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Corporate Employment Law

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COLLECTIVE BARGAINING, INDUSTRIAL ACTION & PICKETING: AMENDMENTS TO THE LRA, THE DRAFT CODE & THE ACCORD

Discussions took place at the National Economic Development and Labour Advisory Council ("NEDLAC") in 2016, the broad objectives of which were to strengthen collective bargaining, to facilitate proactive and speedy resolution of industrial disputes and to enhance labour market stability. The Labour Relations Amendment Bill, 2017 ("the Bill"), which addresses these concerns to some extent, was published in late 2017 and will be discussed in parliament shortly. The proposed amendments to the Labour Relations Act, 1995 as amended ("the LRA") are likely to be signed into law in early 2018. A further result of the NEDLAC negotiations is the Draft Code of Good Practice: Collective Bargaining, Industrial Action and Picketing ("the Draft Code"), which has been published for discussion and comment. NEDLAC constituencies signed an Accord on Collective Bargaining and Industrial Action ("the Accord") in February 2017, which should be read together with the Draft Code.

Below we discuss the most important of the proposed amendments to the LRA in so far as they relate to matters of collective bargaining, industrial action and picketing and we consider the content of the Draft Code and the Accord.

1. Proposed amendments to the LRA concerning collective bargaining, industrial action and picketing

1.1. Advisory arbitration panel and awards

The LRA makes provision for "advisory arbitration". In the Memorandum of Objects on the Bill, we are advised that the amendments to the LRA which concern advisory arbitration have been proposed in order to endeavor to resolve strikes and lockouts that are difficult to control or deal with, that are violent or that may cause a local or national crisis. The proposal by employers that legislation be enacted to address the issues of violent and lengthy strikes was a matter of great contention at NEDLAC and it culminated in the parties agreeing that these provisions concerning advisory arbitration be introduced. Sections 150A, 150B, 150C and 150D have been inserted into the LRA and provide, respectively, for the appointment of an advisory arbitration panel in the public interest, for the composition thereof and for an advisory arbitration award

made by the panel and the effect of an award. Parts of these sections have been poorly drafted, making interpretation difficult.

In terms of section 150A(1), (2) and (3) of the amended LRA, where the earlier of the issuing of a certificate of non-resolution or notice of commencement of the strike or lockout has taken place, the director of the CCMA can appoint a panel to make an advisory arbitration award in order to "*facilitate a dispute*". It is important to note that the appointment of a panel does not interrupt or suspend the right of employees to strike or employers to conduct a lockout. The director can appoint a panel of his own accord, on application by a party to the dispute, where the Minister directs him to do so, where the Labour Court orders him to do so or where the parties agree thereto.

Where the Minister directs the appointment of a panel or a party to the dispute has applied for a panel to be appointed, the director may only appoint an advisory arbitration panel where he has reasonable grounds to believe that one of three sets of facts exist:

- The first of these is that the strike or lockout is no longer functional to collective bargaining, because it has continued for a protracted period of time and no resolution appears imminent;
- The second is that there is an imminent threat that constitutional rights may be violated through the threat or use of violence or the threat of, or damage to, property; and
- The third is that the industrial action "*causes or has the imminent potential to cause or exacerbate an acute national or local crisis affecting the conditions for the normal social and economic functioning of the community or society*";

The Labour Court may only order the establishment of a panel on application, where the threat of an infringement of constitutional rights is imminent or where there is a local or national economic and social threat, as set out in the second and third sets of facts above. A person or association who will be materially affected by these circumstances can apply to the Labour Court for a panel to be appointed, including persons and groups who are not parties to the dispute, for example community members.

The amendments provide that a panel must consist of a senior commissioner of the CCMA, who functions as the chairperson, and two assessors, with one being appointed by the employer and the other being appointed by the trade union. The substantial merits of the dispute must be dealt with a minimum of legal formalities and an award must be issued within seven days of the matter being heard, unless this is extended by the director. The chairperson must issue the award on behalf of the panel, if he or she "*is not able to secure the consensus of both assessors*

in respect of the award" to be issued. It is unclear whether, in terms of this provision, the chairperson will require the agreement of at least one of the assessors.

In terms of the proposed amendments to the LRA, advisory arbitration awards must include a report on factual findings, recommendations for the resolution of the dispute and motivation for why the parties ought to accept the recommendations. The parties have seven days within which they must indicate either their acceptance or rejection of the award, unless this is extended. Where a party rejects the award, this must be motivated. Where either party fails to indicate acceptance or rejection, they are deemed to have accepted it. Within four days of the award being issued, it will be published by the Minister for public dissemination. The parties may request that the panel reconvene in order for the award to be explained or for a settlement of the dispute to be mediated.

The proposed amendments provide that an advisory arbitration award will only be binding on a party to the dispute if one or more of the trade union parties to the dispute have accepted or are deemed to have accepted the award and one or more of the employer organisation, and/or presumably employer, parties have accepted or are deemed to have accepted the award. The binding nature of an award on parties is determined in accordance with section 23 of the LRA, as if it were a collective agreement for the purposes of that section and an award may be extended in terms of section 31 of the LRA, where the parties are parties to a bargaining council.

Section 65 of the LRA may have the effect that parties are prohibited from participating in industrial action if they are bound by an advisory arbitration award. As a result, it would seem that, once the proposed amendments come into operation, parties to the dispute, or their members, employees and officials, and any party to whom the award has been extended would be precluded from striking or conducting a lockout where the cause of action is based on the subject matter of the award.

1.2. Picketing

Section 69 of the LRA has been amended in order to prohibit pickets unless there are picketing rules in place, whether through a collective agreement or as determined by a CCMA commissioner. The underlying purpose of the amendments to section 69 is to minimise violence related to pickets and to require unions to take responsibility and ensure that parties' constitutional rights are not infringed through pickets.

The proposed amendments provide that the CCMA is required to attempt to facilitate an agreement on picketing rules between the parties to a strike or lockout and, failing this, that it establish picketing rules at the same time as issuing a certificate of non-resolution in terms of section 64(1)(a), where there is no collective agreement between the parties which regulates picketing. Therefore, picketing rules may form part of the conciliation process. The current position is that the CCMA would become involved where requested to do so by either of the parties. According to Thembinkosi Mkalipi, Chief Director of the Department of Labour responsible for Collective Bargaining, CCMA commissioners would be required to determine picketing rules in accordance with the "*Default Picketing Rules*", which are currently contained in Item 29 of the Draft Code, after having considered the parties' representations. The Default Picketing Rules should be read with section 69 of the LRA. Currently, picketing rules established by a collective agreement are only binding in respect of specific industrial action and the amendments aim to bring about agreements which will be of general application and will, therefore, regulate all strikes and lockouts in the future involving the same parties. There has been an indication that Picketing Regulations may be published sooner rather than later

These amendments, specifically, have been proposed in order to encourage peaceful collective bargaining and to encourage the exhausting of internal processes before parties "take to the streets". Mkalipi stated that "*It is only when collective bargaining cannot be agreed upon that those employees will be allowed to picket*" and, further, "*no picketing rules, no strike. If workers continue to strike without picketing rules, the strike will not be protected, it will not be granted by the CCMA*", giving us an insight into the legislature's thinking.

In terms of the suggested section 69(6B), provision is made for direct application by a registered union to the CCMA on an urgent basis to determine picketing rules, where the union has referred a dispute to the CCMA concerning a unilateral change to terms and conditions of employment and the employer has not complied with section 64(5) of the LRA or where an employer has commenced an unprotected lockout or has given notice of its intention to do so. The proposed amendments also provide for parties' remedies in the event of breaches of picketing rules. Now, the Labour Court can direct compliance with picketing rules, vary the terms of rules or suspend a picket. Section 68 of the LRA, which provides parties with remedies in the case of an unprotected strike or lockout, is extended to be applicable to breaches of picketing agreements and picketing rules.

We will revisit the proposed amendments regarding advisory arbitration and picketing once they have been signed into law by the President and the Code has been issued.

1.3 Ballots for strike or lock-out and duty to keep records

The proposed new section 95(9) of the LRA extends the meaning of "ballot" for a strike or lockout to include any voting by members that is recorded in secret, for the purposes of section 95(5) of the LRA. The legislature has indicated that the purpose of this amendment is "*to provide for new technologies of balloting while at the same time ensuring good governance and secrecy*". Section 99 of the LRA has been amended with the effect that the records which registered unions and employers' organisations must keep now includes the attendance register or any other prescribed record of its meetings and any documentary or electronic record of a ballot as an alternative to ballot papers. Furthermore, the proposed amendments to section 100 of the LRA include the records referred to in section 99 as part of the documents which registered unions and employer's organisations must provide to the Registrar.

2. Draft Code Of Good Practice: Collective Bargaining, Industrial Action And Picketing

The provisions of the Draft Code will become binding, if a code is issued subsequent to the Draft Code, to the extent that they will have to be applied when interpreting the provisions of the LRA. This means that stakeholders' practices and policy concerning industrial action would need to be aligned with the Code and also that arbitrators and judges would need to apply its provisions.

Below is a summary of the objectives of the Draft Code, its most important provisions and how it will be implemented.

2.1. Primary content and objectives of the Draft Code

The Draft Code provides practical guidance on parties' conduct during collective bargaining, the resolution of disputes of mutual interest and the resort to industrial action. A primary theme of the Draft Code is the introduction of measures to address violent industrial action. It intends to induce a behaviour change in the way employees, employers and the police and private security engage with each other during a strike or a lockout. Furthermore, it is aimed at expediting the resolution of industrial disputes and improving the effectiveness of collective bargaining. It is applicable to a wide range of stakeholders and should the Draft Code be implemented, non-compliance with its provisions would have the same effect as non-compliance with any other Code under the LRA would.

2.2. Collective bargaining

The Draft Code sets out eight "fundamental commitments" for "*orderly and constructive collective bargaining and peaceful industrial and protest action*", which trade unions and their members, trade union federations, employers and employers' organisations would be required to adhere to once the Code is issued. The promotion of trust, development of mutual understanding and constructive engagement are encouraged. The Draft Code promotes the use of facilitators during collective bargaining.

Item 7 of the Draft Code sets out the principles of good faith collective bargaining, which is an important and, potentially, controversial provision. These principles include general directives such as the necessity of disclosing all relevant information during negotiations and of responding to all demands in writing. They also include directives for specific stakeholders, such as stating that employers should not prematurely unilaterally alter terms and conditions of employment during the course of negotiations. Disputes concerning good faith bargaining and attempts to enforce it could become a sideshow detrimental to successful negotiations.

2.3. Negotiations

Item 8 of the Draft Code contains the commitment to develop competent negotiators to engage in collective bargaining and provides that training courses should be developed to this end. In the Accord, undertakings are given by the Department of Higher Education and Training, the National Skills Fund (NSF) and the Sector Education and Training Authorities ("SETAs") to facilitate training and make funding available. In terms of the Draft code, training will be developed by the CCMA and appropriately adapted for sectors by the SETAs. Item 9 provides that in preparation for negotiations and to the extent that it is necessary to do so, leaders should conduct proper research into, amongst other things, the state of the economy and the relevant sector, the alleviation of poverty and reduction of wage differentials and inequality and the impact on employment and employee health, safety and welfare. This should be conducted subject to the democratic procedures contained in a collective agreement or in the constitution of a trade union or employers' organisation. Stakeholders should seek the advice of labour market experts, where necessary, and members should be fully informed in respect of the negotiations.

Item 11 provides that the negotiators in a dispute should consider holding a pre-negotiation meeting, in order to set out a timetable for the negotiations, to decide whether or not to use the services of a facilitator, to consider any request regarding the disclosure of information and to sign the "good faith declaration", which is Schedule 1 to the Draft Code.

2.4. Measures to promote employee participation

Item 15 of the Draft Code places an obligation on unions, employers and employers' organisations to take the measures required to promote workplace democracy and dialogue at the workplace and includes guidelines which reflect certain of the provisions of the LRA concerning organisational rights, such as access to the workplace and disclosure of information by the employer.

Item 15 also provides that the parties should promote participation by employees and trade unions in consultative forums, which may be health and safety committees, employment equity structures, skills development forums or related workplace forums and workplace forums as contemplated in sections 80 and 81 of the LRA. In the absence of workplace forums, consultative forums may be established by collective agreement. Consultative forums should not be used to avoid collective bargaining structures and processes and may not be established to compete with unions in a workplace.

3. The Accord on Collective Bargaining and Industrial Action

The Accord states in its Preamble, that it aims to recognise the Constitutional rights of the freedom and security of individuals, the freedom to assemble peacefully and unarmed, the freedom of association, to strike and to engage in collective bargaining, thereby incorporating and affirming the principles stated in the Ekurhuleni Declaration on 4 November 2014. It has been signed by a wide group of stakeholders and contains undertakings given by the signatories. It is noteworthy that stakeholders that are not parties to NEDLAC have been included as signatories.

The primary undertakings given in the Accord include those to abide by the provisions of the Code of Good Practice, to be issued following the Draft Code, to bargain in good faith and to make public statements during the course of negotiations and industrial disputes calling on members to act in compliance with the Code of Good Practice and to conduct themselves peacefully and in a law abiding manner. In Clause 7 of the Accord, all signatory parties commit in the case of violence, intimidation, and the threat of harm to person or property associated with industrial action, to build capacity, expedite processes and assign sufficient and senior staff to the resolution of issues.

SAPS undertakes, in Clause 10, to ensure that it has sufficient capacity to fulfil its functions regarding industrial action and to ensure that its employees involved in monitoring industrial action are trained in public order policing and the contents of the Code of Good Practice. SAPS

undertakes that its presence at the scene of industrial action will be "*minimal and unobtrusive; that its members will refrain from acting in a manner that escalates the conflict and will only use minimum force and make use of non- lethal weapons to prevent or respond to breaches of the Codes*". The private security companies that are party to the Accord give similar undertakings, in Clause 11.

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