HAS THE LABOUR RELATIONS ACT 66 OF 1995 ACHIEVED ITS PURPOSE OF ADVANCING ECONOMIC DEVELOPMENT AND SOCIAL JUSTICE?: A CRITICAL ASSESSMENT

By

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MAIN TABLE OF CONTENTS

CHAPTER 2

AN OVERVIEW OF THE PRIMARY OBJECTS OF THE LRA AND THE INTERPRETATION THEREOF BY THE COURTS

CHAPTER 3

THE ADVANCEMENT OF ECONOMIC DEVELOPMENT OF WORKERS

CHAPTER 4

AN ASSESSMENT OF THE ADVANCEMENT OF SOCIAL JUSTICE IN THE WORKPLACE

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

Declaration

I, **DENNIS MOEKETSI MATLOU** of Student Number: 97261247 declare that the work "Has the Labour Relations Act 66 of 1995 achieved its purpose of advancing economic development and social justice?: A critical assessment" is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

DM Matlou

Signature

Dedication

This work is dedicated to all the workers toiling daily under poor conditions in South Africa and whose economic development must be pursued and achieved.

Acknowledgement

My sincere gratitude and appreciation go to my supervisor, Prof Monray Marsellus Botha for his invaluable guidance and advices throughout my work. I also thank my family for their care and support. All Mighty praises be to God!

ABSTRACT

In terms of section 1 of the Labour Relations Act 66 of 1995 the purpose of the LRA is to advance economic development, social justice, labour peace and the democratisation of the workplace. The problem of economic development and social justice is one that exists broadly within the South African society and there may be diverse ways of looking at it. However, this investigation specifically addresses the question of economic development and social justice as applicable within the South African labour market. It is a limited investigation in the sense that it is not necessarily intended to broadly cover all other related topics such as the legislated black economic empowerment or affirmative action measures.

The research undertakes to determine if the purpose of the LRA specifically to advance economic development and workplace social justice has been attained and what possible measures could be implemented to achieve economic development and workplace social justice. The purpose of the LRA is to be achieved through the fulfillment of the primary objects of the LRA. The research, which adopts a critical analysis approach, assesses and answers questions such as: what is the purpose of the LRA and how is this purpose to be achieved? Can the idea of the advancement of economic development realistically be limited to the creation of work and the payment of a wage? What does "social justice" in the workplace entail? How can economic development and social justice in the labour environment be enhanced?

CHAPTER 1

INTRODUCTION

1 1 Introduction

The economic development of all South Africans has never really been a significant priority of our labour legislation. This was the situation prior to the adoption of the new Constitution of South Africa Act 108 of 1996.[1]

Section 1 of the Labour Relations Act 66 of 1995[2] specifically records that the purpose of the LRA is to advance economic development, social justice, labour peace and the democratisation of the workplace. This purpose is to be achieved through the fulfillment of the primary objects of the LRA.[3]

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[1] Hereafter referred to as "the Constitution".
[2] Hereafter referred to as "the LRA".
[3] The primary objects of the Act are
"*(a)* to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996;
(Section 1(a) substituted by section 1 of Act 6 of 2014)
(b) to give effect to 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 *employer's* organisations *can* –
(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

This study will acknowledge some of the successes achieved in the areas of economic development and social justice in the working environment since 1995. The study will further assess the scope of such successes; the setbacks and potential improvements that can be made to realize the objects of the LRA.

In this investigation, the purpose of the LRA specifically to advance economic development and social justice will be critically assessed. How best can economic development and social justice in the labour environment be enhanced, within the structure of the LRA? The economic cost of living is high and many a worker simply cannot afford what most high earning company executives take for granted. The government has introduced a legally applicable national minimum wage of R20 per hour. How this will turn out in the workplace remains to be seen. These are some of the controversial issues to be evaluated in this study.

1 2 Historic background

This study gives a historic background to our pre-1994 labour market and how the need to create jobs eventually emerged as a key theme in economic policy development and debates in the "new South Africa".[4] Coloured, African and Indian workers were excluded from participation in the then voluntary centralised collective bargaining system. The dispute resolution system, which at that time focused on the settlement of collective disputes rather than disputes involving individual employees, was promoted by the establishment

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(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".

[4] This term is colloquially used to refer to the era beginning after the advent of the new Constitution.

of industrial councils[5] under the Industrial Conciliation Act[6] which laid the basis for "a dual system of industrial relations".[7] The Minister of Labour played a major role in labour relations because the industrial councils could only be registered (and the agreements reached there, extended) if he considered the parties thereto to be suitably representative of their members within the relevant area and industry. "Where there was no industrial council, the Act provided for the creation of an *ad hoc* conciliation board for bargaining and dispute resolution between trade unions or employees and employers' organisations or employers".[8]

The South African labour market policy remained subject to this political and ideological vision of a racially-determined dual system of industrial relations for over half a century.

A 1930 amendment to the Industrial Conciliation Act authorised the Minister of Labour to lay down minimum wage rates and maximum working hours for "persons excluded from the definition of 'employee'".[9] The purpose being to protect white workers from being undercut by cheaper African labour rather than to benefit the African workers[10] who were marginalised from the mainstream of industrial relations. The Van Reenen Commission[11] in 1935 and the Botha Commission[12] in 1951 noted that skilled workers unions were insisting on worker controls, such as ratios of semi-skilled to skilled employees, thereby limiting the growth of economic activity dependent on semi-skilled labour. The result was strong competition for mainly unskilled jobs and a huge wage gap between well-organised skilled workers and unskilled workers, whose wages were described by the Van Reenen

5 Du Toit *et al Labour relations law - a comprehensive guide* (2015).
6 Industrial Conciliation Act 11 of 1924.
7 Du Toit *et al Labour relations law - a comprehensive guide* (2015).
8 Du Toit *et al Labour relations law - a comprehensive guide* (2015).
9 S 48(4) of the Industrial Conciliation Act 36 of 1937.
10 Du Toit *et al Labour relations law - a comprehensive guide* (2015).
11 Report of the Industrial Legislation Commission (UG 37-1935) paras 19, 24 267.
12 Report of the Industrial Legislation Commission of Enquiry (UG 62-1951) paras 340.

Commission as "inadequate" to maintain a decent standard of living[13]. The Botha Commission recommended the establishment of a "co-ordinating body" to attempt to rationalise the distorted labour market that had developed[14] but this was ignored by government.

The 1953 Native Labour Act[15] then introduced a separate labour dispensation for African workers with plant-based "works committees", regional "native labour committees" and a "Central Native Labour Board" which were limited to reporting and dispute resolution functions and operated under strict government control. African workers could still not form or join registered trade unions and were prohibited from striking.[16]

A new consolidated Industrial Conciliation Act of 1937 was promulgated, further entrenching the racial division of workers by, amongst other things, the introduction of "job reservation" which did not make things easy for African workers.[17] However, by the late 1970s the dual system of industrial relations in South Africa had become practically unworkable.[18]

The economic boom of the 1950s and 1960s had slowed during the 1970s and when the new government came into office, unemployment, already unacceptably high, rocketed to an estimated figure of over 30% of the economically active population. Of particular concern was the performance of the manufacturing sector, the biggest employer in the economy and a critical component of economic development. Total factor productivity growth in the sector declined steadily from 1, 2% in the 1960s to 0, 2% in the 1970s, and dropped to -0, 5% during the 1980s.[19]

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13 Report of the Industrial Legislation Commission (UG 37-1935) paras 23.
14 Paras 408 409 435. The "co-ordinating body" would have the power to refer agreements back to the parties, negotiate changes and advise the Minister as to the desirability of promulgating an agreement.
15 Native Labour Act 48 of 1953.
16 S 18.
17 Du Toit *et al Labour relations law - a comprehensive guide* (2015).
18 Du Toit *et al Labour relations law - a comprehensive guide* (2015).
19 Du Toit *et al Labour relations law - a comprehensive guide* (2015).

The isolation of South Africa had created inefficient and uncompetitive firms and South Africa's re-admission into the mainstream of the global economy in an era of trade liberalisation exposed these firms to intense competition in rapidly changing markets.[20]

It was acknowledged that much of the economic growth was expected to take place in the small, medium and micro enterprise (SMME) sector, straddling the formal and informal economies. The stimulation of this sector was therefore the focus of much attention in policy debates on job creation and economic growth and was explicitly recognised in the government's reconstruction and development programme RDP.[21] Fourie[22] submits that economic transformation has not followed South Africa's transition to democracy. "Although significant progress has been made, it was slow and often stunted. This is not only the fault of the post-apartheid government. The dismal state of the economy it inherited at the dawn of democracy has made it hard for the new ruling party to create the society it envisaged in its RDP, where everyone would enjoy a, "decent living standard and economic security"" says Fourie.[23] It is therefore evident that the RDP was not an outright success that the ruling party had hoped for. The other government programmes that followed the RDP – Growth, Employment and Redistribution Programme (GEAR, 1996), and later the Accelerated and Shared Growth Initiative of South Africa (ASGISA, 2006) were also designed to accelerate economic growth. Each of these programmes had different levels of success in advancing the economic development of poor people. In 2013 the government's National Planning Commission released the latest strategic document intended to lead policy-making on eliminating poverty and reducing inequality by 2030.[24] The RDP promised a strategy for rebuilding the economy

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20 Du Toit *et al Labour relations law - a comprehensive guide* (2015).
21 Du Toit *et al Labour relations law - a comprehensive guide* (2015).
22 Fourie "The long walk to economic freedom after apartheid, and the road ahead" 2017 *JEG* 42.
23 Fourie 2017 *JEG* 42.
24 Fourie 2017 *JEG* 42.

and developing the human resources of the country, focusing on the basic needs of people and giving special attention to labour and worker rights.[25] Furthermore, legislation such as the Broad-Based Black Economic Empowerment Act[26], Employment Equity Act[27], Skills Development Act[28]and the Basic Conditions of Employment Act[29] were introduced to speed up the promotion of skills; economic advancement, commercial opportunities and to achieve the constitutional right to equality of those workers disadvantaged by the erstwhile collective bargaining system.[30]

Later in the discussion I will elaborate on the latest economic concept called "radical economic transformation."[31] The notion was introduced by government in recent times as an attempt to change the control and management of the economy.

The absence of formal legal regulation in the domestic and the tertiary education sectors, and the piecemeal regulation of the educational, agricultural and public service sectors were some of the shortcomings which the LRA sought to address after the new government came into power.[32]

One of the crucial objectives of "decent work"[33] as propounded by the International Labour Organisation is to promote the creation of employment and income opportunities, with the purpose being "not just the creation of

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[25] Du Toit *et al Labour relations law - a comprehensive guide* (2015).
[26] Broad-Based Black Economic Empowerment Act No. 53 of 2003.
[27] Employment Equity Act 55 of 1998.
[28] Skills Development Act 97 of 1998.
[29] Basic Conditions of Employment Act 75 of 1997.
[30] In South Africa labour relations were negatively impacted by the previous economic inequalities and the imbalances brought about as a result of such inequalities. The new government took specific measures to raise the level of empowerment of black South Africans as a stated government objective. The empowerment laws are to be understood in this context.
[31] Head "Radical Economic Transformation: Why you shouldn't believe the hype" 2017, available at https://www.thesouthafrican.com (accessed on 15 November 2018).
[32] Du Toit *et al Labour relations law - a comprehensive guide* (2015).
[33] The concept of decent work "is based on the understanding that work is not only a source of income but more importantly a source of personal dignity, family stability, peace in community, and economic growth that expands opportunities for productive jobs and employment." ILO 2010 www.ilo.org 5.

jobs, but the creation of jobs of acceptable quality."[34] It can be contended that in creating jobs of acceptable quality "An adequate living wage is imperative for the attainment of decent work."[35] "Yes, we need employment, but we need decent work that uplifts the individual's dignity and spirit and gives him or her a sense of pride in being able to do an honest day's work at decent pay."[36]

1 3 Research problem and research questions

The aim of this study is to establish whether or to what degree the purpose of the LRA specifically to advance economic development and workplace social justice has been attained, the obstacles to the attainment of the purpose of the LRA and what possible measures could be embarked on to enhance the stated purpose of Section 1 of the LRA. In order to achieve the above aim, the following questions will be asked and answered:

1.3.1 What is the purpose of the LRA and how is this purpose to be achieved?

1.3.2 Can the idea of the advancement of economic development merely be limited to the creation of work and the payment of a fair wage?

1.3.3 What does the concept of "social justice" in the workplace entail?

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[34] ILO 2010 www.ilo.org 5.

[35] Cohen & Moodley "Achieving "decent work" in South Africa?" 2012 *PELJ* 319. Cohen and Moodley elaborate on the concept of "creation of jobs of acceptable quality" and state: "As pointed out by Anker, "nearly all individuals who work or seek work do so in order to earn an income and ensure the economic well-being of themselves and their households." In South Africa wages and incomes remain highly unequal between the informal and the formal economy, with poverty and inequality assuming racial, gender and age dimensions." Further, "Since it is self-evident that low wages have a direct impact on poverty levels, improving wages and conditions of employment is of crucial importance in overcoming decent work deficits."

[36] This is what Judge Mlambo of the Labour Court and the Labour Appeal Court stated in a welcoming speech of the 25th Annual Labour Law Conference themed "Decent work in a sustainable workplace" in Johannesburg.

1.3.4 What is the current state of the economic development and social justice in the South African labour market?

1.3.5 How can economic development and social justice in the labour environment be enhanced?

Labour relations in South Africa remain susceptible to forces originating from structural problems within the wider socio-political space – those of poverty, unemployment and inequality.[37] Furthermore, our labour market still manifests a great discrepancy of power between employer and employee. As Du Toit[38] notes; significant bargaining power in the workplace continues to be vested in the employer. Historically, the South African labour force is mostly unskilled or semi-skilled and workers often lack elementary education and remain in a weak negotiating position.[39]

1 4 The improvement of economic development of workers

A significant number of people face insecure and unstable working conditions and this does not augur well for the enhancement of economic development or social justice as envisaged by the LRA. South African societal problems continue to sway our labour relations.[40]

This study looks into whether the South African informal economic sector can provide an alternative to unemployment. According to Ligthelm[41], this sector is characterised by survivalist businesses established as, *inter alia*, curbside traders, traders at train stations and taxi ranks (mainly hawkers) and small

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37 Anstey 2013*SAJLR* 133.

38 Du Toit 1997 *Law, Democracy & Development Law Journal* 43.

39 Calitz & Conradie "Should teachers have the right to strike? The expedience of declaring the education sector an essential service" 2013 *Stell LR* 124. The causes of poor or low quality education and the devastating consequences thereof across all facets of life in South Africa, including in the labour industry, are identified and fully evaluated.

40 Anstey "Marikana – and the push for a new South African pact" 2013 *SAJLR* 133.

41 Ligthelm "An evaluation of the role and potential of the informal economy for employment creation in South Africa" 2006 *SAJLR* 30.

home-based businesses such as spaza shops.[42] The informal economic services such as that of street vendors, domestics and gardeners must be protected because these jobs remain vulnerable as the workers are often without labour or social protection. Although the informal sector is still largely unregulated and ignored, it is ironically the sector which creates (or at least has the potential to create) massive employment opportunities for many. It is contended in the following chapters that there is a need for improved regulation and reform and greater investment in the South African job training systems to produce skilled manpower of the quality and in the numbers needed by the economy.[43] Entrepreneurship within the informal sector must be enhanced through an educational system where people are introduced to a business and entrepreneurial culture, thereby facilitating their gradual trading-up to higher levels of business activity that would generate sufficient income for the owner-manager and his/her employees.[44] The workers' economic development ought not to be limited to improving on the low wage rates but must extend to the sustainability of work opportunities.[45] It will be submitted that working people should be enabled within the available resources of every employer, to move up the business ladder and derive reasonable and viable livelihood in line with the government's black economic empowerment principles.[46]

It is evident that part of the solution to achieving economic advancement in the workplace will be based on improved and integrated technical and vocational education and training of the labour force. Consequently, some attention will be given to youth-specific measures which may be made an

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[42] Ligthelm 2006 *SAJLR* 30.

[43] Ligthelm describes the first or modern economy as one that is responsible for the bulk of South Africa's economic production and is integrated with the global economy. It operates with advanced technology, is generally well managed and is well endowed with entrepreneurial acumen. However, it also contains an informal component.

[44] Ligthelm 2006 *SAJLR* 30.

[45] Ligthelm 2006 *SAJLR* 30.

[46] Ligthelm 2006 *SAJLR* 30.

integral part of the employment strategy. Cohen and Moodley[47] suggest that the measures, if implemented, could be very useful.

1 5 The development of social justice in the workplace

Finally, this study illustrates what efforts have been made by the government, business and the judiciary to improve social justice as an important aspect in our labour market, individually between employer and employee, and collectively at bargaining level.

In *Government of the Republic of South Africa v Grootboom*[48] the court highlighted that the attainment of social justice and the improvement of the quality of life for everyone are key constitutional requirements.[49]

1 6 Chapter two

The Constitution has laid the groundwork for a completely new approach to labour relations.

Against this backdrop, the primary objects of the LRA, the interpretation thereof by the courts and South Africa's international obligations under the ILO will be evaluated in Chapter two.

1 7 Chapter three

This Chapter focuses on the subject of economic development of workers as envisaged by the LRA.

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[47] Cohen & Moodley 2012 *PELJ* 319.

[48] 2001 (1) SA 46 (CC) 53B-C.

[49] The same sentiment was expressed in *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd (Lawyers for Human Rights as Amicus Curiae)* 2012 (2) BCLR 150 (CC); *Bannatyne v Bannatyne* 2003 (2) BCLR 111 (CC); *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC).

Numerous interrelated issues will be investigated. The LRA as the primary labour law providing for the protection of workers; unemployment; labour market efficiency problems adversely affecting the workers; efforts towards protecting the workers' rights and promoting their welfare; minimum wages in South Africa; youth-specific measures and other models of economic participation including employee share-ownership schemes and financial participation will all receive attention.

1 8 Chapter four

Chapter four explores the theme of social justice in the workplace.

Labour relations in South Africa are largely fragile and susceptible to social and even political issues.[50] Consequently, the significance of social justice cannot be undervalued.

Attention will be paid to efforts which have been made through the LRA to improve on social justice as an integral part of our labour market. Accordingly, the gains that have been accomplished will be assessed having regard to what was stated in *Government of the Republic of South Africa v Grootboom*[51] that the attainment of social justice and the improvement of the quality of life for everyone is a basic constitutional requirement.

1 9 Chapter five

It will be argued in conclusion that the purpose of the LRA to advance, amongst other things, economic development and social justice in the workplace is one which must be applauded, especially if regard is had to our pre-1994 labour dispensation which was antagonistic to a large section of the South African workforce.

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[50] Anstey "Marikana – and the push for a new South African pact" 2013 *SAJLR* 133.
[51] 2001 (1) SA 46 (CC) 53B-C.

However, more than two decades after the democratic change, a host of labour issues remain of fundamental concern in our labour relations. It is contended that the LRA has radically changed our labour law system in several positive respects. Noteworthy improvements have been made more so in the area of social justice than in the area of economic upliftment of indigent workers.

The legislative project to advance workers is far from being fully accomplished.

CHAPTER 2

AN OVERVIEW OF THE PRIMARY OBJECTS OF THE LRA AND THE INTERPRETATION THEREOF BY THE COURTS

2 1 Introduction

A background account of our pre-1994 labour law, which culminated in the establishment of our current labour regime was laid out in the previous chapter. The Constitution has laid the groundwork for a fresh approach to our labour law structure. It is now opportune to have an overview of the primary objects of the LRA.

2 2 The primary objects of the LRA

The LRA specifically records that the purpose of the LRA to advance economic development, social justice, labour peace and the democratisation of the workplace is to be achieved through the fulfillment of the primary objects of the LRA.[52]

The most important primary objects of the Act relative to advancing economic development and social justice, are

"*(a)* to give effect to and regulate the fundamental rights conferred by

[52] S 1.

section 23 of the Constitution of the Republic of South Africa, 1996;[53]

(b) to give effect to 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 *employer's* 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 … ".

The association between the purposes of the Act and section 23 of the Constitution to which the LRA gives effect, was affirmed by the Labour Appeal Court in *"Kylie" v CCMA.*[54] The court pointed out that 'If the purpose of the LRA was to achieve these noble goals, then courts have to be at their most vigilant to safeguard those employees who are particularly vulnerable to exploitation in that they are inherently economically and socially weaker than their employers."

It is important to realise that the different purposes of the Act cannot be seen in isolation from one another. The promotion of "economic development" is "qualified by the injunction that it must be done in conjunction with other goals, namely those of social justice, labour peace and the democratisation of the work-place. This is to be done by fulfilling the primary objects of the Act." This position was stated by the Labour Appeal Court in *Foodgro v Keil.*[55]

In *AMCU v Chamber of Mines*[56] it was noted that the purposes stated in section 1(*c*) and (*d*) are "doubtlessly consistent with the Constitution, but the means adopted to achieve those purposes must also pass constitutional muster". The majoritarianism principle, the court observed, is a "useful and

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[53] Section 1(a) substituted by section 1 of Act 6 of 2014.
[54] [2010] 7 BLLR 705 (LAC).
[55] [1999] 9 BLLR 875 (LAC).
[56] [2016] 9 BLLR 872 (LAC) at par 102.

essential" means to this end which "has been recognised as an essential and reasonable policy choice for the achievement of orderly collective bargaining and for democratisation of the workplace".[57]

Conradie J held in *NAPTOSA v Minister of Education, Western Cape*,[58] that the effect of section 1(*a*) is to ensure that the LRA "[marries] the enforcement of fundamental rights with the effective resolution of labour disputes . . . If an employer adopts a labour practice which is thought to be unfair, an aggrieved employee would in the first instance be obliged to seek a remedy under the LRA…"

2 3 The interpretation of the LRA and South Africa's international obligations under the ILO

Section 3 of the LRA requires that:

"Any person applying this Act must interpret its provisions-

(a) to give effect to its primary objects;

(b) in compliance with the Constitution; and

(c) in compliance with the public international law obligations of the Republic."

In *Minister of Defence and Military Veterans v Thomas*,[59] it was held that in applying labour law, the court had to look at which interpretation of the law would best "promote the spirit, purport and objects of the Bill of Rights." In this case, the interpretation which was least restrictive of the respondent's rights was accordingly upheld.

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[57] [2016] 9 BLLR 872 (LAC) at par 105.

[58] (2001) 22 *ILJ* 889 (C) at 896. Thus, s 1(a) gives effect to s 23(1) of the Constitution by recognising the right not to be unfairly dismissed in s 185 of the Act: *Chillibush v Johnston* [2010] 6 BLLR 607 (LC) at par 39. See *Aviation Union of SA v SA Airways* [2012] 3 BLLR 211 (CC) at par 29.

[59] 2015 (10) BCLR 1172 (CC).

Section 3 expressly approves the "purposive" as opposed to the "literal approach" to the LRA. "The interpreter must … read the LRA creatively, within the limits that language permits, to arrive at a result which expands, rather than limits, the rights the LRA creates and the values it seeks to promote".[60]

However, a purposive interpretation may not necessarily be the least restrictive of a fundamental right in issue, as was observed in the following words by Van Niekerk J in *SA Airways (Pty) Ltd v SATAWU*[61]

> "It should be recalled that the promotion of orderly collective bargaining is one of the LRA's fundamental purposes. The structure of the Act is one in which the right to strike is drawn from the institution of collective bargaining. The right to strike, fundamental as it is, is thus not an end in itself – the resolution of disputes through collective bargaining remains the ultimate objective."

In *National Union of Metal Workers of South Africa v Bader Bop*[62] the Constitutional Court underlined the importance of South Africa's international obligations under the ILO and recognised the duty of the courts to consider the provisions of the ILO when construing the LRA.[63] ILO instruments[64] reflect international consensus and the values that South Africa through ratification, has committed itself to uphold.[65] Section 39(1)(b) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum

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60 Grogan *Collective labour law* (2014).
61 [2010] 3 BLLR 305 (LC) at par 22.
62 2003 (3) SA 513 (CC) para 26.
63 Thus, in *South African National Defence Union v Minister of Defence* 1999 (6) BCLR 615 (CC) at par 25ff the court relied on ILO Convention 87 of 1948 to clarify the meaning of "worker", and in *Equity Aviation Services (Pty) Ltd v CCMA* [2008] 12 BLLR 1129 (CC) at par 26 the Constitutional Court referred to ILO Convention 158 of 1982 to interpret sections 188 and 193 of the LRA.
64 These include the Right to Organise and Collective Bargaining Convention (1949) (No 98); Abolition of Forced Labour Convention (1957) (No 105); Minimum Age Convention (1973) (No 138); Forced Labour Convention (1930) (No 29); Worst Forms of Child Labour Convention (1999) (No 184); Equal Remuneration Convention (1951) (No 100); Discrimination (Employment And Occupation) Convention (1958) (No 111); Freedom of Association and the Right to Organise Convention (1948) (No 87).
65 Van Staden 2012 *TSAR* 91.

must consider international law. The courts may further refer to the non-binding interpretations of the ILO's Committees or Commissions of Inquiry whose' jurisprudence has been found to be directly relevant to the interpretation of our LRA and our Constitution. This approach was demonstrated very early in our constitutional jurisprudence.[66] South Africa is required to implement international law obligations to uphold, amongst other rights, the rights to freedom of association, to promote collective bargaining, and to ensure equality at work.[67] The labour law reforms that were introduced in 1995 assured that South Africa met these obligations.[68]

2 4 The primary objects of the LRA: a manifestation of social justice

The free-market perspective of labour law perceives the contract of employment and the associated "individual bargain, which it represents as the only legitimate mechanism to regulate the employment relationship".[69] Those who follow the free-market perspective hold the view that legislative regulation in the labour market is irreconcilable with what is referred to as a "right to work under any conditions".[70]

"If labour economics are set aside, however, a number of external limitations on the nature and extent of any deregulation of the South African labour market can be put forward."[71] This shows that labour market policy cannot be only a matter of economics. The Constitution needs to be taken into

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66 *S v Makwanyane* 1995 (3) SA 391 (CC). Also in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration* [2006] 9 BLLR 833 (LC) the court was prepared to invoke the contents of an unratified international pact of the ILO in dealing with the labour matter before it.

67 Van Niekerk and Smit (eds) *Law@work* 6.

68 Botha "The different worlds of labour and company law: truth or myth?" 2014 *PELJ* 2042-2103.

69 Van Niekerk and Smit (eds) *Law@work* 8.

70 Van Niekerk and Smit (eds) *Law@work* 6.

71 Botha 2014 *PELJ* 2042.

account when choices are made and the limitation of constitutional rights is considered.[72]

Du Toit[73] says that "the principle of collective bargaining has become embedded in labour relations over the last three decades, and even more so in the law."

It has been put forward by Botha[74] that today in South Africa, the right of employees to participate in workplace decisions affecting them is included under the purpose and function of labour laws regardless of the view taken of the true function of labour law.

Arguably, the role of labour law has found expression in the primary objects of the LRA, being the promotion of constitutionally guaranteed employment rights, primarily through collective bargaining. The primary objects, I submit, are to a large extent a manifestation of the social justice perspective.

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[72] Van Niekerk and Smit (eds) *Law@work* 8.
[73] Du Toit "What is the future of collective bargaining (and labour law) in South Africa?" 2007 *ILJ* 1405.
[74] Botha 2014 *PELJ* 2042.

CHAPTER 3

THE ADVANCEMENT OF ECONOMIC DEVELOPMENT OF WORKERS

3 1 Introduction

23 years after South Africa became a democratic state, the question is: are the ordinary workers economically developed? One of the objects of the LRA is to advance the economic development of workers. Did the LRA succeed or fail in achieving this? Should we change our laws or revisit the objects of the LRA?

In attempting to assess these questions the main focus will fall on the LRA being the primary and key law providing for the advancement of the economic development of workers. Other black economic empowerment laws, such as the Broad-Based Black Economic Empowerment Act[75], Employment Equity Act[76] or Skills Development Act[77] are also relevant but are often confused with employment legislation or the object of

[75] Broad-Based Black Economic Empowerment Act 53 of 2003.
[76] Employment Equity Act 55 of 1998.
[77] Skills Development Act 97 of 1998.

the LRA of advancing the economic development of workers. Black economic empowerment and the advancement of the economic development of workers are two separate concepts although they are linked to one another in terms of transforming participation of black people in the economic system or in their representation in companies in creating an equitable environment. This distinction has to be born in mind. It will also become evident during the analysis that unemployment and economic advancement are naturally interrelated concepts.

3 2 Unemployment and atypical forms of employment

The absence of economic transformation, in particular, rising levels of unemployment and inequality, have dominated dialogue over the need to revise South Africa's post 1994 labour law framework.[78] The Department of Labour tabled a report in NEDLAC in October 2004 showing that increased levels of employment informalisation, in particular the practice of labour broking, had eroded labour law protection for South Africa's workers. There was agreement within NEDLAC that atypical forms of employment were on the increase and that improved enforcement of existing laws was needed to deal with abuses (NEDLAC 2004).[79] Although non-standard employment had emerged during apartheid, its substantial growth after 1994 has impacted adversely on the capacity of the new LRA to achieve its goals, says Benjamin.[80] In October 2002 strike action by some 4 000 ERPM gold mine workers in Johannesburg took place over labour broking and temporary employment services. A research project which was subsequently commissioned by the Department of Labour, argued that work externalisation (especially outsourcing and labour broking) was the major driver of job informalisation rather than casualisation by hiring temporary and part-time workers.[81]

Non-standard employment is driven by varying reasons. Certain economic sectors such as agriculture, construction and retail, have conventionally been associated

[78] Benjamin "South African Labour Law: A Twenty-Year Assessment" 2016, available at www.cth.co.za/wp-content (accessed 7 May 2018).
[79] Benjamin 2016 www.cth.co.za/wp-content.
[80] Benjamin 2016 www.cth.co.za/wp-content.
[81] Benjamin 2016 www.cth.co.za/wp-content.

with non-standard work arrangements, such as seasonal, temporary and part-time employment. However, non-standard employment has spread to other sectors such as local municipalities, hospitals, manufacturing, service sectors, telecommunications and the airlines.[82] The provision of non-standard work is often undertaken as a means of cutting labour costs; maintaining profit margins; as a strategy for avoiding labour regulations and because the use of non-standard work provides the employer with more flexibility. Advancement in technology is also a contributing factor. Non-standard workers are often cheaper because of lower wages and are typically not formally organised. Employed on a fixed-term basis, labour broker workers are more vulnerable to workplace abuses such as arbitrary dismissals and retrenchments.[83]

The outsourcing of the so-called "non-core" services[84] has also been widely used across South African universities; the reason given being that it enables the employer to focus on the core business of the institution. However, in most cases services are outsourced purely because of their strategic importance to the business, rather than because they are non-core.[85] Outsourcing has a negative impact on workers' salaries, job security and other benefits because these are reduced.[86] Agency workers are paid significantly less than those employed directly by the companies where they work and have no security of employment. Generally, their employment situation tends to be risky.

In 2014, the LRA was amended[87] to introduce several protections for employees in precarious employment by addressing the suggested regulation of non-standard forms of work including TESs, fixed-term contracts and part-time employees.[88]

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82 Mathekga "The analyses of non-standard employment and contemporary labour protest in South Africa" 2016 *SAJLR* 139.

83 Mathekga 2016 *SAJLR* 139.

84 The meaning of the terms 'core services' and 'non-core services' has not been accurately ascertained.

85 Mathekga 2016 *SAJLR* 139.

86 Mathekga 2016 *SAJLR* 139.

87 Labour Relations Amendment Act 6 of 2014 (2014 Amendments).

88 Van Eck "Regulated flexibility and the Labour Relations Amendment Bill of 2012" 2013 *De Jure* 600 says it is clear that the drafters of the amendments were mindful of the overarching policy of regulated flexibility and that they did not merely introduce new obligations on employers without taking account of the fact that it may impact negatively

Commenting on the amendments, Van Eck[89] observes as an encouraging development the fact that the TES industry "was not prohibited and that the imposition of enhanced protection for fixed-term and part-time employees were not extended to small employers and start-up businesses". Although the amendments are not impeccable in all respects, says Van Eck, they were certainly influenced by the principles of regulated flexibility which seek to strike a balance between providing protection to employees and balancing this with some flexibility for employers. Van Eck further makes the point that South Africa can learn from both the "decent work" and "flexicurity" policy approaches adopted by the ILO and the European Union respectively, as their policies "seek to balance the protection of employees' rights with aspects like investment in training and social security measures and the promotion of social dialogue."[90] I especially agree with the submission made by Van Eck that the purpose of labour law should be extended beyond the mere fortification of employees' rights and that labour law should be alert to the factors that may discourage (and encourage) job creation or which may incorporate skills development and social security protection into a nuanced and harmonised labour market policy.[91]

On 26 July 2018 the Constitutional Court delivered judgement in a seminal case that might change the face of the labour broking landscape in South Africa. The case is *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa.*[92] The court was being asked to finally determine the correct interpretation of section 198A(3)(b) of the LRA which provides that an employee who earns less than the stipulated threshold (R205,000 per annum and less) and is contracted through a temporary employment service to a client for more than three months, is deemed to be employed by that client. The issue to be decided was what happens to the

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on especially smaller employers and lower earning employees to implement additional obligations on employers.

89 Van Eck 2013 *De Jure* 600.

90 Van Eck 2013 *De Jure* 600.

91 Van Eck 2013 *De Jure* 600.

92 [2018] ZACC 22.

employment relationship under the LRA between the placed employee and the temporary employment service once the deeming provision becomes effective. In particular, does section 198A(3)(b) give rise to a dual employment relationship where a placed employee is deemed to be employed by both the temporary employment service and the client? Or does it create a sole employment relationship between the employee and the client for the purposes of the LRA? The court ruled in favour of the National Union of Metalworkers of South Africa that "The employee automatically becomes employed on the same terms and conditions of similar employees, with the same employment benefits, the same prospects of internal growth and the same job security that follows."[93]

It remains to be seen how this ruling will change the labour broking landscape in South Africa. Obviously delighted with their court victory, the National Union of Metalworkers of South Africa is reported to have welcomed the judgement as a "major victory for casual and temporary workers who are abused by labour brokers".[94] Other unions under the umbrella of the South African Federation of Trade Unions likewise put out euphoric statements. "This ruling frees workers from slavery and exploitation under Labour brokers," was the comment of the National Union of Public Service and Allied Workers.[95] On the other hand, we are told that the Confederation of Associations in the Private Employment Sector commented, through its lawyer after the judgement: "The Constitutional Court ruling changes very little. It merely confirms that after three months employees have labour relation rights against the client (where they work). Ordinarily, the labour broker will remain the employer of the placed worker in terms of contract."[96] Nevertheless, it

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93 *Per* Dlodlo AJ at para 69, who further held for the majority "the language used by the Legislature in section 198A(3)(b) of the LRA is plain. And, when interpreted in context, it supports the sole employer interpretation. It certainly is also in line with the purpose of the 2014 Amendments, the primary object of the LRA, and the right to fair labour practices in section 23 of the Constitution" at para 84.

94 Van Rensburg "ConCourt ruling on labour broker workers is 'meaningless'" 2018, available at www.city-press.news24.com (accessed on 7 August 2018).

95 Van Rensburg 2018 www.city-press.news24.com.

96 Child "Labour broker judgment will 'not affect' cleaners, security staff" 2018, available at www.timeslive.co.za (accessed on 6 August 2018).

does appear that the placed workers will at least be in a less precarious employment position now, than before the judgement.

3 3 Labour market efficiency problems adversely affecting the advancement of ordinary workers

Labour market efficiency is currently undermined by a number of issues. The economy's low capacity to absorb labour. The mismatch between the workforce skills and those skills demanded by industry, worsened by changes in the sectoral composition of employment, where a shift towards a more capital and skill intensive economy has meant that fewer and fewer new low-skilled jobs are becoming available.[97] Inadequate vocational skills training, a rigid labour market, the ongoing crisis in collective bargaining, the widespread prevalence of the controversial practice of labour broking, problems with the implementation of minimum wages, and policies that actually hamper – rather than aid – efforts to achieve higher rates of job creation[98] and consequently the slow pace of economic development of workers.

International migration, global activities of multinational enterprises, the information high way, new methods of production and trade liberalization have all created novel labour issues, says Feys.[99] While the world economy is becoming much more integrated and much richer overall, the creation and enjoyment of that wealth, however, are very uneven. Advanced technologies threaten to undermine the economies of developing societies as progress benefits those nations that are able to take advantage of the newer methods and science.[100] The increasingly globalized economy demands high levels of adaptability and flexibility on the part of the labour market and its participants.[101]

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97 Soko and Balchin "The South African labour market: a prolonged and worsening crisis" 2014 *New Agenda* 36.

98 Soko and Balchin 2014 *New Agenda* 36.

99 Feys "Labour standards in Southern Africa in the context of globalisation: The need for a Common Approach" 1999 *ILJ* 1446.

100 Feys 1999 *ILJ* 1446.

101 Feys 1999 *ILJ* 1446.

How do we raise efficiency and also achieve representivity at the same time. How does one maintain economic efficiency within the regulated minimum labour standards? According to Feys the ILO has pointed out that labour market flexibility is a multidimensional concept, and is not synonymous with deregulation.[102] Thus, to pose the policy options as a choice between two grand alternatives (regulation versus deregulation or minimum standards versus flexibility) is greatly to oversimplify the matter.[103] The concepts of protection of minimum standards in employment on the one hand, and employment creation through labour market flexibility on the other, are not mutually exclusive. Flexibility must be compatible with labour market security which entails protection from arbitrary loss of employment, reductions in income or benefits, dangerous and unhealthy work practices.[104] Feys is of the view that the traditional economic thinking that there is always a tradeoff between equality and efficiency is coming under increasing attack.[105]

3 4 Efforts towards the protection of the rights of workers and promoting workers' economic development

Significant advances have over the years been made to boost the economy, protect the rights of workers and sustain their economic development. In 2013 the government published the new National Development Plan (NDP) focusing primarily on the need for job creation. "While agreeing with some points in the plan" says Benjamin, "COSATU criticised the NDP because it projected many more jobs to be created by small business than in the services sector; it ignored the New Growth Path and the Industrial Policy Action Plan; and it called for job creation through reducing the rights of existing workers."[106]

The Employment Tax Incentive Act became operational in 2014. The Act, seeks to encourage business to employ the youth by providing for an employment tax

[102] Feys 1999 *ILJ* 1446.
[103] Feys 1999 *ILJ* 1446.
[104] Feys 1999 *ILJ* 1446.
[105] Feys 1999 *ILJ* 1446.
[106] Benjamin 2016 www.cth.co.za/wp-content.

incentive in the form of an amount by which employees' tax may be reduced. The Act recognises that government has identified the need to focus on labour market activation, especially in relation to young work seekers. It is noted by Benjamin that COSATU opposed the Act, arguing that it would see older workers displaced by young people whom employers would hire at a fraction of the cost of older workers. The Treasury noted that it would monitor the implementation of the tax incentive with the possibility of changing it, should any "unintended consequences" arise.[107]

The other common schemes are cited by Brassey.[108] These include that financial subsidies be given for job creation as well as for entrants who struggle to get a foothold in the market. Another variant of this proposal is to improve the employability of new market entrants by placing them partly or wholly outside the regulatory net for a given period (six months, a year, maybe two years) at the end of which the employees are expected to fit seamlessly into the employer's workforce. Even an economic Codesa has been proposed, out of which, presumably, a new labour dispensation will rise up.[109] Brassey criticizes these scheme on the basis, for instance that financial subsidies are wide open to abuse which has already led to "people farming" (that is, the racket in which workers are hired by phantom enterprises at less than the subsidy and the difference is pocketed by the 'employer') as has happened in the old border areas. Brassey also criticizes the regulatory net exemption scheme as one that simply privileges new workers over established workers. Nonetheless, Brassey is of the view that "the bulk of the credit must surely go to an informal sector in which workers *do* get employment, tenuous though it may be, and *can* make money by entrepreneurial activity."[110]

The 2014 amendments were designed to address a range of labour employment issues but significantly, to protect workers from dismissal in a wider array of work situations in an effort to develop security of employment.[111] Section 198A focuses on

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107 Benjamin 2016 www.cth.co.za/wp-content.
108 Brassey "Fixing the laws that govern the labour market" 2012 *ILJ* 1.
109 Brassey 2012 *ILJ* 1.
110 Brassey 2012 *ILJ* 1.
111 Van Eck 2013 *De Jure* 600.

labour broker employees of the TES. Section 198B provides for employees involved in fixed-term contracts. Section 198C protects part-time employees. Section 198D contains general provisions applicable to sections 198A-C. The LRA and its 2014 amendments recognises that a dismissal includes a situation in which an employee reasonably expects the employer to retain him or her on an indefinite basis on the same terms and conditions but the employer offers to retain the employee on less favourable terms or not at all. It also includes the failure to renew a fixed-term contract, the refusal to allow an employee to return to work after a pregnancy, selective non-re-employment, and constructive dismissal on grounds of an intolerable working environment, including as a result of a transfer of a business.

The recent Constitutional Court judgement referred to above[112] appears to be enhancing protection for vulnerable employees by application of a purposive and favourable interpretation of the 2014 amendments. In my view, the judgement is a gain for defenseless workers. "Part of this protection entails that placed employees are fully integrated into the workplace as employees of the client after the three-month period. The contractual relationship between the client and the placed employee does not come into existence through negotiated agreement or through the normal recruitment processes used by the client."[113]

3 5 Minimum wages in South Africa

South Africa has one of the widest wage gaps in the world.[114]

The debate on a possible national minimum wage has been going on for some time, with engagements having taking place in Nedlac. In September 2014, various stakeholders including Agri SA, Business Unity South Africa, the Black Management Forum, Congress of South African Trade Unions, National Union of Metalworkers of South Africa, the Free Market Foundation and Stellenbosch and the Western Cape universities made public submissions to the Portfolio Committee on Labour on a

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112 See note 15 above.
113 *Per* Dlodlo at para 69.
114 Benjamin 2016 www.cth.co.za/wp-content.

possible national minimum wage.[115] Generally, the business constituency contended against a single national minimum wage, while employee trade unions argued in favour of it.[116] Business Unity South Africa maintained that South Africa has a functioning system of sectoral minimum wages through sectoral determinations which provide for minimum wages per job category. Notably, this is also the position of the Democratic Alliance which feels that issues of minimum wages are best left for determination by the negotiating parties at sectoral or plant level. The Black Management Forum, while it fully supported the national minimum wage, felt that the introduction of a national minimum wage would achieve little if it was not accompanied by a serious rethink on executive pay. [117] The Confederation of South African Workers' Unions presented research which it had conducted into vulnerable sectors such as domestic workers and farm labour. A Gauteng-based study among 120 workers in the farming and domestic sectors, showed that the average wage among these workers was around R2 500 per month, with travelling costs being the biggest monthly expense followed by housing, VAT, electricity, water, crèche fees and medicine. Not much is left available for clothing and food. According to the Confederation of South African Workers' Unions more than two million workers were living in poverty. It referred to South Africa as a country of the working poor.[118]

The National Minimum Wage Act[119] was assented to on 23 November 2018 and became operational in January 2019. The minimum wage, which cannot be waived, will take precedence over a contrary provision in a contract of employment, collective agreement, sectoral determination or law and will constitute a term of the employment contract unless the contract of employment, collective agreement or law is more favourable.[120] Employers will now have to pay their staff a minimum wage of R20 an hour with the exception of sectors such as the farm or forestry, domestic and expanded public works programme workers, that have been given a

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115 Crosby "The national minimum wage debate" 2015 *FarmBiz* 38.
116 Crosby 2015 *FarmBiz* 38.
117 Crosby 2015 *FarmBiz* 38.
118 Crosby 2015 *FarmBiz* 38.
119 National Minimum Wage Act 9 of 2018.
120 Crosby 2015 *FarmBiz* 38.

longer transition period to pay R18, R15 and R11 per hour respectively. President Cyril Ramaphosa recognises that the national minimum wage is not a living wage[121] but as he put it "We have made important progress in improving the conditions of the working poor."[122]

One of the big federations of workers' unions, the South African Federation of Trade Unions has come out strongly against the national minimum wage "Saftu insists that the national minimum wage [of R20 an hour for most workers] will do nothing except entrench the apartheid wage structure, keep millions of workers trapped in poverty and slave wages, widen income inequalities that have made our country the most unequal in the world."[123]

While the Democratic Alliance, South African Federation of Trade Unions and others are still up in arms, the issue of minimum wages is far from being amicably settled. It remains to be seen in future how the minimum-wage, which is reviewable yearly, will impact the workers' plight.

3 6 The different labour and empowerment law economic advancement models

As was mentioned earlier, the government has progressively introduced legislation aimed at transforming participation of black people in the economic system as well as promoting their representation in companies, to create an equitable economic environment. Equal employment opportunities policy can address some of the

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121 This is what President Cyril Ramaphosa told crowds gathered at the Dr Rantlai Petrus Molemela Stadium in Bloemfontein for Freedom Day celebrations on Friday April 2018.

122 Ramaphosa called the national minimum wage agreement a "great victory" for workers in South Africa, he acknowledged that the minimum wage of R20 an hour is not a living wage and that it will not end income inequality. Ramaphosa explained that the minimum wage provides a "firm and unassailable" foundation from which to build towards a living wage. The South African Federation of Trade Unions led by Zwelinzima Vavi held a nation-wide strike challenging the minimum wage agreement and amendments to labour bills. Vavi called the national minimum wage a "slave wage" and challenged politicians to live on R20 per hour.

123 Phakathi "Minimum wage: Saftu rejects 'apartheid pay structure'" 2018, available at https://www.businesslive.co.za (accessed on 14 November 2018).

problems we face as society.[124] The Broad-Based Black Economic Empowerment Act is the centrepiece of the government's economic strategy for altering the economic disparity that is a symbol of the South African economy.[125] It facilitates ownership and management of enterprises by black women, rural communities and cooperatives. This has resuscitated debates concerning employee ownership as a vehicle for transformation. As such it can be seen as a form of "contract compliance" in terms of which the incentive of doing business with the State is used to encourage transformation.[126] The Solms-Delta Wine Estate operates a wine-production business in Franschhoek, Stellenbosch. In an innovative agreement between the Wine Estate and national government, funded by the government's National Empowerment Fund, the farmworkers as well as farm dwellers own 45% of the business, including its brand and land. [127] The agreement appears to have positively merged black economic empowerment with labour law by introducing a profitable employee share ownership scheme because every year they gradually increase the ownership percentage of their workers. The workers' share of equity in the company has increased from an original 33% at start up to 45% in 2017, meaning the workers' share of future profits would accordingly be increased. Provision is made for a six-member board, one each for the Empowerment Fund, Solms, Astor and the farm's chief executive, and two representatives for the workers. [128] However, recently in June 2018 the Department of Rural Development and Land Reform said it would assist in a turnaround strategy which will encompass diversification and restructuring of operations to ensure sustainability and profitability of the business to secure the workers' employment and improve their livelihoods.[129] This was after the business

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[124] Benjamin "A review of labour markets in South Africa: labour market regulation: international and South African perspectives" 2005, available at http://repository.hsrc.ac.za (accessed 10 May 2018).

[125] Benjamin 2005 http://repository.hsrc.ac.za.

[126] Benjamin 2005 http://repository.hsrc.ac.za.

[127] Isaacs "No-more-baas-or-klaas" 2017, available at https://www.iol.co.za/businessreport/companies/no-more-baas-or-klaas (accessed 15 August 2018).

[128] Isaacs 2017 https://www.iol.co.za/business-report/companies/no-more-baas-or-klaas.

[129] Villette "State-to-take-over-franschhoek-wine- farm" 2018, available at ttps://www.iol.co.za/capetimes/news/state-to-take-over-franschhoek-wine- farm (accessed 23 August 2018).

had some operational problems.[130] Nevertheless, the system had worked because the workers owned the company and therefore they had a better incentive to work and protect the company. The workers would not readily involve themselves in prolonged unprotected strikes because it is their own business and they would lose. The employees learn the different facets of the business with skills development from picking the grapes on the farm to taking part in board meetings as shareowners. The career development of the employees is linked to the company they work for.

Sectoral charters are used to measure empowerment within the various economic sectors while codes of practice make compliance with charter targets binding criteria for the evaluation of tendering and all other forms of competitive contracting in all spheres of government.[131] The charters have adopted the balanced scorecard as a basis for measuring: direct empowerment through ownership; management control (employment equity); indirect empowerment through preferential enterprise and supplier development; skills development and socio economic development. All these are the core elements of empowerment.

According to Benjamin, targets for the employment of black employees and learners dramatically enhance the incentives for employers to meet targets for employing and training black personnel.[132] The employment of black learners is a factor in the transformation scorecards and, as with employment equity; this is likely to increase the focus on skills development.

The Employment Equity Act and the Skills Development Act are important pieces of legislation. The Skills Development Act and the Skills Development Levies Act are intended at developing the skills of the South African workforce. The objectives of the National Skills Development Strategy include looking after skills development in the formal sector, small businesses and promoting skills growth for employability and

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130 See chapter 5 for a further discussion of this aspect.
131 Benjamin 2005 http://repository.hsrc.ac.za.
132 Benjamin 2005 http://repository.hsrc.ac.za.

sustained livelihoods through social development initiatives.[133] Benjamin points out that "Kraak characterises the NSDS as a differentiated and hybrid training model that contains complementary strategies for upskilling of the low, intermediate and high skill sectors within the economy (Kraak, 2004b: 213)." The institutional substructure of the Skills Development Act consists of the National Skills Authority, Sectoral Education and Training Authorities (SETAs), the National Skills Fund, the Skills Development Planning Unit and labour centres within the Department of Labour.[134] Learnerships (structured training programmes established by SETAs that combines theory at a college or training centre with relevant practice on-the-job.[135]) provide a flexible basis for growing the skills of employees and new entrants into the workforce. Learnerships typically lead to an occupationally related qualification recognised by the SA Qualifications Authority. Although employers are under no obligation to offer qualified learners permanent employment after the training is completed the learners will at least have a qualification and work experience.[136] Employers may apply to their SETA for subsidies to cover both the costs of a learnership and the learner's allowance. In addition, there are significant tax incentives for employers get involved in learnerships.[137] However, Benjamin draws attention to Kraak's proposition that "the reliance on learnerships, rather than ongoing short-course semi-skill training programmes, may be one of biggest limitations of the training system (2004a: 123)."[138]

Employers are required to pay a skills levy equivalent to 1% of their wage bill. Various criticisms have been made against the learnership programmes and

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133 Benjamin 2005 http://repository.hsrc.ac.za.

134 Benjamin 2005 http://repository.hsrc.ac.za says "Kraak has suggested that the new framework has replaced the previous "narrow, short-termist and voluntarist" model of enterprise training with a framework based on greater co-ordination and planning, greater stakeholder consensus and improved financial arrangements which improve the leverage of state and the SETAs over the direction of training initiatives (Kraak, 2004a: 116)."

135 Department: Labour "*How to set up learnerships if you are an employer"* 2007 available at *http://www.labour.gov.za/DOL (*accessed on 6 June 2018).

136 Department: Labour 2007 *http://www.labour.gov.za/DOL.*

137 Benjamin2005 http://repository.hsrc.ac.za.

138 Benjamin 2005 http://repository.hsrc.ac.za.

Benjamin also highlights that "it has been noted that there are severe difficulties in providing skills development programs within the informal sector (NALEDI, 2004)."[139]

Existing minimum standards are not cast in stone as the political economy might change. Labour law, either via its direct influence on the individual contract of service (job security, minimum wages) or the institutions it creates (trade unions, industrial councils, right to strike, etc) effects a transfer of power to labour in order to effect a transfer of wealth to labour in the production (h) process.[140] Accordingly, it is possible and quite valid to evaluate labour law in terms of its direct and indirect influences on growth (efficiency) and on redistribution, that is, in terms of development. In the words of Feys[141], "the question, therefore, is not whether as a matter of public policy the labour market ought to be regulated, but which regulatory regime will best serve our social and economic needs."

Non-standard employment has simply facilitated flexible employment rather than create permanent jobs. Labour exploitation and inequality in South Africa still exists, affecting fundamental opportunities for salary improvements and access to employment benefits.[142] While trades unions and civil society call for full-time employment, companies have been on their feet defending the use of non-standard employment. Jobs in South Africa have become increasingly flexible, unprotected and fragmented and they deviate from the promise of work with dignity. Much remains to be done to protect workers redistribute wealth, maintain and nurture workers' rights and empower the citizenry in a country where the gap between the rich and the poor is widening and unemployment is responsible for major social and economic challenges.[143]

The growth of the triangular employment relationship, and its effects on labour regulation is radical, says Theron.[144] If workers' rights are to be protected, new

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139 Benjamin 2005 http://repository.hsrc.ac.za.
140 Feys 1999 ILJ 1446.
141 Feys 1999 *ILJ* 1446.
142 Mathekga 2016 *SAJLR* 139.
143 Mathekga 2016 *SAJLR* 139.
144 Theron 2008 *ILJ* 20.

models of regulation have to be developed, or existing models will have to be adapted.

Baskin[145] opines that the LRA provides a far more balanced and workable bargaining framework than we had previously. The primary terrain for promoting job growth is sound economic policy, increased growth rates and more investment.[146] Further, the effect of land reform, or the impact on labour costs of high prices and transport expenses, or the consequences of high levels of crime, or the poor quality of our primary education system, are only examples of the many non-labour policies with major employment implications, says Baskin. Even World Bank analysts make this point, commenting that in South Africa labour market factors can be blamed for perhaps 25% of the unemployment problem.[147]

Brassey[148] argues that the solution to our terrible levels of unemployment lies in making deeper structural changes to our labour law and reviewing our industrial relations system. He acknowledges that this can only be a part of the solution and that monetary and fiscal policy in all its ramifications plays a part and its significance is arguably far more profound than regulations.

Collective bargaining is surely one of the biggest achievements of our modern labour law. Its institutional importance cannot be overemphasised because it gives voice to employees who would otherwise find it challenging to match the bargaining muscle of the employer. It gives social power and plays a very vital role in the development of economic progression of workers through improved bargaining rights irrespective of the workplace one finds himself in. But then again, Soko and Balchin are of the view that the collective bargaining system needs a radical overhaul to move away from the preoccupation with industry-level bargaining and re-introduce two-tier bargaining, at both the industry and plant level.[149] The reintroduction of bargaining

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145 Baskin "South Africa's Quest for Jobs, Growth and Equity in a Global Context" 1998 *ILJ* 986.
146 Baskin 1998 *ILJ* 986.
147 Baskin 1998 *ILJ* 986.
148 Brassey 2012 *ILJ* 1.
149 Soko and Balchin 2014 *New Agenda* 36.

at the enterprise level has the potential to restore much-needed rationality and credibility to the collective bargaining system. It also gives workers a far better opportunity to gain an equitable share of the value generated by the businesses in which they work.[150] Moreover, a move towards two-tier bargaining, in which only minimum wage levels or a basic framework are set at industry level, and actual wage levels at plant level, would facilitate wage settlements that far better reflect the current economic realities in South Africa.[151] The same cannot be said of workplace forums because for the moment, the question remains open whether workplace forums are a dead letter or an idea ahead of its time because so far, workplace forums have failed to be effective in collective bargaining processes although they continue to be provided for in our labour law books. The workplace forum, referred to as a sitting duck, make no business sense because to establish a forum the consent of the majority trade union is required. This begs the question why would the majority trade union give away its bargaining power back to the workers when they are already controlling those employment issues under the collective bargaining. The dominance of centralised bargaining – which is at odds with the international movement towards decentralisation – favours large employers, institutionalises the power of trade unions, and results in greater incidence of fixed wages across sectors. [152] Centralised bargaining does not sufficiently recognise differences across enterprises and stifles labour management relationships at the enterprise level. Wage levels are restrained in certain sectors – with commercially stronger employers "required to pay only the modest wage increases that smaller enterprises can afford, while the weakest enterprises may be squeezed out if they cannot afford the increases that the majority are prepared to pay."[153]

Major trade unions must accept responsibility for their failure to achieve real gains for workers through effective collective bargaining over the past decade.[154] For their part, employers have, until recently at least, also been content to leave bargaining

[150] Soko and Balchin 2014 *New Agenda* 36.
[151] Soko and Balchin 2014 *New Agenda* 36.
[152] Soko and Balchin 2014 *New Agenda* 36.
[153] Soko and Balchin 2014 *New Agenda* 36.
[154] Soko and Balchin 2014 *New Agenda* 36.

to industry representatives, while paying little attention to workplace relations, to the detriment of meaningful engagement at the enterprise level. Well-founded concerns that employers have pursued high levels of profit for owners – which are shared with top managers at the expense of lower-paid workers – have also been a source of consternation for trade unions and workers alike.[155]

3 7 Financial participation of workers

Botha[156] points out that S 7(d) of the Companies Act acknowledges an existing principle: it makes provision for the fact that companies must reaffirm the concept of the company as a means of achieving economic and social benefits as well as enhancing the welfare of South Africa as a partner in the global economy.[157] Employees can by means of economic and financial participation, achieve some form of industrial democracy and social justice because the issues relating to the social and economic advancement of society, including employees, are important from the context of both the LRA and the Companies Act, articulates Botha.[158]

Financial participation, where employees are allowed an opportunity to secure a financial stake in the prosperity of the organisation, and is linked to the organizational goals and is promoted by the employer[159] can be achieved voluntarily, where the employer decides to grant employees a financial stake in the prosperity of the organisation, or as a result of negotiations between the employer and the workers' representatives, or by means of legislation or codes.[160] In South Africa, most financial participation deals occure through collective bargaining "in which

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155 Soko and Balchin 2014 *New Agenda* 36.
156 Botha "Evaluating the United Kingdom's employee shareholder status provisions in context of the South African position" 2015 *THRHR* 78.
157 Botha 2015 *THRHR* 556.
158 Botha 2015 *THRHR* 556.
159 Finnemore *Labour relations* (2009) 215.
160 Botha 2015 *THRHR* 556.

trade unions or employee representatives negotiate, on an annual basis, improvements in the financial elements of employee packages, and so forth."[161]

Capital reallocation processes brought about by privatization policies and globalisation allow the potential for employee participation in the capital and governance of the enterprise, resulting in economic participation.[162] Shareholding leads to the transformation of the ownership and governance structure of enterprises while at the same time the "human capital" element gains a higher prominence.

Botha elaborates that financial participation of workers allows them a variable portion of income directly linked to profits, or some other measure of enterprise performance which is specifically linked to enterprise results but separate from an employee's fixed wage. It is not expressed as a predetermined proportion of their wages.[163] Employers can distribute the positive financial company returns to their employees through profit-sharing or workers' share ownership. Profit-sharing bonuses "can be distributed on a deferred basis, with sums being invested in enterprise funds or frozen in special accounts for a specific period, or be paid directly in cash."[164] Examples would include "co-operatives (in which all the firm's shares are collectively owned by its workforce), ESOPs (employee share-ownership plans, which involve a loan to an employee benefit trust) and employee buy-outs (under which the company's shares are exclusively purchased by its individual workers)."[165] Financial participation, depending on the kind of control or influence such schemes

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161 Botha 2015 *THRHR* 556.
162 Botha 2015 *THRHR* 556.
163 Botha 2015 *THRHR* 556.
164 Kester and Pinaud "The trade union challenge of democratic participation" 1998, available at www.academia.edu (accessed on 16 April 2014), referred to by Botha.
165 The necessary legal framework is created under the Companies Act of 2008, where employees can participate as shareholders through the issue of shares in terms of section 38, or through a consideration for shares in terms of section 40. Section 44 also provides for financial assistance in the subscription of securities and employee share schemes.

have over decision-making, may take the form of direct or representative participation.[166]

A way of empowering employees is by means of Employee Share Ownership Plans. Employee share schemes are described as "a scheme for encouraging or facilitating the holding of shares in a company, for the benefit of *bona fide* employees or former employees of the company."[167]

"As a result of the changes in social and economic conditions that have taken place in South Africa, ESOPs have become an important issue that concerns the legitimate demands made by employees for share ownership and economic inclusion in corporations."[168] Employee Share Ownership Plans provide for financial participation of employees through their ownership of shares in the company they are working for. Employees, through financial participation, especially Employee Share Ownership Plans, share in the costs and benefits associated with the company's financial well-being and prosperity.[169]

"From a management perspective, ESOPs have been praised because they improve economic growth and productivity, increase employees' share in the economy and lower unemployment."[170] This form of economic empowerment plays an important role, especially when coupled with a transformation initiative although some trade unions see these schemes as attempts to co-opt employees and weaken the trade unions.[171] "ESOPs have become one of the main channels of promoting economic empowerment by redistributing wealth to previously disadvantaged individuals and communities. By empowering employees through share-ownership options, companies create confidence in the promotion of corporate-governance principles in the workplace."[172]

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166 Kester and Pinaud 1998 www.academia.edu, referred to by Botha.
167 Blackman *et al Companies Act* (2002) 5.
168 Botha 2015 *THRHR* 556.
169 Botha 2015 *THRHR* 556.
170 Botha 2015 *THRHR* 556.
171 Botha 2015 *THRHR* 556.
172 Botha 2015 *THRHR* 556.

3 8 Regulation or flexibility?

Wealth, the argument goes, determines access to socio-economic resources. If social justice does not entail alleviating disparities of wealth, it must at least entail alleviating some of their consequences. This, say Theron and Godfrey,[173] is what the Constitutional Court appears to have had in mind when it said, in *Soobramoney v Minister of Health, Kwazulu-Natal*[174]: "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services…" One reason the term "poorest of the poor" is fashionable is that it refers to an undeniable social reality.[175] On the one hand there is a growing convergence between what is traditionally regarded as the middle class and the diminishing number of the working class in formal employment. On the other hand there is a growing disparity between this intermediate layer and a burgeoning underclass, which includes peripheral workers and the unemployed.[176]

Statistics South Africa reports that the unemployment rate is 26.7% and that figure excludes more than two million discouraged work-seekers.[177] Behind this number lies the legacy of systematic deprivation of opportunities for black South Africans and within it is the undeniable skew of racial inequality. This dire state of affairs is coupled with a history of very poor working conditions and pay for black employees.[178]

It must still be remembered that the world of work has been altered by countless modern events. Technological advances and managerial innovation have

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173 Theron and Godfrey "The labour dispute resolution system and the quest for social justice: a case study on the ccma, unfair dismissals and small business" 2002 *SAJLR* 21.

174 1998 (1) SA 765 (CC).

175 Theron and Godfrey 2002 *SAJLR* 21.

176 Theron and Godfrey 2002 *SAJLR* 21.

177 Statistics South Africa Statistical Release P0211, Quarterly Labour Force Survey Q4: 2017 (13 February 2018).

178 *Per* Dlodlo AJ *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa* [2018] ZACC 22 para 2.

transfigured the organisation of production and the cultural context and meaning of work are in flux. The debate between the requirements of labour standards (or security) on the one hand and the need for flexibility or adaptability on the other must take place in this context.[179]

Whether or not labour law is criticised for hindering efficiency, flexibility and development; condemned for reducing employment or it is seen as being normatively relevant today, says Botha,[180] depends on whether one adopts the libertarian approach or the social justice approach. But then again the libertarian and social justice models are not stand alone models. They are interlinked although their ideologies are different. In South Africa, a hybrid model allowing the application of both models, regulation together with a measure of freedom, would seem to be appropriate.

The question whether the workers have advanced in the past twenty three years and if not, how can this be achieved is closely tied to the enquiry whether our labour laws are too restrictive or if we need more protection or regulation. Do we need to restructure our labour dispensation to create more jobs? It's a question of labour economics if relaxing the labour laws (such as in Botswana for example where the labour laws are relaxed) translates into bringing foreign direct investment and jobs. I am of the view that we need not change our labour laws. To do that would be bringing a short term solution. The challenge for our country is to find a solution to creating sustainable jobs in the long term. It is true that our labour laws are very protective of workers.[181] However, this state of affairs may be explained in terms of the history of our complicated labour relations. Baskin[182] is correct, in my opinion, when he says that the LRA provides "a far more balanced and workable bargaining framework than we had previously."

If a more recent social justice perspective were to be applied, it might "recognise rights as a complementary and perhaps more significant medium to promote social

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179 Benjamin 2005 http://repository.hsrc.ac.za.
180 Botha 2014 *PELJ* 2042.
181 Botha 2015 *THRHR* 556.
182 Baskin 1998 *ILJ* 986.

justice in the workplace."[183] The acknowledgement of human rights, says Botha[184] including fundamental labour rights, is an important corporate responsibility for companies in South Africa as well as for multi-national companies generally. Corporate governance and social responsibility programmes play a significant role in the establishment and enforcement of basic labour rights.[185]

3 9 Conclusion

The functional nature of corporations has changed. Employer companies must now respect and protect human rights to the extent that these rights are applicable to them.[186] The success and value of a company "are no longer measured by having regard to its financial statements only."[187] There is a clear awareness that employees are important role-players in the life and well-being of companies. Not only do they contribute labour but they also contribute to the company's wealth and are also a prerequisite for the company's existence and prosperity.[188] The interests of various stakeholder groups in the context of the corporation as a "social institution" should be enhanced and protected.[189]

Today's labour law landscape is different from what it used to be prior to 1994.[190] But evidently, the legislative project to advance workers is far from being fully accomplished.

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183 Van Niekerk and Smit (eds) *Law@work* 10.
184 Botha 2015 *PELJ* 2.
185 Van Niekerk and Smit (eds) *Law@work* 10.
186 Botha 2015 *THRHR* 556.
187 Botha 2015 *THRHR* 556.
188 Botha 2015 *THRHR* 556.
189 Botha 2015 *THRHR* 556.
190 South Africa is a distinctive case because of previous economic exclusion and the imbalances created by such exclusion. The advancement of workers is a priority for government and hence the legislative project to advance workers.

CHAPTER 4

AN ASSESSMENT OF THE ADVANCEMENT OF SOCIAL JUSTICE IN THE WORKPLACE

4 1 Introduction

The specified goals of the LRA are indicative of the legislative intention to go further than merely stipulating rights which must be claimed, and enforced. "The professed aims disclose rather that the LRA is intended to be an instrument of social change aimed, in particular, at purging the labour dispensation of past inequalities and injustices, and extending democracy into the economic sector. It is in that spirit that the specific provisions of the LRA must be read."[191]

The Constitution puts a high premium on certain core labour rights which must be respected in line with the constitutional provisions to "establish a society based on democratic values, social justice and fundamental human rights."[192] The Constitution, says Botha[193], provides in particular for the right to fair labour practices as a fundamental right, and thus implies that "social justice is a necessary precondition for creating a durable economy and society, and places obvious

[191] Grogan *Collective labour law* (2014).
[192] S 1 of the Constitution.
[193] Botha "The different worlds of labour and company law: truth or myth?" 2014 *PELJ* 2042.

limitations on the policy choices open to those who seek to regulate the labour market."[194]

4 2 Theoretical approaches to social justice in labour relations

Sir Otto Kahn-Freund's theory of labour law, which was advanced in the 1950s and 1960s sees labour law as a means of counteracting the inequality of bargaining power between employers and employees.[195] According to the social justice perspective trade unions are regarded as primary vehicles through which social justice is achieved.[196] This equilibrium, according to Kahn-Freund, can be best achieved and maintained through voluntary collective bargaining, and the law plays only a secondary role as "it regulates, supports and constrains the power of management and organised labour."[197]

The libertarian view of deregulation of labour relations has its own shortcomings, in the South African labour market setting. Labour market policy cannot be only a matter of economics, because the Constitution needs to be taken into account when choices are made and the limitation of constitutional rights is considered.[198]

The ability (or inability) of either party to the employment contract (almost invariably in most cases the employee) to effectively bargain their employment conditions is a critical aspect of the employment relationship. Gericke[199] observes that "The exercise of power by employers in the unequal bargaining relationship is a reality and a direct concern of labour lawyers." However, by bargaining collectively, employees gain some countervailing power to that of the employer.[200] Collective bargaining can thus address the inequality that flows from the power relationship between employers

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194 Van Niekerk and Smit (eds) *Law@work* (2015) 6.
195 Botha 2014 *PELJ* 2042.
196 Van Niekerk and Smit (eds) *Law@work* 8.
197 Davies and Freedland *Kahn-Freund's Labour and the Law* (Stevens and Sons London 1983)15; Van Niekerk and Smit (eds) *Law@work* 9.
198 Van Niekerk and Smit (eds) *Law@work* 8.
199 Gericke "The regulation of successive fixed-term employment in South Africa: lessons to be gleaned from foreign and international law" 2016 *TSAR* 94, see also *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).
200 Davidov "Collective Bargaining Laws: Purpose and Scope" 2004 *IJCLLIR* 85.

and employees. This does not necessarily mean that the parties at the negotiation table possess equal bargaining power, but the "imbalance of power can be expected to be much less dramatic under a regime of collective bargaining", and once the position of the employees improves at the bargaining table, "the problem of democratic deficits is also to be expected to be alleviated."[201]

The interests of the parties and their respective power drive the process of bargaining and the outcomes of the process, says Botha.[202] If a more recent social justice perspective were to be applied, it might not only "acknowledge collective bargaining as an important means to define and enforce protection for workers" but also "recognise rights as a complementary and perhaps more significant medium to promote social justice in the workplace."[203]

4 3 The social justice structure of the LRA

The LRA[204] seeks to promote meaningful employee participation in workplace issues and industry decision-making. Various constitutional court decisions have also spoken of the importance of fundamental labour rights.[205]

Ferreira[206] contents that the new LRA has some "distinctly democratic features" having regard to provisions on access to company information relevant to collective bargaining[207]; recognising collective bargaining as an evidently powerful means of resolving disputes of mutual interest; permitting strikes, lock-outs and picketing as part and parcel of the normal process of collective bargaining[208]; allowing protest action to promote or defend the socio-economic interests of workers.[209] Furthermore, the workplace forum is one of the tools introduced to provide workers

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201 Davidov 2004 *IJCLLIR* 85.
202 Botha 2014 *PELJ* 2042.
203 Van Niekerk and Smit (eds) *Law@work* 10.
204 S 1 LRA.
205 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 1; *Minister of Finance v Van Heerden* 2004 12 BLLR 1181 (CC) para 25.
206 Ferreira 2005 *Politeia* 201.
207 S 89.
208 SS 64, 69.
209 S 77.

with a voice in the workplace.[210] The workplace forum[211] has a right to be consulted by management and to reach agreement over a wide range of workplace issues.[212] Statutory councils, bargaining councils and the workplace forums, are all intended to boost collective bargaining at the plant, sectoral, enterprise and industry levels.[213]

The LRA, in section 1 thereof, requires that the stated objectives of the Act[214] must be achieved through the fulfilment of the primary objects of the Act. These are, amongst others, to provide a framework within which employees and their trade unions, employers and employers' organisations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and to promote orderly collective bargaining.[215]

Botha[216] indicates that "It is thus clear that the pluralist philosophy is central here." According to this philosophy the main object of labour law has always been and will always be "to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship."[217] On this point Du Toit[218] elaborates:

> "It may well be true that functions of "labour" (direct production) and "management" (co-ordination of production) will need to be fulfilled in any economic system ... What pluralism fails to establish, however, is that inequality of wealth, knowledge and power must necessarily exist between members of society fulfilling these respective functions."

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210 Botha 2014 *PELJ* 2042.
211 S 80.
212 S 84.
213 S 1 LRA.
214 The purpose of the Labour Relations Act 1995, is to advance economic development, social justice, labour peace and the democratisation of the workplace.
215 S 1 LRA.
216 Botha 2014 *PELJ* 2042.
217 Davies and Freedland *Kahn-Freund*.
218 Du Toit "Democratising the employment relationship (a conceptual approach to labour law and its socio-economic implications)" 1993 *Stell LR* 355.

Structural difficulties within the wider socio-political space – problems of poverty, unemployment and inequality continue to seriously impact on South African labour relations.[219] These issues directly influence the players within labour relations, and "shape the issues over which they engage and the way they do so."[220] Sophisticated structures of workplace representation and collective bargaining may ensure a certain degree of procedural stability in workplace relations, "but will always be fragile in a context of economic scarcity and perceived inequalities, and the deep resentments that accompany these."[221]

If seen from the social justice perspective, collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers.[222] However, collective bargaining still has its own challenges. In *SANDF v Minister of Defence*[223] the court had come to the conclusion that the Constitution "does not impose a duty on the employer collectively to bargain to deadlock." South African law does not recognise a legally enforceable duty to bargain.[224]

While statutory rights, their nature and scope, and how they are implemented and enforced are important in the protection of workers' rights, they are not absolute, however, and may often need to be balanced against the competing rights of employers and third parties.[225]

Botha[226] states further that the acknowledgement of human rights, including fundamental labour rights, is an important corporate responsibility for companies in South Africa as well as for multi-national companies generally. Corporate governance

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219 Anstey "Marikana – and the push for a new South African pact" 2013 *SAJLR* 133.
220 Anstey 2013 *SAJLR* 133.
221 Anstey 2013 *SAJLR* 133.
222 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa,* 1996 1996 17 ILJ 821 (CC) para 66.
223 *SANDF v Minister of Defence* (2003) 24 ILJ 1495 (T).
224 The SCA maintained this view in *SANDU v Minister of Defence* (2006) 27 ILJ 2276 (SCA); *Minister of Defence v SANDU* (2007) 28 ILJ 828 (SCA).
225 Van Niekerk and Smit (eds) *Law@work* 10.
226 Botha 2014 *PELJ* 2042.

and social responsibility programmes play a significant role in the establishment and enforcement of basic labour rights, "especially in host countries that have little in the way of labour market regulation, or where to attract investment or for want of resources, minimum labour standards are not enforced."[227]

4 4 The nature of social justice

The term "social justice" is not defined in the LRA.[228] For purposes of labour law, social justice would at least in my view, include the achievement by workers to the extent reasonably possible, of their labour rights promised under the LRA. We, as a country have been through social, economic and political challenges where not all workers benefited from fair treatment under the law. As such, the prominence of the concept of social justice in labour relations cannot be underestimated.

Social justice embraces equality, human dignity and socio-economic support and upliftment.[229] The redressing of the past social injustices and the restoration of human dignity to the vulnerable sector of our population are the key elements of workplace social justice constituting some of the "common threads that hold the concept together, and give it shape and identity."[230] It has been stated that the improvement of the quality of life for everyone is a key constitutional requirement and the state is obligated to realize social justice for all based on the reasonable legislative and other measures within available resources.[231]

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227 Van Niekerk and Smit (eds) *Law@work* 10.

228 "As is the case with many other social concepts, social justice has varied and complex definitions. Among these, there exist common threads that hold the concept together, and give it shape and identity … It can therefore be accepted that a general definition of social justice is hard to arrive at and even harder to implement. In essence, social justice is concerned with equal justice, not merely in the courts, but in all aspects of society. …Social justice supports a process built on respect, care, recognition and empathy" Hlalele "Psychosocial support for vulnerable rural school learners: In search of social justice!" 2012 *Journal for New Generation Sciences* 67.

229 "[t]he people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The Preamble to our Constitution records this commitment". *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) 53B-C.

230 Hlalele 2012 *Journal for New Generation Sciences* 67.

231 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) 53B-C.

Some of the acknowledged values underpinning our Constitution are the rights to equality[232]; human dignity[233]; protection against slavery, servitude and forced labour[234]; freedom of expression[235]; freedom of association[236]; freedom of trade, occupation and profession[237]; fair labour practices, including the right to organise, strike and engage in collective bargaining.[238] These rights are either directly or indirectly linked with the social justice notion and are further intricately intertwined with other constitutional rights. As an illustration, one could argue that a denial of social justice amounts to a denial of the right to human dignity. The reverse scenario is also true. Thus the association between the LRA and the Constitution is an important one because evidently, the LRA exists not for its own sake, but rather with the determination to develop social justice by executing the LRA's primary objects – which include giving effect to the right to fair labour practices.[239]

It also bears mentioning that South Africa as a member state of the ILO is bound not only to enforce international law obligations. South Africa has to uphold the rights to freedom of association, to promote collective bargaining, to ensure equality at work, to eliminate forced and child labour.[240] Additionally, our courts have a duty to consider the provisions of the ILO when construing the LRA.

> "The body of work of the organisation [International Labour Organization] must therefore inform the South African understanding of social justice, as its strategic objectives are the facilitation of social justice, which is also the organisation's fundamental aim. In short, social justice is not just a South African but rather a shared concern."[241]

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232 S 9.
233 S 10.
234 S 13.
235 S 16.
236 S 18.
237 S 22.
238 S 23.
239 S 1.
240 Van Niekerk and Smit (eds) *Law@work* 8.
241 Commenting on the ILO's work on social justice in the workplace, Van Staden "Towards

4 5 Social justice in the modern day labour system

Our modern labour law has arguably reinforced the importance of social justice in the working world. It must be appreciated that the LRA, as amended, has introduced positive changes to the work environment, changes which often go to the heart of the contractual relationship between employer and employee. To illustrate, Section 186(1)*(b)* of the LRA has extended the definition of a dismissal to include the non-renewal of a fixed-term contract in circumstances where the employee has a reasonable expectation that her or his contract would be renewed.[242] Similarly, sections 198A, 198B or 198C of the LRA will, when correctly interpreted, greatly contribute towards promoting fair treatment of fixed-term employees.[243]

The amended section 143 of the LRA provides that "an Award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court." An employee in possession of an award need no longer approach the CCMA to have the award certified before commencing contempt proceedings in the Labour Court, where there is non-compliance with an award.[244] This amendment enhances access to social justice for vulnerable workers by facilitating quicker and easier enforcement of arbitration awards.

Moreover, presiding officers are required to be aware of their responsibility to be proactive in labour dispute resolution proceedings and extend a "helping hand" to the lay litigant without necessarily crossing the line and "entering the arena."[245] The courts and other labour tribunals must conduct themselves with utmost integrity and

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a South African understanding of social justice: The International Labour Organisation Perspective" 2012 *TSAR* 91.

242 Cohen "When common law and labour law collide – some problems arising out of the termination of fixed-term contracts" 2007 *SA Merc LJ* 26.

243 Gericke "The regulation of successive fixed-term employment in South Africa: Lessons to be gleaned from foreign and international law" 2016 *TSAR* 94.

244 Vettori "Enforcement of labour arbitration awards in South Africa" 2013 *SA Merc LJ* 245.

245 Grogan *Labour litigation and dispute resolution* (2014) 180.

impartially, accepting their responsibility to bring about social justice "to give effect to the meaning of the values enshrined in our Constitution."[246]

The common law of contract still holds a vital place in the regulation of the employment relationship "as the ultimate determinant of the ambit of the relationship and the rights and obligations that ensue."[247] But as Cohen[248] submits, public policy acknowledges that the express terms of a classic employment contract, characterised by the principles of freedom and sanctity of contract, can no longer simply be enforced by the courts free from considerations of equity or social justice. It is articulated by Du Toit that in contemporary South Africa there is "only one system of law grounded in the Constitution" where fairness and social justice play a more central role.[249]

It is inevitable, in my view that the concepts of social justice, economic development, labour peace and workplace democracy are equally reinforcing. Workers hardly perceive their work and community environments in isolation, especially in a country such as ours. That is why wage disputes can easily be triggered by issues outside the workplace, as was evident from the Marikina conflict.[250]

4 6 Conclusion

It is safe to suggest that government has made satisfactory progress through the various amendments to the LRA, to support the effort to achieve social justice in the work environment. The LRA, as amended, has indeed enabled "[T]he institutional landscape set in place to achieve social justice."[251] Our judiciary, together with the CCMA and other labour tribunals have also demonstrated their crucial role especially

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246 *AG's Distributors v CCMA* (2009) 30 ILJ 1810 (LC).
247 Cohen "The relational contract of employment" 2012 *Acta Juridica* 84.
248 Cohen 2012 *Acta Juridica* 84.
249 Du Toit "Oil on troubled waters? The slippery interface between the contract of employment and statutory labour law" 2008 *SALJ* 95. See also Cohen 2012 *Acta Juridica* 84.
250 Anstey 2013 *SAJLR* 133.
251 Smit "Towards social justice: an elusive and a challenging endeavour" 2010 *TSAR* 1.

with regards to the purposive interpretation of our labour laws. The courts have shown that statutory labour rights can be applied in the work environment "as a complementary and perhaps more significant medium to promote social justice in the workplace."[252] However, South African socio-economic problems can be complex and hence there must be continued contribution and co-operation of all the players in the labour system to strengthen our workplace social justice.

[252] Van Niekerk and Smit (eds) *Law@work* 10.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5 1 Conclusions

Our courts continue to apply sophisticated and purposive judicial interpretation where necessary, so as to protect vulnerable employees. In this process of positive judicial interpretation, our courts are inherently having an influence on the economic progression of our workforce. The recent case of *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others*[253] where the court tried to bring to a halt the abuse of temporary workers in labour-broking arrangements, is just one of the examples of the courts' contribution in this respect.

To address the skills shortages of our workforce would require that existing vocational training systems be reconsidered as a matter of priority.[254] As a first step, the largely ineffective sector education and training authorities should be replaced by industry colleges focused on training artisans and other similar vocations, with greater emphasis placed on improving the link between existing vocational training programs and actual opportunities in the workplace.[255]

Education is unquestionably important. We need to look at how our labour market skills development framework is structured. We also need to re-examine how the accreditation of formal qualifications by the South African Qualifications Authority is made. More specifically, perhaps it would be necessary to re-look at the criteria used to determine at what level the different qualifications are pitched and which markets

[253] [2018] ZACC 22.
[254] Soko and Balchin 2014 *New Agenda* 36.
[255] Soko and Balchin 2014 *New Agenda* 36.

those who are qualified can enter. Further Education and Training colleges[256] and manpower centers must be reconsidered especially looking at their capacity in the development of skills in all the different trades such as plumbing, electricity or bricklaying, paintwork and many more. Training in these trades in essence addresses the issue of advancement of economic growth of workers because invariably when a worker is armed with a specific trade and starts his business operation, not only does he become the owner of his own business and can make a living for himself, but he can also hire other people and give them an economic opportunity. Furthermore, existing technical institutions must be realigned looking at the working environment with a view to matching the demand for particular skilled work, with the skill required. Private sector companies participating in private public consortiums must be recognised and given even better and attractive incentives to continue assisting government with the task of training the youth in the relevant and on-the-job skills. These efforts may assist to generate new jobs and address the workers' economic growth.

The possibility of introducing practical business skills courses for all the professions must be considered.

The propositions in King IV relating to giving workers a voice is important. Botha[257] explains that Section 1(d)(iii) of the LRA sets the promotion of employee participation in workplace decision-making as a primary object. The LRA introduced workplace forums as a means of employee participation, not as an alternative to collective bargaining, but rather as a supplement to it.[258] The purpose was to grant employees a voice in the workplace with regard to production issues affecting the functioning of the enterprise between employers and employees in-house. The voice provided to employees by the LRA relates to decisions affecting them in their daily work activities.[259] Botha contents that "having a voice in decision making provides

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256 Further Education and Training colleges are often referred to as FET colleges.

257 Botha "In search of alternatives or enhancements to collective bargaining in South Africa: are workplace forums a viable option?" 2015 *PELJ* 1812.

258 Botha 2015 *PELJ* 1812.

259 Botha 2015 *PELJ* 1812.

workers with a more active role and a greater input than otherwise. Employees can provide more information on a production issue if the employer consults with them and improvement in the information flow takes place."[260] Workplace forums are designed to deal largely with "non-wage" issues such as restructuring, the introduction of new technologies and work methods, health, safety and changes in the organisation of work at the workplace. Wage matters affecting the terms and conditions of employment are normally dealt with at the level of collective bargaining between employers and trade unions.[261] Despite the noble purpose which they were intended to serve, the impact of workplace forums within our labour law structure remains unproven.

King IV deals specifically with the role of organisations in society and proposes that the governing bodies of these organisations must take account of internal and external stake holders in running their affairs.[262] Although the implementation of the corporate guidelines promoted by King IV is voluntary, these guidelines may realistically translate workers' participation in companies through giving them a voice as well as provide a model of how social justice can be successfully managed.[263] Sustainable working relationships between employers and employees as advocated by the King principles can be promoted if employees are "regarded as benefactors of a co-operative and mutually beneficial working relationship."[264]

Broad-Based Black Economic Empowerment legislation which is an enabling framework for promoting black economic empowerment is also important because it does provide accommodation for sustainable development and economic growth for the previously disadvantaged. The Solms-Delta Wine Estate in Stellenbosch, referred to above[265] was cited as an example of creating share equity ownership by invoking and balancing labour law with empowerment law. The business had experienced

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[260] Botha 2015 *PELJ* 1812.
[261] Botha 2015 *PELJ* 1812.
[262] The King Code and Report on Governance for South Africa (King IV) provides non-legislated guidelines for the regulation of corporate governance in South Africa.
[263] Botha 2015 *PELJ* 1812.
[264] Cohen "The relational contract of employment" 2012 *Acta Juridica* 100.
[265] See, generally chapter 3.

some operational problems because the Wijn de Caab Trust that was meant to represent the workers' 45% shareholding in the project never actually did, according to court documents and trust deeds.[266] Furthermore, the trust deed that was established in 2006 did not specifically identify the Solms-Delta farmworkers and their families as the project beneficiaries.[267] Business rescue process was unsuccessful after a year as only government was prepared to invest to turn the business around. "The previous owners at the time were not prepared to invest additional money in the business and it was difficult to secure another strategic equity partner…"[268]

In August 2018 liquidation proceedings were launched in the Western Cape High Court[269] but were successfully opposed by Solms-Delta workers. The department Rural Development and Land Reform and the National Empowerment Fund (NEF) both indicated the "entire shareholding" of the Solms-Delta project was being reviewed and "as part of the new structure necessary changes are being made to the constitutional documents of the entities including the trust deed."[270] Solms-Delta owners have now offered to transfer their shares to the workers meaning the workers and the NEF would be owners with 95% and 5% shares respectively.[271]

It was agreed liquidation would be averted and a turn-around strategy pursued. Government indicated it "would certainly like to see the farm succeed, the workers empowered and the realisation of government objectives, particularly giving effect to strengthening the relative rights of people working the land."[272]

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266 Merten "The solms-delta way, or, how not to do land reform" 2018, available at https://www.dailymaverick.co.za (accessed on 15 November 2018).
267 Merten 2018 https://www.dailymaverick.co.za.
268 Merten 2018 https://www.dailymaverick.co.za.
269 Merten "Land question at the heart of solms-delta as liquidation looms again" 2018, available at https://www.dailymaverick.co.za (accessed on 15 November 2018).
270 Merten 2018 https://www.dailymaverick.co.za.
271 Merten 2018 https://www.dailymaverick.co.za.
272 Merten 2018 https://www.dailymaverick.co.za.

A model such as the Solms-Delta, if it is properly implemented and executed, is a case in point of what could credibly be put in place to bring real value to the lives of workers. As was discussed in the preceding chapters, other models that could genuinely improve the prosperity of workers are financial participation schemes which, depending on the kind of control such schemes have over decision-making, may take the form of direct or representative participation.[273] Examples include Employee Share Ownership Schemes which provide for financial participation of employees through their ownership of shares in their employer company. Employees, through their financial participation, share in the costs and benefits associated with the company's financial welfare and success. Another example is worker co-operatives – in which the entire firm's shares are collectively owned by its workforce. Employee buy-outs – under which the company's shares are exclusively purchased by its individual workers, is another example. All these are compelling and worthy models to advance workers.

In recent times, "radical economic transformation" is a phrase which everyone in the labour, economic and political circles is talking about. The concept was officially introduced to South Africa by the ruling ANC party in February 2017. According to the ruling party, radical economic transformation is focused on delivering sweeping changes to how the economy is controlled.[274]

Some of the salient features of this new policy include – investing money in township and rural communities and creating vibrant businesses in our townships, no less than 30% of all government spending must go to black businesses and small, medium and micro enterprises, massive roll-out of broadband infrastructure, ensuring wide connectivity in public areas, ensuring 10% of GDP goes to agricultural development, turning South Africa into a construction site; diversifying ownership in the financial services sector by introducing new players and transforming the

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[273] Kester and Pinaud 1998 www.academia.edu referred to by Botha.

[274] Head "Radical Economic Transformation: Why you shouldn't believe the hype" 2017, available at https://www.thesouthafrican.com (accessed on 15 November 2018).

industry in favour of the people as a whole, increasing the requirement for black ownership in mines and providing free higher education to the poor.[275]

Outlining some of his key plans for the South African labour market President Cyril Ramaphosa (who was then Deputy-President of South Africa) said at the Nedlac Labour School in Pretoria on 30 January 2018, that the key priority was the creation of decent work on a scale that makes a decisive impact on poverty and inequality.[276] Ramaphosa said "Radical social and economic transformation is about creating a South Africa where all its citizens, black and white, share equitably in the country's economy."

"It is about implementing programmes that deracialise ownership and control of our economy to benefit South Africans as a whole." A key part of this will require changing the ownership structure of the economy, Ramaphosa said. This will require far higher levels of economic growth and sustained investment by both the public and private sectors in productive economic activity, he said.[277]

How the "radical economic transformation" will be implemented and how it will impact the broader economy are matters of continuing private and public debates in South Africa. It is commonly understood that everyone should have access to a better commercial standard of living. Workers deserve to be uplifted from economic want. However, the current talk about radical economic transformation is "political talk" according to panellists who had gathered to discuss the topic at the University of Cape Town's Graduate School of Business roundtable discussion held on 19 April 2017.[278]

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[275] Head 2017 https://www.thesouthafrican.com.

[276] Staff Writer "Ramaphosa's plan for radical economic transformation and tackling unemployment" 2018, available at https://businesstech.co.za (accessed on 15 November 2018).

[277] Staff Writer 2018 https://businesstech.co.za.

[278] Professor Mills Soko, the director of the GSB, chaired the well-attended discussion, which was at times highly charged and emotive. The panel comprised Mncane Mthunzi, the president of the Black Management Forum; Sean Gossel, a senior lecturer in Finance at the GSB; and United Democratic Movement (UDM) Member of Parliament and chief whip Nqabayomzi Kwankwa.

There is no blueprint on the implementation strategy of the radical economic transformation. It can be argued that the implementation of this policy will largely be a case of trial and error as the country moves forward, seeking to understand the real meaning and economic effect of the concept, particularly on the working class. In my view, the courts and labour tribunals will eventually have to deal with this concept and give meaning and content to it with reference to guidance from domestic and international labour experience.

5 2 Recommendations

Attempts to extend rights at work in a simplistic fashion will not result in decent work.[279] I share the view expressed by Baskin[280] that the LRA provides "a far more balanced and workable bargaining framework than we had previously." I am not persuaded that we need to change our labour laws to advance economic development and social justice in the workplace. A good management and leadership of our labour structures as well as consistent, rigorous enforcement of working labour policies is what is required. Government, capital and labour must re-imagine, find or create new ways, learn and work with each other to help workers move up the business ladder and become rewardingly employed – all these to be done within the existing labour framework and the available resources of the government and employers.

The purpose of the LRA to advance economic development and social justice in the workplace must be applauded, especially having regard to the history of the South African labour workforce. The LRA has, in my opinion, profoundly impacted our industrial relations in a way that would have been unthinkable in the old era. Promising changes have taken root in the area of advancing workers albeit that the legislative purpose has not been fully achieved.

Generally, the success of our industrial social justice is more palpable than the advancement of workers. It is clear that the labour courts have become protective of

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[279] Theron "Decent work and the crisis of labour law in South Africa" 2014 *ILJ* 1829.
[280] Baskin 1998 *ILJ* 986.

workers' rights and entitlements. Likewise, the CCMA system has been fairly responsive as an institution and operates relatively efficiently on its own terms.[281] The collective bargaining system has worked fairly well (but not without problems) and has given workers the voice that they so desperately need.[282]

Unfortunately, very few workers, especially black workers in South Africa have enjoyed economic benefits since 1994. Even then, it is largely due to the broad-based black economic empowerment initiatives than the labour laws.

One thing is certain. The economic destiny of the employer is invariably tied to the economic destiny of the employee. Paying a wage to a worker cannot be the end of the matter. The total economic well-being of workers must be pursued and accomplished.

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[281] Theron 2014 *ILJ* 1829 says assessments of CCMA performance are generally based on data regarding the impressive case load it handles, the percentage of cases it has settled, and the percentage it has arbitrated.

[282] Botha and Lephoto "An Employer's Recourse to Lock-Out and Replacement Labour: An Evaluation of Recent Case Law" 2017 *PELJ* 1.

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List of Abbreviations

BCEA	Basic Conditions of Employment Act
BBBEE ACT	Broad-Based Black Economic Empowerment Act
LRA	Labour Relations Act
EEA	Employment Equity Act
ILJ	Industrial Law Journal
IJCLLIR	International Journal of Comparative Labour Law and Industrial Relations
ILO	International Labour Organisation
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
SAJLR	South African Journal of Labour Relations
SDA	Skills Development Act
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg/ Journal of Contemporary Roman-Dutch Law
TSAR	Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law