

The Unemployment Insurance Bill: A Relic of the Past?

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1 Introduction

Modern democratic nation states are characterised by policies to attain social justice. One of the main strategies for this goal was the development of a social welfare system by means of social security. The International Labour Organisation ('the ILO') defines social security as

'[t]he protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise will be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families with children' (ILO *Convention Concerning Minimum Standards of Social Security* (102 of 1952)).

With the publication of the Unemployment Insurance Bill ([B3-2001] in *Government Gazette* 20952 of 2 March 2000; hereafter 'the Bill') it is appropriate to evaluate whether, against the backdrop of globalisation, the changing nature of work, the privatisation of social security funds, and the active promotion of job creation rather than just addressing the consequences of unemployment, the proposed legislation is in step with developments in social security worldwide.

2 The Framework of the Bill

As is the case with its predecessor, the Unemployment Insurance Act 30 of 1966 ('the Act'), the Bill will set up an unemployment insurance fund to provide protection against the risk of losing income on the grounds of, amongst others, joblessness, illness and pregnancy. There are, however, a number of important differences between the position established by the Act and the broader policy directions to be implemented by the Bill.

The most important of these differences is the fact that the contribution base of the fund, as well as the entitlement to claim from it, will be broadened significantly. In terms of the Act and the Bill, both the employer and contributor must each on a monthly basis pay 1 per cent of the contributor's remuneration to the fund (see s 29(1) of the Act and cl 6 of the as yet unpublished Unemployment Insurance Contributions Bill). Employees earning in excess of R93 288 per annum are currently excluded from the operation of the Act. The threshold on earnings will be

removed by the Bill and, notwithstanding the level of earnings, these employees will become contributors and will accordingly also be entitled to claim benefits from the Unemployment Insurance Fund.

The second difference relates to the quantum of benefits that are payable to a contributor. In terms of the Act the benefits are calculated at 45 per cent of the weekly earnings at which the contributor was last employed (s 34(2)(a)). The maximum benefit that may be paid is one week's benefit for every six weeks' completed employment, payable for a maximum of 26 weeks in any period of one year (s 34(4)(b) and s 34(5)). In contrast with the flat rate in terms of the Act, the Bill will introduce a scale of benefits ranging between 38 and 60 per cent of previous earnings. If a contributor earned R7 774 per month (or R93 288 or more per annum), such a person will receive 38 per cent of those earnings. By contrast, the lower a contributor's income while still employed, the closer to 60 per cent of the earnings will be paid out as a benefit. A contributor's entitlement to benefits accrues at a rate of one day's benefit for every six days of employment, subject to a maximum accrual of 238 days (that is, 34 weeks) in the preceding four years (see cl 13 and Sch 2 of the Bill).

The last significant difference lies in the fact that the Act contains provisions to combat unemployment (in Ch VIII) while the Bill has no such provisions (E van Kerken 'Unemployment Insurance', paper delivered at the *Law Teachers Conference* in Durban (2000) at 3–4). In terms of the Act, the Minister of Labour may implement a scheme to protect contributors threatened with unemployment, or place into employment those who have become unemployed (s 46). The Act also makes provision for the payment of benefits to employees who have become partially unemployed in order to reintegrate them into the workforce (s 48). Neither the introduction nor the purpose of the Bill (cl 2) mentions job-creation schemes or the reintegration of unemployed into the workforce as broad aims of the new unemployment insurance dispensation.

It is our submission that Government has failed to take cognisance of a number of policy directions in international social security systems when drafting the Bill. These directions will now be considered.

3 Globalisation and the Cost of Social Security

Globalisation entails the development of a joined worldwide system in which fewer national borders block the free flow of money, goods and technology (see Roger Blanpain 'Work in the 21st Century' (1997) 18 *Industrial LJ* 185 at 187). Social security was fundamental to the post-war industrial era. However, the advances of technology and the advent of globalisation have resulted in an entirely different labour market, the consequence of new market forces and mechanisms operating worldwide (idem at 188–189).

All nations of the world have to create their future in this increasingly

competitive and interconnected world. To achieve such competitiveness, many nation states have come to realise that the flexibility of and a reduction in the costs involved in labour are essential. It has become paramount for countries to reduce inflation rates and budget deficits. One important method of achieving this is to reduce the amount spent on social security. Blanpain goes as far as stating (op cit at 188) that 'there is no room left for social policies that might burden public expenditure'. However, there is a divergence of opinion on the effect of globalisation on advanced economies as opposed to that of developing countries (see in this regard M Olivier, E van Kerken, R Liffman, S Lombard, L Jansen van Rensburg, N Smit & M Thompson *Social Security Law: General Principles* (1999) Book 1 Part A at 47).

During the twentieth century, developed industrial nations have taken between 30 and 60 per cent of their national income to finance the welfare state (see James Davidson & William Rees-Mogg *The Sovereign Individual: The Coming Economic Revolution, How to Survive and Prosper in It* (1997) at 7). Research indicates that of the USD1,53 trillion American federal expenses during 1995, the single largest expenditure of USD335 billion went to social security (see Olivier et al op cit Book 1 Part A at 25). Social security systems have been under pressure to cut back on the benefits paid out. The main reason for this erosion is simply that nation states can no longer afford to fund such noble exercises. South Africa has had its own experience in this regard. The Unemployment Insurance Fund is under pressure and showed a loss of R254 million in 1997 (idem Book 2 Part O at 14).

Neo-liberalists, who believe that market forces and market mechanisms are superior to social and economic intervention by the state, argue that in the age of globalisation there is no room for public policies that place a burden on social expenditure (see E Euzeby & J van Langendonk 'Neo-liberalism and Social Protection: The Question of Privatisation in EEC Countries' 1990 *ILO Report* (Geneva) at 2). Some of the neo-liberalist arguments in support of this view are as follows.

First, unemployment insurance encourages continued unemployment. The argument is that since unemployment insurance provides unemployed persons with a means to survive, the quest of some of them to find a job is not as urgent as it would otherwise have been and they may consequently take more time looking for a job. The higher the benefits, the longer the time involved in finding a job and the higher the impact on the economy. Although not necessarily a neo-liberalist, the increase in benefits suggested by the Bill (ranging from 38 to 60 per cent of previous earnings) has prompted Van Kerken to point out that '[t]he bottom of the scale is considerably lower than the international norm [of 45 per cent], and the top of the scale is clearly too high to discourage continued unemployment' (op cit at 11).

Secondly, it is argued that social security increases labour costs and reduces labour flexibility. Where employers are obliged to pay for

unemployment insurance, more rigid labour costs result. The cost of labour is prevented from responding naturally to the fluctuations in the levels of economic activity. Persons who are unemployed are also not likely to accept work at wages less than, or equal to, the amount of unemployment benefits they receive. Natural market forces are interfered with. If shifts in economic conditions would normally have resulted in a drop in real wages, such a result will be curtailed (see Euzeby & Van Langendonck *op cit* at 4). In addition, the cost of labour clearly is a very important and decisive criterion for potential investors contemplating investment of their capital in a particular country.

Thirdly, social protection in the form of unemployment insurance cannot prevent poverty or reduce income inequality amongst the poor. This is because unemployment insurance benefits are distributed amongst the formally employed only. These are usually middle to lower-class income earners who were in a position to make contributions. Terminally unemployed citizens do not benefit at all. They can only benefit from an unemployment benefit scheme in terms of which one may claim irrespective of whether a job was lost or of whether contributions to the fund were made. An unemployment insurance scheme must be distinguished from an unemployment benefit scheme. This distinction is important. In the South African context, both the Act and the Bill make provision for an unemployment insurance scheme (see Olivier *et al op cit* Book 1 Part I at 1). After subtracting the relevant administrative costs, the Unemployment Insurance Fund merely gives back the contributions it has collected to those from whom it was collected.

4 The Changing Nature of Work, Employment and the Informal Sector

Although atypical forms of work have existed since the advent of capitalism, such forms of work have over the last decade or two grown rapidly on a global scale. Blanpain suggests that the demise of the industrial era, which went hand in hand with job security and a relatively highly paid workforce, has become a reality. He states that those glorious thirty years of 'Fordism' are over and 'Gatesism is ushering us into a new world' (see Blanpain *op cit* at 189–190). In the modern era, companies and governments alike must become leaner and more competitive in order to survive.

Blanpain also points out that the days of the generalist are a thing of the past. There has been a tendency to decentralise production by subcontracting parts of the production process to smaller firms as market strength now lies with the specialist. He explains that

[t]he worker will have to assemble and monitor his own portfolio of work, most often as an independent worker and in a sense becoming his own employer. ... The old hierarchical enterprise, where someone could start his career as a lift attendant and eventually end up as the managing director at the top of the pyramid is definitely becoming an oddity in the landscape of work. ... Permanent jobs, full-time and life-long

until retirement, will be the great exception, other than perhaps for those engaged in a (slimmed down) public sector and possibly in other protected workplaces' (idem at 195).

South Africa is experiencing the same trend towards outsourcing and decentralisation. A survey conducted by Andrew Levy and Associates in September 1998, found that 68,3 per cent of companies had outsourced in the past five years and that more than three quarters of them had done so on more than one occasion. The survey also found that 91 per cent of employees affected by the outsourcing were blue-collar workers. It anticipated that outsourcing would continue in the foreseeable future (see South African Institute of Race Relations *South Africa Survey 1999–2000 (Millennium Edition)* (2000) at 280).

Due to a lack of accurate and complete statistics, it is difficult to determine the precise extent of atypical forms of employment in South Africa. Although it has been stated that atypical employment has not brought about any 'change of major dimensions in South Africa' (Olivier at al op cit at 670), it is clear that we will not escape the global trend towards specialisation and the growth of atypical employment (see also Marius Olivier 'Extending Labour Law and Social Security Protection: The Predicament of the Atypically Employed' (1998) 19 *Industrial LJ* 669 at 670).

Apart from the threat that atypical employment poses to a sustainable formal employment sector, there are other major reasons for concern in relation to the maintenance and broadening of South Africa's social security systems. High levels of unemployment remain a matter of national concern as large numbers of employees are rendered redundant, companies and the public service downsized, and vast numbers of employees dismissed for operational requirements. If this trend continues, a larger section of our economically active population will be forced into either unemployment or atypical forms of work. The previous Governor of the Reserve Bank, Chris Stals, has stated that the 'most daunting challenge' for the South African economy is to reverse the trend of declining employment (see South African Institute of Race Relations op cit at 408). Although statistics on the official unemployment rate are unreliable, it is estimated at 30 per cent of the workforce (see Olivier op cit at 670). In the Ministry of Welfare and Population Development's *White Paper on Population Policy* (March 1998) it is stated that an estimated 400 000 job seekers enter the labour market annually and that job creation should be at least twenty times higher per year (see cl 2.2.9). Statistics provided by the Department of Labour indicate that during 1999, 267 548 people registered as unemployed. The Department managed to place only 32 189 employees in both the formal (28 142) and informal (4 047) sectors (see the Department of Labour *Annual Report 1999*)(RP 61/2000) at 23–24).

South Africa is also experiencing an increase in the number of small and medium-sized enterprises. According to the Ntsika Enterprise Promotion Agency, a government agency set up in 1995 to promote

the development of the small-business sector, that sector, which comprises survivalist, micro, small and medium enterprises, accounted for 99,3 per cent of all private-sector enterprises in the country. Only 0,7 per cent is made up of large enterprises. In 1998 the Department of Trade and Industry estimated that the small-business sector absorbed some 45 per cent of people who left the formal sector and contributed some 33 per cent to the gross domestic product (see Institute for South African Race Relations op cit at 492).

5 Active and Passive Labour Market Policies

There has been a global tendency towards active as opposed to passive labour market policies. Active labour market policies address the causes of unemployment and attempt to create more employment. Passive labour market policies only address the consequences of unemployment. The ILO *Convention Concerning Employment Promotion and Protection against Unemployment* (168 of 1988) and its *Recommendation on Employment Promotion and Protection against Unemployment* (176 of 1988) state that the best protection against the adverse effects of involuntary unemployment lies in stable economic growth, flexible response to change, and the promotion of all forms of employment, including small undertakings and self-employment. Studies indicate that the European Union, the United States of America, Canada, Australia and New Zealand have changed their market policies by focusing on obtaining employment for people rather than on assisting those who have become unemployed. One of the measures taken on a worldwide basis to encourage people to remain in work or to re-enter employment, was to limit the entitlement to benefits (see Olivier et al op cit Book 1 Part I at 16–26). More specific policy guidelines accepted by the European Union during the late 1990's include improving employability through training, providing incentives to employers to create new jobs, developing entrepreneurship, and encouraging the adaptability of businesses and their employees (see the European Community *Employment Policy Guidelines for 1998* (13200/97)).

6 Privatisation and Inefficient Administration

Public institutions and public officials are not subject to market forces. They are not exposed to competition and therefore do not have to strive to offer the best quality product or service at the lowest possible price. Public institutions are not required to make a profit. Should such institutions run at a loss, governments could simply raise taxes and other compulsory contributions. They have no fear that contributors will take their business elsewhere. It follows that social security funds administered by governments results in inefficiencies.

In some instances public-run schemes have more social security expenditures than social security revenues. Chile provides us with a

leading example of such a public-administered retirement scheme that was transformed to a mandatory, privately funded and administered system. The success of this system has been widely debated and has also been implemented in a number of other countries around the world. This has prompted the opinion that the 'the privatisation argument seems a powerful one' (see Olivier et al op cit Book 1 Part A at 24–43).

7 The Bill against the Backdrop of the Modern Era

How does the Bill measure up against the international trends and developments that have shaped social security elsewhere?

In the first instance there seems to be no recognition of the fact that governments are cutting back on labour costs by limiting benefits in our developing global village. Whereas employees are presently receiving a maximum benefit of 45 per cent of earnings, this will be pushed up to 60 per cent for the lowest income earners. In addition, both employers and employees earning in excess of R93 288 will feel the impact of their inclusion under the Bill. This will add to the cost of labour to be calculated by future investors. In the light of the constitutional imperative that 'everyone has the right to social security' (s 27(1)(c) of the Constitution of the Republic of South Africa, Act 108 of 1996), it may be argued that the inclusion of higher earners under the ambit of unemployment insurance is a step in the right direction. However, it has to be borne in mind that the ambit of the Bill does not cover everyone. Government employees, domestic servants and seasonal workers are expressly excluded from its application (see cl 3(1)). Clearly, then, this constitutional imperative has not been met fully. In addition, if the argument was that everyone has an equal right to social security, why the differential treatment of employees based on the differences in their earnings?

As is the case with the present Act, the Bill provides that the Unemployment Insurance Fund will rely on contributions from salaried employees and their employers in the formal sector. South Africa is burdened by an estimated 30 per cent unemployed workforce who are not able to contribute to the Fund. In addition to this, independent contractors, the atypically employed, the informally employed, those who have never been employed, as well as those categories of persons who have been specifically excluded by the Bill will not contribute to or benefit from the fund. The whole unemployment system is therefore placed under immense pressure because it has such a narrow base on which contributions to it are levied.

Unfortunately the Bill also does not concern itself with the promotion or the creation of employment. Apart from the provision requiring a contributor to register as a work-seeker with a labour centre under the Skills Development Act 97 of 1998, the Bill is silent on job-creation schemes. The limited provisions contained in the present Act in relation

to the Minister of Labour's powers to combat unemployment through schemes to keep contributors employed or to place them in other employment, has in fact been removed from the Bill. The long title to the Bill and the clauses dealing with its purpose sadly do not even state that it forms part of a broader, integrated policy to get the unemployed back to employment as soon as possible.

In addition to the fact that the drafters of the Bill have ignored arguments in favour of privatisation, it creates a complex dual administrative system that could lead to increased administration costs. Van Kerken (op cit at 5) makes the following important observations in this regard:

'[Firstly] contributions in regard to an employee who is taxable must be paid to the Commissioner of SARS whilst contributions in regard to an employee who is not taxable must be paid to the Unemployment Insurance Fund. This may lead to cumbersome administration for the authorities as well as employers where a particular employee at times falls within the tax net, and at other times outside the tax net. Secondly, the South African Receiver of Revenue may delegate his power to collect contributions to the Unemployment Insurance Commissioner. It is possible that delegation of the power to collect contributions, will nullify the purpose of regulating the collecting of contributions under the fiscal regime, and possibly that confusion may arise as to where specific powers are to be exercised. Thirdly, the South African Revenue Services Commissioner must collect contributions whereas the database of the Fund is seated with the Unemployment Insurance Commissioner. The dual administration may cause severe problems for an unemployed person when claiming benefits'.

In conclusion it is surmised that the Bill is an attempt to cling onto a bygone era where a greater degree of social justice was attainable. Western democracies were supported and legitimised partly by their ability to create some measure of social justice and social security. Perhaps the Bill would have been more appropriate 30 or 40 years ago in a typical industrialised western democracy. This proposed legislation is simply out of touch with our current economic circumstances. Different means of attaining social justice, such as active policies towards job creation and the privatisation of social security funds, should rather have been strived for.
