University of the Western Cape

Faculty of Law

IS THERE A RELATION BETWEEN THE LABOUR MARKET REGULATION AND THE HIGH UNEMPLOYMENT RATE IN SOUTH AFRICA?
AN ASSESSMENT OF THE SOUTH AFRICAN LABOUR MARKET REGULATION

A Research Paper submitted in partial fulfillment of the requirements for the degree M Phil Labour Law.

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**CHAPTER FOUR**

ASSESSMENT OF RIGIDITY OF LABOUR MARKET REGULATIONS AND ITS IMPACT ON UNEMPLOYMENT IN SOUTH AFRICA

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**CHAPTER FIVE**

CONCLUSION

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ABSTRACT

This research paper is a review of the assertion by some commentators that the regulation of the labour market is a cause of the high unemployment rate in South Africa. It starts by providing a historical background of statutory industrial relations in South Africa leading to the current labour dispensation. The discussion includes a review of the current labour legislation and assessment of its compliance with international law. The rating of the South African labour market by the *Doing Business* study is discussed. This study seeks to ascertain whether there is a causal relation between labour market regulation and the unemployment rate. The conclusion reached is that South African labour legislation complies with international law as espoused in International Labour Organisation (ILO) Conventions, is not excessively rigid and, most importantly, that there is no convincing evidence of a causal relation between labour market regulation and the unemployment rate.
CHAPTER ONE

THE FRAMEWORK OF THE STUDY

1.1. INTRODUCTION

The South African economy has been growing at an average of approximately 4.68 percent over the past five years.\(^1\) However the unemployment rate still remains unacceptably high despite the sustained moderate economic growth. The unemployment rate was reported to be 23.5 percent in the first quarter of 2009.\(^2\) This is likely to worsen as a result of what started as a global financial crisis but has impacted on the real economy beyond the narrow realm of stock trading. South African economic growth was reported to be negative for the last quarter of 2008 and the first quarter of 2009. This has officially ushered the country into a recession. Job losses have been reported in some sectors of the economy.

Some commentators argue that a cause of high unemployment rate is the rigidity of the South African labour market, specifically, employment regulation.

The aim of this study is to establish, among other things, whether the South African labour market is indeed rigid and whether there is any causal relation between South African employment regulation and the high unemployment rate.

The Global Competitiveness Index (GCI) Report 2008-2009 ranks South Africa at number 45 of the listed 134 countries.\(^3\) The sub-indices for the rankings are basic requirements, efficiency enhancers and innovation factors. South Africa is ranked in 69\(^{th}\) place on basic requirements, 35\(^{th}\) on efficiency enhancers and 36\(^{th}\) on innovation factors. Labour market efficiency is one of the pillars of competitiveness that fall under efficiency enhancers. On this specific pillar South Africa is ranked number 88.\(^4\) This pillar measures the flexibility of the labour market and according to GCI South Africa performs badly on this measure. This measure encompasses, among other indices, hiring and firing practices where South Africa is ranked number 129, flexibility of wage determination (123\(^{rd}\)) and labour-employer relations (119\(^{th}\)). The Labour Market pillar is comprised

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\(^1\) Statistics South Africa (2009).
\(^2\) Ibid.
\(^3\) The GCI ranks South African economy at the second stage of development, where it is driven by efficiency. The first stage is factor driven while the third is innovation driven. The majority of the countries in the top fifty ranking are at the third stage of development (62 percent). 16 percent of the countries in the top fifty are in transition from the second to the third stage while 8 percent are at the second stage. (Sala-I-Martin, X; Blanke, J; Hanouz, MD; Geiger, T; Mia, I & Paua, F. “The Global Competitiveness Index: Prioritising the Economic Policy Agenda” in Porter, ME. And Schwab, K. (2008) The Global Competitiveness Report 2008-2009, World Economic Forum, Geneva).
\(^4\) Ibid.
of two major indices namely, Flexibility and Efficient use of talent. These two major indices form 50 percent of the pillar measure each. Except for the three sub-indices above, the Flexibility index also includes non-wage labour costs (hard data), rigidity of employment (hard data), extent and effect of taxation, total tax rate (hard data) and firing costs (hard data). The efficient use of talent include four sub-indices namely Pay and productivity, Reliance on professional management, brain drain and Female participation in labour force (hard data). This explains why South Africa is placed in 88th position on Labour Market Efficiency while 119 to 129 on some sub-indices to which it is based.

The Doing Business 2009 study which compares regulation in 181 countries places South Africa at number 32. This is a slight improvement from number 35 in 2008. One of the indicators under Doing Business 2009 is Employing Workers. This indicator measures flexibility in the regulation of hiring, working hours and dismissal. South Africa is ranked at number 102 in this measure. On the indices that comprise this indicator South Africa scored 56 for difficulty of hiring index, 40 for rigidity of hours index, 30 for difficulty of firing index, 42 for rigidity of employment index and 24 for firing cost. This study does not rank countries according to sub-indices.

The inference that can be made from these studies is that South African labour market is over regulated, hence the high unemployment rate.

The South African Chamber of Business (SACOB) view is in line with that expressed by the above-mentioned institutions. In its submission to the Labour Market Commission that was tasked to investigate the development of a comprehensive Labour Market Policy, SACOB averred that a minimum pre-condition for the absorption of surplus labour is real-wage restraint. It also proposed flexible employment practices to meet market demand and allow for individual choice. It suggested that labour law should permit practices such as subcontracting, part-time work, casual labour, home work, etc. without over-regulation. It made an observation that too much regulation can discourage employment creation and that this is particularly relevant in the case of job security regulation where a prohibition on firing can become a prohibition on hiring.

On the other hand, Gerry Rodgers made the following observations in response to the argument that, in a globalised economy, flexibility is a precondition for employment creation:

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5 Doing Business 2009. All sub-indices take values between 0 and 100, with higher values indicating more rigid regulation.
- The relationship between employment protection and aggregate employment or unemployment is weak.
- There is some evidence to support the proposition that stricter protection of regular jobs is associated with higher levels of temporary and other non-standard contracts.
- There is weak evidence to support the adverse effect of minimum wages on employment creation.

Andre van Niekerk argues that the South African labour laws are not as rigid and inflexible as many have suggested and that the concept of regulated flexibility remains valid as a means of ensuring a balance between worker protection and economic efficiency. A study conducted by the International Labour Organisation in 1996, which has still not been invalidated by other studies, also found no evidence of labour market rigidity in South Africa.

1.2. Flexibility defined

Flexibility of the labour market is defined as its ability to adapt and respond to change. However, while employers are concerned about flexibility, workers worry about security of their jobs. Therefore labour law has to strike a balance between flexibility and security.

Cheadle defines labour market flexibility in terms of forms of flexibility and security. He identifies three forms of flexibility as follows:

- Employment flexibility- the freedom to change employment levels quickly and cheaply
- Wage flexibility- the freedom to determine wage levels without restraint
- Functional flexibility- the freedom to alter work processes, terms and conditions of employment, quickly and cheaper.

He also identified the following forms of security:

- Labour market security- opportunities for employment
- Job security- protection against arbitrary loss of or alteration to the job
- Work security- health and safety in the work place
- Representation security- representation in the work place

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Rodgers identified five dimensions of flexibility as follows:

- Employment protection - employment protection measures reduce both inflows to and outflows from employment and there the effect on employment or unemployment is indeterminate.
- Wage flexibility - minimum wage regulation, trade union activity and the extent to which there is coordinated wage bargaining are some of the factors identified as limitations to wage variation.
- Internal or functional flexibility – this is similar to functional flexibility identified by Cheadle.
- Supply side flexibility - flexibility in working time.\(^\text{12}\)

The source of the debate on rigidity or flexibility of the labour market regulation is the competing interests of employers and those of workers. Those who argue that the labour market is rigid favour collective bargaining as opposed to legislation. However, labour legislation is the recognition of the imbalance of power between the individual worker and the employer. The employer controls the means of production and the worker sell his/ her labour for the wage. It therefore cannot be assumed that the two parties can enter into a contract of employment as equals. Labour legislation therefore protects individual workers against the abuse of power by employers. This is more so for employees that do not fall under bargaining councils. However, labour legislation also promotes collective bargaining.

In assessing the flexibility or rigidity of labour market regulation, this paper will review the provisions of the LRA and the BCEA and make comparisons with the labour standards of International Labour Organisation (ILO) conventions such as the Termination of Employment Convention, Doing Business criteria and other relevant publications of a legal, theoretical and practical nature. The development of labour market regulation leading to the current LRA and BCEA was intertwined with the developments in the political arena of the country. It is therefore crucial that the debate about the regulation of the labour market in South Africa take the historical context into cognisance. The second chapter looks at the history of statutory industrial relations in South Africa. It also looks at the globalisation of the world economy and its impact on the South African labour market. The third chapter looks at the provisions of the Constitution\(^\text{13}\), LRA and the BCEA that are relevant to this debate. The fourth chapter is an assessment of the evidence of a relation between regulation and unemployment in South Africa. The final chapter is a summary of the whole discussion and conclusion based on the discussion.

\(^{12}\) Rodgers (2006).
\(^{13}\) [Act 108 of 1996].
CHAPTER TWO

THE CONTEXT OF THE DEBATE ON LABOUR MARKET REGULATION IN SOUTH AFRICA

2.1. INTRODUCTION

The struggle for labour rights in South Africa was closely linked with the struggle for political rights. This was because the policy of racial segregation and disenfranchisement of black workers was reflected in the work environment. This led to the development of unions along racial lines. The white unions had collective bargaining rights while blacks were not allowed to join trade unions or their unions were not recognised. The white unions in the Witwatersrand mines that were composed of mainly European immigrants managed to influence the government to pass the first colour bar regulation in 1897, which effectively prohibited black employees from becoming engine drivers. This was followed by the 1911 Mines and Works Act, which reserved thirty two job categories for white mineworkers.\(^\text{14}\) The labour laws reinforced the dualism in the labour relations system.

This chapter surveys the developments that led to the promulgation of the current labour laws. It starts from the establishment of the first statutory machinery for collective bargaining and the settlement of labour disputes in 1924, including the events that led to the enactment of the Industrial Conciliation Act, and continues to the era of the Nationalist government. It also reflects on the struggle waged by the labour movement, earlier along racial lines and later as non-racial unions, against the dual labour relations system. The chapter also discusses the changing content of these pieces of legislation. More importantly, it also discusses the enactment of the post-1994 labour statutes.

2.2. THE HISTORY OF STATUTORY INDUSTRIAL RELATIONS IN SOUTH AFRICA

2.2.1. The Industrial Conciliation Act of 1924 and subsequent legislation

The discovery of gold and diamonds in the Witwatersrand led to the influx of labour both from within the region and Europe. The European workers were more skilled and therefore had influence over mining management and regulation of the industry. They used their influence to

persuade the government to pass legislation that protected white workers from competition against black workers. In 1915 the Transvaal Chamber of Mines agreed to recognise the white unions. This was followed by the conclusion of several agreements between mine management and labour, among others the Standstill Agreement. In this agreement management and labour agreed that the ratio of Whites to Blacks employed would never be less than two Whites for every seventeen Blacks in employment. This agreement was short-lived as the fall in the price of gold led to it being dropped and notices of retrenchments and the closing of some mines being issued. The white mine workers viewed this as an attempt to replace them with cheap black labour and embarked on strike action. In 1922, 25 000 white miners went on strike, which became known as the Rand Rebellion because they took up arms. The government sent in the army to crush the “rebellion” and by the end 153 miners had been killed, 500 were wounded and 5 000 were arrested of whom four were hanged for treason.

The general strike led to the government realising the need for statutory machinery to regulate collective bargaining and the settlement of disputes, which culminated in the passing of the Industrial Conciliation Act (ICA) of 1924 whose primary purpose was to prevent industrial unrest. The Act and the subsequent amendments provided for industrial councils and conciliation boards and placed a criminal sanction on strikes which occurred without prior negotiation in these bodies. It also provided for mediation and arbitration, the latter being compulsory in essential services. Trade unions and employers’ associations established on a voluntary basis could register under the Act and together establish and register industrial councils. These industrial councils became recognised bargaining bodies and agreements reached by them were, if gazetted, legally enforceable. These agreements could also be extended to all employers and employees within the jurisdiction of the council if the Minister deemed it expedient and was satisfied that the parties were sufficiently representative.

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. As with industrial councils, agreements reached in conciliation boards could be gazetted and extended to other employers and employees within the board’s

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16 Ibid, p. 327.  
17 Act [11 of 1924].  
18 The Industrial Councils could be established by employers or employers’ organisations and registered trade unions or group of registered trade unions for the consideration and regulation of matters of mutual interest to them and the prevention and settlement of disputes between them.  
19 The purpose of the Conciliation Boards was similar to that of the Industrial Councils but could only be established where there was no Industrial Council in place.  
20 Industrial Conciliation Act [11 of 1924], Section 12(1) and 12(2).  
21 Ibid Section 9(1)(a).  
22 Ibid Section 9(1)(b).
jurisdiction. Such agreements were also legally binding and carried the same penalties for non-compliance as industrial council agreements.\textsuperscript{23}

The ICA provided a basis for the more orderly conduct of labour relations. However, no union representing black African males could register under the Act, since the definition of “employee” specifically excluded pass-bearing Africans\textsuperscript{24} and indentured Indian workers. The exclusion had the effect that black unions, not being allowed to register, were also not allowed to join industrial councils or apply for conciliation boards and could not, therefore, institute legal strike action. The exclusions laid the basis for a dual system in labour relations.\textsuperscript{25}

The ICA was followed by the Wage Act of 1925\textsuperscript{26} which, with amendments to the ICA of 1930\textsuperscript{27}, allowed for the establishment of minimum wage rates for all workers, irrespective of race, in industries where collective bargaining structures were not sufficiently developed. This is viewed by commentators as merely a ploy to prevent black workers from undercutting wages of white workers.\textsuperscript{28} Nevertheless, some black unions did use this Act to improve the wage rates of black workers.

The Wage Act was followed by the 1926 Mine and Works Act\textsuperscript{29}, which further entrenched job reservation on the mines and by the Native Administration Act of 1927\textsuperscript{30} which made it an offence to promote “hostility” between “Natives” and “Europeans”.\textsuperscript{31} This Act was effectively used against black trade unionists.\textsuperscript{32}

\begin{flushright}
2.2.2. Ascent to power of the Nationalist government (1948-1970)
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On coming to power in 1948 the Nationalist Party government appointed a commission, known as the Botha Commission, to institute an investigation into the then existing labour legislation. The commission argued that, if parity representation was granted to black employees in the industrial situation, it would lead to equality between races. This would put white supremacy at stake. Nevertheless, the Commission did recommend that separate bargaining bodies should be established for blacks, but it emphasised that recognition of black unions should be subject to stringent conditions and that strike action should be outlawed. The government did not agree that

\begin{footnotesize}
\begin{enumerate}
\item Ibid.
\item Ibid Chapter V, Section 24.
\item Act 27 of 1925.
\item Act 24 of 1930.
\item Act 25 of 1926.
\item Act 38 of 1927.
\item Ibid Section 29.
\end{enumerate}
\end{footnotesize}
trade unions should be encouraged. It accepted some, but not all, of the Commission’s recommendations and in 1953 passed the Native Labour Act, later known as the Native Labour Relations Regulation Act.\textsuperscript{33}

The Native Labour Act attempted to avert trade unionism among blacks by allowing for the establishment of workers’ committees for black employees. These committees were to be established on the initiative of the employees themselves. Complaints were to be taken to regional workers’ committees, consisting of blacks appointed by the Minister of Labour, under a white chairman.\textsuperscript{34} The Regional Committees had to report to the Native Labour Board, which had an all-white membership.\textsuperscript{35} Only one worker committee, consisting of not less than three and not more than five members, was allowed per plant.\textsuperscript{36}

Three years after the passage of the Native Labour Relations Regulation Act, the government passed the Industrial Conciliation Act of 1956\textsuperscript{37} (later renamed the Labour Relations Act of 1956). This Act did not differ fundamentally from the previous one but the salient point was the intensification of the racial segregation. It caused further polarisation in that it excluded all “Natives” (including black women)\textsuperscript{38} and prohibited the further registration of mixed unions except with ministerial permission.\textsuperscript{39} It also introduced a system of job reservation, which was increasingly seen by employers as an onerous form of rigidity in the labour market, whereby a particular occupation could be legally reserved for a certain race group.\textsuperscript{40}

2.2.3. The 1972-1973 Strikes

The exclusion of Blacks from the industrial relations system and the intensification of the racial segregation system by the Nationalist government saw a period of relative stability in the labour as well as on the political front during the 1960s following the Sharpville massacre and repression of the mass movement. This period was accompanied by economic boom, which resulted in the improvements in living conditions of white South Africans while the black working class did not reap the fruits thereof.\textsuperscript{41}

\textsuperscript{33} Native Labour (Settlement of Disputes) Act 48 of 1953. See Bendix, S p 333-334 for the appointment of theBotha Commission.
\textsuperscript{34} Ibid Section 4 (2).
\textsuperscript{35} Ibid Section 3 (2).
\textsuperscript{36} Ibid Section 7(2).
\textsuperscript{37} Act 28 of 1956.
\textsuperscript{38} Ibid Section 1(xi).
\textsuperscript{39} Ibid Section 4 (6).
\textsuperscript{40} Ibid Section 77.
\textsuperscript{41} Baskin, J (1991) p. 16-17.
By the beginning of the 1970s black workers were no longer prepared to accept their secondary status in industry. This was marked by the fact that, in 1972, altogether 9 000 black employees engaged in illegal strike actions, of which the most noteworthy were the Putco bus drivers’ strike and the strikes at the Durban and Cape Town docks. Yet the 1972 strikes were insignificant compared with those which occurred in 1973 when, in Natal alone, an estimated 61 000 black employees came out on strike over a very short period. The strike wave started at Coronation Brick on 9 January 1973 when about 2 000 workers downed tools and demanded a pay rise, but later spread to the textile workers in Pinetown and Hammersdale and to the Durban Municipality. Even after the strikes had ended, stoppages occurred intermittently and action was also initiated in other areas, such as the Eastern Cape and the Transvaal.

The strikes had no single cause but a cumulation of objective circumstances and material grievances like stagnant wages combined with rising inflation was seen by many as the trigger. The actions were indicative of general dissatisfaction among black workers. More importantly, they highlighted the joint power of those employees and the necessity to accommodate their interests within the industrial relations system.

Although the strikes were illegal, no arrests were made - perhaps because it was impossible to imprison all strikers since no leaders had emerged, or because the government was at that time being subjected to heightened criticism both from the outside world and from opposition groups inside the country. The 1973 strikes added impetus to the awakened black worker consciousness that started in the early 1970s. Several unions emerged throughout the country, notably the Chemical Workers Industrial Union (CWIU) and the Transport and General Workers Union (TGWU) that were launched by the General Factory Workers Benefit Fund (GFWBF) in Durban in 1973; the Western Province Workers Advice Bureau (WPWAB) later renamed Western Province General Workers Union (WPGWU) in Cape Town in 1976; the Transport and Allied Workers Union (TAWU); the Sweet, Food and Allied Workers Union (SFWU); the Paper, Wood and Allied Workers Union (PWAWU) and the Building, Construction and Allied Workers Union (BCAWU) all formed by the Urban Training Project (UTO) in Witwatersrand in the early 1970s. It is clear from the above that many of the initiatives to organise workers began as advice offices.

The reaction of government to the 1973 strikes was to pass the Bantu Labour Relations Regulation Act. This Act provided for the establishment of liaison committees at plant level as

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42 Ibid.
43 Ibid.
44 See "The Durban Strikes 1973" by Richard Hyman.
an alternative to the already existent workers' committees.\textsuperscript{47} Liaison committees were to consist
of representatives of employers and employees, elected on a parity basis.\textsuperscript{48} Their stated purpose
was to improve communication between the employer and black employees\textsuperscript{49} but the real
purpose was to undermine trade unionism among black workers. The Bantu Labour Relations
Regulation Act also gave black employees a limited freedom to strike. This it did by setting up
dispute machinery similar to that provided for in the Industrial Conciliation Act.\textsuperscript{50}

The state and employers intensified their promotion of liaison committees and works committees
as alternatives to trade unions. By 1978 there were 2 600 liaison committees and over 300 works
committees nationally.\textsuperscript{51} Despite these obstacles, the organisation of workers into trade unions
continued. The talks between various trade union blocks culminated in the formation of the
Federation of South African Trade Unions (FOSATU) in April 1979. FOSATU brought together
some 20 000 workers organized in 12 unions.\textsuperscript{52} Another federation, the Council of Unions of
South Africa (CUSA), was founded in 1980. Together these bodies, and especially FOSATU,
would dominate the South African labour scene during the following five years.

\textbf{2.2.4. The Wiehahn Commission}

By 1976 it had become obvious that the provisions of the Black Labour Relations Regulations Act
of 1973 had not solved the problem of black worker militancy. Also, South Africa's major trading
partners had, partly because of representations made to overseas bodies by local unions and
partly because of the 1976 uprising, become more aware of the position of black workers. The
threat of sanctions and disinvestment had increased and various codes of employment practice
(notably the Sullivan Code)\textsuperscript{53} had been issued by multinational companies in South Africa. Some
employers were also calling for the recognition of the right of African workers to form and join
trade unions, albeit for different reasons.\textsuperscript{54} It was in this climate that the government in 1977
appointed the Commission of Inquiry into Labour Legislation, commonly known as the Wiehahn
Commission.\textsuperscript{55}

\begin{itemize}
\item \textsuperscript{47} \textit{Ibid} Section 3.
\item \textsuperscript{48} \textit{Ibid} Section 3(1)(b).
\item \textsuperscript{49} \textit{Ibid} Section 3(2).
\item \textsuperscript{50} \textit{Ibid} Section 9(1)(a).
\item \textsuperscript{51} \textit{Ibid}, p. 24.
\item \textsuperscript{52} \textit{Ibid}.
\item \textsuperscript{53} The original Sullivan Principles were developed in 1977 to apply economic pressure on South Africa in protest against
its system of apartheid. The principles eventually gained wide adoption among United States-based
\item \textsuperscript{54} Employers believed that recognized unions would be co-opted and better controlled.
\item \textsuperscript{55} Bendix, S. (1995) p. 341.
\end{itemize}
The Report of the commission recommended\textsuperscript{56}, inter alia, that:

- Full freedom of association be granted to all employees regardless of colour, race or sex.
- Trade unions, irrespective of composition in terms of colour, race or sex, be allowed to register.
- Stricter criteria be adopted for trade union registration.
- Prohibitions on political activity by unions be extended.\textsuperscript{57}
- Liaison committees be renamed works councils.\textsuperscript{58}
- Where no industrial council had jurisdiction, works councils and workers’ committees be granted full collective bargaining rights.
- Statutory job reservation be abolished by the immediate removal of section 77 of the ICA.\textsuperscript{59}
- Job reservation be phased out in co-operation with interested parties.\textsuperscript{60}
- Safeguards be introduced to protect minorities previously protected by job reservation.
- The Industrial Tribunal that was established in terms of section 17 of the Industrial Conciliation Act of 1956 be replaced by an Industrial Court.\textsuperscript{61} Some of the functions of the Industrial Tribunal was to hear appeals from industrial councils and arbitration of disputes.
- Fair employment practices be developed by the Industrial Court.
- Allowance for the closed shop be maintained.
- A tripartite National Manpower Commission be established.\textsuperscript{62}

In the White Paper published thereafter the government accepted most of the Commission’s recommendations. However, the Amendment Bill drafted to implement them did not meet with expectations.

\textbf{2.2.5. The Industrial Conciliation Amendment Act of 1979\textsuperscript{63} and subsequent amendments}

Not all recommendations were introduced forthwith, and important amendments to the Act were made in 1980, 1981 and 1982; but by 1983, the following major changes had been made.

- The term “employee” had been redefined to include all persons working for an employer.
- Previous provisions for racially mixed unions to have separate branches and all-white executives had been withdrawn.
- The provision for ministerial approval prior to registration of mixed unions had been cancelled.

\textsuperscript{57} Ibid, Para 3.157.5.
\textsuperscript{58} Ibid, Para 3.157.8.
\textsuperscript{59} Ibid, Para 3.159.2.
\textsuperscript{60} Ibid, Para 3.159.4.
\textsuperscript{61} Ibid, Para 4.28.1.
\textsuperscript{62} Ibid, p 5.
\textsuperscript{63} Act 94 of 1979.
• Unions were more expressly prohibited from influencing members to assist the activities of a political party.
• Unregistered unions had been granted the right to apply for conciliation boards.
• The job reservation clause (Section 77) had been repealed.
• A definition of an “unfair labour practice” had been introduced. It was very broadly defined as “any labour practice which in the opinion of the industrial court is an unfair labour practice”. However this definition did not last long as it was amended with the Industrial Conciliation Amendment Act No.95 of 1980.
• Provision had been made for the establishment of the Industrial Court and the National Manpower Commission.
• The name of the basic Act had been changed to the Labour Relations Act of 1956.

These amendments heralded an end to the dual system of labour relations in South Africa.

2.2.6. Industrial Relations and political transition

The formation of the Congress of South African Trade Unions (COSATU) in 1985 saw unions with different ideological standpoints coming together and developing a broad consensus on their role in the political struggle. An important factor in the intensification of the political struggle was the publication in 1987 of a Bill proposing far-reaching amendments to the LRA. This was followed in February 1988 by the declaration of a state of emergency which restricted COSATU’s political activities as well as imposing extensive restrictions on the United Democratic Front (UDF) and many youth, student and civic organisations.

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64 *Ibid* section 1(f).
65 *Ibid* section 1(c).
66 *Ibid* section 1(a).
68 *Ibid* section 2A.
69 Labour Relations Amendment Bill [B118-87(GA)]. Some of the proposals of the Bill were severe restrictions on the right to strike, trade unions were to be liable for damages caused during the strike, the procedure to be followed prior to engaging in a legal strike was to be made more complicated and employers could retrench with consulting with representative trade unions. (Baskin, J. 1991).
70 The UDF was launched as a national federation of organisation at a meeting in Cape Town on 20 August 1983. It was made up of trade unions as well as community, women’s, students, religious, youth, sports, political, professional and business organisations and interest groups. The purpose of this federation was to coordinate and intensify the struggle against the apartheid system of government.
COSATU decided on a three-day stay-away in protest against the proposed amendments, which took place from 6-8 June 1988 and was the biggest in South Africa’s labour history up to that point. Nevertheless the government promulgated the amendments on 1 September 1988. However, the rising political protests led to the South African Employers’ Consultative Committee on Labour Affairs (SACCOLA) meeting with COSATU and the National Congress of Trade Unions (NACTU) during 1989 and 1990 to discuss the crisis. They agreed to return to the previous dispensation, while business conceded that future changes to labour legislation would have to be negotiated with organised labour.71 This event laid the foundation for tripartism in the labour relations system of the country.

Faced with an increasingly ungovernable country, international pressure and a growing economic crisis, the Nationalist government under FW de Klerk had been compelled by the end of the 1980s to shift to a new political strategy which led to the unbanning of the ANC and other organisations in February 1990, followed by the release of political prisoners and the lifting of the state of emergency. The government recognised the agreement reached between COSATU, NACTU and SACCOLA, which was formalised as the so-called “Laboria Minute” of 14 September 1990. It stipulated that new labour legislation would be subject to consultation and consensus between the major actors prior to submission to Parliament.72 In the same year the LRA was amended to remove many of the objectionable features introduced in 1988.73

The ANC and the government met at Groote Schuur on 4 May 1991 and committed themselves to a negotiated settlement. In December the multi-party Conference for a Democratic South Africa (CODESA) met to discuss transitional arrangements and the principles of a new constitution.74 The negotiations eventually led to agreement on the interim Constitution75, culminating in the April 1994 elections.

With COSATU entering an electoral alliance with the ANC and the South African Communist Party, the elections saw a comprehensive victory for the ANC and the formation of an ANC-led “Government of National Unity” (GNU). Within two months of assuming power the new government announced its intention to introduce a new labour relations statute.76

71 See Du Toit et al. (2006) p. 15.
72 The seed of tripartism in labour relations was sawn here and formalized through NEDLAC Act (No.35 of 1994) after the election of the first democratic government.
73 Ibid.
2.2.7. The New Labour Legislation and the reintegration of South Africa into the Global Economy

Many observers attribute the speed with which the GNU attended to the country’s labour laws to the contribution of organised labour in general, and COSATU in particular, to the struggle against apartheid and the election victory for the ANC.\textsuperscript{77} The conduct of free and fair democratic elections had also resulted in the country being readmitted to multi-lateral organisations such as the United Nations Organisation (UNO) and the International Labour Organisation (ILO). Therefore South Africa had to align its labour laws to the conventions and recommendations of the ILO and also to the Interim Constitution of the country.\textsuperscript{78}

The readmission into the world economy meant that South Africa had to adhere to the World Trade Agreements.\textsuperscript{79} The South African economy was quick to open up to the outside world. It started by shifting away from the import substitution industrialisation policy that had been practiced for decades towards an export oriented growth model. In the framework of the 1994 General Agreement on Tariffs and Trade (GATT) agreements\textsuperscript{80} South Africa made some commitments for the period 1995-1999 which included the reduction in tariffs and gradual elimination of export subsidies before the end of 1997.\textsuperscript{81} These commitments were implemented with some zeal, with most of them being exceeded. The General Export Incentive Scheme (GEIS) was abolished as planned in July 1997, with almost all agricultural subsidies phased out since 1 January 1995, much earlier than required by the government’s GATT obligations. The surcharges that affected close to a third of imports were removed as early as 1995. Liberalisation was also accelerated in clothing and textile as well as the automobile sectors where the country was given permission to extend the timetable for the dismantling of customs beyond the usual five years. The timetable was voluntarily reduced to eight years in the clothing and textile sector, instead of 12.\textsuperscript{82} However, these achievements in liberalising the economy were accompanied by a rise in unemployment in the affected sectors.\textsuperscript{83}

2.3. CONCLUSION

\textsuperscript{77} Ibid p. 17.
\textsuperscript{78} Act 200 of 1993, section 27.
\textsuperscript{79} The World Trade Agreements or Multilateral Trade Agreements are the agreements of the World Trade Organisation that provide the common institutional framework for the conduct of trade relations among Member States.
\textsuperscript{80} GATT was formed in the mid 1940s and lasted until 1994, when it was replaced by the World Trade Organisation in 1995. Its main objective was the reduction of barriers to international trade. This was achieved through the reduction of tariff barriers, quantitative restrictions and subsidies on trade through a series of agreements. It was more a treaty than an organization. It was a result of the failure to form the International Trade Organisation. [Matsushita, M et al (2006)]
\textsuperscript{81} Cling, J. (2001) p 104.
\textsuperscript{82} Ibid p. 105.
\textsuperscript{83} Ibid.
It is evident from the above discussion that the struggle for labour rights in South Africa went hand in glove with the political struggle. The manner in which the newly elected government prioritised the review of labour statutes is the testimony to the strong ties between the ruling party and organised labour led by COSATU. However, the role played by employers in influencing the Nationalist government to relax the racial segregation laws in the workplace that were having untoward effects on the conduct of business must not be underestimated. The following chapter surveys the Labour Relations Act\(^{84}\) as the statute that provides the floor of rights and the Basic Conditions of Employment Act\(^{85}\) as the law that prescribes minimum conditions of employment. It also considers the subsequent amendments to these pieces of legislation that were aimed at addressing the shortcomings of the principal statutes.

\(^{84}\) Act 66 of 1995.
\(^{85}\) Act 75 of 1997.
CHAPTER THREE

REGULATION OF THE SOUTH AFRICAN LABOUR MARKET

3.1. INTRODUCTION

The Interim Constitution provided for fundamental rights, which included labour relations rights. The labour relations rights included the right to fair labour practices, freedom of association for employers and employees, the right to collective bargaining, workers’ right to strike and recourse of employers to lock-out. The then Labour Relations Act became inconsistent with the Constitution and therefore had to be repealed. This was one of the reasons for the Government of National Unity to prioritise the drafting of the new labour laws. The first step to overhaul the labour laws was the appointment of a Ministerial task team, which was done in consultation with employers’ and labour representatives. The task team was assisted by experts provided by the International Labour Organisation (ILO). The brief of the team was to draft a Labour Relations Bill.

The work of the task team culminated in the Labour Relations Act (LRA) of 1995. The LRA was followed by the Basic Conditions of Employment Act (BCEA) in 1997 and the Employment Equity Act (EEA) in 1998 respectively. This chapter explores these pieces of legislation and their subsequent amendments without debating their flexibility or lack thereof. This will be examined in the following chapter.

3.2. THE LABOUR RELATIONS ACT

The LRA gave effect to the labour relations rights enshrined in section 27 of the Interim Constitution, which has since been replaced by section 23 of the final Constitution. It is what can be called auxiliary legislation. It does not seek to directly regulate relations between employers and workers but it lays down the rules of engagement. It lays down rules for the settlement of inevitable disputes between management and labour through collective

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87 Ibid, section 27.
89 Ibid.
91 Act 75 of 1997.
93 See Business SA v COSATU & Another [1997] 5 BLLR 511 (LAC), p517, paragraph A-B.
bargaining. Management expects labour to be available at a rate that allows it to make profit, while labour expects a reasonable wage rate. On the other hand there is the public or consumers that expect uninterrupted provision of services or goods. This is where auxiliary legislation plays its role. Therefore the LRA set the rules under which management and labour enter into collective bargaining to pursue their legitimate interests.

3.2.1. Collective Bargaining and Dispute Resolution

The right to engage in collective bargaining was deliberately phrased in such a way that it does not create a duty or obligation to bargain. The Act promotes collective bargaining in the workplace and at industry level but leaves it to the parties to voluntarily enter into such engagements. However once the parties conclude an agreement it becomes legally binding. The collective agreement is also binding on employees who are not members of the trade union that is party to the agreement if the employees are identified in the agreement; the agreement expressly binds the employees; and that trade union has a majority of employees in the workplace as its members. In order to prevent non-members of a trade union benefiting from collective bargaining without any contribution, the Act provides for agency shop agreements. Such an agreement requires an employer to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof. The Act also makes provision for closed shop agreements, which require all employees covered by the agreement to be members of the trade union. In accordance with the agreement, it is fair to dismiss an employee who refuses or is refused membership of a trade union party to a closed shop agreement or is expelled from the union if the refusal of membership or expulsion is fair in terms of the Constitution of the trade union. However, there are a number of safeguards to ensure that the exercise of this provision is constitutional e.g. allowance for conscientious objection under section 26(7)(b).

A collective agreement also varies any contract of employment between an employee and employer who are both bound by the collective agreement. This was done apparently to deter parties from entering into contracts that provide for conditions that are less favourable than those agreed collectively. Where a collective agreement is concluded for an indefinite period, the principal Act provided for termination by either party by giving reasonable notice to the other.

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95 Ibid pp. 65-70.
97 See section 23 of the LRA 66 of 1995.
98 Ibid section 23(1)(d).
99 Ibid section 25.
100 Ibid, section 26(1).
101 Ibid, section 26(5) and (6).
102 Ibid section 23(1)(5).
party. However this provision was not clear on the nature of notice to be provided, hence the insertion of clarity that the notice must be in writing that was added by subsequent amendments.

The Act also makes provision for the establishment of the bargaining councils. In accordance with the Act, one or more registered trade unions and one or more registered employers’ organisations may establish a bargaining council for a sector and area. The purpose of the bargaining councils includes, inter alia:

- To conclude and enforce collective agreements;
- To prevent and resolve labour disputes;
- To promote and establish training and education schemes.

Collective agreements concluded in bargaining councils may be extended to non-parties that are within its registered scope by following the procedure prescribed in the Act. However, the Act also makes provision for exemptions. The 2002 amendments provided for the extension of the services and functions of the bargaining council to workers in the informal sector and home workers. The essence of this amendment is that a collective agreement concluded by the bargaining council can be made binding on informal workers employed in the particular sector.

The achievement of the new LRA is that it established the Public Service Coordinating Bargaining Council for the public service as whole and empowers it to designate a sector of the public service for the establishment of a sectoral bargaining council.

The Act also established the Commission for Conciliation, Mediation and Arbitration (CCMA), which is an independent forum whose main purpose is the resolution of labour disputes.

3.2.2. Unfair Dismissals and Unfair Labour Practices

The Constitution of 1993 provided for the right to fair labour practices and this right was given effect to by the LRA.

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103 Ibid section 23(1)(4).
104 Act 12 of 2002.
105 Ibid section 27(1).
106 Ibid section 28.
107 Ibid, section 32.
108 Para (l) added by section 3(B) of Act 12 of 2002.
110 Ibid section 112 – 115.
111 See Part B of Schedule 7.
The Act recognises a dismissal effected for a fair reason related to the employee’s conduct or capacity; or based on operational requirements and in accordance with a fair procedure as fair.112 However, the employer who contemplates dismissing one or more employees for reasons based on the employer’s operational requirements is obliged by the Act to consult with the relevant party as stipulated in the collective agreement if there is one.113 The principal Act did not provide for a right to strike and recourse to lock-out for dismissal in disputes about dismissal based on operational requirements. In essence the Act prohibited strikes and lock-out in such disputes since the parties were not allowed to engage in such actions over issues that they have a right to refer to arbitration or to the Labour Court.114 The amendments of 2002 provided the right to strike and recourse to lock-out for some operational requirements disputes. However this right applies only to businesses employing more than 50 employees and if the employer contemplates dismissing not less than ten employees, depending of the number of employees employed in the organization.115 The threshold of applicability was obviously inserted to allow for flexibility for small enterprises.

3.2.3. The regulation of temporary employment services

The Act recognises temporary employment services (TES) as employers of persons whose services have been procured by them for the client company. This has created a triangular relationship where the TES has an employment contract with the employee, a service contract with the client company and the employee renders a service to the client company. Both the TES and the client are held jointly and severally liable if the TES contravenes a collective agreement concluded in the bargaining council that regulates terms and conditions of employment; a binding arbitration award that regulates terms and conditions of employment; the Basic Conditions of Employment Act; or a determination made in terms of the Wage Act.116 This provision was obviously inserted to dissuade employers from utilising the TES to undermine the labour standards set by the labour legislation. However, the Act is silent on the liability of the client in dismissal disputes.

3.2.4. Code of Good Practice: Dismissal on Probation

The amendments of 2002 made provisions for acceptance of less compelling reasons for the dismissal of a worker on probation for poor work performance.117 This was apparently to allow

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112 Ibid, section 188(1)(a)(ii).
113 Ibid, section 189.
114 Ibid, section 65(1)(c).
115 Ibid, section 189A.
116 Ibid, section 198.
117 See Schedule 8: Code of Good Practice on Dismissal, Item 8(1)(j).
more flexibility for employers to dismiss employees that do not perform to the satisfactory level during or at the end of the probationary period. To prevent a situation where the employers abuse this provision by hiring employees and dismissing them at the end of the probationary period or unnecessarily extending the probation period, the Act provided guidelines with regard to procedure to be followed in dismissals of this nature.\textsuperscript{118} However the amendment did not deal with dismissals for other reasons such as incompatibility. Besides performance, probation is also about assessing the suitability of the employee in the workplace. It appears as if the decision not to deal with incompatibility was driven by concerns related to the efficacy of enforcement.\textsuperscript{119}

3.3. \textbf{THE BASIC CONDITIONS OF EMPLOYMENT ACT}

The Basic Conditions of Employment Act\textsuperscript{120} (BCEA) was enacted after the finalisation of the Constitution to give effect to the right to fair labour practices referred to in section 23(1) of the final Constitution\textsuperscript{121}. It is regulatory legislation in that it directly lays down rules of employment.\textsuperscript{122} Like the LRA, the BCEA applies to all employees and employers except those explicitly excluded.\textsuperscript{123} The provisions of the Act constitute a term of any contract of employment except where the contract of employment provides a term that is more favourable than that in the Act.\textsuperscript{124} It covers, \textit{inter alia}, issues such as the regulation of working time, leave and termination of employment.

3.3.1. \textbf{Regulation of Working Time}

The Act makes provision for a maximum of 45 hours’ working week, 9 hours’ day if the employee works a maximum of five days in a week or 8 hours’ day if the employee works more than five days in a week.\textsuperscript{125} It allows for extension of working hours by up to 15 minutes in a day but not more than 60 minutes in a week to enable an employee whose duties include serving the public to complete his/ her duties.\textsuperscript{126} The Act also establishes procedures for progressive realisation of a 40 hours’ working week.\textsuperscript{127} Employees earning in excess of R149 736, 00 per annum are

\begin{itemize}
\item \textsuperscript{118} Ibid, item 8(2), (3) and (4).
\item \textsuperscript{120} Act 75 of 1997.
\item \textsuperscript{121} Act 108 of 1996.
\item \textsuperscript{122} See Paul Davies & Mark Freedland (1983), p. 37.
\item \textsuperscript{123} Employees and employers excluded by the Act are:
\begin{itemize}
\item members of the National Intelligence Agency, the South African Secret Services and the South African National Academy of Intelligence;
\item unpaid volunteers working for an organization serving a charitable purpose; and
\item the directors and staff of Comsec. (See section 3 of the Basic Conditions of Employment Act).
\end{itemize}
\item \textsuperscript{124} See section 4 of the BCEA.
\item \textsuperscript{125} Ibid, section 9.
\item \textsuperscript{126} Ibid, section 9(2).
\item \textsuperscript{127} Ibid, section 9(3).  
\end{itemize}
excluded from almost all the provisions of chapter two, which deal with regulation of working time. 128

3.3.2. Overtime

The overtime section of the Act provides that an employer may not require or permit an employee to work overtime except in accordance with an agreement. 129 The maximum number of overtime hours is limited to 10 hours per week. The amendments of 2002 removed the limitation of 3 hours overtime per day. 130 However, an agreement envisaged above may not require or permit an employee to work more than 12 hours on any day. 131 The Act requires the employer to pay the employee at least one and half times the employee’s wage for overtime worked. 132 For overtime worked on Sunday, the employer is required to pay the employee double the normal wage for every hour worked. 133 The rate of pay that applies to Sunday work is also applicable to public holiday work. However the employer is allowed to grant the employee time off in lieu of overtime worked. 134 Employers and employees may conclude collective agreements increasing the number of allowed overtime per week to 15 hours. 135 The salary threshold that applies to ordinary hours of work is also applicable to overtime.

3.3.3. Termination of Employment

The notice period originally provided for in the Act was one week if the employee had been employed for four weeks or less, two weeks if the employee had been employed for more than four weeks but less than a year or four weeks if the employee had been employed for one year or more. 136 The amendments of 2002 increased the period of employment to six months or less for a notice period of one week and more than six months but less than a year for a notice period of two weeks. 137 Further to this the amendments made provision for reduction by collective agreement of the notice period of four weeks to not less than two weeks. This was done apparently to provide some flexibility for employers. The Act also provides for remuneration in lieu of notice. 138

129 Ibid, section 10(1).
130 Act 11 of 2002.
131 See Section 10(1A) of the BCEA.
132 Section 10(2) of Act 75 of 1997.
133 Ibid, section 16.
134 Ibid, section 10(3)(a) and section 16(3).
135 Ibid, section 10(6)(a).
136 Ibid, section 37.
138 Ibid, section 38.
On termination of employment, the employer must pay the employee for overtime that he/she is entitled to, leave days that were not taken and for paid time-off that is due to the employee.\textsuperscript{139} If employment is terminated for reasons based on employer’s operational requirements, or the contract of employment expired or is terminated in terms of section 38 of the Insolvency Act (Act 24 of 1936), the employer must pay severance pay equal to at least one week’s remuneration for each completed year of continuous service.\textsuperscript{140}

3.3.4. Sectoral Determinations

The Act empowers the Minister to make a sectoral determination establishing basic conditions of employment for employees in a sector or area.\textsuperscript{141} This provision is meant for the protection of those workers not covered by collective agreements.\textsuperscript{142} However in advising the Minister on publication of sectoral determinations, the Act requires the Commission for Employment Conditions to consider, inter alia, the ability of employers to carry on their business successfully; the operation of small, medium or micro enterprises; new enterprises; and impact of a proposed condition on employment creation in the sector.\textsuperscript{143}

3.4. EMPLOYMENT EQUITY ACT

The hiring practices of employers are not regulated by legislation except where they discriminate against persons on prohibited grounds. The Act lists the prohibited grounds.\textsuperscript{144} The Act however does not regard distinctions, exclusions or preferences based on inherent requirements of the job requirements or for the purposes of affirmative action as unfair discrimination.\textsuperscript{145} Small enterprises are excluded from the affirmative action provisions of Chapter III of the Act\textsuperscript{146} This was an apparent attempt to avoid overburdening the small enterprises with regulations.

3.5. CONCLUSION

\begin{itemize}
  \item \textsuperscript{139} \textit{Ibid}, section 40.
  \item \textsuperscript{140} \textit{Ibid}, section 41(2).
  \item \textsuperscript{141} \textit{Ibid}, section 51.
  \item \textsuperscript{142} \textit{Ibid}, section 55(7).
  \item \textsuperscript{143} \textit{Ibid}, section 54(3).
  \item \textsuperscript{144} Act 55 of 1998, section 6(1).
  \item \textsuperscript{145} \textit{Ibid}, section 6(2).
  \item \textsuperscript{146} The Act defines a designated employer as follows:
  \begin{enumerate}
    \item an employer who employs 50 or more employees;
    \item an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to this Act (EEA);
    \item a municipality, as referred to in Chapter 7 of the Constitution;
    \item an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and
    \item an employer bound by a collective agreement in terms of section 23 or 31 of the LRA, which appoints it as a designated employer in terms of this Act (EEA), to the extent provided for in the agreement
  \end{enumerate}
\end{itemize}
This chapter has explored the provisions of the LRA, BCEA and EEA that are most relevant to this paper. The next chapter is an assessment of the flexibility or lack thereof of these labour laws against international law and other internationally recognised measures of flexibility or rigidity of the labour market.
CHAPTER FOUR

ASSESSMENT OF RIGIDITY OF LABOUR MARKET REGULATIONS AND ITS IMPACT ON UNEMPLOYMENT IN SOUTH AFRICA

4.1. Introduction

South Africa has ratified all International Labour Organisation’s (ILO) core labour standards. These standards include eight conventions\(^{147}\) that cover freedom of association and collective bargaining; elimination of forced and compulsory labour; elimination of discrimination in respect of employment and occupation; and abolition of child labour. The core labour standards express the public’s moral convictions about the respect due to labour as partner in global production, and its determination that these standards be honoured. These conventions lay down minimum standards that all countries that ratify them, including those that do not, are encouraged to comply with.\(^{148}\) It is envisaged that adherence to these standards will lead to fairness in global production. It is therefore unthinkable that ILO can promote labour policies that hinder global competitiveness in the labour market. However, despite ratifying and complying with these conventions, South Africa is receiving negative ratings on flexibility of labour market regulation. Doing Business, which is one of the studies that rate South Africa low on labour market flexibility, is a series of annual reports investigating regulations that enhance business activity and those that constrain it and is published by the World Bank and the International Finance Corporation. This chapter reviews the rating of South African labour market regulation by Doing Business. It also evaluates the assertion by some commentators that rigidity of the South African labour market regulation is a cause of the high unemployment rate.

4.2. Regulation of hiring

Doing Business measures difficulty in hiring on 3 sub-indices, which are: whether fixed-term contracts are prohibited for permanent tasks; maximum cumulative duration of fixed-term contracts; and a ratio of minimum wage for a trainee or first-time employee to an average value added per worker. A country is assigned a score of 1 if fixed term contracts (FTC) are prohibited for permanent tasks and a score of 0 if they can be used for any task. A score of 1 is assigned if maximum cumulative duration of FTCs is less than 3 years; 0.5 if it is 3 years or more but less than 5 years; and 0 if FTCs can last 5 years or more. Finally a score of 1 is assigned if a ratio of

\(^{147}\) Conventions 87, 98, 29, 105, 100 111, 138 and 182.

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 Labour Appeal Court held that when determining whether an employee had a reasonable expectation, it is first necessary to determine whether he/she in fact expected his/her contract to be renewed or converted into a permanent appointment. If he/she did have such an expectation, the next question is whether, taking into account all the facts, the expectation was reasonable. The approach to be adopted in considering the facts was outlined in *Dierks v University of South Africa*¹⁵³ as follows: evaluation 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

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¹⁵⁰ Section 186(1)(b).
¹⁵³ [1999] 4 BLLR 304 (LC), para 133.
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\textsuperscript{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.\textsuperscript{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.\textsuperscript{158} This Act was enacted to give effect to the constitutional right to equality.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{156} Act 55 of 1998.
\textsuperscript{157} Ibid, section 6(1).
\textsuperscript{158} Ibid, section 6(2).
\textsuperscript{159} Act 108 of 1996, section 9.
\textsuperscript{160} Article 1(2).
In South Africa working time is regulated by the BCEA. 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. Therefore there are some restrictions on night work.

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. It also regulates payment for work done on Sunday.

The Act provides for a working week of not more than 45 hours that can be extended by up to 1 hour a week and overtime of not more than 10 hours in a week. 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. 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.

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. 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. The Code of Good Practice on the Arrangement of Working Time 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

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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).
Convention.\textsuperscript{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.

\subsection*{4.4. Regulation of dismissals}

\textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\footnotesize{\textsuperscript{174} C47 Forty-Hour Week Convention, 1935.  
\textsuperscript{175} Doing Business 2009 (2008).  
\textsuperscript{176} See sections 188 and 189 of the LRA.  
\textsuperscript{177} Ibid.  
\textsuperscript{178} Act 66 of 1995, section 185(a).}
words or by conduct that the employer intends to terminate the contract. 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.

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. 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. 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. 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.

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. 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. 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. A generally accepted

180 LRA, section 186(1).
181 Ibid, section 187.
182 Ibid, section 187(2)(a).
184 Ibid, section 187(2)(b).
185 Ibid, section 188(1).
186 Ibid, section 188(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. In General Food Industries Ltd/ a Blue Ribbon Bakeries v FAWU & others 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.

The Basic Conditions of Employment Act 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. The Convention also lists conditions that shall not constitute valid reasons for termination, which are similar to those listed in the LRA. The Convention provides for an appeal against alleged unfair dismissal to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator. The LRA established the Commission for Conciliation, Mediation and Arbitration, the Labour Court and the Labour Appeal Court 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, 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?

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188 See Code of Good Practice on Dismissal based on Operational Requirements, item 9. 
189 See section 189(3)(h) and item 12(1). 
190 Act 75 of 1977. 
191 Article 4. 
191 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 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. 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. The study utilised two datasets, one was compiled by Botero et al. 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.

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, 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. 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.

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. 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. 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. 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. 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. Retrenched workers are eligible to unemployment insurance benefits and the unemployment insurance system provides for short-time benefits. 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.

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. 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

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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.\footnote{Ibid.} It therefore follows that unemployment rates are determined by a variety of factors.

A study conducted to ascertain, \textit{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.\footnote{Landmann, O. (n.d.) Wages, Unemployment, and Globalization: A Tale of Conventional Wisdom.}

The finding of another study conducted by the Human Sciences Research Council\footnote{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.} 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, \textit{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
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\textsuperscript{217} study. Most commentators who argue for deregulation of the South African labour market usually quote, \textit{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.

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**International Law**


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