Chapter 7

Employment Protection in South Africa: An Analysis of Recent Labour and Social Security Legislative and Policy Developments

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ABSTRACT

This chapter tests the existing (labour and social security-related) legislation against the South African constitutional framework, as well as international and regional standards. The issues to be addressed specifically include the following: 1) Is the existing legislation pertaining to employment protection, unemployment, and work constitutionally compliant? 2) Is it correct to expect legislation (and state policy) to regulate matters such as job-retention and work creation (for example, by activating the work force and through the creation of public works programmes), and if so, does the present statutory and policy framework address this expectation adequately? 3) To what extent is the legislation compliant with international standards and best practices, and are there fresh approaches to address the present malaise, perhaps emanating from regional standards and experiences? 4) Finally, are there any best practices or lessons learned through the South African experience that should influence developments in other emerging economies?

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INTRODUCTION

South Africa’s unemployment rate is presently 27.7%, with over 6.2 million persons classified as unemployed.¹ More than 2.2 million persons are “discouraged work-seekers”, being available to work or start a business but unable to take active steps to find work as a result of unavailability of jobs, lack of skill or loss of hope of finding any kind of work.² In 2013, of the 1.5 million persons running non-VAT (value-added taxation) registered businesses, as many as 1.4 million were in the informal sector. Predominantly run by black Africans, persons aged 35-44 years and those with the lowest levels of education, the businesses are survivalist in nature and most often are formed as a result of unemployment and the inability of the individual to obtain an alternative source of income.³

Almost nine million people in South Africa are presently without work, despite being willing and able to work. The youth (aged 15-34) are particularly vulnerable in the labour market, with over 37% presently being classified as “unemployed”. This is despite the Constitution of the Republic of South Africa, 1996, (the Constitution) promising the rights to human dignity and equality, to fair labour practices, to freedom of trade, occupation and profession and the right to social security including, for everyone unable to support themselves or their dependants, appropriate social assistance.

It is more than twenty years since this celebrated constitutional text came into operation. During that time, various pieces of legislation have been specifically enacted and/or amended for the purpose of regulating work, protecting those in employment and contributing to the alleviation of the harmful effects of unemployment. Legislation such as the Labour Relations Act, 1995, the Social Assistance Act, 2004, the Unemployment Insurance Fund Act, 2001, the Compensation for Occupational Injuries and Diseases Act, 1993 and the Employment Services Act, 2014 have all been designed, at least in part, with this in mind. Nevertheless, it is clear that South Africa continues to battle structural inequality, unemployment and persistent poverty.

This contribution interrogates this situation by providing a detailed critique of the applicable legislative and policy framework, including the most recent labour and social security statutory developments (such as the regulation of fixed-term employment contracts and the proposed introduction of return-to-work arrangements). The purpose of the analysis is to juxtapose the South African legislative approach with the existing realities of poverty, inequality and unemployment. The (labour and social security-related) legislation is tested against the constitutional framework, as well as international and regional standards.

The issues to be addressed specifically include the following:
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