

REPUBLIC OF SOUTH AFRICA

LABOUR RELATIONS AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 41257 of 17 November 2017)
(The English text is the official text of the Bill)*

(MINISTER OF LABOUR)

[B 32—2017]

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[] Words in bold type in square brackets indicate omissions from existing enactments.

Words underlined with a solid line indicate insertions in existing enactments.

To amend the Labour Relations Act, 1995, so as to provide criteria for the Minister before the Minister is compelled to extend the collective agreement as contemplated in the Act; to provide for the renewal and extension of funding agreements; to provide for picketing by collective agreement or by determination by the Commission in terms of picketing regulations; to provide for the classification of a ratified or determined minimum service; to extend the meaning of ballot to include any voting by members that is recorded in secret; to provide for the independence of the registrar and the deputy registrar; to provide for an advisory arbitration panel; to provide for an advisory arbitration award; to provide for transitional provisions; and to provide for matters connected therewith.

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

Amendment of section 32 of Act 66 of 1995, as amended by section 7 of Act 42 of 1996, section 2 of Act 127 of 1998, section 5 of Act 12 of 2002 and section 4 of Act 6 of 2014

1. (1) Section 32 of the Labour Relations Act, 1995 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

“(2) **[Within 60 days of receiving the request]** Subject to subsection (2A), the Minister must extend the collective agreement, as requested, by publishing a notice in the *Government Gazette*, within 60 days of receiving the request, declaring that, from a specified date and for a specified period, the collective agreement will be binding on the non-parties specified in the notice.”;

(b) by the insertion after subsection (2) of the following subsection:

“(2A) If the registrar determines that the parties to the bargaining council are sufficiently representative within the registered scope of the bargaining council for the purposes of subsection (5)(a), the Minister must publish the notice contemplated in subsection (2) within 90 days of the request.”;

- (c) by the substitution in subsection (3) for paragraphs (b) and (c) of the following paragraphs respectively:
- “(b) the registrar, in terms of section 49(4A)(a), has determined that the majority of all employees who, upon extension of the collective agreement, will fall within the scope of the agreement, are members of the trade unions that are parties to the bargaining council; 5
- (c) the registrar, in terms of section 49(4A)(a), has determined that the members of the employers’ organisations that are parties to the bargaining council will, upon the extension of the collective agreement, be found to employ the majority of all the employees who fall within the scope of the collective agreement;”; 10
- (d) by the insertion after subsection (3A) of the following subsection:
- “(3B) The Minister may make regulations on the procedures and criteria that a bargaining council must take into consideration when developing the criteria for the purposes of section 32(3)(dA), (e) and (f).”; 15
- (e) by the substitution in subsection (5) for paragraph (a) of the following paragraph:
- “(a) the registrar has, in terms of section 49(4A)(b), determined that the parties to the bargaining council are sufficiently representative within the registered scope of the bargaining council;”; 20
- (f) by the substitution for subsection (5A) of the following subsection:
- “(5A) When determining whether the parties to the bargaining council are sufficiently representative for the purposes of subsection (5)(a), the [Minister] registrar may take into account the composition of the workforce in the sector, including the extent to which there are employees assigned to work by temporary employment services, employees employed on fixed term contracts, part-time employees or employees in other categories of non-standard employment.”; 25
- (g) by the substitution in subsection (6)(a) for the words preceding subparagraph (i) of the following words: 30
- “After a notice has been published in terms of subsection (2) or (2A), the Minister, at the request of the bargaining council, may publish a further notice in the *Government Gazette*—”; and
- (h) by the deletion in subsection (6) of paragraph (b). 35

Insertion of section 32A in Act 66 of 1995

2. The following section is hereby inserted in the principal Act after section 32:

“Renewal and extension of funding agreements

32A. (1) For the purposes of this section—

- (a) a “funding agreement” means a collective agreement concluded in a bargaining council, including a provision in such an agreement to fund— 40
- (i) the operational and administrative activities of the bargaining council itself;
- (ii) a dispute resolution fund referred to in section 28(1)(e); 45
- (iii) a training and education scheme contemplated in section 28(1)(f); or
- (iv) a pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the bargaining council or their members, as contemplated in section 28(1)(g); 50
- (b) the “renewal of a funding agreement” means an agreement that is—
- (i) binding on the parties to the agreement; and
- (ii) deemed to be an extension of the agreement to non-parties in terms of section 32(2). 55

(2) Subject to subsection (3), and where the Minister is satisfied that the failure to renew the funding agreement may undermine collective bargaining at sectoral level, the Minister may renew a funding agreement

for up to 12 months at the request of any of the parties to a bargaining council if—

- (a) the funding agreement has expired; or
- (b) the parties have failed to conclude a collective agreement to renew or replace the funding agreement before 90 days of its expiry.

(3) The Minister must, before making a decision under subsection (2)—

- (a) publish a notice in the *Government Gazette* calling for public comment on the request within a period stipulated in the notice; and
- (b) consider the comments received.

(4) Any review of the Minister's decision under subsection (2) must be determined by the Labour Court and any such decision remains in force until—

- (a) set aside by the Labour Court; or
- (b) if the decision is taken on appeal, set aside by the Labour Appeal Court or the Constitutional Court, as the case may be.”.

Amendment of section 49 of Act 66 of 1995, as amended by section 11 of Act 12 of 2002 and section 5 of Act 6 of 2014

3. Section 49 of the principal Act is hereby amended—

- (a) by the substitution for subsection (4) of the following subsection:

“(4) A determination of the representativeness of a bargaining council in terms of this section is sufficient proof of the representativeness of the council for the [year] two years following the determination for any purpose in terms of this Act, including a decision by the Minister in terms of sections 32(3)(b), 32(3)(c) and 32(5).”; and

- (b) by the insertion after subsection (4) of the following subsection:

“(4A) A determination made by the registrar in terms of—

- (a) section 32(3)(c) is sufficient proof that the members of the employer organisations that are party to the bargaining council, upon extension of the collective agreement, employ the majority of the employees who fall within the scope of that agreement; and
- (b) section 32(5)(a) is sufficient proof that the parties to the collective agreement are sufficiently representative within the registered scope of the bargaining council.”.

Amendment of section 69 of Act 66 of 1995, as amended by section 20 of Act 42 of 1996 and section 9 of Act 6 of 2014

4. (1) Section 69 of the principal Act is hereby amended—

- (a) by the substitution for subsections (4), (5) and (6) of the following subsections respectively:

“(4) **[If requested to do so by the registered trade union or the employer]** Unless there is a collective agreement binding on the trade union that regulates picketing, the [Commission] commissioner conciliating the dispute must attempt to secure an agreement between the parties to the dispute on rules that should apply to any picket in relation to that strike or lock-out before the expiry of the period contemplated in section 64(1)(a)(ii).

(5) If there is no collective agreement or no agreement is reached in terms of subsection (4), the [Commission] commissioner conciliating the dispute must [establish] determine picketing rules, in accordance with any default picketing rules prescribed by the Commission under section 208 or published in any code of good practice, and in doing so must take account of—

- (a) the particular circumstances of the workplace or other premises where it is intended that the right to picket is to be exercised; **[and]**
- (b) any relevant code of good practice; and
- (c) any representations made by the parties to the dispute attending the conciliation meeting.

(6) The rules [established] determined by the [Commission] commissioner conciliating the dispute may provide for picketing by employees—

- (a) in a place contemplated in **[section 69(2)(a)]** subsection (2)(a) which is owned or controlled by a person other than the employer, if that person has had an opportunity to make representations to the **[Commission]** commissioner conciliating the dispute before the rules are **[established]** determined; or 5
- (b) on their employer's premises if the **[Commission]** commissioner conciliating the dispute is satisfied that the employer's permission has been unreasonably withheld.”;
- (b) by the insertion after subsection (6) of the following subsections: 10
 - “(6A) The commissioner conciliating the dispute must determine the picketing rules contemplated in subsection (5) at the same time as issuing any certificate contemplated in section 64(1)(a), unless the trade union fails to provide the prescribed information. 15
 - (6B) The Commission may determine picketing rules under subsections (5) and (6) on a direct application from a registered trade union and on an urgent basis if—
 - (a) it has referred a dispute about a unilateral change to terms and conditions of employment in accordance with section 64(4) and the employer has not complied with section 64(5); or
 - (b) the employer has given notice of an intention to commence or has commenced an unprotected lockout. 20
 - (6C) No picket in support of a protected strike or in opposition to a lockout may take place unless picketing rules—
 - (a) are agreed to in—
 - (i) a collective agreement binding on the trade union; 25
 - (ii) an agreement contemplated in subsection (4); or
 - (b) have been determined in terms of subsection (5).”;
- (c) by the substitution in subsection (8) for paragraphs (c) and (d) of the following paragraphs respectively: 30
 - “(c) an alleged material breach of a collective agreement or an agreement **[concluded]** contemplated in **[terms of]** subsection (4); or
 - (d) an alleged material breach of a picketing rule **[established]** determined in terms of subsection (5).”;
- (d) by the substitution for subsection (12) of the following subsection: 35
 - “(12) If a party has referred a dispute in terms of subsection (8) or (11), the Labour Court may, in addition to any relief contemplated in section 68(1), grant relief, including urgent interim relief, which is just and equitable in the circumstances and which may include an order—
 - (a) **[an order]** directing any party, including a person contemplated in subsection (6)(a), to comply with a picketing agreement or rule; 40
 - [or]**
 - (b) **[an order]** varying the terms of a picketing agreement or rule; or
 - (c) suspending a picket at one or more of the locations designated in the collective agreement, agreed rules contemplated in subsection (4) or rules determined by the Commission.”; and 45
- (e) by the addition of the following subsection: 50
 - “(15) For the purposes of this section, ‘commissioner conciliating the dispute’ includes a person appointed by a bargaining council to conciliate the dispute.”.

Amendment of section 70F of Act 66 of 1995, as amended by section 11 of Act 6 of 2014

5. Section 70F of the principal Act is hereby amended by the deletion of subsection (2).

Amendment of section 72 of Act 66 of 1995, as amended by section 13 of Act 6 of 2014

6. Section 72 of the principal Act is hereby amended—

- (a) by the substitution for subsection (5) of the following subsection:

“(5) Despite subsections (3) and (4), section 74 applies to a designated essential service in respect of which the essential services committee has ratified a minimum services agreement or has made a determination of minimum services if the majority of employees employed in the essential services voted in a ballot in favour of this.”; and

(b) by the addition of the following subsection:

“(9) For the purposes of this section, a “ratified minimum service” or “determined minimum service” means the minimum number of employees in a designated essential service who may not strike in order to ensure that the life, personal safety or health of the whole or part of the population is not endangered.”.

Amendment of section 75 of Act 66 of 1995, as amended by section 22 of Act 42 of 1996

7. Section 75 of the principal Act is hereby amended by the addition of the following subsection:

“(8) A panel appointed by the essential services committee may in the prescribed manner vary or cancel the designation of the whole or part of a maintenance service on its own accord or on application by the employer or a registered trade union with members affected by the designation of a maintenance service.”.

Amendment of section 95 of Act 66 of 1995, as amended by section 18 of Act 12 of 2002

8. Section 95 of the principal Act is hereby amended by the addition of the following subsection:

“(9) For the purpose of subsection (5), “ballot” includes any system of voting by members that is recorded and in secret.”.

Amendment of section 99 of Act 66 of 1995

9. Section 99 of the principal Act is hereby amended by the substitution for paragraphs (b) and (c) of the following paragraphs respectively:

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

Amendment of section 100 of Act 66 of 1995

10. Section 100 of the principal Act is hereby amended by the deletion of the word “and” at the end of paragraph (d), the insertion of the word “and” at the end of paragraph (e), and the addition of the following paragraph:

“(f) the records referred to in section 99.”.

Amendment of section 108 of Act 66 of 1995

11. Section 108 of the principal Act is hereby amended by the addition of the following subsections:

“(4) The registrar and the deputy registrars are independent and, subject only to the Constitution and the law, they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(5) No person or organ of state may interfere with the functioning of the registrar.”.

Amendment of section 116 of Act 66 of 1995

12. Section 116 of the principal Act is hereby amended by the addition of the following subsections:

“(4) The governing body may appoint any of its members to act as chairperson whenever—

- (a) the chairperson is absent from the Republic or from duty, or for any reason is temporarily unable to perform the functions of the chairperson; or
 - (b) the office of the chairperson is vacant.
- (5) An acting chairperson is competent to exercise and perform any of the powers of the chairperson.”.

Amendment of section 127 of Act 66 of 1995, as amended by section 33 of Act 42 of 1996 and section 23 of Act 12 of 2002

13. Section 127 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“Any council or private agency may apply to the governing body in the prescribed form for accreditation and for accreditation of its dispute resolution panel to perform any of the following functions—”.

Amendment of section 128 of Act 66 of 1995

14. Section 128 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) (a) (i) An accredited council may confer on any person who is accredited by the governing body and appointed by [it] the council to resolve a dispute, the powers of a commissioner in terms of section 142, read with the changes required by the context.

(ii) For this purpose, any reference in that section to the director must be read as a reference to the secretary of the bargaining council.

(b) An accredited private agency may confer on any person who is accredited by the governing body and appointed by [it] the agency to resolve a dispute, the powers of a commissioner in terms of section 142(i)(a) to (e), (2) and (7) to (9), read with the changes required by the context.”.

Amendment of section 135 of Act 66 of 1995, as amended by section 36 of Act 42 of 1996, section 8 of Act 127 of 1998 and section 26 of Act 12 of 2002

15. Section 135 of the principal Act is hereby amended by the insertion after subsection (2) of the following subsections respectively:

“(2A) If an extension of the 30-day period referred to in subsection (2) is necessary to ensure a meaningful conciliation process, the commissioner or a party may apply to the director in accordance with any rules made in terms of section 115(2A) for an extension of the period, which may not exceed five days.

(2B) The director may only extend the period referred to in subsection (2A) if the director is satisfied that—

- (a) an extension is necessary to ensure a meaningful conciliation process;
- (b) the refusal to agree to the extension is unreasonable; and
- (c) there are reasonable prospects of reaching an agreement.

(2C) Subsections (2A) and (2B) do not apply to instances where the State is the employer.”.

Insertion of sections 150A, 150B, 150C and 150D in Act 66 of 1995

16. The following sections are hereby inserted in the principal Act after section 150:

“Advisory arbitration panel in public interest

150A. (1) The director may appoint an advisory arbitration panel (referred to in sections 150A to 150D as the “panel”) in the public interest to make an advisory arbitration award (referred to in sections 150 A to 150 D as the “award”) in order to facilitate a dispute—

- (a) on the director’s own accord or on application of one of the parties to the dispute;
- (b) after consultation in the prescribed manner with the parties to the dispute; and
- (c) in the prescribed manner setting out the panel’s terms of reference as provided for in section 150C(1).

- (2) The director must establish an advisory arbitration panel contemplated in subsection (1) to facilitate a resolution of the dispute at any time after a commissioner has issued a certificate of unresolved dispute under section 135(5)(a) or a notice of the commencement of the strike or lockout contemplated in section 64(1)(b), (c) and (d), whichever is the earlier— 5
- (a) subject to subsection (3)—
 - (i) if directed to do so by the Minister; or
 - (ii) on application by a party to the dispute;
 - (b) if ordered to do so by the Labour Court in terms of subsection (4); or
 - (c) by agreement of the parties. 10
- (3) The director may only appoint the panel in terms of subsection (2)(a) if the director has reasonable grounds to believe that any one or more of the following circumstances exists:
- (a) The strike or lockout is no longer functional to collective bargaining in that it has continued for a protracted period of time and no resolution of the dispute appears to be imminent; 15
 - (b) there is an imminent threat that constitutional rights may be or are being violated by persons participating in or supporting the strike or lockout through the threat or use of violence or the threat of or damage to property; or 20
 - (c) the strike or lockout causes or has the imminent potential to cause or exacerbate an acute national or local crisis affecting the conditions for the normal social and economic functioning of the community or society. 25
- (4) The Labour Court may only make an order requiring the director to appoint the panel in terms of subsection (2)(b)—
- (a) on application made by a person or association of persons that will be materially affected by any one or more of the circumstances contemplated in subsection (4)(b) and (c); and 30
 - (b) if the Court considers that there are reasonable grounds that any one or more of the circumstances contemplated in subsection (4)(b) and (c) exist. 35
- (5) No person may apply to any court of law to stay or review the establishment or proceedings of an advisory arbitration panel until the panel has issued its award.

Composition of advisory arbitration panel

- 150B.** (1) The panel contemplated in section 150A (1) must consist of—
- (a) a senior commissioner as the chairperson of the panel; and
 - (b) subject to subsection (2)— 40
 - (i) an assessor appointed by the employer party to the dispute; and
 - (ii) an assessor appointed by the trade union party to the dispute.
- (2) If the employer or trade union party to the dispute fails or refuses to appoint an assessor within the prescribed time period, the director must appoint an assessor from the relevant list of assessors determined in terms of subsection (3). 45
- (3) NEDLAC must, in the prescribed manner, provide the director with two lists of assessors which shall consist of—
- (a) the employer list of assessors which must be determined by organised business as defined in section 1 of the National Economic Development and Labour Advisory Act, 1994 (Act No. 34 of 1994); and 50
 - (b) the trade union list of assessors which must be determined by organised labour as defined in section 1 of the Act referred to in paragraph (a). 55
- (4) If the employer or trade union party to the dispute fails or refuses to participate in the proceedings of the panel established in terms of section 150A, the director must appoint a person with the requisite expertise to represent the interests of that party in the proceedings.
- (5) The chairperson of the panel, after consultation with the assessors appointed in terms of this section, may— 60

- (a) conduct the arbitration in a manner that the chairperson considers appropriate in order to make an advisory award fairly and quickly but must deal with the substantial merits of the dispute with minimal legal formalities;
 - (b) exercise the powers of a commissioner under section 142;
 - (c) order the disclosure of all relevant information—
 - (i) subject to section 16(5), (10), (11), (12) and (13); and
 - (ii) only if that information is necessary in order to make the factual finding and recommendations contemplated in section 150C(1)(a) and (b).
- (6) The panel must conduct its proceedings and issue an award within seven days of the arbitration hearing or any reasonable period extended by the director as the case may be, taking into account the urgency of a resolution of the dispute arising from the circumstances contemplated in section 150A(2)(a) to (c).
- (7) The appointment of the panel does not interrupt or suspend the right to strike or the recourse to lockout in accordance with Chapter IV.

Advisory arbitration award

- 150C.** (1) An award must be in the prescribed form and include—
- (a) a report on factual findings;
 - (b) recommendations for the resolution of the dispute;
 - (c) motivation for why the recommendations ought to be accepted by the parties; and
 - (d) the seven-day period within which the parties to the dispute must either indicate acceptance or rejection of the award.
- (2) If the chairperson is not able to secure consensus of both assessors in respect of the award contemplated in subsection (1), the chairperson must issue the award on behalf of the panel.
- (3) The chairperson must serve the advisory arbitration award on the parties to the dispute to allow them to consider the award and consult and take such measures as may be necessary to ensure that the award is not made publicly available before the Minister has published the award in terms of subsection (6).
- (4) A party to the dispute may apply to the chairperson in the prescribed form for an extension of the time period in subsection (1)(d) for no more than five days.
- (5) (a) The parties to the dispute may indicate their acceptance or rejection of the award within the period contemplated in subsection (1)(d).
- (b) If a party to the dispute fails to indicate either its acceptance or rejection of the award within the period contemplated in subsection (1)(d), the party is deemed to have accepted the award.
- (c) If a party rejects the award, it must motivate its rejection in the prescribed manner.
- (6) An employers' organisation or trade union party to a dispute must, in accordance with its constitution, consult with its members before rejecting an award in terms of subsection (5)(a).
- (7) The Minister must, within four days of the award being issued, publish the award in the prescribed manner for public dissemination.
- (8) Nothing in this section may be construed to prevent any party to the dispute to request the panel to reconvene in order to seek an explanation of the award or to mediate a settlement of the dispute based on the award or a variation of the award.

Effect of advisory arbitration award

- 150D.** (1) An advisory arbitration award is only binding on a party and its members to the dispute if—
- (a) one or more of the—
 - (i) trade unions party to the dispute has accepted or deemed to have accepted the award in terms of section 150C(5)(b) or subsection (2); or

- (ii) employer organisations party to the dispute has accepted or is deemed to have accepted the award in terms of section 150C(5)(b); or
- (b) it is binding in terms of subsection (3) or 150C(5)(b). 5
- (2) Subject to subsection (3), the binding nature of an advisory arbitration award is determined in accordance with section 23 as if the award is a collective agreement for the purposes of that section.
- (3) If the parties to the dispute are parties to a bargaining council—
- (a) the binding nature of an award is determined in accordance with section 31 as if the award is a collective agreement for the purposes of that section; 10
- (b) the bargaining council may, subject to paragraph (c), apply to the Minister to have the award extended in accordance with section 32 as if the award is a collective agreement for the purposes of that section, to persons who— 15
 - (i) are not members of the parties to the council; or
 - (ii) have rejected the award in terms of section 150C(4)(c);
- (c) the Minister may extend the advisory arbitration award in accordance with section 32 as if the award is a collective agreement for the purposes of that section if the parties have been deemed to have accepted the award in terms of section 150C(5)(b).” 20

Amendment of section 208A of Act 66 of 1995

17. Section 208A of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) The Minister, in writing, may delegate to the Director- General or any other officer of the Department of Labour any power, function or duty conferred or imposed upon the Minister in terms of this Act, except the powers, functions and duties contemplated in section 32 (but excluding **[subsection]** subsections (5)(c) and (6)) and sections 44, 207 and 208.”. 25

Transitional provisions

18. (1) The registrar must, within 180 days of the commencement of this Act, in respect of registered trade unions and employers’ organisations that do not provide for a recorded and secret ballot in their constitutions—

- (a) consult with the national office bearers of those unions or employers’ organisations on the most appropriate means to amend the constitution to comply with section 95; and 35
- (b) issue a directive to those unions and employers’ organisations as to the period within which the amendment to their constitution is to be effected, in compliance with the procedures set out in the amended constitution.

(2) Until a registered trade union or employers’ organisation complies with the directive made in terms of subsection (1)(b) and the requirements of section 95(5)(p) and (q) of the Act, the trade union or employer organisation, before engaging in a strike or lockout, must conduct a secret ballot of members. 40

Short title and commencement

19. This Act is called the Labour Relations Amendment Act, 2017, and comes into effect on a date published by the President in the *Gazette*. 45

MEMORANDUM ON THE OBJECTS OF THE LABOUR RELATIONS AMENDMENT BILL, 2017

1. OBJECTS OF THE BILL

- 1.1 The Labour Relations Amendment Bill, 2017 (“Bill”), seeks to amend the Labour Relations Act, 1995 (Act No. 66 of 1995) (“the Act”), which includes amendments to—
- (a) section 32 of the Act, to provide for the process and criteria for the extension of bargaining council agreements to non-parties by the Minister of Labour (“the Minister”);
 - (b) insert section 32A into the Act, to provide for the renewal and extension of funding agreements of bargaining councils;
 - (c) section 49 of the Act, to provide for an extension of two years to the determination of the representativeness of a bargaining council;
 - (d) section 69 of the Act, to provide for picketing to occur through a collective agreement or by determination in terms of picketing rules that may be prescribed;
 - (e) section 70F of the Act, to provide for the deletion of the rules by the Commission;
 - (f) section 72 of the Act, to provide for the classification of a ratified or determined minimum service;
 - (g) section 75 of the Act, to provide for a panel that may vary or cancel a designation of a maintenance service on its own accord or on application by the employer or registered trade union;
 - (h) section 95 of the Act, to provide for a ballot for a strike or lock-out to include a secret vote;
 - (i) section 100 of the Act, to provide for the submission of the records referred to in section 99 of the Act, to the Registrar of Labour Relations (“Registrar”);
 - (j) section 108 of the Act, to provide for the independence of the Registrar;
 - (k) section 116 of the Act, to make provision for the appointment of an acting chairperson when the chairperson of the governing body of the Commission for Conciliation Mediation and Arbitration (“Commission”) is absent;
 - (l) section 135 of the Act, to provide for a further extension of the conciliation process by the Director of the Commission (“Director”) to no longer than five days; and
 - (m) insert sections 150A to 150D into the Act which provides for the appointment of an advisory arbitration panel in the public interest and an advisory arbitration award by that panel and matters connected therewith.
- 1.2 The aforesaid proposed amendments also concern matters to be prescribed in the Act, which empowers the Minister, or where appropriate, the Commission, to make such regulations in terms of section 208 of the Act. The matters that may be prescribed includes—
- (a) in clause 1 of the Bill, the procedures and criteria that a bargaining council must take into consideration when developing the criteria for the purposes of section 32(3)(dA), (e) and (f) of the Act;
 - (b) in clause 4 of the Bill, default picketing rules and the information that must be provided by a trade union before a conciliator issue a certificate and determine picketing rules;
 - (c) in clause 7 of the Bill, the manner in which a panel may vary or cancel a maintenance service;
 - (d) in clause 9 of the Bill, the records of the meetings that must be provided by every registered trade union and employers’ organisation;
 - (e) in clause 13 of the Bill, the application form of a council or private agency that must be submitted to the governing body for the accreditation of its dispute resolution panel; and
 - (f) in clause 16 of the Bill, indicating—
 - (i) the manner of consultation between the advisory arbitration panel and the parties to the dispute;

- (ii) the panel's terms of reference;
- (iii) the manner in which the National Economic Development and Labour Council ("NEDLAC") must provide the Director with two lists respectively for the registered trade union and employers' organisation of assessors to choose from;
- (iv) the form on which an advisory arbitration award must be made;
- (v) the form on which a party to the dispute may apply for the extension of the seven-day period within which the parties to the dispute must either indicate acceptance or rejection of the award;
- (vi) the manner in which a party to the dispute may reject an advisory arbitration award; and
- (vii) the manner in which the Minister must publish the advisory arbitration award.

2. DISCUSSION OF THE BILL

Clause 1: Amendment of section 32 of the Act

2.1 Section 32: Extension of collective agreement concluded in bargaining council

- 2.1.1 The following four changes are made to section 32 of the Act:
- (a) The first is the extension of the period within which the Minister must extend a collective agreement if the parties to the agreement are only sufficiently representative. This is to provide the Minister with sufficient time to consider any comments received in respect of the Minister's notice published in terms of section 32(5)(c) of the Act.
 - (b) The second is to provide for improved representativeness requirements for the extension of collective agreements under section 32(2) of the Act. Section 32(2) of the Act required the trade union party to the agreement to represent the majority of employees and in addition that the members of the employer organisations party to the agreement be required to employ the majority of employees within the scope of the agreement. The amendment now only requires one or the other. In order to promote collective bargaining at sectoral level and in accordance with the jurisprudence of the International Labour Organisation ("ILO"), the operating principle underlying the extension of agreements is either whether an agreement applies to the majority of employees in the sector or to the scope of application of the agreement. In other words, the principle is now one of coverage rather than strict representativeness.
 - (c) The third is the manner in which representativeness is determined. The original intention of the Act was that the representativeness of bargaining councils and their constituent parties would be determined annually by the Registrar and not each and every time a bargaining council referred a collective agreement to the Minister for extension. The amendments to both sections 32(2)(c), (5)(a) and 49 of the Act seek to give effect to that intention.
 - (d) The fourth is to give the Minister the power to make regulations on the procedures and criteria that bargaining councils must take into consideration for purposes of complying with the requirements for exemptions from collective agreements.

Clause 2: Insertion of section 32A into the Act

2.2 Section 32A: Renewal and extension of funding agreements

- 2.2.1 The mischief which this amendment seeks to address is that the funding of bargaining councils and their pension, medical aid and other funds are effected through collective agreements. The failure to

secure agreement to extend or renew those collective agreements threatens the continued existence of those bargaining councils and funds.

2.2.2 The amendment gives the Minister the power to renew and extend a funding agreement for up to 12 months at the request of any of the parties to the bargaining council if the agreement has expired or where the parties to the agreement have failed to conclude an agreement to renew or replace the funding agreement 90 days before its expiry. The Minister has to be satisfied though that the failure to renew the funding may undermine collective bargaining at sectoral level.

2.2.3 Provision is also made for a publication and public comment procedure before the Minister may make such a decision. The extent of any judicial review of such a decision is also provided for.

Clause 3: Amendment of section 49 of the Act

2.3 Section 49: Representativeness of council

The amendment extends the determination of the representativeness of a bargaining council contemplated in section 49 to two years. Furthermore other amendments are made in order to align the provisions of section 49 of the Act with the amendment in the Bill to section 32 of the Act.

Clause 4: Amendment of section 69 of the Act

2.4 Section 69: Picketing

2.4.1 The levels of picket line violence that has come to characterise strikes in the last few years requires more stringent regulation to ensure the orderly conduct of pickets in strikes. The thrust of the amendments to section 69 of the Act is to prohibit a picket unless there are picketing rules in place. In this regard the amendment does not deny a trade union to participate in the picketing rule-making process. The purpose underlying these amendments is to require trade unions to take responsibility for pickets and to ensure that the constitutional rights of others to freedom and security of person, freedom of association, fair labour practices and property, are not infringed.

2.4.2 Accordingly, the amendments to the section require a commissioner conciliating a dispute or the person appointed by a bargaining council to conciliate a dispute that may lead to a strike or a lockout to determine picketing rules if there is no existing collective agreement regulating picketing or the commissioner has failed to secure an agreement on picketing before the expiry of the conciliation period contemplated in section 64 of the Act. The commissioner is required to determine the rules at the same time as issuing a certificate of an unresolved dispute in terms of section 64(1)(a) of the Act.

2.4.3 The commissioner, in determining the rules, must do so in accordance with the default picketing rules prescribed or published in a Code of Good Practice and after taking any representations made by the parties to the dispute attending the conciliation meeting. Annexure B of The Code of Good Practice: Collective Bargaining, Industrial Action and Picketing provide default picketing rules.

2.4.4 Specific provisions are made for a direct application to the Commission on an urgent basis in certain circumstances such as the unilateral alteration of terms and conditions of employment and an unprotected lockout.

Clause 5: Amendment of section 70F of the Act

2.5 Section 70F: Regulations for essential services committee

In view of the regulations by the Minister contemplated in section 70F(1), section 70F(2) of the Act which provides for rules by the Commission, is deleted.

Clauses 6 and 7: Amendment of sections 72 and 75 of the Act respectively

2.6 Sections 72 and 75: Minimum services and maintenance services

2.6.1 The amendments to section 72 of the Act provide for the ratification of minimum service agreements by a panel appointed by the essential services committee and a definition of minimum services. The definition clarifies that a minimum service agreement is one in which employees in an essential service are allowed to strike provided that a minimum service maintains a level of production or service at which the life, personal safety or health or the whole or part of the population are not endangered.

2.6.2 Provision is made to permit the panel appointed by the essential services committee to vary or rescind a designation or part of a service as a maintenance service.

Clauses 8 to 10: Amendment of sections 95, 99 and 100 of the Act respectively

2.7 Sections 95, 99 and 100: Matters concerning a secret ballot

2.7.1 Section 95(5)(p) of the Act requires trade unions and employer organisations that seek registration to have a provision in their constitutions requiring a ballot of members before embarking on a strike or lockout as the case may be.

2.7.2 Section 95(9) of the Act has been inserted to clarify that a ballot means any system of voting by members that is recorded and secret. The clarification is to provide for new technologies of balloting while at the same time ensuring good governance and secrecy.

2.7.3 Section 99 of the Act, which deals with the records that registered trade unions and employer organisations must keep and which includes ballot papers, is amended to include the attendance register and other prescribed record, and other forms of documentary or electronic records of a ballot. Section 100 of the Act is amended accordingly.

Clause 11: Amendment of section 108 of the Act

2.8 Section 108: Appointment of registrar of labour relations

2.8.1 Section 108 of the Act is amended in order to clarify that the registrar and deputy registrars are independent and subject to the Constitution and the law, must be impartial and exercise their powers and perform their functions without fear, favour or prejudice.

2.8.2 The amendments also include a prohibition on any person or organ of state from interfering with the functioning of the registrar.

Clauses 12 to 14: Amendment of sections 116, 127 and 128 of the Act respectively

2.9 Sections 116, 127 and 128: Matters concerning the Commission for Conciliation, Mediation and Arbitration

- 2.9.1 Several amendments are made to various sections dealing with the Commission. The first is to section 116 of the Act which seeks to give the governing body of the Commission the power to appoint an acting chairperson if the chairperson is absent or the office is vacant.
- 2.9.2 The amendment to section 127 of the Act seeks to provide that a council or private agency may apply for the accreditation of its dispute resolution panel.
- 2.9.3 The amendment to section 128 of the Act requires that an accredited bargaining council or private agency may only appoint a person to resolve a dispute if that person is accredited by the governing body of the Commission. This has been introduced to ensure that the persons appointed have the requisite qualifications and experience.

Clause 15: Amendment of section 135 of the Act

2.10 Section 135: Resolution of disputes through conciliation

- 2.10.1 The amendments to section 135 of the Act seek to provide for the extension of the 30-day conciliation period in order to ensure a meaningful conciliation process. The commissioner conciliating the dispute or a party to the conciliation may apply to the director of the Commission for an extension provided that the period does not exceed 5 days.
- 2.10.2 The Director may only extend the period if satisfied that the extension is necessary to ensure a meaningful conciliation process, a party's refusal to agree to the extension is unreasonable and there are reasonable prospects of reaching agreement. No extension is however permitted where the State is the employer.

Clause 16: Insertion of sections 150A, 150B, 150C and 150D into the Act

2.11 Sections 150A, 150B, 150C and 150D: Matters concerning the advisory arbitration panel

- 2.11.1 In order to endeavour to resolve strikes or lockout that are intractable, violent or may cause a local or national crisis, the amendments seek to provide for the establishment of an advisory arbitration panel to without delay, expediently investigate the cause and circumstances of the strike or lockout and make an advisory award in order to assist the parties in dispute to resolve the dispute.
- 2.11.2 The Director may only establish an advisory arbitration panel if directed to do so by the Minister or the Labour Court, on application by a party to the dispute or by agreement between the parties and only if one of three circumstances are present namely—
 - (a) The strike or lockout is no longer functional to collective bargaining, it has continued for a protracted period and no resolution appears imminent;
 - (b) There is an imminent threat that constitutional rights may be or are being violated by those participating or supporting a strike or lockout through the threat or use of violence or damage to property; or

- (c) The strike or lockout is causing or may cause an acute national or local crisis affecting the conditions for the normal social and economic functioning of the community or society.
- 2.11.3 All three circumstances are recognised by the ILO as grounds for intervention by the State. The intervention, in accordance with ILO jurisprudence, is advisory in nature and only binding if agreed or deemed to be agreed to by the parties to the dispute. The appointment of the advisory arbitration panel does not interrupt or suspend the right to strike or the recourse to lockout.
 - 2.11.4 The Labour Court may only make an order directing the Director to establish an advisory arbitration panel if it is satisfied that the latter two of the three circumstances exist and the application is made by a person or association of persons that are or will be materially affected by those circumstances.
 - 2.11.5 The advisory arbitration panel consists of a senior commissioner to chair the panel and an assessor appointed by the employer and trade union parties to the dispute. If the parties do not appoint an assessor within the time to be prescribed by regulation, the Director must appoint an assessor from the lists of employer or trade union assessors determined by organised business and organised labour as constituted in NEDLAC. Provision is also made that if a party to the dispute fails or refuses to participate in the arbitration proceedings, the Director must appoint a person with requisite expertise to represent that party in the proceedings.
 - 2.11.6 The advisory arbitration is to be conducted in a manner that the chairperson considers appropriate in order to make an advisory award fairly and quickly with minimum legal formalities. The chairperson is given all the powers of a commissioner under the Act and the power to order disclosure of information in accordance with section 16 of the Act.
 - 2.11.7 The arbitration panel must conduct its proceedings and issue an advisory award within 7 days of the hearing although provision is made for the Director to extend that period taking into account the urgency of the resolution of the dispute.
 - 2.11.8 The advisory award must report on the factual findings and make motivated recommendations why its recommendations ought to be accepted. If the chairperson is not able to secure consensus of both assessors, the chairperson issues the advisory award on behalf of the panel.
 - 2.11.9 The advisory award must be served on the parties to the dispute. The Minister must publish the award in the prescribed manner for public dissemination within 4 days of its issue.
 - 2.11.10 The parties to the dispute are required to indicate their acceptance or rejection of the dispute of the advisory award within 7 days of the award or, if extended, a maximum of 13 days.
 - 2.11.11 If they fail to do so, the party is deemed to have accepted the award. Before a party to the dispute rejects an award, it must consult with its members in accordance with its constitution and, if it does, it must motivate its rejection in the prescribed manner.
 - 2.11.12 An advisory award is only binding if the party to the dispute has accepted or is deemed to have accepted the award. An advisory award can be extended to employees who are not members of the trade union parties to the dispute in accordance with section 23 of the Act. In the

case of bargaining council agreements, the binding nature of an advisory award is determined in accordance with sections 31 and 32 of the Act as if the award was for all intents and purposes a collective agreement.

Clause 17: Amendment of section 208A of the Act

2.12 Section 208A: Delegations

This is a technical amendment in order to align the provisions of section 208A of the Act with the proposed to section 32 of the Act.

Clause 18: Transitional provisions

2.13 Trade union and employer organisation constitutions were registered in the past without strike ballot requirements which is in contravention of section 95(5)(p) read with section 95(9) of the Act. The Bill seeks to provide for transitional provisions in order to provide for the Registrar to consult with national office bearers of those unions and employers organisations on the most appropriate means to amend the constitution to comply with section 95(5)(p) of the Act and issue a directive as to the period within which the amendment to the constitution is to be effected in accordance with the amendment procedures set out in their respective constitutions.

2.14 Until a registered trade union or employers' organisation complies with the directive and the requirements of section 95(5)(p) read with section 95(9) of the Act, the trade union or employers' organisation must conduct a secret ballot of members before engaging in a strike or lockout as the case may be.

3. CONSULTATION

The Departments of Economic Development, Small Business Development, Trade and Industry and the National Treasury were consulted on a regular basis during the process of engagement in the NEDLAC on the Bill. In addition, the South African Police Service and the National Prosecuting Authority have also been consulted in relation to the amendments, including the Accord on Collective Bargaining and Industrial Action and the Code of Good Practice on Collective Bargaining, Industrial Action and Picketing. Organised business, organised labour and the organised community sector were consulted during the engagement in the NEDLAC.

4. FINANCIAL IMPLICATIONS

The financial implications of the amendments to the Act lie in the cost of publishing the Bill, the Code of Good Practice on Collective Bargaining, Industrial Action and Picketing and the regulations to the Act. Costs will also be incurred by national government in conducting public information sessions for stakeholders that is estimated to amount to R450,000.00. Further costs associated with implementing the amendments will be incurred by the Commission in relation to the establishment of Advisory Arbitration Panels, conducting secret ballots, stakeholder workshops on the Code of Good Practice, commissioner training and material development. The total estimated costs associated with the amendments to the Act are R27.6 million.

5. IMPLICATIONS FOR PROVINCES

The Act and its implementation is a national competence and there is therefore no direct implication for provincial government other than the amendments affecting provincial government as an employer that is expected to comply with the amendments to the Act.

6. IMPLICATIONS FOR MUNICIPALITIES

The Act and its implementation is a national competence and there is therefore no direct implication for municipalities other than the amendments affecting them as an employer that is expected to comply with the amendments to the Act.

7. PARLIAMENTARY PROCEDURE

- 7.1. The provisions of the Bill were considered in light of the subject matters listed in Schedules 4 and 5 to the Constitution and it was found that the Bill does not deal with any of those subject matters. The Bill is concerned with the subject matter of labour relations which is not listed in Schedules 4 and 5 to the Constitution. Since the purpose and the effect of the Bill does not in a substantial measure pertain to matters listed in Schedules 4 and 5 to the Constitution, the Bill must be dealt with in accordance with the procedure set out in section 75 of the Constitution.
- 7.2 The Department of Labour and the State Law Advisers are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it does not fall within a functional area listed in Schedule 4 or 5 to the Constitution.
- 7.3 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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