

DRAFT ONLY – PLEASE DO NOT CITE OR DISTRIBUTE WITHOUT AUTHOR’S  
PERMISSION

(Conference Draft)

“The Recent Labour Relations Amendment Act as a Transformative Legislation: A Critical  
Analysis and Race-based Dynamics for Black Economic Sustainability”

Lefa Sebolaisi Ntsoane\*

2017 Law and Development Conference

Cape Town, South Africa  
September 2017

---

\* Department of Private Law, College of Law, University of South Africa

### ***Abstract***

Twenty four (24) years of the democratic dispensation, it still remains important to ask how far transformation has actually worked towards realisation of its projected goals of uplifting the powerless in securing for themselves labour and social justice. Langille, a Canadian scholar, once noted that the objective of labour law is “justice” in employment and that working relations in the labour market cannot be said to adhere to social justice if workers still remains exposed to exploitation in the contracting process. One can only agree that the unequal nature of the bargaining power in the employment relationship touches to the employees’ rights to human dignity, status, livelihood, amongst other rights. The year 2015 saw the enactment of the Labour Relations Amendment Act aimed at the protection of fixed term contract employees who are exposed to exploitation and unequal treatment in the workplace. Although the Act has been appraised by the powerless and downtrodden employees as a compensation for the inequality and a move towards social justice, employers (both private and public) saw this Act as a threat to business and resorted to technical defence of sustainability and as such overlooking the social justice element in the determination of sustainable development. Labour law and transformation in the workplace must be seen as a tool for poverty alleviation. A society motivated by restorative justice and equality can only view labour law as a political and an economic compromise as a way to realise the cherished goal of the Constitution.

This paper therefore examines the practical combination of the economic, social, cultural and the ecological factors in the determination of sustainable development and argues that the economic factor is, in many instances, utilised as a sole criterion by employers in justifying their business decisions in the employment relationship. This results with the social justice factor not being taken into account or rendered of less importance despite South Africa’s history of injustices and exploitation of labour, a direct result of apartheid and colonialism.

### **1. Introduction**

The concept of sustainable development is one of the most ambiguous and controversial in global literature. The World Commission on Environment and Development broadly defining sustainable development as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.<sup>1</sup> There is an increasing need for sustainability and sustainable development to require an integration of the

---

<sup>1</sup> WCED Our Common Future, Brundland Report (Oxford University Press 1987).

economic, social, cultural, political and ecological factors.<sup>2</sup> Although sustainability is generally understood to be a combination of the economic, social, cultural, political and ecological factors, in some cases the practical combination of these factors appears impossible due to their different desired goals and thereby results with one factor prevailing over the other factor/s. The role of the economic factor in determining sustainability, despite its immeasurability and vagueness, is mostly used as a sole criterion in justifying business decisions in cases where there are conflicting factors or interests. The economic factor focuses much on the calculation of profit as opposed to inclusive sustainability and growth. Although it is acknowledged that other factors plays a significant role in the determination of sustainability, the social justice factor in most cases appears to be overlooked when judging sustainability in the economic decision-making processes. Social justice is an explicit recognition of structural inequalities in the world (along class, race, gender, institutional, and other lines) and therefore the need for proactive, structural programmes to counteract these inequalities.<sup>3</sup> Social justice in sustainable development advocates social sustainability. Social sustainability requires a dramatic increase in equity.<sup>4</sup> The social element in the determination of sustainability is people-oriented and strives to maintain stability of social and cultural systems.<sup>5</sup>

This presentation therefore begins with an idea that profits for business owners may mean layoffs for that business’ employees and that the employer’s policies and programmes can be sustainable and socially just and that they can also be sustainable but unjust.<sup>6</sup> The essay examines what meaning can be attributed to ‘sustainability’ (taking into account the combination of factors outlined above) in line with the race-based dynamics for black economic sustainability in employment. A question as to how one strike a balance between the economic imperatives of the employer and labour laws in particular aimed at the protection of employees at the workplace remains an issue at hand. The failures or reasons for the non-compliance with section 198B of the Labour Relations Amendment Act<sup>7</sup>, as a legislative transformation, by institutions of employment and the race-based dynamics for

---

<sup>2</sup> UNCED 1992. See also Gallopin et al “Science for the 21<sup>st</sup> century: From Social Contracts to the Scientific Core” (2001) *Int Journal Social Sciences* 168 211. and Kates et al Sustainability Science (2001) *Science* 292 645.

<sup>3</sup> Scott D “Sustainable development and Social Justice: Conflicting urgencies and the search for common ground in urban and regional planning” 2013 *Michigan Journal of Sustainability* Vol 1 76.

<sup>4</sup> Gallopin GC *Impoverishment and Sustainable Development: A Systems Approach* International Institute for Sustainable Development (Winnipeg Canada 1994).

<sup>5</sup> M Munasinghe and J McNeely. 1995 *Protected Area Economics and Policy*, World Conservation Union (IUCM) and World Bank, Geneva and Washington, DC.

<sup>6</sup> Marcusse P “Sustainability not enough” *Environmental and urbanisation* 1998 Vol 10 No 2 105.

<sup>7</sup> 6 of 2014.

black economic sustainability are analysed. The study is based on the idea that South African law does not provide any clear guidelines to harmonise the competing interests of employees and the economic imperatives of the employer and as a result the concept of ‘sustainability’ is often utilised by employers to circumvent compliance with labour law regulations aimed at the protection of employees. The use of the broader concept of ‘sustainability’ by employers not to comply with section 198B of the Labour Relations Amendment Act<sup>8</sup> has the effect of violating the rights of fixed term contract employees to be placed on permanent appointments.

Section 198B of the Act explicitly provides that fixed term contract employees earning below the threshold amount as determined by the Minister of Finance in terms of section 6(3) of the Basic Conditions of Employment Act<sup>9</sup> and appointed for a period of more than three (3) months must be granted permanent placement. According to this Act, if the nature of the work suits permanent employment or the employer fails to provide justification for temporary appointment instead of permanent appointment, the employment relationship will be deemed to be permanent.

## **2. Scope of the Labour Relations Amendment Act**

Fixed term contracts is in every institution of employment characterised by the withholding of rights and benefits, instability of employment and deprivation of status. The Labour Relations Amendment Act is aimed at the protection of this category of employees whose rights are infringed by employers in ways that include, amongst other things, the non-renewal of their fixed term employment contract and not being entitled to the same employment benefits as permanent employees. There are exceptions to the application of the Act. These exceptions include but are not limited to cases where the employee’s remuneration is above the threshold limit as determined by the Minister of Finance, employers with fewer than ten (10) employees, start-up companies with fewer than fifty (50) employees in operation for less than two (2) years, the work not being of a permanent nature and when the fixed term contract employee’s appointment was a temporary replacement to a permanent employee.

The Labour Relations Amendment Act has, as its purpose, the protection of fixed term contract employees and also to ensure stability in the workplace. Stability in employment serves multiple functions of providing an income, conferring social legitimacy and providing the individual access to full citizenship right- in other words, inclusion in the system of labour. The unequal bargaining power in the employment relationship to the extent where

---

<sup>8</sup> *Ibid.*

<sup>9</sup> 75 of 1997.

employers can decide on the renewal and/or non-renewal of fixed term contracts on yearly basis without any clear prospects of permanent placement clearly has the effect of violating the employees’ right to human dignity, equal treatment at the workplace and status. Although the Act have been appraised by the powerless employees as a compensation for the workplace inequality of the past and as such having a transformative element, the immeasurable and vague concept of sustainability defeats the purpose of the Act.

The biased interpretation of the concept of sustainability (through its lack of a social justice element) gives rise to unequal distribution of power and strengthens the employer’s bargaining power despite the good objectives of the Act. The disparity between the rich and the poor is therefore maintained. The unfortunate reality is that the market economy has taken priority over social development, strengthened by a lack of a political will to drive inclusive economy. Unbalanced power relations between the rich and the poor has the effect of leaving the poor bearing the costs of the unjust practices. The market economy depicts a system that seek economic sustainability and then strive for social justice as opposed to an inclusive system that will first seek social justice and then strive for sustainability. The system that seeks economic sustainability and strive for social justice afterwards has an effect of maintaining the *status quo* and renders social justice a futile factor despite South Africa’s history of race, gender and other social identical inequalities.

### **3. Transformation and race-based dynamics**

The argument is that sustainability must be interpreted and seen through the lenses of our political history and the cherished goal of our Constitution. We have to acknowledge that the political, social and economic system of racial discrimination which prevailed in the South African society during the apartheid regime had filtered into all aspects of the society and virtually left no African (black) community and nothing untouched (institutionalisation of racisms). Twenty four (24) years of the democratic dispensation, it still remains important to ask how far transformation in employment has actually worked towards the realisation of its projected goal of uplifting the powerless in securing for themselves labour and social justice. The configuration of poverty in South Africa is a clear outcome of the colonial and apartheid engineering due to the large scale of land dispossession that resulted with poorly resourced and overcrowded homelands for the majority of the black population and the migratory labour system that formed the backbone of the country’s mining and industrial sectors. This history of apartheid and colonialism must form the basis for rectifying the injustices of the past and should serve as guidelines in achieving a just and balanced society. The World Summit on

Sustainable Development identified poverty eradication as an indispensable requirement for sustainable development.

Transformation is a mechanism to achieve social justice. The interpretation that transformation translate to reserving positions for unqualified individuals from previously disadvantaged groups is unwarranted. Transformation requires acknowledging the injustices of the past in the workplace and placing necessary measures to rectify those injustices. This means making opportunities available to the previously disadvantaged groups and open doors for capacitation and mentoring programmes. This is in clear contrast with the interpretation given by the anti-transformation groups that advocates the ‘best of them all principle’ which has the effect of maintaining the *status quo* due to our country’s history of unequal access to, amongst other things, wages, decent employment and education . South Africa, by virtue of it being an unequal state due to the injustices caused by colonialism and apartheid, white South Africans continue to enjoy relative privileges in the labour industry. I strongly believe that one cannot transform the society following the ‘best of them all’ principle without looking at the race-based dynamics and the social conditions which are a clear result of the apartheid system where the black community was regarded as of an inferior status and less of a human being entitled to rights. The view is that utilising the economic factor as the sole criterion or a factor prevailing above the other factors without cognisance of the social justice element preserves the relative privilege and does not in any way assist with poverty eradication and the social justice agenda.

The South African literature has been content to acknowledge the economic, social and political context of labour law but seldom to ascribe a purpose to it. My point is that the purpose of labour law is clear but due to the unequal bargaining power in the employment relationship and the weak enforcement mechanism, employees find themselves with no form of protection. Labour law has a purpose and that purpose is to advance social justice, economic development, labour peace and the democratisation of the workplace without losing sight of the injustices of the past.<sup>10</sup>

Despite the democratic dispensation, the workplace is still in a way characterised by a racial structure that signifies and reinforces an idea of white power and privilege. In a truly democratic state based on principles of equal society, one cannot appraise the managerial positions occupied by few members of the black community simply because there has never

---

<sup>10</sup> A Smith “The role of Labour, Business and Government” a paper presented at a Conference on Labour Law in Transition, 4 August 2015 available at <https://www.lexisnexis.co.za/pdf/Labour-Law-in-Transition-A-Smith.pdf> (accessed on 13 June 2017)

been a systematic change in the institutions of employment but a modified racial division of labour. The practical utilisation of the concept of sustainability characterised by a lack of a social justice element, to my mind, serves as a hindrance to transformation and maintains the *status quo*. There is primarily no clear line to demarcate the managerial authority of black managers and the labour system. The system is modified in a way that black managers role in the workplace is to effectively foresee and monitor the attitudes of their black community with their decisions influenced by the system rather than the core values of the Constitution. The characteristics of a workplace in the apartheid era is that the master will establish a division of managers termed the ‘indunas’ as an effective communication tool and also to monitor the social networks of the black community. The same that South Africa is still faced with a question as to what hinders transformation when there are black people occupying managerial positions. Redistribution of natural and commercial resources created a small black middle class at the expense of the black majority.

Although the Labour Relations Amendment Act is aimed at the protection of vulnerable employees, one cannot simply expect the law to change by a simple command rule. A change in the system of labour is required. Sustainability and transformation, in order to have a meaningful role in the South African context needs to get to the root of poverty and inequality, address unemployment and to facilitate training and retraining of the society. It has been acknowledged that the drive to alleviate poverty brings with it the caveat that social development and (environmental) stability must be included as essential elements. There is a need for a move towards an idea that sustainable development is development that is economically viable, socially acceptable and economically sound without taking one element as more important than the other.<sup>11</sup> The social element aims to ensure that the economic interests of the community is also taken into account when determining what is economically sustainable. This entails a thorough understanding of the social conditions of our communities and their needs. Rebecca Freeth<sup>12</sup> in her research on sustainable social change suggested that social and material privileged sustainability practitioners seeking to engage poor and black communities on matters of water, sanitation, waste or climate change without engaging on the question of historical and current patterns of injustice will struggle to support meaningful and inclusive sustainability. To relate this view to the labour industry, this means that

---

<sup>11</sup>World Summit on Sustainable Development (WSSD), Johannesburg 2002. Political Declaration and Plan of Implementation available at <http://www1.uneca.org/Portals/sdra/sdra1/chap1.pdf> (accessed on 13 June 2017).

<sup>12</sup> R Freeth Just Facilitating: Talking about race, privilege and sustainability available at <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjA6oP0z-LUAhUSOsAKHf6dDRoQFggIMAA&url=http%3A%2F%2Fwww.sustainabilityinstitute.net%2Fresearch%2Fresearch> (accessed on 13 June 2017)

transformation in the workplace can only be achieved through a conscious acknowledgment of the injustices of the past and an enabling participation of the black community.

#### **4. Sustainability as a measuring tool**

There are different views on whether labour law rights such as, for instance, the right not to be discriminated against on the basis of status, equal pay and benefits are the same or can be treated as the same kind of rights that are central to the human right discourse such as the right to human dignity, freedom, the right to life etc. How is the right to equal work and equal benefit different from a human right discourse such as the right to have your dignity respected and protected? Is it because the right to equal work and equal benefit appears to have a lesser compelling moral imperative than the right to human dignity? Langille, a Canadian Scholar, once noted that the objective of labour law is ‘justice’ in employment and that working relations in the Labour market cannot be said to adhere to social justice if workers still remains exposed to exploitation in the contracting process. Material differences and social privileges relative to others gives rise to a different interpretation of sustainability and social justice. These social and material privileges carries the risk of recreating injustice in determining the sustainability of labour decisions.

The conflicting relations between sustainability and labour laws is evident from the incident in Marikana where thirty-four black striking platinum mineworkers were killed in 2012. The incident is a true depiction of exploitation of black labour and the exploitation of natural resources for the benefit of socially and materially privileged individuals through the current unjust system of labour.<sup>13</sup> A closer analysis of the incident, which resulted with the loss of life, reveals the politics of profit at the expense of social justice. It was unfortunate that, according to the privileged economic power entrusted to the employer, his/her/its economic imperatives trumped the economic and social interests of the workers and the mining community. Despite attempts to infuse the idea of social justice into sustainability, the labour system seems not ready and remains occupied by the colonial and unjust exploitation of labour. The poor black working masses in our country experiences a day-to-day life with inequalities and subjugations in the workplace from which they suffer and which they have a reason to resent but the realities of poverty does not allow them.<sup>14</sup>

#### **5. Conclusion**

---

<sup>13</sup> *Ibid.*

<sup>14</sup> Paraphrased from the introductory paragraph of Sen A *The idea of Justice* (London:Penguin Group 2009) p 1.

It is trite that despite South Africa’s twenty four (24) of democracy, the workplace still remains untransformed and depicts a racial division of labour. This is the case despite the legislature’s effort to enact transformative labour laws aimed at the protection of vulnerable employees and a desire to achieve an equal society. The mediocre compliance with labour laws contributes to the militant stances that workers often take in dealing with injustices in employment relations. Without transformation and a conscious deliberation of what sustainability entails in South Africa, what development means to the privileged will remain a different meaning to the vulnerable society. The lack of the social justice element in the determination of sustainable development will maintain the *status quo* and a gap between the rich and the poor. A systematic change in the system of employment is required.

The Labour Relations Amendment Act, despite its good objectives is rendered futile due to the biased interpretation of sustainability used by employers as a defence not to comply with the Act. Without a social element being practically applied as one of the factors in determining sustainability, the economic interests of the vulnerable society will not be upheld when determining what is sustainable. The current patterns of injustice needs to be acknowledged when determining what is sustainable. This is the because material differences and social privileges relative to others gives rise to a different interpretation of sustainability. South Africa must adopt a system (its own system) that strive for social justice in the determination of sustainable development.

## **Bibliography**

Brundtland et al (1987), *Our Common Future*, World Commission on Environment and Development (The Brundtland Report), Oxford University Press.

Freeth R “Just Facilitating: Talking about Race, Privilege and Sustainability” available at <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjA6oP0z->

[LUAhUSOsAKHf6dDRoQFggI0MAA&url=http%3A%2F%2Fwww.sustainabilityinstitute.net%2Fresearch%2Fresearch](http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjA6oP0z-LUAhUSOsAKHf6dDRoQFggI0MAA&url=http%3A%2F%2Fwww.sustainabilityinstitute.net%2Fresearch%2Fresearch)

Gallop GC *Impoverishment and Sustainable Development: A Systems Approach* International Institute for Sustainable Development (Winnipeg Canada 1994).

Gallop et al “Science for the 21<sup>st</sup> century: From Social Contracts to the Scientific Core” (2001) *Int Journal Social Sciences* 168 211

Kates et al *Sustainability Science* (2001) *Science* 292 645.

Marcusse P “Sustainability not enough” *Environmental and urbanisation* 1998 Vol 10 No 2 105.

Munasinghe M and J McNeely. *Protected Area: Linking Conservation and Sustainable Development*. Economics and Policy, World Conservation Union (IUCM) and World Bank, (Geneva and Washington, DC, 1995).

Scott D “Sustainable development and Social Justice: Conflicting urgencies and the search for common ground in urban and regional planning” 2013 *Michigan Journal of Sustainability* Vol 1 76.

Sen A *The idea of Justice* (London:Penguin Group 2009).

Smith A “The role of Labour, Business and Government” a paper presented at a Conference on Labour Law in Transition, 4 August 2015 available at <https://www.lexisnexis.co.za/pdf/Labour-Law-in-Transition-A-Smith.pdf>

United Nations (1992): *Earth Summit: Agenda 21; Rio Declaration; Conference on Environment and Development (UNCED)*, Rio de Janeiro, Brazil.

World Summit on Sustainable Development (WSSD), Johannesburg 2002. Political Declaration and Plan of Implementation.

## **Legislation**

Labour Relations Amendment Act 6 of 2014.

DRAFT ONLY – PLEASE DO NOT CITE OR DISTRIBUTE WITHOUT AUTHOR’S  
PERMISSION

Basic Conditions of Employment Act 75 of 1997.