the minimum wage to an average value added per worker is 0.75 or more; 0.67 for a ratio of 0.50 or more but less than 0.75; 0.33 for a ratio of 0.25 or more but less than 0.50; and 0 for a ratio of less than 0.25. The three values of sub-indices are then averaged and scaled to 100 to get the index score.[149] South Africa scored 56 in the hiring index, which is far above the average score of 30.73. This implies that, according to Doing Business, laws regulating hiring practices in South Africa are rigid.

In South Africa there is no law prohibiting use of FTCs for permanent tasks. There is also no regulation determining the duration of FTCs. The LRA only refers to FTC with regard to dismissals where it defines refusal to renew or renewal of FTC on less favourable terms where there was a reasonable expectation for renewal on same or similar terms as dismissal.[150] This implies that FTCs are allowed in South Africa and termination of the contract at the end of term is not regarded as dismissal unless a reasonable expectation was created. Therefore if parties agreed at the outset that a contract was for a specified period, a contract terminates automatically at the end of that period and notice is not required to effect a termination.[151] In *University of Cape Town v Auf der Heyde*[152] the La[illegible]hat when determining whether an employee had a reasonable expec[illegible]o determine whether he/she in fact expected his/her contract to be ren[illegible]rmanent appointment. If he/she did have such an expectation, the ne[illegible]ing into account all the facts, the expectation was reasonable. The a[illegible]onsidering the facts was outlined in *Dierks v University of South Afric*[illegible] of all surrounding circumstances, significance or otherwise of contractual stipulation, agreements, undertakings by the employer or practice or custom in regard to renewal or reemployment, the availability of the post, purpose of or reason for concluding the FTC, inconsistent conduct, failure to give notice and the nature of employer's business.

With regard to the sub-index on minimum wages for trainees or new employees, trainees normally receive allowances from their employers. Allowances rates are regulated through a sectoral determination.[154] This sectoral determination applies to those trainees who were not employed by an employer when a learnership agreement was concluded.[155] The allowance rate is determined as a percentage of a wage that an employer would pay a learner on obtaining the qualification for which a learnership is registered. The rating is also influenced by a number of

[149] Doing Business 2009 (2008).
[150] Section 186(1)(b).
[151] Grogan, J (2003) pp. 73-74.
[152] [2001] 12 BLLR 1316 (LAC), para 21.
[153] [1999] 4 BLLR 304 (LC), para 133.
[154] Sectoral Determination No.5: Learnership, published under Government Notice 519 in Government Gazette 22370 of 15 June 2001.
[155] See Skills Development Act, section 18(2).

credits already earned by a learner and the exit level of a learnership. The minimum percentage that a learner can earn is 13 percent and the maximum is 69 percent of a qualified wage. However, the determination stipulates that no learner may be paid less than R120-00 per week.

Hiring is not specifically regulated by any legislation in South Africa. However, the Employment Equity Act[156] prohibits discrimination on listed grounds in any employment policy or practice including hiring. The listed grounds include race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.[157] The Act further states that it is not unfair discrimination to take affirmative action measures or distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.[158] This Act was enacted to give effect to the constitutional right to equality.[159] It is also in line with the International Labour Organisation (ILO) Convention 111 that deals with discrimination and was ratified by South Africa. In accordance with this convention, any distinction, exclusion or preference in respect of a particular job based on inherent requirements thereof shall not be deemed to be discrimination. The Convention provides for affirmative action and requires all countries to prohibit discrimination on a limited number of grounds.[160]

It is therefore unclear why South Africa scored badly on this index, as the above discussion shows no restrictions in the use of FTCs and no major rigidities regarding wages for trainees or new employees.

4.3. Regulation of working hours

Doing Business measures rigidity of working hours on 5 components, namely: whether night work is unrestricted; whether weekend work is unrestricted; whether the work-week can consist of 5.5 days; whether the work week can extend to 50 hours or more (including overtime) for 2 months a year to respond to a seasonal increase in production; and whether paid annual vacation is 21 working days or fewer. For each of these questions, if the answer is no, the country is assigned a score of 1; otherwise a score of 0 is assigned. The higher score indicates high rigidity of working hours. In this index, South Africa scores 40. This is slightly higher than the average score of 37.35.

[156] Act 55 of 1998.
[157] *Ibid*, section 6(1).
[158] *Ibid*, section 6(2).
[159] Act 108 of 1996, section 9.
[160] Article 1(2).

In South Africa working time is regulated by the BCEA.[161] In terms of the Act, an employer may only require an employee to perform night work if there is an agreement and if an employee is paid an allowance or work reduced hours; and transportation is available to take an employee to and from work.[162] Therefore there are some restrictions on night work.[163]

In respect of weekend work, the BCEA only refers to work done on Sundays. The Act regards Sunday as a rest day unless there is an agreement between an employer and an employee requiring the employee to work.[164] It also regulates payment for work done on Sunday.[165]

The Act provides for a working week of not more than 45 hours[166] that can be extended by up to 1 hour a week[167] and overtime of not more than 10 hours in a week[168]. Therefore the work-week can extend to more than 50 hours when overtime is included. The Act also makes provision for a compressed work week and averaging of working hours.[169] These provisions allow for structuring of working hours to suit the particular needs of business. The Act stipulates a minimum of 21 consecutive days for annual leave or one day for every 17 days worked or one hour for every 17 hours worked.[170]

The chapter on regulation of working time, except section 7, does not apply to senior managers; employees engaged in sales who travel to premises of customers and employees who work less than 24 hours a month for an employer.[171] Sections that deal with ordinary hours of work; overtime; meal intervals; daily and weekly rest period; night work; and public holidays do not apply to emergency work that cannot be performed during ordinary hours of work.[172] The Code of Good Practice on the Arrangement of Working Time[173] is a guide for employers and employees concerning arrangement of working time and impact on health, safety and family responsibilities of employees.

Schedule one of the Act provides for procedures to be followed towards realisation of 40 hours work week and 8 hours work day. This is in compliance with the ILO Forty-Hour Week

[161] Act 75 of 1997.
[162] See section 17(2).
[163] The employer is also required to inform, in writing, the employee who is expected to perform regular night work of any health and safety hazards associated with the work that the employee is required to perform and of the employee's right to undergo a medical examination before or within a reasonable period of starting such work and at appropriate intervals.
[164] See section 15(1)(b).
[165] See section 16.
[166] See section 9(1)(a).
[167] See section 9(2).
[168] See section 10(1)(b).
[169] See sections 11 and 12.
[170] See Section 20(2).
[171] BCEA, section 6(1).
[172] *Ibid*, section 6(2).
[173] Published under Government Notice R1440 Government Gazette 19453 of 13 November 1998.

Convention.[174] The rationale behind the reduction of working hours is that if employees work fewer hours, more will be employed, thus reducing the rate of unemployment.

South Africa probably scored 40 because of some restrictions on night and weekend work. The fact that an agreement must be reached with an employee might have been seen as a restriction. If this was the case, than the country scored two out of five and when this figure is scaled to 100 it gives a final score of 40.

4.4. Regulation of dismissals

Doing Business's "difficulty of firing" index has 8 sub-indices, namely: whether redundancy is not allowed as a basis for dismissal; whether employers need to notify a third party (such as a government agency) to dismiss 1 redundant worker; whether employers need to notify a third party to dismiss a group of 25 redundant workers; whether employers need permission from third party to dismiss 1 redundant worker; whether employer need approval from the third party to dismiss a group of 25 redundant workers; whether the law requires employers to reassign or retrain workers before declaring them redundant; whether priority rules apply for redundancies; and whether priority rules apply for reemployment. Where redundancy is not allowed as a basis for dismissal, a score of 10 is allocated and the rest of the questions do not apply. Where employers need approval from a third party to dismiss 1 redundant worker, a score of 2 is allocated. For other questions, 1 is allocated for a positive answer and 0 for the negative.[175] A higher score is an indication of more rigidity of labour market regulation. On a scale of 100, South Africa scores 30 on this index, which is slightly lower than the average score of 31.27.

In South Africa redundancy, which is covered under dismissals for operational requirements, is allowed as a basis for dismissal.[176] Employers are not required to notify a third party before dismissal for operational requirements. They are required to consult with concerned parties, which can include a representative trade union or workplace forum, before instituting dismissals.[177] However, employers are not required to seek approval from a consulting party or a third party.

The LRA provides that every employee has the right not to be unfairly dismissed.[178] A dismissal can be simply defined as termination of the contract of employment at the instance of the employer and entails some communication by the employer to the employee, which can be in

[174] C47 Forty-Hour Week Convention, 1935.
[175] Doing Business 2009 (2008).
[176] See sections 188 and 189 of the LRA.
[177] *Ibid*.
[178] Act 66 of 1995, section 185(a).

words or by conduct that the employer intends to terminate the contract.[179] Nevertheless, the LRA defines dismissal broadly to include termination that is initiated by the employee where the employer made continued employment intolerable for the employee and where the new employer after transfer of business as a going concern, offered employment conditions that are substantially less favourable than those provided by the old employer. It also includes termination related to failure to renew a fixed term contract as defined under the regulation of hiring section. A refusal by an employer to allow an employee to resume work after she took maternity leave in terms of any law, collective agreement or her contract of employment, also falls under the statutory definition of dismissal. The Act also defines selective re-employment of some employees after dismissal of a number of employees for the same or similar reasons as dismissal.[180]

The LRA provides that, amongst others, a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.[181] This is similar to the provision of the EEA that prohibits discrimination based on listed grounds. In accordance with the LRA, a dismissal based on inherent requirements of the job may be fair.[182] This is also similar to the EEA provision that states that it is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.[183] The LRA also provides that a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.[184]

The Act also provides that a dismissal may be substantively fair if it is effected for a fair reason related to the employee's conduct or capacity; or based on employer's operational requirements.[185] The LRA requires the parties to attempt to reach consensus before dismissals based on operational requirements on, among other things, appropriate measures to avoid dismissals or to minimise the number of dismissals.[186] The envisaged measures include reassigning employees or retraining for other duties. The Act also requires parties to seek consensus on the method for selecting the employees to be dismissed.[187] A generally accepted

[179] Grogan, J (2005) Workplace Law, p. 106.
[180] LRA, section 186(1).
[181] *Ibid*, section 187.
[182] *Ibid*, section 187(2)(a).
[183] Employment Equity Act (55 of 1998), section 6(2)(b).
[184] *Ibid*, section 187(2)(b).
[185] *Ibid*, section 188(1).
[186] *Ibid*, section 189(2) (a).(i) & (ii).
[187] *Ibid*, section 189(2) (b) and 189(7).

criterion for selecting employees to be dismissed is the "last in, first out" (LIFO) principle.[188] In *General Food Industries Ltd/ a Blue Ribbon Bakeries v FAWU & others*[189] the Labour Appeal Court ruled that where a company has branches, longer-serving employees from affected branch must be "bumped" into places of shorter-serving employees in other branches of the company. This ruling underscored the importance of the LIFO principle as a selection criterion. The Act also requires employers to consult on the possibility of future reemployment of dismissed employees and the Code of Good Practice recommends that dismissed employees should be given preference if the employer hires employees with comparable qualifications.[190]

The Basic Conditions of Employment Act[191] provides for notice of termination of employment, payment instead of notice, payments on termination and severance pay. These provisions are discussed in chapter 3.

Even though South Africa did not ratify ILO Convention 158, the LRA's regulation of dismissal complies with most of the articles of the convention. In accordance with the Convention, employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of a worker or it is based on operational requirements of the undertaking, establishment or service.[192] The Convention also list conditions that shall not constitute valid reasons for termination, which are similar to those listed in the LRA.[193] The Convention provides for an appeal against alleged unfair dismissal to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.[194] The LRA established the Commission for Conciliation, Mediation and Arbitration[195]; the Labour Court[196] and the Labour Appeal Court[197] for the resolution of labour disputes, including unfair dismissals. The Convention makes provision for a reasonable notice period of termination or compensation in lieu thereof and severance allowance,[198] which are covered by the BCEA.

The above discussion as well as the score allocated by the Doing Business on the index of dismissals reflects that South Africa's regulation of dismissals is not excessively rigid. South Africa scored less than average on this index.

4.5. Is the South African labour market excessively rigid?

[188] See Code of Good Practice on Dismissal based on Operational Requirements, item 9.
[189] [2004] 9 BLLR 849 (LAC).
[190] See section 189(3)(h) and item 12(1).
[191] Act 75 of 1977.
[192] Article 4.
[193] Article 5.
[194] Article 8.
[195] Section 112.
[196] Section 151.
[197] Section 167.
[198] Articles 11 and 12.

The Green Paper on Policy proposals for a new Employment Standards Statute[199] attempted to balance the protection of minimum standards and the requirements of labour market flexibility. It proposed the concept of "regulated flexibility", which has two main aspects, namely, the protection and enforcement of a revised body of basic employment standards; and rules and procedures to vary these standards through collective bargaining, sectoral determinations for unorganized sectors and administrative variations (exemptions). This is also applicable to other relevant labour statutes such as the Labour Relations Act and the Employment Equity Act. In view of the above discussion of provisions for regulation of hiring, working hours and dismissal, South Africa appears to have been able to strike a balance between employment protection and the requirements of labour market flexibility.

A 1996 study conducted by the International Labour Organisation (ILO) found that there was little evidence of employment rigidity in the South African labour market.[200] It, however, also found that employment protection was low with high unemployment rates, short notice periods and inadequate skills development initiatives. A review of the country's labour laws was aimed at addressing these shortcomings. The finding of the ILO study has been confirmed by a recent study that measured regulation using the 1990s and the 2006 data.[201] The study utilised two datasets, one was compiled by Botero *et al*[202] in a study on the impact of labour regulation around the world and the other was the World Bank's Cost of Doing Business Survey for 2006. This study found that South Africa is not an extraordinarily over-regulated (or indeed under-regulated) labour market.[203]

4.6. Is there a relation between rigidity of employment regulation and unemployment?

South Africa's aggregate score for the above three indices (rigidity of employment index) is 42 in a scale of 100[204], which is above the average of 33. Nevertheless, South Africa's rigidity of employment is below 50. South Africa's unemployment rate was reported to be 23.6 percent in the first quarter of 2009 financial year.[205] However, an observation of rigidity of employment indices and unemployment rates of other countries reveals that rigidity of employment regulations does not correlate with the rate of unemployment.

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[199] Department of Labour. (1996) Minimum Standards Directorate Policy Proposals for a new employment standards statute Green Paper.
[200] Standing, G. et al (1996) Restructuring the Labour Market: The South African challenge. An ILO Country Review, p 486.
[201] Bhorat, H. and Cheadle, H. (2009) Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions.
[202] Botero *et al* (2004) The Regulation of Labour, Quarterly Journal of Economics. November. 1339-1382.
[203] Bhorat, H. and Cheadle, H. (2009).
[204] Doing Business 2009 (2008).
[205] Statistics South Africa (2009).

Germany, France and Belgium are some of the European countries whose labour market regulations are regarded as rigid. Employment indices for Germany, France and Belgium are currently 44, 56 and 20 respectively.[206] In Germany the required notice for termination of employment for individual workers vary from two weeks to six months, depending on whether the worker holds a blue-collar or a white-collar job and upon his or her seniority and age.[207] In the event of a collective dismissal (dismissal for operational requirements) employers are required to advise works councils and the local employment office of any developments that might lead to a dismissal for operational requirements over the next twelve months and must consult the works council "as soon as possible" when contemplating retrenchments.[208] Employers employing more than twenty workers are required to negotiate a social plan that stipulates compensation for dismissed workers with work councils when contemplating retrenchments. If the two parties cannot agree on a social plan, the law provides for compulsory arbitration.[209] German law allows employers to use fixed-term contracts but seek to ensure that they cannot evade job security legislation by hiring temporary workers. The allowed duration of fixed term contracts is generally eighteen months but a duration of twenty-four months is allowed for new small businesses.[210] Retrenched workers are eligible to unemployment insurance benefits and the unemployment insurance system provides for short-time benefits.[211] France and Belgium have similar laws with some variations. The unemployment rates for Germany, France and Belgium were reported to be 7.5, 7.4 and 7.0 respectively.[212]

A study was conducted to compare the adjustment of employment in the manufacturing sector and working hours in West Germany (prior to the re-unification of Germany), France and Belgium with that of the United States, which is regarded as a "gold standard" of labour market flexibility.[213] These European countries encouraged adjustment of hours instead of retrenchments by providing pro rata unemployment compensation to workers on reduced hours. The study found that, although the adjustment of employment to changes in output was much slower in the German, French and Belgian manufacturing sectors than in United States manufacturing, the adjustment of total hours worked was much more similar. A significant conclusion reached by this study was that strong job security is compatible with labour market flexibility. This suggests that given appropriate supporting measures, such as? pro rata unemployment compensation in this

[206] Doing Business 2009 (2008).
[207] Abraham, KG and Houseman SN (1993) Does Employment Protection Inhibit Labour Market Flexibility? Lessons from Germany, France and Belgium, p. 2.
[208] *Ibid*.
[209] *Ibid*.
[210] *Ibid*.
[211] *Ibid*.
[212] Unemployment rate figures obtained from LABORSTA Internet, which is an International Labour Office database on labour statistics operated by the International Labour Organisation's Department of Statistics.
[213] Abraham, KG and Houseman, SN (1993).

study, strong job security need not inhibit employer adjustment to changing conditions. No evidence of a causal relation between strong job security regulations and the unemployment rate was established.[214] It therefore follows that unemployment rates are determined by a variety of factors.

A study conducted to ascertain, *inter alia*, whether there is a trade-off between wage inequality and unemployment found that one of the determinants of the unemployment rate is the type of investments. Investments in capital-intensive technologies lead to an increase in the unemployment rate, as seen in European countries. This study dismissed the popular sentiment that rigid wage-setting behaviour influences decision to invest in capital intensive technologies rather than labour as misleading. It argued that if there is any causation, it runs the other way round. This study averred that the long-run capital-labour ratio is determined by technology and the cost of capital. The real wage, in turn, is a single-valued function of the capital-labour ratio and thus independent of wage-setting behaviour. This was supported by the observation that European unemployment levels remained relatively high or even increased despite slowing real wage growth and a declining labour share throughout the 1980s and 1990s.[215]

The finding of another study conducted by the Human Sciences Research Council[216] in South Africa supports the conclusion reached by the above-mentioned study. This study found that the primary cause of unemployment in South Africa is the capital-intensity that historically characterized the minerals economy and globalisation more recently. It asserted that trade liberalisation led to an increase in trade, which had the effect of shifting the economy towards a demand for highly skilled labour. This phenomenon happened in the context of severe skills shortages, thus leading to an increase in the unemployment rate. This assertion is supported by the fact that labour-intensive exports declined from 8.9 percent to 6.8 percent of total exports between 1992 and 1999, while human capital-intensive exports increased from 49.5 percent to 58.5 percent during the same period. The high unemployment rate that South Africa is experiencing can therefore be attributed to, inter alia, capital intensity and a mismatch between available skills and required skills.

4.7. Conclusion

This chapter has shown that a perception of the South African labour market as excessively rigid is not supported by empirical evidence. This was confirmed by a study conducted by the ILO and

[214] *Ibid*.
[215] Landmann, O. (n.d.) Wages, Unemployment, and Globalization: A Tale of Conventional Wisdom.
[216] Mayer, ML. and Altman, M (2005) South Africa's economic development trajectory: implications for skills development, Journal of Education and Work, Vol. 18, No. 1, pp. 33-56.

supported by the study conducted recently utilizing, *inter alia*, the Doing Business survey dataset. A study that compared the adjustment of some European countries and United States to changes in output concluded that there is no evidence of a causal relation between strong job security and the unemployment rate. In view of the above discussion, it is therefore submitted that high unemployment rate is caused by a variety of factors, including types of investments and low skills levels.

CHAPTER FIVE

CONCLUSION

Rigidity of the labour market is often cited as one of the causes of the high unemployment rate in South Africa. One of the global surveys that portray the South African labour market as rigid is the Doing Business[217] study. Most commentators who argue for deregulation of the South African labour market usually quote, *inter alia*, this study.

This research paper has reviewed documented research into this subject and did not find evidence of a causal relation between South African labour market regulation and the high unemployment rate. It is a known fact that unemployment is caused by a multiplicity of factors. Those who argue that the unemployment rate is caused by rigid labour market regulation have so far not stated the quantum of the contribution made by labour legislation. The fact that some countries with less flexible markets than South Africa have significantly lower unemployment rates militates against this argument. This study found that South African labour legislation is in compliance with international standards as set by the International Labour Organisation, which aims at promoting opportunities for workers to obtain decent and productive work in conditions of freedom, equity, security and dignity. These standards are an essential component in the international framework for ensuring that growth of the global economy provides benefit to all. There is therefore no convincing evidence that labour market regulation is a cause of the high unemployment rate in South Africa.

[217] Doing Business 2009. (2008).

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C138: Minimum Age Convention, 1973.

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