

Trends in the labour market

In this instalment, the first of a series on recent developments in the South African labour relations and employment law dispensation, we briefly look at the lessons that may be learnt from the recent spate of strikes that hit various sectors. In future instalments, emphasis is placed on aspects such as the proposed amendments to labour legislation and the implications thereof for employers; the distinction between employees and independent contractors; employment contracts; dispute settlement; employment equity; the management of poor performance and dismissal due to misconduct, incompetence and on operational grounds.

It is inevitable that strikes such as these experienced recently would make headlines and consequently create the impression that not all is well with relations between trade unions and employers. Naturally one doesn't condone the economic losses accompanying strikes by employees or lock-outs by employers. In many cases, however, it is true that labour unrest could certainly have been avoided if better leadership was displayed both on the side of management and that of trade unions. It is however essential that perspective is not lost and the dynamics of our labour relations dispensation and the role played by economic power and sound management practices in that dispensation are understood.

In any system, labour relations take place in a specific economic, statutory and political environment. Changes in this environment directly impact on relations in the workplace and the manner in which it is managed. For example, effective competition in the internal market demands the implementation of world class technology, as well as competitive production and management methods. This, however, places pressure on the employer and employee to work more effectively and productively, which in turn may lead to new working methods, staff reductions, changes in agreed conditions of employment etc.

Equally, developments in the political arena impact on relations in the work environment. For example, one of the side-effects of the new constitutional set-up is that employees, the same as all other citizens, receive new rights which they wish, and are entitled, to exercise in the broader community, as well as within the workplace, within reason of course. These rights include the right to belong to trade unions; the right to strike; the right not to be unfairly discriminated against and the right to fair labour practices. Within this new legislative culture, it can be expected that pressure will be exerted on management to respect the above-mentioned and other rights and to manage the exercising of these rights accordingly. One can also expect that employees would insist that the way in which they are managed should reflect the values of the new constitutional dispensation and that the workplace should consequently be managed in a more participative and transparent manner.

Against this background, it must be accepted that our legislator cannot, as was the case under the previous Labour Relations Act (LRA), put the proverbial lid on the boiling pot of labour unrest in an attempt to prevent labour strikes. The approach followed by the new LRA is a pluralistic one, in terms of which it is accepted that the employer and employee often have opposing (yet legitimate) expectations and interests, but at the same time, holds the view that these opposing interests may from time to time be reconciled by means of a process of negotiation (or "collective bargaining"). Seeing as the Act – for the sake of good order – attempts to inhibit unilateral actions by contracting parties and because the lessons learnt under the previous LRA indicate that the strategy of placing a lid on a boiling pot is

neither effective nor desirable, the new LRA now allows that, when deadlock is reached in the negotiating process, alternative methods of dispute settlement may be used to attempt to reach an agreement.

Conciliation before a bargaining council or the Commission for Conciliation, Mediation and Arbitration (“CCMA”) is an important step in this process. If, however, it does not achieve the desired results, the Act allows persons who are not employed in essential services and who comply with the statutory prerequisites for industrial action, to exercise economic pressure on the opposite party by withdrawing their labour (in the case of employees) or refusing to allow employees on the premises (in the case of employers) in an attempt to reach a settlement.

Although the new LRA affords employees new rights, among which the right to strike in particular, it creates, unlike the case under the old LRA, a better balance between the legal positions of the employer and employee. Contrary to what one may expect, this has an inhibiting effect on the parties, precisely because they regard each other more seriously around the negotiating table. Furthermore, the new Act allows only economic considerations (and consequently the relative economic power positions of the parties, i.e. employer and employee) and no longer considerations of fairness (as was the case previously) to determine the outcome of the negotiating process and possible subsequent industrial action.

This also means that the party who is economically in the stronger position would normally be able to enforce his will on the other party. In the current economic climate, in which those who mainly tend to strike are also the ones who can least afford it because they are often replaceable, employers are generally on the winning side. This further means that the reasons why strikes sometimes last so long, cannot merely be attributed to the relentlessness of striking workers, but also to concerted and deliberate decisions by employers to enter the ring with workers. In this context, employers are often equally able to end the economic battle as the workers, but they often decide, for sound strategic reasons or perhaps less wise reasons, not to do so.

One often tends to regard strikes that do occur as representative of the poor state of labour relations in South Africa. In the process, the success stories – that serve as proof that the new statutory labour dispensation is indeed starting to bear fruit – are being disregarded. Few people realise, for example, that large-scale unrest in the most vulnerable sectors, such as the mining, clothing manufacturing and road transport industries was averted because the roleplayers succeeded in reaching agreements without needing to resort to industrial action. In at least two of these sectors – which were historically extremely prone to labour unrest – the success of this year’s negotiation process can be attributed to the fact that employers and trade unions have decided to embark on a new direction in their approach to the negotiating process. In a nutshell, this involves moving away from the clichéd approach where the parties join battle at the negotiating table based on established mandates and positions, towards an approach where (a) economic and other factors affecting the sector are investigated together beforehand; (b) information is shared beforehand; (c) the agenda for negotiation is developed jointly; (d) those involved in negotiation are trained to articulate their underlying needs – rather than their mandates; and (e) generous use is made of facilitators to guide the negotiation process.