TOKISO

15 March 2018

Honourable Minister Mildred Oliphant
Minister of Labour

For attention: Mr Thembinkosi Mkalipi / Mr Ian Macun
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Dear Honourable Minister M Oliphant

SUBMISSIONS ON THE LABOUR RELATIONS AMENDMENT BILL

Introduction

1. Tokiso Dispute Settlement (Pty) Ltd ("Tokiso") welcomes the opportunity to make submissions on the Labour Relations Amendment Bill.

2. Tokiso is an accredited private agency in terms of section 127 of the Labour Relations Act 66 of 1995 (as amended) ("the LRA").

3. Tokiso's submissions are limited to the proposed amendments to sections 127 and 128.

Amendment of section 127 and 128 of Act 66 of 1995 (as amended by section 33 of Act 42 of 1996 and section 23 of Act 12 of 2002)

4. The proposed amendments seek to amend sections 127 and 128 to extend the authority of the Commission for Conciliation Mediation and Arbitration ("CCMA") and its governing body to not only accredit bargaining councils and private agencies, but also the dispute resolution panel that these bodies may use for purposes of dispensing their accredited functions.

5. The reasons proffered for the proposed amendment to section 128 (and by extension, 127) is that this will "ensure that the persons appointed have the requisite qualifications and experience."[1]

6. It is submitted with respect that the proposed amendments to sections 127 and 128 are contrary to the objectives of the LRA, and will undermine collective bargaining, negatively impact on bargaining councils and private agencies, undermine the growth of skills in the marketplace and create an unnecessary burden on the CCMA.

6.1. **Undermine the objective of the LRA and in particular collective bargaining:**

Section 1 of the LRA provides for employees and their trade unions, employers and employers' organisations to collectively bargain to determine matters of mutual interest in a manner that they deem appropriate, including at sectoral level. The parties to a bargaining council regulate their dispute resolution function, including their rules and panel of dispute resolvers through collective agreements.

This amendment to sections 127 and 128 intrude on a bargaining councils' and private agencies' rights and duties by prescribing how they must conduct their internal affairs, effectively undermining section 30 which provides that a council must provide in its constitution the procedure to be followed if a dispute arises between the parties to the bargaining council. Therefore, bargaining councils (and private agencies) provide in their constitutions for the requirements of their panel of conciliators and arbitrators in compliance with section 30, read with the provision of the LRA. The application of section 23 of the LRA will also be impacted by this amendment.

Parties' self-regulation by way of a collective agreement of all employment issues in terms of the LRA is consistent with the primary purposes of the LRA. This is particularly pertinent to bargaining councils.

[1] At clause 2.9.3. of the Memorandum on the Objects of the Labour Relations Amendment Bill, 2017.

The Court in *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another*[2] referred with approval at para 65 to the following passage by Brassey[3]:

> "The general intention behind the Act is that voluntarism (provided, at any rate, that it is collective) should prevail over state regulation. As a result, the rights conferred by the Act are generally residual: they are normally subordinate to arrangements that the parties collectively craft for themselves and operate only in the absence of such an agreement (see, by way of further support for this proposition, s 21(3)). This section gives recognition to this principle, not merely by expressly preserving the rights of registered unions and employers to conclude agreements that regulate organizational rights, but also by impliedly permitting them to prevail over the rights conferred by part A..."

It is submitted that the proposed amendments will undermine the voluntarism and self-regulation afforded to parties through collective bargaining and bargaining council structures.

6.2. **Compromise initiatives to promote skills development in the industry:**

The CCMA has decided to outsource its training to tertiary institutions creating a greater pool of skills and expertise in the labour market. This means that aspirant dispute resolution practitioners may complete the respective courses without being appointed as a commissioner. By requiring the CCMA to accredit an individual commissioner, this will undermine the opportunity of bargaining councils and private agencies to develop the labour market through various self-determined means such as mentoring and further training and selection of persons, for example, persons appropriate for a particular industry.

South Africa has a history of credible and high-quality dispute resolution before the CCMA was established. Bargaining councils and private agencies are equipped, within the framework outlined in section 127(1) of the LRA, to assess whether an individual person has the requisites skills and qualifications for their needs.

The dispute resolution industry has already established the Dispute Settlement Accreditation Council ("DISAC"). There has been an in-principle agreement to register DISAC as a professional body to regulate dispute resolution practitioners.

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[2] (2003) 24 ILJ 305 (CC) at paragraphs 26-29.

[3] Brassey 'Commentary on the Labour Relations Act' Vol 3 (Juta Cape Town 1999).

This is, it is submitted, a more effective way of ensuring and enhancing qualifications and experience in the industry without unnecessarily burdening the CCMA for further functions.

6.3. **Further regulation and monitoring will place an unnecessary burden on the CCMA and undermine their monitoring role:**

The CCMA, it is submitted, already has an extended and onerous role. To place a further burden on them to appoint and monitor bargaining council panels is particularly onerous, particularly for party disputes, which should sit with the bargaining council.

Section 52(1) read with section 51(3) of the LRA requires that bargaining councils only require CCMA accreditation to resolve non-party disputes (in the converse, CCMA accreditation is not required for purposes of resolving party disputes). It is assumed that the amendments would only apply to non-party disputes, however, it is unclear. This could lead to confusion and create uncertainty in the monitoring and accreditation role of the CCMA.

7. The bargaining councils are established in an industry for purposes of *inter alia* making and enforcing collective agreements, and preventing and resolving disputes in their industry. The bargaining councils are in a unique position to provide a dispute resolution system that meets their industry's needs. Some industries are more complex and/or require different skills to others, and indeed the CCMA. At least two mechanisms in the LRA provide for bargaining councils to achieve this, including–

7.1. instituting procedures in terms of section 51(9) of the LRA by collective agreement to resolve disputes (the bargaining councils may establish their own dispute resolution rules); and

7.2. establishing a panel that has particular skills and expertise required for the purpose of their dispute resolution needs.

8. Should a bargaining council or private agency not meet the statutory requirements in section 127(4), the governing body of the CCMA may as the regulatory body, withdraw the accreditation of that body. Therefore, under the current statute, the CCMA governing body may ensure that accredited bodies meet their obligations to

ensure that the dispute resolution provided meets the required skills and expertise. Therefore, amendments are not required.

9. It is on this basis that it is proposed amendments are contested and such amendments should be deleted in its entirety.

Conclusion

10. The amendments proposed to section 127 and 128 will have far-reaching and largely negative effects on the bargaining councils, private agencies and the CCMA.

11. It is for the reasons set out above that these amendments are best left out of the final amendments.

Yours sincerely

TANYA VENTER
CEO