A NEW LABOUR DISPENSATION FOR SOUTH AFRICA

The Labour Relations Act 66 of 1995 (LRA) (assented to by the President on 29 November, 1995) represents a watershed in the often troubled history of labour law in South Africa. Initially, the Act was to have come into force on 1 May, 1996—International Workers’ Day—but delays in setting up the new system of dispute resolution resulted in it coming into force only on 11 November, 1996.

The new Act is important for a number of reasons: it embodies the spirit of the new South African dispensation; it is the result of intensive negotiation and consultation with all major players in South African industrial relations (making it a document of political compromise); and it is also one of the first examples of the “new look” style of South African legislation-writing, using plain language with a minimum of legalese and a relatively easy-to-follow lay-out. Schedule 4 of the Act also contains a number of flow charts which graphically illustrate the procedures to be followed in the resolution of certain common disputes.

The rationale for a new Act

Before the negotiations and consultations that gave rise to the new legislation, South African labour law was governed by the Labour Relations Act 28 of 1956, a piece of legislation that had, in its basic structure, remained essentially unchanged since 1924. The original Industrial Conciliation Act of 1924 was itself the direct result of the Rand Revolt of 1922. The government adapted this basic Act (changing the name in 1956) to suit the needs of the day, resulting in one of the most amended Acts in the history of South Africa. The many amendments resulted in a legislative text that was inconsistent, sometimes contradictory, and extremely difficult to read. It had also been written in a very technical style (not unusual for older legislation), with detailed and cumbersome procedures to be followed before workers could, for example, resort to a strike.

Major amendments were made between 1979 and 1981 as a result of a commission of enquiry into labour legislation (the Wiehahn Commission). But these amendments did little to improve the Act, as one judge pointed out as long ago as 1987:

“I have on previous occasions, in relation to a variety of problems arising from the interpretation of various provisions in the Act, expressed dismay at the fact that the legislature, in 1979, saw fit to cut, trim, stretch, adapt and generally doctor the old Act in order to accommodate and give effect to the recommendations of the Wiehahn Commission instead of scrapping the old Act and producing an intelligible piece of legislation which clearly and unequivocally expressed its intentions.” (Per KRIEK, J., in Natal Die Casting Company (Pty) Ltd v. President, Industrial Court and others (1987) 8 ILJ 245 at 253J–254A)

These problems were compounded by the fact that the 1956 Labour Relations Act did not apply to farm workers, civil servants, educators or domestic workers. As a result of the report of the Fact-Finding and Conciliation Commission of the Governing Body of the International Labour Organisation (the commission visited South Africa in 1992), specific legislation was set up to cover these problems.

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employees. This meant that by 1994, apart from the general Labour Relations Act, South Africa also had a Public Service Labour Relations Act, an Agricultural Labour Relations Act and an Education Labour Relations Act, each differing in significant respects. There was, in short, no integrated legislative framework for regulating labour relations in South Africa at this time.

Other problems related to the extensive discretion given to administrators and adjudicators, the haphazard nature of collective bargaining institutions, ineffective conciliation machinery, expensive dispute resolution systems, and a failure to comply with international labour standards. As regards the international labour standards, it was especially the ILO Convention on Freedom of Association and Protection of the Right to Organise No. 87 (1948) and the Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively No. 98 (1949) which came under the spotlight during the ILO's 1992 visit. The Commission concluded that South African labour law failed, in significant respects, to meet the basic requirements contained in the international instruments. Nor did the 1956 Labour Relations Act fit into the new constitutional order, an order containing, for the first time, a protected right to strike and to bargain collectively.

These problems (and some others of a more technical nature) led the government to appoint a Ministerial Task Team to draft a new Labour Relations Act in July 1994. The Task Team published a first draft document in February 1995, and the final legislation appeared in November 1995.

The application and interpretation of the new Act

The stated purpose of the Act (section 1) is to advance economic development, social justice, labour peace and the democratization of the workplace. The Act achieves this by giving effect to the fundamental rights conferred by the Constitution, by giving effect to the obligations incurred by South Africa as a member state of the International Labour Organisation and by providing a framework within which employees, trade unions, employers and employer organizations can bargain collectively and formulate industrial policy. Other objects of the Act include the promotion of collective bargaining and the encouragement of employee participation in decision-making in the workplace. The new Act applies to all employees in South Africa, save for members of the National Defence Force, the National Intelligence Agency, and the South African Secret Service (section 2).

There are also guidelines for the interpretation of the new Act (section 3): the Act must be interpreted to give effect to its primary objects, in compliance with the Constitution, and in compliance with the public international law obligations of the country.

Freedom of association

Chapter II of the Act contains a large number of detailed provisions regulating the right of workers to join and participate in the activities of trade unions. Employers are given equivalent rights to form and to participate in the activities of employer organizations. As regards protection of the freedom of association of workers, it is interesting to note that section 5 extends the protection to persons seeking employment. Protection against victimization is built-in, as are procedures for the resolution of disputes. Seen generally, Chapter II of the LRA...
gives full effect to the protection of freedom of association embodied in the interim Constitution (Act 200 of 1993, as amended).

**Collective bargaining**

It is in relation to collective bargaining that the LRA effects the most innovative changes to South African labour law.

**Organizational rights**

The first part of Chapter III deals in detail with organizational rights, including trade union access to the workplace, trade union representatives and the deduction of trade union subscriptions. Many issues that proved controversial under the 1956 Act are dealt with unequivocally, for example time off for union activities (for union office bearers) and the perennially important disclosure of information. The importance of the organizational rights conferred by the first part of Chapter III lies in the fact that through the exercise of these rights a trade union builds up a presence on the factory floor and gradually also a relationship with the employer or management.

**Collective agreements**

The second part of Chapter III deals with collective agreements, setting out their legal effect, and how disputes over the application or interpretation of collective agreements are to be resolved. Provision is also made for agency shops and closed shops, even though it is not certain whether the protection of freedom of association embodied in the Constitution includes a negative freedom of association—a right not to join or not to be forced to join a trade union.

**Bargaining councils**

The new institution of the bargaining council replaces a system of industrial councils established in terms of the 1956 Act and its predecessors. The new Act spells out in detail how a bargaining council is formed, what its constitution must contain, and the functions of the bargaining council (which include the conclusion of collective agreements, enforcement of those agreements, dispute resolution and the establishment of training schemes). Essentially, the establishment of a bargaining council has two components: one or more trade unions on the one hand and one or more employers’ organizations on the other hand agree on the constitution of the council. This voluntary aspect is then formalized by a registration procedure, after which the council acquires legal personality. The powers of the registrar in registering a council are dealt with in detail (section 29). Parts of Chapter III relate to bargaining councils within the public service.

**Industrial action (strikes and lock-outs)**

The provisions of the 1956 Act regulating industrial action were complex and difficult to comply with in practice. The old Act did not protect striking employees against dismissal. The 1995 Act simplifies the procedures considerably, and all that a trade union need now do before embarking on a strike is refer the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) (see below) and, if the dispute remains unsettled, give the employer 48 hours’ notice of the impending strike.
The 1995 Act recognizes that the right to strike (and to lock-out) is not absolute—if there is a binding collective agreement in respect of the issue in dispute, industrial action is not permitted. Further limitations on the right to resort to industrial action include compulsory arbitration, essential services, or a dispute where other remedies (such as arbitration) are available to the parties. A distinction is drawn between protected strikes and unprotected strikes (unlike its predecessor, the 1995 Act no longer functions in terms of a legal/illegal paradigm in relation to strikes and lock-outs). A protected strike entails a protection against dismissal of striking workers for being on strike (although the employer may still dismiss employees for conduct during the strike or on operational requirements). A protected strike also entails an exclusion of any civil litigating on the basis of loss suffered by the employer. An unprotected strike may be interdicted by the Labour Court which may also order payment of "just and equitable" compensation for any loss attributable to the strike or the lock-out. In determining "just and equitable" compensation reference is had to whether the industrial action was premeditated, the interests of collective bargaining, whether attempts were made to comply with the provisions of the Act, the duration of the industrial action, and the financial position of the employer, trade union or employees (section 68).

Other aspects dealt with in Chapter IV on industrial action include picketing, the resolution of disputes in essential services (which was identified as a problem by the ILO’s Fact-Finding and Conciliation Commission) and replacement labour. This chapter also regulates protest action to defend the socio-economic interests of workers.

Workplace forums

During the consultation process and after the first draft of the new Act was published early in 1995, workplace forums became a controversial issue. The rationale for introducing these participative structures in South African labour law (characterized by trenchantly adversarial industrial relations) was explained as follows by the Ministerial Task Team which drafted the legislation:

"Workplace forums are designed to facilitate a shift, at the workplace, from adversarial collective bargaining on all matters to joint problem-solving and participation on certain subjects. In creating a structure for ongoing dialogue between management and workers, statutory recognition is given to the realization that unless workers and managers work together more effectively they will fail adequately to improve productivity and living standards. Workplace forums are designed to perform functions that collective bargaining cannot easily achieve: the joint solution of problems and the resolution of conflicts over production. Their purpose is not to undermine collective bargaining but to supplement it. They achieve this purpose by relieving collective bargaining of functions to which it is not well suited. The forum’s focus if [sic] qualitative—that is, on non-wage matters such as restructuring, the introduction of new technologies and work methods, changes in the organization of work, physical conditions of work and health and safety, all issues best resolved at the level of the workplace. Workplace forums expand worker representation beyond the limits of collective bargaining by providing workers with an institutionalised voice in managerial decisions. Employers receive different benefits from the workplace forum: increased efficiency and performance.”

(Explanatory Memorandum prepared by the Ministerial Legal Task Team, January 1995, in Government Gazette No. 16259 (10 February, 1995)

The institution of the workplace forum was borrowed from the German institution of the works council, and only time will tell how successful this
transplant has been. Initial reactions have foreseen that relatively few workplace forums will be established, but that, given a year or two, the popularity of these institutions, so totally foreign to South African labour law and industrial relations, may increase.

The LRA describes the general functions of a workplace forum (including the promotion of the interests of all employees in the workplace, regardless of union membership and enhancing efficiency) and the establishment of the forum (by means of collective agreement). A workplace forum must have a constitution, and the contents of the forum constitution are set out in the Act. The Act then lists certain matters on which the employer and the workplace forum must consult. These consultation issues include the restructuring of the workplace, changes in the organization of work, partial or total plant closures, the dismissal of employees for reasons based on operational requirements, job grading, education and training, and the criteria for merit increases or the payment of discretionary bonuses.

The consultation process itself is set out: in consulting with the workplace forum, the employer must attempt to reach consensus with the forum. The workplace forum must be given an opportunity to make representations and to advance alternative proposals, after which the employer must consider and respond to the representations or proposals, stating, where necessary, the reasons why the employer disagrees with the proposals or representations. If no agreement is possible, the employer must invoke any agreed dispute resolution procedure before proceeding to implement his or her decision. There are other issues on which an employer must go further than consult: the employer must reach consensus with the workplace forum on disciplinary codes and procedures, rules relating to the proper regulation of the workplace, and measures designed to protect and advance persons disadvantaged by unfair discrimination (that is affirmative action). If no agreement between the employer and the workplace forum is possible, the dispute must be referred to either arbitration or to the Commission for Conciliation, Mediation and Arbitration. The commission may also settle the dispute finally through arbitration, and the award of the arbitrator then takes the place of the joint decision by employer and workplace forum.

The registration of trade unions and employer organizations

As most of the provisions in this part of the Act are technical, they will not be discussed in any detail. Suffice it to say that the procedures for registration have been simplified, and that the discretion which the registrar had in the registration process has been virtually eliminated. Once a trade union or an employer’s organization complies with certain formal requirements, the registrar must register the organization.

Dispute resolution

The LRA does away with all dispute resolution institutions established by its predecessor. Under the new system, labour disputes can be processed from the first instance through to a final appellate body outside the ordinary civil courts, as follows.
The Commission for Conciliation, Mediation and Arbitration (CCMA)

The CCMA plays a pivotal role in the new dispute resolution system, as all disputes not dealt with in terms of agreed and private resolution systems must be referred to the commission for conciliation (a process which includes mediation, fact-finding and advisory arbitration) before the dispute can be settled either through arbitration or through adjudication. Usually, the arbitration is also conducted by the CCMA itself.

The success of the CCMA will, to a large extent, determine the success of the entire LRA, for the efficiency with which the CCMA can perform its tasks, the costs involved in the new procedures and the extent to which the personnel of the CCMA can succeed in gaining the trust of employers and employees will be decisive. Especially relevant in this regard is the initial conciliation process—it is hoped that most of the disputes referred to the CCMA in terms of the Act will be settled at this stage (which costs the parties to the dispute nothing). Should this initial conciliation phase fail to succeed in filtering out the majority of disputes, the arbitral and adjudication machinery which follows will become bogged down in overloads similar to those that plagued the industrial court (the central dispute resolution institution in terms of the 1956 Act).

The labour court

The labour court is a court of law, consisting of a judge president, a deputy judge president and ordinary judges. It has limited jurisdiction in that it can only hear matters reserved to it by the LRA. One of the most important functions of the labour court may soon be to determine the fairness of dismissal based on the operational requirements of the employer.

The labour appeal court

This court is established as a court of law and equity and hears appeals against decisions handed down by the labour court. In status it is equivalent to the Appellate Division of the Supreme Court of South Africa.

Unfair dismissal

It comes as a surprise to find provisions regulating the law of unfair dismissal in the LRA, as the focus of this Act is, from first to last on collective labour relations between employers, employer organizations and trade unions. Technically, the drafters of the new legislation had no choice but to include provisions relating to unfair dismissal: the law of unfair dismissal that had developed in South Africa was made possible by a vague and open-ended definition of “unfair labour practice” inserted into the 1956 Act in the course of the major amendments in 1979–81. The industrial court, acting in terms of its power to strike down unfair labour practices, used the international labour standards (ILO Conventions) to develop a detailed and complex law of unfair dismissal, more or less in line with the standards contained in the international instruments. The 1995 Act neither contains the same wide definition of an unfair labour practice nor provides for the continued survival of the industrial court. The fact that both the statutory basis for the law of unfair dismissal and the institution which, through judge-made law, created that law, had been done away with by the new Act, necessitated some regulation of unfair dismissal in the new Act. The drafters of the Act have expressed the view that the law of unfair dismissal will, at some future stage, be
included in legislation relating to employment standards or an individual-oriented Employment Act, and that its regulation in the LRA is temporary.

The system of unfair dismissal law in terms of the new Act relates to both substantive and procedural aspects of dismissal, and can be briefly summarized as follows:

- The Act contains a list of employer actions that will constitute dismissal. This statutory definition of "dismissal" was necessary because the industrial court often had problems in consistently determining what type of employer actions in fact amounted to a dismissal. Another related preliminary question is whether the applicant was an employee as defined in section 213 of the Act.
- Some types of dismissal are categorized as being automatically unfair—the unfairness of these dismissals usually relates to the reason for the dismissal. Consequently, a dismissal for pregnancy is unfair, as is a dismissal due to participation in protected strike action, or a dismissal based on the employee's exercise of a right contained in Chapter I of the Act (freedom of association).
- Other unfair dismissals are all those not based on one of the internationally accepted grounds (the conduct of the employee, the capacity of the employee, or the employer's operational requirements) and/or which do not comply with the procedural requirements set out in the Act itself, or in schedule 8 to the Act (Schedule 8 is called the Code of Good Conduct: Dismissal).

Perspectives

How the new Labour Relations Act will affect the way in which South Africans conduct their industrial relations remains to be seen. Will the Act succeed in moving industrial relations away from the adversarialism that has characterized it for so long? A few closing remarks are apposite. The new Act is not based on fairness, as was its predecessor. As mentioned earlier, the old Act contained a wide definition of an unfair labour practice, and the effect of this concept was felt not only in the unfair dismissal law, but also in collective labour law. The industrial court used the concept of the unfair labour practice to found a duty to bargain (which the new Act does not contain) and to reinstate dismissed strikers. The new Act is based on legality and the imposition of duties coupled with a totally new dispute resolution system. This entails that while a primary activity under the old Act was arguing about the meanings and limits of "fairness", the primary activity under the new Act will be statutory interpretation. Even though the LRA has been written in more direct and simple language, problems inevitably remain. Some of these relate to the history of the 1995 Act and the fact that it is a negotiated document resulting from a number of compromises. There are conflicts and contradictions in the new Act as well and anyone rash enough to hope that the Act represents the last word, may be disappointed. The story of South African labour legislation never quite seems to end.

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THE LEGAL PRACTITIONERS ACT, 1996, OF BOTSWANA

The passing of the Legal Practitioners Act, 1996, on 2 August, 1996, should normally not have raised any notable public comment as it is a re-enactment, with amendments, of the Legal Practitioners Act, 1967 (Cap. 61:01). However