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FINAL NEDLAC REPORT ON THE LABOUR LAW REFORM PROCESS

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1. PROCESS AT NEDLAC

1.1. In 2021, Business and Organised Labour tabled proposals for labour law reform. In March 2022, Government also tabled proposals, some of which responded to those of Business and Labour. These proposals covered amendments to:

1.1.1. The Labour Relations Act ("LRA") and associated Codes of Good Practice ("COGP");

1.1.2. Basic Conditions of Employment Act ("BCEA");

1.1.3. National Minimum Wage Act ("NMW"); and

1.1.4. Employment Equity Act ("EEA").

1.2. The social partners variously articulated that labour law reform needs to:

- Respond to changes in the labour market and the nature of work;
- Provide an enabling environment to support job creation and the sustainability of small and medium businesses;
- Respond to identified bottlenecks in existing systems;
- Broaden access to collective organisation and bargaining in response to an increasingly large group of unprotected workers;
- Respond to rights and protection appropriate to the changing nature of work and an increasingly large group of unprotected workers; and
- Improve efficiencies of labour market institutions such as the CCMA and bargaining councils.

The Labour Market Chamber established a Labour Law Reforms Task Team comprising Organised Labour, Organised Business and Government to discuss their proposals and develop proposed legislative amendments and recommendations on the way forward, where required.

1.3. The process ran from April 2022 until October 2024. The report below sets out the amendments in the order in which they were negotiated. During the process, the parties tabled additional proposals.

1.4. To support the process, Nedlac secured the services of a facilitator, two legal drafters and technical support for Organised Labour and Business. A technical team, made up of the two legal drafters and the technical support, was also agreed upon, and they met from time to time to consider technical drafting issues. The names of these resources are included in Annexure A.

1.5. 28 meetings were held. Action points, as captured by the Nedlac secretariat or decision matrixes from the meetings, will be made available in a SharePoint folder. A list of all meetings held is attached as Annexure B.

1.6. The discussions on each of the issues listed are recorded in this report, including the details of the proposer, the nature or substance of the proposals and the outcome of the discussions between the parties. Which party proposed, agreed or disagreed with the final proposals is also set out.

1.7. Attached are the following Amendment Bills where amendments agreed to by two or more parties are reflected:

- Annexure C: Labour Relations Amendment Bill, 2024
- Annexure D: Basic Conditions Amendment Bill, 2024
- Annexure E: Employment Equity Amendment Bill, 2024
- Annexure F: National Minimum Wage Amendment Bill, 2024.

2. LABOUR COURT

2.1. The erstwhile Judge President of the Labour Court and the Labour Appeal Court, Judge B Waglay ("the JP"), submitted twenty-three proposed amendments

2.2. The core proposal from the JP was for the institutional separation of the Labour Court from the Labour Appeal Court, with separate Judge President and Deputy Judge President posts for each court. Related and consequential proposals dealing with the operation of the courts accompanied this proposal. After much deliberation, all of the parties rejected the core proposal for institutional separation because they were not convinced that the separation of the courts would achieve a more fluid or efficient court process or address the problems, such as back-logs, which are resulting in lengthy delays in the handling of cases in the Labour Court.

2.3. The parties accepted the JP's proposed amendments to the following sections of the LRA:

- section 153(2)(a) enabling the appointment of judges of the Labour Court to be appointed as Judge President or Deputy Judge President;
- section 156(1)(2) clarifying the area of jurisdiction and seats of the Labour Court;
- section 160(2) replacing references to Supreme Court with High Court;
- sub-sections 162(2) and (2)(a) referring to expanding the discretion of the Labour Court to rule on costs;
- section 167(2) clarifying that the Labour Appeal Court is the final court of appeal in all matters within its jurisdiction, subject to the Constitutional Court;

- section 169(2) allowing the appointment of Labour Court judges as acting judges of the Labour Appeal Court;
- section 170(3A) in respect of tenure, remuneration and terms and conditions of appointment of Labour Appeal Court judges; and
- Sub-sections 179(1) and (2) expand the discretion of the Labour Appeal Court to rule on costs.

2.4. The following proposals from the JP were rejected for the following reasons:

2.4.1. Proposed amendments to sections 158(1) and 167(1) aimed at recording that the Labour Court and the Labour Appeal Court were courts of law and equity were rejected because the parties were of the view that the amendments were unnecessary in the light of how the LRA had been interpreted;

2.4.2. A proposed amendment to section 158(1)(i) aimed at empowering the Labour Court to award damages (without limiting it to matters contemplated in the LRA) was rejected because the proposal would have the unintended consequence of giving the Labour Court an unfettered delictual jurisdiction;

2.4.3. A proposed deletion of section 168(3) which provided that "*no judge of the Labour Appeal Court may sit in the hearing of an appeal against a judgment*, *or an order given in a case that was heard before that judge"*, was rejected because the parties were of the view that it should be retained, particularly as it is envisaged that

Labour Court judges would be entitled to act in the Labour Appeal Court; and

2.5. A proposed amendment to section 162(1) aimed at giving the Labour Court the power to order costs on the same basis as the High Court was rejected, but a modified version which will provide the Labour Court with a broader discretion when determining costs was agreed for both the Labour Court and Labour Appeal Court.

Agreed: Business, Labour, Government

Amendments are in clauses 25 to 33 of the LRA Amendment Bill.

3. ESSENTIAL SERVICES

3.1. The Essential Services Committee ("ESC") made proposals tabled by Government, which developed into amendments of sections 65; 70; 71(9); 72(2)(a) 72(3) - (8); 72(10) and 74(1) of the LRA, all of which were accepted, some with modifications.

3.2. The proposed amendments aim to clarify the ESC's relationship to the CCMA, promote the conclusion of minimum services agreements, improve the regulation of disputes in essential services with minimum services agreements, and amend provisions that have had a negative impact on the ESC's operation.

Agreed: Business, Labour, Government

Amendments are in clauses 5 and 7 to 10 of the LRA Amendment Bill.

4. BARGAINING COUNCILS, COLLECTIVE AGREEMENTS AND POWERS OF THE REGISTRAR OF LABOUR RELATIONS

4.1. Government made the following proposals, which were agreed to:

4.1.1. amendments to section 26(15)(a) and section 95(9), and the insertion of section 26(15A) of the LRA to require representative trade unions to conduct a secret ballot, as contemplated by section 95(9), of the employees covered by a closed shop agreement, for the purposes of determining whether that agreement should be terminated and providing that if three years have elapsed since the commencement of the agreement or the last ballot was conducted, the agreement will lapse;

4.1.2. an amendment to sections 32A(2); (2)(b) and (c) to enable the Minister of Employment and Labour ("the Minister") to renew funding agreements concluded by bargaining councils for up to thirty-six months;

4.1.3. an amendment to section 99 to allow the Minister to make regulations concerning the retention of records required of trade unions and employers' organisations in the case of strike and lock-out ballots;

4.1.4. The insertion of section 106(4) to enable the Minister, after consultation with Nedlac, to publish guidelines to be applied by the registrar when exercising the powers in terms of sub-section (2A) to initiate a legal process to cancel the registration of a trade union or employers' organisation;

4.1.5. The amendment of section 107 to enable the Registrar of Labour Relations to regulate federations of trade unions and employers' organisations;

4.1.6. The amendment of sections 53 and 98 to permit trade unions, employers' organisations and bargaining councils to maintain their financial records in accordance with the financial reporting standards prescribed under the Companies Act 2008.

Agreed: Business, Labour, Government

Amendments are in clauses 1,2 - 4 and 12-16 of the LRA Amendment Bill.

5. DISMISSAL

Limitation of remedies for high-paid employees

5.1. The government proposed that the ability of high-paid employees to refer unfair dismissal cases should be restricted because these cases often led to lengthy disputes and overwhelm the CCMA. Business supported the proposal on the basis that Nedlac had agreed to such a restriction in the 2012 Labour Relations Amendment Bill. Labour opposed this It was ultimately agreed that –

5.1.1. a new section 193(2A) be inserted providing that high-paid employees should only be entitled to reinstatement in cases of automatically unfair dismissal and in other dismissals, should be restricted to compensation as a remedy;

5.1.2. sub-sections 194(1) and (4) be amended so that the compensation that could be paid to high-paid employees in unfair dismissal and

unfair labour practices cases would be capped, although this would not apply to automatically unfair dismissals and unfair labour practices involving whistleblowing;

5.1.3. the high earnings threshold would be based on an amount of R 1 800 000 per annum for the period from May 2024 to April 2025 and would be adjusted annually on 1 May in line with the Statistics SA consumer price index (CPI). This is achieved by inserting a new section 208B and a transitional provision in Schedule 7. In terms of the transitional provision, the notice that the Minister issues when the Amendment Act comes into effect must include an adjustment for the change in the CPI in the intervening period.

Agreed: Business, Labour, Government

Amendments are in 43 and 46 of the LRA Amendment Bill.

Test for procedural fairness and qualifying period for full protection against unfair dismissal

5.2. Government proposed –

5.2.1. the insertion of a new section 188(3) which specified that the test for a fair dismissal is that the employee must have had a fair and reasonable opportunity to respond to the reason for the dismissal. This does not apply to retrenchments and is consistent with the Dismissal Code agreed to by the parties for publication; and

5.2.2. a new section 188(2) specifying that there should be a six-month qualifying period during which new employees would have limited protection against unfair dismissal and only be able to bring claims

involving an automatically unfair dismissal or discrimination. It argued that this would encourage hiring new employees, particularly young employees without a work history.

5.3. Business supported the proposal and initially suggested that it be for twelve months. After extensive discussion, Business agreed with Government that the relevant period would be six months, and Labour disagreed with the proposal. At the Task Team meeting of 17 October 2024, Government and Labour agreed that the qualifying period should be reduced to the first three months of employment or a longer period of probation provided for in a contract of employment, which was reasonable and operationally justifiable.

Agreed: Labour, Government to a three month period

Disagreed: Business did not agree to the three month period

Amendment is in clause 33 of the LRA Amendment Bill.

Inquiries by arbitrators in dismissal cases

5.4. Government proposed an amendment of section 188A to promote the use of inquiries by arbitrators to reduce the pressure on the CCMA. Business supported this, but Labour opposed the proposals on the following basis:

5.4.1. That the consent of an employee **may be given in a contract of employment** (proposed additional by government and business to 188(A)(1) given that employees are most vulnerable when signing contracts of employment;

5.4.2. That 188A(3)(b) be deleted – which would take out the requirement

for “the employee’s written consent to the inquiry”

5.4.3. That 188A(4)(a) and (b) be deleted – which takes out the requirements that an employee may only consent after being advised of the allegation in subsection (1), and taking out the provision that employees earning above a certain amount my agree in a contract of employment;

5.5. Regarding the use of inquiries by arbitrators without employee consent, The government proposed a revised version of subsection (1) that would include consent to inquiries in all employees' employment contracts. Labour disagreed with this.

5.6. In addition, a provision clarifying the issue of payment in inquiries by arbitrators in whistleblowing cases was agreed and included as a new subsection (13).

Agreed: Business, Government, Labour (subsection 13 only)

Amendments are in clause 36 of the LRA Amendment Bill.

6. RETRENCHMENT PROCESSES, INCLUDING SEVERANCE PAY

Section 189A – large-scale retrenchments

6.1. A number of proposals were made to amend section 189A, which requires that large- scale retrenchments be referred to facilitation by the CCMA before a dismissal can take place.

6.2. Labour made a number of proposals to amend section 189A to make it more difficult to retrench. Proposals included extending the facilitation period from 60

to 120 days to ensure that retrenchment is undertaken as a measure of last resort and increasing severance pay from one to four weeks per year of service.

6.3. Business proposed amending section 189A(7) to empower the facilitator to issue a certificate earlier than the anticipated 60-day facilitation and amending 189(8) of the LRA and section 41 of the BCEA to exclude SMMEs from the provisions of section 189.

6.4. The parties also closely scrutinised the case law on section 189A, including two constitutional court cases that interpreted its operation.[1]

6.5. The following proposals were made –

6.5.1. amend section 189A(6) and the insertion of a new subsection (6A) to enable the CCMA to make rules relating to facilitations held in terms of the section rather than for the Minister to make regulations which is the current position;

6.5.2. amend sub-sections (7)(b)(ii) and (8)(ii)(bb) to clarify that unfair dismissal disputes may be referred to the Labour Court after the conclusion of facilitation without a further referral for conciliation but that conciliation was required where there had been no facilitation. Business opposed the amendment to subsection (7)(b)(ii) on the basis that the recent Labour Appeal Court ruling in *NUMSA v SAA Technical*[2] requires that further conciliation should be applied;

[1] *Regenesys Management (Pty) Ltd t/a R2egenesys v Ilunga and Others* (CCT 220/22) [2024] ZACC 8; 2024 (7) BCLR 901 (CC); [2024] 8 BLLR 777 (CC); (2024) 45 ILJ 1723 (CC); *Steenkamp and Others v Edcon Limited* (CCT29/18) [2019] ZACC 17; 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC).

6.5.3. Labour proposed that employees and trade unions should be able

to challenge the fairness of a procedure of an operational requirements dismissal in an unfair dismissal and not merely in urgent proceedings under section 189A(13) as is presently the case. After extensive discussion, the drafters made a proposal that restored the position that prevailed before the introduction of section 189A, in terms of which a challenge to all aspects of retrenchment dismissal could be made after the dismissal. This amendment was achieved by amendments to sub-sections (7) and (10), the repeal of sub-sections (13) to (18) and the insertion of a new definition of "unfair dismissal" in sub-section (20).

Agreed: Business, Labour, Government (except the amendment to (7)(b)(ii) which was opposed by Business insofar as it provided that no referral to conciliation is required.)

Amendments are in clause 37 of the LRA Amendment Bill.

Statutory severance pay

6.6. Organised Labour proposed that section 41 of the BCEA be amended to increase the minimum statutory severance pay from one weeks' pay per annum. Government accepted an increase to two weeks on the condition that a transitional provision would be inserted explicitly stating that the increase would only apply prospectively, in other words to completed years of service commenced after the commencement of the Amendment Act. Labour agreed to this proposal. but Business rejected any increase to severance pay.

[2] *National Union of Metalworkers of South African obo Members v SAA Technical SOC Ltd* (JA109/23) [2024] ZALAC 41 (10 September 2024).

Agreed: Labour, Government

Disagreed: Business

Amendment is in clause 4 of the BCEA Amendment Bill

7. REVISION OF UNFAIR LABOUR PRACTICE DEFINITION

7.1. Government proposed the deletion of sub-sections 186(2)(a) and (c) to exclude disputes relating to promotion, demotion, probation, training and benefits and a refusal to reinstate or re-employ former employees. The effect would be to limit justiciable unfair labour practices to disputes about unfair suspensions and unfair disciplinary action short of dismissals and protected whistleblowing.

7.2. Labour rejected the proposal, arguing that it eroded workers' rights and that there was no justifiable reason to the proposed amendments. Business agreed to the proposal.

7.3. Government further proposed that a transitional provision be inserted delaying its application to the public service for one year to allow collective agreements dealing with issues such as promotion disputes to be negotiated in the public service bargaining councils. Labour disagreed with this proposal.

Agreed: Business, Government

Disagreed: Labour

Amendments are in clauses 34 and the transitional provisions are in 46 of the LRA Amendment Bill.

8. TEMPORARY EMPLOYMENT SERVICES, FIXED-TERM CONTRACTS AND PART-TIME WORK

8.1. Business made proposals to amend the provisions of sections 198A(1)(a); 198B(3) and 198C(2)(d) to extend the initial period of employment during which these provisions did not apply from three to twelve months. After various discussions Business suggested that the period be six months as envisaged in the 2012 LRA Amendment Bill.

8.2. Government initially agreed to this and Labour did not agree.

8.3. Following a bilateral between Government and Labour on 17 October 2024 Government indicated that it no longer agreed to this proposal. As a result, no amendment is proposed to these sections.

Proposed amendments not supported by Government and Labour.

9. DEMARCATION DISPUTES

9.1. Government proposed to amend section 62(9) by removing the obligation for a Commissioner to consult with Nedlac before making an award in a demarcation dispute, because it is inappropriate for Nedlac to get involved in the process of the determination of disputes, and should instead be engaged in the development of policies relevant to demarcation matters.

9.2. Business agreed to the proposal, but Labour rejected it on the basis that consultation with Nedlac prior to the determination of a demarcation dispute often adds weight to the outcome and that past practice has proven the value of the consultation with Nedlac.

No amendments proposed.

10. SOCIO-ECONOMIC PROTEST ACTION

10.1. Business proposed repealing section 77 of the LRA in its entirety because there is no rationale to maintain this provision as it enables protest action in relation to issues over which business has no control and is being abused by trade unions who rely on certificates years after the fact.

10.2. After much deliberation, Business revised its proposal by proposing an amendment to section 77 to ensure that notices issued in terms of this section prior to calling protest action would only be valid for a specified time period from the date of consideration of the referral. The parties did not accept the Technical Team's proposal to deal with the issue through changes to the Code of Good Practice (COGP) for section 77 referrals.

10.3. Business initially proposed twelve months of validity. After extensive deliberation, Labour and Government agreed to an amendment to the Act to insert a validity period of twenty-four months after the issue had been considered, after which the matter would have to be referred to Nedlac again before there could be any protest action.

Agreed: Labour, Government

Disagreed: Business

Amendment is in clause 11 of the LRA Amendment Bill.

11. CODES OF GOOD PRACTICE (COGP) ON DISMISSAL AND DISMISSAL FOR OPERATIONAL REQUIREMENTS

11.1. Government tabled amended versions of the two above COGPs. These revised

Codes sought to update the Codes in the light of the jurisprudence of the courts, in particular the Labour Appeal Court and the Constitutional Court.

11.2. Business and Labour both tabled detailed proposals to amend the text of the revised Codes, and the Technical Team considered these and tabled revised proposals for the parties' consideration.

11.3. Thereafter, the government requested the Technical Team prepare a code that would apply to small businesses. The government proposed that if a code for small businesses could be adopted, small employers could be exempted from the provisions of section 189 of the LRA. Labour opposed this approach.

11.4. Thereafter, Labour tabled a revised code which applied to all categories of dismissal and which would take greater account of the position of small employers. After extensive revision by the Technical Team and deliberation by the Task Team, the contents of a single code were agreed upon, which would be published for public comment before gazetting as a statutory COGP.

Agreed: Business, Labour, Government

The Code is attached as Annexure G.

12. EXTENDED DEFINITION OF EMPLOYEE

12.1. Labour made initial proposals to amend the definition of employee in all labour legislation to include workers involved in non-standard work who currently fall outside of labour law protection. After much deliberation, the parties agreed that the issues raised by the proposal were more complex than anticipated and that a different approach was warranted in terms of which each statute was

considered separately.

12.2. The legal drafters prepared a detailed memorandum outlining the extent to which the current coverage of labour was not in compliance with the Constitution and international labour standards. In addition, detailed comparative information concerning how other countries, including SADC countries, had dealt with this issue was provided to parties. This was based on a paper commissioned by Nedlac from the Centre for the Transformative Regulation of Work (CENTROW) at the University of the Western Cape.

12.3. Subsequently, the legal drafters proposed a new Schedule 11 to the LRA which effectively extends the rights of freedom of association, organisational and bargaining rights to a broader category of employees than those defined in section 213 of the LRA and specifies how these rights are to be applied.

Schedule 11 was agreed to by Labour and Government but was rejected by Business, who opposed the extension of the Act to other workers.

12.4. The drafters also proposed amendments to the BCEA in new sub-sections 3(4) and (5) that would allow sectoral determinations to cover a wider group of employees. This provision contains the same expanded definition of an employee as is used in the proposed Schedule 11 to the LRA with the result that the Minister would have the power to set basic conditions of employment for this category of employees through sectoral determinations.

12.5. Labour and Government agreed to these proposals but they were rejected by Business.

Agreed: Labour, Government

Disagreed: Business

Amendments are in clause 47 of the LRA Amendment Bill and clause 2 of the BCEA Amendment Bill.

13. "ON CALL" WORKERS

13.1. Labour made proposals to include –

13.1.1. A definition of "on-call employee" with reference to an employee or worker as defined in the National Minimum Wage Act 2018 and who earns less than the threshold determined in terms of section 6(3) of the BCEA; and

13.1.2. A fair rotational system, advance notification of work of at least 48 hours, minimum payment of at least 40 hours a month, and the determination of leave entitlements on an average of hours over three months.

13.2. The proposal was rejected by Business and Government, *inter alia*, because it created confusion about the applicable definition and the current provisions in the BCEA, which contain provisions for seasonal employees. Business emphasised that they were of the view that the issue could be adequately addressed through sectoral determinations for these categories of workers.

13.3. A revised proposal only dealing with employees who are obliged to hold themselves available for work but are not guaranteed work by their employer was proposed as a new section 9B in the BCEA. It was accepted with modifications by Government but rejected by Business.

Agreed: Labour, Government

Disagreed: Business

Amendments are in clause 3 of the BCEA Amendment Bill.

14. INTEREST PAYMENTS ON EMPLOYERS WHO DO NOT COMPLY WITH THEIR OBLIGATIONS

14.1. Labour proposed an amendment to section 32 of the BCEA to impose extensive interest payments on employers who do not comply with their obligations to pay employees timeously for services rendered and to hold those responsible for such obligations personally liable..

14.2. After much deliberation , the view from both Government and Business that the BCEA already provides for enforcement processes, and a commitment from the Government to further capacitate the labour inspectorate and drive enforcement of existing legislation, the proposal was not pursued.

No amendments were proposed

15. DEDUCTIONS FROM REMUNERATION

15.1. Labour proposed amendments to sub-sections 34(2) and (4) of the BCEA to deal with the issue of deductions from remuneration and to reduce the extent of deductions in order to protect employees.

15.2. Both Government and Business rejected the proposal on the basis that the current provisions on deductions are sufficient.

15.3. Government stated that the Reserve Bank was developing proposals on the matter and undertook to get the Reserve Bank to present to the Task Team.

15.4. Given that further engagement would take place on the matter, it was not further pursued in the current proposed amendments.

No amendments were proposed, but a process was agreed to engage on the matter further through the Labour Market Chamber.

16. FAILURE OF EMPLOYERS TO TRANSFER BENEFIT FUNDS PAYMENTS

16.1. Labour proposed the insertion of new subsections 34A (5) and (6) to deal with employers' failure to transfer contributions to relevant benefit funds each month. Labour set out that it was experiencing numerous cases of non-payment, in some cases for years, that were disadvantaging workers and that attempts to remedy the situation under the current legislation had not been successful.

16.2. In the discussion, it was pointed out that a Ministerial notice prevented labour inspectors from relying upon section 34A of the BCEA to assist employees in recovering non-payments to pension and provident funds. In this context, employees were reliant on funds referring claims to the Pension Funds Adjudicator, which was severely under-resourced. Labour also pointed out that the provisions in the BCEA, which allowed for the enforcement of rights in terms of collective agreements and contracts of employment, were inferior to those in the Pension Funds Act.

16.3. It was agreed by the parties that a notice should be published inviting public comment on whether the notice excluding the application of section 34A of the BCEA to pension and provident funds should be withdrawn should be published for public comment.

16.4. Government and Labour tabled –

16.4.1. An amendment to section 62A of the BCEA which clarifies the application of the enforcement provisions of the BCEA to claims related to non-payment of benefit fund contributions;

16.4.2. The insertion of a new section 77B in the BCEA to clarify the powers of the Labour Court, CCMA and bargaining councils when dealing with claims relating to the non-payment of pension or provident fund contributions, including the power to order interest payments at the rate of interest prescribed under the Pension Funds Act.

16.4.3. Business opposed these proposals on the basis that they were already adequately regulated through the Pension Funds Act, which made non- payment a criminal offence, and this would place extra pressure on the case-load of the CCMA.

Agreed: Labour, Government

Disagreed: Business

The amendment is in clauses 5 and 11 of the BCEA Bill.

17. UNFAIR DISCRIMINATION ON OTHER ARBITRARY GROUNDS

17.1. Labour proposed amendments to sections 1, 6 and 11 of the Employment Equity Act (EEA) to include a definition of “arbitrary grounds” to include arbitrary grounds not akin to the listed grounds for the purposes of enabling the referral of claims related to irrational or arbitrary wage differentiations. This would allow for conduct that is not analogous to the listed grounds to be classified as unfair discrimination. It was argued that this change was justified to allow the courts to rule that irrational or arbitrary wage differentiations were discriminatory.

17.2. The proposal was rejected by both Government and Business. Government expressed the view that the issues raised in it were complex and required research and analysis of the relevant jurisprudence in South Africa and internationally to determine whether an amendment was justified. Government proposed that this would be taken forward in the Nedlac Labour Market Chamber. Business disagreed with the proposal that research of this nature would be useful.

No amendments proposed.

18. IMPROVING EFFICIENCY OF CCMA FUNCTIONING AND OTHER DISPUTE RESOLUTION AGENCIES

18.1. Government submitted several proposals after consultation with the CCMA and in light of proposals made in a paper commissioned by Nedlac from CENTROW dealing with inefficiencies within labour market institutions. These proposals covered problems that have arisen in relation to the CCMA's jurisdiction and others aimed at improving its operational efficiency.

18.2. The parties agreed to the following seventeen proposed amendments from Government in the LRA:

18.2.1. **section 69(15) and (16)** - to clarify who may conciliate a dispute about picketing rules and the application of picketing rules provisions to strikes about organisational rights and operational requirements dismissals;

18.2.2. **sections 115, 115(2A) - (2B) and 213** - alignment of CCMA jurisdiction to allow the CCMA to issue rules in order to determine

procedures and forms applicable to CCMA dispute resolution, compliance and enforcement procedures under any employment law. The proposal includes the expansion of the CCMA's initial jurisdiction to include other employment statutes;

18.2.3. **section 115(2) (bB) -** to insert a new subsection to confirm the legal status of the CCMA's role in respect of assisting employees in enforcing awards, including the briefing of sheriffs to enforce awards;

18.2.4. **section 115(2) (cA)(iv) –** to insert a new clause to regulate the charging of fees in inquiries by arbitrators in terms of section 188A;

18.2.5. **section 115(2A)(n)-(q)** – to expand the topics on which the Governing Body may make rules;

18.2.6. **section 115(2B) –** to enable the Commission to apply arbitration rules to inquiries by arbitrators;

18.2.7. **section 115(3)** – to expand the CCMA statutory mandate and functions to cover a wider range of activities, including dispute prevention. Amendments were agreed to subsections (3)(a) and (i) and the insertion of (dA) and (k)- (n);

18.2.8. **sections 117(7) and 125 (1)(b)** - to enable the Governing Body to delegate its functions to terminate a Commissioner's contract in appropriate circumstances;

18.2.9. **sections 126(1) and 209A** - to insert standard limitation of liability clauses, in respect of the CCMA and other statutory agencies

operating in terms of labour legislation, similar to those found in other statutes;

18.2.10. **section 127** - to align council/agency jurisdiction, to permit accreditation of bargaining councils and agencies for functions under all employment laws, particularly in light of the Labour Appeal Court judgment in *Motsomotso v Mogale City Local Municipality* [2016] 11 BLLR 1146 (LAC);

18.2.11. **section 143(5)** - to clarify that arbitration awards for the payment of monies may be treated as if it were an order of the Magistrate's Court or the Labour Court;

18.2.12. **section 159(3)(aA)** – to insert a provision in the LRA, which gives the Rules Board the power to make rules that prioritise effective dispute resolution at the Labour Court and the role of the judge therein;

18.2.13. **section 191(5)(v)** - to provide for the harmonisation of LRA and EEA dispute resolution, in order to enable the CCMA to hear unfair dismissal disputes together with unfair discrimination claims arising from the same issues;

18.2.14. **section 191 (11A) – (11C)** – to enable the CCMA to assume jurisdiction in respect of certain automatically unfair dismissals in relation to employees who earn below the threshold, including those disputes where it emerges that the dismissal was automatically unfair during the course of the hearing of an unfair dismissal dispute;

18.2.15. **section 213** - to amend the definition of “employment law” to take into account several amendments to the LRA, BCEA and EEA;

18.2.16. **section 213** – the insertion of a definition of “interpretation or application” in collective agreements in order to prevent the splitting of interpretation and enforcement disputes. This amendment was made in the light of the implications of the judgment in *HOSPERSA obo Tshambi v Dept of Health, KZN* (2016) 7 BLLR 649 (LAC).

Agreed: Business, Labour, Government

Amendments are in clauses 6, 18-22, 38, 44 and 45 of the LRA Amendment Bill.

18.3. In addition, the government proposed the insertion of a new section 112(4) to allow the CCMA to carry forward any unexpended balance to the following financial year which was agreed to by SPs..

Agreed: Business, Labour, Government

Amendment is in clause 17 of the LRA Amendment Bill

18.4. In addition, the government proposed the insertion of a new section 140A to authorise the CCMA to charge a fee payable by a party that unreasonably causes the postponement of a hearing. Business agreed to this proposal, but Labour opposed it on the basis that postponements should be dealt with on a case-by-case basis. This was agreed to by Business but opposed by Labour.

Agreed: Business, Government

Disagreed: Labour

Amendment is in clause 23 of the LRA Amendment Bill.

Employment Equity Act (EEA)

18.5. The following two proposed amendments to the EEA by the Government were agreed to:

18.5.1. **section 10(6)(a)** - to enable low-paid employees to elect to refer any claim of harassment to the CCMA for arbitration unlike the current position where this only applies to sexual harassment;

18.5.2. **section 52(5)(a) and (b)** - the harmonisation of LRA and EEA dispute resolution to enable accredited bargaining councils to determine disputes under the EEA.

Agreed: Business, Labour, Government

Amendments are in clauses 1-2 of the EEA Amendment Bill.

Basic Conditions of Employment Act

18.6. The following seven proposed amendments to the BCEA by Government were agreed to:

18.6.1. **section 41(6)** - to give the CCMA jurisdiction in respect of all severance pay claims. This amendment was necessitated by a lack of clarity in the jurisprudence[3] as to whether the CCMA could adjudicate claims for severance pay in excess of the statutory entitlement;

[3] There is uncertainty about whether section 41(6) enables employees who have a contractual severance pay dispute (but not an unfair dismissal dispute) in the CCMA. Despite the intention of the BCEA to exclude these claims from the CCMA, there is a labour court decision, *Telkom v CCMA* [2004] 8 BLLR 844 (LC) which holds the contrary view and has been followed in the High Court in *NUMSA v SCAW SA (Pty) Ltd* (2023) 44 ILJ 1807 (GJ).

18.6.2. **section 69(5A), (5B) and (7)** - the insertion of new provisions to enable the CCMA to consider condonation applications in respect of appeals by employers against compliance orders issued by labour inspectors;

18.6.3. **section 73(1A) and (3)** - the insertion of new provisions clarifying the CCMA's powers when adjudicating and determining disputes about compliance orders;

18.6.4. **section 73A(1), (4) and (5)** - to clarify bargaining councils' jurisdiction in respect of enforcement issues in light of the current refusal by some bargaining councils to entertain enforcement disputes, including those about their own collective agreements;

18.6.5. **section 74(2) and deletion of (3)** - to enable an arbitrator to consolidate and jointly determine claims that relate to the same matter but have been referred separately, including claims under different statutes, so as to avoid the splitting of disputes or different aspects of the same dispute having to be referred to different forums;

18.6.6. **section 76A(1); (2) and (5)** - to provide for the clarification of proceedings in which a fine for non-compliance may be imposed;

18.6.7. **section 86(3)** - to enable the Minister to issue regulations specifying the purpose for which fines received by the CCMA or the Department of Employment and Labour may be used.

Agreed: Business, Labour, Government

Amendments are in clauses 4, 6-10 and 12 of the BCEA Amendment Bill.

LRA Regulations

18.7. The parties agreed to the following proposed amendment to LRA Regulations from Government, the details of which appear in the draft amended Regulation l, attached as Annexure H.

18.7.1. **regulation 14** - the publication by the Minister of a new regulation to confirm the legal status of the current practice of conscientious objector funds paid by employees who are covered by agency shops being used to cover the costs of enforcement of awards by the CCMA.

Agreed: Business, Labour, Government

19. MATERNITY AND PATERNITY LEAVE

19.1. Government proposed amendments to the maternity and parental leave provisions in the BCEA and Unemployment Insurance Fund ("UIF") Act in light of the judgment of the High Court in *Van Wyk v Minister of Justice and Correctional Services* [2023] ZAGPPHC 192.

19.2. After deliberation and consideration of the draft amendments, the parties agreed that the proposal should be reconsidered after the Constitutional Court delivers its judgment. The hearing on this matter is scheduled for 1 November 2024 and it is, therefore, anticipated that the Court will rule on the matter in 2025.

No amendments made

20. NATIONAL MINIMUM WAGE ACT - *QUANTUM FOODS* JUDGMENT

20.1. Government raised the issue of the interpretation of the National Minimum

Wage Act, in light of the Labour Appeal Court's judgment in *Quantum Foods (Pty) Ltd v Commissioner Jacobs and others* [2024] 1 BLLR 32 (LAC), in which the court held that deferred payments such contractual bonuses must be taken into account to determine whether an employee's wages exceeded the minimum wage.

20.2. Government proposed amendments to section 4(4) and (5) and section 5(1)(a), to exclude deferred payments from the determination of the minimum wage.

20.3. The proposal was accepted by Labour but rejected by Business because they were of the view that the Act was clear and had intended to include such payments in the determination of the minimum wage.

Agreed: Labour, Government

Disagreed: Business

Amendments are in clauses 1 and 2 of the NMW Amendment Bill.

21. PARTICIPATION IN TRIPARTITE INSTITUTIONS

21.1. Business raised the issue of the Community constituency's participation in labour market institutions and sought its removal.

21.2. It was agreed that the issue of representation on the UIF Board should not be addressed in this process because there is a separate process addressing the restructuring of the UIF, and the problem of representation would be addressed there.

21.3. Government and Business supported a proposal that the Community should not have a representative on the National Minimum Wage Commission.

Agreed: Business, Labour, Government

The amendment is in clause 3 of the NMW Amendment Bill**.**

22. EXCLUSION OF START-UP BUSINESSES FROM BARGAINING COUNCIL AGREEMENTS

Government proposed the insertion of new sub-sections 32(12) and (13) which provide that new employers employing less than 50 employees would be exempt from conditions of employment set by extended bargaining council collective agreements for two years. This would not apply when a section 197 transfer to a new employer or the business was formed out of an existing business. Business supported this proposal.

Labour does not agree to government's proposed blanket exemptions.
This matter was raised very late in the engagements and thus denied Labour the opportunity for thorough internal engagements on the implications of a blanket exemption. Government also refused to engage on various options for modalities presented by Labour on how our concerns could be addressed.

Key issues we had raised for inclusion in drafting included the following options:

- Bargaining Councils should be required to have exemptions; where they do not, the following could be in the law as a default template.
- Directors of start-ups should not have been registered previously for the past two years (to avoid people trying to close and reregister new companies to qualify as new companies).
- Their employees should not have been registered previously for the past two years with the Bargaining Council for the same above reason.
- There needs to be a financial threshold to avoid a wealthy SMME qualifying, e.g. could be an annual turnover figure.
- Exemptions apply to wage agreements for a specified amount, e.g. 10% and not to other collective agreements to avoid making companies who comply with

collective agreements uncompetitive and at risk to non-compliant companies.

- All qualifying companies must register with the Bargaining Council during this period.
- Applications for exemptions should be submitted to the Bargaining Council, and the Bargaining Council should be required to approve them if they meet the set criteria.
- A shorter time frame than 24 months, e.g. 12 months.

Agreed: Business, Government

The amendment is in clause 2 of the LRA Amendment Bill**.**

23. CONCLUSION

This report concludes considerations at Nedlac on the Labour Law Reform Process to amend the Labour Relations Act, Basic Conditions of Employment Act, Employment Equity Act, and National Minimum Wage Act. In terms of Section 8 of the NEDLAC Act No 35 of 1994, the Report is submitted to the Minister of Employment and Labour and the Portfolio Committee on Employment and Labour.

Per the Nedlac Protocol, the Report has been approved by the Business Overall Convenor, Labour Overall Convenor and Government Overall Convenor on behalf of their constituencies. The Community Constituency submitted comments, which are attached as Annexure 7.

List of Annexures

A	Attendance Register
B	Dates of all meetings
C	Draft LRA Amendment Bill
D	Draft BCEA Amendment Bill
E	Draft EEA Amendment Bill
F	Draft NMW Amendment Bill
G	Code of Good Practice on Dismissals
H	Draft regulation 14 in terms of the LRA.
I	Community Constituency Submission

ANNEXURE A: ATTENDANCE REGISTER: LABOUR LAW REFORM TASK TEAM

Government T. Mkalipi N. Mamashela S. Rathai U. Ramabulana M. Lefika H. Mabunda	**Business** K. Moyane J. Goldberg J. de Villiers S. Leyden M. Motlhamme S. Jantjies I. Dwayi A. Ranchod L. Sethusha K. Mathe T. Phasha
Labour M. Mbongwe M. Parks T. van Meelis N. van Rooyen J. Wilimiec Z. Vavi L. Phetuka T. Shaku	**Facilitators** Shamina Gaibie Lisa Seftel **Technical support** Anton Roskam (for organised labour) Chris Todd (for organised business) **Legal drafters** Paul Benjamin Halton Cheadle Obakeng Molemi Amogelang Makuwa Emily Swindale

ANNEXURE B: LIST OF DATES OF TASK TEAM MEETINGS

28 meetings were held

The task team met on the following dates:

- 05 April 2022
- 10 May 2022
- 15 June 2022
- 10 August 2022
- 20 September 2022
- 12 October 2022
- 23 November 2022
- 08 February 2023
- 15 March 2023
- 18 May 2023
- 11 August 2023
- 22 August 2023
- 28 September 2023
- 27 November 2023
- 16 January 2024
- 28 February 2024
- 13 March 2024
- 09 May 2024
- 24 June 2024
- 02 July 2024
- 16 July 2024
- 30 July 2024
- 22 August 2024
- 13 September 2024
- 23 September 2024
- 17 October 2024
- 14 November 2024