National Labour Law Profile: South Africa

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Constitution of South Africa

The Constitution of South Africa, Act 108 of 1996 was adopted on 10 May 1996 and came into effect on 4 February 1997. The Constitution is the supreme law of the land, binding on all organs of State at all levels of government. South Africa is a State founded on the principles of a constitutional democracy.

The 1996 Constitution is the successor of the earlier interim Constitution, Act 200 of 1993, which was brought into effect on 27 April 1994, following the first democratic elections in South Africa. The interim Constitution was the product of months of negotiations and effectively secured the demise of the ten year old tri-cameral constitutional system and the apartheid regime, which flowed from it.

The Country is organized as a central State, which has been divided into nine provinces.

The Constitution provides for three branches of Government, namely, the executive, the legislature and the judiciary. The Constitution gives recognition to the doctrine of separation of powers by providing a range of various mechanisms which have been designed to distribute power between the different spheres and levels of government and to introduce various institutional checks and balances so as to prevent the abuse of state power.

The executive consists of the cabinet, national government departments, the provincial executives and the provincial departments. It is empowered to implement legislation, develop and implement policy, direct and co-ordinate the work of the government departments and prepare and initiate legislation. Both the national and provincial executives are accountable to the national legislature.

The head of State is the President. He/she is elected by members of the national executive and enjoys a term of approximately five years. The Constitution provides that a national election must be held at least every five years and that a President cannot hold office for more than two terms.

The legislature is effectively Parliament. Each of the nine provinces also has it's own legislature. These ten legislatures function autonomously and co-operatively within the framework provided by the Constitution.

The legislature effectively has two houses: the National Assembly and the National Council of Provinces [NCOP]. The National Assembly must have a maximum of 400 members and a minimum of 350 members of Parliament. Parliament is elected by the public through an electoral system based on proportional representation.

The National Council of Provinces represents the nine provinces and ensures that the provinces and local government have a voice in Parliament when laws are made.

The Provincial legislature must have a minimum of 30 members and a maximum of 80 members. Members are elected from provincial lists on the basis of the number of votes received by a political party. Provincial legislatures are responsible only for passing laws specific to its province and the laws passed are only effective in that particular province. Parliament may intervene and amend these laws, if the laws undermine national security, economic unity, national standards or the interests of another province.

Legislative authority is vested nationally in Parliament [Section 44 of the Constitution], whilst the provincial legislative authority vests in the provincial legislatures [Section 104 of the Constitution].

The judiciary is responsible for upholding the laws of the country and for ensuring that all laws passed by Parliament comply with the Constitution. The judiciary is composed of various courts, judges and magistrates. Judicial authority is vested in the courts. The courts of the land are independent and only subject to the laws of the constitution.

The hierarchy of courts are as follows:

The Constitutional Court;
The Supreme Court of Appeal;
The High Courts;
The Magistrates Courts; and
Various other courts established by Acts of Parliament.

The President, after consulting the Judicial Services Commission and the leaders of the parties within the national assembly appoints the President and Deputy President of the Constitutional Court. Following consultation with the Judicial Services Commission, the President also appoints the Chief Justice and Deputy Chief Justice of the Supreme Court of Appeal.

The Judicial Services Commission prepares lists of recommendation, which is then used by the President to appoint the other nine judges of the Constitutional Court. The President appoints all the other Judges in the other courts on the advice of the Judicial Services Commission.

Issues pertaining to labour matters are dealt with by the Labour Courts and the Labour Appeal Court of South Africa.

Labour Rights in the Constitution

The Constitution contains a Bill of Rights, Chapter Two, which enshrines the rights of all South Africans. The following labour rights are enshrined in the Constitution:

Section 18: Freedom of Association
Section 23: Labour Relations

Everyone has the right to fair labour practices;

Every worker has the right to form and join a trade union and to participate in the union's activities;

Every worker has the right to strike

Every employer has the right to form and join an employers' organization and to participate in the activities of the organization; and

Every trade union, employers' organization and employer has the right to engage in collective bargaining.

Labour Regulation

The History of Labour Law

Prior to the discovery of gold and diamonds in South Africa, the economy could by and large be described as agrarian, with the main economic activity being agriculture. The relationship between employers and domestic workers and farm workers was governed by various Acts, including the Master and Servants Act 15 of 1856. At this time, the employment relationship was regarded as being a "master and servant" relationship.

When gold and diamonds were discovered, mining activity in South Africa rapidly increased. The booming mining industry brought with it an influx of labour and workers to the mines. The first South African trade union was, the Carpenters' and Joiners' Union was established in 1881, largely to protect the interests of skilled foreign workers working on the mines.

As the mining industry developed, the difference in political power between whites and blacks became entrenched as trade unions, catering largely for white workers, mobilised increasingly on the basis of race. In 1911, the Mines and Works Act was passed which reserved various types of work for white workers only. This era was very turbulent and a number of strikes, with the aim of securing the position of white workers on the mines, took place.

After the general strike of 1914, martial law was declared and trade union leaders were deported from South Africa. The "labour peace" which ensued was short lived as the circumstances of the mines worsened due to the economic depression, a large foreign debt and the rising costs of living. The mines responded by restructuring. This led to a number of white workers being retrenched, which in turn led to the abolition of the ratio between skilled white workers and unskilled black workers on the mines.

This situation gave rise to the 1922 strike, one of the watershed moments in South African labour history. The result of this strike was the passing of the Industrial Conciliation Act in 1924. This Act was the direct forefather of the Industrial Conciliation Act of 1956, which was later, renamed the Labour Relations Act of 1956. In terms of this Act, trade unions representing white workers were accorded recognition, while a separate system for Black workers were created.

In 1948, the National Party came into power, which saw the birth of Afrikaner Nationalism. In 1950, the Suppression of Communism Act was passed which led to the large-scale repression of union-activists. The 1950's was a turbulent time in the

political history of South Africa. This turbulence led to the amendment of the 1956 Industrial Conciliation Act, in order to ensure tougher controls over black workers.

The Wiehahn Commission of Inquiry was established in 1979 to investigate the labour situation in South Africa. The resultant report of the Commission went on to change the face of South African labour relations and labour law. The most consequential recommendation made by the Commission was the extension of freedom of association to cover all persons, irrespective of race or sex. The result was that trade unions representing Black workers were now able to make use of the machinery of the Labour Relations Act of 1956.

The period between 1991-1994 saw the birth of the new democratic South Africa. In 1994, the Interim Constitution, Act 200 of 1993, came into effect. The Act totally changed the constitutional basis of the South African legal system and it became clear that the Labour Relations Act of 1956 was not in line with the new constitutional order.

In 1994, the Department of Labour appointed a Ministerial Legal Task Team to draft new labour legislation and the Labour Relations Act 66 of 1995 was born and came into effect on 11 November 1996. The Act heralded a new era in South African labour law.

The sources of labour law

The sources of South African labour law include:

Legislation;
Judicial precedent (judicial decisions), including arbitration awards;
Collective agreements;
Common law; and
Custom and legal writings

Since the democratisation of South Africa after April 1994 the country's labour law was amongst the first areas of law to be reformed. The main employment law statutes of South Africa are the following:

The Labour Relations Act 66 of 1995 (LRA) [NB: this law was amended in 2002. Text of the Labour Relations Amendment Act, 2002.
The Basic Conditions of Employment Act 75 of 1997 (BCEA). [NB: This law has also been amended in 2002 by the Basic Conditions of Employment Amendment Act 2002]
The Employment Equity Act 55 of 1998 (EEA)
The Skills Development Act 97 of 1998 (SDA)
The Unemployment Insurance Act 30 of 1996 (UIA) [NB: This law has been repealed and replaced by the Unemployment Insurance Act, 2001]
The Occupational Health and Safety Act 85 of 1993 (OHSA)
The Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA).

Employment protection legislation applies to all employees who ordinarily work in South Africa. Therefore, the legislation also covers employees who work partly outside South Africa and partly inside South Africa and outside the country. It also

applies regardless of the stated governing law of any employment contract or the nationalities of either the employee or the employer. It is not possible for an employee to contract out of statutory employment protection unless the legislation specifically permits it and then, only to the extent permissible in terms of the legislation. In many cases, the legislation is supported by codes of practice which may be statutory codes of practice drawn up by the National Economic Development and Labour Council (NEDLAC) or non-statutory codes of practice issued by the Commission for Conciliation, Mediation & Arbitration (CCMA). These codes of practice, although often merely providing guidelines and accordingly not always being of direct legal effect, are taken into account by the Labour Courts in deciding whether or not an employer has breached statutory employment regulations. Additionally, there are numerous laws implementing health and safety regulations.

Unlike the law in certain other countries, collective agreements are normally legally enforceable as between employers and trade unions. The Labour Relations Act 66 of 1995, ("the LRA") supports the primacy of collective agreements and emphasises the need for organised labour and business to regulate its relationship through the entering into of collective agreements which binds the employer, the union's members and, where the union represents more than 50% of the employees in a workplace and if such intent is stated, non-union members in the workplace.

Contract of Employment

The starting point should be that a written contract of employment is not strictly a necessary requirement for the validity of an employment relationship.

However, the Basic Conditions of Employment Act (No. 75 of 1997 – the BCEA) compels an employer to give an employee a host of prescribed employment details in writing when they start work with that employer. This is to ensure certainty between the employer and employee, and attempts to protect the 'vulnerable' employee against the employer who holds the purse strings in the event of any disagreement as to the details.

It therefore makes more sense to enter into a detailed contract of employment upfront with the employee, and thereby bind him/her to the Company's disciplinary codes and the like at the same time, rather than to provide a list of prescribed details in a rather ad hoc or non-contextualised manner. A comprehensive contract also has the benefit of being signed by both parties and is therefore legally binding. It is very often the essence of an employment relationship – it details its commencement, currency, and termination – since in most cases the document will 'speak for itself'.

Prescribed Written Particulars

These are dealt with in Section 29 of the BCEA. They are:

The name and address of the employer - These may seem like obvious details, but many an employee claim has been thwarted either by insufficient or incorrect details in this regard (e.g. regarding the identity of the employer party, especially in a group or division of companies, and in enforcing a judgment).

The employee's name - Again apparently an obvious requirement but it provides certainty as to the parties.

The employee's occupation or a brief description of the work for which the employee was employed - Certainty on this issue is required for reasons relating to advancement and remuneration, giving instructions which are reasonable to that post, performance, discipline and the like.

The employee's place of work - and if the employee is required or permitted to work at various places, an indication of this. The employee should agree at the outset of the employment relationship that s/he would be required to travel, work at various stations etc, failing which s/he may not easily be compelled to do so at a later date without agreement. The employer may have to remunerate the employee additionally for undertaking work at different places, and could not simply compel the employee to do so if it has not been agreed initially in the contract.

The date of commencement of employment - this is important for the calculation of benefits such as leave, recognition of length of service and the benefits attached to it – e.g. severance pay in a retrenchment.

The employee's ordinary workdays and work hours - The BCEA sets minimum standards (more specifically, maximum hours and days that may be worked) in this regard, which may not be changed in most cases even with an employee's consent. The regulation of working hours will be addressed in more detail below.

The employee's wage or the rate and method of calculating wages - This has undoubtedly been included for certainty, consistency and protection for the employee, in addition to ensuring that the employee is fairly remunerated for leave, for overtime, etc.

The overtime rate - Similar to above.

Any other payments in cash or kind to which the employee may be entitled (and for payments in kind, the value of those payments) - Again important for calculating the monetary value and benefits to which an employee would be entitled during leave, on termination (e.g. severance pay on retrenchment is calculated at one week's *remuneration* per completed year of service, not one week's base *salary*. Remuneration includes the value of a number of benefits.

The date when remuneration will be paid - promotes certainty and consistency.

Details of any deductions that will be made from the remuneration - In addition to reasons of certainty, the nature and amount of deductions that can be made from an employee's remuneration is strictly regulated by the BCEA.

The amounts of leave which can or must be taken - This aspect will be dealt with in detail below. It will suffice to state that the BCEA strictly regulates when and how much leave *may* and *shall* be taken. This relates not only to annual leave, but also sick, maternity and family responsibility leave in respect of which there are legislated minimums that may not be contravened.

The period of notice - This too is strictly regulated by the BCEA - the quantity and manner of giving notice of termination of a contract of employment will be specified below.

A description of any bargaining council or sectoral determination that covers the employer's business - This too is in protection of employee rights since it is often the case that terms and conditions of employment more favourable to the BCEA are collectively negotiated within a bargaining council. The bargaining council standards will then take precedence over those set out in the BCEA.

Any period of employment with a previous employer that counts towards the employee's period of employment. E.g. the length of service with a seller who transfers its business to the purchaser, is obliged to recognize the employee's previous length of service, for the purpose of calculating benefits, such as severance packages, long service awards and the like.

A list of any other documents that form part of the contract - (and an indication of where a copy of these documents may be obtained). This would relate to policies and procedures, and the like, of the employer. It again provides certainty to the parties to the employment relationship.

If and when any of the above details change, the employee is to be notified of the change and be given a copy of the change.

Employment contracts are of two types.

Fixed-term contracts: The duration of the contract is clearly specified between the parties. The contract will endure for the specified period, or upon the happening of a particular event or until a particular task has been completed. Unless otherwise agreed, such a contract cannot be terminated during its currency without good cause, unless the parties have agreed otherwise. If after the contract has lapsed and the employee remains in the employ of the employer, the contract may be tacitly renewed, provided that it is consistent with the parties' conduct. The LRA expressly provides that non-renewal of a fixed term contract is equivalent to a dismissal in circumstances where the employee expected the employer to renew it on the same or similar terms but the employer either failed to renew the contract at all or offered to renew it on less favourable terms [Section 186 LRA].

Indefinite-period contracts: The duration of the contract is not specified by the parties. The contract will endure until:

it *is terminated by agreement;*
one of the parties give the contractually specified or reasonable notice to the other;
either party elects to terminate on fundamental breach;
on retirement of the employee at the agreed age;
summary termination of the employee;
death of either party; and
insolvency of the employer.

Probation

It is quite common that employers engage employees for a probationary period, which may be negotiated and stipulated in the contract of employment. After expiry of the probationary period, the employer is entitled to decide whether to retain the services of the employee on a permanent basis. The Code of Good Conduct, contained in the LRA, expressly provides for probationary periods and employees. The Code stipulates that the probationary period must be reasonable given the circumstances of the job and the time it takes to determine the employee's suitability for the job. The probationary period can be extended, in suitable circumstances.

The Code also states that following termination of the probationary period, probationary employees should not be dismissed unless they have been given appropriate remedial treatment and they have been allowed a reasonable period for improvement but have failed to improve their performance. If the employer fails to counsel the probationary employee and thereafter fails to confirm the employee's employment, such termination will amount to a dismissal.

Termination of the contract of employment

The contract of employment can be terminated on the following grounds:

on *expiration of the agreed period of employment;*
on completion of the specified task;
by notice duly given by either party;
by summary termination in the event of a material breach on the part of either party;
by repudiation;
by mutual agreement;
by death of either party;
by the insolvency of the employer; and
by the supervening impossibility of performance, where either party becomes permanently unable to perform his/her obligations in terms of the contract.

The contract may not be terminated in the absence of a justified reason.

The LRA expressly recognises the following grounds for termination of the employment contract:

misconduct on the part of the employee;
the employee's poor work performance and/or incapacity;
the operational requirements of the employer.

The concept of unfair dismissal is a right created by statute and contained in the LRA. Chapter VIII of the LRA, along with an accompanying code of practice, has made a large contribution to systematising and clarifying this important area of South African employment law. Unfair dismissals now fall into four categories:

Automatically unfair dismissals
Dismissals which an employee cannot justify on the basis of:
the employee's conduct;
the employee's capacity; or
the operational requirements of the business.

Besides these substantive grounds, dismissal will also be unfair where it is not effected in accordance with a fair procedure.

The meaning of dismissal has been extended by statute to include:

a *failure to renew a fixed term contract when there was a reasonable expectation of renewal;*
a failure to allow an employee to resume work after maternity leave;
selective employment following a collective dismissal;
a situation where an employee terminates the contract because the employer has made continued employment intolerable (constructive dismissal);

A dismissal is automatically unfair if it:

offends against an employee's rights to freedom of association;
is by reason of an employee's refusal to do protected strikers' work;
is effected to compel an employee to accept a demand relating to employment;
constitutes victimisation for exercising any rights under the statute;
is by reason of an employee's pregnancy;

constitutes discrimination on some arbitrary ground.

An employee's rights emanate from either statute or common law. Whilst there does exist certain residual common law rights arising out of breach of contract which may be proceeded with by an employee to the High Court of South Africa, the exercise of these rights is rare and the relevance to EPL liability issues extremely limited. By far the vast majority of cases arise out of a breach of statutory rights and obligations. The statutory rights may relate to the following issues:

Automatically unfair dismissals
Unfair dismissals
Operational terminations (redundancy/retrenchment)
Residual unfair labour practices
Transfer of businesses
Alleged discrimination, etc.

A dismissal that is not automatically unfair is deemed to be unfair unless the employer proves that the dismissal is for a fair reason either related to the employee's conduct or capacity or based on the operational requirements of the employer. In addition the employer must prove that the dismissal was effected in accordance with a fair procedure. Accordingly, even if the dismissal is proven to be related to the employee's conduct, capacity or based on the employer's operational requirements (i.e. substantively fair), it will nevertheless still be unfair (procedurally unfair) if the employer has not followed a fair procedure.

Remedies available

If an unfair dismissal claim succeeds the CCMA has a choice of remedies. The commissioner may:

Order the employer to reinstate the employee from any date not earlier than the date of dismissal.
Order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal.
Order the employer to pay compensation to the employee.

The primary remedy applied by the CCMA in respect of a dismissal which is substantively fair is to order reinstatement or re-employment. In the event that the employee does not wish to be reinstated or re-employed or the circumstances are such that a continued employment would be either intolerable or no longer reasonably practical or the dismissal is unfair only because the employer did not follow a fair procedure, the commissioner may award compensation rather than reinstatement/re-employment. There are certain limits on compensation. In the case of an automatically unfair dismissal, the commissioner is enjoined to make an award which is "just and equitable" in all the circumstances, but not more than the equivalent of 24 months' remuneration. In an unfair dismissal the commissioner may award up to a maximum of 12 months' remuneration as compensation.

The Labour Appeal Court has held that compensation arises out of statute and does not relate to patrimonial loss. The Labour Courts have a discretion on whether compensation should be awarded or not. If the Labour Courts decide that the case is such that compensation should be awarded, they have no discretion in respect of the amount. Compensation must be awarded from the date of dismissal to the date of adjudication, subject to a maximum of 12 months compensation.

This has serious ramifications for procedurally unfair dismissals. In the past a commissioner/arbitrator may have decided to award a month or two's compensation because of the minor nature of the employer's lack of procedural compliance. The Labour Courts are now faced with adopting an "all or nothing" approach and now have to award either 12 months or nothing to an employee who has been visited with a procedurally unfair dismissal. In most instances, other than cases of trivial procedural deficiencies, this will result in 12 months compensation being awarded to the employee for procedural unfairness because of the inherent delays in having such matters heard.

In the event that a party can establish that the delay is due to the fault of the other party in not expeditiously pursuing his or her remedies, the court is empowered to take such delay into account in calculating compensation.

Hours of Work and Leaves

The BCEA sets clearly defined limits on working hours for employees who earn below R89 455, 00 per annum, and for employees (irrespective of their gross annual earnings) who are empowered by the Company with the authority to 'hire and fire'. The working hours provisions do also not apply to sales staff who travel to customers and regulate their own hours, or to employees who work less than 24 hours per month.

Save for the exceptions outlined above, the working hours of all other employees must be regulated in accordance with the BCEA and cannot be contracted out of or excluded.

What then are those statutory hours of work?

Ordinary hours of work (i.e. not overtime) may not be more than 45 hours in a week or 9 hours in a day. For employees who work a 6-day week, it is 8 hours per day.

Any additional hours will be considered overtime for which a specified amount of additional remuneration is prescribed.

Overtime is limited to a total of 10 hours per week and then too, may not exceed 3 hours of overtime per day.

An agreement is necessary between the employer and the employee for overtime work.

Overtime work must be paid at no less than 1.5 times the normal hourly rate, or time off (equivalent to 1.5 times), or partially paid and partially paid time off.

The BCEA does recognize a certain amount of flexibility in arranging shifts and work times. These are however also regulated – e.g. a compressed working week can be implemented by means of a written agreement, to allow for 12 ordinary hours of work (including meals) to be done in a day. It may however only be done in terms of a 5-day week, and with regard to the statutory daily rest periods. Averaging of hours is also recognized by the BCEA, to enable more hours to be worked on a particular day and less on another provided it 'averages' out over a period of 4 months to the statutory weekly limit on ordinary and overtime hours of work per week. Averaging can however only be done in terms of a collective agreement (i.e. a written agreement concluded with a registered trade union), and must be subject to the daily and weekly rest periods.

A meal interval of at least one hour is compulsory for employees who work more than 5 continuous hours. The meal interval can be reduced to 30 minutes by written agreement (e.g. in the contract of employment) with the employee.

An employer must allow an employee a daily rest period of at least 12 consecutive hours between ending and restarting work. There is also a compulsory weekly rest period of at least 36 hours. The rest period must include a Sunday unless otherwise agreed. There is some flexibility permitted and it would be advisable to include such issues in the contract of employment.

Employees can only be required to work on a Sunday or a public holiday where they have agreed to it. The employee must be paid at double his normal wage/rate, if he does not ordinarily work on Sundays, and at 1.5 times his ordinary rate if he does ordinarily work on Sundays. Paid time off may be agreed to instead of additional payment.

Employees are entitled to at least the 12 current public holidays provided for in the Public Holidays Act. However, by agreement, a public holiday may be exchanged for another day. An agreement is also required to get an employee to work on a public holiday. Double pay (or ordinary wage plus paid time off) must be paid if the employee works on a public holiday that falls on an ordinary workday.

Employees who perform night work enjoy special protection in terms of the BCEA. Night work means work done between 6 o'clock in the evening and 6 o'clock the next morning. An employer can only require an employee to do night work if there is an agreement with the employee (e.g. in the contract of employment), the employee is paid an allowance (which may be a shift allowance) or receives a reduction in working hours, *and* if there is transport available between the employee's home and the workplace. There are a number of strict regulations around night work, including those contained in a code of good practice passed in terms of the BCEA, in ensuring the health and safety of employees who do night work.

Paid Leave

The BCEA prescribes a leave period of no less than 21 consecutive days per completed year of employment (or 1 day for 17 day's worked, or 1 hour for 17 hours worked), on full pay. Public holidays are not part of annual leave, and may not be 'encashed'. Leave can also not be accumulated form one year to the next. It is

important to note that an employer is compelled to ensure that statutory leave is taken within a period of 6 months of the end of the annual leave cycle.

Additional holiday leave may however be agreed between employer and employee and may be dealt with in any way agreed, usually set out in the contract of employment.

Sick Leave

There is also an entitlement to a minimum number of sick leave on full pay. An employee is entitle to one day's paid sick leave for every 26 days worked during the first four months of employment, and thereafter to 30 days paid sick leave for every 36 months worked (the leave cycle). An employer will only be obligated to grant paid sick leave of longer than two days or for longer than one day when more than two absences occurred in a space of eight weeks, if the employee produces a valid medical certificate which has been issued by a medical practitioner.

Maternity Leave

Employees are entitled to maternity leave of no less than 4 months, which is to start from 4 weeks prior to due date of birth, and end not less than 6 weeks after birth of the child. Maternity leave is classified as unpaid leave, unless otherwise agreed by the parties. There are also strict provisions around the nature of work that a pregnant or nursing employee is not permitted to perform where it could be hazardous to her or the child's health.

Family Responsibility Leave

Employees are also entitled to take family responsibility leave. An employee who has been employed for longer than four months and who works four days or more for the employer is entitled to three days paid leave during each twelve month leave cycle to discharge family responsibilities in the following circumstances:

When the employee's child is born or falls ill;

In the event of the death of the employee's spouse or life partner, parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.

Minimum Age and the Protection of Young Workers

The BCEA makes it a criminal offence to employ a child under 15 years of age or under the minimum school-leaving age, if this is older. Beyond the age of 15 years, no person may employ a child for work that is inappropriate or that place his/her well-being, education, physical or mental health or spiritual, moral or social development.

The Constitution goes further by giving children further protection from exploitative labour practices – Section 28 (1) (e) and (f).

Equality

The Constitution guarantees the right to equality and also gives protection to all from unfair discrimination. It goes further by acknowledging that affirmative action

measures are necessary to advance disadvantaged groups. Furthermore, the Constitution requires laws to be enacted to prevent discrimination, including workplace discrimination. The legislature has since passed and implemented the Employment Equity Act to deal with unfair discrimination and workplace equality.

The Employment Equity Act

The purpose of the Employment Equity Act is to ensure workplace equity. It prohibits unfair discrimination in the workplace and guarantees equal opportunity and fair treatment to all employees. However, it recognises that, given the historical disparities, simply removing discrimination does not in itself result in substantive equality. The Act therefore imposes an obligation on certain employers ("designated employers") to implement affirmative action measures to advance "designated groups" (African, Indian and Coloured people, women and people with disabilities).

A key requirement of the Employment Equity Act is the elimination of all barriers, particularly unfair discrimination, in the workplace.

What are barriers?

A barrier exists where a policy, practice or an aspect of the work environment limits the opportunities of employees because they are from designated groups. Examples of 'barriers' previously identified in comparative discrimination law include:

the lack of role models from designated groups in senior positions in a corporation;

the "glass-ceiling" for women, as manifested in the "old boys" network; expectations of long working hours; and lack of childcare facilities or "career breaks";

job specifications that set requirements which are not essential for job performance (for example, a matric or university degree);

workplaces structured according to the assumptions of a homogenous, white, male workforce.

Pay Issues

South African law does not prescribe minimum wages through statute. Usually wages are fixed by the employer or by collective agreements or by the employee's contract of employment.

Trade Union Regulation

The LRA sets out a procedure for the registration of trade unions and employer organisations. It allows a union which is independent, has a distinctive name, an address in the Republic and which has adopted a constitution which meets the requirements of the law, to make application for registration. Unions and employer's organisations are not obliged to register, but registration is a precondition for participation in the industrial relation system developed by the Act.

The registrar of labour relations has the discretion to refuse an application to register a trade union, in terms of the Act. However, this discretion is strictly controlled by the Act. The LRA also allows a trade union to appeal the decision of the Registrar to the Labour court.

Chapter 2 of the LRA sets out basic labour rights. Chief amongst these is freedom of association – the right of employees and employers to join and participate in the lawful activities of unions and employer organisations respectively.

On the employee's side, the right to freedom of association protects against both interference, state interference and the union discrimination on the part of an employer. Now that the unfair labour practice remedy has been limited to individual employees, considerable union attention is now given to the anti-discrimination provisions contained in the LRA and the EEA.

The Constitution recognises the right to freedom of association, the right to form and join a trade union and the right to participate in trade union activities.

The LRA gives recognition to organisational rights in Sections 12 and 13. It allows a registered union or a sufficiently representative union to-

Enter an employer's premises to recruit or communicate with members;

Hold meetings with employees outside working hours;

Conduct union elections or ballots at the workplace;

Instruct the employer to make deductions of and pay over union membership subscriptions from member employees;

Reasonable leave, including possible paid leave, for their office bearers.

Registered unions which have as members a majority of employees in a workplace have a further right to disclosure of all relevant information, which allow its representatives to perform their functions.

Unfair Labour Practices

Item 2(1) of Schedule 7 of the LRA gives recognition to the notion of "residual unfair labour practices". The Act defines the notion as any unfair act or omission which arises between the employer and employee and which involves –

direct or indirect unfair discrimination on any arbitrary ground;

unfair conduct of the employer relating to the promotion or demotion, training or benefits of the employee;

unfair suspension of an employee or any other disciplinary action;

failure or refusal of an employer to re-instate or re-employ an employee in terms of an agreement.

Remedies

As with other disputes, those in relation to alleged unfair labour practices must first be referred to the CCMA for conciliation. If after conciliation the dispute remains unresolved, the parties may then refer the dispute to the labour court for adjudication or to arbitration, if it is so agreed by the parties. The Court has wide discretion and may determine the dispute on terms it deems or reasonable, including but not limited to the ordering of reinstatement or compensation.

Collective Bargaining and Agreements

The LRA states that one of its central objectives is to promote collective bargaining as a means of regulating relations between management and employees and as a means of settling disputes between them.

The approach of the LRA is quite different from its predecessor. The collective dimension of the unfair labour practice jurisdiction has been effectively abolished and with it the duty to bargain. However, the institution of collective bargaining is unequivocally fostered, albeit down a different path. The object has been to create a statutory framework conducive to bargaining whilst preventing the judicial appropriation of politically sensitive terrain. The key bargaining-promoting measures include:

organisational rights, which allow unions with a membership base to establish themselves in the workplace;

the self-governance benefits flowing from participation and bargaining councils, particularly now that council agreements can override many of the restrictions imposed by the BCEA;

the moral force of CCMA advisory awards under Section 64(2) in the event of the refusal to bargain;

the socio-political leverage of NEDLAC, whose peak employer bodies cannot be seen to countenance a refusal by members to impress the collective bargaining ethic;

The right to engage in a protected strike over an employer's refusal to bargain.

The LRA fosters and rewards representative unionism. In other words, it promotes inter-union co-operation and union amalgamation. Only unions that are sufficiently representative in a workplace are entitled to organisational rights. Unions with majority membership are entitled to receive relevant information from the employer and to conclude collective agreements.

A collective agreement is a legally enforceable instrument and is negotiated by the parties usually concerns terms and conditions of employment or any other matter of mutual interest between the parties. The only formality in respective of collective agreements is that it must be reduced to writing. The agreements bind the parties to the agreement and their members. The agreement can also be extended to bind non-union members if the party union has majority membership within the workplace. Collective agreements will override the provisions of any inconsistent individual employment contracts and may also be concluded within bargaining councils and thus save as minimum wage and working conditions instruments.

Bargaining Councils have been established by the LRA and are by definition, statutory bodies that registered unions and employer organisations may voluntarily and co-operatively establish within a specific economic sector. They represent the centre-piece of the system of bargaining fostered by the LRA.

Collective agreements are inclined to be time-bound, with a life span that is by and large determined by the parties' bargaining cycles. However, the agreement can be terminated on reasonable notice by either party.

Strikes and Lock-Outs

The right to strike is entrenched in Section 23 of the Constitution. Employers enjoy a reciprocal right to lockout, which is also constitutionally entrenched.

The LRA does regulate the right to strike and lockout. The LRA defines a strike as a partial or complete concerted refusal to work or the retardation or obstruction of work by employees of the same employer for the purpose of remedying a grievance or resolving a dispute in respect of a matter of mutual interest.

A lockout is defined as an exclusion by the employer of the employees from the employer's workplace for the purposes of compelling the employees to accept a demand in respect of any matter of mutual interest.

Protected strikes and lock-outs are those which comply with the procedures as laid down in Chapter IV to the LRA, namely:

the party to the dispute must first refer the dispute to the bargaining council with jurisdiction or if there is none, to the CCMA, for conciliation;

if the dispute remains unresolved, a certificate of non-resolution must be obtained or alternatively, the party may wait for the statutory 30-day period to lapse;

once the certificate has been obtained and/or the 30-day period has lapsed, the concerned party must then give the other party 48 hours notice of the strike or lockout.

Effect of a protected strike or lockout

The LRA extends strong protection to strikes and lockouts that comply with its provisions:

Guarantees immunity from the reaches of the civil law i.e. they do not constitute a delict or breach of contract;

An employer is not obliged to remunerate an employee for services not rendered during a strike;

Employees are protected from dismissal.

Effects of an unprotected strike or lockout

The LRA has decriminalised non-compliance with the Act. However, other sanctions are imposed for non-compliance:

The affected party can approach the Labour Court for an interdict or order restraining a strike or lockout.

The Labour Court can also order the payment of just and equitable compensation in the circumstances.

Participation in an unprotected strike may constitute a fair reason for dismissal.

Strikes in essential services

Section 65 (1) (d) of the LRA prohibits strikes and lockouts in essential services and maintenance services. Instead employers and employees are obligated to refer their disputes to final and binding arbitration. The Act defines an essential service as a service the interruption of which endangers the life, personal safety or health of the

whole or any part of the nation, the parliamentary service and South African Police Services.

Settlement of Individual Labour Disputes

South Africa has established specialist Labour Courts. These courts exist side by side with the traditional courts. Whilst the High Court of South Africa still retains concurrent jurisdiction with the Labour Courts in respect of certain issues, e.g. breach of contract, constitutional issues, the Labour Courts generally exercise exclusive jurisdiction over specialist labour matters. The Labour Court of South Africa has exclusive jurisdiction over all matters reserved for it under the LRA. It is also a court with inherent jurisdiction. It has concurrent jurisdiction with the High Court in respect of violations of certain fundamental rights protected in the Constitution. The Labour Courts' primary tasks are to:

adjudicate disputes relating to freedom of association (union- and employer- organisation membership);
adjudicate automatically unfair dismissals including dismissals arising out of operation requirements (i.e. redundancy/retrenchment matters) as well as strike disputes;
review CCMA arbitration awards.

In determining the above matters the Labour Court may issue declaratory and interdict relief (including urgent relief), make compensatory damages and costs awards.

The Labour Appeal Court's task is to hear appeals against final judgments of the Labour Court to decide questions of law reserved by the Labour Court. Labour Appeal Court judges must be judges of the High Court of South Africa whilst Labour Court judges are normally appointed from the ranks of experienced legal practitioners.

The CCMA is tasked with resolving multifarious employment related disputes. Such disputes include the following:

freedom of association and general protection,
disclosure of information,
collective agreements on organisational rights,
withdrawal of organisational rights,
interpretation or application of organisational rights,
interpretation or application of collective agreements,
interpretation or application of agency or closed shop agreements,
non-admission as a party to close a shop,
interpretation or application of a ministerial determination,
interpretation or application of a lapsed collective agreement,
interpretation or application of collective bargaining provisions,
any matter of mutual interest,
refusal to bargain,
unilateral change to terms and condition of employment,
picketing,
disputes and essential services,
joint decision making (workplace forum),

disclosure of information (workplace forum),
interpretation or application of workplace forum provision,
unfair dismissal,
severance pay,
unfair labour practices.

The CCMA is also responsible for arbitrating disputes. The CCMA is entitled to arbitrate the following disputes:

disclosure of information,
collective agreement on organisational rights,
withdrawal of organisational rights,
interpretation or application of organisational rights,
interpretation or application of collective agreements,
interpretation or application of agency or closed shop agreements,
interpretation or application of ministerial determinations,
interpretation or application of lapsed collective agreements,
disputes in the essential services,
joint decision making (workplace forum),
disclosure of information (workplace forum),
interpretation or application of workplace forum provisions,
consent to arbitration,
arbitration of Labour Court matter by consent,
unfair dismissal,
severance pay,
unfair labour practices.

Judges and Commissioners

Labour Court judges are normally appointed from the ranks of specialist labour law practitioners (practising advocates or attorneys) and in some cases suitably qualified academics. Labour Appeal Court judges must, in addition, be judges of the High Court of South Africa. CCMA commissioners, unlike Labour Court judges do not have to have legal qualifications. There are various levels of commissioners appointed and generally the more senior commissioners are either legally qualified or have experience in arbitrating disputes. Commissioners are required to conciliate or arbitrate disputes. Disputes are first conciliated and if they remain unresolved, referred to arbitration, normally before a different commissioner.

Defence Issues

The Labour Courts generally do not award costs against the other party unless such party has acted frivolously, vexatiously or unreasonably in bringing or conducting the proceedings. In the common law courts, costs are awarded at the discretion of the court, but usually the losing party will be required to pay the taxed costs (approximately 50% of the actual costs) of the prevailing party.

Length of Proceedings

There is currently a backlog in the CCMA of at least between 1 to 3 months in having a case conciliated depending upon the region in which the case is referred. The delay in having matters arbitrated before the CCMA is greater and in practice it is now taking approximately one year depending upon the region. The delays in the Labour Court may even be greater. Matters that have been conciliated upon by the CCMA and referred to the Labour Court may take anything between 6 to 12 months to be heard. Delays, particularly in the Labour Court, are increasing. Cases may take from a half-day 5 days or more in complicated matters.

Legal Representation

In the Labour and Labour Appeal Courts legal representation is not compulsory but most employers and many employees are usually represented. In the CCMA legal representation is permitted, save for incapacity and misconduct cases where legal representation is in the discretion of the commissioner and must be on application by one or both parties. Legal representation in such matters is not normally permitted unless there are complex issues of facts and law, conflicting arbitration awards or it is in the interests of public policy that legal representation be permitted. Generally, at the CCMA if legal representation is sought it is preferable to apply for the appointment of a senior commissioner, which, if successful, will normally result in the parties being afforded legal representation.

Class Actions

There is no specific provision for class actions in our Labour Courts. Often, however, matters are brought by representative trade unions for and on behalf of their members and without their members being specifically cited. This form of representative action is permissible.

Damages and Compensation Issues

Damages and compensation granted are normally limited to 24 months (in respect of automatically unfair dismissals) and 12 months (in respect of unfair dismissals) and are not strictly linked to patrimonial loss. The primary remedy in South African labour law, unlike England and other jurisdictions, is that of reinstatement/re-employment.

Societal Disposition

There is an increasing propensity by employees to avail themselves of their rights in terms of employment related legislation. Historically, litigation relating to unfair dismissals was brought by trade unions and largely unskilled aggrieved employees. Increasingly members of management (including senior management) have come to appreciate that South African employment legislation draws no distinction between senior managerial and lowly skilled employees and affords them the same rights and benefits. This has resulted in a large number of plaintiff based labour lawyers and labour consultants seeking relief (sometimes on a contingency basis) on behalf of their clients. Such relief is often based on the failure of employers to properly comply

with the strict procedural requirements associated with dismissal in South Africa (to which reference will be made below) and to seek compensation in respect thereof. Such claims for compensation often result in settlements being agreed between the parties, which may be in excess of any compensation that the employee may actually have suffered.

ILO Conventions Ratified by South Africa

South Africa joined the ILO in 1919, but it left the Organization in 1966, because of the ILO position concerning the government's apartheid policy. It resume membership in 1994. So far it has ratified 21 conventions, of which 18 are in force for the country, including the eight ILO fundamental conventions.

Web Links

The official Website of the South African Goverment.

The website of the Department of Labour.

workinfo.com: A non official website which provides access to different sources of the labour law: laws, bills, case law, articles.

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