IRR
South African Institute of Race Relations
The power of ideas

@LIBERTY
The policy bulletin of the IRR

No 3/2015 / 24 June 2015 / Issue 19

Contents

Author
John Kane-Berman

Contact details
Telephone: (011) 482-7221
e-mail: info@irr.org.za
website: www.sairr.org.za

Give the poor back their right to work: a 10-point plan for jobs

Recent violent attacks on foreign nationals in South Africa that left seven people dead have been blamed in part on high unemployment. This issue of *@Liberty* suggests remedies for the latter problem. In particular, it proposes a new set of ideas and policies to restore balance to the country's industrial relations system and liberalise its labour market. These ideas are put forward not simply because high unemployment may be a contributing factor in public violence, but because our high unemployment levels are both morally unacceptable and a waste of human and economic potential.

INTRODUCTION

High unemployment among South African youth has been described as a "ticking time-bomb" so often that nobody pays much attention to a threat that never seems to materialise. But perhaps the murderous attacks on foreign nationals in various parts of the country in April and May this year were a series of mini-explosions arising out of high youth unemployment.

Among those who said unemployment was the biggest cause of the attacks was Zwelinzima Vavi, former general secretary of the Congress of South African Trade Unions (Cosatu). Whether this is true is impossible to say. People not working may have more opportunity to participate in violence, but trade unionists who go on strike are themselves major contributors to public violence, sometimes with the acquiescence or encouragement of their leaders.

Youth unemployment in South Africa is extraordinarily high. According to Statistics South Africa (Stats SA), the rate among youths between the ages of 15 and 24 is 63%. Unemployment among older people is lower, but the overall rate

on the expanded definition of unemployment (which includes so-called discouraged workers) is 36%. Moreover, the number of jobless people of all ages (including the discouraged) has risen from 3.67 million in 1994 to 8.74 million this year.

Not only has unemployment in this country increased, it is high by international standards. Using a narrower definition (excluding discouraged workers), we have much the same unemployment rate (26%) as does Greece (25%). Yet we are stuck there after five years of economic growth – tepid growth admittedly, but growth nonetheless – whereas Greece records 25% after five years of economic recession. Our current unemployment rate is also substantially higher than those of Brazil and Russia (6% each), India (9%), and China (4%).

Our current unemployment rate (26%) is substantially higher than those of Brazil and Russia (6% each), India (9%), and China (4%).

In addition, although South Africa's labour force participation rate – the proportion of the economically active population working or seeking work – has risen from 48% in 1994 to 59% in 2015, it is still low by world standards. In 2013 we thus had a male participation rate of 61%, against 81% for Brazil, 78% for China, 84% for Indonesia, and 82% for Botswana, for example. Our female rate of 45% was the same as those of Greece and Malaysia, higher than those of India and Morocco (both 27%), but lower than those of Brazil (59%) and China (64%), Lithuania (56%), and numerous other countries.

Two other comparisons are of interest. Our current unemployment rate of 26% is slightly higher than it was in 2001. In that year Germany and France both had a rate of 8%, but the current German rate is 6%, whereas the rate in France is above 10%. Since then Germany has liberalised its labour market, whereas the French have added more restrictions to theirs.

Our labour system is only one of the reasons for our high unemployment. Others include inadequate schooling and technical education, skill shortages, policy uncertainty, anti-business sentiment, excessive regulation, infrastructure backlogs, electricity shortages, and other factors deterring investment. Also relevant is the risk that South Africa's extensive welfare system – including plans to introduce social assistance for unemployed people between the ages of 19 and 59 – could act as a deterrent to entry to the labour market.

All these factors need attention, and some have already been the focus of proposals in earlier issues of *@Liberty*. The focus of this issue will be the labour scene. Our proposals are designed to curtail violence, replace coercion with democracy, lower barriers to market entry, and remove obstacles to the engagement of workers. The rights to join trade unions and go on strike should be retained, but there should be a better balance between the interests of the unemployed, trade unions, and employers.

IRR proposals for labour reforms are designed to curtail violence, replace coercion with democracy, and lower barriers to market entry.

CRITICAL VOICES

As the Labour Relations Act (LRA) of 1995 was being processed, the IRR warned that it would have a detrimental impact on employment. At the time we were an isolated voice. Since then criticism of the country's labour system has been mounting. Local and international organisa-

tions evaluating the South African investment climate now mention labour instability more frequently than in the past. Criticism from within the government and ruling party is also heard more frequently now, even though these are still minority voices.

Some years back Tito Mboweni, the labour minister responsible for the LRA, is reputed to have blamed it on the "sins of my youth". In 2005 plans to liberalise the country's industrial relations system were mooted in documents prepared by the then deputy finance minister, Jabu Moleketi, for a national general council meeting of the African National Congress (ANC). However, they ran into strong opposition and were finally thwarted when President Thabo Mbeki was ousted as ANC leader by Jacob Zuma with the help of Cosatu and the South African Communist Party (SACP) at the ANC's national conference at Polokwane in 2007. Since then restrictions on the labour market have been tightened up.

Gill Marcus has criticised our inability to link pay more closely to productivity, as well as high starting wages and dismissal costs.

Among those who have recently voiced criticisms is Gill Marcus, one of Mr Mboweni's successors as governor of the South African Reserve Bank. She said South Africa could not compete in skilled sectors because it lacked skills, and that it could not compete in unskilled sectors because of high costs. Inability to link pay to productivity more closely was a major feature of our labour market regime. Ms Marcus also said that, although the collective bargaining system contributed to labour peace, it favoured big firms at the expense of smaller ones. New entrants found it difficult to enter the labour market. Starting wages were higher than in other countries, discouraging employers from hiring inexperienced workers. Dismissal costs, especially for smaller firms, were high by international standards. South Africa had not seen dynamic growth of small and medium-sized firms. In addition, Ms Marcus said, it was critical for South Africa to focus on growing labour-intensive sectors of the economy, including mining and agriculture, because most of the unemployed lacked the skills to fit into the more skill-intensive parts.

The new governor of the reserve bank, Lesetja Kganyago, has also criticised rigidities in the labour market. Pravin Gordhan, speaking in 2012 as finance minister, said there was a need for a comprehensive set of reforms, among them greater flexibility for employers, to maximise job creation. He was particularly worried about the disproportionate burden of high unemployment borne by young and less skilled people.

In 2012 Pravin Gordhan spoke of the need for a comprehensive set of reforms, including greater flexibility for employers, to maximise job creation.

The general secretary of the ANC, Gwede Mantashe, himself a former mining trade unionist, has spoken in favour of strike ballots as a tool to mobilise workers. So has another prominent former mining unionist, Cyril Ramaphosa, who is now deputy president of both the ANC and the country. Mr Ramaphosa also said that starting wages were higher than the relative productivity of new workers, so that firms incurred a "loss" when hiring inexperienced workers. Costs of dismissal were also too high. New entrants to the labour market were effectively locked out. This system, he said in 2013, denied our children and future generations the opportunity to work, to learn, to gain experience, and to become full citizens in their own right.

Others favouring strike ballots include the mining minister, Ngoaka Ramatlhodi, and the head of the ANC's economic transformation "cluster", Enoch Godongwana. Mr Godongwana also said earlier this year that unions did not care about creating new jobs, but only about defending existing jobs.

The concerns repeatedly expressed by several senior figures within the ANC need to be addressed. Overcoming the unemployment crisis is also an economic, social, and moral imperative, while persistent strike violence costs lives, damages property, and compels many workers to persist with stoppages long after they would have preferred to return to work. Ten key reforms are thus required. They will no doubt be dismissed as "neo-liberal", or "neo-conservative", or "right-wing", but the need for them is increasingly compelling.

Union officials seem quite unashamed about the use of violence to enforce strikes, and an opinion survey showed that half Cosatu members believe it is justified.

TEN STEPS FOR LABOUR LAW REFORM

Step 1: End strike-related violence

Strike-related violence must be brought to an end through criminal prosecutions and civil liability for unionists who incite or carry out arson attacks, assaults, or murders.

Trade union leaders often use violence or the threat of it to compel reluctant workers to take part in strikes, or to prolong stoppages that many employees would prefer to end. During last year's platinum strike, for example, which lasted five months and cost striking workers close on R11bn in lost wages, a number of the employees affected told the press that they wanted to go back to work but were too afraid to do so for fear of being attacked.

Union officials seem quite unashamed about the use of violence to enforce strikes, and an opinion survey showed that half Cosatu members believe it is justified. When Mr Vavi was still general secretary of Cosatu, he himself incited violence against non-strikers, saying of those who failed to join a stoppage, "Let the rats be crushed". This was in 2006, during a strike by security guards in which more than 60 people were killed, some of them by being thrown off moving trains.

In the last 20 years, 162 people have been killed in violence against workers who failed to heed strike calls. (This figure excludes the Marikana massacre, in which police shot dead 34 striking workers and other demonstrators outside Lonmin's Marikana mine in Rustenburg in the North West province in August 2012.) To the best of the IRR's knowledge, neither Mr Vavi nor anybody else has ever been held to account for strike-related murders.

Coercion to enforce compliance with a strike should result in prosecutions for assault, arson, or murder whenever these crimes occur.

This failure to enforce the criminal law must end. Coercion to enforce compliance with a strike should result in prosecutions for assault, arson, or murder whenever these crimes occur. If the National Prosecuting Authority cannot or will not act, then private prosecutions must be brought with the help of pro bono legal assistance, and with opposition political parties or civil society organisations acting as "friends of the court" to ensure that justice is done.

To add to deterrence, unions should be sued in civil proceedings for any loss of earnings by the dependants of people killed to enforce a strike. This is already possible under the LRA

– despite its bar on civil litigation for "any conduct in furtherance of a protected strike" – because this provision does not protect conduct involving "an offence". Again, if dependants lack the means to sue, they must be helped to litigate in the ways outlined above.

In addition, once a strike is marred by intimidation or violence, the employer, the police, or any other party with a direct interest should be able to bring an urgent application to court for its protected status to be removed. Once such an application has been granted, this will entitle the employer to dismiss anyone continuing on strike. However, workers who can show they were compelled by further coercion to stay out against their will should not be dismissed, as this would be unfair to them. Instead, both employers who suffer further financial losses – and any employees who continue to lose wages – through such an unprotected strike should be entitled to sue the relevant unions for damages to restore them to the position they would otherwise have had. Compensatory damages should be supplemented by punitive ones to drive home the message that violence in strikes will not be tolerated.

Once a strike is marred by intimidation or violence, any interested party should be able to apply to court to have its protected status removed.

Moreover, where unions or workers fail to comply with court interdicts against strikes marred by violence, proceedings for contempt of court should be brought against those responsible. These individuals should be sent to jail for appropriate periods for disregarding court orders. Union funds should also be attached by order of court where interdicts are disobeyed and further damage caused.

Once union leaders start going to jail for contempt of court and strike-related violence, and once unions start having to pay substantial damages to dependants, employers and employees for losses resulting from strike violence, the current culture of impunity will end.

Step Two: Require secret pre-strike ballots

No strike should be "protected" under the LRA unless two thirds of workers have voted for it in a pre-strike secret ballot.

High levels of intimidation and assault by trade unionists to compel workers to take part in stoppages show that many employees would have preferred not to go out on strike. The LRA is nevertheless silent on the need for pre-strike ballots.

Union leaders must start going to jail for contempt of court and strike-related violence, while unions should pay substantial damages for financial losses resulting from strike violence.

Amendments to the LRA that came into force earlier this year initially sought to introduce a clause making pre-strike ballots compulsory. This clause was drafted by the Department of Labour and agreed upon in deliberations on the bill at the National Economic Development and Labour Council (Nedlac). However, the proposed clause was removed by the ANC before the bill's adoption – no doubt at the behest of Cosatu.

Yet, as earlier noted, two of the ANC's most senior leaders have come out strongly in favour of such ballots. Mr Ramaphosa said in July 2014 that he was "hugely in support" of them, as they had proved a powerful tool to mobilise and educate workers during the apartheid era.

Unions then, he said, had taken it as a matter of course that they should ballot workers before going out on strike. Mr Mantashe has gone so far as to suggest that the violent nature of strikes today is a function of not using ballots to mobilise and confirm support. Strikes, he said, thus often meant "the death penalty for a number of workers". This was a startling admission from a former trade union leader.

The LRA should be amended to provide for secret ballots, while ballot papers should be made available in as many different languages as necessary. Ballots should be required both before a strike and at regular intervals during a strike to test whether or not support continues. Strikes implemented without a two-thirds majority authorisation in a ballot should have no claim to "protected" status: in other words, anyone going or remaining on strike would face dismissal, while those engaging in such a strike or in conduct designed to further it would be subject to civil claims for damages for any resulting losses.

Strikes implemented without a two-thirds majority authorisation in a secret ballot should have no claim to "protected" status.

This proposal would protect the rights of minorities. It would also ensure that the decision to go out on strike was taken not by union officials but by those most directly affected, not least by losing their wages while on strike but possibly also by jeopardising their jobs. At the same time, workers who do not wish to join a strike should not be compelled to do so, and the police must be deployed to protect them.

Step 3: Protect property during strikes and pickets

Union organisers should be held liable for damage to property during strikes and pickets, while union assets should be attached for this purpose through civil litigation.

As earlier noted, though the LRA bars civil liability for "any conduct in furtherance of a protected strike", this prohibition does not apply where such conduct involves "an offence". Hence, striking workers can already be held accountable under the LRA and the criminal law for attacks on property during strikes. However, prosecutions for such offences are rare.

The LRA and other laws already allow unions to be held accountable for damage to property during strikes, but these provisions are seldom used.

A different law – the Regulation of Gatherings Act of 1993 – has thus been invoked to help hold trade unions accountable for damage to property during marches and demonstrations. In 2006 a protracted strike by the South African Transport and Allied Workers Union (Satawu) led to a march by thousands of people through the streets of Cape Town. The march turned into a riot in which a number of people were killed and damage to property was extensive. Some of those who lost their property successfully claimed R70 000 in damages from Satawu under the 1993 statute, which makes the organisers of a demonstration civilly liable for any damage which is reasonably foreseeable. Satawu challenged the constitutionality of the legislation, arguing that it infringed the right to freedom of assembly. But the Constitutional Court disagreed, ruling in June 2012 that the statute "reasonably balances the conflicting rights of organisers, potential participants, and the often vulnerable and helpless victims of a...demonstration which degenerates into violence".

This ruling provides a good start for amendments to the LRA to allow union organisers to be held liable for damage to property during strikes or pickets, and for union assets to be attached by court order following due process of law. This liability should be incurred irrespective of whether the strike itself enjoys protection or not.

Union organisers should be held liable for damage to property during strikes, and union assets should be attached by court order.

This provision for civil actions against unions by property owners needs to be supplemented by criminal prosecution for malicious damage to property. Where unions cannot show in their defence that they have taken reasonable steps to prevent damage to property, inter alia by deploying marshals or immediately calling off strikes where violence threatens or occurs, this should be an aggravating factor in the determination of damages. Where the damage is done during the course of a strike carried out in defiance of a court interdict against it, this should be a further aggravating factor. Provision should again be made for both compensatory and punitive damages.

Step 4: Limit the scope of protected strikes and pickets

Only strikes and pickets over work-related issues between workers and their own employers should be protected.

The LRA protects the right to strike, provided that the employer has been given 48 hours' notice of the proposed stoppage. It also provides that any dismissal of an employee for participation in a protected strike is automatically unfair. This provision is an important safeguard for the right of workers to withhold their labour in appropriate circumstances. However, the protections in the LRA go too far, especially in covering "secondary" strikes and "socio-economic" strikes.

The LRA should be amended to limit the protection it provides to strikes arising from disputes over work-related issues between workers and their own employers. "Secondary" – sometimes known as "sympathy" – strikes against third-party employers should carry the penalty of lawful dismissal. So too should strikes for "socio-economic" reasons, such as protesting against e-tolling or privatisation proposals. Picketing should likewise be confined to premises whose employees are on strike. Unions should be liable for damages for consequential losses where they extend strikes or pickets to businesses not directly involved in their dispute with a particular employer. Strikes in essential services, such as teaching and nursing, should not enjoy protection.

The LRA should limit its protection to strikes arising over work-related issues between workers and their own employers.

Step 5: End the "closed" shop and make unions collect their own subscriptions

The "closed" shop clauses in the LRA should be repealed, while unions should be obliged to collect their own union subscriptions, instead of getting employers to do this for them.

The LRA includes "closed shop" provisions, which bind employers to hire only people who belong to particular unions. The Act should be amended to outlaw these provisions. This would free employers to hire anyone they wish, irrespective of their union membership.

In addition, majority unions should not be able to exclude others from negotiations with employers. Union subscriptions should be collected by unions themselves, not by employers on their behalf. This would help to promote union accountability to their members and so strengthen unions.

"Closed shop" provisions should be outlawed, so freeing employers to hire people irrespective of their union membership.

Step 6: Stop extending bargaining council agreements to "non-parties"

The LRA should be amended to prevent bargaining council agreements being extended to those not party to the negotiations or the agreements reached.

The LRA allows trade unions and employer organisations to form joint bargaining councils with the capacity to make binding agreements on wages and working conditions for employees in particular areas and industries. Such bargaining council agreements, which are the fruits of voluntary negotiation, should continue to have binding force.

However, the LRA also allows bargaining council agreements to be extended to "non-parties": that is, to other employers and workers who have not been party to the negotiations and have never consented to the agreements reached. The Act should be amended to remove this power. Extending agreements to non-parties is an undemocratic and coercive practice, which is drawing increasing criticism because it helps to protect the interests of big business and organised labour against small business and the unemployed. Small businesses are thus compelled to pay wages that only larger firms can afford, leading to closures, retrenchments, and in some cases relocation to neighbouring states.

Under the present law, the minister of labour is obliged, on the request of councils, to extend their agreements to non-parties. The Free Market Foundation has brought a court action seeking to replace the minister's current obligation with a discretionary power to decide whether or not an agreement should be extended. However, such a change does not go far enough. The LRA needs to be amended to remove the minister's power to extend agreements to non-parties altogether, and so ensure that these agreements bind only those who sign them.

Extending bargaining council agreements to non-parties helps protect big business and organised labour against small business and the unemployed.

Employers, unions, and non-unionised workers who choose not to join bargaining councils should be free to determine their own wages and working conditions independently. The result would be more competition, more viable small businesses, and more jobs. Freed from the decrees of bargaining councils, employers and unions would be able to engage in plant-level bargaining, where wage increases could be tied to productivity improvements and other incentives. Plant-level bargaining would also enable the circumstances of particular businesses to be taken into account, which is not possible under the "one-size-fits-all" centralised bargaining system.

Step 7: Give people back their right to work

End minimum-wage laws and make it easier for unskilled people to find jobs by pricing them back into the labour market, while recognising their right to work.

Unskilled people without education or assets have only one thing to call their own: their willingness to work. This is the only capital they have: yet under current labour legislation they are often not free to use it, except at a price determined by others. This happens not only when bargaining council agreements are extended to non-parties under the LRA, but also where the minister of labour uses the Basic Conditions of Employment Act of 1997 to set minimum wages and decide on minimum annual wage increases. The minister's power to set minimum wages or wage increases is normally exercised in sectors where bargaining councils do not operate: for example, in domestic service, agriculture, and the retail trade.

Where the State sets wages higher than employers are able or willing to pay, they will naturally employ fewer people.

Where wages are set higher than employers are able or willing to pay, they will naturally employ fewer people. Yet, in a country with unemployment as high as ours, policy should aim to price people into jobs, not out of them. Trade unions argue that higher wages are necessary because employees often have to support so many dependants. But the burden of dependency would diminish if more people could find jobs. In addition, a household in which two people earn R5 000 a month each is better off than one which has to rely on the income of only one person earning R8 000.

The largest single category of unemployed people in South Africa consists of new entrants to the labour market. Most of the unemployed are also poorly skilled (only some 8% have tertiary education), while two thirds of them have been jobless for a year or more, making it still more difficult for them to find work. Better education is often cited as the answer to high unemployment, but this will take time to achieve and can make a difference only in the long run. In the meantime, as the National Development Plan (NDP) observes, large numbers of workseekers cannot enter the labour market, which "locks out new entrants".

The NDP urges new policies to 'initiate massive absorption' of the unemployed into economic activity, but then fails to set out realistic reforms.

The NDP adds that "it is critical to urgently introduce active labour market policies to initiate massive absorption of young people and women into economic activity", but it then fails to take the bull by the horns by setting out realistic reforms. So we must rather look for guidance to Adam Smith, who wrote in *The Wealth of Nations* in 1776: "The property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of a poor man lies in the strength and dexterity of his hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbour, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman, and of those who might be disposed to employ him."

The need to amend the LRA to stop the extension of bargaining council agreements to non-parties has already been described. A further necessary reform is to delete from the Basic Conditions of Employment Act the labour minister's power to set minimum wages and wage increases in specific sectors of the economy. Cosatu's demand for the introduction of a minimum wage across the board must also be rejected, not incorporated into labour law. As Mr Godongwana has pointed out, unions do not care about creating new jobs, but only about defending existing jobs. Cosatu's self-interest should not be allowed to trump the urgent need to help the unemployed find work on terms that they are willing to agree.

The Bill of Rights needs to be amended to recognise and entrench a "right to work" in lawful occupations, "free of restriction by trade unions or others".

The Bill of Rights also needs to be amended to recognise and entrench "the right to work". The relevant section (Section 23 of the Constitution) currently entrenches the rights to fair labour practices, to join trade unions, to engage in collective bargaining, and to strike. Conspicuous by its absence is a "right to work". This is a right that most people take for granted, but which is denied to many people by restrictive labour law and practice.

Denying a poor man the right to earn a living through minimum-wage laws and the like, or to satisfy what Cosatu (or others) regard as a "decent" salary, is an unjustifiable violation of a natural right. A constitutional amendment should be enacted to remedy this deficiency in our Bill of Rights. It could be worded as follows: "Everyone has the right to seek and obtain employment in a lawful occupation free of restriction by trade unions or other institutions set up to regulate employment." A second clause would be worded: "Employers and employees shall have the right to enter into individual contracts to regulate their relationship free of restraint by third parties, and subject only to essential health and safety requirements." This would not preclude collective agreements being reached in bargaining councils, but it would also leave many employers and would-be workers free to enter into their own agreements at enterprise level.

Step 8: Allow dismissals and retrenchments to be governed by employment contracts

Amend the LRA to allow businesses to dismiss or retrench in accordance with agreed notice and other clauses in employment contracts, without the intervention of the State.

The LRA makes it difficult to dismiss poorly performing workers, or to retrench them where a business needs to downsize.

The LRA makes it difficult to dismiss poorly performing workers or to retrench them where a business needs to downsize. Under the statute, dismissals are automatically unfair unless the employer can prove that they were carried out for good reason and following a fair procedure. Retrenchments, which often need to be quickly made in response to market shifts, generally cannot be implemented without a prolonged and cumbersome process of prior consultation with employees and/or trade unions.

The LRA also makes it easy and cheap for employees – whose misconduct or poor performance may in fact have merited their dismissal – to claim reinstatement or substantial damages from businesses before the Commission for Conciliation, Mediation, and Arbitra-

tion (CCMA). Recent changes to the LRA have also made it possible for CCMA rulings to be enforced in the same way as labour court judgments.

Not surprisingly in these circumstances, the CCMA has a huge case load. In 2013 the CCMA heard 667 cases every working day, putting a major strain upon managers, especially those in small businesses, without the time to spend in hearings. Although the CCMA claims a very high "settlement" rate, the fact that so many cases are referred is a weakness in our industrial relations system, not a strength. The CCMA claims to have prevented more than 100 000 retrenchments in a five-year period, and has set the saving of 20% of jobs as a "key performance area". This is an extraordinary "strategic objective" for a supposedly neutral tribunal to set itself, equivalent to a judge declaring in advance what proportion of people appearing before him he intends to send to prison.

In 2013 the CCMA heard 667 cases every working day, putting a major strain upon managers, especially of small firms, who lack the time to spend in hearings.

The LRA and easy access to the CCMA have undermined the rights of employers to run their businesses efficiently, competitively, and profitably. Dismissals for whatever reason (except participation in a protected strike, as earlier outlined) need to be made much easier, as employers are currently at constant risk of being hauled before the CCMA on grounds which are often spurious but nevertheless take significant time, effort, and money to refute. Hiring workers always involves an element of risk, ranging from poor performance on their part to overmanning arising from downturns in demand for a company's products or services. Employers are more likely to take the risks involved in hiring people if they know they can dismiss them or retrench them if necessary without facing litigation, especially litigation which could result in the overturning of reasonable decisions taken in good faith.

The LRA should thus be amended to allow notice periods and other provisions relating to termination of contracts to be spelt out in the contracts concluded between workers and employers. Businesses should be allowed to dismiss or retrench in accordance with these agreements, without the intervention of the State. The CCMA's jurisdiction over dismissals should be removed. If a company and its employees want to be able to refer disputes over dismissals or retrenchments to arbitration, a voluntary agreement to this effect should be included in their employment contracts. If a dismissal dispute arises, it should be referred either to arbitration (where applicable) or to the labour court, where the normal common-law rule on the onus of proof should apply. An employee who alleges unfair dismissal should thus bear the burden of proving this (with the help, if necessary, of rules regarding the disclosure of relevant information held by the other party to a dispute).

Employers are more likely to risk hiring people if they know they can dismiss or retrench them if necessary, without facing litigation.

Step 9: Remove new restrictions on temporary labour

Repeal recent amendments to the LRA (and other labour legislation) which restrict the use of temporary employees and make it harder for young people to find work.

Private employment agencies, which help to place permanent and temporary employees in

jobs, have grown substantially in the last 20 years. In this period, many employers have turned increasingly to temporary employees, in particular, to help meet their labour needs. This shift is partly a response to South Africa's restrictive labour legislation, partly a response to the changing nature of the production process in many sectors of the economy, and partly to give employers greater flexibility in coping with peaks and valleys in demand. It also reflects developments in many other countries across the globe. Here, the use of temporary employees has also rapidly expanded as labour needs have become more variable and unpredictable, the idea of "jobs for life" has fallen away, and people increasingly see themselves as "workerpreneurs" shifting from one employment contract to the next.

One private placement agency says it has introduced more than 5m people to the world of work since 2000. Most of these are youths.

In South Africa, the largest private placement agency, Adcorp, says it has introduced more than five million people to the world of work since 2000. Most of these are youths. An independent study confirmed that the industry focused on finding employment for young people and ensuring that a significant share of these moved into permanent positions. Another independent study found that most of those who found work through brokers appeared to be among the least skilled and experienced people. The labour broking industry has done more to promote youth employment than has the ANC youth league, which opposes the removal of the restrictions that keep so many young people out of jobs.

Instead of regarding employment arranged through placement agencies as a problem to be combated, the government should recognise the constructive role such agencies play in getting people into jobs. Yet unions are generally hostile to labour broking, as they call it, for temporary and casual and other "atypical" or "non-standard" workers are more difficult to organise.

The LRA (and other labour legislation) has thus recently been amended to compel employers to treat temporary employees as permanent staff after three months, as well as to ensure that they are then all paid the same. This could cause job losses among temporary staff, and is likely to reinforce the longer-term trend for employers to reduce their dependence on labour, especially unskilled youths. They, more than the labour broking industry itself, will be the main victims of the government's determination to restrict the industry that constitutes the single most important stepping-stone to permanent jobs. These recent amendments thus need to be repealed, while the government should start recognising the placement agencies as its allies in overcoming the unemployment crisis.

Recent restrictions on temporary employment should be repealed, while the government should recognise placement agencies as its allies in overcoming joblessness.

The growth of atypical employment and of the private placement industry are in part the perverse consequence of the increasingly restrictive laws to which employers are subject. As entrepreneurs, they will always try to find loopholes. Politicians, trade unionists, and government bureaucrats will then try to find a way to close the loopholes. It is in the interests of the unemployed, however, that this game of entrepreneur-versus-bureaucrat is in the end won by the former.

Step 10: Stop fighting the private sector

Recognise the importance of the private sector in generating jobs, and stop trying to "defeat" capitalism and shift to a socialist system.

The NDP sees the private sector as the source of nearly all the 11 million additional jobs it wishes to see generated by 2030 in order to reduce unemployment to 6%. However, this goal will be unattainable without a fundamental change in the government's attitude towards the private sector.

Although some ministers recognise the vital contribution private investment makes to growth, others are hostile. The same is true of many senior officials of both the ANC and the SACP, not to mention Cosatu. Hostility takes the form not only of increasingly onerous legislation, but also the belligerent attitude shown by ministers in portfolios with a direct impact on the economy, among them Trade & Industry, Economic Development, Mineral Resources, Energy, Labour, Rural Development & Land Reform, and Agriculture, Forestry, & Fisheries. Hostility to the private medical and pharmaceutical sector is evident also in the Department of Health, while Home Affairs seems oblivious of the difficulties its permit and visa regulations cause to private employers. Recently, the minister of public works, Thulas Nxesi, who doubles as the deputy chairman of the SACP and is busy trying to push an unconstitutional expropriation bill through Parliament, warned that "monopoly capital had not yet been defeated" and called on "the people" to put an end to its "machinations".

Although some ministers recognise the vital contribution that private investment makes to growth, others are hostile.

The essential problem is that there is a contradiction at the heart of public policy. While the NDP recognises the importance of faster growth and of high levels of private investment, the ANC remains committed to the ideology of the National Democratic Revolution (NDR), first adopted in the 1960s and reaffirmed regularly since then, including at the party's policy conference in Mangaung at the end of 2012. The NDR is essentially a blueprint for racial nationalism and socialism. This is all the more reason to put forward a radically different set of ideas, among them this 10-point plan to liberalise the labour market. The starting point of bringing about changes in policy is to devise and propagate the changes that are required.

TRADE-OFFS

South Africa's very high unemployment rate tells us that there is something wrong with our labour market. Job security for some has been achieved at the price of unemployment for others who might have benefited from a more adaptable and flexible regulatory environment. Some years ago, a study commissioned by the Government found that if we had a rate of employment similar to those of countries in Latin America, Eastern Europe, and East Asia at similar levels of development, six million more people in South Africa would be working. Little progress has been made since then. Quite apart from its human consequences, joblessness on this scale represents a colossal loss in economic output.

Our very high unemployment rate tells us there is something wrong with our labour market. Job security for some has been achieved at the price of joblessness for others.

Mr Ramaphosa has pointed out that unions in the apartheid era followed labour relations law to the letter. So indeed they did, and the battle to win for African workers the same trade union rights as had long been enjoyed by white, coloured, and Indian/Asian workers, was largely free of violence. By contrast, unions with some of the most powerful constitutionally entrenched rights and privileges in the world, not to mention close ties with a largely compliant ruling party, now routinely flout the law, ignore court orders, and use violence to achieve their objectives. Some of the reforms suggested above are designed to subordinate unions to the rule of law and hold them responsible where they violate the rights of others. The right to strike will remain, but it will be governed by much stricter rules.

The liberalising reforms of which Jabu Moleketi spoke ten years ago were squashed. But the necessity for reform is becoming more and more apparent.

Unions will also still be free to engage in collective bargaining through the bargaining council system, but agreements reached in that system will be binding only on those who choose to be parties to them. Removing the power of the minister to lay down minimum wages will allow wages to be set in the market. Unskilled poor people in particular will then be able to price themselves into jobs instead of facing a barrier in the form of a minimum wage that employers cannot afford.

Restoring to employers the prerogative of dismissing workers will result in a better balance of power in the workplace between employers and employees. Our labour law has shifted the balance too far against the employer, with the result that the engagement of labour carries more risks than it should. Reducing these risks would open up more jobs. Employers in Brazil can easily dismiss workers. That country has 6% unemployment.

CONCLUSION

The liberalising reforms of which Jabu Moleketi spoke ten years ago were squashed. Recent attempts by the official opposition to introduce reforms were likewise unsuccessful. But the necessity for reform is becoming more and more apparent, not least to senior people in the ruling party. The ideas put forward in this paper are intended to strengthen the arguments for reform by showing how it is possible to balance the lawful rights of organised labour with those of South Africa's jobless millions.

— John Kane-Berman

*** John Kane-Berman is a consultant at the IRR**