

The extension of collective agreements to non parties

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Abstract

There is a theme of majoritarianism running through the Labour Relations Act 66 of 1995 (LRA). Part of this theme is legislation that provides for the extension of collective agreements reached at sectoral level to non -parties. After due consideration of arguments for and against the extension of collective agreements, the conclusion is reached that the extension of collective agreements can potentially, under certain circumstances, increase unemployment and consequently inhibit the growth of small and medium sized firms. In the light of this possibility and with due regard to the stated objectives of the LRA, it is suggested that the legislation that makes provision for the extension of collective agreements to non –parties in section 32(g) of the LRA should be given a purposive interpretation. It is suggested that in giving effect to this provision the effects on the labour market of any proposed extension of a collective agreement must be considered, before extension by the Minister of Labour.

Key words: Collective agreements, Labour Relations Act (LRA), unfair discrimination, economic growth, tourism, SMMEs

Introduction

The LRA unashamedly encourages collective bargaining, especially at sectoral level in order to achieve its stated objectives.¹ These stated objectives include economic development and social justice. Economic development should not be confused with economic growth. Economic growth merely refers to increases in real gross domestic product (GDP) over time. It occurs when the total market value (after adjusting for the effects of inflation) of all final goods and services, produced within the borders of the country, has increased. Economic growth tells us absolutely nothing about life expectancy, literacy rates, poverty levels, unemployment or access to basic services. Economic development is a significantly broader concept. It explicitly recognises the human dimension and most development economists would argue that there is no development if economic growth is not accompanied by a reduction in poverty, decrease in unemployment, more equitable distribution of income,

¹ S 1 of the LRA provides: The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act which are-

- a) to give effect and to and regulate the fundamental rights conferred by section 27 of the Constitution;
- b) to give effect to the obligations incurred by the Republic as a member state of the International Labour Organisation;
- c) to provide a framework within which employees and their trade unions, employers and employers' organisations can –
 - i) collectively bargain to determine wages , terms and conditions of employment and other matters of mutual interest; and
 - ii) formulate industrial policy; and
- d) to promote-
 - i) orderly collective bargaining
 - ii) collective bargaining at sectoral level;
 - iii) employee participation in decision-making in the workplace; and
 - iv) the effective resolution of labour disputes."

increase in life expectancy, improved education, access to food, water, shelter, sanitation, health services, electricity, protection and basic services in general. The focus on human development can largely be credited to the work of Amartya Sen² who sees human development as a system which enhances the richness of human life rather than the richness of the economy in which the human beings live. In this regard economic development is a process whereby countries (societies) are transformed into a system in which human life is respected by all and everybody has the opportunity to achieve maximum self-esteem and self-actualisation. The objective is to create an enabling environment for people to enjoy long, healthy and creative lives. The process requires economic, social and political change. A development policy which embraces the above includes measures aimed at achieving industrial, agricultural, environmental and human development.

Certainly a system that creates barriers to entrepreneurship and employment opportunities cannot be said to promote economic development or social justice. In fact, such a system promotes inequality and discrimination and is consequently unconstitutional. In short a system that promotes centralised collective bargaining with the consequence of extension and imposition of collective agreements to non-parties, in certain circumstances, may possibly promote economic development and social justice for an elite group only, namely the employed. In a country such as South Africa which has been plagued by unemployment for decades, this smacks of inequality (the antithesis of social justice) and consequently discrimination.

It is the view of the authors that a centralised system of collective bargaining that promotes the extension of collective agreements in a manner that does not allow for sufficient flexibility for smaller enterprises to manoeuvre gives rise to an inflexible labour market that cannot respond adequately to market forces. This tends to stifle economic growth, increase unemployment and consequently compromise economic efficiency and social justice. The view that the restriction of the operation of market forces as a result of the extension of collective agreements in terms of section 32 of the LRA may potentially have a negative impact on the survival and creation of small and medium sized enterprises and consequently the rate of unemployment is put forward in this article.

This is of particular relevance to the hospitality industry as it is made up mostly of very small, micro and medium sized enterprises making up 90% of the sector, with very few large enterprises.³ Large establishments employ only 1.4% of the employees in the industry. Hospitality forms part of the tourist industry.⁴ Tourism is the fourth largest generator of Gross Domestic Product in South Africa and the hospitality industry makes up 67% of all tourism in South Africa,

In order to address this concern, suggestions regarding the interpretation and implementation of the provisions in the LRA which deal with the extension of collective agreements are put forward.

The purpose of this article is twofold: Firstly to highlight how various provisions of the LRA that encourage centralised or sectoral collective bargaining may potentially contribute to

² See United Nations Development Programme (UNDP), Development Reports, viewed 20 October 2013. Available at: <http://hdr.undp.org/en/humandev/>

³ Webster E et al 2012 "Working in the Hospitality Industry in Gauteng" Society, Work and Development (SWOP) Institute, South Africa: University of the Witwatersrand at 5.

⁴ Ibid 5.

unemployment; and secondly to make suggestions for the appropriate interpretation of the legislative provisions regarding the extension of collective agreements in order to accommodate the growth of small businesses and consequently promote economic efficiency and reduce unemployment.

Firstly the authors provide a brief summary of how the LRA encourages majoritarianism, which is the foundational basis for the extension of collective agreements. Thereafter, a brief exposition of theoretical economic models is undertaken. The purpose of this is to demonstrate that according to classical economic theory, artificially set wages that are set above the market equilibrium rate will result in unemployment. Having said this, the authors are acutely aware that these are merely theoretical arguments that are only one hundred per cent valid in perfectly competitive labour markets. Despite this, there must be some merit in these classical theories, to the extent that there is at least the potential for artificially set wages, set above the equilibrium rate, to contribute to unemployment. In addition if the predictions of theory are consistent with the empirical evidence then the theory can be considered to be a valid framework for analysis.

As can be expected there are arguments both in favour and against the extension of collective agreements. These arguments are considered and ultimately, the conclusion that the extension of collective agreements can potentially, under certain circumstances, increase unemployment is reached. In the light of this conclusion, it is suggested that section 32(g) should not be given a literal interpretation. In giving effect to this provision the effects on the labour market of any proposed extension of a collective agreement must be considered, before extension by the Minister of Labour.

2 A theme of majoritarianism in the LRA

The LRA has a theme of majoritarianism running through it. Consequently big unions and big business are favoured. This is conducive to a centralised or sectoral collective bargaining system. What follows is a short overview of some of the provisions in the LRA which favour big unions and big employers. The LRA provides unions with organisational rights, namely trade union representativeness,⁵ trade union access to the workplace,⁶ deduction of trade union subscription fees,⁷ trade union representatives,⁸ leave for trade union activities⁹ and disclosure of information.¹⁰ Only “representative trade unions” are entitled to access to these organisational rights. With regard to the organisational rights of the election of trade union representatives¹¹ and access to information ‘representative trade union’ “means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by the employer in a workplace”.¹² Regarding the other organisational rights the LRA does not stipulate what is meant by ‘representative trade

⁵ S 11.

⁶ S 12.

⁷ S 13.

⁸ S 14.

⁹ S 15

¹⁰ S 16.

¹¹ Commonly known as ‘shop stewards’.

¹² ‘Workplace’ is defined in s 213 as “...the place or places where the employees of an employer work. If an employer carries o or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.”

unions'. However section 21(8)(a)(i) of the LRA stipulates that in circumstances where there is an unresolved dispute concerning whether or not the registered trade union is a representative trade union, the commissioner "must seek to minimise the proliferation of trade union representation in a single workplace and, where possible, to encourage a system of a representative trade union in a workplace..."

Furthermore, in terms of section 18 of the LRA "an employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15." In short, a majority representative trade union and an employer can enter into a collective agreement which effectively results in depriving other unions of all the organisational rights. In this way, a majority representative trade union can ensure a monopoly at a workplace.

Agency shop¹³ and closed shop¹⁴ agreements also favour big employers and big trade unions. Since a closed shop obliges all employees at a workplace to be members of a particular union, and an agency shop obliges all employees to pay union subscription fees, irrespective of whether employees are members of the union or not, in both cases there is very little incentive to become a member of another union. In effect, these agreements create a quasi-monopoly for majority representative trade unions and ultimately may result in the prevention of other unions bargaining collectively with the employers who are party to these agreements.

The LRA provides for the voluntary creation of forums known as bargaining councils for collective bargaining at sectoral level by trade unions and employers organisations.¹⁵ The collective agreements concluded at the bargaining councils can be extended to non-parties provided certain requirements are met.¹⁶ Essentially the Minister of Labour must extend a collective agreement reached at a bargaining council to non-parties to the collective agreement who are in the registered scope and are identified in the request if the following criteria are met:

"i) one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favour of the extension; and

¹³ S 25 of the LRA provides that a registered trade union or two or more registered trade unions acting jointly, whose members are a majority of the employees employed by an employer in a workplace or by members of an employer's organisation in a sector and area in respect of which the agency shop applies," may conclude a collective agreement with an employer or an employer's organisation, known as agency shop agreement requiring the employer to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but who are eligible for membership thereof."

¹⁴ S 26 of the LRA provides that a registered trade union or two or more registered trade unions acting jointly, whose members are a majority of the employees employed by an employer in a workplace or by members of an employer's organisation in a sector and area in respect of which the agency shop applies "may conclude a collective agreement to be known as a closed shop agreement, requiring all employees covered by the agreement to be members of the trade union."

¹⁵ S 27.

¹⁶ S 32.

ii) one or more registered employers' organisations whose members employ the majority of the employees employed by the members of the employer's organisations that are party to the bargaining council vote in favour of the extension."¹⁷

iii) the collective agreement establishes and appoints an independent body to grant exemptions to non-parties. The collective agreement must set up criteria that are fair and promote the primary objectives of the LRA that the independent body must consider when considering an appeal from a non-party's application for exemption from the collective agreement.¹⁸ These provisions allow the bargaining council to exercise control over the procedure for exemption since the 'independent' body is obliged to apply the criteria provided for in the collective agreement when deciding on the appeal.

Finally, and most importantly, section 32(g) provides that the collective agreement may not be extended unless the Minister is satisfied that the "terms of the collective agreement do not discriminate against non-parties."

Bargaining council collective agreements usually contain provisions about terms and conditions of work, most importantly wages. In effect, collective agreements provide for the application of minimum wages. When these agreements are extended to non-parties, these non-parties are obliged by law, to implement these minimum wages as set out in the relevant collective agreement.

3 Theoretical Considerations

Theoretical economic models are often used to analyse the functioning of the labour market. In a perfectly competitive labour market the equilibrium wage rate (market-clearing wage) is determined by the intersection of the upward sloping supply of labour curve and the downward sloping demand for labour curve. At the intersection of the two curves the quantity of labour supplied by workers is exactly equal to the quantity of labour demanded by firms. There is neither excess demand nor excess supply. Classical economists refer to this level of employment as the full employment level since each and every worker who is willing to offer their labour, at the equilibrium wage rate, is employed.

In the absence of government intervention the forces of demand and supply will ensure equilibrium. An increase in the demand for labour, for example, will shift the demand for labour curve to the right. At the current wage rate this will lead to an excess demand for labour. Competing firms will bid up the price of labour (wage rate) until the quantity demanded is equal to the quantity supplied. Alternatively if the supply of labour increases the supply curve will shift to the right creating excess supply. Competition amongst workers will result in the equilibrium wage rate falling. But what would happen if the labour market was not perfectly competitive and there were impediments within the system that thwarted or prevented workers from competing amongst each other in an effort to reduce the excess supply of labour? Theoretically we would now have a case where the wage rate was higher than the market-clearing rate and this would translate directly into unemployment. The magnitude of this involuntary unemployment will depend on the wage elasticities of the demand for and supply of labour.

¹⁷ S 32(1) (a) and (b).

¹⁸ S 32 (f).

In practice there are at least three reasons why above-equilibrium wages may exist, namely efficiency wages, market power of labour unions and minimum wage laws. And in each of these cases the consequence is unemployment!

The efficiency wage theory offers one explanation for the presence of unemployment. According to this hypothesis firms will often pay workers a wage in excess of the equilibrium wage rate because labour productivity increases with the wage rate. The hypothesis assumes that workers' productivity depends positively on their wages. When the gains from this increase in productivity equal the costs of offering higher wages, this is the efficiency wage for firms. Note that when the going wage is higher than the equilibrium wage the effect is an increase in the quantity of labour supplied and reduction in the quantity of labour demanded. The result is a surplus of labour, or unemployment. Because the efficiency wage is above the market clearing wage it gives rise to unemployment.

Above-equilibrium wages can also be the result of trade union market power. When workers, in a particular market, are organised in a trade union, they can collectively act as a monopolistic supplier of labour. Wages often tend to be higher in labour markets dominated by trade unions, compared to more competitive markets, as a result of their market power. According to Mankiw and Taylor¹⁹, studies show that union workers earn about 10 to 20 per cent more than similar non-union workers. Once again the negotiated wage will be higher than wage rate that would have come about under perfect competition and the net theoretical result is unemployment.

Finally, minimum wage laws may also contribute to unemployment. If a minimum wage is set below the equilibrium wage rate then the consequences are trivial. At any wage rate below the equilibrium there will be excess demand and firms will simply bid the wage rate up until the market equilibrium is reached. If, however, the minimum wage rate is set above the market equilibrium then this will result in excess supply for labour resulting in unemployment and a decrease in output by the firms employing that particular type of labour. The magnitude of this involuntary unemployment will once again depend on the wage elasticities of the demand for and supply of labour. In addition if the minimum wage legislation is not effectively enforced the excess supply of labour may translate into minimum wage violation since there are workers out there who are prepared to work for less than the minimum wage.

4 Empirical Evidence

The issue of minimum wages (wage-setting) and the impact on employment is a controversial topic. There appears to be no clear-cut unambiguous answer. Although the theory, under perfect competition, suggests a potential increase in unemployment, when the wage is set above the market equilibrium, it should be noted that labour is not a homogeneous factor of production and consequently there are different markets for each respective type of labour. A model based on the assumption of perfect competition may therefore not be the most appropriate theoretical framework for analysis. Taking cognizance of the above a brief review of recent empirical evidence, regarding these issues in South Africa, will now be undertaken.

¹⁹NG Mankiw and MP Taylor *Economics - South African Edition* (2014), Cengage Learning, 381.

Bhorat *et al*²⁰ estimated the impact of minimum wages on employment, wages, and non-wage benefits in the agriculture sector in South Africa. Their results are consistent with the simple supply-demand theory which predicts that wage setting above the equilibrium level will result in unemployment. Their findings suggest a significant reduction in employment as a consequence of the introduction of a minimum wage law within the agriculture sector in South Africa. Their study also shows an increase in wages on average, no significant change in hours worked and a sharp rise in non-wage compliance.

Regarding the issue of minimum wage compliance, Bhorat *et al*²¹ present estimates of minimum wage violation in South Africa. The simple supply-demand model of the labour market suggests that if the minimum wage is set above the equilibrium rate this will lead to an excess supply of labour and consequently unemployment. In a flexible labour market competition amongst workers will result in wages falling until the market clears. In the case of minimum wages however, the only way for the market to “clear” is for workers to work “illegally” at a wage rate that is lower than the statutory minimum rate. Their study is consistent with the predictions of the theoretical model suggesting that 44 per cent of covered workers get paid wages below the statutory minimum, with an average shortfall of 35 per cent of the minimum wage. Wage violation is most prevalent in the forestry, security and farming sectors.

In a recent article Bhorat and Mayet²² focus their analysis on five non-agricultural sectors, namely wholesale and retail, domestic workers, forestry, taxi, and private security sectors in an attempt to establish whether minimum wage laws promote fair remuneration and social justice or whether these laws price workers out of the labour market consequently increasing unemployment? Their research suggests that the evidence is not unambiguously consistent with the standard economic theory. Contrary to the experience in agriculture, minimum wages in other sectors in South Africa have not had a significant negative effect on employment. What then are the advantages and disadvantages of wage-setting and the extension of collective agreements? Those who favour the extension of collective agreements attribute the following advantages to equal wages in an industrial sector and area.

- 1) Equal wages protect non-unionised employees who would otherwise be exploited.
- 2) Equal wages prevent the shift of production from the unionised sector to the non-unionised sector.
- 3) Equal wages take wages out of competition.

All the above stated perceived advantages of equal wages can be countered by the following:

²⁰ H Bhorat, R Kanbur and B Stanwix *Estimating the impact of minimum wages on employment, wages and non-wage benefits: the case of agriculture in South Africa* (2012) DPRU Working Paper 149 available at <http://www.dpru.uct.ac.za/?q=node/277>.

²¹ H Bhorat, R Kanbur N Mayet “Minimum wage violation in South Africa” (2012) *International Labour Review*, 151:277–287.

²² H Bhorat and N Mayet *The impact of sectoral minimum wage laws in South Africa* (2013) DPRU, University of Cape Town.

- 1) Equal wages inhibit economic growth and increase unemployment. Opponents of minimum wages argue that minimum wages give rise to an inflexible labour market that cannot respond adequately to market forces. This tends to thwart economic growth and increase unemployment.
- 2) Equal wages favour big firms at the expense of smaller ones which in turn inhibits the growth of SMMEs. The mandatory extension of collective bargaining agreements makes it difficult for smaller firms to compete against the bigger firms since they simply don't enjoy the economies of scale that are typical of larger firms. The practice also makes markets less competitive and contributes to oligopolistic and monopolistic structures that inhibit innovation, growth, and job creation. Governor Gill Marcus²³ claims that although collective bargaining may have contributed to labour peace in South Africa, it has also favoured big firms at the expense of smaller ones. This in turn has had an inhibiting effect on the growth of small and medium sized firms. As Gill Marcus states "We have not seen the dynamic growth of small and medium sized firms as one would have expected in a country at the level of development of South Africa."²⁴
- 3) Many critics argue that a developing country like South Africa simply cannot afford a sophisticated set of labour laws similar to those in developed countries. In their latest Country Report on South Africa the IMF²⁵ thoroughly researched the economic and social challenges currently facing South Africa. With regards to wage-setting they explicitly recommended that it is imperative "to stop extending negotiated wages to other firms that were not part of the bargaining process. While discontinuing this mandatory extension will be politically challenging, it would open the way to firm-level bargaining and facilitate wage outcomes that are conducive to employment gains."²⁶
- 4) Wage-setting and the extension thereof often gives rise to cost-push inflation. Increases in real wages²⁷ are easily justified if they are accompanied by concomitant increases in productivity. In reality, however, increases in minimum wages often bear no relation to increases in productivity at all and the increased costs are simply passed on to consumers. In South Africa real wage²⁸ growth has exceeded productivity growth, even during the 2008/2009 recession when South Africa experienced negative growth.
- 5) Opponents of minimum wages also contend that it is not the best way to combat poverty since it only affects the income of those in employment. The unemployed stay unemployed. Despite unprecedented growth in South Africa since 1994, there is no evidence that this growth trickled down to the poor and unemployed.

²³ G Marcus *Employment and the economics of job creation*, Speech for the 26th Annual Labour Law Conference, South African Reserve Bank, 31 July 2013. Available at: <http://www.resbank.co.za/Lists/Speeches/Attachments/379/Employment and the economics of job creation final.pdf>

²⁴ Marcus (2013) 8

²⁵ International Monetary Fund 2013, IMF Country Report No. 13/303 (South Africa), viewed 20 October 2013. Available at: <http://www.imf.org/external/pubs/ft/scr/2013/cr13303.pdf>

²⁶ IMF (2013) 51

²⁷ Real wages refer to money (nominal) wages that have been adjusted for inflation. The real wage therefore refers to the purchasing power of money wages.

²⁸ Real wage = W/P where W =nominal wage and P = inflation.

- 6) Firms tend to substitute capital for labour when real wages increase at a relatively faster rate than the real cost of capital (real interest rate²⁹). This substitution effect means that labour is being replaced by machines and other capital equipment in the production process. This phenomenon is referred to as the declining labour intensity of production or the increasing capital intensity of production. The ultimate effect is an increase in unemployment. In South Africa the real interest rate has been declining encouraging firms to substitute capital for labour. In addition real wages have been increasing, again encouraging firms to substitute capital for labour. The net result is a declining labour intensity of production and a higher rate of unemployment.
- 7) Finally the extension of collective agreements may result in unfair discrimination which will be discussed in detail in section 5 below.

Unemployment in South Africa – the current status

South Africa	Q2 April-June 2013	Q2 April-June 2013
	Official (strict) Definition (thousands)	Expanded Definition (thousands)
Population 15-64 years	33 352	33 352
Labour Force	18 444	21 696
Employed	13 721	13 721
Formal sector (Non-agricultural)	9 694	
Informal sector (Non-agricultural)	2 221	
Agriculture	712	
Private households	1 093	
Unemployed	4 723	7 976
Not economically active	14 908	11 656
Discouraged work-seekers	2 365	
Other(not economically active)	12 543	
Rates (%)		
Unemployment rate	25.6	36.8
Employed / population ratio (Absorption)	41.1	41.1
Labour force participation rate	55.3	65.1

Source: Statistics South Africa, Statistical Release P0211, Quarterly Labour Survey, Quarter 2.

It is important to note that there are two distinct definitions of unemployment that are currently being used in South Africa. The official or strict definition excludes discouraged work-seekers³⁰ while the expanded definition includes discouraged work-seekers. In the

²⁹ The real interest rate is approximately equal to the nominal interest rate minus the inflation rate.

³⁰ According to Statistics South Africa a discouraged work-seeker is a person who was not employed during the reference period, wanted to work, was available to work/start a business but did not take active steps to find work during the last four weeks, provided that the main reason given for not seeking work was any of the following: no jobs available in the area; unable to find work requiring his/her skills; lost hope of finding any job

table above the official unemployment rate during Q2: 2013 (April 2013 – June 2013) was estimated to be equal to 25.6 per cent. Using the expanded definition, however, the unemployment rate was significantly higher at 36.8 per cent. According to the official definition there were 4.7 million people unemployed whereas the expanded definition suggests that there were 7.97 million people unemployed. This is significant since the level of unemployment was 68.86 per cent higher using the expanded definition. This has serious implications when attempting to measure the impact of the extension of collective agreements on SMMEs. If for example small firms lay off workers as a result of increasing labour costs and these workers end up in the pool of 'discouraged work-seekers' then a study using the official definition of unemployment will come to the conclusion that the extension had little or no effect on unemployment whereas a researcher using the expanded definition will arrive at the exact opposite conclusion.

Regarding the trends in unemployment it is important to note that the highest level of employment occurred in the 4th quarter of 2008 at the same time that South Africa started going into recession as a result of the effects of global economic crisis. During Q4:2008 the estimated number of employed was 14.02 million and the unemployment rate was 21 per cent. Although South Africa was only in recession for nine months, employment continued falling for more than eighteen months reaching a record low of 12.97 million in Q3:2010. Over one million jobs were lost and despite three years of positive growth in real GDP, with employment currently at 13.7 million, we still have not managed to close the gap. As indicated previously if the expanded definition of unemployment is used then the situation is significantly worse. From Q3:2008 to Q2:2013 the number of discouraged work-seekers increased from 1.175 million to 2.365 million. This represents an increase of 101.28 per cent over the five year period.

The table below shows the composition of the unemployed using the strict or official definition of unemployment. Although the national unemployment rate is 25.6 per cent the unemployment rate is much higher amongst Blacks (29.1%) and women (28.3%). Of the 4.7 million unemployed more than 4 million are Black/African. Also of significance is the fact the age group (15-34 years) represents more than 3.3 million of the total 4.7 million unemployed as at Q2:2013.

		Q2: Apr - Jun 2013	
		Official definition	Official definition
South Africa		Unemployment Rate (per cent)	Unemployed (thousands)
	National	25.6	4 723
Gender	Women	28.3	2 378
	Men	23.4	2 346
Race	Black/African	29.1	4 025
	Coloured	25.1	495
	Indian/Asian	13.4	79
	White	6.1	124
Age group	15-24 yrs		1 410
	25-34 yrs		1 920
	35-44 yrs		944
	45-54 yrs		352
	55-64 yrs		97
	Total		4 723

Source: Statistics South Africa, Statistical Release P0211, Quarterly Labour Survey, Quarter 2.

5. The extension of collective agreements may result in unfair discrimination

The cornerstone of anti-discrimination legislation in South Africa takes the form of what is commonly known as the “equality clause” contained in section 9 of the Constitution:

Section 9(4) of the Constitution reads:

“No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.”

Section 233 of the Constitution mandates courts to interpret all legislation in accordance with international standards. Section 39 of the Constitution contains a constitutional mandate to courts to interpret the rights contained in the Bill of Rights³¹ in the Constitution in accordance with international law. International Labour Organisation (hereinafter “ILO”) Convention 111 on Discrimination in Employment ratified by parliament on 5 March 1997, requires member states to enact legislation “to promote equality of opportunity and treatment in respect of

³¹ S 7(1) of the Constitution proclaims the Bill of Rights as the cornerstone of South African democracy.

employment and occupation with a view to eliminating any discrimination in respect thereof.”³²

In the light of the fact that as discussed above, the extension of collective agreements may under certain circumstances inhibit the creation of employment, it could be argued that such extension causes disadvantage not only to non-parties but also to the unemployed. The unemployed in South Africa are mostly, Black, mostly under age of and mostly women. Consequently, this constitutes indirect discrimination³³ on the basis of race, sex and age.

South Africa is obliged to enact legislation “to promote equality of opportunity and treatment in respect of employment and occupation with a view to eliminating any discrimination in respect thereof” in terms of international law.³⁴ Consequently, the interpretation of legislation in a manner that inhibits and limits aforementioned, runs contrary not only to South Africa’s international law obligations but also to the constitutional mandate regarding how courts must interpret legislation in terms of section 39 and 233 of the Constitution. In addition, the extension of collective agreements that discriminate against a certain group of people is not only contrary to the equality clause itself but is also contrary to section 32 of the LRA itself. In short therefore, it is not the provisions of the LRA which allow for the extension of collective agreements which are at issue, but the manner in which they have been interpreted and implemented, specifically section 32(g).

The judiciary’s insistence that the provisions of the LRA be given a purposive interpretation in line with the stated objectives of the LRA³⁵ serves to add further impetus to the constitutional and international law mandates discussed above.³⁶ In short, the extension of a collective agreement by the Minister which results in unemployment, not only runs contrary to the stated purposes of the LRA, but may also constitute an act of unfair discrimination contrary to the terms of the Constitution’s Equality clause as well as a breach of international law.

The LRA mandates a purposive interpretation of its provisions: Section 3(a) provides:

“Any person applying this Act must interpret its provisions to give effect to its primary objects.”

³² Arts 2-3.

³³ S 9(3) and (4) of the Constitution and s 6(1) of the Employment Equity Act 55 of 1998 prohibit both direct and indirect discrimination. Indirect discrimination recognises that where the application of a particular criterion in certain action which may appear to be neutral and non-discriminatory results in discrimination against a certain group of persons, this constitutes indirect discrimination. See *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC) par 32 and *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* (1998) 19 ILJ 285 (LC) 292.

³⁴ ILO Convention on Discrimination (Employment and Occupation) 1958 (No 111).

³⁵ See *Chirwa v Transnet Ltd* [2008] 2 BLLR 97 (CC) par 10 where the Constitutional Court stated: “The objects of the LRA are not just textual aides to be employed where the language is ambiguous. This is apparent from the interpretive injunction in section 3 of the LRA which requires anyone applying the LRA to give effect to its primary objectives and the constitution. The primary objectives of the LRA must inform the interpretative process and the provisions of the LRA must be read in the light of its objectives. Thus, where a provision of the LRA is capable of more than one plausible interpretation, one which advances the objectives of the LRA and the other which does not, a court must prefer the one which will effectuate the primary objectives of the LRA.”

³⁶ In *Ceramic Industries Ltd v NCBAWU* [1997] 6 BLLR 697 (LAC) 701 it was held that the LRA must be interpreted “to give effect to its primary objectives and in conformity with the Constitution and South Africa’s public international law obligations.”

Furthermore, the Labour Appeal Court, in giving meaning to “purposive approach” explained:³⁷

“A purposive approach is not synonymous with a liberal or extensive interpretation of the Act. Depending on the proper purpose of the Act, a particular section may have to be interpreted restrictively rather than extensively...”

With regard to the Act’s stated purpose of advancing economic development, the court held that the court must take into account:

“not only the rights of employees and employers...but also, importantly, the interests of the public at large and... the effect on the national economy.”

An interpretation of section 32 (g) that takes into account the effect of the extension of a collective agreement on non-parties, the public at large (including the unemployed) as well as the national economy, would be in line with the meaning accorded to “purposive approach” by the Labour Appeal Court. It is our view that the Minister of Labour, in adhering to section 32 (g) of the LRA which provides that a collective agreement may not be extended unless the Minister is satisfied that the “terms of the collective agreement do not discriminate against non- parties,” must consider very carefully, the full effect of such extension before extending it. It is submitted that in the past, in extending collective agreements, the Minister has given due consideration to the requirement contained in section 32 (g) simply by having due regard to the wording of the collective agreement itself. In other words, the provision has been given a literal interpretation in the sense that if the terms or wording of the collective agreement do not discriminate against non- parties, the collective agreement will satisfy the requirement contained in section 32 (g). It is our view, that in order to give a purposive interpretation to this provision, as opposed to a literal interpretation, it is not only the terms of the agreement itself that must not discriminate against non-parties, but the effect of the application of the terms of the agreement to non-parties must also be considered. Only in this way can the provision be given a purposive interpretation. In *Equity Aviation Services (Pty) Ltd v SATAWU & others*³⁸ the Labour Appeal Court, with reference to the appropriate interpretation of the provisions of the LRA, explained the reasons why a purposive interpretation to the provisions of the LRA must be preferred to a literal interpretation, and differentiated between a “purposive interpretation” and a literal interpretation as follows:

“Unlike those cases in which the literal theory of interpretation applies, a person applying the provisions of the LRA need not first find that the language of the statute is not clear or is ambiguous or that giving provisions of the LRA the ordinary or natural meaning will lead to an absurdity before he can interpret provisions of the LRA in such a way as to give effect to the primary objects of the LRA. In my view the effect of section 3 of the LRA is that whenever one seeks to interpret any provision(s) of the LRA, one is required to always give effect to the primary objects of the LRA and to always give an interpretation that will also be in compliance with the Constitution and with public international law obligations of the Republic. This does not mean that one disregards the language chosen by the Legislature to formulate the statutory provision. However, it does mean, in my view, that where adherence to the literal meaning of the statutory provision would not give effect to or promote the

³⁷ Per Myburgh JP in *Business SA v COSATU* [1997] 5 BLLR f11 (LAC) 516.

³⁸ [2009] 10 BLLR 933 (LAC) par 40.

purpose or object of the provision and there is another meaning or interpretation that can be given to the provision which would promote , or give effect, to the purpose of the statutory provision, effect must be given to the interpretation that gives effect to the purpose of the provision even if this means departing from the ordinary or grammatical meaning of the words or provision.”

6 Conclusion

Recently, there has been an insistence on the application of the concept of majoritarianism as embodied in sections 32 (2) and (3) of the LRA by the Minister of Labour in exercising her prerogative to extend a collective agreement to non- parties.³⁹ However, there has yet to be a challenge in court based on the contention that a collective agreement sought to be extended to non-parties discriminates against non-parties as a consequence of the practical effect of such extension. Section 32(g) of the LRA should be given a purposive, and not a literal interpretation in order to advance the primary objectives of the LRA of economic development and social justice. A failure to do so runs contrary to the provisions of the LRA, case law, the Constitution and international law which South Africa is bound by. In order to assist the Minister of Labour in ascertaining the potential practical effects of the extension of a particular collective agreement to non-parties, a code that sets out criteria and methods for the determination and assessment of these effects should be drafted. In this regard it is pertinent to reflect on the advice of the IMF:⁴⁰ “It is important to stop extending negotiated wages to other firms that were not part of the bargaining process. While discontinuing this mandatory extension will be politically challenging, it would open the way to firm-level bargaining and facilitate wage outcomes that are conducive to employment gains.”

³⁹ *National Employers Association of South Africa and others v Minister of Labour and others* 2012 33 ILJ 929 (LC); [2012] 2 BLLR 198 (LC).

⁴⁰ International Monetary Fund 2013, IMF Country Report No. 13/303 (South Africa), viewed 20 October 2013 51. Available at: <http://www.imf.org/external/pubs/ft/scr/2013/cr13303.pdf>