# MEMORANDUM ON THE OBJECTS OF THE NATIONAL MINIMUM WAGE BILL, 2017

## BACKGROUND

* 1. Section 7(2) of the Constitution of the Republic of South Africa, 1996 (‘‘the Constitution’’), imposes an obligation on the State to respect, protect, promote and fulfil the rights in the Bill of Rights, which include the right to fair labour practices. In this respect, the proposed National Minimum Wage Bill, 2018 (‘‘the Bill’’), seeks to provide for a national minimum wage and establish the National Minimum Wage Commission (‘‘the Commission’’), which will, amongst other things, implement the provisions relating to the national minimum wage.
  2. The South African labour market is characterised by high levels of inequality, unemployment and poverty. One of the measures to reduce these levels is a national minimum wage.
  3. Such a measure respects and promotes the right to dignity and fair labour practices.
  4. To this end, the business, labour, community and government representatives at the National Economic, Development and Labour Council (‘‘NEDLAC’’) commissioned a task force to investigate and make recommendations on a national minimum wage and a legislative mechanism for the annual adjustment of the national minimum wage.
  5. On the basis of the report from this task force, NEDLAC engaged in an extensive process of consultation resulting in agreement in respect of the national minimum wage and the mechanism for annual adjustment. The resulting agreement constituted the basis for the drafting of this Bill, in order to enact the envisaged National Minimum Wage Act, 2018 (‘‘the Act’’).

## OBJECT OF BILL

The main object of the Bill is to provide for a national minimum wage in order to advance economic development and social justice by improving the wages of lowest paid workers, protecting workers from unreasonably low wages and promoting collective bargaining and supporting economic policy.

## CLAUSE-BY-CLAUSE ANALYSIS

* 1. **Clause 1**

Clause 1 of the Bill provides for the definitions which will assist in the interpretation of the Bill.

## Clause 2

Clause 2 of the Bill provides for the purpose of the Act which is to advance economic development and social justice by improving the wages of lowest paid workers, protecting workers from unreasonably low wages, promoting collective bargaining and supporting economic policy.

## Clause 3

Clause 3 outlines the application of the Act, which applies to all workers and their employers except members of the South African National Defence Force, the National Intelligence Agency, the South African Secret Service and volunteers.

## Clause 4

* + 1. Clause 4 of the Bill specifies the national minimum wage that was agreed to at NEDLAC, and set out in Schedule 1 to the Bill. In terms

of Schedule 1 to the Bill the national minimum wage is R20 for each ordinary hour worked, and is due to come into force on a date fixed by the President by proclamation in the Gazette. The reason for placing it in a Schedule is that it is to be adjusted on an annual basis.

* + 1. In terms of clause 4 every worker is entitled to at least the national minimum wage. An employer may not pay wages that are below the national minimum wage and the national minimum wage cannot be varied by contract, collective agreement, sectoral determination or law, except a law amending the Act.
    2. The national minimum wage constitutes a term of the worker’s contract except to the extent that the contract provides for a more favourable wage.
    3. In terms of the Bill it is an unfair labour practice for an employer to unilaterally alter hours of work or other conditions of employment in implementing the national minimum wage.

## Clause 5

* + 1. Clause 5 of the Bill provides for the calculation of the national minimum wage. The national minimum wage is the amount payable for the ordinary hours of work. This means that a worker is entitled to receive the minimum wage for the number of hours that the worker works in a day. This does not include the payment of allowances such as transport, tool, food or accommodation allowances, payments in kind (board or lodging), tips, bonuses and gifts. Provision is also made for the exclusion of other forms of payment by regulation.
    2. Clause 5 also provides that any deduction made from the remuneration of a worker must be in accordance with section 34 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997)(“Basic Conditions of Employment Act”), provided that a deduction made in terms of section 34(1)(a) of the Basic Conditions of Employment Act does not exceed one quarter of a worker’s remuneration.

## Clause 6

* + 1. Clause 6 of the Bill provides for the annual review and adjustment of the national minimum wage by the Commission, which must annually review the existing national minimum wage, and make recommendations to the Minister, and the minimum wage must commence a date fixed by the President by proclamation in the *Gazette*. The Commission must prepare a report with recommendations for the Minister by a date fixed by the President by proclamation in the *Gazette*, and if the Minister does not agree with the recommendations of the Commission or requires clarity, the Minister may refer the report back to the Commission to clarify or reconsider.
    2. The Minister must, by a date fixed by the President by proclamation in the Gazette, determine the adjustment to the national minimum wage, and by notice in the Gazette, amend the national minimum wage contained in Schedules 1 and 2.
    3. The Minister must, within 7 days of the publication of the amended Schedules in the *Gazette*, table the amended Schedules 1 and 2 in Parliament.

## Clause 7

In terms of clause 7 of the Bill the Commission must conduct an annual review of the national minimum wage by promoting medium term targets, alleviation of poverty, the reduction of wage inequality, and in this regard take into account factors such as inflation, cost of living and the need to retain the value of the national minimum wage.

## Clauses 8, 9 and 10

* + 1. Clauses 8, 9 and 10 of the Bill provide for the establishment, the composition and appointment of members of the Commission. According to clause 9, the Commission consists of—
       - A chairperson appointed by the Minister;
       - three members nominated by organised business;
       - three members nominated by organised community;
       - three members nominated by organised labour; and
       - three independent experts appointed by the Minister, who are knowledgeable about the labour market and conditions of employment.
    2. In terms of clause 10 the members of the Commission are appointed by the Minister from members nominated by organised business, organised labour and the organised community, in other words through nomination by these three constituencies as they are constituted in NEDLAC. The Minister also appoints the chairperson and three independent experts after consultation with NEDLAC.

## Clause 11

Clause 11 of the Bill provides for the functions of the Commission, which are to review the national minimum wage and to make recommendations annually for its adjustments. The Commission has ancillary functions such as investigating the impact of the national minimum wage on the economy, collective bargaining and income differentials. (read with the amendments to the Basic Conditions of Employment Act, , the Commission will take over the functions of the disestablished Employment Conditions Commission).

## Clause 12

Clause 12 of the Bill provides that the Commission must determine its own rules in respect of the conduct of its meeting.

## Clause 13

Clause 13 of the Bill provides for a secretariat of the Commission, which will support the Commission with the responsibility of administering the Commission, procurement of research and also monitor the impact and evaluation of the national minimum wage on the economy and income differentials.

## Clause 14

Clause 14 of the Bill provides for the funds of the Commission which must consist of money defrayed from the budget vote of the Department.

## Clause 15

Clause 15 of the Bill empowers the Minister, on application by any relevant employer, to grant exemptions from the national minimum wage, and provides that the applications must be made in the prescribed form and manner.

## Clause 16

* + 1. Clause 16 of the Bill empowers the Minister to make regulations in the form and manner in which exemptions must be made in terms of clause 15, including the—
       - procedure for applying for an exemption;
       - information to be submitted with an exemption application;
       - obligations on employers to consult with employees or trade unions concerning an exemption application;
       - criteria that must be applied when evaluating exemption applications;
       - period within which an application must be made; and
       - period within which a decision on an exemption must be made.
    2. Clause 16 of the Bill also gives the Minister the power to make regulations on any matter required or necessary to be prescribed. It

sets out a standard publication and comment procedure in respect of interested parties.

## Clause 17

Clause 17 provides for the short title and commencement of the various provisions of the Bill.

## Schedules 1 and 2

* + 1. Schedule 1 to the Bill provides that the national minimum wage will be R20 for each ordinary hour worked. Schedule 1 also provides for temporary exceptions to the national minimum wage for the first year, which is a date fixed by the President by proclamation in the Gazette, as follows:
       - The minimum wage for farm workers will be R18 per hour;
       - the minimum wage for domestic workers will be R15 per hour; and
       - the minimum wage for workers in expanded public works programme will be R11 per hour.
    2. Schedule 2 specifies the learnership allowances in respect of workers who conclude learnership agreements in terms of the Skills Development Act, 1998 (Act No. 97 of 1998).

## DEPARTMENTS/BODIES/PERSONS CONSULTED

The Department 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 National Economic Development and Labour Council on the National Minimum Wage Bill. Organised business, organised labour and the organised community sector were consulted during the engagement in the National Economic Development and Labour Council.

## FINANCIAL IMPLICATIONS

The National Minimum Wage Bill will require the Department of Labour to establish a Secretariat to support the work of the National Minimum Wage Commission. Provision has been made within the Medium Term Expenditure Framework for this cost.

## PARLIAMENTARY PROCEDURE

* 1. The Constitution prescribes procedure for the classification of Bills, therefore a Bill must be correctly classified so that it does not become inconsistent with the Constitution.
  2. The Office of the Chief State Law Adviser considered the Bill against the provisions, of the Constitution relating to the tagging of Bills and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.
  3. The established test for classification of a Bill is that any Bill whose provisions, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution must be classified in terms of that Schedule. The process is concerned with the question of how the Bill should be considered by the provinces and in the National Council of Provinces. Furthermore, how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more the Bill affects the interests, concerns and capacities of the provinces, the more say the provinces should have on the contents of the Bill.

15

* 1. The issue to be determined is whether the proposed amendments to the Act, as contained in the Bill, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution.
  2. The Bill seeks to provide for a national minimum wage, to establish the Commission (and its composition and functions) in order to advance economic development and social justice by improving the wages of lowest paid workers, protecting workers from unreasonably low wages, promoting collective bargaining and supporting economic policy. The functions of the Commission, amongst others, are to review the national minimum wage and to make recommendations annually for its adjustment. The Commission may also investigate the impact of the national minimum wage on the economy, collective bargaining and income differentials.
  3. The Bill provides for the annual review and adjustment of the national minimum wage by the Commission and the final determination thereof by the Minister. The Commission has to take a number of factors into consideration in conducting its review of the national minimum wage and its recommended adjustment. These factors include the increase in inflation, the cost of living, wage levels, wage differentials, productivity, the ability of businesses to carry on successfully and the impact on small businesses and employment.
  4. The Bill empowers the Minister, on application by any relevant employer, to grant exemptions from the national minimum wage, the exercise of which is to be regulated by regulations.
  5. The Bill gives the Minister the power to make regulations regarding the procedure for exemption, the obligation on employers to consult with employees or their trade unions and the criteria for evaluating exemptions. The Minister may also make regulations on any matter required or necessary to be prescribed. It sets out a standard publication and comment procedure in respect of interested parties.
  6. Schedule 1 of the Bill provides for the national minimum wage of R20 for each ordinary hour worked and also provides for temporary exceptions to the national minimum wage for the first year, from a date fixed by the President by proclamation in the Gazette i.e. the national minimum wage for farm workers will be R18 per hour, the national minimum wage for domestic workers will be R16 per hour and R11 per hour for workers in expanded public works programmes.
  7. The provisions of the Bill as reflected above have been carefully examined to establish whether, in substantial measure, they fall within any of the functional areas listed in Schedule 4 to the Constitution.
  8. In the view of the Office of the Chief State Law Adviser, the subject matter of the provisions of the Bill does not fall within any of the functional areas listed in Schedule 4 to the Constitution and it does not affect provinces whereby the procedure set out in section 76 of the Constitution would be applicable.
  9. The Office of the Chief State Law Adviser is therefore of the opinion that since this Bill does not deal with any of the matters listed in Schedule 4 of the Constitution, it must be dealt with in accordance with the procedure set out in section 75 of the Constitution.
  10. The Office of the Chief State Law Adviser is also 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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