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Labour Relations Act (LRA)

Submission by the Free Market Foundation
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This submission is in two sections, the first of which deals with general principles of law and economics and the second of which deals with specific proposals.

1. General Principles

The discourse on labour law and policy tends to focus on details at the expense of basic truths. Arguably, the only "law" of economics that is incontestable is that "there ain't no such thing as a free lunch" (TANSTAAFL). The implication of this law is of critical importance in South Africa since it is seldom acknowledged, especially in the context of labour. An inescapable fact is that all benefits have costs and that the benefit of improved working conditions, wages and job security is achieved by having fewer jobs, less investment, lower growth, substitution of technology for labour, and worse conditions for all non-formal employment. President Zuma has declared job creation as the leading national priority. Economic theory and the world's experience suggest that all the jobs he envisages can be created with relative ease and certainty. The challenge is not how to increase employment, but whether the government is willing politically to implement measures that will do so.

The measures necessary to increase employment are mercifully straightforward yet lamentably difficult to achieve politically. Laws and policies that increase the cost, risk and difficulty of employing people, as the proposed measures do, necessarily have benefits for a privileged few at the expense of the unemployed and prosperity in general.

Given the priority of job creation, our proposal is that the existing measures should not be considered for implementation in isolation, but that the government should undertake a comprehensive review of laws and policies, and retain only those that will reduce unemployment immediately and improve working conditions, incomes and job security by virtue of increased demand for labour rather than draconian legislation.

Increased demand for labour, namely conditions that promote capital formation, skills, and the desire for hiring more employees, is the only sustainable means of achieving two otherwise irreconcilable objectives: more jobs and improved working conditions. In a static or low growth economy, one of these can be achieved only at the expense of the other and both can be achieved only under conditions of economic prosperity.

It is therefore recommended that the envisaged measures not be proceeded with. Instead they should be included in a comprehensive response to the President's call for "jobs, jobs, jobs". It is recommended that the government include in such a comprehensive policy review, not only all existing and proposed labour law and policy, but all other measures that are of direct relevance. Such other measures include the proposal repeated by the President in his two State of the Nation addresses, by Minister Ebrahim Patel and others, that there should be a review of laws and policies impacting small business so that it is easier for small business to operate and prosper in general and so that small businesses create more jobs in particular. Comprehensive review of measures to increase employment should consider all disincentives to savings and investment, both by local and foreign investors.

There are two broad categories of policy available to government if it wants to create jobs. The first is to discontinue measures that discourage and penalise employment, and the second is to implement new measures that encourage and reward employment, including self-employment.

There are various provisions in this Bill on which no comment is made because they are regarded as positive or of no significant consequence. Comment has been confined to issues of concern.

2. Labour Relations Act (LRA)

Clause 5 (115(2A)(k) in Act): The right to representation is regarded jurisprudentially as a fundamental right. It is provided for in our Bill of Rights (Section 35(3) Criminal Proceedings).

There are important philosophical and practical reasons for never curtailing the right to representation. The philosophical principle is a matter of natural justice and due process, namely that people should be free to be represented by whomever they regard as the most competent person to represent them in order to protect their rights effectively. This right should be limited only under abnormal conditions such as somebody being represented in proceedings by a person who has no knowledge of prescribed formalities. However, even in such cases, there must be a substantial onus on whoever wants to deny the right to representation in such cases, simply because people have the right to represent themselves regardless of knowledge or competence.

As a practical matter in labour relations, the denial of the right to representation means that people who are unable to represent themselves satisfactorily, which could be due to a multiplicity of reasons, will be denied a fundamental right to their rights being protected effectively. An employer or employee who is eloquent, knowledgeable about the law, and familiar with proceedings will be disproportionately advantaged over an adversary who is not. This provision would have the undesirable effect of victimising the weak and protecting the strong. That will be its effect in virtually every case. It is true by definition that people who want to be represented are likely to be those who need it most, and the denial of their rights arbitrarily or whimsically by whoever a presiding officer happens to be, should not be considered.

It should always be remembered that presiding officers are human and they may in the exercise of such open-ended discretion exercise it for all sorts of inappropriate reasons, which could be as trivial as being in a hurry for personal reasons or as disturbing as having a personal axe to grind with one of the parties.

Power could also be exercised for inappropriate ideological reasons such as being biased in favour of employers or employees due to a predilection for capitalism or socialism.

Clause 5.2 (115(2A)(kA) in Act): This amendment is appropriate but should be amplified allowing for a party to be represented ("…*for not attending* ***or being represented at*** *those proceedings...*").

We hope that the case for this addition speaks for itself and does not need to be motivated.

There may, of course, be many reasons why someone is not present in person. They may be indisposed, or may know in advance that a postponement is anticipated.

Clause 13 (186 in Act): This amendment is an example of bad law and inconsistent with the rule of law for two reasons, firstly that it renders a perfectly clear and objective contract vague and unpredictable, and secondly that the clause itself lacks legal certainty and objectivity. A requirement of the rule of law is that people know with relative certainty in advance what their rights and obligations are. This provision provides for retroactive determination of rights and obligations. For these reasons the proposal is probably unconstitutional.

Apart from jurisprudential problems with this clause, the practical implications should be considered. If an employer has someone on a fixed term contract and behaves in a positive way towards that employee by being encouraging and congenial, the employee may get the impression that the employment will be continued. This clause will needlessly inject negativity into employment relations. The simple and obvious way for an employer to respond to it will be to make it clear to employees that they are not wanted. The clause will have a counter-productive impact on labour relations. It is better for all concerned if they know where they stand in law and not be induced into playing games with each other. What they agree to should be respected and upheld. That is a core element of good law.

Quite apart from these considerations, the clause will inevitably result in increased litigation, demands on the CCMA, wasted financial and human resources and fewer jobs.

Clause 13.3 (186(2) in Act): This proposal is superfluous on one hand and inappropriate on the other. Firstly, labour relations within a sub-contracting entity are fully and adequately subject to existing labour law. Secondly, to elevate disputes from a sub-contractor to a principal contractor, places them in a completely inappropriate context. Principal contractors typically have no knowledge regarding, and have nothing to do with, labour relations of sub-contractors. This provision would plunge labour law and practice into needless and wasteful confusion and duplication. The provision should be scrapped (or suspended pending the comprehensive review suggested above).

Clause 16 (191 in Act): This provision may be unconstitutional under, for instance, Section 32, which entitles everyone to fair and reasonable administrative action. It is, in any event, undesirable. Its effect is to force parties to be fully prepared for arbitrations regardless of whether they are likely to be suspended or postponed, or regardless of how they proceed.

The problem here is typical of what happens when quasi-courts are created in the executive rather than remaining vested in the judiciary; that is where the rule of law requirement of a separation of powers is violated. Dispute resolution (judicial) proceedings should occur, in accordance with natural justice and due process, in ways that are practical and reasonable for all concerned including the parties and the institution itself. Excessive human and material costs should be avoided. The provision should be scrapped (or suspended pending the comprehensive review suggested above).

Clause 20 (200B in Act): This proposal needlessly curtails freedom of contract and creates a major disincentive to create jobs. It is therefore in direct conflict with the national priority of job creation. As with all benefits, there are costs. The cost here is that people will be employed "permanently" on less satisfactory terms than if employers have the discretion of offering fixed term employment. In other words, the necessary consequence of this section will be to reduce employee incomes and other conditions of employment, on one hand, and to reduce employment opportunities on the other.

Furthermore, creating a reverse onus and introducing legal uncertainly and retroactivity are a violation of the rule of law. Legal uncertainty is *per se* retroactivity, which, apart from being bad law, needlessly increases litigation, cost, risk, waste and unemployment.

The provision should be scrapped (or suspended pending the comprehensive review suggested above).

Clause 21(200C in Act): As stated above, the law should govern labour relations between parties to a contract and only those parties, namely employers and employees. It is wrong in principle and in law to subject people who are not parties to a contract to the terms of that contract and to disputes under it.

This Bill is infused with the notion that employment conditions applicable to sub-contractors, labour brokers, and others, should apply to "client companies". This is an extremely bad idea from all perspectives: law, economics and national interest.

Consider a commonplace example such as the government undertaking the development of Koega. The government enters into many contracts with large corporations. This notion would have it suddenly engaged in the labour relations of every one of those contractors. It gets worse. Each contractor necessarily engages the services of hundreds of sub-contractors in a complex pattern or hierarchy, the details of which are not and cannot be known at higher levels. Sub-contractors are essential simply because of the types of expertise required. There are electrical contractors, transport operators, caterers, security companies, professional engineers, surveyors, and so on. Each of these is fully subject to existing laws governing labour relations, and that is where the matter should end. The full administrative, economic and jurisprudential implications of involving entities at higher levels with labour relations at lower levels cannot be anticipated. In particular, the incentive effects on all concerned to operate in sub-optimal ways should be appreciated. The unavoidable impact of this notion will be that people avoid employment as far as possible and set about convoluted stratagems to protect themselves.

This diversion and subversion of human and material resources is called "rent seeking" in economics. It is a manifestation of pure economic waste, and a cause of economic distortion and inefficiency.

One of the most serious consequences will be a massive disincentive to use small and independent operators as sub-contractors. The State President and various Ministers have declared government policy to be to promote small business as an end in itself and as a means of job creation. Provisions such as this are in conspicuous conflict with national goals and should therefore be removed from consideration or addressed in the comprehensive review suggested above.

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