Comments on the Labour Relations Amendment Bill and the Basic Conditions of Employment Amendment Bill furnished by Solidarity Trade Union

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1. Introduction

1.1 These comments are furnished by Solidarity Trade Union ("Solidarity") following the written invitation for comment on the proposed amendments to the Labour Relations Act ("the LRA") and the Basic Conditions of Employment Act ("the BCEA"). The aforesaid bills will hereinafter collectively be referred to as "the Bills".

1.2. Solidarity is one of the oldest trade unions in South Africa. Its origins date back to 1902 and the Witwatersrand mines. Since its inception, Solidarity – formerly the Mine Workers Union – has been closely linked to the course of South African history. In the 1990s a number of other trade unions, including the South African Workers Union joined the Mine Workers Union and the trade union's name was changed, first to MWU-Solidarity and subsequently to Solidarity.

1.3. Solidarity has members in virtually every industry in South Africa. It also has members in a vast number of companies. The main industries in which Solidarity is organised are metal and engineering, mining, the electrical industry, telecommunications, the chemical industry, agriculture and general industries, including tertiary institutions, aviation and other specialised areas. Solidarity also has a significant number of members in the Temporary Employment Services industry.

1.4. Solidarity is a trade union in the christian democratic trade union tradition. The organisation supports and actively promotes, among other things, the rights of workers and trade unions; the supremacy of the Constitution and its founding principles; a capitalist economy and the free market; the rights of minority groups; and limited government.

1.5. Solidarity does not support any political party. The organisation is committed to the future of South Africa and firmly believes that the country belongs to all its residents. As such, the trade union supports and promotes debate with all political stakeholders and has no affiliations with any political party.

1.6. Solidarity would be pleased to make verbal representations to the Honourable Portfolio Committee on Labour at the date of the public hearings to be conducted on a future date or when otherwise requested.

2. Relevant policy considerations

2.1. Consideration and implementation of the relevant sections of the Constitution of the Republic of South Africa[1] is regarded as paramount and non-negotiable.

2.2. Solidarity is in favour of attempts to activate legislation whereby the rights of workers are protected and exploitation and abuse of workers are stamped out. At the same time consideration should be paid to the realities and importance of various relevant factors including:

2.2.1 micro- and macroeconomic principles;

2.2.2 the importance of sustainable investor relations, particularly with foreign investors as investments are of vital importance to *inter alia* support our currency valuation;

2.2.3 the sustainability of full-scale economic growth, job creation and the fight against poverty within the Republic of South Africa;

2.2.4 the envious protection of constitutionally entrenched rights of our citizens;

2.2.5 the accountability of national government in respect of balancing competing rights of citizens within the Republic of South Africa.

3. Introductory remarks regarding the Bills

3.1 During February 2011, Solidarity furnished the Portfolio Committee on Labour with extensive comments on the proposed four bills put forward towards the end of 2010. Various other organisations also furnished the committee with comments on the proposed bills.

[1] Act No. 106 of 1996 (as amended).

3.2 Solidarity commends the committee on reacting positively to the critique advanced by various parties on the previous four bills by retracting and reworking the same.

3.3 A point of concern is that the latest bills put forward by Parliament for comment, have not been subjected to a similar assessment as was done by UCT on the previous bills put forward. This is worrisome, because we deem such an impact assessment as a necessity when bills of this nature are tabled. Having said this, we recommend that these bills still be subjected to a similar process that gave rise to the regulatory impact assessment document on the previous bills furnished by UCT.

4. Method of commentary

The aim of this document is to focus on those proposed amendments in the Bills which we deem to be worrisome and warranting further attention.

5. Comments on the proposed amendments to the LRA

5.1 Amendment of section 64 of Act 66 of 1995

A careful balance needs to be struck between the constitutionally enshrined right to strike[2] and the adverse effect that strikes have had on the country's economy in the recent past. Having said this, the right to strike remains an important right and an indispensable bargaining tool for trade unions. As such, we express our concern that these amendments might prejudice trade unions when it comes to exercising the right to strike.

5.2 Amendment of section 65 of Act 66 of 1995

The proposed amendment of section 65 (c), aimed at further limiting the right to strike in circumstances where the issue in dispute is one that could be referred to arbitration or to the Labour Court in terms of any employment law besides the LRA, is of concern. Again, the right to resort to strike action is an important tool for trade unions to balance the relationship between management and the workforce. This further proposed limitation should be revisited.

[2] Sec 23(1)(c) of the Constitution.

5.3 Amendment of section 111 of Act 66 of 1995

The proposed insertion of subsection 5, to include that an appeal in terms of this section against the decision by the registrar to de-register a trade union in terms of section 106 does not suspend the operation of the decision, is extremely worrisome.

Article 4 of the Freedom of Association and the Right to Organise Convention, 1948 (no 87) states that *"workers and employers organisations shall not be liable to be dissolved or suspended by administrative authority*". This convention has been ratified by South Africa and as such government must take into account the contents thereof in terms of sections 232 and 233 of the Constitution.

In addition to the above, the Committee for Freedom of Association of the ILO has on numerous occasions, while dealing with international cases, laid down the following principles:

5.3.1 Dissolution or suspension

- *"Measures of suspension or dissolution by the administrative authority constitute serious infringements of the principles of freedom of association."*[3]

- *"The administrative dissolution of trade union organizations constitutes a clear violation of Article 4 of Convention No. 87."* [4]

5.3.2 Cancellation of registration or trade union status

- *"The Committee has emphasized that the cancellation of registration of an organization by the registrar of trade unions or their removal from the register is tantamount to the dissolution of that organization by administrative authority."*[5]

[3] 1996 Digest, para. 664; 302nd Report, Case No. 1849, para. 209; 304th Report, Case No. 1850, para. 214; 325th Report, Case No. 2090, para. 166; 327th Report, Case No. 1581, para. 110; 329th Report, Case No. 2181, para. 760; and 338th Report, Case No. 2364, para. 979.[3]

[4] 1996 Digest, para. 665; 304th Report, Case No. 1850, para. 214; 305th Report, Case No. 1893, para. 459; and 324th Report, Case No. 1880, para. 857

[5] 1996 Digest, para. 669; 318th Report, Case No. 2006, para. 348; 320th Report, Case No. 1953, para. 120; 323rd Report, Case No. 2075, para. 518; 327th Report, Case No. 2098, para. 759; 329th Report, Case No. 2181, para. 760; and 338th Report, Case No. 2364, para. 979.

5.3.3 Dissolution through legal measures

- *"Dissolution by the executive branch of the government pursuant to a law conferring full powers, or acting in the exercise of legislative functions, like dissolution by virtue of administrative powers, does not ensure the right of defence which normal judicial procedure alone can guarantee and which the Committee considers essential."*[6]

- *"Noting that under a legal provision, the registration of existing trade unions was cancelled, the Committee considered that it is essential that any dissolution of workers' or employers' organizations should be carried out by the judicial authorities, which alone can guarantee the rights of defence. This principle, the Committee has pointed out, is equally applicable when such measures of dissolution are taken even during an emergency situation."*[7]

5.3.4 Judicial interference

- *"The Committee considers that the dissolution of trade union organizations is a measure which should only occur in extremely serious cases; such dissolutions should only happen following a judicial decision so that the rights of defence are fully guaranteed".*[8]

- *"The suspension of the legal personality of trade union organizations represents a serious restriction on trade union rights and in matters of this nature the rights of defence can only be fully guaranteed through due process of law."*[9]

From the above it is clear that this proposed amendment falls foul of international law and should thus be revised.

[6] 1996 Digest, para. 675; and 302nd Report, Case No. 1849, para. 209.
[7] 1996 Digest, para. 676.
[8] 1996 Report, para. 666; 315th Report, Case No. 1935, para. 22; 327th Report, Case No. 1581, para. 110; and 329th Report, Case No. 2181, para. 760.
[9] See the 1996 Digest, para. 678.

5.4 Amendment of section 144 of Act 66 of 1995

The inclusion of the provision that an award or ruling may be varied or rescinded if there is good cause shown, is a positive step. We do however indicate that this amendment might lead to an increase in review applications in terms of section 145 of the LRA in circumstances where the term “if good cause is shown” is not given content. We suggest that an effort be made to provide guidelines to commissioners as to what circumstances will be regarded as constituting “good cause”.

5.5 Amendment of section 158 of Act 66 of 1995

The term “exceptional circumstances”, as contained in the proposed section (1B) might be problematic and will need to be given content.

5.6 Amendment of section 188A of Act 66 of 1995

Our comments on this proposed amendment are not aimed at dealing with the contents thereof, but is rather at suggesting that the legislator include a provision that an employee, in the absence of a collective agreement, may also request a council, an accredited agency or the commission to appoint and arbitrator to conduct an inquiry into allegations about the conduct or capacity of that employee.

With this suggestion we hope to give employees better access to the benefit of a pre-dismissal inquiry. The LRA currently provides for an employer to be able to file a request for a pre-dismissal arbitration. This is often not done because it is not in the interest of an employer who is set on dismissing an employee. This state of affairs is detrimental to employees who could have benefited from a pre-dismissal arbitration award in their favour.

5.7 Insertion of section 188B in Act 66 of 1995

An immediate concern with this proposed provision is that no indication of what the amount will be which is to be determined by the Minister by notice in the Gazette. It is unclear at which level of employee this proposed provision is aimed at. In this regard we suggest that clarity be provided to all stakeholders on the envisaged amount or level to be determined.

A further concern that we have about this provision is that it may quite possibly fall foul of the provisions of Section 195(1) (d) of the Constitution of South Africa, stating as follows:

"195 (1) Public administration must be governed by the democratic values and principals enshrined in the Constitution, including the following principles:
a) …

b) …

c) …

d) *Services must be provided impartially, fairly, equitably and without bias*"

Given the above, it is our suggestion that this provision be retracted and reworked with the input of all stakeholders before being included in an amendment bill.

5.8 Amendment of section 198 of Act 66 of 1995

Solidarity commends government for its proclaimed goal of ensuring that workers' right to fair labour practices is protected and decent work for all is created. As a trade union, our first and foremost focus is the protection of the rights of our members and as such we share this goal. With this in mind, legal intervention with the current section 198 of the LRA is warranted as the same would contribute to protecting workers' rights in the TES. The following should be however be kept in mind:

Indications in the recent past have been that the number of permanent employees has significantly decreased in the past decade, while employees employed in a temporary employment service (TES) have drastically increased. This poses problems for South Africa, which essentially follows the model of employment that focuses on permanent jobs or what can also be called a standard employment relationship.

The idea adopted between business, organised labour and Government in the period after passing of the LRA and prior to its coming into effect in November 1996, was that a standard employment relationship should be pursued in the country, with minimal accommodation for forms of employment that did not comply with this model. However, it is clear that the nature of employment has changed significantly since November 1996. Trends suggest a decline in permanent employment since as far back as 1986, which naturally coincides with an upsurge in labour broking.

The economic growth after 2004 prior to the current economic crisis did not translate into significantly lower poverty rates and the significant alleviation of unemployment. Employment growth was mainly achieved in the informal sector and during this period but no transmittance occurred from the informal to the formal sector due to a number of constraints.

The labour market dynamic that would be indicative of the fact that unemployment is diminishing, would be a movement from persons from the fields of unemployment, informal work and outsourced work to that of full time employment. As stated above all indications are that movement in the opposite direction, i.e. from fulltime employment to outsourced employment and informal employment, is taking place.

In view of the aforesaid we suggest that an impact assessment be done in order to ascertain the possible effects that the proposed amendment of section 198 might have on the labour market and the economy as a whole.

5.9 Insertion of section 198A of Act 66 of 1995

Due to the ambiguous explanation found in the Memorandum of Objectives pertaining to the bill, it appears that two schools of thought have come into existence regarding the effect of clause 198A(3)(b)once it becomes operative.

It appears that one school of thought, in circumstances where section 198A (3) (b) becomes operative, regards the employee as having become an employee of the client and having ceased to be an employee of the temporary employment services. On the other hand it appears that a different school of thought regards the employee as remaining an employee of the TES but is also deemed for purposes of the LRA to be an employee of the client.

We suggest that the memorandum of objectives be reworded in order to address the aforesaid ambiguity.

5.10 Insertion of section198B in Act 66 of 1995

Solidarity supports the stamping out of abuse of employees engaged on fixed term contracts. This abuse has been prevalent since the inception of the LRA and strong measures need to be taken to address this.

However, having said this, we again bring to the attention of the committee, the important role that fixed term contracts have to date played in the labour market and as such, the justifiability provision contained in section 198B(3)(b) should be assessed by something similar to the regulatory impact assessment of the previous four bills done by UCT.

6. Comments on the proposed amendments to the BCEA

6.1 Amendment of section 55 of Act 75 of 1997

Regarding the proposed provisions to be inserted at the end of paragraph O, we contend that the discretion of the Minister to set a threshold of representativeness should be better qualified, cognisance being had to the purpose of the LRA to *inter alia* advance democratisation of the workplace and to promote orderly collective bargaining.

It is therefore our request that guidelines governing the minister's discretion in this regard be developed with the input of all stakeholders involved.

7. Conclusion

The Portfolio Committee on Labour is commended for adhering to calls for the retraction and reworking of the previous four bills. The proposed amendments, besides those discussed herein, appear workable, but a thorough impact assessment should be done. Solidarity urges that the issues raised herein be taken to heart and remedied. In this regard we repeat our willingness to assist the Portfolio Committee with verbal representations or in any other requested manner.

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