Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions

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1. Introduction

The paper to which this Policy Brief refers to is trying to further the debate on the South African Labour Market and Worker Protection. It has **two key objectives**:

- **To highlight the differences in intensity of labour regulation and worker protection in a global context.**
- **To give an overview of some of the Legislative and institutional challenges that exist within the South African labour market.**

The paper attempts to **integrate economic and legal analyses of the South African labour market.**

2. The Economist's View of Labour Regulation

In order to utilise the evidence to further the debate on the extent and nature of labour regulation in South Africa, it is necessary:

- To provide an overview of the evidence relating to **the degree of actual and perceived rigidity within the South African labour market**

Extracting the drawbacks of recent studies (Bhorat 2004; Chandra *et al* 2000; Devey *et al* 2005; Rankin 2006) the paper attempts to provide a more detailed and more objective assessment of the labour regulatory environment in South Africa and its global comparative standing.

2.1 Data

Two datasets are utilised in the paper:

- **Botero et al's dataset covering 85 countries comparing aspects of employment, collective relations law and social security legislation.** It constructs indices and labour regulation from laws on overtime and part-time work to dismissals, notice periods and the right to strike and, collective bargaining.
- **The World Bank's Cost of Doing Business Survey (CDBS) dataset covering approximately 175 countries.** It provides objective measures of the cost of

business regulation within an economy. The broad areas of labour regulation covered in the survey are those related to labour legislative provisions for hiring, firing and hours of work. There are also legislative provisions for firing a worker and non-wage costs are converted into a measure of regulatory costs of hiring and firing workers.

Botero et al's methodology, however, leaves us with two broad objections and concerns:

- **The range of different sub-indices utilised for hiring and firing which may exclude certain important measures of regulation**
- **Some legislative provisions which are implicitly viewed as regulatory in nature which are not generally regarded as such by legal practitioners**.

2.2 Labour Regulation and Worker Protection in the late 1990s

The Botero et al database serve to interrogate the labour and other legislation within a country and converting its relevant components into a measurable ranking of rigidity or protection. This dataset is, therefore, an attempt at converting legislative provisions and stipulations into a consistent, comparable and measurable index of labour market protection.

Of greater importance, within the context of the paper, are the regulatory measures calculated for South Africa, classifying it as an upper-middle income country. In almost all of the individual regulatory sub-indices, South Africa yields a level of regulation that is lower than both the mean for upper-middle income countries, and for the sample of countries as a whole. Three important exceptions to the fairly standard levels of regulation found for South Africa in the late 1990s are in the areas of firing costs, labour union power and the provision of unemployment insurance. The data indicates that South Africa, in terms of its employment law index, reflects a composite value at the low end of the global distribution.

2.3 Labour Regulation and Worker Protection as a Cost of Doing Business

Key measures are gleaned from the CDBS by country income level. The CBDS refers to hiring costs as social protection costs which measure all social security and health costs associated with hiring a worker. The cost of firing, measures the costs of terminating

the employment of an individual in terms of legislated notice period requirements, severance pay and so on.

Although, recent analysis of South Africa's labour market regulation indicates an overall level of hiring and firing costs that is low by global standards. Yet, in the case of legislative provisions for firing workers and less so for hiring provisions, South Africa possesses a particularly high level of regulation.

2.4 Changing Levels of Regulation and Protection

South Africa is in the bottom one-third of the global distribution of labour market regulation. But, at the same time, the country also yields higher levels of worker protection relative to labour regulation, resulting in a composite regulatory index that positions the economy in about the middle of the global distribution of worker protection and labour regulation. In terms of the more specific measures that appear to be high for South Africa, it is labour union power which is extremely high. However, freedom of association and collective bargaining embedded in this measure, should not be subject to notions of 'rigidity' or 'flexibility' within a labour market because such regulation is premised on universal human rights entrenched in international law and constitutional law and accordingly as a matter of regulation not capable of being removed.

3. Legal Analysis

3.1 Approach to regulatory reform

The Paper attempts to seek appropriate regulatory reform, which may mean the **repeal of unnecessary or counter-productive regulation**; just as it **may require new forms of regulation**, and perhaps **more intensive forms**.

The data presented on **hiring and firing rigidity** indicates a surprising shift in South Africa's position on the actual measure of regulation. It shows that South Africa is at the bottom half of rigidity on a global level.

3.2 Institutional landscape

One of the functions of the Commission for the Conciliation, Mediation and Arbitration (the CCMA) is to conciliate and arbitrate disputes arising from the fairness of a dismissal. Other bodies charged with this function are:

- Bargaining councils – required to perform the same functions within their respective sectors.
- The Labour Courts – have jurisdiction over certain dismissals
- The Labour Appeal Court – hears appeals from the Labour Courts
- Supreme Court of Appeal – hears appeals from the Labour Appeal Court

The two-part process of unfair dismissal disputes are:

- All must be referred to conciliation
- If the bargaining councils cannot conciliate the dispute it is conciliated by the CCMA

3.2 The Logic and Design of the LRA

The starting point of the Labour Relations Act (LRA) is the international law and constitutional obligations which guarantee the right to fair labour practices that the Constitutional Court has held as a core component of the right not to be unfairly dismissed.

- The international labour standards are developed with the direct involvement of employer and worker representatives.
- International standards on termination of employment have influenced the unfair labour practice jurisprudence under the LRA.

The new LRA sought to introduce the following as measures to limit the transactional costs associated with unfair dismissal regulation: Like elsewhere in the world, there were to be specialist courts established to determine labour disputes exclusively.

Included in the paper is a list of items that ought to be introduced so as to cut the unnecessary costs for all parties in resolving unfair dismissal disputes.

a. Implementation of the Design

Critical elements have been undermined by changes in the constitutional context and decisions of arbitrators and the courts. The affect of this has been transactional costs of unfair dismissal that are higher than they need to be to meet the constitutional protection of fairness.

b. Code of Good Practice

Although the Code of Good Practice has been supplemented by a Code on Operational Requirement Dismissals in 1999 and amended in 2002 to introduce changes in respect of probationary employees, the Code has not been kept up to date. It has, as a result, been an 'insufficient guide' to decision makers.

It is also evident from Benjamin (2006) that only 25 percent of commissioners refer to the Code in their arbitration awards. Section 203(3) of the LRA imposes a statutory duty on 'any person interpreting or applying' the Act to take the relevant code into account. The object of ensuring consistency and accordingly predictability continues to be undermined by the failure to do so.

It is also evident from Van Niekerk (2007) that the failure to take the Code into account means that the arbitrators approach the question of fairness without a guiding norm or without a justification for departing from it. This is clearly illustrated by the CCMA and the Labour Courts jurisprudence on procedural fairness –'Commissioners have ignored the Code of Good Practice and continue to apply rigid rules of procedure, making punitive awards of compensation for even relatively minor lapses….

The failure to take the Code into account has also had the effect that jurisprudence on the circumstances that may justify a departure from the Code has not been developed. Take probation for example, the CCMA failed to shape the norms of fairness in a context where new employees are being tested for the purpose of determining whether they are suitable for long term employment. The same can be said of the failure to develop a jurisprudence that took into account the special requirements of small business.

c. Pre-Dismissal Procedures

In respect of pre-dismissal procedures, the CCMA and Labour Court jurisprudence has continued to impose the rigid and formalistic approach adopted by the courts under the old LRA. There is an over-emphasis on pre-dismissal procedures. This imposes an

unnecessary burden on employers without advancing the protection of workers.

Without procedural fairness, employers will continue to engage in costly formal hearings or pay dearly for not doing so. Pre-dismissal procedural unfairness is seen in over three quarters of cases, in which findings are made against employers. This is as a result of the limited requirements for procedural fairness in the Code.

d. Probationary Employees

Employers need this in order to assess the suitability of the employee in the work situation. If an employer is unable to dismiss an employee that proves to be unsuitable with relative ease during probation, the purpose of probation is undermined and may become a barrier to employment. At the same time the concern is that unscrupulous employers will use the reduced level of protection during probation to dismiss employees at the end of the probationary period and to replace them with new employees.

e. Functioning of the CCMA and the Labour Courts

The high number of approximately 80 000 to 90 000 dismissal cases referred to the CCMA each year amounting to 80 percent of its referrals demonstrates the legitimacy of the institution. The high number of referrals settled through conciliation demonstrates that, despite criticism, the institution has played an important role in reducing the number of disputes going into the more expensive process of arbitration.

In the Labour Appeal Court it is reported that delays of 12 to 18 months between date of hearing and date of judgment are not uncommon. Although the uncertainty concerning the restructuring of the Labour Courts has had an effect on the efficacy of the Labour Courts, these delays run counter to one of the reasons for a specialist labour court, namely, expedition. If it is possible for the Supreme Court of Appeal, on average, to hand down judgments within three months of the hearing, there is no reason why the Labour Appeal Court cannot do the same.

f. Dispute Resolution by Bargaining Councils and Private Agencies

One of the goals of **the dispute resolution system** was to require bargaining councils to:

- **Resolve disputes between their parties** and
- To **ensure the quality of dispute resolution** in so far as non-parties are concerned through a system of accreditation and subsidy.

In 2004, over 2.3 million employees fell within the jurisdiction of bargaining councils. Of these 35 000 disputes were referred to bargaining councils in 2003/4. Approximately 27 percent of those were referred to the CCMA in the same year. But there is a low settlement rate of only 22 percent of the disputes referred.

The LRA sought to encourage the establishment of private agencies to:

- Relieve the pressure on the CCMA
- To assist bargaining councils in meeting their statutory obligations and
- To allow employers and trade unions to develop dispute resolution systems tailored to their needs.

This was done by providing for the accreditation and subsidisation of private agencies by the CCMA. But, even though several applications for accreditation were received, the CCMA Governing Body has failed to accredit a single private agency.

g. Application of Dismissal Protection to Senior Management and Professional Employees

The LRA's unfair dismissal protections apply to all employees. Senior management and professional employees are normally able to protect themselves contractually and therefore do not need unfair dismissal protection.

h. Application of Statutory Retrenchment Procedures to Small Businesses

Section 189 of the LRA prescribes a procedure for operational requirement dismissals. The procedure requires:

- prior notification
- consultations
- consideration of alternatives
- selection criteria
- re-employment commitments

Because the procedure is contained in the statute, it is not a guideline and employers must apply the procedure regardless of the circumstances. The root of the problem is the imposition of a statutory standard rather than a flexible guideline for fairness.

i. Compensation for Procedural Unfairness

Part of the problem associated with the formalistic approach to pre-dismissal procedures is that arbitrators have awarded compensation for procedural irregularities. There was no contemplation in the Code's requirements for procedural fairness in misconduct and incapacity dismissals. Van Niekerk (2007) demonstrates significant inconsistency in the reasons for and the amount of compensation awarded by arbitrators. Given the Code's approach to procedural fairness, compensation ought not to be awarded for any procedural unfairness. The open discretion given to arbitrators and the lack of guidelines on compensation is one cause for this state of affairs. The LRA's approach to compensation ought to be aligned to the Code's approach to procedural fairness.

j. Appellate Structure in Dismissal Disputes

The Constitutional Court has final jurisdiction over the right not to be unfairly dismissed as it is a constitutionally protected right. The application and interpretation of laws giving effect to that right therefore constitutes a constitutional matter.

- **Reforming the Labour Market: A Synthesis of Proposed Interventions**

The analysis in the paper suggests a number of reforms to improve the functioning of the legislative and institutional design to both limit transactional costs and to modify the perceptions that the South African dismissal regime is inflexible.

k. Small employers

A Code of Good Practice for Small Employers should provide appropriate guidelines on substantive and procedural fairness. These guidelines should take account of:

- the personal nature of the employment relationship,
- the capacity and resources of the employer and the employee, and
- special circumstances such as the provision of accommodation.

The statutory procedures for a fair dismissal for operational requirements should not apply to small employers. Although the dismissal for operational requirements should remain procedurally fair, the procedures appropriate to small employers should be contained in the Code.

l. Probationary employees

The dismissal protection (other than dismissal for automatically unfair reasons) contained in Chapter VIII of the LRA should not apply to probationary employees. The simplest way to give effect to this is to exclude all employees with less than six months experience and to provide safeguards against abuse.

m. Code of Good Practice: Dismissal

The Codes of Good Practice on dismissal need to be updated and merged based on the emerging jurisprudence from the CCMA and the Courts and any legislative amendments that may flow from the current review of labour market regulation.

n. Structure of the Courts

In order to meet the requirements for the expeditious resolution of labour disputes, the specialist nature of labour law and the constitutional structure of courts, it is necessary that the Labour Appeal Court be disestablished and that appeals go to the Supreme Court of Appeal. There are various ways to retain specialisation – one is the current proposal in the Superior Courts Bill to establish a specialist panel headed by a Deputy Judge President within the Supreme Court of Appeal. Another is to ensure that the appointments are made with an eye to ensure that there are sufficient labour law specialists on the Supreme Court of Appeal to address the requirements of expedition, specialisation and constitutionality. Whatever mechanism is chosen, the current system, in which the Judicial Service Commission consults with representatives of workers and employers before appointing labour judges should be retained.

o. Institutional Reforms within the CCMA

The CCMA should develop more detailed guidelines based on the Code of Conduct to guide its commissioners and bargaining council conciliators and arbitrators. The guidelines should address the factors that should be taken into account:

- In determining **procedural fairness**,
- The approach to **compensation for procedural fairness** (that is, that compensation should only be granted if there is a flagrant breach of the Code) and
- **The approach to interfering with the imposition of sanction**.

The use of the Code and the Guidelines as a measure of performance of Commissioners should be included. It should be a disciplinary offence for an arbitrator to fail to consider

the Code or the CCMA Guidelines.

It should be **stated in the award** that: **They have been considered**, **to apply them** or, **state the reasons they are departed from**.

The CCMA should **train Commissioners** and to **offer training to employers, trade unions and the legal profession**s on the Code and its Guidelines.

4. Conclusion

The empirical evidence attempting to position South Africa's labour regulatory regime within an international context yields three key results.

- Firstly, for the measures of **labour regulation** for both the 1990s and the 2006 data, South Africa is **not an extraordinarily over-regulated market**.
- Secondly, on the basis of the 1997-2006 inter-temporal comparison **there is evidence**, within the global distribution of labour regulation, **of an increase in hiring and firing rigidity, but a decline in hiring and firing costs**.
- Finally, on the basis of this evidence, the legislative source of any **increased actual or perceived rigidity** in the South African labour market would have to be located around clauses and provision for the dismissal of workers.

Given the centrality of the unemployment rate to South Africa's long-term welfare challenge, within the policy environment, attention has often turned to reforming the labour market. After one round of amendments, it appears that the economy may be heading for a second round. This paper tries to present evidence with this pending process in mind. Its explicit aim is that of achieving some positive success in the labour market reform packages that may emanate from these debates.