



Annexure B:

PROGRESS REPORT ON THE LABOUR LAW REFORM TASK TEAM

The following sections of the Labour Law Reform Act were considered and finalised by the Nedlac Task Team

GENERAL EXPLANATORY NOTE:

_____ = the words underlined in the solid line indicate insertion in the revised Act

[] = the words in the square bracket indicate deletion in the revised Act

1. Section 107, Labour Relations Act 66 of 1995 “Regulation of federations of trade unions or employers’ organisations”

- Change regulation of federations and employer organisations to clarify compliance and enable non-compliant organisations to be removed from the register.
- Anticipated impact: more orderly regulation of labour market institutions.

The revised amendments to s 107 are as follows:

(1A) The registrar must maintain a register of federations of trade unions and federation of employers’ organisations that have complied with the provisions of subsection (1).

(2) (3) **[remain as is]**

(4) The registrar may remove the name of a federation of trade unions or employers’ organisations from the appropriate register if the registrar has issued a written notice requiring the federation of trade unions or employers’ organisation to comply with sub-section (1) within a period of **90 days** of the notice and the federation of trade unions or employers’ organisation has, despite the notice, not complied with those sections.

(5) The registrar may not act in terms of subsection (4) unless the registrar has published a notice in the *Government Gazette* at least 60 days prior to such action —

(a) giving notice of the registrar’s intention to remove the name of the federation of trade unions or federation of employers’ organisations from the register; and

- (b) inviting the federation of trade unions or federation of employers' organisations and any other interested parties to make written representations as to why its name should not be removed from the register.
- (6) When a federation of trade union's or federation of employers' organisation's name is removed from the appropriate register, all the rights it enjoyed as a result of being listed in that register will end.

2. Section 32A, Labour Relations Act 66 of 1995 "Renewal and extension of funding agreements"

LRA S 32A(2)(a) -Bargaining Councils

- Extension of funding agreements of BCs for 36 months.
- Anticipated impact: improve management of BCs.

Draft amendments to S 32A (2): **Annexure A** hereto

- (2) Subject to subsection (3), the Minister may renew a funding agreement for up to **[12] 36** months at the request of any of the parties to a bargaining council if –
 - (a) the funding agreement has expired; or
 - (b) the parties have failed to conclude a collective agreement to renew or replace the funding agreement before 90 days of its expiry; and
 - (c) The minister is satisfied that the failure to renew the funding agreement may undermine collective bargaining at the sectoral level.

LRA S 32A -Bargaining Councils

Include "agreements covering terms and conditions of employment".
The proposal was withdrawn.

LRA S 32(3) – Bargaining Councils

- Minister to be given power to regulate BC exemption procedures.
- Anticipated impact – improve BC processes.

Draft amendments to S 32(3): **Annexure A** hereto

The insertion of subsection (3C) after subsection (3B):

(3C) The Minister may make regulations on -

- (a) the documents that employers are required to submit when applying for an exemption from a bargaining council agreement;
- (b) the period within which bargaining councils must make a decision in respect of an application for an exemption contemplated in subsection 3(dA);
- (c) the period within which the independent body must hear and decide an appeal contemplated in subsection 3(e);

- (d) any other matter that the Minister considers necessary or expedient to regulate applications for, and decisions in respect of, applications from exemptions from a bargaining council agreement and any appeal in respect of such a decision.

Government and Business agreed to the proposed amendment.

Labour disagreed - raised concerns that subsections (3C)(a) – (d) confer broad powers and may lead to potential abuse by the Minister who might be opposed to BCs;

3. Sections 99 and 100, Labour Relations Act 66 of 1995 “Duty to keep records and provide information to the registrar”

LRA S 99(c) and S 100 – Duty to keep records and provide information to the registrar

- Minister’s regulation and delegation powers to be clarified, including the rules re: retention of electronic records of ballots etc.
- Anticipated impact: modernisation and clarification of strike processes and Minister’s powers.

Draft amendments to S 99:

99 Duty to keep records

In addition to the records required by section 98, every registered trade union and every registered employers' organisation must keep -

- (a) a list of its members;
- (b) the attendance register, minutes or any other prescribed record of its meetings, in an original or reproduced form, for a period of three years from the end of the financial year to which they relate; and
- (c) the ballot papers or any documentary or electronic record of the ballot in such form as may be prescribed for a period of three years from the date of every ballot.

3. Section 189A, Labour Relations Act 66 of 1995 “Dismissals based on operational requirements by employers with more than 50 employees”

LRA S 189A (6) – Retrenchment

- Minister’s power to make rules in respect of facilitations to be shifted to the CCMA.
- Anticipated impact: more responsive; consistency with current regulatory architecture and principle of subsidiarity.

Draft amendments to S 189A(6):

- (6) The [**Minister, after consulting NEDLAC and the**] Commission may make **[regulations]** rules relating to -
- (a) the time period, and the variation of time periods, for facilitation;
 - (b) the powers and duties of facilitators;
 - (c) the circumstances in which the Commission may charge a fee for appointing a facilitator and the amount of the fee; and
 - (d) any other matter necessary for the conduct of facilitations.
 - (e) (6A) A rule made in terms of subsection (6) must be published in accordance section 115 (6).

4. Section 65, Labour Relations Act 66 of 1995 “Limitation on right to strike or recourse to lock-out”

Amendment to s 65(1)(d):

- (d) that person is engaged in —
 - (i) a[n] designated essential service unless notice of a strike has been given in compliance with section 72(5);
 - (iA) an agreed or determined minimum service in terms of section 72; or
 - (ii) a maintenance service.

5. Section 70, Labour Relations Act 66 of 1995 “Essential Services Committee”

Amendment to s 70:

The *Minister*, after consulting NEDLAC, must establish an essential services committee **[under the auspices of]** which is to be supported administratively by the Commission in accordance with the provisions of this Act. The essential services committee acts independently when exercising its powers and performing its functions.

6. Section 71, Labour Relations Act 66 of 1995 “Designating a service as an essential service”

Amendment (or part deletion) of s71(9), as follows:

A panel appointed by the essential service committee may vary or cancel the designation of the whole or part of a service as an essential service **[or any determination of a minimum service or ratification of a minimum service agreement]**, by following the provisions set out in sub-sections (1) to (8), read with the changes required by the context.

7. Section 72, Labour Relations Act 66 of 1995 “Minimum Services”

Amendment of s72(3) + deletion of s72(3)(b):

- (3) If a panel appointed by the essential services committee ratifies a collective agreement that provides for the **[maintenance]** provision of minimum services in a service designated as an essential service or if it determines such a minimum service which is binding on the employer and the employees involved in that service-
- (a) the agreed or determined minimum services are to be regarded as an essential service in respect of the employer and its employees; **[and]**
 - (b) **the provisions of section 74 do not apply.]**

Amendment to s72(4):

Subsection (4)

- (4) A minimum service determination –
- (a) is valid until varied or **[revoked]** cancelled by the essential services committee; and
 - (b) may not be varied or **[revoked]** cancelled for a period of 12 months after it has been made.

Amendment of s72(5):

Subsection (5)

[Despite subsections (3) and (4), s] Section 74 does not apply [applies] to a designated essential service in respect of which the essential services committee has ratified a minimum services agreement or has made a determination of minimum services if one or more trade unions that represent the majority of employees employed in the designated essential service have given notice of the intention to strike in accordance with section 64(1) provided that the employees in the designated minimum service are precluded from participating in the strike [voted in a ballot in favour of this].

[Subs. (5) substituted by s. 6 of Act 8/2018 w.e.f. 1 January 2019]

The deletion of s72(6)

Subsection (6)

[Subsection (5) does not apply to a dispute in respect of which a notice of a strike or lock-out has been issued prior to the holding of the ballot.]

The amendment of s 72(7):

Subsection (7)

Despite subsection (4), a panel may vary a determination by ratifying **[a collective]** an agreement concluded between or on behalf of one or more-

- (a) trade unions representing a majority of the employees covered by the determination;
and
- (b) employers employing the majority of the employees covered by the determination.

Amendment of s72(8):

Subsection 8

Any party to negotiations concerning a minimum services agreement may, subject to any applicable **[collective]** agreement, refer a dispute arising from those negotiations to the Commission or a bargaining council having jurisdiction for conciliation and, if an agreement is not concluded, to the essential services committee for determination.

Insertion of a new s72(10):

Subsection 10

A panel contemplated in subsection (3) may, after consultation with the affected parties, vary, rescind or cancel a ratified or determined minimum service.

7. Section 74, Labour Relations Act 66 of 1995 “Disputes in essential services”

The amendment to s 74(1):

- (1) Subject to section **[73(1)]** 72(5), any party to a dispute **[that is precluded from participating in a strike or a lock-out because that party is engaged]** in an essential service may refer the dispute in writing to –
 - (a) a council, if the parties to the dispute fall within the registered scope of that council; or

- (b) the Commission, if no council has jurisdiction.

PROPOSALS SUBMITTED BY THE JUDGE PRESIDENT OF THE LABOUR COURT AND THE LABOUR APPEAL COURT

1. Section 151, Labour Relations Act 66 of 1995 “Establishment and status of Labour Court”

Section 151 (1):

“(1) The Labour Court is hereby established as a court of law and a court of law and equity.”

The social partners rejected the proposal

Labour Courts are both courts of law and equity. Their “court of law” jurisdiction is deciding legal disputes arising from contracts, collective agreements, and legislation. The “equity” jurisdiction is the determination of unfair labour practices and unfair dismissals – all other disputes arising in respect of the LRA are “court of law” disputes. The proposed amendment is not necessary.

2. Section 153, Labour Relations Act 66 of 1995 “Appointment of Judges of the Labour Court”

“(2) The Judge President and the Deputy Judge President of the Labour Court must be judges of the **[Supreme Court]** High Court or the Labour Court; and must have knowledge, experience, and expertise in labour law.”

3. Section 156, Labour Relations Act 66 of 1995 “Area of jurisdiction and seat of Labour Court”

“(1) The Labour Court has jurisdiction **[in all the provinces of]** throughout the Republic.

(2) The **[Minister of Justice, acting on the advice of NEDLAC, must determine the seat]** seats of the Labour Court are in Johannesburg, Cape Town, Durban and Port Elizabeth and such further areas as the Minister of Justice and Correctional Services, on the advice of NEDLAC, may determine.”

“(4) An applicant must launch its application at the seat of the court where the respondent is based.”

4. Section 160, Labour Relations Act 66 of 1995 “Proceedings of Labour Court to be carried on in open court”

“(2) Despite subsection (1), the Labour Court may exclude the members of the general public, or specific persons, or categories of persons from the proceedings in any case where a court of a provincial division of the **[Supreme] High** Court could have done so.”

5. Section 162, Labour Relations Act 66 of 1995 “costs”

(2) When deciding whether or not to order the payment of costs in any matter, the Labour Court may take into account, among other factors –

- (a) whether the matter referred to the Court ought to have been referred to arbitration in terms of **[this Act]** an employment law and, if so, the extra costs incurred in referring the matter to the Court; and
- (b) the conduct of the parties –
 - (i) in proceeding with or defending the matter before the Court; and
 - (ii) during the proceedings before the Court.”

6. Section 167, Labour Relations Act 66 of 1995 “Establishment and status of Labour Appeal Court”

“(2) Other than the Constitutional Court, the Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court **[in respect of the matters within its exclusive jurisdiction]**.”

7. Section 169, Labour Relations Act 66 of 1995 “Appointment of other Judges of Labour Appeal Court”

“Appointment of Judge President, Deputy Judge President, and other judges of Labour Appeal Court

[(1) The President, acting on the advice of NEDLAC and the Judicial Service Commission, after consultation with the Minister of Justice and the Judge President of the Labour Appeal Court, must appoint the judges of the Labour Appeal Court referred to in section 168 (1) (c).

(2) The Minister of Justice, after consultation with the Judge President of the Labour Appeal Court, may appoint one or more judges of the High Court to serve as acting judges of the Labour Appeal Court.]

- (1) The Judge President and the Deputy Judge President of the Labour Court, holding office immediately before the commencement of the amendment to section 168 by the Labour Relations Amendment Act, 2020, must, not later than 30 days after such commencement, inform the Minister of Justice and Correctional Services in writing whether he or she chooses to continue in office as the Judge President and Deputy Judge President of the Labour Appeal Court, as the case may be.
- (2) In the absence of a Judge President as provided for in subsection (1), the President, acting on the advice of NEDLAC and the Judicial Service Commission, provided for in the Constitution of the Republic of South Africa, 1996, in this Part and Part E called the Judicial Service Commission, and after consultation with the Minister of Justice and Correctional Services, may appoint the Judge President of the Labour Appeal Court.
- (3) The President, acting on the advice of NEDLAC and the Judicial Service Commission, after consultation with the Minister of Justice and Correctional Services and the Judge President of the Labour Appeal Court, may in the absence of a Deputy Judge President as provided for in subsection (1), appoint the Deputy Judge President and the judges of the Labour Appeal Court referred to in section of 168(1)(c).
- (4) The Minister of Justice and Correctional Services, after consultation with the Judge President of the Labour Appeal Court, may appoint one or more judges of the High Court or the Labour Court to serve as acting judges of the Labour Appeal Court.”

Proposed Amendments to the Labour Relations Act that are currently being discussed

LRA S 188A – Inquiry by Arbitrator

- Appointment of an arbitrator to hold in house inquiry should not require agreement and related amendments to discourage unnecessary and/or frivolous disputes.
- Anticipated impact – avoids duplication of hearings (internal and external); and consistency with current regulatory architecture and principle of subsidiarity.

Draft amendments to S 188A:

- (1) An employer may[, **with the consent of the *employee* or in accordance with a **collective agreement**,**] request a *council*, an accredited agency or the Commission to appoint an arbitrator to conduct an inquiry into allegations about the conduct or capacity of that *employee*.

- (1A) An employer must request a *council*, an accredited agency or the Commission to appoint an arbitrator to conduct an inquiry into allegations about the conduct or capacity of that *employee* if the *employee*, after having been advised of the allegation, requests the employer in the prescribed manner to make such a request.
- (2) The request must comply with any applicable provision in a collective agreement or contract of employment and must be in the *prescribed* form.
- (3) The *council*, accredited agency or the Commission must appoint an arbitrator on receipt of-
- (a) payment by the employer of the *prescribed* fee; **[and**
 - (b) **the *employee's* written consent to the inquiry.**
- (4) (a) **An *employee* may only consent to an inquiry in terms of this section after the *employee* has been advised of the allegation referred to in subsection (1).**
- (b) **Despite any other provision in *this Act* an *employee* earning more than the amount determined by the *Minister* in terms of section 6 (3) of the *Basic Conditions of Employment Act* at the time, may agree in a contract of employment to the holding of an inquiry in terms of this section]**

The proposed amendments to S 115 + S 188A:

S 115 of the Labour Relations Act 66 of 1995 “Functions of the Commission”:

- (2) The Commission may-...
- (cA) make rules-
- (iv) determining the amount of any fee the Commission may charge under section 147 or the Commission, a Council or an accredited agency may charge under section 188A, and regulating the payment of such a fee in detail;
- (2B) The Commission may make rules dealing with any matter referred to in subsection(2A) in respect of inquiries in terms of section 188A.

S188A:

- (4) An employer may[, **with the consent of the *employee* or in accordance with a collective agreement,**] request a *council*, an accredited agency or the Commission to appoint an arbitrator to conduct an inquiry into allegations about the conduct or capacity of that *employee*.

- (1A) An employer must request a *council*, an accredited agency or the Commission to appoint an arbitrator to conduct an inquiry into allegations about the conduct or capacity of that *employee* if the *employee*, after having been advised of the allegation, requests the employer in the prescribed manner to make such a request.
- (5) The request must comply with any applicable provision in a collective agreement or contract of employment and must be in the *prescribed* form.
- (6) The *council*, accredited agency or the Commission must appoint an arbitrator on receipt of-
- (c) payment by the employer of the *prescribed* fee; **[and**
 - (d) **the *employee's* written consent to the inquiry.**
- (4) (a) **An *employee* may only consent to an inquiry in terms of this section after the *employee* has been advised of the allegation referred to in subsection (1).**
- (b) **Despite any other provision in *this Act* an *employee* earning more than the amount determined by the *Minister* in terms of section 6 (3) of the *Basic Conditions of Employment Act* at the time, may agree in a contract of employment to the holding of an inquiry in terms of this section]**

Section 195, Labour Relations Act 66 of 1995 “Compensation is in addition to any other amount”

LRA S 195 - Remedies

- Limiting employees to either statutory compensation or contractual damages.
- Anticipated impact: avoid forum shopping and duplication of disputes.

The proposed amendments to S 196 (not S 195):

- (1) An employee who has referred a dispute about the fairness of a dismissal in terms of this Chapter may not also bring a claim, arising from the same facts, in respect of the lawfulness of that dismissal.
- (2) An employee who has brought a claim about the lawfulness of a dismissal may not also refer a dispute, arising from the same facts, in respect of the fairness of that dismissal in terms of this Chapter.

LRA – Dismissals

- New provision – High Paid Employees.
- Anticipated impact: less onerous to employers to dismiss high paid senior employees; they are able to protect themselves contractually.

Section 193, Labour Relations Act 66 of 1995 “Remedies for unfair dismissals and unfair labour practice”

The proposed amendments to S 193:

- (2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the *employee* unless –
- (c) it is not reasonably practicable for the employer to reinstate or re-employ the *employee*; or
 - (d) the employee earns more than an amount prescribed by the Minister; or
 - (e) the dismissal is unfair only because the employer did not follow a fair procedure.
- (2A)(a) In the case of employees contemplated in subsection (2)(d), the remedy for unfair dismissal must be determined after consideration of all the relevant circumstances.¹
- (b) Subsection (2)(d) does not apply if the dismissal was automatically unfair.

LRA – Dismissals

- Simplification of procedural fairness.
- Limitation of compensation for procedurally unfair dismissal.
- Anticipated impact: expedite internal procedures; prevent technical disputes over procedure; reduce the caseload of CCMA & BCs over the procedure.

Section 194, Labour Relations Act 66 of 1995 “Limits on compensation” and Section 195, “Compensation is in addition to any other amount”

The proposed amendments to S 194 + S 195:

¹ This is to prevent the interpretation that in the case of high paid employees re-instatement or re-employment is not an option.

S 194:

- (1) The compensation awarded to an *employee* whose *dismissal* is found to be unfair ... must be just and equitable in all the circumstances but may not be more than the equivalent of 12 months' *remuneration* calculated at the employee's rate of *remuneration* on the date of *dismissal*, to a maximum of the amount prescribed in section 193(2)(d).
- (2) ...
- (3) The compensation awarded to an *employee* whose *dismissal* is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' *remuneration* calculated at the employee's rate of *remuneration* on the date of *dismissal*, to a maximum of double the amount prescribed in section 193(2)(d).
- (4) The compensation awarded to an *employee* in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months *remuneration*, to a maximum of the amount prescribed in section 193(2)(d).
- (5)

S 195:

Subject to section 196, [A] an order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.

LRA Dismissals - qualifying period

- Qualifying period – 6 to 12 months for dismissal protection without excluding protection in respect of automatically unfair dismissals.
- Possibly limiting the qualifying period to certain categories of businesses.
- Anticipated impact: reduce risk attached to hiring new employees; encourage employment of new entrants into the labour market.

Section 188, Labour Relations Act 66 of 1995 “other unfair dismissals”

The proposed amendments to S 188:

- (2) Subject to subsection (3), [A] any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance

with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.

(3) Subject to any applicable collective agreement, a fair procedure for the purpose of subsection (2) is one in which the employee has been given an adequate and reasonable opportunity to respond to the reason for dismissal.

(4) Subject to subsection (5), this section does not apply to –

(a) an employee during the first 6 months of employment; and

(b) that employee is less than 30 years of age at the date of commencement of employment.

(5) The qualification period in subsection (4) does not apply to an employee who prior to commencement of employment has been in full time employment with one or more employers for a period of 24 months.

LRA - ULP Definition

- ULP definition to be refined to only include –
- unreasonable periods of suspension;
- unreasonable delays in disciplinary procedure;
- occupational detriment protections linked to the PDA;
- probation and qualifying period abuses.
- Anticipated impact: reduction of ULP litigation; encourage employment of new entrants into the labour market.

Section 186, Labour Relations Act 66 of 1995 “Meaning of dismissal and unfair labour practice”

The proposed amendments to S 186:

(2) “Unfair labour practice” means any unfair act or omission that arises between an employer and an *employee* involving—

[(a) unfair conduct by the employer relating to the promotion², demotion, probation (excluding *disputes* about dismissals for a reason relating to

² See Transitional Provision for retention of “promotion” ULP for one year in public service (including SAPS) and for educators.

probation) or training of an *employee* or relating to the provision of benefits to an *employee*;

- (b) the unfair suspension of an *employee* or any other unfair disciplinary action short of dismissal in respect of an *employee*;
- [(c) a failure or refusal by an employer to reinstate or re-employ a former *employee* in terms of any agreement;]** and
- (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the *employee* having made a protected disclosure defined in that Act.

Section 189, Labour Relations Act 66 of 1995 “Dismissals based on operational requirements”

LRA S189 – Retrenchments

1st - Tightening of S189 and extension of the 120-day period for facilitation in S189A

- Anticipated impact: making retrenchments more difficult.

2nd – Increase in severance pay

- Anticipated impact: improve benefits for retrenched workers.

3rd - Relaxation of S189A for 24 months

- Anticipated impact: reorganisation of the economy, save businesses and jobs.

4th – Urgent exemptions to severance pay provisions to prevent businesses from closing

- Anticipated impact: business continuity for businesses in distress.

Section 198A, Labour Relations Act 66 of 1995 “Application of section 198 to employees earning below earnings threshold”

LRA S 198 A – D – TES

- Deeming provisions for non-standard work to be increased from 3 to 12 months.
- Anticipated impact: increased flexibility for non-standard employment contracts.

S 189 -Code of Good Practice – LRA Provisions – small business

- Code of Good Practice to regulate dismissal of employees of small business. Once enacted, small businesses would be excluded from Section 189
- Anticipated impact: enables and encourages job creation and small business sustainability.