AMENDMENTS TO LABOUR RELATIONS ACT ('LRA')

A number of changes to LRA's provisions on collective bargaining are currently pending. Some of the key ones are outlined below:

1. **Organisational rights**

   The LRA currently makes provision for certain organisational rights to be granted to trade unions that are sufficiently represented in the workplace and additional organisational rights to those who have majority representation.

   Currently the LRA makes provision for trade unions who have sufficient representation to be granted basic organisation rights which includes access to the workplace (s12), deduction of trade union subscriptions or levies (s13) and leave for trade union activities (s15). Only trade unions who represent the majority of the employees in the workplace are entitled to the additional organisational rights, i.e. election of trade union representatives (s14) and disclosure of information (s16). The proposed amendments to s 21 of the LRA will adjust the circumstances under which a Commissioner who is determining a dispute may grant organisational rights. In determining the representivity of a trade union in the workplace, the Commissioner would be required to consider not only the employer's own permanent, temporary and part-time employees but also employees of a temporary employment service (TES) working for it.

   In terms of the amendments, the right to trade representatives in the workplace and disclosure of information may be granted to a trade union (or two or more trade unions acting jointly) who do not represent the majority of employees, but are sufficiently representative to be given the rights referred to in s12, 13 and 15 of the LRA and is the 'most representative' trade union in the workplace. This option will not be available if there already is a majority union in the workplace; the additional organisational rights will also lapse if another trade union develops majority status. In the event of the trade union being

granted the rights as referred to in s14 and /or s16, these rights would lapse if the trade union/s are no longer the most representative trade union in the workplace.

Section 18 of the Act, which allows an employer to provide exclusive rights to a majority trade union, will also be amended. Currently, the section makes provision for an employer and a registered trade union who represents the majority of the workforce to conclude a collective agreement that establishes a threshold for representativeness in respect of s12, s13 and s15 rights. The amendments now allow a commissioner to grant rights in terms of s12, s13 and s15 to minority unions who would be not be entitled to these rights as a result of the collective agreement, on condition that all parties to the collective agreement have been given the opportunity to participate in the arbitration proceedings and the unions seeking these rights represent a 'significant interest' or substantial amount of employees in the workplace. This provision may take us back to the days of serious and often violent trade union rivalry that were a feature of the 1956 Act, a situation which the current s18 was designed to try and avoid.

Finally, as far as employees of a TES working for a client are concerned, the amendments will now allow a trade union representing those employees to exercise organisational rights on the premises of the client.

2. Bargaining Councils

In an effort to address concerns about the extension of bargaining council to non-parties in an industry s 32 of the LRA will be amended to improve and speed up the process of exemption applications and disputes arising from those. If the Minister is not satisfied that there is an effective dispute process for applications of exemption from non-parties, she may refuse to extend a collective agreement to the non-parties. The amendments make provision for an independent body to hear and decide on exemption applications by no later than 30 days from the date the appeal was lodged.

3. Limiting the right to strike

The amendments to the LRA, if passed in their current form, will put several limitations on the right to strike. As was the case prior to 1996, trade unions may in future only go on strike if they have conducted a ballot with their members in good standing and the majority

of the members who voted, voted in favour of the strike. Further, the trade union would be required to obtain a certificate from the CCMA, a bargaining council or an accredited agency to certify that the requirements for the conduct of a ballot have been met. It is important to note that the requirement to have the dispute conciliated does not fall away and therefore, the dispute must still be unresolved after conciliation for the trade union to embark on a strike and a strike notice still has to be issued.

Currently s 67(8) of the LRA states that the indemnity provisions relating to protected strikes and lockouts are not applicable to any act that is an offence. The amendments have now extended this provision to include an act that is a material breach of a picketing agreement or picketing rules, which means that the union and its members will not be immune from damages claims even if the strike itself is protected. The amendments also make provision for employees to picket on premises which are not owned or controlled by the employer (e.g. in a shopping mall) on condition that the party controlling or owning the premises (the landlord) is given the opportunity to make representations before the CCMA when the picketing rules are drafted. While the amendments make provision for the employees to picket on premises not owned by the employer, it removes the right for union supporters to join a picket.

Where there is a dispute regarding a picket, a party to the dispute (which includes a third party) may approach the Labour Court for urgent interim relief. The Labour Court would have jurisdiction to make an order to either suspend the picket/strike, order a party to comply with the picketing rules and/or agreement or amend/vary the picketing agreement/rules. The Labour Court can however only make such an order if 48 hours' notice of the application seeking an order to direct a party to comply with a picketing rule or to vary the terms of a picketing rule has been given to the respondent or the respondent has been given 72 hours' notice of the application to suspend a strike or lock-out. The Labour Court may permit notice periods less than the 48 hours or 72 hours as prescribed by the LRA, if the applicant has informed the respondent in writing of its intention to apply for an order or the respondent was given reasonable opportunity to be heard before the decision is taken or the applicant has shown good cause for a shorter period.

4. Essential services:

Following the chaotic public sector strike a few years ago when many employees in essential services went on strike, the amendments to the LRA will change the composition of the Essential Services Committee (ESC) to ensure its independence and to give it more teeth to determine and monitor essential services.

The powers and functions of the ESC includes:

- monitoring the implementation and observance of essential service determinations, minimum service agreements and minimum service determinations;
- promotion of effective dispute resolution within essential services;
- development of guidelines for the negotiation of minimum service agreements;
- deciding, on its own initiative or at the reasonable request of any interested party, whether to institute investigations as to whether or not the whole or a part of his service is an essential service;
- management of its case load; and
- appointment of panels to exercise certain powers (see below).

For each matter referred to the ESC, the ESC must appoint a panel to deal with that matter. The panel must consist of 3 or 5 persons, which would include the assessor/s. The panel must be presided over by the chairperson or deputy chairperson of the ESC or a suitably trained senior CCMA commissioner.

The powers and functions of a panel include:

- investigating whether the whole or any part of a service is an essential service;
- determining whether to designate the whole or part of a service as an essential service;
- determining disputes as to whether the whole or any part of any service falls within the scope of a designated essential service;
- determining whether or not the whole or part of any service is a maintenance service;
- ratifying collective agreements that provides for the maintenance of minimum services in a service designated as an essential service; and
- determining minimum services required to be maintained in a service that is designated as an essential service.

The amendments also extend essential services to include ’public officials exercising authority in the name of the state’, which will include customs officials, immigration officers, judicial officers and officials working in the administration of justice.

Section 72 provides that, when making a determination that a service is an essential service the panel may direct the parties to negotiate a minimum services agreement within a specific period. If the agreement is not negotiated within the period specified by an order, either party may refer a dispute to mediation. Should mediation fail, a panel will determine the minimum services that are required to be maintained in that essential service.

5. Conclusion

While the proposed limitations on the right to strike must be welcomed, the proposals relaxing representivity requirements are a cause for concern: those who have experience of the pre-1996 labour dispensation will recall the problems created on the shop floor by multi-unionism and inter-union rivalry. It is to be hoped that commissioners will approach their responsibility to decide whether or not to award organisational rights with due regard to that history.

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Robyn Walasan
Maserumule Consulting