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Labour Market Flexibility: will a social pact help?

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I was asked to speak from a paper that I produced for the presidency where they wanted me to revisit the Labour Relations Act (LRA), relook at it. And one of the central concepts that Minister Mboweni used when we devised the Labour Relations Act and the Basic Conditions of Employment Act (BCA) was a phrase called regulated flexibility. In other words the idea was that you had a tree, you allowed the tree to bend but it couldn't bend beyond certain limits and if you think about the concept that was developed and gave, I think, some sense of what we were doing in both the LRA and the BCA, it was looking for how we can allow for efficiency, for productivity, for adaptability, but within the parameters or the limits of protection.

There is no question that the insistent and consistent attacks on the Labour Relations Act in relation to sectoral determinations, to extending of sector-wide collective agreements, the push by the Institute of Race Relations for dismantling sectoral bargaining entirely, arguments for removing all forms of protection for workers working for small employers – we hear it all the time and it keeps coming. There is no doubt that is one source for a revision and a review of our labour laws. No doubt it is also what might well have informed president Mbeki's statement in his State of the Nation address this year and may well inform what the Minister of Finance and the Deputy Minister of Finance believes should be done.

But I think that there are other good reasons for us to grasp the nettle and look at what we have done. I think we did quite well but we haven't done as well as we should and I would like to suggest to you that since the government may be driven by its own concerns about small business as the engine of growth – by the way a proposition that I don't agree with – and that regulation inhibits growth and employment – also a proposition I don't agree with – but that apart, whatever their motives may be, I'm not driven by motives, I want to look at merits of argument and deal with merits as they come. Let me say to you that some of this paper will be controversial.

There are two other very good reasons why we should review our legislation. Firstly, there is a huge protection hole – casual workers are not protected, informal workers are not protected,

marginalised workers are not protected. Our protection does not extend to them and one of the reasons for that has got to do with, I think, the whole history of labour law and that's tying it to the contract of employment. I think what we've got to do now is break the link to the contract of employment so that anyone who performs work in a sector, irrespective of whether it's employed under a contract of employment or any other – I call it dependent labour and legally that's going to make it quite difficult for us to understand – but that we do need to extend our concept of who should be protected by labour laws. So I'm talking about an extension of protection because those people are not being protected at the moment. Quite difficult – it's been a debate amongst labour lawyers elsewhere in the world where this phenomenon has arisen but I do believe there are mechanisms and I do believe there are ways of doing that. So there's a very good reason why we have to come to the aid of the consequences of the changes in the labour market.

The second good reason I think is the way the CCMA and the courts have, in my view, misunderstood what they were meant to do. I think in relation to the CCMA, a good example is the over-proceduralisation of disciplinary hearings, the over-proceduralisation itself when it conducts those hearings, where commissioners now think that they are judges and want their awards printed in law reports when what they are meant to do is produce a simple set of reasons and get on with it. That's just one example that needs to be attended to because it makes the CCMA inefficient. The second, probably the most recent case is that of Fry's Metals. In this decision, it's Numsa versus Fry's Metals, the labour appeal court came to the extraordinary conclusion that it was permissible for an employer to retrench workers who refused to accept new terms and conditions of employment. There is a fundamental conceptual structure to the Labour Relations Act and that's between interests and rights. If you have an interest, you sort it out through collective bargaining. Collective bargaining means you sort it out by strike if you can't agree. What Fry's Metals has done, it's said that it's a good reason to terminate or retrench somebody after having gone through the procedures, if the employees will not accept new terms and conditions of employment - in other words, new shift systems, indeed out-sourcing itself. These decisions are for me blatantly wrong decisions, and the only way you deal with blatantly wrong decisions when both the Labour Court and the Supreme Court of Appeal concur – and on top of that the Constitutional Court wouldn't even hear the matter, it requires everyone else to have a fair hearing but not us, not labour, when it seeks to appeal they just say "we will not hear the appeal," they won't even hear us to give us leave to appeal on the matter. Those need to be fixed up. I suppose my response is, let's get to it and let's fix up the LRA and while we're at it, let's actually take them at their word, and lets look at the issue of how we do regulate the individual employment relationship.

That's the analysis I went through in the main part of this paper – I looked at the individual employment relationship starting from hiring, training, promotion, demotion and dismissal. The conclusion I come to in the paper – and that's the controversial part of the paper – is that it's not constitutionally possible, in my view, to exclude small business from dismissal protection because

the most vulnerable workers are, very often, the workers of small businesses and small employers.

The second conclusion I come to is that you don't need to protect middle and top management. In other words, you don't need to give them dismissal protection, they can look after themselves contractually and indeed they do. We are wasting CCMA resources dealing with top and middle management with their complaints in the CCMA from public service, parastatals and elsewhere. Now interestingly enough, that is constitutionally possible because they are capable of looking after themselves.

I then started looking at the statutory unfair labour practice – not the constitutional unfair one but the statutory unfair labour practice – and I looked at the issue of recruitment and hiring and I thought to myself, it's not there, it is not one of the listed unfair labour practices. It is a labour practice but why should an employer be able to unfairly hire? I came to the conclusion, and it's a set of legal arguments which I will not bore you with, but very simply it's this: we protect unions through victimisation provision, we protect against discrimination through discrimination provisions and in the public service we protect corrupt and inept appointments – appointing people who are not capable of doing the job. That's as far as the law should go. You do not want to interfere with the operational personnel decisions of the employer other than to protect against discrimination, against victimisation and against corrupt appointments – appointing your brother, your sister, etc.

If you turned that logic then to promotion, which is what I did – I thought, well, if you say that an employer should not promote in a discriminatory way, should not promote in order to victimize a persons trade unions activities and the promotion shouldn't be corrupt, what else are we interfering with? Why are we giving middle management the right to challenge a promotion to say that they should have been promoted rather than someone else? It's never a problem for ordinary workers, for the people that require protection but somehow or another, we have this provision in the unfair labour practice dealing with promotion. It's not very different from appointment and hiring. So I asked myself, why are we protecting something that we don't need to protect? That seems to me gratuitous regulation – regulation that has no protective purpose at all other than making it damn difficult to manage the public service and we all want the public service to be managed properly. Protect the workers, protect against discrimination, protect against corruption – but why are we interfering with decisions as to who should be the person to be promoted or not, outside of that category.

Then I looked at demotion and I said, "What is demotion? Why is it an unfair labour practice?" because contractually you can't demote somebody without their consent. If you gave a worker an alternative of demotion rather than dismissal and the employee refused to be demoted, then that could be challenged in the dismissal., The question then is, was the demotion a reasonable alternative to dismissal, part of the ordinary way in which the commissioners and the labour

courts deal with the matter. Then you go through each one of the unfair labour practices and it boils down to basically, I asked myself, “why are these things here?” and then I reflected on the history.

This is the history: in 1979, Weihan introduced the unfair labour practice. The definition tells you everything. An unfair labour practice is a labour practice that the industrial court thinks is unfair. Why was it there? Go and have a look at the commission report. They feared by extending the Industrial Conciliation Act or what was then called the Labour Relation Act to black workers, remember they had been excluded from the LRA by a racial definition of employee which excluded black workers, that black workers would then replace whites. They would lose their jobs because black labour, being cheap labour, would immediately compete unfairly with white workers. It only has to be stated for you to realise what a ridiculous idea.

What did we do? In 1979 and 1980, as a bunch of labour lawyers and trade unionists, we seized on this extraordinary definition and we built up a jurisprudence on the right to strike, a jurisprudence on the duty to bargain, a jurisprudence on unfair dismissal, a jurisprudence on anything and everything that hit us. Certainly for the first seven or eight years of the unfair labour practice, the links between the labour lawyers and the trade unionists were enormously close. We managed the jurisprudence.

But by the time it comes to 1994, its very adhoc and a strange jurisprudence. It deals with both individual employment relationships and collective bargaining relationships. How does the unfair labour practice get into the Constitution? It gets into the Constitution because the primarily white public service is terrified in the Constitutional negotiations that once you have a black government that they are all going to be dismissed and unfairly treated. So they argue for the unfair labour practice to come into the Constitution. That’s why it’s there. It is the oddest and the most extraordinary constitutional provision. There’s only one other country in the world that’s got it and that’s Malawi and they’ve got it because they copied us. We’ve got to worry about it because, as a labour lawyer, I’m very concerned about the autonomy of labour law, that’s what we fought for. And what we’ve done, is we’ve constitutionalised our labour law and I’m afraid I think we’ve lost our autonomy in that process. But that’s another debate and another story.

So what happens in 1995 when we work on the Labour Relations Act? We incorporate the collective unfair labour practices, we don’t call it unfair labour practices, we build it into the act. That’s the whole portfolio of organisational rights. So we took that and built it into the act. The right to strike we built into the act. We don’t talk about an unfair labour practice and whether a strike is legitimate or illegitimate, there’s only one question – do you follow the procedure on strike and if you do then your strike is lawful.

If you look at the LRA, it’s a collective statute. We were going to originally deal with the BCA and the LRA together. But that didn’t happen and we basically negotiated the LRA and we had a set

of transitional provisions which were just stuck at the back, saying when we deal with the Basic Conditions of Employment Act, we are going to come to the unfair labour practices dealing with promotion etc and what that was is a codification of rather obscure and strange judgments of the industrial courts in the previous era. We kept it as a holding operation pending proper consideration, proper thinking about what was needed there and not needed. That was a transitional provision, it was a holding provision. When the Basic Conditions of Employment Act came through, they didn't draw down the individual dismissal law as they should have, into the basic condition, and the drafters did not bring down the unfair labour practice. It just hung there as a transitional provision. In the 2002 amendments, they decided to bring it across, change a couple of words and now it's in the body of the statute.

This is an ill-conceived provision and it has never been subject to proper policy consideration and it has become a charter for middle and top management, primarily – I don't say all the unfair labour practices need to be given some affair – when we are failing to protect the most vulnerable: the informal, the marginal and the casual.

In a sense what my paper says, is let's open a debate about the unfair labour practices – does the working class need it? I know top and middle management want it but I don't think they need it and they should look after themselves contractually, and what we really should be doing is concentrating on the marginal, tightening up the issue of termination. Your point, Gwede, about you don't have to prove a good reason for operational requirements – well, that's not what the act says but that is how the courts are interpreting it and so what we've got to do is we've got to rewrite the act to make the courts do it. I also think there are institutional reforms we should engage in because these courts have not worked as they were meant to.