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NEDLAC REPORT ON THE LABOUR LAW AMENDMENT BILLS

1. BACKGROUND

1.1. On 27 July 2000, the Minister of Labour tabled the Labour Relations Amendment Bill, 2000, the Basic Conditions of Employment Amendment Bill, 2000, and the Insolvency Amendment Bill, 2000, at Nedlac.

1.2. The Minister of Labour indicated that the proposed amendments were intended to improve the application of the laws, address unintended consequences and ensure that the labour market regulatory framework was sensitive to the imperative of job creation.

2. PROCESS IN NEDLAC

2.1. The Nedlac parties set up a negotiating committee under the auspices of the Labour Market Chamber and the Management Committee chaired by the Executive Director of Nedlac, to negotiate the proposed amendments. The names of the negotiating committee and the dates on which they and/or the convenors of the negotiating team met are set out in Appendix A.

2.2. At the beginning of the negotiations there was little agreement on any of the issues of significance covered by the amendments.

2.3. At the meeting of 6 October 2000 an impasse was reached and the parties agreed to set up a one-a-side Nedlac contact committee to attempt to break the impasse. The names of the Nedlac contact committee are set out in Appendix A.

2.4. At the same time, a series of bilateral meetings were held between the parties to the negotiations, including between Business and Labour at the Millenium Labour Council (MLC), which considered possible principles for a settlement of some of the issues on which an impasse had been reached.

2.5. The Nedlac contact committee met in December 2000 to attempt to develop a framework for settling the areas of disagreement on the proposed amendments. The contact committee produced an unmandated framework document that set out proposed principles of agreement on the amendments.

2.6. This unmandated document was introduced into the MLC and formed a basis for discussion between the MLC parties between January and May 2001. The MLC produced an in-principle agreement between Business and Labour that was presented to the negotiating committee at Nedlac on 01 June 2001 as the framework of a possible agreement between all three parties, subject to negotiations at Nedlac.

2.7. The parties to the negotiations each nominated one legal drafter to form a legal drafting team. The names of the legal drafters are also set out in Appendix A.

2.8. Negotiation then proceeded on the dates set out in Appendix A. Agreement was reached on most issues and legal text drafted to capture these agreements. In the report below, the areas of agreement and areas of reservation are recorded.

3. OUTCOMES

The parties achieved the following in terms of agreements or noted their reservations on the issues as listed below:

3.1. Amendments to the Labour Relations Act 66 of 1995

3.1.1. Bargaining Councils

Amendments were agreed to in relation to private and public sector bargaining councils to ensure that they service employers and employees better, through improving their efficiency, the information required on their activities in relation to small business, regulatory oversight, expanding the scope of their functions to include provision of services to industries and their coverage of the informal sector.

Amendments in the draft amendment Bill agreed include to:

(a) Increase the **functions of bargaining councils** to include providing support services to industry and extending their scope to include the informal sector (S.28);

(b) Shorten the processes to **vary the scope** of a bargaining council in the event that there are no objections (S29 and 58);

(c) Revise the **powers and functions of designated agents** of bargaining councils (S 33);

(d) Improve the **dispute resolution function** of bargaining councils (S33A);

(e) Enable a more efficient process of and criteria for checking the **representivity** of parties to bargaining councils (S 49 and S32);

(f) Oblige bargaining councils to provide a report to the Registrar of Labour Relations on which basis it can be determined the extent to which the bargaining councils cover **small employers** and take small business interests into account (S54);

(g) Increase the **power of the Registrar** to investigate allegations relating to the administration and functioning of bargaining councils including the funds administered by councils (S 53 and 54).

Policy statement

In addition to the statutory changes set out above, the negotiations covered a policy statement on bargaining councils, and acknowledged to the following:

Bargaining councils are an important part of the collective bargaining arrangements in South Africa, and there is a need to strengthen their functioning. One feature is the number of non-parties to the council. The parties agreed it would be desireable to promote membership of small businesses of employers' associations so that their interests may be represented more effectively in bargaining councils where such bargaining councils have jurisdiction. Membership of such employers' associations would be voluntary.

To this end, the parties identified a number of possible means to achieve the above:

- a political signal by the leadership of government, business and labour to non-party employers that good practice will be developed by bargaining councils to encourage better communication and to achieve the objectives in the above paragraph; and

- an institutional environment within bargaining councils to facilitate the achievement of the above.

3.1.2. Commission for Conciliation, Mediation and Arbitration (CCMA)

The parties agreed that it was desirable to improve the functioning of the CCMA through measures that will, inter alia, simplify CCMA processes, shorten the time taken to process cases and limit the scope for abuse of CCMA resources and processes.

Amendments in the draft amendment Bill include to:

(a) Clarify the **rule-making power of the Governing Body** and give the Minister the power to make regulations in respect of representation at the CCMA and the charging of fees (S.115);

(b) Increase the scope of commissioners to make **cost awards** in the event of abuse of the dispute resolution process (S. 138);

(c) Align the processes relating to **subpoenas** with the rest of the justice system (S,142);

(d) Deem **arbitration awards** to be final and binding and to be capable of being enforced in the same manner as a court order(S,143);

(e) Clarify who can **vary and rescind** an arbitration award or ruling (S. 144);

(f) Give CCMA conciliators the power to **continue to conciliate a dispute** even after a certificate to strike has been issued (S.150);

Reservations

Reservations were recorded by both labour and business in relation to the proposed amendments to Section 115 and 138.

Business and Labour proposed that rules in respect of representation at the CCMA, charging of fees and the criteria

for cost awards by commissioners should be developed in consultation with Nedlac.

The parties agreed that:

- The CCMA Governing Body would receive a new mandate through NEDLAC to settle every dismissal dispute within a set period determined after consultation with the CCMA management, with this mandate accompanied by appropriate measures to ensure achievement thereof and that

The other amendments in relation to the CCMA were agreed.

3.1.3. Labour Court

The parties agreed on measures relating to the status of Labour Court judges and the appointment of acting judges.

It was agreed that:

(a) The LRA should be amended to provide for the **appointment of Labour Court judges simultaneously as judges of the High Court** with the same remuneration and terms and conditions (S153 and S154);

(b) Transitional provisions should be included in relation to the **present Labour Court judges** including that they are able to receive a gratuity the same as other judges in similar situations (Sch. 7);

(c) Discussions should be initiated between the Nedlac parties and the Judge President of the Labour Court in respect of a protocol or similar arrangement or a statutory provision to guide the **appointment process of acting judges**.

(d) The Nedlac parties should interact with the process of the Department of Justice that is designed to **rationalise the court system** to ensure their concerns relating to the Labour Court and the Labour Appeal Court are taken into account in this process.

3.1.4. Unfair dismissals and unfair labour practices (including probation and formal hearings)

Amendments were effected which improve the resolution of disputes in respect of unfair dismissals and unfair labour practices. Amendments were agreed that would have the effect of:

(a) Changing Chapter 8 to cover both unfair dismissals and **unfair labour practices** (S.185, 186);

(b) Introducing an **enquiry** into allegations of an employee's conduct and capacity by a council, accredited agency or the CCMA (S 188);

(c) Aligning the LRA with the **Protected Disclosures Act** (S186, 187);

(d) Clarifying the **date of dismissal** and the **time periods** in which an unfair dismissal and unfair labour practice dispute must be referred (S.191);

(e) Introducing a single seamless (one stop) **con-arb** process for resolution of disputes, in order to simplify and shorten current procedures (S.191);

(f) Amending the Code of Good Practice in respect of dismissal to include a more extensive section on probation. This section provides guidelines as to the time period of probation, employer and employee obligations during probation, the role of an adjudicator and the criteria to be used when determining the fairness of a dismissal in the case of probation. (Sch. 8).

Agreement was not reached on introducing a greater degree of discretion for arbitrators, in the awarding of compensation for procedurally unfair dismissals (S. 194).

Reservations

Labour recorded its reservation on the terms of the compensation to be awarded in the case of an unfair dismissal. It proposed compensation be at the rate of pay that the employee would have been receiving at the time of the award being made, a minimum compensation for unfair dismissals and no ceiling to apply to the compensation awarded.

Labour expressed a reservation with the concept of compatibility in relation to probation.

3.1.5. Retrenchments

The parties agreed to a substantial amendment to the current provisions governing retrenchments and they agreed that saving jobs and limiting retrenchments was desirable.

The parties considered a detailed text from the MLC agreement in respect of proposed amendments to Section 189 that addressed this principle as well as proposed measures to requiring a meaningful process of engagement, clarifying and streamling the process, and spelling out the rights of parties in the event of no agreement being reached. It was agreed that any amendment to this section needed to be constitutional, practicable (implementable) and not lead to increased litigation.

Arising out of the negotiations, the following amendments were made to Section 189 and a new Section 189A was inserted to:

(a) Require the parties facing possible retrenchments to engage in a **meaningful joint consensus seeking process**;

(b) Allow parties, if they agree, to request a **facilitator** from the CCMA;

(c) Change the **onus of proof** in disputes regarding disclosure of information;

(d) Permit **industrial action** by the parties within 60 days of notice of retrenchment or refer a dispute about whether there is a fair reason for the retrenchment to the **Labour Court**;

(e) Allow employers to give 30 days **notice** of retrenchment to individual workers with more than one year's service or **a lesser notice period** for those with less than one year's service after the time periods for meaningful engagement have been exhausted;

(f) Allow workers to refer a complaint about **procedural fairness** to the Labour Court on an expedited basis and

allow the Labour Court to compel an employer to comply with a fair procedure;

(g) Define the **grounds that the Labour Court** can consider when deciding on the substantive fairness of the retrenchment of workers covered by S189A.

Section 189A is only applicable to employers who employ more than 50 employees; and a defined number of retrenchments in any 12-month period depending on the number of employees employed by that employer.

Reservations

Business, although agreeing to the introduction of the principle of a strike cannot agree with S189A as in the current Bill. The areas of concern are fundamental to Business agreeing to the entire section. These are:

- reference to S37(2) should be included in paragraphs 7(a) and 8(b)(I) of S189A;
- the employer should not be limited to a defensive lockout in S189A
- the period of 30 days referred to in S17 (a) of 189A is too long and should be reduced to 21 days.

Labour expressed reservations regarding the operation of the proposed facilitation and proposes that facilitation should be triggered at the request of either an employer or a trade union/employees and that rules on facilitation, including on variation of the periods of facilitation prescribed in the Act, should be concluded in consultation with Nedlac.

3.1.6. Transfers of contracts of employment (Section 197)

The parties agreed that the provisions relating to the transfers of contracts of employment should be redrafted for greater clarity, to ensure adequate protection for worker benefits in the event of transfers, and to reduce possibilities for abuse of the provisions. It was agreed that Section 197 should be amended to provide for:

(a) the **automatic transfer** of the contracts of employment when a business changes hands;

(b) the transfer of **all rights and obligations** as between old employer and employee to new employer and transferred employee, with provisions to protect collective agreements and the rights of employees not covered by collective agreements. In this latter case, an appropriate balance between flexibility and protection of rights was crafted;

(c) the transfer of employees' **pension, provident, retirement or similar funds** upon the transfer of the business provided that the benefits of the new funds are reasonable and equitable;

(d) the new employer to be bound by the **collective agreements and arbitration awards** that bound the old employer;

(e) the old employer to take reasonable steps to ensure that the new employer can meet the **obligations of leave pay, severance pay and other monies owing** to employees.

Similar amendments in respect of section 197A that regulates the transfer of employees of an insolvent company were also agreed.

3.1.7. Independent contractors

The parties recognised that abuse of contractual relationships was occurring on an increasing scale in the labour market including the phenomenon of disguised employment relationships. An amendment to the LRA (S.200A) and BCEA (S.83A) was agreed which:

(a)Creates a **rebuttable presumption** for all employees who earn below a threshold of approximately R90 000 per year (as determined in S6 (3) of the BCEA) as to whether or not an employment relation exists;

(b) Enables Nedlac to issue a **Code of Good Practice** on guidelines in respect to the above; and

(c) Allows parties to approach the CCMA for an **advisory award** as to whether persons involved in the above mentioned arrangements are employees.

3.1.8. Public service amendments

The parties recognised the need for amendments to align the LRA with changes in the regulation of public service councils and changes to laws that govern the public service. The parties agreed amendments which:

(a) Clarify the processes of **designating, establishing, amalgamating and varying the scope of public sector bargaining councils** (S29, 37, 61);

(b) Give the CCMA the power to resolve **jurisdictional disputes** between public sector councils (S.38);

(c) Amend the definition of **public service, workplace and registered scope** in respect of the public service.

Reservations

Labour recorded its reservation in relation to the definition of a workplace in the public service (Section 213) and proposed that workplaces should be defined by the Public Services Co-ordinating Bargaining Council.

3.1.9. Other amendments

The parties agreed to a number of other amendments, some technical and others more substantive that are aimed at improving the application of the law.

Among these that were agreed are:

(a) Giving the Registrar of Labour Relations the power to refuse to register labour organisations that are not **genuine** (S95);

(b) Giving the Registrar greater **oversight** over the effective functioning of bargaining councils (S.53, 54);

(c) Simplifying the processes of **de-registration** of labour organisations and increasing the powers of the Registrar to wind up and de-register defunct organisations (S103, 105, 106);

A further proposal was tabled extending the power of the Labour Court to make an order in the event of an unprocedural strike or lock out to any **conduct in**

contemplation or in furtherance of the strike or lock out (S68);

Reservations

Labour indicated that the amendment to section 68 was receiving careful consideration and it would revert with a position on the amendment the parliamentary process.

3.2. Amendments to the Basic Conditions of Employment Act 75 of 1997

Government's proposed amendments focused on two areas:

- Changing of substantive conditions of employment
- Improving the application and enforcement of the Act

3.2.1. Changing of substantive conditions of employment

The parties agreed amendments which:

(a) Enable employers and trade unions to conclude a collective agreement to extend the weekly limit on permissible **overtime to 15 hours for two months in any 12 month period** (S.10);

(b) Require employers to pay over their **contributions as well as deductions** made from employees' salaries for benefit funds within 7 days of the deduction being made or the contribution becoming due (S.34A);

(c) Reduce the **minimum notice period** to one week during the first six months of employment and provide that a collective agreement may not reduce the notice period below two weeks (S37);

(d) Ensure that workers whose contracts of employment are terminated when their employer is sequestrated or liquidated are entitled to **severance pay** (S.41).

Reservations

Reservations were expressed in relation to the following amendments:

(i) Payment for work on Sundays

Labour did not agree to an amendment that would remove the premium on work on Sundays.

Labour expressed a serious reservation to the proposal that the premium be removed for work performed on a Sunday, for the following reasons:

- the compromise reached in 1997 during negotiations on the BCEA had a clear trade-off that organised labour drop a general opposition to Sunday work in return for the retention of a premium for Sunday work;
- the argument of constitutional problems with a Sunday premium was facile since the premium was based on the social inconvenience of work on a Sunday;
- the architecture of the Act recognises that work at socially inconvenient times (e.g. night work) should carry a premium.

Labour further noted that the test of an unintended consequence did not apply to the 1997 amendments, since a premium similar to the current premium had been in the old Act. Labour supported the formulation agreed to at the MLC on Sunday work that proposes to vary the premium in respect of certain businesses, but would not support the removal of the premium.

Business advised that it can accept the proposal as set out by Government although this did not form part of the MLC text as tabled at the negotiations.

Business should decide how they formulate their reservation.

(ii) Power of the Minister to vary the 45 hour week

The Bill provides for an amendment, which would enable the Minister, through a ministerial or sectoral determination, to increase the ordinary hours of work above 45 if the resultant working time arrangements are more favourable, and in the following circumstances:

- where there is a collective agreement;
- where it is necessitated by the operational circumstances of the sector; or

- in respect of the agricultural or private security sectors.

Labour expressed strong opposition to the formulation in the Bill. Labour agreed that provision should be made to vary hours of work in an industry such as the maritime industry (and after substantial negotiations labour was prepared to accept that this list be expanded to include agriculture and private security) provided that the resultant package of hours and leave are more favourable to employees and that the variation carried the support of the representative trade union/s, but it was opposed to hours of work (a core right in the BCEA) being capable of being increased above 45 hours for every other sector or workplace. It was further opposed to:

- the wide remit of the formulation, 'the resultant working arrangements', (which may permit, for example, a normal working week in excess of 45 hours simply in turn for double overtime pay);
- the provision that **any** collective agreement may vary hours of work (which would permit progress to a 40 hour working week to be seriously undermined in every sector of the economy, even in sectors where it is practicable to retain the current 45 hour week and decrease it over time to 40 hours a week;
- the abuse possible through reference to 'operational circumstances of the sector' (a formulation likely to be used by every sector of the economy as a justification to move away from the 45 hour week);
- the absence of a provision that agreement by a representative trade union was required for any variation on hours of work, albeit variation on the more limited basis as set out in labour's submission;
- the inclusion of agriculture and private security in the provision unless the concerns of labour were adequately addressed.

Business expressed a reservation with reference to the determination only being able to be made where the conditions "are on the whole more favourable". Business proposes that the conditions should not be "less favourable than those applicable in the BCEA". This reservation must also be read together with the reference to section 50 and section 55(6)(d). Business also proposes that a variation

should be possible in any industry and restricted to specific industries.

(iii) Civil and criminal liability of company executives
Business and Labour proposed that directors of companies should be held criminally and civilly liable if they do not pay over their and employee contributions to benefit funds and the affected workers are thereby prejudiced as a result.

Government argued that remedies already exist in criminal law and other legislation.

There was no agreement in this regard.

3.2.2. Improving the application and enforcement of the Act

The parties agreed to amendments which:

(a) Clarify the definitions of **'day' and 'daily'** (S 8);

(b) Remove the **daily limit on overtime** while continuing to ensure that employees are not permitted to work more than 12 hours in one day (S10);

(c) Give the Minister the power, after consultation with Nedlac to determine what kinds of payment should be included or excluded from the calculation of remuneration (S35);

(d) Introduce alternate delegates from organised business and labour to the Employment Conditions Commission (S60);

(e) Improve the enforcement mechanisms in the Act (S69, 70, 73, 74 and 77A)

(f) Broadens the scope of Codes of Good Practice to all employment laws (S87);

(g) Deem wage determinations to be sectoral determinations (Sch. 3)

3.3. Amendments to statutes regarding Insolvency

At present the Insolvency Act does not cover all instances of insolvency. Aspects of insolvency are dealt with in several different statutes.

The parties agreed that the statutory arrangements currently covering insolvency should be audited against the following principles:

- timeous notification of possible liquidation and notice of applications for liquidations, should be given to trade unions;
- [courts should be satisfied that there are no viable alternatives to liquidation that would keep a business as a going concern and save jobs;]
- workers' contracts of employment should not be terminated simply by the act of provisional liquidation, and severance and other payments due should be recovered from the insolvent estate;
- worker and employer contributions to workers' benefit funds (pension, provident or medical funds) should be managed in such a way that workers are not prejudiced in the event of insolvency, and;
- the risk to workers in the event of insolvency is inequitable and this risk should be alleviated or shifted.
- The constituencies agree that abuse of insolvency should be curbed. Labour and Business are of the view that provision should be made for the court to examine whether there are viable alternatives to liquidation that would keep a business as a going concern and save jobs.

The parties agreed to address certain of the above areas through amendments to be introduced in current sitting of parliament, and these are set out in 3.3.1 and 3.3.2 below

3.3.1 Amendments proposed to the LRA and BCEA

The following amendments were agreed to the LRA and BCEA that address the problems of workers facing insolvency:

(a) Requiring that employers **notify trade unions or employees** of circumstances and legal proceedings that may result in insolvency (LRA, S.197B);

(b) Requiring employers to pay over their **contributions as well as deductions** made from employees' salaries for

benefit funds within 7 days of the deduction being made or the contribution becoming due (BCEA, S.34A);

(c) Ensure that workers whose contracts of employment are terminated when their employer is sequestrated or liquidated are entitled to **severance pay** (BCEA, S.41);

3.3.2. Amendments proposed to the Insolvency Act

The following amendments were agreed for inclusion in the Insolvency Amendment Bill:

(a) Obliging a petitioner to give **notice** of a provisional liquidation to a trade union or employee (S 4 and 9);

(b) **Suspending** (as opposed to terminating) the contract of employment of an employee in the case of an insolvency (S. 38);

(c) Providing for a process of **consultation** with trade unions that may be able to assist in saving a company facing insolvency (S. 38).

3.3.3. Further amendments

The parties noted the current process b y the Department of Justice to undertake a comprehensive review of insolvency legislation with the intention of producing an all-encompassing Insolvency Act. The parties therefore agreed that the remainder of the issues listed previously should be taken up as amendments to be addressed in the proposed comprehensive Insolvency Amendment Bill.

Labour noted a reservation that should the process of finalising the comprehensive Act be delayed beyond 2002, it would reconsider support for the process and may seek to have the matter dealt with more immediately in Nedlac.

3.4. Labour market institutions

The parties agreed that institutional performance is critical to the successful performance of the labour market and accordingly agreed to institute, through Nedlac, a review of the performance of a range of labour market institutions.

The parties further agreed to have social dialogue on their different positions regarding Workplace Forums.

4. CONCLUSION

4.1. The negotiation on amendments to the three statutes has been completed with a significant contribution to the final outcome by all three parties involved As is evident from the above, a very high level of agreement was reached on a wide range of difficult and complex amendments. The fact that substantive agreement was reached demonstrates yet again the value of social partnership. It also bodes well for the subsequent processes of implementation of the legislation.

4.2. This report therefore completes consideration of the Amendment Bills in Nedlac and the report and the Amendment Bills are hereby submitted to the Minister of Labour in terms of section 8 of the Nedlac Act, No. 35 of 1994.

APPENDIX A

Labour Law Amendments Negotiating Committee

Government
R. Ramashia
L. Kettledas (Convenor)
L. Seftel
T. Mkhaliphi
T. Cronje

Labour
E. Patel (Convenor)
T. Ehrenreich
B. Mthombeni
J. Maqhekeni
C. Milani
K. Moleme

Business
V.van Vuuren (Convenor)
F. Barker
F. Ernst
E. Strydom
G. Mathewson
T. Cohen

Contact committee

R. Ramashia - Government
V. van Vuuren - Business
E. Patel - Labour

Legal drafters

P. Benjamin - nominated by Government.
A. Roskam - nominated by Labour.
A. van Niekerk - nominated by Business.

Dates on which the negotiating committee met

14 September 2000
06 October 2000

01 June 2001
12 June 2001
19 June 2001
27-28 June 2001
08-09 July 2001
29 July 2001

Further dates on which the Convenors met

13 July 2001
01 August 2001
03 August 2001