the large public sector strikes, and the Marikana strikes in 2012. A reaction to these incidents was to focus on ways of increasing the regulation of strikes in the LRA. As a result the 2012 Amendment Bill proposed that a statutory strike ballot be reintroduced. In the old LRA the onerous requirements relating to the holding of a strike ballot had had the effect of undermining the legality of a strike, with strikes being interdicted for want of a strict adherence to the balloting requirements. The interdicting of the nationwide metal industry strike of over 100 000 workers in 1992 epitomised this approach with the strike being declared illegal on the basis, inter alia, of technical infractions of the requisite procedures.

The Amendment Bill provided that the right to stage a protected strike was dependent on a trade union conducting a ballot of its members in good standing who were entitled to strike in respect of the issue in dispute and a majority of those members voting in favour of the strike. The memorandum of objects accompanying the 2012 Bill stated that the intention in re-introducing the balloting provisions was to prevent industrial action being staged if it enjoyed only minority support because violence and intimidation were more likely to occur under these circumstances.

Proof of compliance with these provisions was to be provided in the form of a certificate issued by an independent body such as the CCMA, a bargaining council, or any council or private agency assigned with this function. Once the ballot had been certified in this manner, there could be no legal challenge to its validity. The memorandum of objects argued that the requirement for a certificate of compliance by an independent body would avert the problem of strikes being found to be non-compliant on merely technical grounds which had been the rationale for omitting balloting in the 1995 Act.

In practice, most trade union constitutions currently permit ballots to occur by a show of hands (Paton June 2014). Thus there is no guarantee that such ballots truly reflect the views of the membership. One of the statutory duties of trade unions under the Act is to keep ballot papers for a period of three years from the date of every ballot. This would suggest that what is envisaged by the Act is that a strike ballot should be conducted via secret ballot on paper. However, this has now become a source of contention between organised labour and the Department of Labour. The Registrar of Labour Relations, the functionary responsible for

the approval and registration of trade union constitutions, has adopted a view that constitutions of new trade unions will not be registered unless they provide for strike ballots to be conducted by secret ballot.

Whether the reintroduction of a statutory strike ballot will lead to a decrease in violent strikes is open to question. As stated elsewhere, a cause of strikes has been worker dissatisfaction with their socio-economic conditions (massive unemployment, increasing poverty levels and large inequalities in wages) and government's failure to address the backlog in service delivery. Of service delivery protests in one month in 2013, 88% were violent, highlighting the anger of the poorer sections of the population with their conditions (Ngcukaitobi 2013, 846). It has also been argued that certain features of the labour relations landscape also tend to encourage violence in strikes: for instance, perceived collusion between the police and either the employer or the state, the apparent intransigence of management, and the protracted duration of the strike. Furthermore, faced with the possibility of losing the strike, individuals attempt to 'police' the strike by assaulting non-strikers, leading to violent confrontation rather than a negotiated compromise (Ngcukaitobi 2013, 846). Under these circumstances, it is difficult to see that a ballot will have any real impact on decreasing the incidence of violence, although it may have other benefits, for instance providing the space for parties to reconsider their negotiating positions.

The final version of the Bill omitted these proposed changes. While no reasons were given, it was widely believed that government bowed to pressure from the trade union movement which opposed the reintroduction of a formal ballot as a precondition for the holding of a strike. COSATU had stated that the absence of a strike ballot in the current LRA was an acknowledgment by the legislature of the extensive abuse of technicalities by employers around balloting to prevent industrial action. Its reintroduction, therefore, represented a fundamental attack both on the right to strike and the right to engage in collective bargaining. Furthermore, it stated that the deletion of the provision was one of the areas on which agreement had been reached with the ANC leadership at a bilateral meeting.

Picketing

Pickets constitute an important weapon in employees' industrial action arsenal, and the 1995 Act provides for a registered trade union to authorise a picket by its members and supporters

in support of a strike or in opposition to a lockout. The purpose of a picket is to 'peacefully encourage non-striking employees and members of the public to oppose a lockout or to support strikers involved in a protected strike'.14 That support may be directed at encouraging employees not to work during the strike or lockout; dissuading replacement labour from working; or persuading members of the public or other employees and their employees not to conduct business with the employer.15 Employees may picket at their own place of work in support of a secondary strike provided the picket satisfies the requirements for such strike. This is because a picket amounts to 'conduct in contemplation or furtherance of a strike' which forms part of the definition of a secondary strike in the Act.16 These requirements are in compliance with ILO principles regarding pickets, which include the precept that taking 'part in picketing and firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful' (ILO 1996d paras 586, 587) and that interference by public authorities is justified only where the strike ceases to be peaceful (ILO 1996d paras 583, 584).

A picket may be held in a public place but outside the employer's premises.17 Either the trade union or the employer may request the CCMA to secure an agreement between the parties on rules for picketing during a strike or, if there is no agreement, establish the rules itself. An amendment contained in the 2012 Bill attempted to limit a picket only to members of the union and to exclude 'supporters'. This restriction was opposed by COSATU as it would exclude 'public and civil society supporters as well and fundamentally undermine the principle of labour solidarity which underpins the emphasis on collective power'. The exclusion was subsequently withdrawn (COSATU 2012; Du Toit et al 2015, 366).

Previously, there were problems when a trade union wanted to picket outside an employer's premises in a shopping mall, which was owned or controlled by a third party. The 2014 Amendment Act addressed this problem by providing that the CCMA may provide for picketing on premises owned or controlled by a third party if that person has had an

[14] Code of Good Practice on Picketing, GN 765 in *GG* 18887 of 15 May 1998, item 3(1).

[15] Ibid.

[16] See s 66 of the LRA 1995; Code of Good Practice on Picketing, item 3(2) op cit.

[17] The ILO's Committee of Experts has held that the requirement that strike pickets can only be set up near an enterprise does not infringe the principles of freedom of association (ILO 1996d paras 586 and 587).

opportunity to make representations to the commission. COSATU supported this amendment, as previous restrictions had severely undermined the right of affected workers to picket in office parks and shopping malls (COSATU 2012). A further amendment in 2014 to the Act allows a party, with due notice to the respondent, to approach the Labour Court for an order directing a party to comply with a picketing agreement or rule, or varying such agreement or rule. Despite objections by COSATU to this proposal, the provision was retained (COSATU 2013).

Essential Services

The 1995 Act prohibits strikes in essential services defined according to the ILO definition as those 'services whose interruption would endanger the life, personal safety or health of the whole or part of the population'.[18] A service may be declared essential by the Essential Services Committee (ESC) after a process of public hearings. Disputes are settled instead by compulsory arbitration. Registered trade unions and employers may include within their collective agreements provisions on the maintenance of a minimum service within an essential service. If ratified by the ESC, a strike or a lockout may take place in an essential service provided the minimum service is maintained. Strike action is prohibited in breach of a collective agreement or a determination by the essential services committee concerning a maintenance service — defined as a service the interruption of which would have the effect of the material physical destruction of a working area, plant or machinery — in other words the wealth generating capacity of the company. This is balanced by prohibiting the employment of replacement labour to continue or maintain production during the strike.

Few minimum service agreements have been concluded in the 29 declared essential services and there is infrequent recourse to compulsory arbitration. A growing incidence of prohibited strikes in essential services, particularly in the municipal and health services, led government to introduce amendments to the Act to improve the efficiency of the process of deciding on which services should be prohibited. Apart from administrative changes, the work of the ESC will be conducted by specialist panels familiar with a particular sector. Furthermore, when an ESC panel determines a service essential, it may direct parties to negotiate a minimum service agreement within a specified period (Grogan 2014, 261). If they

[18] ILO 1996-2013 ch 5.

fail to do so, a panel may do so instead. The amendment followed on a protracted court case in which Eskom (the electricity utility) had refused to conclude a minimum service agreement, with the dispute being finally decided by the Supreme Court of Appeal (SCA). Whether these amendments, especially the introduction of specialist panels, are sufficient to prevent strikes in essential services remains to be seen.

Legal Responses to Informalisation

Introduction

The South African labour market has experienced a large increase in informalisation in line with global trends.[19] There has been a notable increase of non-standard employment through the deployment of labour brokers and increased outsourcing by the public and private sectors. Firms have restructured to reduce standard employment and self-employment has increased in both the formal and the informal sector. The informal economic sector has grown, although it remains small in comparison to other developing counties, while unemployment remains disproportionately high.

While the Department of Labour's 1996 Green Paper on Employment Standards had noted the rise of non-standard employment relationships, South Africa's post-apartheid labour law framework retained the standard employment relationship as the normative model for

[19] It was estimated by Budlender (May 2011) that in 2010 a third (33 per cent) of all employed people in South Africa were informal workers – 39 per cent of employed women and 29 per cent of employed men. Of the informal workers, an estimated 67 per cent were employees, 25 per cent were own-account workers, 5 per cent were employers, and 3 per cent were unpaid family workers. Statistics South Africa defines informal employment as including all workers in the informal sector. As stated by Budlender, 'Employers, own-account workers and unpaid family workers are defined as being in the informal sector if the business for which they work is not registered for value added tax (VAT) or income tax. Employees are defined as being in the informal sector if their employer does not deduct income tax from their pay and if the business in which they work has fewer than five employees. Informal employment also includes employees in the formal sector and private households whose employers do not contribute to their pension or medical insurance, and who also do not have a written contract of employment.' (However, they include all domestic workers.)

employment (Godfrey & Clarke 2002). The key definition of an employee, which determines the ambit of the labour legislation, was imported without significant changes from its apartheid-era predecessor. While the definition was open to a broad purposive interpretation, the courts tended to interpret it narrowly and formalistically. Non-standard employment had emerged during apartheid, but its significant growth after 1994 has impacted negatively on the capacity of the post-apartheid legislation to achieve its goals.

Independent contracting

The practice of disguised employment in terms of which employees were 'converted' into independent contractors by contractual stipulations to avoid labour legislation intensified after 1995. This practice was most closely associated with the Confederation of Employers of South Africa (COFESA), a consultancy that had originated in an anti-union front organisation established by the security police.

By the end of the decade there had been judicial and legislative responses to this development. The courts rejected this crude form of avoidance as a 'bizarre subterfuge' and a 'cruel hoax and sham' designed to deprive employees of the protection of labour law. [20] In 2002 a rebuttable presumption of employment was introduced into the principal labour statutes[21] to assist vulnerable workers assert their rights as employees.

The presumption applies irrespective of the form of the employment relationship, emphasising that a court must inquire into the realities of an employment relationship rather than being content to scrutinise the wording of the contract. Once the employee satisfies the presumption's relatively low hurdle of establishing that one of seven factors stipulated in legislation is present, the employer must lead evidence about the nature of the employment relationship to show that the claimant is not an employee. These factors included those traditionally used by the courts to determine the existence of a contract of employment (control, supervision) as well as one ('economic dependence') which had not been part of

[20] See *Motor Industry Bargaining Council v Mac-Rites Panel Beaters & Spray Painters (Pty) Ltd* (2001) 22 *Industrial Law Journal (SA)* 1077 (N); *Building Bargaining Council (Southern & Eastern Cape) v Melmon's Cabinets CC & another* (2001) 22 *ILJ* 120 (LC).

[21] The presumption is found in s 200A of the Labour Relations Act 66 of 1995 and s 83A of the Basic Conditions of Employment Act 75 of 1997.

South African law and one (being part of the employer's organisation) which had previously been rejected by the courts. The presumption applies to employees whose earnings are less than the threshold set by the Minister in terms of section 6(3) of the BCEA. (The threshold was set at R205 433 per annum in 1 July 2014.) The parties to a proposed or existing work arrangement are entitled to apply to the CCMA for an advisory award on whether the persons concerned are employees, although in practice this issue arises most often in unfair dismissal cases at the CCMA. To complement the presumption, in December 2006, NEDLAC adopted a soft law Code of Good Practice on who is an employee which seeks to give practical guidance to distinguish employment from self-employment.[22]

The labour courts have adopted an increasingly purposive approach to the issue of who is an employee. While the presumption does not apply to employees earning above the threshold of earnings, the courts have taken the listed factors into account in analysing the employment relationship of high-earning employees.[23] The Labour Appeal Court (LAC) has held that there are three 'primary criteria' for determining whether a person is an employee. These are an employer's right of supervision and control; whether the employee forms an integral part of the employer's organisation; and the extent of the employee's economic dependence upon the employer.[24] The presence of any one of these three factors will generally be sufficient to establish that the person is an employee.

The broader interpretation of the definition of an employee often emerges in cases involving traditional 'difficult' categories of employment on the cusp between employment and self-employment, such as estate agents.[25] However, vulnerable 'non-standard' workers have been brought into the statutory net by judicial decision-making. For example, workers covered by a framework casual employment agreement regulating a pool of some 2 000 workers whom the employer could draw upon to meet its day-to-day demands for casual labour in harbours, were classified as a 'special class of employees', even though they did not have individual contracts and had no right to be engaged.[26] The courts have held that owner-drivers are not employees. They have rejected arguments that the definition of an employee

[22] Employment Relationship Recommendation 198 of 2006 is annexed to the code.
[23] *Denel (Pty) Ltd v Gerber* [2005] 9 BLLR 849 (LAC).
[24] *State Information Technology Agency (Pty) Ltd v Commission for Conciliation Mediation & Arbitration & others* (2008) 29 *ILJ* 2234 (LAC).
[25] For example, *Pam Golding Properties v Erasmus & others (2010) 31 ILJ 1460 (LC).*
[26] *NUCCAWU v Transnet t/a Portnet* (2000) 21 *ILJ* 2288 (LC).

excludes employment relationships that are tainted by illegality in some regard; this has resulted in extending statutory protection to foreign employees hired without the requisite permits,[27] refugees[28] and sex-workers.[29]

The labour broking controversy

A strike in October 2002 by 4 000 workers at the century-old ERPM gold mine east of Johannesburg has proved to be the seminal event in the debate over labour broking (or temporary employment services (TESs))[30] that remains one of the most emotive and divisive labour market issues.

A research project, commissioned by the Department of Labour in the wake of this incident, argued that strategies of externalising work (in particular outsourcing and labour broking) were the major driver of the informalisation of work in South Africa, rather than casualisation by hiring temporary and part-time workers (Bezuidenhout et al 2004). Labour broking had been utilised by firms to reduce standard employment in order to reduce labour costs and minimise risks associated with employment. The report concluded that agency workers were paid significantly less than those employed directly by the firms where they work and have no security of employment.

The report also pointed out that while the avoidance of protections in labour legislation had provided the motive for firms to use TESs, the legislative provisions concerning TESs had provided the opportunity to achieve this. The report identified the regulation of labour brokers as a priority for policy and legislative reform. These proposals were tabled in NEDLAC in 2004, but by 2007 no report or recommendation had emerged from its deliberations.

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[27] *Discovery Health Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 *ILJ* 1480 (LC).
[28] *Ndikumdavyi v Valkenberg Hospital & others* (2012) 33 *ILJ* 2648 (LC).

[29] *'Kylie' v Commission for Conciliation, Mediation & Arbitration & others* 2010 (4) SA 383 (LAC); (2010) 31 *ILJ* 1600 (LAC).

[30] Almost the entire mine's workforce was employed by a labour broker rather than by the mineowners. The striking workers demanded that the labour broker pay them money it had received from the mine, which they believed to be part of their wages. Until shortly before the strike, most of the workers apparently believed that they were employed by the mine (Bezuidenhout 2008).

This trend was confirmed by subsequent research in a report by the CCMA based on its experience in conciliating disputes involving labour brokers and other forms of outsourced labour. It concluded there where employers contract out operations (whether to labour brokers or independent contractors), there is usually inequity between contracted workers and permanent employees regarding job security, equal treatment, equitable pay and benefits. These inequities generally result in a demand from contract employees to become permanently employed (CCMA 2009). Data produced by the Confederation of Associations in the Private Employment Sector (CAPES) confirmed that agency employees received less remuneration than direct employees, but attributed this primarily to the fact that they were excluded from benefits such as provident funds and medical aid schemes.

There has been an exponential growth in the number of employees placed by labour brokers, particularly in the period after 2000.[31] The absence of official data recording the level of agency work does mean that the exact extent of the practice is not known. The interpretation of the available data provided by the industry is a major source of controversy. Spokespersons for the labour broking sector argue that the growth in the number of employees placed indicates that labour brokers play a large role in creating jobs and this argument is widely repeated. However, there is no empirical study that distinguishes the extent to which these figures reflect the creation of 'new' jobs as opposed to positions in which agency employees have been substituted for workers who previously worked directly for the employer. There is evidence in reported case law of occasions of practices such as employers pressurising employees to re-apply for their own jobs at lower rates through an agency or retrenching employees and replacing them with workers supplied by labour brokers.

[31] It was estimated in 1995 that about 3 000 labour brokers were placing an estimated 100 000 employees annually (Standing et al 1996). In late 2010, the National Association of Bargaining Councils estimated that 780 000 employees were placed by TESs in the private sector, representing 6.5% of the total workforce. However, this was an extrapolation from bargaining council figures. Figures provided by CAPES in 2013 estimate that the number of agency employees is in the vicinity of one million. These figures in all likelihood underestimate the full extent of agency employment as they do not take into account placements by smaller agencies that do not belong to the industry associations.

The use of labour brokers as a long-term alternative to direct employment is most strikingly illustrated by the Post Office which imposed a moratorium on direct employment in 2000 and filled some 8 000 posts by employing workers through a large number of labour brokers. These employees received 25% of the remuneration that direct employees performing the same work received and the labour brokers received a fee equal to the employee's wages. Dissatisfied with the response of established trade unions in the sector, these employees organised themselves into worker committees from 2005 onwards and embarked on a series of work stoppages during 2012 and 2013-2015 which ultimately led to the Post Office agreeing to phase out this practice (Dickinson 2015).

The broad legislative definition of a TES means that the range of persons and organisations that fall within its terms vary greatly. They range from large multinational corporations and well-established firms that supply particular categories of skilled employees to 'informal recruiters' such as seasonal farmworkers who are asked by a farmer to bring a few additional workers during peak periods. The combination of lax regulation of labour broking, patriarchal employment relations in agriculture and high rural unemployment resulted in the widespread use of labour broking as means of exploitation and labour law avoidance in the countryside (Women on Farms Project 2005).

Certain South African firms expanded their operations to Namibia and the issue of labour broking became a major political controversy in that country. In 2007 its Parliament amended the country's legislation to prohibit triangular employment.[32] A 2008 report commissioned by the Department of Labour drew attention to this and suggested that labour brokers who act as employers of sub-contracted lower-paid workers should be outlawed (Webster et al 2008).[33] This proposal quickly gained traction and was embraced by the then Minister of Labour, and was adopted as a campaign by the labour movement, particularly COSATU. The official policy of the ANC has remained that labour broking and other forms

[32] This prohibition was subsequently declared to be unconstitutional by the Namibia Supreme Court.

[33] The authors of the report made two further recommendations that have not received much traction in local debates. The proposal that the Department of Labour should explore a successful system of regulating labour standards via supply chains. They further proposed that the Department should facilitate the introduction of labour market intermediaries (LMIs) who do not replace employers through a commercial contract but, instead, recruit among the unemployed, especially the youth, train them and then place them in decent jobs. This latter recommendation was echoed in the report of the National Planning Commission which proposed public subsidies for institutions which train and place individuals in employment.

of non-standard work should be regulated in order to avoid the abuse of workers.[34] In contrast, CAPES, the organisation representing businesses operating as TESs, argued in favour of self-regulation, adopting the view that the legislative model was adequate and that the problem lay more broadly with the enforcement of labour legislation. The subsequent debate needs to be assessed in the light of the history of legislation regulating triangular employment.

South African law first recognised agency work in 1983 when the concept of a 'labour broker' was introduced in amendments to the Labour Relations Act 28 of 1956. Labour brokers were 'deemed' to be the employers of individuals whom they placed to work with their clients, provided that they were responsible for paying their remuneration. A requirement for labour brokers to register with the Department of Labour was also introduced. The rationale for enacting the amendments was that firms were structuring employment relationships to prevent these workers receiving the protection of statutory wage-regulating measures and other minimum conditions of employment (Brassey & Cheadle 1983).[35]

While this approach clarified who the employer of a placed employee is, it left employees vulnerable to abuse by 'fly-by-night' labour brokers, colloquially known as the 'bakkie brigade', as the risk of non-compliance by labour brokers rested on the employers and not on the client. The 1995 LRA retained in section 198 the formulation that the labour broker (or TES) was the employer of persons it placed with clients as employees if it assumed responsibility for remunerating these employees. However, the law was changed to make the client jointly liable for breaches of statutory basic conditions of employment and minimum wages, collective agreements and arbitration awards. An initial proposal to extend joint and several liability to unfair dismissal and unfair labour practices was included in the draft Bill, but was removed during negotiations at NEDLAC. The requirement for labour brokers to register with the Department of Labour was omitted (Van Eck 2010), seemingly unintentionally.

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[34] For instance, the ANC's 2009 Election Manifesto states, 'In order to avoid exploitation of workers and ensure decent work for all workers as well as to protect the employment relationship, [government will] introduce laws to regulate contract work, subcontracting and outsourcing, address the problem of labour broking and prohibit certain abusive practices.'

[35] During the 1980s, the large international placement agencies lobbied governments for express legislative recognition of triangular employment in their legislation. However, there is no concrete evidence indicating this occurred in South Africa. The ILO expressly recognised agency work for the first time in its Convention of 1997.

For many years, Labour Court judges tended to construe section 198 of the LRA in an extremely literal manner, with the result that employees were left without a remedy in all but the most egregious cases. The almost inevitable consequence was that a claim for unfair dismissal by a placed employee failed because no challenge could be made to the client's rationale for requesting the termination of its assignment. As long as the client remained on the books of the agency, there had not been a dismissal. This would be the case even when the agency did not offer the employee another assignment. Significantly, organised labour did not mount any major litigation challenges to the relevant legal provisions. From 2010 onwards Labour Court judges have fashioned remedies that give a measure of employment security to employees placed by labour brokers.[36] These judgments have adopted a more purposive approach and have proceeded from the premise that section 198 was not intended to deprive employees of their constitutional protection against unfair labour practices, including unfair dismissal.

Trade unions have directed, and processed through the statutory conciliation system, demands that have led to public and private sector employers agreeing to phase out the use of labour brokers.[37] In a number of sectors in which collective bargaining takes place through bargaining councils, collective agreements have been concluded restricting the proportion of the workforce that employers can engage through temporary employment services.

In late 2010, the Department of Labour published a Bill containing amendments to the LRA. The Bill proposed repealing section 198 which regulates labour broking in its entirety by inserting a new definition of 'employer' and amending the definition of 'employee.' It also proposed making employers liable for the labour practices of all sub-contractors that they engaged. A draft Employment Services Bill that dealt with the regulation of private employment agencies would prevent these agencies placing their employees to work for others. The intention of these proposed amendments was to prevent triangular employment relationships and effectively prevent TESs from being employers, but without an explicit

[36] *Nape v INTCS Corporate Solutions (Pty) Ltd (*2010) 31 *ILJ* 2120 (LC); *Mahlamu v CCMA & Others* [2011] 4 BLLR 314 (LC).

[37] Employers who have concluded collective agreements phasing out the use of labour brokers after procedural strike action include Goodyear Tyres (September 2006), Tshwane (Pretoria) Municipality (May 2008), South African Airways (March 2009) and the Post Office (2012).

prohibition on the operation of temporary employment services which might give rise to a constitutional challenge.

The publication of these Bills was accompanied by a Regulatory Impact Assessment (RIA) which had been requested by the Cabinet as a result of controversies over the approach adopted (Benjamin et al 2010). The RIA, which was confined to dealing with the Bill's proposals and not the regulation of labour broking more generally, concluded that changing the definition of employment would constitute an unjustifiable limitation of the rights of many workers to receive the labour protections guaranteed to 'workers' in terms of section 23 of the Constitution. In addition, the draft legislation rested on the erroneous assumption that the repeal of section 198, which regulates labour brokers, would prevent triangular employment rather than result in a situation in which the validity of these arrangements would be determined by reference to contractual principles. The Bill was opposed by organised employers as well as trade unions (Benjamin et al 2010) and was withdrawn in early 2011. A fresh policy process to review labour legislation commenced at NEDLAC in mid-2011 and draft legislation was submitted to Parliament in early 2012. This processes culminated in significant changes to the law dealing with non-standard employment that came into effect on 1 January 2015. The extended nature of the parliamentary deliberations created uncertainty and led to some employers terminating the services of employees placed by TESs prior to the revised law coming into effect (Bhorat et al 2015).

These amendments have left the framework for regulating temporary employment services introduced in 1995, although the provisions dealing with joint and several liability are strengthened. Employees are given the option to institute proceedings against either the agency or the user enterprise, and to enforce any order or award made against either of these parties. In addition, labour inspectors enforcing minimum standards legislation may secure or enforce compliance against the TES, or the client, or both of them. The amendments also seek to promote trade unionism among placed workers by permitting these workers and their trade unions to exercise organisational rights at the client's workplace and not exclusively at the workplace of the temporary employment agency, as is currently the case. An arbitration award granting organisational rights that applies to employees of the agency may also be made binding on a user enterprise (on condition that they have been given the opportunity to participate in arbitration proceedings).

A new set of protections are introduced for lower-paid employees that will restrict agencies to employing these workers to perform work of a temporary nature. TES employees will only be considered to be employees of the TES during placements lasting less than three months, or if the worker is a substitute for an employee during a period of temporary absence (such as maternity leave or sabbatical).

However, the Bill that was approved by the Cabinet after an extensive negotiation process in NEDLAC set this period at six months. This was the final proposal of the Department of Labour representatives in NEDLAC, and was opposed by some trade union federations which favoured prohibiting TESs (COSATU and NACTU 2012). It was also opposed by organised business which proposed that the period of employment by TESs should be two years (BUSA 2012). One trade union federation engaged in the NEDLAC process supported the amendments dealing with TESs (FEDUSA 2011). In addition, the Minister of Labour has the power to classify other categories of work as temporary, during which an employee can remain an employee of the agency.

An employee placed by an agency who works for a user enterprise for longer than three months is deemed to be the employee of the user enterprise for the purposes of the LRA. This gives the employee protection against unfair dismissal and unfair discrimination – against the user enterprise. These employees must be treated for the purposes of employment in the same manner as other employees of the user enterprise, unless the employer can justify the differentiation. In order to prevent TESs defeating this provision by terminating assignments within the three months, the law provides that the termination of an assignment to avoid the employee becoming the client's employee is a dismissal, which can be challenged as an unfair dismissal.

The draft legislation also proposed restrictions on the use of short-term contracts. Employers were able to conclude three-month fixed term contracts with new employees. However, any additional contracts could only be concluded if the work that the employee was performing was not of an indefinite nature, or there were other justifications to conclude a fixed-term contract. After the three-month period, employees hired under fixed term contracts had to be treated in the same manner as employees who had been hired indefinitely, unless there were rational grounds for differentiation.

The Department of Labour justified the draft legislation as striking a balance between what was accepted as the legitimate role of agencies in placing employees in short-term assignments and the severe abuses associated with long-term triangular employment. The key new protections – particularly those that guaranteed protection against unfair dismissal and parity of work conditions with direct employees – only applied to lower-paid workers.

The draft Bill approved by the Cabinet after the NEDLAC process allowed employees to be classified as temporary for their first six months of employment which the Department argued was sufficient to permit flexibility for short-term placements and encourage the hiring of new employees. This period was reduced to three months as a result of representations to the Parliamentary Portfolio Committee by COSATU and NACTU (COSATU and NACTU 2012). The trade unions continue to argue for a prohibition on labour brokers, on the basis that the abuses associated with labour broking are so severe that they cannot be remedied by regulation.

Organised business, while accepting the need for greater regulation to prevent abuse, argued that the approach in the legislation was overly restrictive and would have negative consequences on job creation. It suggested that agencies should be able to remain the employers of employees they placed for up to two years (BUSA 2012). In certain of its representations, it argued for a 'joint employment' model.

The amendments which involve TES's providing employees to work under the direction of a client of the TES have the import that such employees are obliged to follow the instruction of the client and its management. Agency work differs from outsourcing or sub-contracting in terms of which an aspect of a business is performed by a separate legal entity and its workers are not considered to be employees of the principal/client contractor. As with all legal boundaries, this distinction can be fudged and it is likely that the distinction between agency work and sub-contracting/outsourcing arrangements is likely to become area of dispute and litigation.

The highly politicised (and as yet unresolved) debate over labour broking has had a negative impact on the making of labour market policy in South Africa. The call for a total prohibition is a slogan, rather than a considered policy position. Trade unions have, with few exceptions, failed to develop organisational responses to the rise of agency work. Organised business on the other hand has allowed the larger labour broking firms to dominant their

policy positions arguing for a position that best suits their business model. This has resulted in a highly antagonistic debate, briefly referred to above, which has had the undesirable consequence of crowding out more constructive debates to develop a labour market intermediary sector that could train individuals with a goal to place them in decent employment.

Security of Employment

The 1995 LRA comprehensively regulates dismissal. It was drafted against a background of an absence of appropriate regulation or of a dedicated forum for resolving dismissal disputes; protracted court processes dealing with such disputes deriving from an overwhelming case load; an incomplete and confusing jurisprudence; and inconsistent remedies. The development of the Act also took place within the context of a significant growth in the size and influence of the trade union movement with forceful political and social influence.[38] Its impact was felt not only through a critical input in respect of the final form of the Act, but also through collective bargaining and industrial and protest action by means of which it sought positive gains in relation to employees' work security, among other protections.

Work security gains

The Act seeks to provide for the comprehensive protection of workers from arbitrary dismissal by inclusively defining the forms of dismissal; clearly articulating the requirements for a fair dismissal; and by providing an easily accessible forum for the quick resolution of disputes, thereby lifting most disputes out of the realm of the courts.

Apart from the common law form of dismissal as the termination of a contract, the Act seeks to protect workers from dismissal in a broader range of circumstances. It thus also recognises as a dismissal the failure to renew a fixed-term contract, the refusal to allow an employee to return to work after a pregnancy, selective non-re-employment, and constructive dismissal on grounds of an intolerable working environment, including as a result of a transfer of a business.

The notion of a 'contract' was found to be too narrow for the Act adequately to regulate all forms of dismissal and in 2014 an amendment substituted the word 'employment' for

[38] See Du Toit et al (2015) 10-15.

'contract' in certain of the categories of dismissal thus broadening the reach of the provisions. It also brought the provisions into line with the wide definition of employee in the Act which includes any relationship in which a person works for another except where it involves an 'independent contractor'. The relationship therefore is not dependent on the contract of employment. An 'employee' includes a person who has been dismissed and who disputes the fairness of the dismissal or the employer's refusal to reinstate or re-employ.

The Act defines unfairness or fairness in relation to three types of dismissal:[39] an employee's conduct,[40] capacity,[41] or the operational requirements[42] of the business, and also requires that a dismissal be in compliance with a fair procedure. More egregious forms of dismissal are regarded as automatically unfair, including an employee's participation or support for a strike; pregnancy; discrimination; the refusal by employees to accept a demand; the transfer of a business or a reason related to that transfer (added in 2002); and contravention of the Protected Disclosures Act which affords protection to whistleblowers in the workplace (added in the 2002 amendments). A dismissal may be fair if it is based on an

[39] Although the ILO's Termination of Employment Convention 158 of 1982 has not been ratified by South Africa, the Act closely follows the Convention, which sets forth the principle (art 4) that the employment of a worker should not be terminated unless there is a valid reason for such termination connected with the worker's capacity or conduct or based on the operational requirements of the undertaking, establishment or service.

[40] This relates to the contravention of a rule or standard in the workplace, ie misconduct, which warrants dismissal. See Code of Good Practice: Dismissal Schedule 8 to the LRA 1995. The Act, which provides that the worker should be allowed the opportunity to state a case in response to the allegations is in line with ILO Convention 158 (op cit) which bars an employee from being dismissed before the employee is provided with an opportunity to defend herself or himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

[41] Dismissal because of incapacity relates both to dismissal for poor performance and well as for ill health or injury. In the case of a dismissal for poor performance, the employee must fail to meet a performance standard, must have been given a fair opportunity to meet the relevant standard, and dismissal must be the appropriate sanction for not meeting the standard: Code of Good Practice: Dismissal (op cit) item 9. Regarding incapacity due to ill health or injury, in the case of temporary incapacity the employer should investigate alternatives short of dismissal including taking into account the nature of the job, the period of absence, the seriousness of the injury or illness, and the possibility of securing a temporary replacement. This reflects art 6 of ILO Convention 158 (op cit) that temporary absence from work because of illness or injury shall not constitute a valid reason for termination. In cases of permanent incapacity the Code states that the employer should ascertain the possibility of adapting the work to accommodate the disability or the securing of alternative employment. The degree of incapacity is relevant to the fairness of the dismissal: Code of Good Practice: Dismissal (op cit) item 10.

[42] A dismissal for operational requirements (retrenchment) is one that is based on the economic, technological, structural or similar needs of the employer and is reflective of art 15 of the Termination of Employment Convention 158 (op cit). Both procedural and substantive obligations are placed on the employer by the Act. Employers are obliged to consult with employees over the dismisasal, which consultation should be in the form of a joint problem-solving exercise aimed at considering alternatives to retrenchment . If retrenchment cannot be avoided, selection of those to be retrenched should be based on fair criteria, in particular 'last-in, first-out' (LIFO): Code of Good Practice on Dismissal based on Operational Requirements item 9.

inherent requirement for a job or if the person has reached the normal or agreed retirement age for persons in that capacity.

A major innovation was the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA) as a cheap and quick forum for the resolution of disputes. All disputes have to be referred in the first instance to a process of conciliation, followed, at the discretion of the employee, by arbitration for misconduct or incapacity cases and the Labour Court in the instance of automatically unfair dismissals, those based on operational requirements, an unprotected strike, and trade union membership.

In retrenchments, in certain circumstances, single employees may elect to refer the dismissal to arbitration rather than the Labour Court. This is to prevent a single employee being burdened with the expense of having to lodge a claim in the court.

The strength and influence of the trade union movement has meant that it has played a critical role in the shaping of the regulatory model. From the inception of the Act the labour movement, in particular, COSATU, has fought to have the right to strike over retrenchments rather than have the Labour Court decide the fairness of a retrenchment. Its opposition to the 2002 proposed amendments was in part because this was omitted, leading to its threat to stage a general strike. The proposed 2002 amendment was that a conciliator would mediate in large-scale retrenchments (over 500 employees retrenched in a year). A general strike was averted when agreement was reached between business and labour in the MLC providing for a right to strike over retrenchments. In terms of the final 2002 Amendment Act a strike was permitted in a retrenchment dispute where the employer employed more than 50 employees and according to a sliding scale in terms of the number of employees employed and the number to be retrenched. Either party may request facilitation of the consultation process before a notice of dismissal is given. After observing relevant time periods, the employer may issue a dismissal notice whereupon the registered union or employees may issue a notice of a strike or refer the retrenchment to the Labour Court. A party must make an election between striking and adjudication in the Labour Court – they may not have recourse to both. Secondary strikes are also permitted providing the relevant procedures are followed. The import of the amendment is that it allows the trade union to assess in any retrenchment whether it would be more effective for it to strike than place the dispute in the hands of the Labour Court. Commenting on the amendment Van Niekerk & Le Roux had this to say: '…

most private sector employers may not be too concerned. Most industries have effected massive restructuring over the last few years, and … the extension of the right to strike in these circumstances may not be an issue. Indeed, the right to strike may represent a more preferable option than interference by Labour Court judges in decisions about restructuring, the organisation of work and retrenchment'(Van Niekerk & Le Roux).

Finally, if an arbitrator or the Labour Court finds that a dismissal is unfair, reinstatement or re-employment are the primary remedies. Reinstatement or re-employment is not required if the employee does not wish it, or if a future employment relationship would be intolerable or if it is not reasonably practicable for the employer. In such a case compensation may be awarded.

The above regulatory system has had a major positive impact on the work security of employees. In particular, the establishment of the CCMA has provided unprecedented access to justice for employees complaining of unfair dismissal **(**and unfair labour practices**)**. This is because it is advantageous to both parties. For organised labour there is the advantage of expedited arbitrations without the expense of lawyers and with reinstatement as the preferred remedy. For employers the gain is the simplification of their obligations in respect of internal disciplinary inquiries, the short referral period, and the cap on compensation awards at 12 months for most dismissal cases.

The success of the CCMA in providing access for dispute resolution is demonstrated by the number of dismissal cases which has risen from an estimated 3 000 in the final years of the old system (1994–5) to approximately 100 000 per year currently. Likewise, the goal of expeditious dispute resolution has been achieved: conciliations take on average 27 days and arbitrations are concluded within 39 days. Nevertheless, while the speed of dispute resolution is a considerable achievement compared to the standard of conventional litigation, employers frequently use review proceedings to resist the claim and it can be several years before the worker sees any money or returns to work. A review of CCMA processes from 1997-2007 indicated that in relation to a total of 1,700 review applications per annum, as at May 2007 only 20% had been finalised. Of those finalised, it took an estimated 23 months from the date of an arbitration award for the Labour Court to hear a review application and a further three months for judgment to be given. In some cases, further delays can flow from the fact that there are three levels of appeal available against Labour Court decisions (Benjamin 2009). A

significant reason for the delays is that apart from an initial requirement in the LRA that reviews be instituted within six weeks of an award, there are no requirements in either the rules or practices of the court to expedite the progress of review applications through the court and to prevent reviews being used as a delaying technique (Benjamin 2009). Grogan has pointed out that this failure by the LRA to specify a time limit for the conclusion of matters set in motion by review proceedings is a 'gaping omission' (Grogan 2005, quoted in Benjamin 2009). Finally, there is also evidence that many employers do not comply with orders in the hope that unemployed workers will not have the resources to enforce them.

Roughly 60% of dismissal cases that are referred are settled through conciliation, generally within a month of the dispute being referred. The terms of these settlements are not known, but it is likely that the majority involve a financial settlement. Of the unresolved cases that go on to arbitration, one-third of employees succeed with a claim but less than 10% of employees who win their cases receive a reinstatement award in their favour (Benjamin 2009). The vast majority of workers who are found to have been unfairly dismissed receive an award of financial compensation, despite the Act articulating reinstatement as the primary remedy. The average award is in equivalent to four months' pay (Benjamin 2009).

The institutionalisation of dismissal disputes through the CCMA was followed by a very substantial decline in industrial action over dismissal and disciplinary issues. But there must now be a concern as to whether the current caseload is sustainable and whether further modifications are required. A range of proposals has been made to address concerns about the high level of referrals to the CCMA: these include stricter rules on costs for unsuccessful parties, clearer and less stringent rules on the employer's obligations during probationary periods and the introduction of a qualifying period before an employee receives full protection against unfair dismissal. However, none of these proposals has been incorporated into the law, and all have been strenuously resisted by organised labour.

Proposals to revise the operation of the CCMA are likely to be strenuously resisted, unless they are debated in conjunction with a wider range of provisions that impact on security of employment. These include the level of statutory unemployment and retrenchment benefits as well as other provisions which would minimise the consequences of inevitable unemployment for workers or assist with reintegration and training. As yet these issues have not been included debates about the labour market.

Work security challenges

While the 1995 Act has offered concerted protection to workers from dismissal, a less positive scenario in terms of work security has developed in which many employers have responded to the growth in collective bargaining and the protections afforded by the Act by seeking to avoid the resulting requirements. The responses have included restructuring through outsourcing and subcontracting; transforming formal jobs into temporary ones through fixed term contracts and temporary labour provided by labour brokers; and restructuring business by breaking up bargaining units. A further strategy has been to turn formal employees into independent contractors. This has had the effect of reducing the work security of a significant proportion of the workforce.

It is a fact that labour law generally finds itself in a reactive position to the development of events in the labour market. And this is the case with regard to the various 'new' forms of insecure employment referred to above. In certain instances the law has managed to stay in step with new challenges to employees' work security, in others it has fallen behind, this constituting a failure of the regulatory framework adequately to protect the affected employees from dismissal.

Fixed term contracts

In relation to fixed term contracts the law seems to have kept pace. The 1995 LRA included the termination of such contracts as a form of dismissal. Thus a dismissal would occur where an employee reasonably expected the employer to renew a fixed term contract but the employer offered to renew it on less favourable terms or did not renew it. The provision did not address the issue of an employee's status where a fixed term contract was allowed to subsist past the agreed expiry deadline without any further explicit agreement. The question with which the courts struggled was whether, under the latter circumstances, the contract had been transformed into an indefinite one or not. A further problem which emerged particularly in relation to the temporary employment (labour broker) sector was that often the termination of a fixed term contract by the broker was occasioned by the cancellation of a contract by the client, regardless of the kind of work being performed and its intended duration (Du Toit et al 2015, 95).

The 2014 Amendment Act introduced provisions designed to address these issues. The definition of dismissal now includes a situation in which an employee reasonably expects the employer to retain him or her on an *indefinite* basis on the same terms and conditions but the employer offers to retain the employee on less favourable terms or not at all. This clarifies the situation where the employee continues to work beyond the expiry date of a fixed term contract and allows the courts to find that an indefinite contract may have come into being.

Extensive provisions were introduced in order to protect vulnerable employees on fixed term contracts, ie those earning below a certain threshold ascertained in the Basic Conditions of Employment Act. In terms of the amendments an employer may employ an employee on a fixed term contract or successive fixed terms contracts for longer than three months' duration only if the nature of the work is of a limited or definite duration or the employer can demonstrate the existence of any other justifiable reason for fixing the term of the contract. The Act introduces an extensive list of such justifiable reasons (which is not a closed list) which covers most instances of genuine temporary work, for instance employment of a temporary person to take the place of an absent full-time employee; or seasonal work; or work on an official public works scheme or similar public job creation scheme. The employment in terms of a fixed term contract concluded or renewed in contravention of the above is deemed to be of indefinite duration.

Employees on fixed term contracts and those on a permanent basis must be given equal access to opportunities to apply for vacancies. In order to ensure than employees on fixed term contacts for a period exceeding 24 months are not discriminated against, the employer must pay such employee on expiry of the contract one week's remuneration for each completed year of the contract in terms of the BCEA provisions, subject to the terms of an applicable collective agreement.

COSATU supported the amendment as it would address the situation where courts had tended to make findings that such employees only had an expectation of another limited duration contract. It, however, opposed the exclusion of small businesses from the added controls on fixed term contracts, on the basis that employers could circumvent the section merely by engaging in commercial and legal restructuring (COSATU 2012).

While BUSA accepted the need to put measures in place to guard against the abuse of temporary contracts, it was opposed to the creation of employment relationships on the basis

of expectation, rather than actual agreement, which provided for the conversion of fixed term contracts into indefinite contracts in a country which has such high levels of unemployment. It warned that the rise in expectations, litigation and resultant confusion could only lead to labour unrest and act as a disincentive to temporary employment and job creation in general (BUSA 2012).

Dismissals due to a transfer of a business

The transfer of a business as a going concern constitutes a ripe opportunity for employers to rid themselves of 'unwanted' labour on the basis that the business is changing hands and the new employer wishes to cut the workforce or to employ existing workers on less favourable and often temporary terms. The Act has tackled this situation in two ways: firstly, a dismissal occurs if the employee terminates employment with or without notice because the new employer after the transfer of a business provided the employee with conditions or circumstances of work that are substantially less favourable to the employee than those provided by the old employer.

Secondly, in terms of the 2002 Amendment Act, a dismissal because of a transfer, or a reason related to a transfer, is automatically unfair. COSATU had objected strongly to the original proposed amendments which in effect would have permitted an employer to transfer workers, who would subsequently be retrenched for 'operational requirements'. After agreement in the MLC the 2002 amendments provided that there must be agreement between the new and old employer to a valuation of the severance pay that would have been payable to the transferred employees of the old employer arising from a retrenchment; accrued leave pay; and any other payments accrued to the employees, with the agreement specifying the employers' respective liability for such payments. If the old employer fails to comply with the section, it remains jointly and severally liable with the new employer for any payments consequent on a dismissal for a period of 12 months after the date of transfer.

Temporary employees

While in the above two examples, the law has been adjusted to deal with attempts to attack employees' work security seemingly with some success, the situation with regard to temporary employees employed by labour brokers has proven to be more protracted and

difficult. The problems in this respect have been outlined in detail above. In summary, the central problem in relation to work security is that the labour broker, who is in law the employer of the temporary employee, is often not in control of the security of the worker, but rather the client who can demand the dismissal of the worker willy-nilly. Part of the problem is that labour brokers often are placing small groups or individual workers in a variety of workplaces spread out over a large area. This leads to the atomisation of the temporary employees and difficulty in tracking abuses. It also leads to difficulties for trade unions in organising such workers. In the 2014 amendments the law has attempted to address the problem with regard to vulnerable employees by deeming the client to be the employer and the employee to be employed on an indefinite basis if the employee is employed for longer than three months or is not a genuine temporary worker replacing an absent employee; or whose work is not regulated by a collective agreement or sectoral determination.

A possible further avenue of work security lies with a new provision allowing a sectoral determination to prohibit or regulate task-based work, piece work, homework, sub-contracting and contract work. It remains to be seen whether the Minister uses this to protect workers' work security.

Where to from here?

The extent of the work insecurity and other abuses relating to temporary labour point to a fundamental regulatory failure, in particular the absence of a system for registering and controlling labour brokers. In this situation of regulatory failure, the importance of trade union organisation becomes more critical. This, of course, has its own problems, not least of which is the difficulty, mentioned above, of trade unions being able to organise vulnerable workers in atomised circumstances. It is only latterly (2014 amendments) that the law has been adjusted to make the organising of vulnerable employees easier for unions by providing that the Minister in a sectoral determination may set a threshold for trade unions to gain organisational rights and stop order facilities in workplaces covered by the determination.

Traditionally labour law has primarily been concerned with the establishment of employment relationships, the terms and conditions under which employees work, and the circumstances in which the contract can be terminated. Its concern with the protection of employees once they are unemployed is much more limited. Currently, protection is offered to

an extent through the Unemployment Insurance Act which offers a reduced wage for a limited period during unemployment, or for those who are involuntarily unemployed through injury and disease at work. The high and ever increasing levels of unemployment[43] both endemic (structural) and cyclical in nature in South Africa, however, point to an urgent need for innovative measures to address growing work insecurity. This raises the challenge of whether and how labour law should provide security during the many periods of unemployment that workers are likely to experience in their working life.

This challenge — to maintain the working and living conditions of workforces — was introduced into South African debates by the 2002 Report of the Committee of Inquiry into a Comprehensive Social Security System (Taylor Committee 2002), which recommended that a more comprehensive notion of social protection was needed to minimise the negative effects of unemployment on social cohesion. Its recommendations included extending access to social insurance to informal workers — where administratively feasible — as well as social grants and indirect social protection through the facilitation of favourable labour market transitions. The committee concluded that there are close linkages between direct (conventional social security measures) and indirect (active labour market-type policies) protection, and that institutions to co-ordinate these policies in the long-term should be constructed. This recommendation gained little traction in subsequent debates on the future of labour market regulation although it is indicative of one of the most significant shortcomings.

[43] A Statistics South Africa presentation (available at www.statssa.gov.za/stats%20SA%20presentation%20on%20skills%20, undated) indicated that the strict unemployment rate for South Africa increased from 22% to 25% between 1994 and 2014. The expanded employment rate remained unchanged at 35%. However, regarding both strict and expanded statistics, the percentage growth of the unemployed was higher than the growth of the employed: 103.4% growth for the unemployed as compared with 69.2% for the employed in respect of the strict statistics; and 73.3% as compared with 69.2% for the expanded statistics. With regard to those with tertiary education, the increase in the unemployment rate from 6% to 14% was the highest for all education levels. The unemployment rate for black matriculants decreased, however, while that for whites increased. The unemployment rate between 2008 (32.7%) and 2014 (36.1%) for the youth was higher than that for adults — 13.4% and 15.6% respectively.

Statistics for the year October/December 2013 to October/December 2014 indicated an overall increase in employment of 143 000 broken down as follows: Construction (130 000), Community and social services (31 000), Agriculture (28 000) and Trade (22 000) industries. Employment in the Mining and Finance and other business services industries remained virtually unchanged. The largest decreases in employment were observed in the Private households (26 000) and Utilities (23 000) industries. The statistics showed that generally higher levels of education were associated with higher absorption rates. The absorption rate for men was higher than the absorption rate for women irrespective of educational attainment. However, the gender gap in absorption rates narrowed as the levels of education advanced to a tertiary level (Statistics South Africa 10 February 2015).

In 2009 surplus funds from the Unemployment Insurance Fund were allocated to a Training Lay-Off Scheme to provide for partial benefits to be paid to employees of companies who are suffering a shortage of work as a result of the recession. Companies wishing to access this scheme are required to undergo facilitation under the auspices of the CCMA. To date the scheme has resulted in the saving of close to 12 000 jobs. While some commentators have suggested that this is a negligible contribution in the light of the total job loss due to the recession, it does point to the potential for schemes of this type to minimise retrenchments during periods of economic downturn.

Employment Equity Act

Introduction

The legacy of inequality in the workplace on race, gender and other grounds made it imperative that an Act be passed to eradicate such inequality. This is reflected in the dual purpose of the Employment Equity Act (EEA) which is both to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination, and secondly to implement affirmative action measures to redress disadvantages in employment experienced by designated groups in order to achieve their equitable representation in all occupational levels in the workforce.

The Act gives effect to a substantive notion of equality: it does not merely prohibit discrimination; it requires that certain groups be advantaged in order to redress past inequalities in the workplace. The notion of substantive equality derives from the equality right in the Constitution to which the Act gives effect. The constitutional right to equality prohibits discrimination on various grounds which are listed, as well as on analogous grounds to those listed. It also permits legislative and other measures to advance persons or categories of persons disadvantaged by unfair discrimination in order to promote equality. This provides the constitutional basis for affirmative action.

Despite initial uncertainty, the equality right was interpreted as giving effect to a substantive rather than a formal notion of equality. A formal notion holds that like should be treated alike and prohibits unequal treatment. A substantive concept of equality goes beyond this and recognises that formal equality could perpetuate already existing inequality. It envisages that groups which have been disadvantaged may be preferred in order to eradicate

systemic equality which has developed through years of discrimination and inequality. This is not 'reverse discrimination' or 'positive discrimination' but is integral to the notion of equality (Fredman 2012, 262).

The introduction of legislative measures to address the systemic inequality in the workplace was also required by South Africa's ratification of the ILO Convention Concerning Discrimination in Respect of Employment and Occupation 111 of 1958.[44] The need for the eradication of workplace inequality has more than a rights basis. Inequality in the workplace has been shown to have adverse effects on the economy both in relation to the productivity of the workforce and the ability of the economy to operate effectively and competitively. International research indicates that the elimination of discrimination raises economic efficiency throughout the economy by ensuring a more rational allocation of labour resources. By increasing the pool of skilled and qualified employees, and improving labour market mobility, economic efficiency is enhanced.[45]

Process of consultation

The implementation of affirmative action in the workplace proved to be a highly contested notion, and it engendered a range of divergent reactions from the main constituencies in the employment sphere. The publication of the Act was preceded by an extensive process of consultation culminating in a report adopted by the parties in NEDLAC in May 1998 (COSATU 1998).

Although Business South Africa (BSA (subsequently BUSA)) participated in the discussions on the Bill and signed off on the NEDLAC report, it was initially opposed to the legislation. It argued that there was no need for the Act and that it would impact adversely on South Africa's already poor record in competitiveness, and discourage labour-intensive investment and job creation. Employers would be required to classify employees by race, reminiscent of the apartheid era. They would also be prevented from employing the best person for the job irrespective of race or gender, and would be obliged to give preferential treatment to 'suitably qualified' persons from a designated group. BSA also argued that imbalances should be left to market forces to rectify. The Act would add yet another

[44] See Appendix for the list of ILO Conventions ratified by South Africa.
[45] Explanatory Memorandum on the Employment Equity Bill GN 1840 *GG* 18481 of 1 December 1997 8-9.

administrative burden to employers, and would be especially detrimental to small business which lacked the capacity required for its administration. Employment equity was also problematic in that it required a period for training and mentorship and thus unproductive time before the appointees could do the work properly (Matshikwe 2004, 116).

By contrast, the Black Management Forum (BMF), representing black business people, stated that affirmative action was needed to transform the entire environment: black people because of apartheid lived far from their workplaces, while black culture was not accepted in the workplace (Matshikwe 2004, 112).

COSATU supported the overall thrust of the legislation, arguing that the mere repeal of past discriminatory laws was insufficient to tackle the legacy of inequality (COSATU 1998). Left to itself the market would continue to replicate this inequality. It was a fallacy as was suggested by some employer organisations that a process of 'self-regulation' could be successfully pursued without a strong element of enforcement and compulsion by government. If employers were willing and able to implement employment equity measures without government intervention, there would have been no need for the legislation. Far from acting as a barrier to economic growth, a programme of positive measures advancing previously disadvantaged workers was a necessary condition for sustainable economic development. It supported the approach in the Bill of trying to strike a balance between compulsion by the state and a process of self-regulation by employers.

Discrimination

The Act currently contains an overarching provision that requires every employer to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Furthermore, it prohibits unfair discrimination, whether direct or indirect, against an employee – which includes applicants for work – in any employment policy or practice on one or more grounds which include: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground. The Act also specifically provides that harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of the listed grounds of unfair discrimination.

The list of grounds specified is not a closed list and, as with constitutional jurisprudence, unlisted grounds may also be found to be unfair discrimination provided they are analogous to the listed grounds. The Constitutional Court has said that there 'will be discrimination on an unlisted ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner'.[46]

Furthermore, the scope of prohibited unfair discrimination has been broadened by the introduction of the criterion of an 'arbitrary' ground in the 2013 Amendment Act, which was not included in the 1998 Act. This brings it into line with the grounds for a dismissal on the basis of unfair discrimination in the LRA which also contains a prohibition on an arbitrary ground as well as the specified grounds. The meaning of 'arbitrary ground', it has been suggested, means a ground that is 'capricious' or irrational; this interpretation significantly widens the basis of conduct which could amount to unfair discrimination. COSATU welcomed the amendment as, it stated, unfair discrimination could arise when workers of the same gender or race suffered from unjustified, 'arbitrary' discrimination in salaries, benefits or promotions (COSATU 2014).

The Act provides two instances in which conduct will not amount to unfair discrimination: firstly the implementation of affirmative action measures consistent with the purpose of the Act; and secondly where it is necessary to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. In specifying two defined instances of discrimination that would not be unfair, the EEA deviates from the schema relating to the constitutional right. Constitutional jurisprudence provides that discrimination on a listed or unlisted ground may be found to be fair.[47] If the discrimination is on one of the listed grounds of discrimination, unfairness will be presumed but may be rebutted. If it is on an analogous ground, the unfairness will have to be proved by the complainant.[48] In the EEA on the other hand, the only basis for fairness are the two defences above.

Unfair dismissal disputes based on the impermissible listed grounds fall outside the scope of the Act as they are specifically dealt with under the unfair dismissal provisions in the LRA which provides for unfair dismissal on the basis of unfair discrimination. In reality,

[46] *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) para 46.
[47] Section 9 of the Constitution of South Africa Act 108 of 1996. *Harksen v Lane* ibid para 54.
[48] *Harksen v Lane* ibid.

however, an employee who claims an automatically unfair dismissal on one of the prohibited grounds may also claim unfair discrimination in terms of the EEA. It has been found in practice that a significant part of the case law on unfair discrimination has arisen from automatically unfair dismissals rather than from the other bases of unfair discrimination (Du Toit et al 2015, 675).

The discrimination provisions of the Act apply to all employers and employees, except, because of the nature of their work, to members of the National Defence Force, the National Intelligence Agency, The South African Secret Service, the South African National Academy of Intelligence, and the director and staff of Comsec.

Previously, a dispute over discrimination had to be referred to the CCMA for conciliation and if unresolved could be referred to the Labour Court or all parties to the dispute could agree to refer it to arbitration. Following an amendment in 2013, an employee may refer a dispute to the CCMA for arbitration if it involves unfair discrimination on the grounds of sexual harassment, or in any other case if the employee earns less than a ceiling stated by the Minister in terms of the BCEA. The CCMA is limited to imposing an order for payment of compensation or damages, or directing the employer to desist from taking such steps in the future. The intention behind the amendment is to 'assist lower income employees in having their disputes adjudicated in a cost effective manner which will promote protection for vulnerable, powerless and exploited employees' (Explanatory Memorandum 1995, para 2.4). This threshold has been criticised as being arbitrary and not high enough in reality to assist persons who cannot afford to litigate. Such employees, it has been argued, 'may be said to have been treated both unequally and unfairly in being denied a means of access to justice which has been extended to others in a similar situation' (Du Toit et al 2015, 718).

Under the initial Act the burden of proof operated against the employer, while no distinction was made between the listed or unlisted grounds, whereas in constitutional jurisprudence the burden of proof regarding the listed grounds rests with the employer, but on unlisted grounds with the employee. The amended Act adopts this format but introduces the notion of rationality as a factor to be taken into account when determining whether the burden of proof has been discharged. This brings the test into line with the meaning of the added arbitrary (or irrational) ground to the forms of prohibited unfair discrimination as well as to

render it congruent with the Promotion of Equality and Prevention of Unfair Discrimination Act which operates outside of the scope of the EEA.

Affirmative Action

The affirmative action measures in the Employment Equity Act encompass a substantive concept of inequality embodied in the Constitution. At the same time the Constitutional Court has cautioned, 'Remedial measures must be implemented in a way that advances the position of people who have suffered past discrimination. Equally, they must not unduly invade the human dignity of those affected by them, if we are truly to achieve a non-racial, non-sexist and socially inclusive society.' [49]

The affirmative action provisions in the Act apply only to designated employers: in the 1998 Act they encompassed employers with 50 or more employees; employers with fewer than 50 employees but with a specific turnover; as well as all municipalities and organs of state.

The 2013 Amendment Act extended this definition to include employers bound by a collective agreement declaring them to be a designated employer as provided in the agreement.

Designated employees refer to black people, women and people with disabilities – in other words those groups who were considered to have been disadvantaged in the past and who continue to be disadvantaged in the present. The criterion which the Act has adopted to determine the selection of members of different designated groups is that of 'equitable representation' (Du Toit et al 2015, 738). Remedial measures based on degrees of disadvantage among the designated groups are not provided for in the Act. This was confirmed by the Labour Court[50] which stated that the EEA 'does not provide for disparate treatment of members of a designated group on the basis of degrees of disadvantage suffered in the past . . . nor does the Act recognise the notion of multiple disadvantages'.

Affirmative action measures are defined in the Act as measures designed to ensure that 'suitably qualified' people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer.

[49] *SAPS v Solidarity obo Barnard* [2014] 11 BLLR 1025 (CC).

[50] *Naidoo v Minister for Safety & Security* [2013] 5 BLLR 490 (LC) paras 123-4.

Employers must also take measures to identify and eliminate employment barriers; further diversity in the workplace; make reasonable accommodation for people from such groups to ensure they enjoy equal opportunities and are equitably represented; ensure the equitable representation of suitably qualified people from designated groups; and retain people from such groups and ensure they receive appropriate training.

The Act does not sanction the dismissal of people from non-designated groups so that they may be replaced by those from designated groups. Such dismissal would be an automatically unfair dismissal based on unfair discrimination in terms of the LRA.

A contested issue when the Act was first promulgated was the provision that requires employers to employ 'suitably qualified' people from the designated group and not necessarily the best applicant for a job. The Act specifies that a 'suitably qualified' person is a person who possesses one or a combination of formal qualifications, prior learning, relevant experience; or the capacity to acquire, within a reasonable time, the ability to do the job. In making this assessment an employer may not unfairly discriminate against someone solely on the grounds of that person's lack of previous experience. The aim of the provision was to ensure that a person from a designated group, who might not be the best person for the job but could adequately perform what was required, was not overlooked, particularly because of that person's lack of experience (Du Toit et al 2015, 734).

BSA in opposing this provision (see earlier) argued that the government had violated the NEDLAC agreement on the Bill and that the section was bad policy. COSATU supported the view that a lack of previous experience should not be used to discriminate against employees. Affirmative action should be developmental and take into account the potential of employees to acquire the requisite ability to perform the work. It also denied that the draft Bill was not consistent with the NEDLAC agreement. It was business — not labour or government — that had wanted the Bill to include a definition of persons who were 'suitably qualified'. Given that employers routinely trained new appointees, it could not be claimed that there would be insufficient qualified employees from designated groups.

The provision contains two important qualifying provisions. Firstly, affirmative action measures should include preferential treatment and numerical goals but exclude quotas. Secondly, the Act provides that affirmative action does not 'require' measures that would establish 'an absolute barrier to the prospective or continued employment or advancement of

people who are not from designated groups'. The meaning to be attached to these concepts is discussed under the section on 'Jurisprudence' below.

Consultation, employment equity plans and compliance

The Act provides for employers to consult with representative trade unions or if there is no such union with its employees or their representatives in the analysis of the workforce, the preparation and implementation of an employment equity plan, and the drawing up and issuing of reports to the department. Employers who fail to comply are subject to investigation by the inspectorate and/or orders of the Labour Court. The procedures for compliance were streamlined in the 2013 Amendment Act, which also increased the fines which may be imposed for non-compliance. The streamlining of the provisions was triggered by evidence that employers' progress in implementing affirmative action was too slow, and that many employers had not put in place employment equity plans. Now, if there is non-compliance in these respects, the director-general can apply directly to the Labour Court for an order for the imposition of fines, bypassing the previous process of representation and appeal against the issuing of compliance orders.

The 1998 Act provided for a list of factors which a person assessing compliance should take into account. The main one was the extent to which suitably qualified people from and among the different designated groups were equitably represented within the occupational categories and levels of the employers' workforce in relation to the demographic profile of the national and regional economically active population. The 2013 Amendment Act streamlined the procedures to focus predominantly on the importance of the demographic profile as a basis for determining whether affirmative action in a particular instance is justified. Other amendments made the test for compliance more stringent by requiring employers to take 'reasonable steps' to implement a plan and appoint/promote suitably qualified people from the designated groups and not merely to make 'progress' in achieving this. A new factor requires employers to take reasonable steps to train suitably qualified people – critical to ensuring that suitably qualified people can actually become competent at the job. A further change is that, unlike previously, not all the factors need to be taken into account in assessing compliance.

BUSA opposed the above changes on the basis that the factors that the amendment proposed to delete were important in that they guided any party considering an employment

equity plan as to which factors were relevant. The scrapping of the provisions would be extremely prejudicial to the employer as it would not be able to share with the department the realities and obstacles faced by it when trying to implement affirmative action. For the same reason it was also important that the Minister consider all the factors and not have a discretion to consider some only (BUSA 2012).

Inequality in wages

South Africa has one of the widest wage gaps in the world. How to address this gap in the Act has been a matter of some debate. The Act requires a designated employer when reporting on affirmative action progress to submit a statement to the Employment Conditions Commission (ECC) on employees' remuneration and benefits per occupational level and where disproportionate differentials are reflected to take measures progressively to reduce such differentials subject to guidance by the Minister. These measures include collective bargaining, compliance with sectoral determinations, norms and benchmarks by the ECC, relevant measures in skills development legislation, and other appropriate measures.

However, the absence of a provision dealing expressly with wage discrimination on the basis of race and gender was criticised by the ILO,[51] while the Act did not comply with the ILO's Equal Remuneration Convention 100 of 1951. As a result of an amendment in 2013 the Act now states that a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in section 6(1) is unfair discrimination. A further subsection states that the Minister, after consultation with the commission, may prescribe the criteria and methodology for assessing work of equal value. In August 2014 regulations were promulgated in terms of the Act prescribing the criteria, methodology, and process employers should follow when giving effect to the new provision. While the Labour Court in *Mangena & others v Fila SA (Pty) & others*[52] had ruled that the terms of the prohibition against unfair discrimination were sufficiently broad to incorporate claims of wage discrimination, the amendment puts the issue beyond doubt.

[51] See Explanatory Memorandum, Employment Equity Bill 2012 at 1.
[52] (2010) 31 *ILJ* 662 (LC) at 669D-E.

BUSA was critical of the provision arguing with reference to the *Mangena* decision that it was unnecessary and that the general unfair discrimination provision was broad enough to contend with the situation envisaged by the new provision.

Significant jurisprudence

In the jurisprudence on affirmative action four interrelated issues have emerged: the difference between quotas and targets; the meaning of the prohibition on absolute barriers; how the national or regional demographics have been employed; and the role of the employment equity plan. All the above issues emerged in *South African Police Service v Solidarity obo Barnard*,[53] in which a white woman claimed unfair discrimination on the basis that she was overlooked for an appointment on the basis of her race. The majority of the Constitutional Court confirmed that the primary distinction between numerical targets and quotas lay in the 'flexibility of the standard'. Quotas amounted to 'job reservation' and were 'properly prohibited'. Numerical goals (targets), by comparison, constituted a 'flexible employment guideline to a designated employer' (Du Toit et al 2015, 730). The prohibition of an absolute barrier, it found, 'makes it quite clear that a designated employer may not adopt an Employment Equity Policy or practice that would establish an absolute barrier to the future or continued employment or promotion of people who are not from the designated groups' (*Barnard* para 42). The majority found that the national commissioner of the police service had not implemented targets specified in an employment equity plan 'so rigidly as to amount to quotas', as was evidenced by the over-representation of white women at the particular level (*Barnard* para 66). In addition, the failure to appoint Barnard had not prevented her subsequent promotion to a different post (Du Toit et al 2015, 730). The minority of the court found that the' sanctioning of rigidity . . . would convert the numerical targets in the employment equity plan to impermissible quotas' that could operate even to the disadvantage of persons from designated groups. In this case, it was a 'close call' as to whether such rigidity in fact was present (Du Toit et al 2015, 731).

[53] *SA Police Service v Solidarity on behalf of Barnard (Police & Prisons Civil Rights Union as Amicus Curiae)* (2014) 35 *ILJ* 2981 (CC).

Before this case, in *Naidoo v Minister for Safety and Security*[54] the Labour Court had found that demographic targets in an employment equity plan which had remained the same from 2001 to 2014, leading to the rejection for employment of an Indian woman, as well as the manner in which they were applied, constituted an absolute barrier to employment of the Indian designated group. The court had held that the adherence over time to set percentages as demographic targets in a plan, leading to their being set in stone, contradicted the Act's purpose of creating a workforce 'broadly representative' of the population (*Naidoo*;[55] Du Toit et al 2015, 732). The court had found that the purpose of affirmative action was to redress past discrimination and not to create de facto barriers to employment.

The difference between this case and *Barnard* above is that Indian women, unlike white women in the *Barnard* case, were not overrepresented at the occupational level in question. The cases seem to suggest that a white person, who claims unfair discrimination on the basis of race for being overlooked for a post because of the demographic goals in an employment equity plan, will have difficulty in convincing a court that the targets are in fact quotas if the occupational level concerned is already oversubscribed with white employees. Where, however, a plan is used as the basis for denying a post to a white person where there is a dearth of white employees at that particular level and where the representation of designated groups has met the required targets, it may be possible to argue that the targets are in fact quotas that constitute an absolute barrier to the employee's appointment/promotion and, being akin to job reservation, constitute unfair discrimination.

That both national as well as regional demographics need to be taken into account in appointments was confirmed by the Constitutional Court in *Solidarity and Others v Department of Correction Services and Others* ([2016] ZACC 18 (15 July 2016)) in which, inter alia, certain coloured applicants had been denied appointment to the department in the Western Cape on the basis that coloured people were overrepresented in the department, and black applicants were appointed instead. The court held that, in terms of the legislation, the department was required to take into account the demographic profile of both the national and regional economically active population in determining the level of representation of the different designated groups when making the appointments, but had only taken into account

[54] [2013] 5 BLLR 1163 (LC).
[55] paras 175 and 195.

national demographics. It had thus used an incorrect basis for determining the representation of designated groups in the department. Consequently, it was in breach of section 42*(a)* of the EEA, and had acted unlawfully. The court rejected as contrary to the Act the department's justification for taking into account only the national demographics on the basis that it was a national department.

A right to affirmative action?

In the above cases the basis of the applicants'complaints was unfair discrimination, to which the defence of affirmative action had been presented. In an earlier case the issue arose whether a person from a designated group could lodge a claim in court to be appointed to a post on the basis of affirmative action. In *Harmse v City of Cape Town* [56] the Labour Court held that if an employer adopted an employment equity plan, then employees may have a legitimate expectation that the employer would act in accordance with the plan. In other words, they may be able to claim a right to the post in court. However, in *Dudley v City of Cape Town* [57] the LAC held that an employee may not enforce an affirmative action claim in terms of either the EEA or an employment equity policy or plan. If an employer failed to promote or appoint a person from a designated group in terms of plan, that would give rise to an enforcement issue in terms of the compliance provisions in the Act. As a result of the 2013 Amendment Act, a failure by an employer to comply with its plan now may lead to the director general applying to court for the imposition of a *fine* on the employer, but not as yet an *order* by the court to comply.

Conclusion

This paper gives an account of the development of South Africa's three principal labour law statutes since the advent of democracy in 1994. We have sought to give an account of how these statutes, and the subsequent amendments introduced to them, have been shaped by the views of the three stakeholders – organised business, organised labour and government. These debates show a significantly decreasing level of consensus over this period with the result that legislative development has become increasingly drawn out. This is vividly

[56] [2003] 6 BLLR 413 (LC) para 48.
[57] [2008] 12 BLLR 1155 (LAC).

illustrated by the fact that the development of legislative amendments to address abuses associated with labour broking took more than ten years to develop. The implementation of labour law reforms has also been significantly undermined by a lack of capacity within enforcement institutions, while a lack of capacity among trade unions and employers has contributed to the worsening of the labour relations climate. This can be attributed, on the union side, to a massive exodus of senior leadership to the legislature and other public institutions after 1994 and, on the employer side, to a tendency to outsource industrial responsibilities (Benjamin 2013).[58]

Labour market regulation in South Africa continues to face the same triad of issues that dominated the transition from apartheid to democracy: high levels of unemployment and inequality, exacerbated by skills shortage. Current debates, such as those dealing with precarious work and the introduction of a minimum wage, seek to address the impact of the heightened inequality in earnings since the advent of democracy. The impact of persistent social and economic inequality on labour relations was most dramatically illustrated by persistent labour disputes in the mining and agricultural sectors in 2012 and 2013, as well as in public institutions such as the public sector. These developments are illustrative of the extent to which the capacity of labour legislation to achieve its goals is dependent on broader economic and social transformation.

[58] Sipho Pityana, Speech to CCMA 15th Anniversary Think-Tank, October 2011 quoted in Benjamin 2013 at 30.

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Appendix

C002 - Unemployment Convention, 1919 (No. 2)

C004 - Night Work (Women) Convention, 1919 (No. 4)

C019 - Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19)

C026 - Minimum Wage-Fixing Machinery Convention, 1928 (No. 26)

C027 - Marking of Weight (Packages Transported by Vessels) Convention, 1929 (No. 27)

C029 - Forced Labour Convention, 1930 (No. 29)

C041 - Night Work (Women) Convention (Revised), 1934 (No. 41)

C042 - Workmen's Compensation (Occupational Diseases) Convention (Revised), 1934 (No. 42)

C045 - Underground Work (Women) Convention, 1935 (No. 45)

C063 - Convention concerning Statistics of Wages and Hours of Work, 1938 (No. 63)Excluding Parts II and IV

C080 - Final Articles Revision Convention, 1946 (No. 80)

C081 - Labour Inspection Convention, 1947 (No. 81)

C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)

C089 - Night Work (Women) Convention (Revised), 1948 (No. 89)

C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

C100 - Equal Remuneration Convention, 1951 (No. 100)

C105 - Abolition of Forced Labour Convention, 1957 (No. 105)

C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

C116 - Final Articles Revision Convention, 1961 (No. 116)

C138 - Minimum Age Convention, 1973 (No. 138)*Minimum age specified: 15 years*

C144 - Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)

C155 - Occupational Safety and Health Convention, 1981 (No. 155)

C176 - Safety and Health in Mines Convention, 1995 (No. 176)

C182 - Worst Forms of Child Labour Convention, 1999 (No. 182)

MLC - Maritime Labour Convention, 2006 (MLC, 2006)In accordance with Standard A4.5 (2) and (10), the Government has specified the following branches of social security: sickness benefit; unemployment benefit; employment injury benefit and maternity benefit.

C188 - Work in Fishing Convention, 2007 (No. 188)

C189 - Domestic Workers Convention, 2011 (No. 189)