

16 APRIL 2010

LABOUR RELATIONS AMENDMENT BILL, 2010

[Words in bold type indicate omissions from existing enactments]

Words underlined indicate insertions in existing enactments

To amend the Labour Relations Act, (Act 66 of 1995) so as to define certain expressions, to align the employment laws to ensure decent work by regulating sub-contracting, contract work and outsourcing, to provide for the prohibition of certain abusive practices to workers, and to repeal section 198.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:

Substitution of section 43 of Act 66 of 1995

- 1 Section 43 of the Labour Relations Act (hereafter referred to as the principal Act) is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) If a statutory council concludes a collective agreement in terms of subsection (1)(d) or in respect of any matter referred to by subsection (2), the provisions of sections 31, 32 and 33 apply, read with the changes required by the context.”

Insertion of section 51 of Act 66 of 1995

- 2 Section 51 of the principal Act is hereby amended by the substitution for subsection (9) of the following subsection:

“(9) A bargaining council may, by collective agreement[,] –

- (a) establish procedures to resolve any dispute contemplated in this section;

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- (b) provide for payment of a dispute resolution levy; and
- (c) provide for the payment of a fee in relation to any conciliation or arbitration proceedings in respect of matters for which the Commission may charge a fee in terms of section 115(2A)(1) and which may not exceed that fee.”

Substitution of section 65 of Act 66 of 1995

- 3 Section 65 of the principal Act is amended by the substitution for paragraph (c) of subsection (1) of the following paragraph:

“(c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law;

Amendment of section 115 of Act 66 of 1995

- 4 Section 115 of the principal Act is hereby amended by –

- (a) the insertion in subsection (1) of the following paragraph:

“(e) review any rules made in terms of this section at least every second year, .”

- (b) the insertion in subsection (2) of the following paragraph:

“(d) if asked, assist a party to serve any notice or document in respect of conciliation or arbitration proceedings in terms of this Act;

“(e) if asked, assist a party to enforce an arbitration award that has been certified in terms of section 143(3);”

- (c) the substitution for paragraph (k) of subsection (2A) of the following paragraph:

“(k) **[the right of any person or category of persons to represent any party]** the representation of parties in any conciliation or arbitration

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proceedings, including the limitation or prohibition of representation in those proceedings;”

(d) the insertion in sub-section (2A) of the following paragraph:

“(m) the consequences for any party to conciliation or arbitration proceedings for not attending those proceedings; and”

(e) re-numbering paragraph (m) of sub-section (2A) as sub-paragraph (n).

(f) the substitution for sub-section (3) of the following sub-section:

“(3) **[If asked,] [t]**The Commission may provide employees, employers, registered trade unions, registered employers’ organisations, federations of trade unions, federations of employers’ organisations or councils with advice or training relating to the primary objects of this Act or any other employment law, including but not limited to –”.

Amendment of section 136 of Act 66 of 1995

5 Section 136 of the principal Act is amended by –

(a) the substitution for subsection (1) of the following subsection:

“(1) If this Act requires a dispute to be resolved through arbitration, the Commission must appoint a commissioner to arbitrate that dispute, if –

(a) a commissioner has issued a certificate stating that the dispute remains unresolved or the 30 day period or any further period agreed between the parties has ended and the dispute remains unresolved;

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(b) within 90 days after the date on which that certificate was issued or the end of the 30 day period or any further period agreed between the parties, whichever is the later, any party to the dispute has requested that the dispute be resolved through arbitration. However, the Commission on good cause shown, may condone a party's non-observance of that timeframe and allow a request for arbitration filed by the party after the expiry of the 90-day period."

6 Section 143 of the principal Act is hereby amended by –

(a) the substitution for subsection (1) of the following subsection:

“(1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, High Court or the Magistrate’s Court, as the case may be, unless it is an advisory arbitration award.”

(b) the insertion after subsection (3) of the following subsection:

“(3A) An arbitration award certified in terms of subsection (3) that orders a party to pay a sum of money has the status of a writ of execution of –

(a) the Magistrate’s Court, to the extent that the award is in respect of an amount within the jurisdiction of the Magistrates Court;

(b) the High Court, to the extent that the award is in respect of a greater amount.”

Substitution of section 144 of Act 66 of 1995

7 The following section is substituted for section 144 of the principal Act:

“144 Variation and rescission of certificates, arbitration awards and rulings

Any commissioner who has issued a certificate in terms of section 135, an arbitration award or ruling or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or,

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on the application of any affected party, vary or rescind an arbitration award or ruling –

- (a) erroneously sought or erroneously made in the absence of any party affected by that award;
- (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; **[or]**
- (c) granted as a result of a mistake common to the parties to the proceedings; or
- (d) if there is good cause on any other ground for the award or ruling to be varied or rescinded.”

Amendment of section 147 of Act 66 of 1995

8 Section 147 of the principal Act is amended by insertion after subsection (6) of the following subsection:

“(6A) Despite sub-section (6), the Commission must appoint a commissioner to resolve the *dispute* in terms of *this Act* if

- (a) the employee is required to pay any part of the cost of the private dispute resolution procedures; or
- (b) the person or body appointed to resolve the dispute is not independent of the employer.”

Substitution of section 150 of Act 66 of 1995

9 The following section is substituted for section 150 of the principal Act:

“**150. Commission may appoint commissioner to conciliate in the public interest**

- (1) The Commission may appoint a commissioner to attempt to resolve a dispute by conciliation whether or not that dispute has been referred to the Commission or a bargaining council –
 - (a) at the request of the parties; or
 - (b) if there is no request, if the Director believes it is in the public interest to do so.

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- (2) Before appointing a conciliator in terms of this section, the Commission must consult with –
 - (a) the parties to the dispute; and
 - (b) the secretary of a bargaining council with jurisdiction over the parties to the dispute.
- (3) The Director may appoint one or more Commissioners to conciliate the dispute, who may include a person who has already conciliated in respect of that dispute.
- (4) In addition, the Director may appoint to assist in conciliating –
 - (a) one person drawn from a list of at least five names submitted by the representatives of organized labour on the governing body of the Commission; and
 - (b) one person drawn from a list of at least five names submitted by the representatives of organised business on the governing body of the Commission.
- (5) Unless the parties agree otherwise, the appointment of a conciliator in terms of subsection (4) does not provide any entitlement to strike or lock-out that any party to the dispute may have acquired in terms of Chapter IV.”

Substitution of section 157 of Act 66 of 1995

10 The following section is substituted for section 157 of the principal Act:

“157. Jurisdiction of Labour Court

- (1) Subject to the Constitution and section 173 of this Act, the Labour Court has exclusive jurisdiction in respect of –
 - (a) a matter that is required to be determined by the Labour Court in terms of this Act or any other employment law;
 - (b) the interpretation or application of any employment law;
 - (c) a dispute concerning the termination of a contract of employment;
 - (d) a constitutional matter arising from labour relations;
 - (e) subject to subsection 145, review any administrative action taken in terms of this Act or any employment law;

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- (f) determine a dispute between a trade union or an employers organisation and a member or applicant for membership of the union or organisation, as the case may be, about an alleged non-compliance with the constitution of the union or organisation or section 25(5)(b); and
- (g) hear and determine any appeal in terms of section 35 of the Occupational Health and Safety Act, 1993 (Act 85 of 1993).
- (2) In addition to its jurisdiction in terms of sub-section (1), the Labour Court has concurrent jurisdiction with the High Court in respect of any matter arising from employment or labour relations that is not within its exclusive jurisdiction.
- (3) If the CCMA or a bargaining council has exclusive jurisdiction in a particular matter, no party may refer such matter to the Labour Court before finalisation by the CCMA or a bargaining council.
- (4) If proceedings concerning any matter contemplated in terms of subsection (1) are instituted in a court or tribunal that does not have jurisdiction in respect of that matter, that court or tribunal may at any stage refer those proceedings to the Labour Court for determination.

Amendment of section 158 of Act 66 of 1995

11 Section 158 of the principal Act is amended by –

- (a) the substitution for paragraph (b) of sub-section (1) of the following paragraph:
- “(b) order compliance with any provision of this Act or any employment law;”
- (b) the deletion of paragraph (e) of sub-section (1):
- “(e) **[determine a dispute between a registered trade union or registered employers’ organisation and any one of the members or applicants for membership thereof, about any alleged non-compliance with-**

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- (i) the constitution of that trade union or employers' organisation (as the case may be);**
 - (ii) section 25(5)(b);]**
- (c) the deletion of paragraph (g) of sub-section (1):
 - “(g) [subject to section 145, review the performance or purported performance of any function provided for in terms of this Act on any grounds that are permissible in law]”;**
- (d) the deletion of paragraph (h) of sub-section (1):
 - “(h) [review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;]”**
- (e) the deletion of paragraph (i) of sub-section (1):
 - “(i) [hear and determine any appeal in terms of section 35 of the Occupational Health and Safety Act, 1993 (Act 85 of 1993);]**
- (f) the insertion after section (1A) of the following subsection –
 - “(1B) No decision may be taken on review in respect of conciliation or arbitration proceedings under the auspices of the Commission or any bargaining council with jurisdiction in respect of a matter contemplated in section 65(1)(c) until the dispute has been determined by the Commission or a bargaining council.”**

Substitution of section 159 of Act 66 of 1995

12 The following section is inserted after section 159(10) of the principal Act:

- “(11) The Judge President must ensure that the Rules Board meets at least once every two years to review the Labour Court Rules.”**

Substitution of section 186 of Act 66 of 1995

13 Section 186 of the principal Act is amended by the substitution for paragraph (b) subsection (1) of the following paragraph:

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- “(b) an employee engaged under a fixed term contract of employment reasonably expected the employer –
- (i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or
- (ii) to offer the employee an indefinite contract of employment on the same or similar terms but the employer offered it on less favourable terms, or did not offer it, where there was reasonable expectation;”

Insertion of section 187A in Act 66 of 1995

- 14 The principal Act is hereby amended by the insertion after section 187 of the following section:

“187A Limitation on application of Chapter VIII

- (1) Except in so far as an automatically unfair dismissal is concerned, the provisions of Chapter VIII listed in subsection (2) do not apply to an employee earning in excess of an amount determined from time to time by the Minister by notice in the Gazette.
- (2) The provisions of Chapter VIII that do not apply to employees contemplated in subsection (1) are: sections 185, 186, 188 and 189, 189A, and 197.

Substitution of section 188A of Act 66 of 1995

- 15 The following section is substituted for section 188A of the principal Act:

188A. [Agreement for pre-dismissal arbitration] Enquiry by arbitrator

- (1) An employer may, with the consent of the employee or in accordance with a collective agreement, request a council, an accredited agency or the Commission to appoint an arbitrator to conduct an [arbitration] enquiry into allegations about the conduct or capacity of that employee.
- (2) The request must be in the prescribed form.
- (3) The council, accredited agency or the Commission must appoint an arbitrator on receipt of –

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- (a) payment by the employer of the prescribed fee; and
 - (b) the employee's written consent to the inquiry.
- (4) (a) An employee may only consent to an **[pre-dismissal arbitration]** inquiry in terms of this section after the employee has been advised of the allegation referred to in subsection (1).
- (b) Despite any other provision in this Act **[subparagraph (a),]** =
- (i) an employee earning more than the amount determined by the Minister in terms of section 6(3) of the *Basic Conditions of Employment Act* at the time, may **[consent]** agree in a contract of employment to the holding of an **[pre-dismissal arbitration]** enquiry in terms of this section in a contract of employment;
 - (ii) a collective agreement may provide for an inquiry to be held in terms of this section.
- (5) In any **[arbitration]** enquiry in terms of this section a party to the dispute may appear in person or be represented only by –
- (a) a co-employee
 - (b) a director or employee, if the party is a juristic person
 - (c) any member, officer bearer or official of that party's registered trade union or registered employers' organisation; or
 - (d) a legal practitioner, by agreement between the parties.
- (6) Section 138, read with the changes required by the context, applies to any arbitration in terms of this section.
- (7) An arbitrator appointed in terms of this section has all the powers conferred on a commissioner by section 142(1)(a) to (e), (2) and (7) to (9), read with the changes required by the context, and any reference in that section to the director for the purpose of this section, must be read as a reference to –
- (a) the secretary of the council, if the arbitration is held under the auspices of the council;
 - (b) the director of the accredited agency, if the arbitration is held under the auspices of an accredited agency.
- (8) The ruling of the arbitrator in an enquiry has the same status as an arbitration award and the provisions of sections 143 to 146

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apply with the changes required by the context to any ruling made by an arbitrator in terms of this section.

- (9) An arbitrator conducting an **[arbitration]** enquiry in terms of this section must, in the light of the evidence presented and by reference to the criteria of fairness in the Act, **[direct]** rule as to what action, if any, **[should]** may be taken against the employee.
- (10) (a) A private agency may only appoint an arbitrator to conduct an **[arbitration]** enquiry in terms of this section if it is accredited for **[this purpose]** arbitration by the Commission.
- (b) A council may only appoint an arbitrator to conduct an **[arbitration]** enquiry in terms of this section in respect of which the employer or the employee is not a party to the council, if the council has been accredited for **[this purpose]** arbitration by the Commission.
- (11) Despite subsection (1), if an employee alleges that the holding of an enquiry contravenes the Protected Disclosures Act, 2000 or that the employer has contravened section 5 of this Act, that employee or the employer may require that an enquiry be conducted by arbitration under this section –
- (a) into allegations by the employer into the conduct or capacity of that employee; or
- (b) in respect of any contemplated dismissal for operational requirements.
- (12) The holding of an enquiry by a arbitrator in terms of this section and the suspension of an employee on full pay pending the outcome of such an enquiry do not constitute an occupational detriment, as contemplated in the Protected Disclosures Act, 2000.”

Substitution of section 191 of Act 66 of 1995

16 Section 191 of the principal Act is hereby amended by –

- (a) the substitution for subsection (5A) of the following subsection:
- “(5A) Despite any other provision in the Act, the *council* or Commission must commence the arbitration immediately after certifying that the *dispute* remains unresolved unless – [if the dispute concerns –

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- (a) the *dismissal* of an *employee* for any reason relating to probation;
- (b) any unfair labour practice relating to probation;
- (c) any other *dispute* contemplated in subsection (5)(a) in respect of which no party has objected to the matter being dealt with in terms of this subsection]
 - (a) the commissioner and the parties agree otherwise;
 - (b) the commissioner concludes that it is unreasonable for the arbitration to commence immediately, after considering –
 - (i) the nature of the questions of law raised by the dispute;
 - (ii) the complexity of the dispute; and
 - (iii) the public interest.”

the substitution for subsection (12) of the following subsection:

- “(12) [If a] An employee [is] dismissed by reason of the employer's *operational requirements* [**following a consultation procedure in terms of section 189 that applied to that employee only, the employee]** may elect to refer the *dispute* either to arbitration or to the Labour Court if –
- (a) the employer followed a consultation procedure that applied to that employee only, irrespective of whether that procedure complied with section 189; or
 - (b) the employer's operational requirements for the dismissal relate to that employee only; or
 - (c) the employer employs less than ten employees.”

Amendment of section 197 of Act 66 of 1995

17 Section 197 of the principal Act is amended by the substitution for paragraph (b) of subsection (1) of the following paragraph:

- “(b) ‘**transfer**’ means the transfer of a business [**by**] from one employer (‘the old employer’) to another employer (‘the new employer’) as a going concern.”

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Repeal of section 198 of Act 66 of 1995

Section 198 of the principal Act is hereby repealed.

Amendment of section 200A of Act 66 of 1995

18 Section 200A of the principal Act is amended by

(a) the substitution for subsection (1) of the following subsection:

- (1) Until the contrary is proved, for the purposes of this Act and any employment law, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

Insertion of a new section after 200A of Act 66 of 1995

19 The principal Act is hereby amended by the insertion after section 200A of the following sections:

“Section 200B Declaring Temporary Employment to be permanent

An employee must be employed indefinitely, unless the employer can establish a justification for employment on a fixed term.”

Insertion of section 203 of Act 66 of 1995

20 Section 203 of the principal Act is hereby amended by the insertion of the following subsections:

“(5) The Minister may table proposals in NEDLAC –

(a) for a code of good practice; or

(b) to change or replace any code of good practice.

(6) If NEDLAC fails to reach consensus on any proposal to change, replace or issue a code of good practice within six months of the

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commencement of consultations, the Minister may publish in the Government Gazette the relevant change, replacement or code of good practice in accordance with the provisions of this section.

(7) A code of good practice issued by the Minister in terms of subsection (6) has the same status as a code of good practice issued by NEDLAC in terms of this section.”

Amendment of section 213 of Act 66 of 1995

21 Section 213 of the principal Act is hereby amended by the:

(a) insertion after the definition of “collective agreement” of the following definition –

“contract of employment’ means –

- (a) a common law contract of employment; or
- (b) any other agreement or arrangement under which an individual agrees to work for an employer but excluding a contract for work as an independent contractor;”

(b) substitution for paragraph (a) of the definition and deletion of paragraph (b) of “employment law” and addition of paragraph (e) of the following paragraph –

“Employment Law” includes this Act, any other Act the administration of which has been assigned to the Minister, and any of the following Acts

(a) The Unemployment Insurance Act, [1966, Act No. 30 of 1966;]
(2001Act No. 63 of 2001)

(b) [**the Skills Development Act, 1998 (Act No. 97 of 1998);**

[c] (b) the Employment Equity Act, 1998 (Act No. 55 of 1998);

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[d] (c) the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993);

[e] (d) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No 130 of 1993)

(e) Basic Condition of Employment Act, 1997 (Act No. 75 of 1997)

(c) Substitution for paragraph (11) of the definition of an “employee”

“Employee” means any person who is employed by or who works for an employer and who receives or is entitled to receive any remuneration and who works under the direction and supervision of an employer.

(d) Insertion of paragraph 12 of the definition of an “employer”

“Employer” means any person, institution or organisation, including government who employs and provides work to an employee, directly supervises, remunerates or tacitly or expressly undertakes to remunerate such employee for services rendered by such employee.

(e) Insertion after the definition of “essential service” of the following definition –

“‘independent contractor’ means a person who works for or supplies services to a client or customer as part of the person’s business, undertaking or professional practice;”

(f) substitution for the definition of “serve” of the following definition –

“serve’ means to send by registered post, telegram, telex, telefax or to deliver by hand and –

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- (a) in respect of the Labour Courts, any other method of service specified in the Rules of the Labour Courts;
- (b) in respect of the Commission, any other method of service specified in the Rules of the Commission;”

Transitional provisions

- 22 Any proceedings instituted in any court or tribunal before the commencement date in respect of which the Labour Court has exclusive jurisdiction must be dealt with as if the principal Act had not been amended by this Act.
- 23 Nothing in subsection (2) precludes a court or tribunal referring any such proceedings to the Labour Court for determination in terms of section 157(4) of the principal Act as amended by this Act.
- 24 Until the Rules Board for Labour Courts in section 159 of the principal Act makes rules concerning the reference of matters from other courts in terms of section 157(4) of the principal Act as amended by this Act, the registrar of the Labour Court must submit a referred matter to a labour court judge in chambers to give a directive as to how the proceedings should be conducted in the Labour Court.
- 25 The Minister will publish a notice in the Government Gazette notifying the public when section 198 will cease to operate.