DLA CLIFFE DEKKER HOFMEYR

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EMPLOYMENT MATTERS: SPECIAL EDITION

CABINET APPROVAL OF LABOUR LEGISLATION AMENDMENTS PUTS PRESSURE ON BUSINESSES TO PREPARE FOR CHANGE

On 22 March 2012, the Cabinet approved the Labour Relations Amendment Bill and the Basic Conditions of Employment Amendment Bill. The bills will now go to Parliament, which will conduct public hearings on their content.

This Cabinet approval paves the way for the amendments to the suite of labour legislation soon to be passed into law. Companies can no longer delay considering the impact of these amendments on their businesses.

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Minimum services agreement – Who has the power?

A minimum service agreement (MSA) may be entered into between the employer and employees within the essential service, where terms and conditions will be agreed on to provide that some employees continue to work and provide a minimum service while other employees can strike. These terms and conditions are to be determined with a view to ensuring that the basic needs of the population are met during a strike in the industry, an interruption which would be as prejudicial to the public as to justify a total ban on strikes. The function of the MSA is to relax the effects of the designation made by the Essential Services Committee (ESC).

A controversy arose as to whether the Commission for Conciliation, Mediation and Arbitration (CCMA) may adjudicate a dispute regarding the failure to conclude a minimum services agreement.

On 30 November 2011, the Supreme Court of Appeal (SCA) was confronted with the issue in *Eskom Holdings Ltd v National Union of Mineworkers and Others (2011) 32 ILJ 2904 (SCA)*. An employer and a union in an industry, designated as an essential service in terms of s71 of the Labour Relations Act, No 66 of 1996 (LRA), cannot agree on a MSA as contemplated by s72 of the LRA and, thus, are "in dispute". Can an aggrieved union refer the dispute over the terms of a MSA to the CCMA for compulsory interest arbitration, under s74 of the LRA, and obtain an award setting out a MSA and submit the award to the ESC for ratification in terms of s72 of the LRA?

Writing for the SCA, Leach JA held that in an industry where employees' right to strike has been curtailed as a result of its employer operating in an industry that is designated as an essential service, failure by the employer and employee to reach an agreement on the terms and conditions of a MSA does not oblige employees to "lump it", but rather that the ESC must be approached for determination thereof in terms of s73 of the LRA.

continued

The proposed amendment to the LRA bridges the thinking between the Labour Appeal Court (LAC) and the SCA. In *Eskom v NUMSA*, the LAC held that if the parties could not conclude a minimum services agreement, the CCMA has the power to adjudicate that dispute. The SCA held that this power is held by the ESC.

The proposed amendment states that the ESC has the power to order the parties to negotiate a MSA within a specified period. If the parties are unable to conclude an agreement, either party may refer the matter to the CCMA for mediation. If mediation fails the parties are required to refer it to the ESC for determination. It is apparent from this that the legislature has built a bridge between the reasoning of the LAC and the SCA.

Aadil Patel and Nicolette du Sart

Transfer of a business as a going concern

The media briefing by the Minister of Labour on the proposed amendments quite correctly states that the amendments "*... are now very different to the bills published in December 2010.*" This observation applies particularly to s197 of the LRA, which regulates a transfer of a business or a service (or part thereof) as a going concern.

The 2010 proposal was to substitute the phrase "*... transfer of a business* **by** *one employer ...*" with the phrase "*transfer of a business* **from** *one employer ...*" to ensure that the so-called second generation outsourcing falls within the application of s197.

The 2010 proposed amendment was necessitated by conflicting interpretations in the Labour Court (Court) as to what the effect of a cancellation of an outsourcing agreement is on those employees engaged in the business or rendering the service, when a new service provider is appointed to replace the old service provider.

The litigation about the interpretation and application of s197 culminated in a judgment of the Constitutional Court in *Aviation Union of South Africa and Another v South African Airways (Pty) Limited and Others case number CCT08/11*, handed down on 24 November 2011.

The Constitutional Court held that the test formulated in *National Education Health and Allied Workers Union v University of Cape Town and Others (2002) 306 LAC* must be applied to the facts pertaining to a termination of an outsourcing agreement when a new service provider is appointed.

The court in *Harsco Metals SA (Pty) Limited and Another v ArcelorMittal SA Limited and Others case J2923/11* dated 29 December 2011, gave effect to the Constitutional Court judgment. In applying the *NEHAWU* test, the court was swayed by the value of assets taken over from Harsco and the number of offers of employment made to Harsco employees by the new service provider and decided that s197 applied and that a transfer from Harsco to the new service provider occurred.

The Honourable Minister has clearly been persuaded that in view of the Constitutional Court judgment there is no need to propose any changes to s197. The proposed amendment in the 2010 proposals has now fallen by the wayside and s197 will remain on the statute book in its current form.

Faan Coetzee

Is there still scope for fixed term contracts of employment under the Labour Relations Amendment Bill?

The proposed new s198B provides additional protection against dismissal for all employees employed on fixed term contracts. The new section applies only to employees who earn on or below the threshold prescribed in terms of the Basic Conditions of Employment Act, No 75 of 1997 which is currently R172,000 per annum.

The section does not apply to:

- employees who are employed in terms of a statute, sectoral determination or collective agreement that permits the conclusion of a fixed term contract;
- employers that employ less than 10 employees;
- an employer that employs less than 50 employees and whose business has been in operation for less than two years.

continued

The latter two exclusions do not apply if the employer conducts more than one business or the business was formed by the division or dissolution for any reason of an existing business.

An employer is permitted to employ an employee on a fixed term contract or successive fixed term contracts for up to six months. An employee may be employed on a fixed term contract for a longer period if the nature of the work for which the employee is engaged is of a limited or definite duration, or the employer can demonstrate any other justifiable reason for fixing the term of the contract.

The section sets out a non-exhaustive list of 10 justifiable reasons for appointing a fixed term employee. An employee to whom the section applies who is employed for a period longer than six months is deemed to be employed for an indefinite period unless the nature of the work is of a limited or definite duration, or the employer can demonstrate any other justifiable reason for fixing the term of the contract.

An employer who employs an employee on a fixed term contract or who renews or extends a fixed term contract must do so in writing and must state the reason that justifies the fixed-term nature of the employment contract.

An employer bears an onus to prove in any relevant proceedings that there is a justifiable reason for fixing the term of the contract and that the term was agreed. An employee employed on a fixed-term contract for more than six months must be treated, on the whole, not less favourably than an employee on an indefinite contract performing the same or similar work, unless there is a justifiable reason for treating the employee differently.

If a fixed term of longer than 24 months can be justified, the employer must, on expiry of the contract, pay the employee one week's remuneration for each completed year of the contract. The employer is not obliged to make this payment if, prior to the expiry of the fixed-term contract, it offers the employee employment or procures employment for the employee with a different employer no later than 30 days after expiry of the contract and on the same or similar terms.

Melanie Hart

The Labour Relations Amendment Bill and its impact on review applications

The proposed amendments to s145 of the Labour Relations Act, No 66 of 1996 aim to reduce the number of review applications that are instituted by employers simply to frustrate compliance with unfavourable arbitration awards and to speed up the finalisation of review applications.

Presently, a review application does not suspend the operation of an arbitration award. This often results in an interlocutory application to stay the enforcement of awards pending the final determination of the review application. The amendment proposes that the operation of an arbitration award be suspended if security equivalent to the amount of compensation awarded, alternatively 24 month's remuneration in the case of an order for reinstatement, is provided.

The amendments require applicants to apply for a date for the hearing of a review application within six months of commencing proceedings. The Labour Court may, on good cause shown, condone a late application for a date. Judgments in review applications must be handed down within six weeks unless there are exceptional circumstances.

Another subsection clarifies the legal position with regard to the interruption of prescription of the arbitration awards by providing that a review application interrupts the running of prescription in terms of the Prescription Act No 68 of 1969.

Finally, an amendment to s158 provides that it is only in exceptional circumstances that the Labour Court may deal with review applications against decisions or rulings (such as jurisdictional rulings) handed down by the Commission for Conciliation, Mediation and Arbitration, before the matter has been finalised. Such amendment seeks to limit the use of piecemeal review applications launched during arbitration proceedings.

Melanie Hart

Granting minority trade unions majority rights

The proposed amendments to s21 of the Labour Relations Act, No 66 of 1995 (LRA) bring about two fundamental changes in determining whether or not a registered trade union is '*a representative trade union*', which materially affects the granting of the rights contained in s12 to s16 of the LRA.

First, the amendments demand that a Commissioner takes into account employees that fall into '*categories of non-standard employment*' such as temporary employment services or fixed termed contracts in determining whether a trade union is a '*representative trade union*.' Following on from this consideration, the amendments allow trade unions that represent employees of temporary employment services to exercise their rights '*in either the workplace of the temporary employment service or one or more of the clients of the temporary employment service*.'

Intrinsically linked to this first change to s21, is the second focus of the amendments, which is to regulate the rights given to minority interest trade unions. The two changes are linked in that the employees of '*non-standard employment*' will be taken into account in determining whether a trade union is entitled to the rights as found in s12 to s16 of the LRA.

Perhaps the most important change brought about by the amendments is the conferral of rights in terms of s14 and s16 to minority unions, which have in the past been given exclusively to majority unions. In addition, the amendments allow, if certain conditions are met, for a trade union that does not meet a threshold established by a collective agreement in terms of s18, to nevertheless be granted rights in terms of s12, s13 or s15 of the LRA.

To the benefit of minority trade unions, the amendments serve to circumvent the traditional representivity restrictions associated with s14, s16 and s18 of the LRA. Slight reprisal is given by the internal limitations created in the amendments as a theme of exclusivity runs through the granting of such rights. In other words, the rights may only be granted in circumstances where no other trade union is entitled to the same rights.

Johan Botes

Variation and rescission of arbitration awards and rulings

Commissioners at the Commission for Conciliation, Mediation and Arbitration (CCMA) have no inherent powers, nor does the CCMA have inherent jurisdiction (unlike the High Court, for instance). The CCMA and its commissioners derive its jurisdiction and their powers from the Labour Relations Act, No 66 of 1995 (LRA). Among others, this means that once commissioners hand down their awards or rulings, they have fulfilled their function (legally speaking, they become *functus officio*). They may not then withdraw or alter their awards or rulings as they no longer have the power to do so.

However, in terms of s144 of the LRA, any commissioner who has issued an arbitration award or ruling may vary or rescind an arbitration award or ruling on three grounds, as follows:

- where it was erroneously sought or erroneously made in the absence of any party affected by that award;
- where there is ambiguity or an obvious error or omission;
- granted as a result of a mistake common to the parties to the proceedings.

The Labour Relations Amendment Bill 2012 seeks to amend the LRA, specifically s144, by introducing "good cause" as a ground on which a party may seek the rescission or variation of the arbitration award or ruling.

"Good cause" has been imputed as a ground for rescission or variation in terms of s144 by the courts.

continued

In *Shoprite Checkers (Pty) Ltd v CCMA (2007) 28 ILJ 2246 (LAC)*, the Labour Appeal Court (Court) found that the element of "good cause" should be read into s144 in order to afford a litigant the opportunity to be heard.

The court found that there are circumstances which can be envisaged, which fall outside the circumstances referred to in s144 of the LRA. As a matter of justice and fairness, where good cause is shown, the applicant should be afforded relief. The court found that if one was to hold that s144 does not allow for the rescission of an arbitration award in circumstances where good cause is shown and that an applicant was compelled to bring the application within the limited circumstances allowed by the wording of s144, it could lead to unfairness and injustice. This was inconsistent with the spirit and the primary object of the LRA.

Since the *Shoprite Checkers* case, the test for good cause in an application for rescission normally involves the consideration of at least two factors, being:

- the explanation for the default; and
- whether the applicant has a prima facie defence.

The amendment to s144 accepts this view and creates a statutory right to rescission or variation of an arbitration award or ruling where good cause is shown.

Sherisa Rajah

Ballot before a strike

Balloting requirements were contained in the repealed Labour Relations Act, 28 of 1956, (1956 LRA), but these requirements were not retained in the Labour Relations Act, No 66 of 1995 (current LRA). The proposed amendment of s64, re-introduces the requirement of a union to conduct a ballot before commencing with a strike.

This means that in order for a strike or lock-out to be protected, the trade union or employers' organisation must conduct a ballot of its members in good standing who are entitled to *strike* or *lock-out* in respect of the issue in dispute and a majority of the members of that trade union or employers' organisation who voted in that ballot, must have voted in favour of the industrial action.

This proposed amendment aims to prevent an industrial action taking place in the circumstances where it does not enjoy majority support. The purpose is to quell violence and intimidation against non- strikers.

This amendment seeks to "democratise" the procedure to be followed leading up to the industrial action. At present, minority members of a trade union or an employers' organisation are able, stage industrial action regardless of the will of the majority, by simply complying with the requirements of the current s64. This amendment seeks to change this state of affairs.

Further limitations on the right to strike

The current LRA limits the right to strike if the issue in dispute is one that a party has the right to refer to arbitration before the Commission for Conciliation, Mediation and Arbitration (CCMA) or bargaining council, or to adjudication before the Labour Court, but only where that right to arbitrate or adjudicate is provided in terms of the current LRA. This statutory limitation will be broadened to include any right to refer the dispute to arbitration or adjudication in terms of any other employment legislation.

CCMA's right to intervene in a mutual interest dispute

The proposed amendment would allow the Director of the CCMA to intervene in a mutual interest dispute, even in circumstances where statutory conciliation has already been attempted. The CCMA could intervene without the consent of the parties. The purpose of such an amendment will give the CCMA the power to intervene in protracted disputes to secure the resolution in the public interest.

continued

Picketing rules

The proposed amendment removes protection against civil liability for damages resulting from a conduct in breach of any picketing rules or agreement. The amendment also envisages regulating picketing in respect of third parties, for example, by making picketing rules binding on third parties such as the landlords of employers, which would have application in the retail industry such as the shopping malls. However, this will only be permitted where the party has consented to the picketing rules or was given an opportunity to be heard before the rules were made. Another important proposed amendment is that the Labour Court would be empowered to order compliance with picketing rules, or to vary them, or to suspend the picket or strike in appropriate circumstances, for example to quell violence. The Labour Court would also be empowered to suspend a lock out or suspend an employer from engaging replacement labour during the industrial action.

Fiona Leppan and Ndumiso Zwane

Temporary employment services

One of the most contentious issues in the Labour Relations Amendment Bill, 2012 is that of Labour Brokers Temporary Employment Services (TES). What follows is a brief analysis of the changes which have been proposed by the Amendment Bill.

The Amendment Bill proposed the amendment of s22 of the Labour Relation Act, 66 of 1995, as amended (the LRA). Section 22 of the LRA deals with disputes about organisational rights. Previously, employees with TES could not take advantage of organisational rights in the client of the TES. Section 22 now provides that any arbitration award made in determining disputes about organisational rights also extends to employees of TES to the extent that it is applicable. Awards also extend to the client of the TES to the extent that it is applicable as long as the client is given an opportunity to participate in the arbitration proceedings.

The extension of organisational rights to temporary employment workers does not end there. The representative of a party to a Bargaining Council in the context of disputes about extension of collective agreements to non parties has also been affected. When determining whether a party to a Bargaining Council is sufficiently representated for the purposes of extension, the Minister may also take into account the composition of the work force including the extent to which employees are assigned to work by TES.

The debate on whether to ban labour brokers or not has settled on stauncher regulation rather than banning, as a solution to the issues. The first notable change is in the definition of a temporary employment service. Previously, a TES was a person who rendered services to or performed work for a client. The amendment seeks to remove the words "rendered service to" and then simplify the definition to a person who "for reward procures for or provides to a client other persons who perform work for that client."

One of the principle objections to TES was that they protected the client from the compliance with the LRA. The amendments have sought to significantly curtail such protection. Previously, a TES and a client were jointly and severally liable if the TES contravened a collective agreement, a binding arbitration award or the provisions of the Basic Conditions of the Employment Act.

Section 198(4) of the LRA has remained intact. However, if a client of a TES is indeed jointly and severally liable in terms of this section then the amendment allows an employee to institute proceedings against the TES, the client or both in their own right.

TES offices are no longer allowed to operate unless they are registered in terms of any applicable legislation in force.

Section 198 of the LRA no longer applies to employees earning an excess of the prescribed threshold in the Basic Conditions of Employment Act. This means that employees earning above R172,000 per annum are not covered by s198. This extends to all provisions of s198 including the determination of the employer. The amendment deals with this gap by providing that the TES will be the employer where the employee is genuinely performing "temporary services" as defined.

Temporary services means work for a client by an employee for a period not exceeding six months; as a substitute for an employee who is absent or in a category determined by a collective agreement. If an employee provides work for a client, which work does not fall into these categories, then he is deemed to be an employee of that client.

Mabasa Sibanda

Labour Relations Amendment Bill, 2010

A number of the proposed amendments in the latest version of the Labour Relations Amendment Bill, 2010 (the Amendment Bill) will directly impact on the powers of the Governing Body of the Commission for Conciliation, Mediation and Arbitration (CCMA) with regard to its rule-making ability.

As a point of departure, the Governing Body will be required to consider the adequacy of its rules at least every two years. This appears to be an attempt to ensure that the CCMA rules are kept abreast with the latest procedural challenges it may face.

The Amendment Bill also seeks to reaffirm the CCMA's right to regulate the right of appearance at conciliations and arbitrations with the proposed amendments placing emphasis on the CCMA's right to limit such representation. The Explanatory Memorandum on the Amendment Bill states that, by introducing this amendment, the Department of Labour seeks to give the CCMA the discretion of whether to allow or prohibit representation at its proceedings, depending on the complexity of the matter.

Of significance to employers and employees alike, is the proposed change to s143 which regulates the effect of arbitration awards.

The proposed amendment to s143(1) elevates an arbitration award to a position where it may be enforced as if it were an order of the Labour Court in respect of which a writ of execution has been issued.

The Department of Labour suggests that this amendment will assist with the enforcement of arbitration awards by removing the protracted process involved in having a writ issued by the Labour Court in order to pursue the execution of an award. It is questionable whether this proposed amendment will achieve this objective, given that, employees currently complain about delays experienced in attempting to enforce an arbitration award when applying to the CCMA to have the award certified.

Another noteworthy amendment to the effect of arbitration awards is that, in terms of the newly inserted section 143(5), an arbitration award in terms of which a party is required to pay an amount of money must be treated as if it were an order granted by the Magistrate's court for the purpose of enforcing or executing such award. Consequently, if the amount of compensation awarded falls within the current jurisdiction of the Magistrate's court (currently R100 000.00), the Magistrate's court tariff will apply to the costs associated with execution of the award as opposed to those of the Labour Court or High Court, which are much higher. Such lower tariffs are conducive to the speedier resolutions of matters in that it will assist indigent employees and others in a similarly vulnerable position in the execution of the awards.

The Amendment Bill also seeks to expedite the resolution of disputes pertaining to the non-compliance of the provisions of an arbitration award. In the case of failure to comply with a certified award that orders the performance of an act (other than the payment of a sum of money), the aggrieved party may enforce such award by way of contempt proceedings instituted in the Labour Court. Such contempt proceedings may be instituted without a further order being obtained.

In effect, this proposed amendment does away with the need to apply to the Labour Court in an instance where the unsuccessful party defaults in the performance of the terms of the award. The proposed amendments provide for a writ to be issued immediately without instituting proceedings in the Labour Court.

Evident from the above, the theme of the amendments to the CCMA rules in founded on the objective of creating speedier and more cost effective means of resolving employment disputes at this level. Only time will tell if the proposed amendments will have the desired effect in practice.

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