South Africa: Public policy

Author: René Carapinha
This policy brief discusses labor laws in South Africa, with a particular focus on national legislation, as it relates to the dimensions of the quality of employment framework. Rather than discussing all employment policies, this brief will highlight the most significant legislation in order to provide a general introduction to current labor policies. Emphasis will be placed on how effective these policies are in moderating quality of employment for people of all ages and population groups. Even though South Africa can celebrate 14 years of democracy, many aspects of life, in particular work and quality of employment are still tainted by the legacies of apartheid that discriminated against people predominantly based on race and ethnicity. Thus, achieving equality and quality of employment for all is still a challenge.

This brief includes four sections:

- An in-country policy context introducing the reader to the policy background of South Africa. The country has a lean social democratic and developmental approach to policy. The rationale and implications of policies within a lean social democratic framework is briefly explained. Challenges associated with such policies for quality employment will be highlighted throughout the paper.

- A discussion of dimensions of quality of employment, providing a policy overview of the major public policies affecting each dimension. Both employers and employees have a role in determining whether the quality of employment factors are fulfilled, but government policies strongly influence how this is accomplished. In South Africa many of these laws can be divided into mandates that force a certain outcome, or incentives to encourage outcomes. Many employment laws are multi-faceted and therefore apply to a number of quality of employment indicators, while other laws and policies neatly fall within one or another factor.
During the last century, the informal economy in South Africa (also referred to as the second economy in South Africa) has expanded rapidly. Work in the informal economy challenges social provision and protection since labor policies are primarily aimed at the conventional employment relationships in the formal economy. This policy brief explores the implications of the government’s approach to the informal economy and the impact of current labor policy to ensure quality of employment for workers in the informal economy.

This brief discusses seven components in the quality of employment matrix. Opportunities for Meaningful Work are omitted because this is not legislated in South Africa. The data presented here will illustrate the implementation gaps and contextual challenges that hinder the advancement of quality of employment in the formal sector. This brief concludes with a summary of the implications of public policy for quality of employment in South Africa.

IN-COUNTRY POLICY CONTEXT

South Africa is a young democracy. The country and its people were shaped by years of exclusionary policies and practices introduced by colonialism but formalized by the Apartheid regime in 1948. Racial segregation and discrimination by a white minority government characterized Apartheid. In 1948, the country had its first democratic election with full universal suffrage for all people aged 18 and older. The years leading up to the election were tumultuous, but were mostly characterized by consultation, negotiation, and reconciliation between various stakeholders such as business, organized labor, the government, and political parties. These negotiations became known as the Convention for a Democratic South Africa (CODESA). Agreements struck during these negotiations lay the ground work for collaborative governance and pluralism, and revealed the transformation agenda of South Africa. Through these processes, the country was able to transition peacefully into a democracy, exceeding the expectations of many.

Although freedom and democracy were achieved, the country continues to face overwhelming challenges. These challenges—including high levels of unemployment, low skill and education levels, and lack of highly skilled laborers primarily amongst previously disadvantaged groups—are direct consequences of the discriminatory and oppressive policies of the Apartheid regime. The early rationale for discriminatory policies was based on the need for cheap labor to mine the low-grade, gold-bearing ore discovered in South Africa during the late 1900s. Mining companies decided to pay a small number of white miners high wages and a large army of black laborers very low wages, while forcing blacks to take work in the mines by instituting a hut tax. The hut tax was levied on African households that occupied a traditional African home (referred to as a hut). In order to be able to afford to pay this tax, African men had to earn a wage and were thereby forced into labor in the mines. The Civilized Labour Policy enacted in 1921 legalized wage differentials based on race and the restriction of certain categories of employment to whites.

The following seventy years saw the development and implementation of various policies with differing rationales, but with the single aim: to promote and advance the interest of the white minority population and to systematically oppress the black African population. The combination of policies that ensued forced black laborers into migrant labor and to work in productive work areas designated for whites. A population, disproportionately comprised of woman, children, and the elderly, was left behind in non-productive areas designated for blacks, known as homelands. In addition, education provided to non-whites was purposefully inferior and limited opportunities existed for job advancement and self-advancement. Although these policies were designed to oppress the majority black population in order to maintain white supremacy, the policies primarily served business interest. Hence, large employers played a key role in supporting oppressive policies and the Apartheid state.

Collectively, the apartheid policies disenfranchised the non-white population to the extent that the socioeconomic differences persisted through the end of the 20th century. In order to address the imbalances created by apartheid, labor market regulation and other policy areas underwent massive innovation and reform, particularly in the first five years of democracy.

Today, the labor policy framework in South Africa is contained in the country’s constitution, as well as in various Labor Acts, Basic Guides, and Codes of Good Practice. Section 23 of the South African constitution emphasizes the right to fair labor practices. The freedom to choose a trade, occupation, or profession is guaranteed by section 22 of the Constitution. Section 27 informs labor relations.

The Basic Conditions of Employment Act (BCEA) was adopted in 1997 and serves as the corner stone for guiding
The summary of the various labor Acts in Table 1 illustrates the rights based approach of the new policy framework. However, it has been suggested that South Africa can be described as a “lean social democracy” since a “system of rights is cultivated but the responsibility of the state to provide a universal system of social security support is abrogated.” Other middle income developing countries that have made significant investments in developing relatively more democratic constitutional dispensations such as Brazil, Chile, and India have also been described as lean social democracies.

Several reasons have been cited for adopting lean social democratic policies. The most compelling reason is the inability of the State to finance universal forms of social security since this burden will be placed on a “comparative narrower band of middle and high income earners.” Since the State is “faced with usual cohort of multiple demands for fiscal support” the tendency is “to instead invest in programs that enhance human capital acquisition and skills development.” Accordingly, South Africa’s labor policy is dominated by skills development versus employment security options. In addition, the Expanded Public Works Program (EPWP) and the Accelerated Shared Growth Initiative South Africa (ASGISA) are examples of macro policies directed towards human and capital investment.

Although all policy frameworks have their strengths and weaknesses, public policy in South Africa is constrained in particular by questions of efficacy and inability to influence the growing informal economy (also know as the second economy). Also, the new legislative framework contains a variety of regulatory strategies, but “levels of enforcement and compliance with labor standards remain low and implementation is a major stated priority of the State.”

Since South African labor law is primarily constructed on a “foundation of the conventional employment relationship,” a significant portion of the labor force that works in the informal economy (29.6% in 2006) is excluded from the protection and benefits of labor regulation. Consequently, workers in the informal economy earn their livelihoods through insecure and unprotected work in which employer power is unrestrained. In essence, the increase in informal work poses a range of challenges for the “provision of labor and social protection.” Although the second economy is mostly beyond the reach of legislative frameworks, some public policies are aimed at the second economy. The reach and implications of these policies for quality of employment will be briefly assessed and discussed.

Table 1: Summary of Employment Relevant Legislation

<table>
<thead>
<tr>
<th>Labor Acts (Chronological Order)</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unemployment Insurance Contributions Act, No. 4 of 2002</td>
<td>Prescribes how employers should contribute to the UIF Contributions fund.</td>
</tr>
<tr>
<td>Unemployment Insurance Act, No. 63 of 2001</td>
<td>Provides security to workers when they become unemployed.</td>
</tr>
<tr>
<td>Employment Equity Act, No. 55 of 1998</td>
<td>Applies to all employers and workers and protects workers and job seekers from unfair discrimination, and also provides a framework for implementing affirmative action.</td>
</tr>
<tr>
<td>Skills Development Act, No. 97 of 1998</td>
<td>Aims to develop and improve the skills of the South African workforce.</td>
</tr>
<tr>
<td>Skills Development Levies Act, No. 9 of 1999</td>
<td>Prescribes how employers should contribute to the National Skills Fund.</td>
</tr>
<tr>
<td>Basic Condition of Employment Act, No. 75 of 1997</td>
<td>Applies to all employers and workers and regulates leave, working hours, employment contracts, deductions, pay slips, and termination.</td>
</tr>
<tr>
<td>Labour Relations Act, No. 66 of 1995</td>
<td>Applies to all workers and employers and aims to advance economic development, social justice, labor peace and the democracy of the workplace.</td>
</tr>
<tr>
<td>Occupational Health and Safety Act, No 85 of 1993</td>
<td>Aims to provide and regulate health and safety at the workplace for all workers.</td>
</tr>
<tr>
<td>Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993</td>
<td>Workers who are affected by occupational injuries and diseases are entitled to compensation.</td>
</tr>
</tbody>
</table>

Source: adopted from the Department of Labour, RSA
POLICY OVERVIEW

DIMENSIONS OF QUALITY OF EMPLOYMENT

Indicators of Fair, Attractive, and Competitive Compensation & Benefits

Employees’ basic economic needs are secured, and fair and equitable distribution of compensation and benefits among employees is promoted.

Overview

The BCEA defines the minimum conditions for employment in South Africa, including issues relating to leave, working hours, employment contracts, remuneration, and termination. The minimum conditions outlined in the Act are not applicable to members of the National Defense Force, National Intelligence Agency, South African Secret Service and unpaid volunteers working for an organization with a charitable purpose. Particular chapters of the Act are also not universally applicable to all employees. Senior managerial employees, employees engaged in sales and staff that travel, and employees who work less than 24 hours a month are often excluded from sections in the Act. Benefits such as pension and health care benefits are facilitated through tax incentives and regulated through various Acts.

Minimum wage determinations and basic needs

Through sectoral determinations, minimum wage levels are set for specific sectors. As a result there is no universal minimum wage but rather a series of minimum wage levels. Little is known empirically about the impact of these determinations on unemployment (especially low skill unemployment) and competitiveness since analyses are all theoretical. However, it has been suggested that workers may benefit individually from minimum wages but it is unlikely that minimum wages will make a significant dent on poverty rates. This is very important to take note of as a significant majority of the South African population in the labor market earns very low wages. Being employed therefore does not necessarily secure basic needs or draw a household out of poverty.

The BCEA also outlines stipulations for wage calculation, but do not apply to employees working less than 24 hours per month. In general, wages must be calculated by the number of hours ordinarily worked. Monthly remuneration or wage is four-and-one-third times the weekly wage. If remuneration is “calculated on a basis other than time, or if the employee’s remuneration or wage fluctuates significantly from period to period, any payment must be calculated by reference to remuneration or wage during the preceding 13 weeks, or if employed for a shorter period.”

Equitable wage distribution

There is no law that moderates equitable wage distribution and access to benefits. Issues relating to equity and fairness at work and in hiring are moderated through the Employment Equity Act. Although wage distribution has improved across population groups, it is still an issue of concern as great inequality still exists by population group and gender.

The South African economy is characterized by extreme unemployment amongst low skill workers, and by a shortage of skilled workers and professionals. In such a context, it is typical to see a widening gap in earnings between high and low skill workers. However, the opposite trend was observed during the mid-1990s when the wages of low skill African workers increased and wages of higher skill workers remained relatively stagnant. This trend was mainly due to the socio-political correction after years of legal exploitation of low skilled black workers. Other explanations for this trend are increased unionization, work intensity and job losses amongst low wage workers. Nonetheless, wage equity improved considerably during the first few years after democracy.

However, when analyzing average income by population group, very little change over time has been observed and great inequality still exists. This could be explained by the “continued crowding of African workers in low paying jobs” which is reminiscent of pre-labor market discrimination, i.e. quality and length of schooling, access to tertiary education, and good learning environments.

Figure 1 represents the percentage of employees by population group in each income group in the formal sector. Figure 1 illustrates that lower income workers are predominantly black. However, greater equality is
observable amongst black and white middle income earners which can be attributed to policy interventions to stimulate the growth of the black middle class.

Figure 1: Monthly income by population group in the formal sector

Pension and provident funds

Labor legislation does not deal directly with the issue of retirement age. Retirement age is usually stipulated in company policy, company pension policy, or agreed upon between employers and employees. South Africa’s social pension fund is means tested and not funded through employer or employee contributions directly. Instead, in the formal sector, there is very substantial coverage of private contractual retirement. Contributions to employees’ retirement and pension funds are regulated both by contract between employers and their employees and the Pensions Fund Act No. 69 of 1996. The Pensions Adjudicator oversees contributory pensions and provident funds. Figure 2 illustrates the widespread and increasing incidence of employer contribution to pension or retirement annuities by age among employees in the formal sector.

Paid leave

Paid leave is regulated by the minimum requirements outlined in the BCEA, Chapter Two, Sections 20 and 21. Employees are entitled to 21 consecutive days leave annually or, by arrangement, one day for every 17 days worked. Payment leave is not allowed except upon termination of employment. The BCEA also regulates sick leave, maternity leave, and family responsibility leave. These benefits are discussed in Section III (Indicators of Wellness, Health & Safety Protections).

Medical and Health Insurance

Many of South Africa’s larger employers, “particularly the large mining companies, agricultural companies and large retail companies fund health services provided at the workplace.” In addition, employer funded health insurance has become the norm for senior and mid-level staff because of competitive talent management practices. Subsidizing medical scheme membership (voluntary or compulsory membership) or providing workplace based health care is encouraged through tax benefits to the employer.

The 2005 Old Mutual Health Care Survey found that 69% of employers have a documented health care strategy. “The extent of benefits and employer willingness to pay for medical plan subsidies are, however, dependent on company size and industry sector.”

Three major trends are observed in the provision of health care benefits: 1) overall capping of benefits, 2) exclusion of lower skilled workers, and 3) limiting post retirement benefits. Many companies have been “capping their level of sponsorship by linking the increase in contribution rate to salary increases or even by shifting the total employer subsidy to the cash package of the employee.” Although health care is presented as a benefit, the burden of the increasing cost of health care has been shifted to employees through the restructuring of employer contribution. These cost sharing arrangements between employees and employers are becoming more controversial especially because of the high burden of disease, the poorly performing public health sector, and the expensive private health care sector. Moreover, lower ranking employees are increasingly excluded from medical benefits because packages cannot be negotiated in terms of cost to the company or because of the inability of smaller companies to raise the budget to...
accommodate a health subsidy as it will affect their bottom line. Open-ended employee benefits have also been under severe scrutiny, causing a trend to reduce open-ended benefits. As a result, many employers have cut or capped post retirement benefits. It has been suggested that the International Accounting Standard IAS19, which requires companies to quantify their open-ended benefit liabilities on their financial statement, has influenced this trend, mostly because open ended benefits cannot be quantified. These trends are causing an increasing tension between providing health care benefits to employees - in order to promote a productive a and healthy workforce with low absenteeism - and decreasing company liabilities.

Overview

South Africa faces the dual challenge of a skilled labor shortage and unskilled labor surplus. As a result, it is important to adhere to a “policy framework that emphasizes both the need to enhance economic growth and ensure that the characteristics of the suppliers of labor match those in demand by growing sectors.” Training and skills development are main features of the South African labor law. The Skills Development Act (SDA) and the Skills Development Levies Act (SDLAs) collectively aim to “create an enabling framework for developing the skills of the South African workforce.”

These policies have moderated the development of an extensive institutional infrastructure to support skills development. This infrastructure consists of the National Skills Authority, Sectoral Education and Training Authorities (SETAs), the National Skills Fund, the Skills Development Planning Unit, and labor centers within the Department of Labour. It is believed that the “skills development framework promotes greater co-ordination and planning, greater stakeholder consensus, and improved financial arrangements which improve the leverage of state and the SETAs over the direction of training initiatives.”

Indicators of Opportunities for Development, Learning, & Advancement

Job skill development and advancement are promoted for employees of as many industrial sectors, employment statuses and life/career stages as possible.
Training and work performance

The Labour Relations Act facilitates investment in employee training during probation. It is stipulated that during the probation period, the employee's performance should be assessed. An employer should give an employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service. After probation, an employee should not be dismissed for unsatisfactory performance unless the employer has given the employee appropriate evaluation, instruction, training, guidance or counselling.

Scarce skills training and employment or re-employment of retired workers with specialist skills

Skills development and training are priority areas in South Africa since the country faces a skill deficit in various areas which has been identified as “scarce skills”. Training and employment in these areas are encouraged through a scarce skill training subsidy and allowances.

In addition to subsidizing training in scarce skills, the government has launched the Joint Initiative on Priority Skills Acquisition (JIPSA) program. The purpose of JIPSA work placement program is to fast-track the deployment of young qualified persons with scarce skills both locally and internationally. The program also oversees the re-employment of retired professionals with specialist scarce skills to fill the growing skills gap.

The placement of retired specialized professionals in low performing municipal offices is facilitated by the Development Bank of Southern Africa’s Siyenza Manje Programme (“we are doing it now”). A database of retirees serves as an important intervention in dealing with the skills shortage at the local government level. Recent reports indicate that 190 retired civil engineers have been deployed to 154 underperforming municipalities throughout the country.

“Learnerships”

The Skills Development Act (SDA) outlines the purpose and nature of “learnerships.” Learnerships are offered through SETAs in partnership with employers. Participation of employers is facilitated through incentives such as tax breaks. Through learnerships, opportunities are given to new entrants into the workforce to get both structured instruction and practical work experience. Learnerships must lead to an occupational qualification recognized by the South African Qualifications Authority. The engagement of unemployed persons in the labor force through learnerships is a key strategy for addressing growth and development in the informal economy.

Financing skill development and training

According to the SDA, employers are required to pay a skill levy equivalent to 1% of their wage bill (payroll) in addition to other human development and training activities. Eighty percent of levy funds are distributed to SETAs and 20% to the National Skills Fund. These institutions distribute the funds accordingly to allow for workplace training and learnership opportunities.
Indicators of Wellness, Health & Safety Protections

Protection of employees’ safety and health at their worksite is mandated, and their physical and mental well-being is promoted. In the case of job-related injury or illness, compensation or other forms of social protection are offered.

Overview

The Department of Labour has the principal responsibility for administering occupational health and safety legislation. The Occupational Health and Safety Act, No. 85, 1993, (OHS) and the Compensation for Occupational Injuries and Diseases Act, No. 130, 1993, provide the framework for occupational health in South Africa. In addition, various specific industry acts and charters guide health and safety issues, for example, the Mine Health and Safety Act of 1996 (MHSA) which is administered by the Department of Minerals and Energy.

The definition of an “employee” in the OHS Act is wider than that contained in other labor legislation. As a result, the OHS Act regulates the health and safety of all employees including self-employed persons. It applies to workers in both the formal and informal economy. The reach of the OHS Act is only limited in sectors where specialist sector legislation applies.

Cost of occupational disease and injury, compensation, and health benefits

It has been estimated that the direct and indirect costs of occupational diseases is equivalent to at least 3.5% of the GDP. Critics argue that the costs of occupational disease and injury are not reflected in the costs of production and are borne disproportionately by workers and their families. Compensation for disabled workers is regulated by the Compensation for Occupational Injuries and Diseases Act, No. 130, 1993. The compensation is often inadequate and access to rehabilitation is extremely limited. In addition, the severity of the impact of occupational accidents and disease are exacerbated by HIV/AIDS.

Promoting health and safety through regulation of safe and reasonable working hours

Regulations mandating safe and reasonable working hours is outlined in the Basic Condition of Employment Act, No. 75, 1997, but do not apply to senior management, employees engaged in sales or staff who travel, or employees who work less than 24 hours a month. Employers are not permitted to require employees to work more than 45 hours in a week, 9 hours in any day if an employee works for five days or less in a week, or 8 hours in any day if an employee works on more than five days in a week. Overtime must be agreed upon and employers may not require more than 10 hours overtime per week. (An agreement may not require an employee to work more than 12 hours on any day). Overtime must be paid at 1.5 times the employee’s normal wage or an employee may agree to receive paid time off. Daily (12 consecutive periods) and weekly (36 consecutive hours) are also mandated. Employees who work regularly after 11 p.m. and before 6 a.m. the following day must be informed of any health and safety hazards and have the right to undergo a medical examination.

Promoting health and safety through regulating sick leave, maternity leave and family responsibility leave

The Basic Condition of Employment Act, No. 75, 1997, also regulates leave. Employees are entitled to six week’s paid sick leave over a period of 36 months. During the first six months of employment, an employee is entitled to one day’s paid sick leave for every 26 days worked. A medical certificate will be required for more than two consecutive days. Entitlement to sick leave may not be reduced by any agreements concluded by a bargaining council.

Expecting employees are entitled to four consecutive months of maternity leave and is not allowed to perform work that is hazardous. Entitlement to maternity leave may not be reduced by any agreements concluded by a bargaining council.

Full-time employees are entitled to three days paid family responsibility leave per year on request for the employee’s spouse or life partner, parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.
Indicators of Opportunities for Meaningful Work

Opportunities for meaningful and fulfilling work are available.

This dimension is omitted because it is not regulated by legislation in South Africa.

Indicators of Provisions for Employment Security & Predictability

Stable provision of employment opportunities for job seekers is promoted, clear communication of terms of employment is facilitated, and protecting job security of the employed is a policy objective.

Overview

Employment opportunities and security are two major policy objectives that are central to economic development and poverty alleviation strategies. These objectives are addressed through a range of public initiatives and regulations. To date, employment creation, through enterprise development has been limited or insufficient to address the country's high unemployment (23.5% in 2009). As a result, the government has launched the Expanded Public Works Programme (EPWP) that aims to draw significant numbers of the unemployed into productive work accompanied by training so that they increase their capacity to earn income. Terms of employment especially predictability are regulated by the BCEA. Finally, the country's public unemployment security system has been completely overhauled in order to be more efficient in providing social security.

Promoting employment opportunities through the Expanded Public Works Programme

“The EPWP is one of the government's initiatives to bridge the gap between the growing economy and the large numbers of unskilled and unemployed people who have yet to fully enjoy the benefits of economic development.” Temporary work opportunities are created for the unemployed in various sectors, using public sector expenditure. The aim of the EPWP is to equip unemployed and unskilled persons with basic training, education, or skills development to perform a low skill job. Once these people leave the program, they must be equipped with the ability to earn an income. The skills development focus of the program is a collaborative effort between the Department of Labour and the SETAs.
Promoting employment security and predictability by regulating termination requirements

The mandatory requirements for termination of employment as stipulated in the Basic Condition of Employment Act, No. 75, 1997, only applies to employees who work more than 24 hours per month for an employer. The notice periods needed to terminate a contract of employment is stipulated in the BCEA. Notice periods vary mostly by how long the employee has worked for the employer. The Labour Relations Act, No. 66, 1995, codified the protection against unfair dismissal. Thus an employee may challenge the fairness or lawfulness of a dismissal in terms of the Labour Relations Act or any other law. Employees who are dismissed for operational requirements or terminated because of insolvency are entitled to one week’s severance pay for every year of service.

Unemployment Insurance

The principle statutory institutions for unemployment protection are the Unemployment Insurance Fund and the Worker’s Compensation Fund (discussed in Section III: Wellness, Health & Safety). It is suggested that the passage of the Unemployment Insurance Act of 2001 was the most significant post-apartheid social insurance enactment. "The Act modernized the existing system for unemployment, maternity and illness benefits, but remains a system for temporary relief to the unemployed. The Act’s scope was extended from high wage earners to include domestic workers, which has resulted in some 600,000 private employers registering with the Fund." Monthly contribution is mandatory and enforced by penalties.

Yet, despite updating, the Act still reflects its origins as an act designed to deal with cyclical unemployment. The Act is also criticized for its failure to provide benefits for partially employed, the failure to provide measures to integrate and reintegrate the partially employed, and failure to provide measures to promote employment. For example, employees who resign may not claim benefits under the Act. While this was introduced to stop abuse, a consequence is that employees who leave employment to undergo further education or training cannot claim benefits.

Overview

The BCEA introduced two forms for workplace flexibility: averaging hours of work over a period of up to four months and compressed workweeks. Compressed work weeks are permitted only when an employee agrees in writing to work up to 12 hours in a day without receiving overtime pay. However, the agreement may not require or permit an employee to work more than 45 ordinary hours in any week, more than 10 hours’ overtime in any week, or more than five days in any week. Furthermore, “a collective agreement may permit the hours of work to be averaged over a period of up to four months.” Overtime is also regulated and the overtime wage rate was recently increased.

The regulation of work time received various critiques, including that it amounts to a “vicious cycle consisting of a smaller core workforce, increased intensification of work; increased in atypical employment and limited or no increases in permanent employment.” In addition the BCEA is criticized for “missing the opportunity to establish a framework that would allow the reduction of hours of work to lead to the creation of more and better jobs and increase productivity through reduced hours of work.”
The BCEA promotes the right of employees to arrange work time with consideration given to health, safety, and family responsibilities. In fact, any other collective agreement concluded by a bargaining council may replace or exclude any basic condition of employment except among others the duty to arrange working time with regard to the health and safety and family responsibility of employees.\(^3\)

Figure 3 illustrates the extent to which workers of different ages have a say in determining the number of hours they would like to work per week, whether they can decide to work flexible hours or whether they have to work the hours as stipulated by the employer without a say.

Figure 3: Flexible work options by age group in the formal sector

<table>
<thead>
<tr>
<th>Age Group</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>15-19</td>
<td>0%</td>
</tr>
<tr>
<td>20-24</td>
<td>0%</td>
</tr>
<tr>
<td>25-29</td>
<td>0%</td>
</tr>
<tr>
<td>30-34</td>
<td>0%</td>
</tr>
<tr>
<td>35-39</td>
<td>0%</td>
</tr>
<tr>
<td>40-44</td>
<td>0%</td>
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<tr>
<td>45-49</td>
<td>0%</td>
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<tr>
<td>50-54</td>
<td>0%</td>
</tr>
<tr>
<td>55-59</td>
<td>0%</td>
</tr>
<tr>
<td>60-64</td>
<td>0%</td>
</tr>
<tr>
<td>65+</td>
<td>0%</td>
</tr>
</tbody>
</table>

- **Number of hours are fixed by employer**
- **Employee can decide, within a limited range**
- **Employee can decide fully for him/herself**

Source: Stats South Africa, Labour Force Survey September 2007\(^3\)

Figure 3 illustrates that for the majority of workers in the formal sector across all age groups the number of work hours are fixed by employers without the input of an employee. However, self-determination does seem to increase with age. Determination of hours is particularly prevalent amongst older workers.

Divisibility in the workforce and inclusion of less advantageous populations are promoted, and equity in work conditions is pursued.

**Overview**

The Employment Equity Act, No. 55, 1998, was designed to achieve equity in the workplace by prohibiting discrimination and by requiring the implementation of affirmative action measures to ensure the equitable representation of designated groups (blacks, women, and disabled persons) in all occupational categories and levels in the workforce. The Act recognizes “that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation, and income within the national labor market. Those disparities created such pronounced disadvantages for certain categories of people that they could not be redressed by simply repealing discriminatory laws.”\(^2\)

The scope of the Act is confined to employees. Independent contractors and other persons not covered by labor law are protected against discrimination by the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4, 2000. The obligation to implement affirmative action measures is restricted to employers employing more than 50 employees and certain other categories of designated employers. Most employers with less than 50 employees are not obliged to implement affirmative action although they may choose to do so voluntarily.\(^2\)

**Prohibition of unfair discrimination**

Chapter 2 of the Employment Equity Act instructs employees to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy.
The Act stipulates under which conditions and on which bases employees may not be discriminated against such as race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, color, sexual orientation, age disability, religion, HIV status, conscience, religion, belief political opinion, culture, language, and birth.\textsuperscript{22}

Furthermore, the conditions under which medical and psychometric testing of employees are allowed are outlined. These restrictions also apply to applicants for employment.\textsuperscript{22}

\textbf{Affirmative action}

The Employment Equity Act requires that designated employers must implement affirmative action measures for designated groups to achieve employment equity. In order to implement affirmative action measures, a designated employer must: “1) consult with employees; 2) conduct an analysis; 3) prepare an employment equity plan; and 4) report to the Director-General on progress made in the implementation of the plan.”\textsuperscript{22} The Act requires that employers must have an employment equity plan and assign one or more senior managers to ensure implementation and monitoring of the employment equity plan. Employers are required to allocate necessary resources available to achieve employment equity.\textsuperscript{22}

The Act also outlines affirmative action measures which are intended to ensure that suitably qualified employees from designated groups have equal employment opportunity and are equitably represented in all occupational categories and levels of the workforce. The Act encourages the use of the following measures: 1) identification and elimination of barriers with an adverse impact on designated groups; 2) measures which promote diversity; 3) making reasonable accommodation for people from designated groups; 4) retention, development and training of designated groups (including skills development); and 5) preferential treatment and numerical goals to ensure equitable representation.\textsuperscript{22} This excludes quotas.

\textbf{Incentives for equity through the Broad Based Black Economic Empowerment Act}

“The Broad Based Black Economic Empowerment (BBBEE) Act (2003) is the centerpiece of the Government’s economic strategy for transforming economic inequality in South Africa.”\textsuperscript{23} The purpose of the BBBEE Act is to facilitate economic empowerment amongst previously disadvantaged populations, especially poor black people.\textsuperscript{2} The BBBEE Act therefore defines broad based black economic empowerment as “economic empowerment of all black people including women, workers, yough, people with disabiilites and people living in rural areas through diverse but integrated socio-economic strategies that include, but are not limited to: a) increasing the number of black people that manage, own and control enterprises and productive assets; b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises; c) human resource and skills development; d) achieving equitable representation in all occupational categories and levels in the workforce; e) preferential procurement; f) and investment in enterprises that are owned or managed by black people.”\textsuperscript{23}

In order to promote and monitor transformation, several sector specific charters were developed to provide sector specific guidance to employers on how to implement the BBBEE Act. “The charters are voluntary documents developed by stakeholders in a sector.”\textsuperscript{23} However, the state has issued codes of best practice “that make compliance with charter targets binding criteria for the evaluation of tendering and all other forms of competitive contracting in all spheres of government.”\textsuperscript{23} A scorecard mechanism was developed in consultation with sector stakeholders to assess performance against charter targets and core elements of empowerment as outlined in the Act.

The legislative rules promoting affirmative action goals are highly self-regulatory.\textsuperscript{3} Thus, legislation does not set targets with respect to employing or training members of designated groups. The Broad Based Black Economic Empowerment Act, No. 53, 2003, serves as a guideline for implementing these goals.
Employer-employee frictions are mitigated, and constructive workplace relations are facilitated.

Overview

The Labour Relations Act, No. 66, 1995, provides various means to promote constructive workplace relations and mitigate employer-employee frictions. Amongst these measures are the regulation of organizational rights of trade unions and the promotion of collective bargaining at the workplace and at sector level. The Act also promotes employee participation in decision-making through the establishment of workplace forums.16

In case of workplace and labor disputes, the Act “provides simple procedures for the resolution of these disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration was established), and through independent alternative dispute resolution services accredited for that purpose.”122 The Act also mandates the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act.

Freedom of Association and General Protections

The Labour Relations Act provides every employee the right to participate in forming a trade union or federation of trade unions, and to join a trade union, subject to its constitution.16 People who are seeking work may not be discriminated against if they belong or formerly belonged to a union or forum.

The Act also protects the right to freedom of association of employers to participate in forming an employers’ organisation or a federation of employers’ organizations, and to participate in these organizations’ lawful activities.16 As with employees, no one may request or force an employer to resign or not participate in an employer organization’s activities.16 Figure 4 illustrates the extent of union membership amongst employees of different ages in the formal economy. The difference between membership and non-membership is high among employees aged 15 to 34 and 60 and older. This difference is much less among employees 35 to 59.

Collective Bargaining

The Labor Relations Act also regulates trade union representatives and the rights of representative trade unions. Hereby trade unions are given access to workplaces and workplace premises for union related activities.16 Employees who are formal office bearers of representative unions are entitled to take reasonable leave during working hours for the purpose of performing the functions of that office given special rights to apply for leave from that office.16 Procedures for collective bargaining and dispute resolution are outlined in detail in the Act.

Figure 4: Membership in union by age group in the formal sector

Source: Stats South Africa, Labour Force Survey September 200713
CONTEXTUAL FOCUS: EMPLOYMENT IN THE INFORMAL ECONOMY AND PUBLIC POLICY

Overview

“There are a number of extremely severe labor market problems in South Africa.” South Africa has one of the worst unemployment problems in the world, wage inequalities are also severe by international standards, and a massive disparity exists in the incidence of unemployment by race. However, a major critique of the post-apartheid labor policy framework is its inability to address the challenges and dynamics of work and employment in the growing informal economy. In general, labor laws are aimed at employers and employees in “conventional employment relationships” and are thus inappropriate in the informal economy. Against the background of South Africa’s high unemployment rate and limited social welfare protection, informal employment or informal work serves as the means of survival for many. It is for this reason that the challenges posed by the informal economy are a major contemporary policy issue in South Africa.

Although it is difficult to measure informal work, it is estimated that a significant portion of the workforce (26% in 2006) works in the informal economy. Since work in the informal economy is mostly unregulated, informal work challenges the role of government in moderating quality of employment for all. For example, people earn their livelihoods through insecure and unprotected work in which employer power is unrestrained. This problem is recognized by the government and since current labor market policies are inappropriate to address these challenges, macroeconomic and industrial policies have been developed to mobilize people from the informal economy to the formal economy. In the section that follows, emphasis is placed on identifying and describing the informal economy in South Africa, assessing the challenges of work and quality of employment in the informal economy, and discussing the link between work in the informal economy and current public policy.

The nature and extent of work in the informal sector

The definition and delimitation of the informal, or second, economy varies dramatically. Several authors have attempted to define the informal economy in South Africa and internationally. In general, it is accepted that work in the informal economy consists of “otherwise legal forms of income generation not regulated by the legal/political institutions of society.” This definition has been expanded to also include employment relationships that are not legally regulated or protected. Hereby “informal employment is now defined as being without formal contracts, worker benefits, or social protection.” This includes:

- “self-employment in informal enterprises; workers in small unregistered or unincorporated enterprises, including employers, own-account operators, and unpaid family members;
- wage employment in informal jobs: workers without formal contracts, worker benefits, or social protection for formal or informal firms, for households or with no fixed employer, including employees of informal enterprises and other informal wage workers such as casual or day labourers, domestic workers, unregistered or undeclared workers and temporary or part-time workers as well as industrial outworkers (also called homeworkers)”

Since democratization, informal work has increased considerably in South Africa, both through formal economy subcontracting, casual work and the emergence of small, unregulated enterprises. The increasing size of the sector implies that the informal economy is not disappearing, nor is it becoming more formal as previously assumed. However, evidence does suggest that the two economies are not geographically separate as there is a long history of incorporation and integration.

There are various reasons for the rapid expansion of the informal economy. First, it is suggested that the power of organized labor has stimulated informalization. In South Africa, rapid informalization is observed in those sectors with the highest concentration of unionization, such as the mining and clothing sectors. “A second reason for the growth of the informal economy is that it is a reaction against the state’s regulation of the economy.”

Exclusionary laws, particularly during apartheid, spurred the growth of various underground economies. Although many of these activities are legalized today, it is very challenging to administer the requirements of new regulation. The liquor and taxi industries in South Africa are prime examples. On the contrary, “the growth of informal employment has been accelerated by the lifting of some apartheid restrictions such as those imposed on street trading and the spread of spaza shops in suburban areas.” Increased international competition especially impacting the South African clothing industry has caused a great deal of decentralization, increased homework, and subcontracting. Finally, the
contraction of formal employment through the process of the global restructuring of work has also contributed to increased informalization.28

Depending on how informal work is measured, it is estimated that as much as 29.6%25 or as little as 21%29 of the South African workforce is active in the informal economy. One of the more striking differences between the informal and formal economy is age distribution. The mean difference between working in the informal economy and formal economy is much smaller amongst young workers aged 15–19 and older workers aged 65 and older in comparison to other age groups. Figure 5 illustrates the percentage of informal workers by age in comparison to workers in the formal economy. The greater likelihood of working in the informal economy amongst workers aged 15-19 and 65 and older is well illustrated in Figure 5. The figure also illustrates that participation in the formal economy decreases as age increases whereas in the informal economy participation increase as age increases.

Figure 5: Work in the formal and informal sectors by age group

Source: Stats South Africa, Labour Force Survey September 200721

Previous studies have found that labor stratification in the informal economy is very similar to stratification in the formal economy.27 In addition, the transition patterns into and out of formal and informal jobs are also very similar.27 There is also a significant linkages between employment in the formal and informal economy.28

Although there are similarities between the two economies and clear linkages and areas of interdependencies exist, existing labor policies do not adequately address the challenges of the informal economy. This is mostly due to the fact that the labor policies “assume a conventional or traditional employment relationship.”3 The problem is best described as follows:

The assumption underlying the new labour relations regime introduced in 1995 was that it would bring all employees into one industrial relations system with the standard employment relationship as the foundation. The growing informalisation of work has undermined this foundational idea as many workers do not have regular full-time, indefinite contracts and may, as a result, be excluded in practice from the operation of many labour laws and the new regulatory framework.28

Consequently, there is a growing policy gap in promoting quality of employment in the informal economy. This gap is also referred to the “good governance deficit” in recent work literature.30

The limitations of labor policy to promote quality of employment in the informal economy

Work in the informal economy challenges most of the aforementioned quality of employment dimensions discussed in this paper since work in the informal economy is either not covered or inefficiently covered—in law or in practice—by formal arrangements.29 In some instances, workers in the informal economy are not covered by law, “which means they are operating outside the formal reach of the law; or they are not covered in practice which means that, although they are operating within the formal reach of the law, the law is not applied or not enforced; or the law discourages compliance because it is inappropriate, burdensome or impose excessive costs.”30

In relation to the quality of employment framework used in this paper the areas of greatest concern in the informal economy are fair compensation, job security, opportunity for training and development, and industrial relations. Although The Basic Conditions of Employment Act should by definition provide protection to employees in the second economy (except those working less than 24 hours per month), it certainly does not empower them. It is argued that these regulations contribute to employment losses and increasing poverty amongst workers especially low skilled workers.31 In essence, the informal economy is not covered in practice by this Act since enforcement is limited in the informal economy.

The Labour Relations Act does not promote the right to workplace forums at workplaces with less than 100 employees. “This has been shown to effectively exclude 98%
of farm workers and more than 60% of firms in wholesale and retail trade.” Hereby, most of the workers in the informal economy cannot organize themselves. In addition, since it is difficult to organize effective worker organization in the informal economy, the “LRA also fails unions by not regulating for situations where worker representatives can have access to workers and use the employer’s facilities without first having to become representative.” Overall, informalization undermines the power of organized labor through de-collectivism.

Finally, the scenario of the informal economy falling through policy gaps is echoed with respect to access to training services. There are two potential routes whereby those working in the informal economy can access training – the Sector Education and Training Authorities (SETAs) and the National Skills Fund. It has been argued that this system does not adequately service those working in the informal economy. The problem is as follows:

The SETA’s are funded through the skills levy which is paid by employers who are registered – and thus in the formal economy – and whose annual wage bill is more than R250 000. There is evidence that SETAs tend to prioritise the needs of those contributing to the skills levy. The National Skills Fund relies on training providers responding to incentives. Training providers are often reluctant to service those in the informal economy. The reasons include the lack of profitability because workers cannot cover the costs, the low levels of education of workers, their mobility and thus difficulties of accessing workers, the need to develop non-traditional methods and the fact that many trainers are afraid to enter the areas where people need to be trained.

Promoting quality of work in the informal economy

There are three major perspectives about the ideal relationship between informal work and the formal regulatory environment. The first perspective promotes the idea that the role of government in the informal economy should be limited to providing support such as credit and business development services. More intervention than this would lead to wage rigidity that would increase informalization and vulnerability of workers. The second perspective advocates only for the formalization of property rights in the second economy in order to convert informally held assets into real assets. The third perspective promotes for regulation of the relationship between the informal and formal economy in order to address the unequal relationship between ‘big business’ and subordinate informal producers and workers.

Public policy in response to the informal economy in South Africa has been a mix between the first and third approaches. To date, macroeconomic policy and industrial policy has followed the approach of the first perspective. Since 2003, the “policy discourse in the country has shifted from a narrow focus on global integration and competitiveness to acknowledge that the state will have to redistribute resources actively in an effort to overcome the social crisis caused by poverty.” As a result, the government proposed “state intervention through a series of programmes such as micro-credit for the poor, agrarian reform, intensified skills development, the extension of public services and a massive public works programme.” Through the transfer of resources to the second economy, the government hopes to empower the working poor and those in the informal economy. Hereby, the government believes that “the second economy will end its marginalisation and be integrated into the first economy.”
IMPLICATIONS FOR QUALITY OF EMPLOYMENT

The advent of democracy in South Africa ushered in an era of policy reform aimed at eradicating the injustice and inequalities of the apartheid past. In general, South Africa’s policy approach can be characterized as lean, social, democratic, and developmental. Emphasis is placed on transformation and the empowerment of previously disadvantaged groups such as black South Africans and women. To achieve these aims, South Africa has elaborate employee relations and skills development policies. These policy areas address three of the quality of employment dimensions discussed in this paper: 1) opportunities for development, learning and advancement; 2) promotion of a culture of respect, inclusion and equity; and 3) promotion of constructive relationships at work.

Although these policies create favorable opportunities for South African workers, policy gaps, policy lags, and weak policy implementation challenge the quality of employment for all workers. Since South Africa has high unemployment, policies have to promote and not hamper new employment opportunities in order to absorb the unemployed (23% of the working aged population). In this paper, various shortcomings of the current public policy have been identified. Some of these shortcomings challenge quality of employment directly, such as:

- Basic employment conditions set out by law do not necessarily secure basic needs or draw households out of poverty.
- Major wage inequalities exist and equitable wage distribution is not facilitated by law.
- Medical and health insurance by employers is increasingly being capped, lower skilled workers are systematically excluded from health benefits, and post retirement benefits are being limited.

- Despite the updating of the Unemployment Insurance Act, unemployment insurance still deals only with cyclical unemployment. The Act does not provide measures to integrate and re integrate the partially employed and it also fails to provide measures to promote employment.
- Current labor policy is based on a conventional employment relationship and therefore it fails to address the needs or provide any protection to the 29% of workers engaged in the informal economy. This section of the South African economy is growing rapidly and will continue to expand.
- The creation of flexible work options through the regulation of work time is viewed as a vicious cycle consisting of a smaller core workforce, increased intensification of work, increase in atypical employment and limited or no increases in permanent employment. In addition, the BCEA is criticized for “missing the opportunity to establish a framework that would allow the reduction of hours of work to lead to the creation of more and better jobs and increase productivity through reduced hours of work.”

Despite these negative implications for quality of work, South Africa has made remarkable progress since apartheid to legislate various aspects of the quality of employment dimensions. As a result, laudable progress has been made to promote quality of employment for all employees regardless of race, ethnicity, or gender.

Policy lags occur and are attributed mostly to demographic changes in the labor force such as the employment of more women than men and the entry of a new generation of employees that did not experience apartheid and the exiting of skilled labor due to retirement and immigration. Lastly, the informal economy will continue to expand and will serve to provide income for the most vulnerable populations in society (youth, the elderly, low skilled workers). Public policy must be extended to provide security and greater quality of work opportunities for these workers.
REFERENCES:

1. The discussion of quality of employment draws on a working paper entitled “Labour market regulation: International and South African Perspectives” by Benjamin (2005), for a number of its arguments.


Note on data:
Data sourced from Stats South Africa's Labour Force Survey September 2007 was accessed online via Nesstar WebView. Data was weighted in order to obtain results representing the universe and presented as column percentages unless otherwise specified.
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ABOUT THE AUTHORS:

René Carapinha

René Carapinha is a doctoral student in the School of Social Work at Boston College. Her research focus is on the work-life interface and global corporate citizenship. René is interested in business models and strategies that enhance employee, family, and community wellbeing and development. Previously René worked at the Boston College Center for Corporate Citizenship and as a researcher at the Centre for Social Development in Africa at the University of Johannesburg. René also served as the National Chairperson of the South African Occupational Social Work Association.