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Proposed changes to the Labour Relations Act:

A summary of the Labour Relations Amendment Bill

by P.A.K. Le Roux

The publishing of a series of amendments to the Labour Relations Act (66 of 1995), the Basic Conditions of Employment Act (75 of 1997) and the Insolvency Act will usher in yet another period of intense debate concerning amendments to our labour law.

The amendments do not, nor were they designed to, mark a major shift in the government's labour market policy. The changes seem to be clearly within the ministerial mandate of the review process which was to focus on correcting and clarifying sections of the Act which have resulted in "*unintended consequences*" over the last five years.

Whether the amendments go too far or not far enough for this purpose will now be the subject of debate at NEDLAC and thereafter within the parliamentary process. Although the Labour Minister has indicated optimism that the amendments will become law before the end of the year, the initial response of the labour movement's opposition to the proposed changes indicates that a prolonged battle lies ahead of any promulgation of a revised Act.

This edition of CLL will provide a broad overview of some of the most important amendments that are being proposed by the Labour Relations Amendment Bill. The Bill contains over 50 proposed amendments to the LRA on a wide range of topics. A detailed assessment of all these amendments is not possible. (The full text of the Bill is available on the Internet at *www.polity.org.za*)

(Proposed amendments to the The Basic Conditions of Employment Amendment Bill will be dealt with in the next edition of **CLL**)

The most significant changes to the Labour Relations Act are contained in ;

- proposals relating to unfair dismissals.
- proposals relating to the functioning of the CCMA and dispute resolution;
- proposals relating to the transfer of employees from one employer to another; and
- proposals relating to the establishment and functioning of bargaining councils;

In addition, there are various amendments

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which could also have important consequences for the day-to-day practice of industrial relations. These include, amendments to the definition of employee, amendments dealing with labour consultants, and proposals dealing with the appointment of judges to the Labour Court.

Unfair Dismissal

The proposed changes to the law relating to the unfair dismissal of employees are clearly the most important amendments to the LRA. These affect both the substantive law of unfair dismissal as well as the procedures to enforce the right not to be unfairly dismissed.

Unfair Dismissal : Retrenchments

One of the issues pressed most strongly by COSATU during the process of the drafting was that of amending the law relating to retrenchments. The primary source of its dissatisfaction has been its inability to prevent, or at least restrict, retrenchments. Although there is a legal duty placed on employers to consult prior to retrenchments, there is no duty to reach agreement on the issue prior to taking such a step. Competent employers can easily comply with this obligation, although it may be time -consuming. At most, unions have the ability to delay and obstruct a properly conceived and planned retrenchment process.

Strikes on the issue are also, in principle, unprotected (although it appears that the unions have not, as yet, really explored the limits of the right to strike in this regard). Unions have also expressed dissatisfaction with the Labour Court's perceived inability to protect workers against retrenchments on the basis that the Labour Court has not been willing to judge the merits of managerial decisions leading to retrenchments This has meant that successful challenges to the substantive fairness of dismissals, unless linked to improper selection for retrenchment, have been difficult to establish.The Bill seems to address both these issues and its provisions reflect a compromise born from difficult debates.

As far as the processes prior to retrenchments are concerned, COSATU appears to have lost its battle (at this stage at least) to require employers to negotiate on retrenchments and to acquire the right to embark on protected strike action in this regard. However, attempts have been made to increase the effectiveness of the consultation process that must precede a retrenchment. The first of these relates to the provision of information. Although the duty of an employer to provide information can arise in other contexts, the main sphere in which disputes arise is that of retrenchment. It has become virtually a standard response from unions faced with retrenchments to demand information from the employer relating to the retrenchments.

In many cases such information is indeed necessary to assist unions in assessing the rationale put forward by the employer for the proposed retrenchments, and to formulate alternatives to retrenchments. However, it is also in many cases simply used as a delaying tactic in which a union, late in the consultation process, submits demands for information that has little, if any, relevance to the reasons for retrenchment. A proposed amendment to s16 of the LRA will mean that employers will bear the onus of proving that the information which is the subject of dispute is relevant. Whether this provision will have any impact on future retrenchment processes remains to be seen.

Of greater potential significance will be the proposed s189A. In terms of this provision, an obligation will be placed on employers, who wish to terminate the employment of more than 500 employees in any 12 month period on the basis of operational requirements, to inform the Minister Labour of this fact. (The threshold of 500 employees may be altered by a notice in the Government Gazette.) This is in accordance with the provisions of the Social Plan Agreement finalised at the 1998 Presidential Job Summit.

It is also provided that the CCMA must appoint a facilitator to assist the parties to any consultation process that takes place in terms of s 189 of the LRA. A facilitator must be appointed within 5 days of the CCMA being requested to do so by the employer.

The parties can agree to appoint their own facilitator, or agree not to appoint one. In addition to assisting the parties, the facilitator must also "draw the attention of

the consulting parties" to the Social Plan published in Government Gazette 20305 of 23 July 1999.)

The facilitator must chair all consultation meetings held in terms of s 189. The facilitator is also given the power to determine disputes regarding the disclosure of information on an expedited basis. In doing so, the facilitator has the same powers as a CCMA commissioner when acting in terms of s 16 of the LRA, but it is specifically stated that the facilitator must afford the affected parties "adequate opportunity" to make representations in this regard.

The consulting parties may enter into a written agreement determining the facilitator's functions. These can include the making of advisory awards and final and binding awards on any matter. On employee side, the agreement can only be entered into by parties who represent the majority of employees who are likely to be affected by the proposed retrenchments.

Measures are also proposed to protect the integrity of the consultation process in that:

- the facilitator may not give evidence, or in any way assist in, any conciliation or adjudication concerning any marter in respect of which he or she acted as facilitator;
- the facilitator may not disclose information obtained during the facilitation, unless the consulting parties agree to this.

The Explanatory Memorandum states that the purpose of the above provisions is to seek to resolve disputes through consultation "in a manner that promotes job retention and job creation rather than by adjudication". Whether these facilitators will have any success remains to be seen. It is to be noted that the facilitator will be given no legal powers other than to chair meetings and to determine information disputes. He or she will not be able, for example, to force an employer to convene further meetings, or to require a union to concede that an issue should be taken from the consultation table. Crucial to the success of an intervention in matters of such importance will therefore be the credibility and competence of the facilitator concerned. Nothing is said about who these facilitators ought to be. It is interesting to note that the proposal does not require that the facilitator be a commissioner of the CCMA.

Also of importance is the proposed enactment of s191A, which is an attempt to assist the Labour Court to deal with the difficult economic and business issues that underlay decisions to retrench, and which have led to Court to be reluctant to "second guess" managerial decisions taken in this context. Two mechanisms are provided for. The first is the appointment of assessors to act in an advisory capacity. The second is the appointment of persons to conduct investigations into any aspect of an alleged dismissal and to report to the Court in this regard.

According to the Explanatory Memorandum, approximately 50 per cent of the disputes referred to the Labour Court deal with the dismissal of individual employees on the basis of the operational requirements of the business. In order to lessen the case load of the Labour Court, and because such dismissals are not seen to involve difficult issues, it is proposed that "if the dismissal affected only one employee" the CCMA will have jurisdiction to determine the dispute.

Unfair Dismissal : Procedures for misconduct and incapacity in the CCMA

Significant amendments are proposed to the procedures for the determination of unfair dismissal disputes dealt with by the CCMA. As is the case at present, all disputes relating to alleged unfair dismissals will first be referred to the CCMA or a bargaining council with jurisdiction. In a case involving the dismissal of more than one employee on the basis of the operational requirements of the business, the normal conciliation will be held and, if this fails to resolve the matter, it can be referred to the Labour Court for adjudication.

Those unfair dismissal disputes that are currently referred to a council or the CCMA for arbitration (i.e dismissals for reasons of misconduct or incapacity, constructive dismissals and dismissal the reason for which the employee does not know) plus operational requirement dismissals involving individuals, will be dealt with in terms of a new joint process of conciliation

and arbitration, ("con-arb"). This involves:

- the dispute being enrolled by the council or the CCMA within 30 days of the referral of the dispute to the council or CCMA;
- the parties being informed that if the dispute is not settled on the date on which it has been enrolled, the arbitration of the dispute will commence "immediately";
- an attempt first being made to conciliate the dispute on the date of the hearing;
- if the council or the CCMA decides that no further purpose will be served by continuing with the conciliation, the parties being advised accordingly and the employee being asked whether he or she wishes to have the dispute arbitrated;
- if the employees indicates that the arbitration must proceed, it commencing, unless the dispute is withdrawn or the arbitration is postponed on the application by a party to the dispute. The Council or the CCMA may, of its own motion, decide to postpone the dispute;

The council or the CCMA agree to the dispute being referred to the Labour Court if one of the parties requests this, on the basis of factors such as the reason for the dismissal, the complexity of the dispute, the fact that questions of law are involved, the fact that there are conflicting awards on an issue, or that it is in the public interest to do so.

The parties may be represented by a legal practitioner or an accredited labour advisor -see below.

Unfair Dismissal: the definitions of "employee" and "constructive dismissal"

Attempts to evade the provisions of the LRA and other legislation through the use of independent contractors has led to many cases dealing with the question as to whether a particular person is an employee or not. The definition in the LRA has not been particularly helpful in determining this question. An attempt has been made to provide greater clarity in this regard and to restrict attempts to evade the provisions of the LRA. It is proposed to introduce a new section s 200A, in terms of which a person who works for, or provides services to, another person will be presumed to be an employee (unless the contrary is proved) if one or more of the following factors are present:

> *"(a) the manner in which the person works is subject to the control or direction of another person,*
> *(b) the person's hours of work are subject to the control or direction of another person,*
> *(c) in the case of a person who works for an organisation, the person forms part of that organisation,*
> *(d) the person has worked for that person for an average of at least 40 hours per week over the last three months,*
> *(e) that person is economically dependent on the person for whom he or she works or provides services,*
> *(f) the person is provided with his or her tools of trade or work equipment by another person,*
> *(g) the person only works or supplies services to one person."*

The definition of a dismissal will be amended to include the situation where an employee is transferred to the employment of a new employer by virtue of the provisions the new s 197 of the LRA and the new employer provides "conditions of work" that are substantially less favourable than those provided to the employees by the old employer. (See below). The difference between the concept "conditions of work" and the concept of "terms and conditions of employment" used in s197 itself is not clear. It may refer to the physical or non-contractual conditions in or under which the employee works. It may, of course, not be possible for the new employer to provide the same conditions of work. In this case it may be possible for the new employer to argue that the "dismissal" was not unfair

The definition of the date of dismissal will also be amended to cater for the situation where an employee is dismissed and leaves employment prior to the completion of an internal appeal hearing. In this case the date of dismissal will be the date of the decision of the appeal tribunal.

Unfair dismissal - substantive aspects

The proposed amendments make provision for two important amendments with regard to the substantive

and procedural fairness of dismissals.If a dismissal takes place during the first 6 months of employment, or any lesser period agreed to between the employer and the employee, and if the reason for dismissal is incapacity, either in the form of the employee's incompatibility or a failure to meet the required performance standards, the employer need not prove the substantive fairness of the dismissal, but must show that it was done in a procedurally fair manner.

The Code of Practice has also been amended to reflect a less strict approach to probationary employees, irrespective of whether the probationary period is longer than 6 months. It reads as follows:

> *"(a) a newly hired employee may be placed on probation for a resonable period. Probationary periods should be determined in advance and be of reasonable duration. The purpose of probation is to determine the suitability of the employee before a permanent employment relatioship is established.*
>
> *(b) A probationary clause does not give an employer absolute power to dismiss an employee either during or on the expiration of the probationary period. Unless the contract providses otherwise, the effect of probation is to limit the scope of protection granted by the Act against unfair dismissal, in circumstances where an employee is dismissed for incapacity, poor work performance, incompatibility or some other reason related to the purpose of probation. In practice, any person making a decision about the fairness of a dismissal for incapacity during or on the expiration of a probationary period, ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after successful completion of a probationary period.*
>
> *(c) It follows that dismissal during a probationary period for a reason that is not automatically unfair, or which bears no relation to the purpose of the probationary period, is unfair for the purposes of the Act."*

Of importance here is the fact that the purpose of a probationary period is not limited to only determining whether the employee can *"do the work"* in a narrow sense of the work. It includes *"unsuitability"*, *"incompatibility"* and *"some other reason related to the purposes of probation"*

Generally speaking, both employers and the CCMA commissioners did not take advantage of the opportunity granted by the LRA, when first enacted, to relax the strict requirements for procedural fairness developed under the 1956 LRA. The Bill tries to emphasise this point again. The proposed s 188 states that an employees who may be dismissed on the basis of misconduct or incapacity must be given an opportunity to "state his case" unless the employer cannot be reasonably required to provide this opportunity. It is also stated that this need not be a formal hearing. Clause 4 of the Code of Practice also spells this out in the following terms:

> *..(b) The right to a fair procedure does not require that the employer hold a formal hearing. In the absence of any provisions to the contrary contained in a collective agreement or contract of employment, the right to a fair procedure requires the employer to conduct an investigation to determine whether there are grounds for dismissal. The right to a fair procedure requires the employer to notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The right to state a case does not require the employer to convene a formal hearing at which evidence is led and subjected to cross-examination. The employee is entitled*

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to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee while doing so. The person evaluatiuing the response should, unless the employer's structure does not permit this, not be a person on whose allegations the charge is based.

(c) After the inquiry, the employer should communicate the decision taken and preferably furnish the employee with written notification of that decision. It is not necessary that any right of appeal be granted against the employer's decision. However, the employee should be advised of the right to refer any disputed dimissal to the Commission or to the appropriate bargaining council or, to private arbitration as the case may be."

Various points emerge from the above. The first is, once again, the fact that a formal hearing need not be held. The second is that the requirement of an "unbiased" consideration of the issue will be made less strict. Thirdly, internal appeals would no longer be required. Finally, and most importantly, employers will be held to such stricter standards as they may lay down or agree to. The invitation to make disciplinary hearings less technical and formal is clear. Whether employers will accept this invitation, despite their frequent complaints, is less clear.

Unfair dismissal: Compensation

The inequitable results that flow from the application of the formula for the calculation of compensation in terms of s 194 will be done away with and an arbitrator and the Labour Court will be granted a wider discretion in this regard. Uncertainties related to the payment of compensation for substantively unfair dismissals will also be eliminated. It is made clear that there will be a statutory maximum amount of compensation payable, equal to 12 months remuneration, irrespective of whether or not the dismissal was also procedurally unfair.

Unfair Dismissal : Section 188A enquiries

On occasion, and especially when dealing with sensitive matters or the possible dismissal of senior executives, an employer and an employee agree that an independent third party will act as chairperson of a disciplinary enquiry, and not a member of management. This process is also sometimes adopted by small employers in situations where the only manager who can conduct the disciplinary hearing was intimately involved in the events that led to the disciplinary charge being laid. The involvement of an outsider usually means, in practice at least, that the hearing is even more formal than would normally be the case and that accordingly, even more resources are committed to the process. Then if the employee is dismissed, there is the possibility that the process will be repeated before the CCMA.

On occasion this duplication can be to the disadvantage of both the employer and the employee, and an agreement is reached to the effect that the proceedings chaired by the independent third party will take the form of an arbitration in which the arbitrator will be required to determine whether the employee should be dismissed or not.

The proposed s188A provides a statutory basis for this approach. In terms thereof, an employer, with the consent of the employee, will be able to request the CCMA or a bargaining council to conduct an enquiry into allegations relating to the conduct or capacity of an employee. The CCMA or the council **must** appoint an arbitrator to conduct an enquiry, on the condition that it receives written consent to this from the employee, and the employer pays the required fee.

The proceedings will then, in essence, take the form of a typical CCMA arbitration with the exception that legal practitioners and labour advisors will not be entitled to be present. The decision made will be final and binding, but may be reviewed on the same grounds as an ordinary CCMA award dealing with alleged unfair dismissals.

Unfair labour practices

The definition of an unfair labour practice has been removed from schedule 7 to the LRA dealing with transitional provisions and placed in the main body of the LRA. It has not been amended in any way. The procedure for the resolution of such disputes has been incorporated into s 191. This means that there will be a time limit of 30 days (calculated from the date that the unfair labour practice was committed) for the referral of unfair labour practice disputes to the CCMA or a bargaining council.

The Commission for Conciliation Mediation and Arbitration

There are several amendments proposed to the functioning and structure of the CCMA. The following are of importance.

Rule 12 of the rules regulating the practice and procedure of the CCMA sets out procedures for the joining of parties to CCMA proceedings. There appear to have been doubts as to whether the CCMA has the power to issue such a rule. Section 115 of the LRA will be amended to authorise the CCMA to make rules regulating this matter.

It is proposed to amend section 123 of the LRA to permit the CCMA to charge a fee for the conducting of arbitrations. This fee will be according to a tariff to be established by the governing body of the CCMA. The explanatory memorandum makes it clear that this provision is aimed at dissuading "*executives, managers, and other highly-paid employees*" from approaching the CCMA to hear allegations that they have been unfairly dismissed.

The explanatory memorandum makes the point that this type of unfair dismissal dispute generally involves legal teams and hearings that are lengthy. It is envisaged that arbitration fees will be charged if the employee concerned earns in excess of a defined earning threshold. This would encourage the parties to agree to refer the dispute to private arbitration, thus freeing the resources of the CCMA "to assist more vulnerable workers".

According to newspaper reports, it was originally envisaged that senior executives and highly-paid employees would not be permitted to approach the CCMA, but would only be permitted to take the matter to the Labour Court. This proposal seems to have been dropped.

The issue of the representation of parties in proceedings before the CCMA has attracted some controversy. The most important aspect of this debate has been that of representation in arbitration proceedings dealing with unfair dismissals on the grounds of misconduct and incapacity. Representation by legal practitioners is prohibited unless such the parties agreed to this, or unless the commissioner, on application by a party, agrees to this. Labour consultants were completely prohibited from representing parties in these proceedings. It is proposed to do away with this prohibition on legal representation when the CCMA hear unfair dismissal disputes in terms of its new "con-arb" procedure dealt with below. Candidate attorneys will also be entitled to represent parties. A Labour Advisor who has been accredited by the Labour Advisors Board (see below) will also be entitled to represent parties in these proceedings.

As indicated , labour consultants have registered trade unions and employers organisations to be able to represent parties in CCMA proceedings. In the typical situation a person who feels that he or she has been unfairly dismissed will approach such a consultant and join the "union" or "employers organisation" so as to be able to use the consultant's services during the arbitration proceedings.

It is proposed that such representation will not be possible if the employee or employer joins the union after the dispute relating to the dismissal has arisen. A stricter approach would have been to prohibit this type of representation if the employees was not a member prior to dismissal as the date when a dispute arose may be difficult to determine and will not necessarily be the same as the date of dismissal.

Under the current dispensation an employer can be represented at an arbitration by one of its employees. However, in the case of a group of companies, the employee with the necessary expertise to perform these services may not be employed by the company which dismissed the employee and which is a party to the CCMA proceedings. The Bill proposes to amend the LRA to cater for this situation - a company can be represented by anemployee of a subsidiary or holding company.

CCMA officials have, in the past, expressed concerns over the fact that many cases without merit are referred to it and that, in too many instances, inadequate attempts have been made to resolve the dispute. This means that the limited resources of the CCMA are expended on matters that have no merits, or which could have been resolved. It is proposed to address these problems by giving commissioners the power to make costs orders against parties who pursue cases that have no merit.

However, the drafters have not adopted the approach followed in the ordinary courts in terms of which the unsuccesful party normally pays the costs of the successful party. It is proposed that a commissioner will have the power to order a party to a dispute, as well as any person who represents such a party in proceedings before the CCMA, to pay the costs of the other party:

> *"... having regard to the conduct of that party either in instituting or defending the proceedings, or during the proceedings...".*

In making this decision the commissioner must have regard "in particular" to a refusal to participate in a conciliation process, a refusal to accept a settlement offer made on a with prejudice basis, conduct amounting to an abuse of the arbitration process, the persistent institution of legal proceedings, the absence of legal grounds for instituting or defending arbitration proceedings and the refusal to participate in a s 188A enquiry - (see above).

The grounds for the recission of an award will be extended slightly and it is provided that a recission application need not be heard by the commissioner who made the award, but by any other commissioner appointed by the Director of the CCMA for this purpose.

Section 197 : Transferring of a business

Section 197 of the LRA dealing with the transfer of a business as a going concern has been redrafted in an attempt to rectify the uncertainties that arose from the enigmatic formulation of the section

The proposed amendment states that if a business is transferred from one employer (the old employer) to another employer (the new employer) then, unless otherwise agreed:

- the contracts of employment between the old employer and its employees are transferred to the new employer;
- all rights and obligations are transferred; and,
- continuity of employment is maintained.

A transfer of the business is defined as a "transfer as a going concern" and a business includes a part of a business. An attempt is made to define what constitutes a transfer for the purposes of this section.

The section makes it clear that such a transfer can take place without the consent of the employees and that it can also not be prevented by an employer. Automatic transfer can only be prevented by agreement.

Unless otherwise agreed, the new employer is under an obligation to provide the same terms and conditions of employment to the employees. Alternatively, the terms and conditions of employment must, on the whole, not be less favourable. The position with regard to employer contributions to medical aid and pension/provident funds has been clarified in that it is provided that in determining whether the terms and conditions are the same, or not less favourable, regard will be had to the contributions made by the employer to such funds, rather than to the benefits the employee is entitled to from those funds.

It is specifically provided that an employer may not dismiss an employee "on account of a transfer" in terms of s197. Such a dismissal would be automatically unfair. However, it is also provided that notwithstanding this prohibition, dismissals on the basis of the operational requirements of the business will be permitted.

The current s 197 only deals with the transfer of rights and obligations in connection with the employment relationship. The amendments further provide for the transfer of organisational rights. Rights flowing from collective agreements recognising a union will be transferred.

Section 197A deals with transfers when an employer is declared insolvent.

Bargaining councils

The extension of a bargaining council agreement to so-called non-parties who are not represented on the council has been one of some controversy. It has often been viewed as a mechanism by which unions and employer representatives (who often represent larger employers) on bargaining councils can enforce

minimum wages on smaller employers who are not represented on the council.

The LRA attempts to cater for the interests of smaller, non-party, employers in various ways. The Bill introduces a further safeguard . It is proposed to amend s 32 of the LRA to enable non-parties to the council to make representations to the council concerning any collective agreement that is to be submitted to the Minister of Labour for extension. The Explanatory Memorandum, states that this will enable the Minister of Labour to take into account, in a structured manner, the views of non-parties before making a decision on whether or not to extend the agreement to non-parties.

The Bill also proposes amendments to make it easier to extend bargaining council agreements to non-parties falling within the jurisdiction of a particular chamber of a bargaining council.

The powers of designated agents appointed to assist in the enforcement of bargaining council agreements will be significantly altered. In particular, their powers to investigate alleged contraventions of a collective agreement entered into by a council will be amended to resemble those granted to inspectors in terms of the Basic Conditions of Employment Act, 75 of 1997 (BCEA) for the enforcement of the BCEA and sectoral determinations published in terms of the BCEA.

In addition, and in order to counter possible problems associated with the enforcement of bargaining council agreements by means of arbitration, specific provision will be made for the enforcement of bargaining council collective agreements through the issuing of compliance orders by designated agents and the referral of disputes concerning compliance with such orders to an arbitrator appointed by the Commission for Conciliation Mediation and Arbitration (CCMA).

An arbitrator who finds that an employer has not complied with a collective agreement may order an employer to pay any amount owing in terms of a collective agreement, as well as impose a fine. The employer could also be ordered to pay the costs of the arbitration and to pay a fee in this regard.

Provisions relating to the ministerial review of the representivity of bargaining councils have also been simplified and there are various amendments relating to the bargaining council for the public service.

Finally, provision is made for the normal statutes regulating pensions and provident funds to be made applicable to pension and provident funds established and administered by a bargaiing council.

Workplace forums

The hopes of the drafters of the LRA that the introduction of workplace forums would contribute to the creation of a more participative, less adversarial, climate of industrial relations have not been realised. One of the reasons for this may be the significant restrictions placed on who may apply for the establishment of a workplace forum.

According to the Explanatory Memorandum, there have been 78 applications for workplace forums but only 17 of these applications complied with the provisions of the LRA.

One of these requirements is that a workplace forum can only be set up in a workplace with more than 100 employees. Another is that a workplace forum can only be established if a registered trade union (or a group of registered trade unions) that represents the majority of the employees in a workplace, approves of the formation of a workplace fomm. This requirement was set to counter the fears of especially the COSATU unions that workplace forums would be a threat to their influence in the workplace.

The Bill proposes that a registered trade union will be able to apply for the establishment of a workplace forum in a workplace in which the majority of the employees are not trade union members, provided that the application is supported by non-union members, and a majority of the employees in the workplace as a whole support the application.

In addition, if there is no registered trade union, the majority of employees in a workplace can apply for the establishment of a workplace forum.

Finally, it will also become possible to establish a workplace fomm in workplaces where there are less than 100 employees.

Registration of trade unions and employers organisations

Recent years have seen a dramatic increase in the number of unions and employers organisations registering in terms of the LRA. One of the reasons for this increase has been the prohibition on employees and employers being represented in CCMA unfair dismissal proceedings by labour consultants and lawyers. In terms of the provisions of the LRA at present, an employee can be represented in such proceedings by an official, office-bearer or member of a union of which he or she is a member. An employer can also be represented by an official, or office-bearer of an employers' organisation. This has led to the registration of a number of unions and employers' organisations which are no more than disguised labour consultancies. This has been made easier by the fact that the LRA simplified the procedure for the registration of unions and employer organisations. The Bill proposes to take measures to prevent such practices. In terms of a proposed amendment, the Registrar of Labour will not be able to register a trade union or an employers organisation unless the Registrar is satisfied that the applicant is a genuine trade union or a genuine employers organisation. The Bill also envisages the Minister of Labour publishing a notice in the Government Gazette containing guidelines for determining whether an applicant is a genuine trade union or a genuine employers' organisation. These provisions must also be seen in the context of proposed amendments to the LRA dealing with labour consultancies, dealt with below.

Labour advisors

One of the criticisms levelled against labour consultants has been the lack of regulation of their activities by any supervisory body. No standards or qualifications are set before a person can act as a consultant and there is no body prescribing or monitoring the ethical standards and conduct of such consultants. On the other hand, they can play an important role in providing advice and assistance to employees and especially small employers.

The Bill envisages the establishment of a Labour Advisors Board under the auspices of the CCMA. It will be the function of the Board to establish procedures and requirements for the accreditation of labour advisors. In particular, it will be required to establish a code of ethics for accredited advisors, to hear complaints against, and to discipline labour advisors.

Advisors who have been accredited by Board will be entitled to represent parties during the course of the new "con-arb" dispute procedure that will be utilised to consider disputes concerning the alleged unfair dismissal of employees on the basis of misconduct or incapacity.

A labour advisor is defined as a person who advises employers, employees, trade union or employers organisations in labour relations but who is not a candidate attorney or a legal practitioner.

Comments

When viewed from the perspective of what employers were hoping would emerge from the drafting team, there may be some dissatisfaction regarding the Draft Bill. However, when the demands made by COSATU in this regard are taken into account, the balance struck appears more acceptable.

In so far as foreign investors take into account statutes such as the LRA when deciding to invest in a country, these amendments do not change the picture significantly. In this regard the increased measure of flexibility introduced by the amendments to the BCEA may be of more significance. Nor do these proposals significantly affect the position of small employers, with the exception of the proposed provisions dealing with unfair dismissal.

The important question is however, whether this Bill will be transformed into law. If so, how will it differ from its present form and content? It is apparently envisaged that the uncontroversial provisions will be enacted in the near future. The other provisions will be the subject of extensive debate during a process in which the influence and power of COSATU will undoubtedly be significant. If past experience is anything to go by, it will succeed in achieving its wishes, at least in part.

PAK le Roux