

## January 2019

The Labour Relations Amendment Act 8 of 2018 (the Amendment Act) came into effect on 1 January 2019. The Amendment Act aims to amend the Labour Relations Act 66 of 1995 to, *inter alia*, provide criteria for the Minister before the Minister is compelled to extend a collective agreement; provide for the renewal and extension of funding agreements; provide for picketing by collective agreement or by determination by the commission in terms of picketing regulations; provide for the classification of a ratified or determined minimum service; and extend the meaning of ballot to include any voting by members that is recorded in secret.

### Extension of collective agreements

- Section 32(2) has been amended to allow the Minister to extend a collective agreement to non-parties within 60 days of receiving a request to do so.
- In terms of the newly inserted section 32(2A), where the registrar determines that parties are sufficiently representative within a bargaining council's registered scope, the Minister's *Government Gazette Notice* extending the collective agreement must be published within 90 days of the request.
- Section 32(3)(b) and (c) now stipulates that a collective agreement may not be extended unless a majority of the employees fall within the scope of the agreement and are members to the trade unions that are parties to the bargaining council or members of the employers' organisations that are parties to the bargaining council.
- Under the amended section 32(5)(a), a collective agreement may be extended by the Minister where the registrar determines that parties to the bargaining council are sufficiently representative within the council's registered scope.
- It is now the responsibility of the registrar, and no longer the Minister, to determine whether parties to a bargaining council are sufficiently representative for purposes of extending a collective agreement (section 32(5A)).

### Renewal and extension of funding agreements

- The Amendment Act has introduced a new section 32A that deals with the renewal and extension of funding agreements.
- A funding agreement is a collective agreement concluded in the bargaining council, which includes agreement to fund the council's operational and administrative activities, a dispute

resolution fund, training and education scheme, pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds (or similar) for the benefits of the parties and their members.

- The Minister may renew a funding agreement at the request of a party to the bargaining council for up to a year, where the funding agreement has either expired or the parties have failed to conclude a collective agreement to renew or replace the funding agreement 90 days before its expiry. The Minister must call for public comment on the request prior to taking a decision on the renewal. The Minister's decision is reviewable.

### **Representativeness of a bargaining council**

- The amended section 49 extends the determination of the representativeness of a bargaining council to two years.

### **Picketing**

- Section 69(4) obliges a conciliating commissioner to attempt to secure an agreement between parties on picketing rules in relation to a strike or lockout before expiry of 30 days (or a period extended by agreement) since the referral, unless there is a collective agreement binding on the trade union that regulates picketing.
- Where parties fail to agree or there is no collective agreement, the conciliating commissioner must determine picketing rules in accordance with any default picketing rules prescribed by the CCMA under section 208 or published code of good practice.
- In addition to the particular circumstances of the workplace or other premises where it is intended that the right to picket is to be exercised and the relevant code of good practice, the commissioner must take into account representations made during conciliation by the parties.
- The picketing rules may provide for picketing in a place to which the public has access but outside the employer's premises, which is owned or controlled by a person other than an employer, if that person was afforded an opportunity by the conciliating commissioner to make representations before the rules are established.
- The rules may provide for picketing at the employer's premises, if the conciliating commissioner is satisfied that the employer's permission has been unreasonably withheld.
- The newly inserted section 69(6A) requires a conciliating commissioner to determine the picketing rules at the same time as issuing a certificate of deadlock.
- Section 69(6B) allows for a trade union to bring a direct application for the urgent determination of picketing rules where the dispute relates to the unilateral change in terms and conditions of employment, or an employer has given notice of intention to or has commenced an unprotected lockout.
- Section 69(6C) prohibits a picket in support of a protected strike or in opposition to a lockout, unless picketing rules are agreed in a collective agreement binding on the trade union, or determined by the conciliating commissioner in accordance with any default picketing rules prescribed by the CCMA under section 208 or the published code of good

practice.

- Section 69(12)(c) provides an additional remedy. The Labour Court may grant an order suspending a picket at one or more of the locations designated in the collective agreement, the agreed rules or the rules determined by the CCMA.
- The newly added section 69(15) grants a bargaining council commissioner jurisdiction to conciliate a dispute.

### **Rules of the essential services committee**

- Previously, section 70F (2) allowed the CCMA to make rules regulating the CCMA's meetings and meetings of any of its committees. This provision has been deleted.

### **Minimum services and maintenance services**

- Section 72(5) provides that 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.
- A new section 72(9) has been added to define "ratified/determined minimum service" as 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.
- Section 75 has been amended by introducing subsection 8, which stipulates that 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.

### **Registration requirements for trade unions and employers' organisations; duty to keep records; duty to provide information to the registrar**

- Section 95(9) has refined the definition of "ballot" to include any system of voting by members that is recorded and in secret for purposes of section 95(5). Section 95(5) sets out the requirements for a trade union or employers' organisation's constitution. Under subsection (5)(q), the constitution must provide that members may not be disciplined or have their membership terminated for failure or refusal to participate in a strike or lockout if no ballot was held about the strike or lockout, or a ballot was held but a majority of the members who voted did not vote in favour of the strike or lockout.
- In terms of section 99(b), every trade union and employer's organisation must keep the attendance register, minutes or any other prescribed record of its meetings in an original or reproduced form, for three years from the end of the financial year to which they relate.
- In terms of section 99(c), trade unions and employers' organisations have a duty to keep records, the ballot papers or any documentary or electronic record of the ballot for three years from the date of every ballot.

- Section 100 now includes a further requirement in the new subsection (f) for every registered trade union and every registered employer's organisation to furnish the registrar with the records referred to in section 99.

### **Appointment of registrar of labour relations**

- Section 108(5) prohibits interference by any person or organ of state with the functioning of the registrar.

### **Amendments relating to the extension of conciliation**

- The newly introduced section 135(2A) permits extension of the 30-day period, on application to the director by a commissioner or party, for up to five days. Subsection 2B stipulates that the director may extend conciliation, if satisfied that extension is necessary, to ensure a meaningful conciliation process, if refusal to agree to an extension is unreasonably withheld, and there are reasonable prospects of success in reaching an agreement.
- These provisions do not apply where the employer is the state.

### **Advisory arbitration panel in public interest**

- Section 150A provides for the appointment of an advisory arbitration panel to make an advisory arbitration award to facilitate a dispute on the CCMA director's own accord or on application of either party to the dispute, after consultation with the parties, and setting out the panel's terms of reference.
- The CCMA director must establish the panel to facilitate resolution of a dispute at any time after a commissioner has issued a certificate of unresolved dispute after conciliation, or a notice of commencement of a strike or lockout, whichever is earlier, if so directed by the Minister or on application by either party to the dispute.
- An advisory panel may be appointed if the CCMA director has reasonable grounds to believe that a strike or lockout is no longer functional to collective bargaining, 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 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.
- The Labour Court may make an order requiring the director to appoint an advisory panel on application by a materially affected person or association, or where there are reasonable grounds that there is imminent threat of constitutional rights being violated by participants in or supporting the strike or lockout through threats, use of violence, or threat to damage to property, or 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.
- A person may not 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.

- Section 150B regulates the composition of the advisory arbitration panel.
- In terms of section 150B (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.
- 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 (section 150B(6)).
- Section 150B (7) provides that the appointment of the panel does not interrupt or suspend the right to strike or the recourse to lockout.
- Section 150C deals with the advisory arbitration award. The parties will have seven days within which to indicate whether they accept or reject the award, failing which they will be deemed to have accepted the award. A party who rejects the award is required to motivate its rejection "in the prescribed manner".
- In terms of section 150C (3), the award may not be made publicly available (save to the parties to the dispute) until such time as the Minister has published the award within four days of its issuing for public dissemination.
- A party may request the panel to reconvene in order to seek an explanation of the award or mediate settlement of the dispute based on the award or a variation of the award.
- Section 150D deals with the effect of an advisory arbitration award. An award is only binding on a party and its members to the dispute if one or more of the trade unions or employer organisations to the dispute accept or are deemed to have accepted the award.
- The binding nature of the award is determined as if it were a collective agreement and may be extended by the Minister on application in accordance with section 32.

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