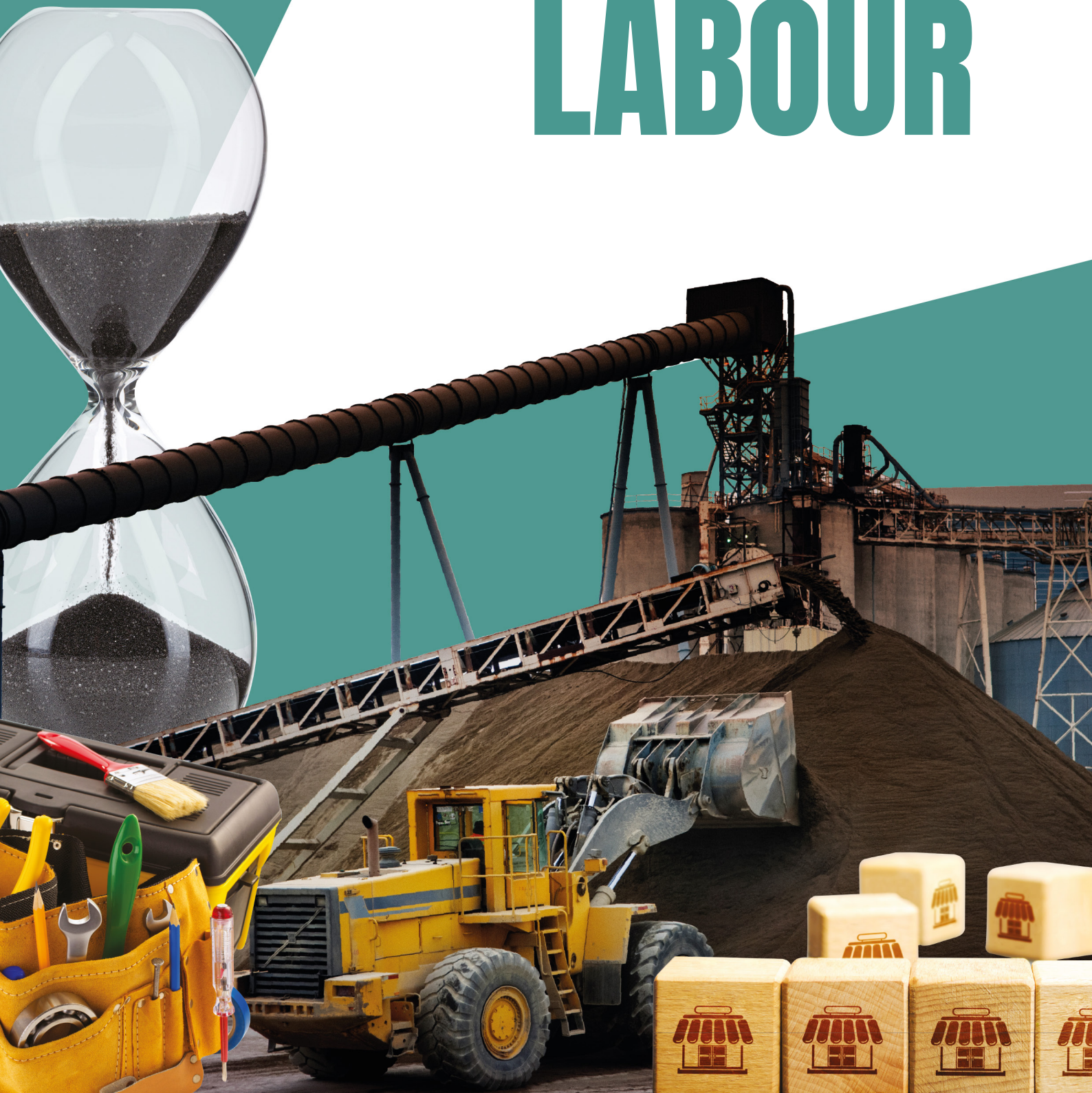
FREE MARKET FOUNDATION

# LAWS AFFECTING SMALL BUSINESS

# LABOUR



First compiled in 1997 by the FREE MARKET FOUNDATION
First published in 1997 by the FRIEDRICH NAUMANN STIFTUNG
This edition published in 2022


Free Market Foundation, Bryanston Gate, 170 Curzon Road, Bryanston, South Africa
www.freemarketfoundation.com

ISBN 978-1-990986-06-2

Cover by Blacfox Enterprises

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# LABOUR

## SYNOPSIS

### Problems

Labour legislation, which may be appropriate for regulating relations between large employers and employees represented by large trade unions, is wholly inappropriate for regulating relations between small employers and their employees. The legislation imposes an excessive burden on small employers, especially employers who are illiterate or not literate in the languages in which the laws are written. As small businesses offer the main avenue of employment for the young, unskilled or otherwise disadvantaged, there is usually an above-average labour turnover in such businesses.

Not unexpectedly, by far the largest volume of cases coming before the Commission for Conciliation, Mediation and Arbitration (CCMA) involves small businesses, and most of those are for alleged wrongful dismissals. The unwillingness of small employers to take risks in employing people who may later turn out to be unsuitable or unaffordable is consequently understandable, particularly when there is a prospect of having to contend with disputes about the fairness of dismissals being referred to arbitration by a bargaining or statutory council (or the CCMA, if a party to the dispute falls outside such a council's registered scope), and dismissed employees might be represented by a highly qualified trade union official who has detailed knowledge of the labour laws. In the event that a dispute about the fairness of a dismissal is referred to the Labour Court, the employer will have to contend with the dismissed employee's labour lawyer.

All disincentives to job creation should be swept away in order to reduce the numbers of the unemployed and increase economic growth. Demand for labour from small businesses offers the greatest potential for reducing unemployment. But small employers will avoid employing people if they face the possibility of being involved in perpetual disputes with their employees, of having to spend hours of their time in arbitration or the Labour Court, and having to pay high fees to labour lawyers.

If government wishes to achieve its economic growth targets, it can do no better than to release the entrepreneurial energy of small employers, combined with the rapid absorption of the unemployed, to achieve an acceleration in economic growth. This desirable result can be achieved by increasing the fluidity at the bottom end of the labour market. This requires exempting small employers from all inappropriate legislation and regulations.

*Definition of small employer*
"Small employers" in this entry refers to small employers as may be defined for purposes of granting exemption from the application of particular legislation. It is envisaged that small employers would be defined by reference to number of employees, turnover, capital employed or a combination of these factors. It is also envisaged that statutory definitions of "small employers" would differ for different exemptions.

### Recommendations

- Allow employees, after counselling by officials of the Department of Labour, to enter into written "customised contracts" with small employers in which they waive some of their statutory entitlements under certain specified sections of the Labour Relations Act and the Basic Conditions of Employment Act, such agreements to be recorded by the Department.
- Recognise the right of small employers to freedom of association as well as disassociation by exempting them from the provisions of the Labour Relations Act which interfere with that right.
- Exempt small employers from section 10 of the Labour Relations Act, thereby restoring the burden of proof to the person making an allegation regarding the conduct of another person.
- Exempt small employers from the requirements of section 16 of the Labour Relations Act relating to disclosure of information.

- Exempt small employers who are non-parties to collective agreements from extension of those agreements.
- Automatically exempt small employers from sectoral determinations promulgated in terms of section 44 of the Labour Relations Act read with section 54 of the Basic Conditions of Employment Act.
- If wider exemptions have not been granted, exempt small employers and their employees from the provisions relating to strikes and lock-outs.
- Withdraw the allowance of employees employed by small employers to take part in work stoppages for the purpose of promoting or defending the economic interests of others in general.
- Allow a short form of arbitration for small employers in place of the existing dispute resolution procedures required for the resolution of disputes under the auspices of the CCMA.
- Allow small employers to be represented by experts in labour law in conciliation proceedings held in terms of section 135 of the Labour Relations Act if the employer is not a member of an employers' organisation and if the employee is being represented by a member of a trade union.
- Set a ceiling of two months' salary on compensation that may be awarded in terms of section 194 of the Labour Relations Act against small employers in the event of a finding against the employer.
- Exempt small employers who employ temporary employees through a labour broker from section 198(4) of the Labour Relations Act which imposes joint liability on the labour broker and client if the labour broker contravenes the Basic Conditions of Employment Act or a collective agreement.
- Provide for the exemption of small employers from the application of Chapter II (regulation of working time—sections 6 to 18) of the Basic Conditions of Employment Act, 1997.
- Exempt small employers from section 20(11) of the Basic Conditions of Employment Act which prohibits an employer from paying an employee for leave not taken.
- Exempt small businesses from the National Minimum Wage Act, 2018.

## SMALL BUSINESS AND LABOUR

This entry on *Laws Affecting Small Business* identifies labour laws which impose unduly burdensome requirements on small businesses and which dissuade them from taking on more employees. It identifies the labour laws that small businesses find most problematic and makes recommendations for relief. While owners of small firms may contend that the recommendations do not go far enough, trade unions could maintain that they go too far.

The entry deals with what is economically desirable. There is no hesitation in contending that many of the existing labour laws are difficult, if not impossible, for small employers to comply with. Labour laws in general impose a relatively higher cost on small firms than on large firms and undoubtedly have the effect of reducing the number of people employed by small firms. Small employers are at a disadvantage in dealing with highly trained trade union officials, whose skills are honed in negotiations with the experts employed by large corporations. The labour laws need to take these factors into account, not only to provide relief to small firms, but to increase job opportunities for the unemployed and allow the economy to grow faster. This is the only sustainable antidote to the destitution that grips increasing numbers of ordinary South Africans.

## SMALL BUSINESSES AS "JOB LABORATORIES"

Highly skilled people are inclined to gravitate towards large firms whereas the less skilled look to small firms for employment. Applicants to large firms are evaluated and interviewed several times by highly qualified personnel managers, have to produce detailed CVs and references, and are given positions only if they have good track records and fit the profiles of the posts being offered. Everything possible is done to ensure that candidates are right for the jobs in order to avoid subsequent dismissals for reasons of unsuitability.

Owners of small firms, on the other hand, are more likely to assess people by instinct rather than by thorough evaluation. They function on a “hit-or-miss” or “trial-and-error” basis, hoping that the person they appoint will fit the job and handle it efficiently. People with low skills are taken on in the knowledge that they will have to be taught the job and may initially not be productive. Small employers also hope, when they appoint people, that the new employees will help increase the earnings of the business sufficiently to cover their wages. When this does not happen, or there is incompatibility for some other reason, employers are faced with having to dismiss the unsuitable employee.

It has been observed that, throughout the CCMA’s life, the overwhelming majority of cases referred to it have been for unfair dismissal, and a significant proportion have involved very small businesses. It is not surprising, therefore, that of the 221,547 cases referred to the CCMA between 1 April 2019 and 31 March 2020, a significant proportion would involve small businesses, and that most of these cases would be for allegedly unfair dismissals. Employees, however, often leave without giving adequate notice and small employers seldom take action against them. Consequently, contracts of employment and notice periods for termination of employment at the small firm level are in practice binding on the employer but not on the employee.

Employees tend to regard small firms as “jumping-off-places” from which they can move to larger firms once they have accumulated knowledge and experience. Staff turnover in small firms is therefore relatively high, but total employment in these firms keeps growing in line with growth in the economy.

Given their preparedness to take risks by employing inexperienced staff with poor or inadequate employment histories, small businesses are the “job laboratories” of South Africa and cannot carry out this important function within a rigid regulatory framework. If they are compelled to do so, the whole economy becomes less efficient and unemployment levels increase. While the rigid labour law regime ostensibly exists to further the interests of the vulnerable employee, in practice it is vulnerable South Africans, condemned to unemployment, who are these laws’ greatest victims.

## EMPLOYMENT FOR THE “UNEMPLOYABLE”

Wages of workers in South Africa have risen rapidly in real terms over the past twenty years, yet there is high unemployment. According to Statistics South Africa’s expanded definition of unemployment (which includes those discouraged from seeking work), 38.5% of the workforce was unemployed at the end of the third quarter of 2019, before reports in December 2019 in China of coronavirus disease 2019 (COVID-19), the viral disease which is caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) and which in a few months became a global pandemic, the response to which aggravated unemployment in South Africa and elsewhere. Other surveys provide differing views on the severity of the unemployment problem but whatever criteria are used there is no doubt that, even apart from COVID-19, unemployment in South Africa is unacceptably high.

Legislation formulated on the basis of agreements entered into between large trade unions and large employers are part of the problem. Not unexpectedly, the respective organisations focus entirely on their own interests without consideration for the effects of their agreements on what in labour terminology are described as “non-parties”. If non-parties were permitted to go about their business undisturbed, the unemployed and small firms would be able to reach accommodation on wages, conditions of employment, working hours and all the other factors involved in employer-employee relations. The unemployed would rapidly be absorbed into the small firms and all would be better off than they are now. However, under current labour laws, many of the agreements between trade unions and employer organisations are extended to small firm “non-parties” who are then compelled to pay the same wages and meet the same employment conditions as the large firms.

A consequence of rigid labour laws is that some people become “unemployable” because employers are not prepared to employ them at the wages and under the conditions laid down in the laws. These unfortunate potential employees

are then deprived of the right to offer to compensate for their perceived deficiencies by agreeing to work for lower wages or finding some alternative way to reach an accord with an employer.

During the apartheid era, unskilled black workers were kept out of employment by job reservation and rate-for-the-job minimum-wage laws which were designed to protect the jobs of white workers. The underlying intention of current labour laws is totally different from the thinking that motivated the apartheid legislation, yet the effect is the same. The unemployed and small employers are unintended casualties.

Naturally, if barriers to employment in the small firms sector are reduced, salaries will initially be lower than they are presently. At the bottom end of the labour market working conditions would also be below currently stipulated standards. However, more people would be employed as a result of the increased competitiveness of South African firms. What the country needs is for increased demand for labour to drive up wages and bring about improved working conditions, and for this to happen legislative measures which indirectly discourage the hiring of workers should be removed so that the currently "unemployable" can more easily get work.

## CUSTOMISED CONTRACTS

## RECOMMENDATION 1

### Allow employees, after counselling by officials of the Department of Labour, to enter into written "customised contracts" with small employers in which they waive some of their statutory entitlements under certain specified sections of the Labour Relations Act and the Basic Conditions of Employment Act, such agreements to be recorded by the Department.

Giving individual employees the right to enter into whatever voluntary agreements they choose with small employers offers a method of accommodating the variety of circumstances that exist at the bottom end of the business and labour markets. Labour legislation too often proceeds from the apparent assumption that employees need protection from unscrupulous employers who, if the law did not prevent them, would exact maximum labour for minimum benefits. It does not provide for employees who, of their own free will, and for their own personal reasons, wish to enter into agreements with reputable employers to work for lower benefits and on less favourable terms than the law allows. Possible reasons for agreeing to work for low wages or under trying conditions could range from being unemployed and desperate to work, to being young and inexperienced and being prepared to "pay" to learn special skills or merely to get job experience.

Small employers offer the greatest hope to the unemployed. They will hire the inexperienced, the young, the old, the illiterate and the otherwise disadvantaged. They do not have standard hiring procedures and minimum requirements that have to be met before offering someone employment. They have niches into which they can fit people who would have no hope of getting jobs in large firms. The law therefore needs to make provision for variations that will allow small employers to hire those who would otherwise be unemployed.

Variations could be accommodated by allowing employees, after counselling by the Department of Labour, to enter into "customised contracts" with small businesses in which they agree to working arrangements that are less favourable than allowed by current legislation. Such contracts would have to be officially recorded and subject to termination by the employee at not more than one month's notice.

This recommendation would place the decision relating to conditions of employment entirely in the hands of the employee, who would at all times be able to withdraw from the agreement by giving the necessary notice. The Department of Labour could ensure that all those entering into such "customised contracts" are fully aware of the implications of their actions. The Department would not have the authority to reject such contracts, but simply provide

advice to employees. General application of the labour laws, and especially their application to large firms, would not be affected. Trade union members would, in addition to the advice available from the Department of Labour, have access to the advice of their union officials.

## FREEDOM OF ASSOCIATION

### RECOMMENDATION 2

**Recognise the right of small employers to freedom of association as well as disassociation by exempting them from the provisions of the Labour Relations Act which interfere with that right.**

Sections 4 to 10 of the Labour Relations Act, 1995 form Chapter II of the Act under the heading Freedom of Association and General Protections. What these sections in effect do is to forbid freedom of association and disassociation.

The rights that are granted to small employers to become members of employer organisations and to exercise their rights as members are of little or no value to them in their dealings with their employees, or with trade unions to which their employees may belong. The rights that are granted to employees in section 5 of the Act, however, give employees very powerful union allies, who are in turn granted special privileges under the law. Small employers are at a decided disadvantage under this dispensation, as they are granted rights of dubious value in comparison with powers granted to employees.

Contracts between employers and employees have long been considered to be different from contracts relating to goods and services. It has been regarded as legitimate for government to interfere with the contractual rights of the parties because of the social impact of their relationships. In a world in which institutions of all kinds are downsizing, this view deserves reconsideration as there is an increased need for a variety of arrangements between small employers and their employees.

## BURDEN OF PROOF

### RECOMMENDATION 3

**Exempt small employers from section 10 of the Labour Relations Act, thereby restoring the burden of proof to the person making an allegation regarding the conduct of another person.**

Our law is based on the principle that a person claiming something from another party has to prove that he or she is entitled to it. It is therefore usually the case that anyone making an allegation has the burden of proof. But section 10 transfers part of the burden of proof to the other party. It states:

"In any proceedings-

(a) a party who alleges that a right or protection conferred by this Chapter has been infringed must prove the facts of the conduct; and

(b) the party who engaged in that conduct must then prove that the conduct did not infringe any provision of this Chapter."

This means that a complainant, in order to make a claim, need merely prove the other party's conduct, and does not also have to show that the other party's conduct infringed the statute.

The other party is then subjected to the "reverse" burden of proving that his conduct did not infringe the statute.

In practice, employees submit written statements alleging that their employers have infringed their rights to participate in trade union activities (or other rights protected under Chapter II of the Labour Relations Act which deals with "freedom of association and general protections") as "proof" of the fact of their employers' conduct. The employers then have to prove that their conduct did not infringe the provisions of this chapter of the Act.

Where the employer has access to a highly skilled personnel department, transferring the burden of proof to the employer may not result in injustice. However, where the burden of proof is transferred to a small employer with no experience of such matters and, at most, a rudimentary understanding of the law, the outcome may frequently be manifestly unjust.

## DISCLOSURE OF INFORMATION

## RECOMMENDATION 4

### Exempt small employers from the requirements of section 16 of the Labour Relations Act relating to disclosure of information.

One of the greatest problems facing small businesses is the necessity to keep proper records. Failure to maintain adequate financial records and to understand the implications of financial results is a major cause of small business failure.

Section 16(2) of the Labour Relations Act states that an employer must as a rule disclose to a trade union representative all relevant information to allow the trade union representative to effectively perform his or her functions of representing employees in grievance and disciplinary procedures, and of monitoring the employer's compliance with the Act and other laws regulating terms and conditions of employment and collective agreements binding on the employer. In addition, the trade union representative has the power to report any alleged contraventions of the Act to the employer, the representative trade union, and any responsible authority or agency.

However, the nature of the information that might be required by the trade union representative to perform all these functions is nowhere spelled out.

Compliance with this requirement constitutes a substantial burden on small and micro employers who are often uninformed about what information is relevant to enable a union representative to represent employees in grievance and disciplinary procedures.

If an exemption will not be granted to small businesses from the disclosure requirements, then at least the nature of the information that may be required of such a business should be clearly specified.

## BARGAINING COUNCILS

## RECOMMENDATION 5

### Exempt small employers who are non-parties to collective agreements from extension of those agreements.

Sections 27, 28 and 31 of the Labour Relations Act state that a trade union and employers' organisation may establish a bargaining council for a sector and area, with power to adopt and enforce collective agreements containing terms and conditions of employment. A collective agreement binds the union and the employers' organisation who are parties to the agreement, and also (if the agreement regulates terms and conditions of employment) the union's members and employer members of the employers' organisation.

Section 32 states that a bargaining council may ask the Minister to extend a collective agreement concluded in the bargaining council to non-parties to the agreement.

Bargaining councils must have a procedure to deal with applications by non-parties for exemptions from the agreement, and collective agreements are obliged to provide for an independent body to hear appeals against council refusals to grant exemptions to non-parties from the provisions of the collective agreements.

In practice, applications for exemption are very costly and beyond the capacity of most small businesses. An automatic exemption for small employers would save them the cost and time required to make application.

Large firms which are compelled by pressure from trade unions to pay high wages are protected from competition by the extension of labour agreements to non-parties. Extension of the agreements prevents small firms from employing labour at lower rates and out-competing large firms by charging lower prices. Rigid, inflexible and compulsory conditions of employment make it difficult for small firms to offer compensating advantages to workers, such as flexible arrangements regarding hours of work, methods of compensation, time off, job responsibilities, leave periods and wage rates, varied to suit the capabilities and preferences of the individual employee. In particular, they prevent variations being introduced to suit the needs of employees whose personal circumstances make them unsuitable for employment in large firms.

Benefits to trade unions of extending agreements to non-parties include the expansion of their sphere of influence and the achievement of higher wages and improved conditions for those of their members who are employed by non-party employers. A direct and little-recognised benefit to trade unions is the protection of the jobs of their members employed by large firms through a reduction in the threat to those employers of competition from small firms.

Trade unions would be deeply concerned if employees and employers were allowed by law to contract freely with each other at whatever wages and under any conditions they may agree upon. It is therefore in the interests of trade unions to make collective agreements as all-encompassing as possible by extending them to non-parties.

Exemptions would no doubt have to stipulate that if a business should grow beyond the size for which exemptions are granted, it would automatically become party to the agreement.

## STATUTORY COUNCILS

### RECOMMENDATION 6

**Automatically exempt small employers from sectoral determinations promulgated in terms of section 44 of the Labour Relations Act read with section 54 of the Basic Conditions of Employment Act.**

Sections 39 and 43 of the Labour Relations Act provides that a trade union whose members constitute, or an employers' organisation whose members employ, at least 30% of employees in a sector and area, may apply to the Registrar of Labour Relations for the establishment, in a sector and area with no industrial council, of a statutory council with power to enter into collective agreements to perform dispute-resolution and other agreed functions of a bargaining council.

Section 44 states that a statutory council that is not sufficiently representative may submit a collective agreement to the Minister, who must treat it as an Employment Conditions Commission recommendation on matters to include in a sectoral determination under sections 54 and 55 of the Basic Conditions of Employment Act, and may promulgate the agreement as a sectoral determination under that Act.

A sectoral determination may set terms and conditions of employment including remuneration, provide for increases and prohibit remuneration in kind; prohibit task-based work, piecework, home work, sub-contracting and contract work; regulate travelling and other allowances; specify conditions of employment for trainees; regulate training and education schemes; regulate pension and other funds; and set a representation threshold at which a trade union will automatically have organisational rights in workplaces covered.

The Minister must be satisfied that the recommendation gave consideration to inter alia, the operation of small and new enterprises, and the likely impact of any proposed condition of employment on current or new employment in that sector and area.

In practice, however, trade unions and large employers will have less concern for the effects of an envisaged sectoral determination on small business, and will focus on other matters to be given consideration, that are more aligned with their own interests: Employers' ability to carry on business; employment conditions; and "any other relevant information".

An automatic exemption for small employers and their employees would be preferable to having their fate decided by sectoral determination.

Exemptions for small employers can expire once the criteria for exemption are exceeded.

## STRIKES AND LOCK-OUTS

### RECOMMENDATION 7

**If wider exemptions have not been granted, exempt small employers and their employees from the provisions relating to strikes and lock-outs.**

Section 64 of the Labour Relations Act grants every employee the right to strike and every employer recourse to lock-out if proper procedures have been followed as laid down in the Act. Small businesses function differently from large employers, and strikes and lock-outs are not an appropriate method of resolving disputes in small organisations.

In practice, the right to lock-out is of very little value to a small employer because of the high cost involved in pursuing this course against employees supported by a large trade union.

The interests of the employees have to be weighed up against the interests of the employer. Small employers are not necessarily in a powerful position in the employer-employee relationship and are unable to deal with the severe consequences of a strike or lock-out. In terms of section 76 of the Labour Relations Act, an employer under certain circumstances is precluded from hiring replacement labour. This could have severe repercussions for small firms with contract deadlines. Section 23(2)(c) of the Constitution of the Republic of South Africa protects the fundamental right of workers to strike, but does not determine conditions under which strikes may occur.

Small employers and their employees should be exempted from the provisions relating to strikes and lock-outs. Section 36(1) of the Constitution authorises reasonable and justifiable statutory limitations of fundamental rights (including the right to strike) in light of more pressing social necessities.

## SECONDARY STRIKES

## RECOMMENDATION 8

### Withdraw the allowance of employees employed by small employers to take part in work stoppages for the purpose of promoting or defending the economic interests of others in general.

Section 77 of the Labour Relations Act states that every employee who is not engaged in an essential service or a maintenance service may take part in the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the economic interests of others.

Small employers are unable to afford the cost of employee participation in actions that are in reality of a political nature. The survival of small businesses is dependent on the cooperation and full involvement of employer and employee in the operations of the business at all times. It is not in the interests of the employees if the survival of the business is threatened and their future employment is jeopardised.

Large firms may be able to absorb the cost when employees participate in secondary strikes, but small employers can be badly harmed if they are not able to continue to function as a result of such strikes.

## DISPUTE RESOLUTION

## RECOMMENDATION 9

(a) Allow a short form of arbitration for small employers in place of the existing dispute resolution procedures required for the resolution of disputes under the auspices of the CCMA.

(b) Allow small employers to be represented by experts in labour law in conciliation proceedings held in terms of section 135 of the Labour Relations Act if the employer is not a member of an employers' organisation and if the employee is being represented by a member of a trade union.

The resolution of disputes under the auspices of the CCMA is expensive and complicated. It was not designed for the purpose of resolving disputes between low-income small employers and their employees. The introduction of a short and inexpensive form of arbitration to deal with such cases would be in the interests of both the employer and employee.

Small employers, many of whom are not literate in the languages in which the laws are written, and some of whom may be illiterate, are at an unfair disadvantage in being compelled to appear on their own in conciliation proceedings where they are faced with a highly-trained trade union representative who is fully conversant with the law. Justice demands that the scales should be balanced in such dispute hearings.

To establish which cases should be dealt with according to a short form of arbitration, a determination could be made by size of business and/or number of employees.

If there is an objection to the employer having expert representation, the matter could be resolved by excluding employee representation by trade unions in the event that the employer is not a member of an employer's organisation.

## UNFAIR DISMISSAL

### RECOMMENDATION 10

**Set a ceiling of two months' salary on compensation that may be awarded in terms of section 194 of the Labour Relations Act against small employers in the event of a finding against the employer.**

The average small employer does not have the administrative capacity and knowledge to deal with the complicated procedures required to prove that a dismissal has been fair. The lengthy process of consultation that has to take place before a dismissal under section 189 can occur is also excessively costly and time-consuming.

Hearings may be delayed for reasons that have nothing to do with the actions of the small employer. It is therefore unjust to determine compensation on the basis set out in this section.

Making the dismissal of employees complicated and expensive will tend to reduce the number of people in employment, because small employers will be reluctant to take on employees when they may be faced with the existing dismissal and compensation procedures. In the longer term, this barrier to employment is detrimental to both employers and potential employees.

## TEMPORARY EMPLOYMENT SERVICES

### RECOMMENDATION 11

**Exempt small employers who employ temporary employees through a labour broker from section 198(4) of the Labour Relations Act which imposes joint liability on the labour broker and client if the labour broker contravenes the Basic Conditions of Employment Act or a collective agreement.**

Small firms cannot be expected to take responsibility for the actions of labour brokers when the broker firms may be very much larger than they are themselves. Imposing such a responsibility on small firms is unfair as they do not have the administrative capability or knowledge to ensure that the labour brokers through whom they are employing temporary staff are complying with the requirements of the labour laws.

If the requirements of the labour laws are not being complied with by labour brokers, small firms should not be made responsible. Small firms often need temporary staff to fill in when their own staff are on leave or are absent for any

other reason. They should not be discouraged from hiring such staff by the potential threat of being held responsible for actions which are not under their control.

## REGULATION OF WORKING TIME

## RECOMMENDATION 12

### Provide for the exemption of small employers from the application of Chapter II (regulation of working time - sections 6 to 18) of the Basic Conditions of Employment Act.

The following is a simplified summary of some of the main provisions of Chapter II of the Basic Conditions of Employment Act:

- Ordinary hours of work are limited to 45 hours per week.
- Daily ordinary working hours are limited to nine hours in a five-day working week and eight hours where the employee works on more than five days in any week.
- An employer who works for less than four hours on any day must be paid for four hours work on that day.
- Overtime is limited to ten hours per week overall, with a maximum working day of twelve hours.
- Employees must be paid at least one-and-a-half times their ordinary wage for overtime worked.
- Employees must be paid at double their normal wage rate for working on Sundays, except that if they normally work on Sundays the rate is one and one-half times the normal rate.
- Night work (which is defined as work performed after 18:00 and before 06:00 the next day) may only be required or permitted by agreement, and only if the employee is compensated in the form of an allowance or reduced working hours, and if transport to and from the employee's home is available.

Chapter II of the Act further provides for variations on the main provisions, and also covers matters such as a compressed working week, averaging hours of work, determination of hours of work by the Minister, meal intervals, daily and weekly rest periods, and public holidays.

Section 6 of the Act provides that Chapter II, except one provision, does not apply to, among others, employees such as senior managers and sales staff – thus setting a precedent for granting exemptions. Employees of small employers should be excluded from the whole of Chapter II in order to provide the parties with the flexibility they need to arrive at mutually satisfactory arrangements regarding working hours. Very few small businesses maintain standard working hours because they tend to fill gaps in the market not covered by large firms. Small employers themselves traditionally work longer hours than any of their employees because of the wide range of activities they have to cover and they are inclined to expect employees to work as hard as they do. Any form of statutorily determined rigidity acts as an impediment to small business efficiency.

Any recommendation to leave the determination of working hours to voluntary agreement between small employers and their employees is likely to conjure up visions of sweat shops and other unpleasant working conditions. But employees always have the freedom to seek better wages, better working conditions and shorter working hours elsewhere. Nothing binds them to stay in jobs that demand unduly long working hours. Relationships between most small employers and their employees are congenial and not at all adversarial, so that mutually satisfactory arrangements are achieved without undue difficulty.

The ministerial determination for the small business sector that was promulgated in 1999 is very limited in scope, applying only to employees who are employed by employers that have nine or fewer employees, and providing that an employee may only agree with the employer to adjust the employee's overtime limit and overtime pay, and then only by—

Extending the weekly overtime limit (from 10 hours), to 15 hours,
adjusting the rate of payment for weekly overtime worked (from time-and-a-half), to—
time-and-a-third for the first 10 hours, and
time-and-a-half for the next 11–15 hours.

That determination should be extended to include employees employed by employers that have up to twenty employees, and broadened to allow agreements permitting any extension of the weekly overtime limit and any adjustment of the rate of payment for overtime worked.

## RECOMMENDATION 13

### Exempt small employers from section 20(11) of the Basic Conditions of Employment Act which prohibits an employer from paying an employee for leave not taken.

Employees very often prefer to be paid out for part of their annual leave rather than taking all their leave. This matter should therefore be left to voluntary agreement between small employers and their employees.

The 1999 ministerial determination for the small business sector is unduly limited, applying only to employees employed by employers with nine or fewer employees as mentioned, and providing that an employee may only agree with the employer to reduce the employee's annual leave entitlement by the number of family responsibility leave days (up to three days per annual leave cycle) taken by the employee.

That determination should be extended to include employees employed by employers that have up to twenty employees, and broadened to allow agreements permitting any reduction of an employee's annual leave entitlement.

## RECOMMENDATION 14

### Exempt small businesses from the National Minimum Wage Act, 2018.

The National Minimum Wage Act requires every employer to pay its workers a wage which is no less than a specified minimum wage.

The entitlement to be paid that minimum wage cannot be waived, and it takes precedence over contrary provisions in any contract, collective agreement, or sectoral determination.

The Act states that the minimum wage will constitutes a term of the worker's contract, unless the contract or a collective agreement or law provides a higher wage.

An employer may apply for an "exemption" (in fact merely a discount) from having to pay the minimum wage.

An exemption must be for a year or less, and must specify the wage that the employer must pay.

The minimum wage specified (currently R21.69 for each ordinary hour worked) is subject to annual review by the National Minimum Wage Commission.

Those who argue for a statutorily prescribed minimum wage assume that all businesses will afford the minimum wage. The compliance burden impact small businesses the most. The small business sector does not have the resources to adjust easily as labour costs rise, although it accounts for the majority of new jobs created. The consequence of the minimum wage will be a loss of jobs in the small business sector. This will benefit dominant companies who can exploit their market power at the expense of small businesses.

Minimum wages and other onerous employment requirements make employers, especially small business owners, reluctant to employ staff. Compliance costs drive up the total cost of labour and increase the barriers to entry into the labour market.

Many people who would otherwise have been eligible for jobs are consigned to unemployment. As Nobelist Milton Friedman observed, “A minimum wage law is, in reality, a law that makes it illegal for an employer to hire a person with limited skills.”

### *Statutory and other legislative measures*

Labour Relations Act, 1995—
- Chap II (freedom of association and general protections)—
  - s 4 (employees' right to freedom of association),
  - s 5 (protection of employees, and persons seeking employment)—
    - (2) (no-one may)—
      - (a)(i) (require an employee not to be a member of a trade union),
      - (b) prevent an employee from exercising rights conferred by this Act)
    - (3) (without precluding settlement of a dispute, no-one may promise to advantage an employee in exchange for not exercising a right conferred by this Act)
    - (4) (a contract not permitted by this Act which limits these provisions is invalid),
  - s 6 (employers' right to freedom of association),
  - s 7 (protection of employers' rights),
  - s 8 (rights of trade unions and employers' organisations),
  - s 9 (procedure for disputes),
  - s 10 (burden of proof)—
    - (a) (a party alleging that a protection conferred by this Chapter was infringed must prove merely the facts of the conduct) and
    - (b) (the party who engaged in that conduct must then prove that the conduct did not infringe a provision of this Chapter),
- Chap III (collective bargaining) —
  - s 14 (trade union representatives)—
    - (1) ("representative trade union" means a union, or two or more jointly, that have the majority of employees in a workplace as members),
    - (2) (where at least ten members of a representative union are employed in a workplace, they may elect from among themselves)—
      - (a) (a trade union representative, if ten union members are employed)
      - (b) (two representatives, if more than ten union members are employed)
      - (c) (two representatives for the first 50 union members plus one for every other 50 members up to seven representatives, if more than 50 members are employed)
      - (d)–(f) ([etc]),
    - (4) (a trade union representative has a right to perform the functions of)—
      - (a) (assisting an employee on request in grievance and disciplinary proceedings);
      - (b) (monitoring employer compliance with the workplace provisions of this Act, any law regulating employment conditions and any collective agreement), and
      - (c)(i) (reporting alleged contraventions of those provisions to the employer and union and any responsible authority or agency)
    - (5) (subject to reasonable conditions, a union representative may take reasonable time off with pay during working hours to)—
      - (a) (perform those functions) and
      - (b) (be trained in any subject relevant to performing those functions),
  - s 16 (disclosure of information)—
    - (2) (an employer must disclose to a union representative all relevant information that will allow the union representative to perform those functions effectively)
    - (3) (an employer bargaining with a representative union must disclose to the union all information that will allow the union to engage effectively in collective bargaining)

(5) (an employer is not required to disclose information that)—
(a) (is privileged)
(b) (cannot be disclosed without the employer contravening a law or court order)
(c) (is confidential and disclosure may cause it or an employee substantial harm) or
(d) (is private information about an employee, unless he or she consents),
s 20 (annual leave)—
(11) (employer may not pay employee instead of granting paid leave),
s 27 (family responsibility leave),
s 28 (powers and functions of bargaining council),
s 32 (extension of collective agreement concluded in bargaining council)—
(1) (council may ask Minister to extend agreement to identified non-parties who are in sector and area for which council is registered, if at a council meeting—
(a) (unions whose members constitute majority of members of the unions party to the council vote in favour) and
(b) (employers' organisations whose members employ majority of employees employed by members of the organisations party to the council vote in favour),
(2) (Minister must publish Gazette notice declaring that, from date and for period specified, the agreement will be binding on specified non-parties),
(3) (collective agreement may not be extended unless Minister is satisfied)—
(b) (majority of employees who on extension of the agreement will fall in its scope are members of the unions party to the council),
(c) (members of employers' organisations party to council will on extension be found to employ majority of employees in agreement's scope),
(dA) (the council has effective procedure to deal with non-parties' applications for exemption from the collective agreement and can decide applications in 30 days)
(e) (provision is made in the agreement for independent body to hear and decide, not later than 30 days after appeal lodged, any appeal against—
(i) (council's refusal of non-party's application for exemption)
(ii) (withdrawal of an exemption by the bargaining council)
(f) (the agreement contains criteria that independent body must apply when considering an appeal, which are fair and promote Act's primary objects)
(g) (the agreement does not discriminate against non-parties),
(3A) (no official of union or employers' organisation party to the council may be member of appeal body or participate in its deliberations),
(5) (despite (3)(b) and (c) (employee majorities), Minister may extend agreement if)—
(a) (parties to bargaining council are sufficiently representative in its scope)
(b) (satisfied failure to extend may undermine sectoral collective bargaining) and
(c) (comments invited by Gazette notice),
s 39 (application to establish statutory council),
s 43 powers and functions of statutory councils),
s 44 (Ministerial determinations),
Chap VII (Dispute resolution)—
Pt A (Commission for Conciliation, Mediation and Arbitration),
Pt C (resolution of disputes under auspices of Commission) ss 133–150,
Chap IX (regulation of non-standard employment and general provisions)—
s 198 (temporary employment services)—
(4) (temporary employment service and its client jointly and severally liable if former contravenes i.r.o. latter's employees)—
(a) (a collective agreement regulating employment terms and conditions) or

(c) (Basic Conditions of Employment Act),
Govt Notice R223 of 17 Mar 2015 (rules for conduct of proceedings before Commission)
rule 25(1) (representation in conciliation proceedings)

Basic Conditions of Employment Act, 1997—
Chap 2 (regulation of working time)—
s 9 (ordinary hours of work)
s 10 (overtime)
s 11 (compressed working week)
s 12 (averaging of hours of work)
s 13 (determination of hours of work by Minister)
s 14 (meal intervals)
s 15 (daily and weekly rest period)
s 16 (pay for work on Sundays)
s 17 (night work)
s 18 (public holidays)
s 50 (variation by Minister)
(1) (Minister may make determination to replace or exclude a basic condition of employment in this Act, i.r.o. (a) (any category of employees or employers),
(3) (such determination must be made on Employment Conditions Commission's advice and by Gazette notice),
s 51 (sectoral determination),
s 54 (Director-General must prepare report advising Minister)—
(3) (when advising Minister on publication of sectoral determination, Commission must consider regarding the sector and area)—
(b) (ability of employers to carry on business successfully)
(c) (operation of small, medium or micro-enterprises and new enterprises)
(d) (cost of living)
(e) (alleviation of poverty)
(f) conditions of employment)
(g) (wage differentials and inequality)
(h) (likely impact of proposed conditions of employment on current employment or creation of employment)
(i) (possible impact of proposed conditions of employment on employees' health, safety or welfare)
(j) (other relevant information made available)
(4) (Commission must prepare report for Minister recommending matters to include in sectoral determination for relevant sector and area),
s 55 (making of sectoral determination)—
(4) (sectoral determination may i.r.t. sector and area concerned)—
(a) (set minimum terms and conditions of employment, including rates of remuneration)
(b) (provide for the adjustment of remuneration)
(c) (regulate the manner, timing and other conditions of payment of remuneration)
(d) (prohibit or regulate payment of remuneration in kind)
(e) (require employers to keep records)
(f) (require employers to provide records to their employees)
(g) (prohibit or regulate task-based work, piecework, home work, sub-contracting and contract work)
(h) (set minimum housing and sanitation standards for employees residing on employers' premises)

(i) (regulate payment of travelling and other work-related allowances)
(j) (specify minimum conditions of employment for trainees)
(k) (specify minimum conditions of employment for persons other than employees)
(l) (regulate training and education schemes)
(m) (regulate pension, provident, medical aid, sick pay, holiday and unemployment schemes or funds)
(n) (regulate other matters re remuneration or employment terms or conditions)
(o) taking Labour Relations Act s 21(8) in account, set a representativeness threshold at which a union will automatically have organisational rights in workplaces covered)
s 200 (representation of employees or employers)
Govt Notice R1295 of 5 Nov 1999 (Ministerial determination: Small business sector)

Constitution, 1996—
s 23 (labour relations)—
(1) (everyone has the right to fair labour practices)
(2) (every worker has right to)—
(a) (join a trade union)
(b) (participate in its activities) and
(c) (strike)
(3) (every employer has right to)—
(a) (join an employers' organisation) and
(b) (participate in its activities)
(5) (every trade union, employers' organisation and employer has right to engage in collective bargaining),
s 36(1) (limitation of rights)

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