SUBMISSION TO THE
PORTFOLIO COMMITTEE ON LABOUR
Parliament

NEASA

NATIONAL EMPLOYERS' ASSOCIATION OF SOUTH AFRICA

17 April 2018

CONSTITUTIONAL PROVISION ON COLLECTIVE BARGAINING

Sec 23(5): “Every trade union, employers’ organisation and employer has the right to engage in collective bargaining…”

PURPOSE OF THE LRA

Section 1

(a) to give effect to and regulate the fundamental rights conferred by Section 23 of the Constitution of the Republic of South Africa, 1996;

(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can –

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest;

(d) to promote –

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

CURRENT LRA PROVISIONS

SECTION 32 (2)

Within 60 days of receiving the request, the Minister must extend the collective agreement, as requested, by publishing a notice in the Government Gazette 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.

PROPOSED LRA PROVISION

Section 32 (2)(A)

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.

OUR COMMENTS

Section 32(5)(b)-(d) contains a number of other criteria the Minister must adhere to in addition to 32(5)(a), including, the interest of collective bargaining and a publication in the Government Gazette requesting public comment.

CURRENT LRA PROVISIONS

SECTION 32 (3) - Summarised

The Minister must extend a collective agreement if requested to do so by a council:

- Where the parties to the council represent
- the majority of the employees within the scope of the agreement on the side of trade unions, and
- the majority of the employees within the scope of the agreement are employed by the employer parties to the council.

PROPOSED AMENDMENT

Section 32(3)(b) and (c)

(b) the registrar, in terms of section 49(4A)(a), has determined that the majority of all the 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;

or

(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;

EFFECT OF PROPOSED AMENDMENT

Section 32(3)(b) and (c)

- Currently s32(3) states that the Minister **must** extend the collective agreement if:
  - the majority of the employees within the scope of the collective agreement are members of trade union parties to the council, (and)
  - the majority of the employees within the scope of the collective agreement are employed by the members of the employer parties to the council.
- Amendment proposes to insert **‘or’**

OUR COMMENTS

- The effect of this amendment will be that, for example, if:

- employer parties (who might even only represent a small percentage of employers in the industry), employ 51% of employees in the industry,
- they can conclude an agreement with labour parties representing 1% of employees in the industry,
- and the Minister will be obligated to extend such an agreement to 99% of employees in such an industry, as well as to non-party employers, who had no say in the conclusion of the agreement.

- A similar arrangement may apply in respect of a dominant trade union and a minority employer grouping.

OUR COMMENTS

continued

These amendments will:

- Interfere with principles of majoritarianism, voluntarism and the constitutional right to not associate with a trade union or employers' organisation
- Negate the need for trade unions to recruit members as extension is practically guaranteed
- Lead to increasing dissatisfaction among SMMEs as big business will now be able to enforce their unaffordable arrangements upon them with ease

- The argument that collective bargaining is about coverage and not representativity cannot pass constitutional muster as it is aimed at protecting big business (with more employees) - tantamount to stating that because the union is poorly represented, large employers have negotiated with themselves on behalf of their employees

OUR COMMENTS

continued

- It is often said that collective bargaining aims to level the playing field and avoid competition between employers on the back of employee wages. However, what is seemingly permissible is unfair competition by large employers on the back of the financial – and operational limitations of SMMEs
- No trade union or employers' organisation who does not represent the majority of employees or employers can claim to be the voice for that particular body

CURRENT LRA PROVISIONS

Section 32

(6)(a) After a notice has been published in terms of subsection (2), the Minister, at the request of the bargaining council, may publish a further notice in the Government Gazette-

(i) extending the period specified in the earlier notice by a further period determined by the Minister; or

(ii) if the period specified in the earlier notice has expired, declaring a new date from which, and a further period during which, the provisions of the earlier notice will be effective.

(b) The provisions of subsections (3) and (5), read with the changes required by the context, apply in respect of the publication of any notice in terms of this subsection.

PROPOSED AMENDMENT

Deletion of paragraph 32(6)(b)

(b) The provisions of subsections (3) and (5), read with the changes required by the context, apply in respect of the publication of any notice in terms of this subsection.

EFFECT OF PROPOSED AMENDMENT

Deletion of Section 32(6)(b)

- It effectively allows the Minister to extend the period of operation of agreements (excluding fund agreements) without having to comply with any of the requirements contained in sections 32(3) or 32(5)
- Representativity does not play a role
- Non-parties right to be heard is removed
- Not in line with principles of administrative justice
- Will allow councils with very low levels of representativity to artificially keep arrangements alive

NEW PROPOSED SECTION 32A

CURRENT: No provision specifically dealing with extension of fund agreements

PROPOSED: Now allows Minister to extend period of operation of fund agreements for a period of 12 months if it is deemed to be in the interest of collective bargaining

EFFECT OF PROPOSED SECTION

New Proposed section 32A

- Allows Minister to extend fund agreements which is about to expire for a period of 12 months at request of **any of the parties** to the council
- Only one criteria - which is whether, in the opinion of the Minister – the extension is in the interest of collective bargaining, is subjective. Our view is that this, in fact, undermines collective bargaining
- Representativity plays no role
- Conclusion of collective agreements, including the time period of such agreements, falls within the domain of collective bargaining. It is not for the Minister to interfere in how the parties choose to run their affairs in respect of funding of a council or benefits provided by the parties
- It infringes on the principles of majoritarianism and self-determination

UNCONSTITUTIONALITY OF AMENDMENTS

- The Bill of Rights affords every employer and employee the right to engage in collective bargaining
- This necessarily includes the right to not engage in collective bargaining
- Collective bargaining is aimed at organised sectors
- Legislation aimed at allowing selected parties operating in unorganised (minority) sectors to enforce their agreements on the majority, who elected not to participate in collective bargaining, undermines and limits the constitutional rights of such parties

UNCONSTITUTIONALITY OF AMENDMENTS *continued*

- Enabling minority parties to extend collective agreements to majorities is selective bargaining, not collective bargaining
- Legislating collective bargaining to this extent no longer creates a framework for collective bargaining as is envisaged by the LRA, but infringes on the rights of parties and non-parties to self determination
- Such limitation cannot be said to be reasonable and justifiable in a democratic society based on equality

WHY THE PROPOSED AMENDMENTS?

NEASA'S LEGAL BATTLES AGAINST CURRENT SMME HOSTILE ARRANGEMENTS

Metal and Engineering Industries Bargaining Council (MEIBC) taken as a case in point:

- Used to be known as the 'flagship bargaining council'
- Currently bankrupt

2010 – ARBITRATION

- NEASA challenged the constitutionality of the MEIBC
- Arbitration ruled in NEASA's favour (2011)
- Finding – the MEIBC did not even exist at the time
- The consequence of this was that all agreements prior to 2011 were unlawful

2011 – URGENT LABOUR COURT APPLICATION BY NEASA

- NEASA wanted to stop extension pending outcome of arbitration
- Labour Court ruled against NEASA on the basis of lack of urgency
- Various respondents misled the Court

2011 – REVIEW APPLICATION BY NEASA

- 2011-14 Main Agreement Extension challenged
- 2012 – Labour Court ruled in NEASA's favour setting aside 2011-14 extension of Main Agreement
- The Court however suspended the judgment giving the Minister another opportunity to reconsider extension

2012 – FURTHER REVIEW APPLICATION BY NEASA

- NEASA challenged further extension by the Minister of 2011-14 Main Agreement
- SEIFSA (representing mainly big employers), NUMSA and the Department of Labour misled the Minister of Labour
- They were forced to do so because SEIFSA no longer had the required levels of representativity to justify extension of agreement
- Labour Court found in NEASA's favour, calling the whole process/scheme a 'sham'

2014 – REVIEW APPLICATION BY NEASA

- NEASA challenged the extension of the 2014-17 agreement (between SEIFSA, NUMSA and other trade unions) by the Minister of Labour
- SEIFSA again could not justify extension as a result of low levels of representativity
- Submission to Minister was again manipulated
- Labour Court again found in NEASA's favour, asking the question: 'Don't they learn?'

2014-17 MAIN AGREEMENT

In terms of a Labour Court ruling in December 2014, in the matter between NEASA and NUMSA:

- It was confirmed that NEASA entered into a much more beneficial agreement for employers with NUMSA (as was the case between SEIFSA and NUMSA)
- Minister, on advice of officials of the Department of Labour, simply overruled the NEASA/NUMSA agreement and extended the SEIFSA/NUMSA agreement to NEASA and other non-parties

2015 – NEASA'S REVIEW APPLICATION IN THE LABOUR COURT

- Opposing extension of administration and dispute levies agreement
- Labour Court found in NEASA's favour on a number of grounds **(2017)**
- Court found non-compliance with Section 32(1), (3) and (5) by Minister of Labour
- NEASA brought this matter on 20 odd grounds

2016 – NEASA's URGENT APPLICATION IN THE LABOUR COURT

- The purpose of this application was to stop the bargaining council to request the Minister of Labour to extend the administration levies agreement
- Labour Court found in NEASA's favour **(2017)** in that the parties to the council did not meet the required threshold of representativity

WHAT DOES THE LEGISLATOR WANT TO ACHIEVE?

The aim of the amendments is seemingly to entrench collective bargaining, in the face of the opposition from SMMEs and dwindling representativity figures, in that it will now become easier for non-representative parties to extend agreements to non-parties although they do not represent the majority of employers or employees in a sector.

It will furthermore allow the Minister to artificially keep bargaining councils alive where parties cannot agree on conditions of employment, funding or benefits.

WHAT DO THE EXPERTS SAY ABOUT THE EXTENSION OF AGREEMENTS

Gill Marcus - previous Governor of the Reserve Bank

Gill Marcus claims that, although collective bargaining may have contributed to labour peace in South Africa, it has also favoured big firms at the expense of smaller ones.

This in turn has had an inhibiting effect on the growth of small and medium sized firms.

She stated: “We have not seen the dynamic growth of small and medium sized firms as one would have expected in a country at the level of development in South Africa.

International Monitory Fund (IMF)

The IMF thoroughly researched the economic and social challenges currently facing South Africa. With regards to wage-setting they explicitly recommended that it is imperative “to stop extending negotiated wages to other firms that were not part of the bargaining process. While discontinuing this mandatory extension will be politically challenging, it would open the way to firm-level bargaining and facilitate wage outcomes that are conducive to employment gains.”

Lesetja Kganyago - Governor of the Reserve Bank

"Under this system, dominant firms in a sector negotiate wage rates with the dominant unions. The agreed wages are invariably extended by government to the whole sector. …this forces new and smaller firms to close unless they can shift to a more capital-intensive approach…The upshot has been a lower level of employment at higher wages and a concentration of fewer, more profitable firms."

This is **John Kane-Berman's - a policy fellow at the South African Institute of Race Relations, a think-tank promoting political and economic freedom** - view on the current arrangement:

"Bargaining councils function as price-fixing cartels*, the price being that of labour. Like all cartels, they seek to eliminate competition. This is illegal in many other fields. So too should it be in industrial relations."

(*It is for this reason that the Competitions Act specifically excludes bargaining councils)

President Cyril Ramaphosa

During President Cyril Ramaphosa's State of the Nation Address, he undertook to build a small business support ecosystem that assists, nourishes and promotes entrepreneurs. He committed himself to reduce the regulatory barriers (red tape) for small business.

The current collective bargaining arrangement, especially with regard to the extension of agreements, is hostile towards the stated ideals of the President.

CONCLUSION

- Amendments will not strengthen collective bargaining but will elicit an even stronger push back.
- Powers given to the Minister are autocratic of nature and takes place outside of the context of collective bargaining – negotiations and consensus-seeking processes.
- Some of the amendments infringes on constitutional rights and will be challenged.
- A new inclusive approach is required for collective bargaining to survive.
- Underlying fundamental principles of collective bargaining are voluntarism, majoritarianism and consensus.
- Legislation aimed at forcing employers and employees into collective bargaining arrangements of minorities will completely undermine these principles and may very well lead to the demise of the system.