



REF: 1/3/1/1/NAC 1/3/1/1/NAC 11/2019-2020

MEMORANDUM

The Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour

National Council of Provinces

Attention: Ms. Noziphiwo Dinzulu

Per email: ndinizulu@parliament.gov.za

RE: NATIONAL MINIMUM WAGE AMENDMENT BILL [B 9-2019]

We refer to the above and herewith submit our comments.

Please note that the National Minimum Wage Act, 2018, is referred to as the "principal Act", the National Minimum Wage Amendment Bill [B 9-2019] as the "amendment Bill" and the Labour Relations Act, 1995, as the "LRA".

General comments:

1. Clause 1 of the amendment Bill proposes to amend section 17 of the principal Act by substituting the reference to section 4(6) of the principal Act with a reference to section 4(8) of the principal Act. The Memorandum on the Objects of the amendment Bill explains that the reason for the proposed amendment is to correct an incorrect cross-reference to section 4(6) in section 17 of the principal Act with the correct reference to section 4(8) and that the proposed amendment constitutes a technical amendment.
2. Paragraph 1 of the Memorandum on the Objects of the amendment Bill explains that the current legal position, which is that section 4(6) of the enabling Act takes effect from 1 May 2017, leads to an absurdity and that the section that should have commenced as from 1 May 2017 is in fact section 4(8) of the principal Act. The absurdity referred to is not apparent from the principal Act.
3. The current legal position in so far as it relates to section 4(8) of the principal Act is understood by the public to have commenced as from 1 January 2019, the date proclaimed by the president that the principal Act would commence.

4. The public and in particular employees and employers have since 1 January 2019 conformed their conduct in accordance with the current legal position. The amendment Bill now seeks to reform the current legal position. It is therefore submitted that the proposed amendment contained in clause 1 of the amendment Bill is not merely a technical amendment as indicated in paragraph 1 of the Memorandum on the Objects of the amendment Bill but reforms the law.

Legal comments:

5. Section 17 of the principal Act contains the commencement provisions of the principal Act. Clause 1 of the amendment Bill proposes an amendment to section 17(4) to read that section 4(8) of the principal Act takes retrospective effect from 1 May 2017 instead of section 4(6). Section 4(8) of the principal Act provides that It is an unfair labour practice for an employer to unilaterally alter wages, hours of work or other conditions of employment in connection with the implementation of the national minimum wage and sections 191, 193, 194(4) and 195 of the LRA, apply, unless the context indicates otherwise.
6. The LRA draws a distinction between conduct that constitutes an unfair labour practice and that which constitutes a change in the employment conditions of an employee. A dispute that relates to these two different types of conduct are resolved by means of different mechanisms in the LRA. This is the legal position in the LRA as at 1 May 2017.
7. Section 186(2)(a) of the LRA provides that "Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving—
 - (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;
 - (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
 - (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and
 - (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

Wages constitute a benefit to an employee. A unilateral change in the benefits of an employee would therefore constitute an unfair labour practice in terms of the LRA and a resolution of an unfair labour practice follows the process set out for it in terms of the LRA.

8. The LRA recognises that a unilateral change in the conditions of employment of an employee is different to a change in the benefits of an employee. See section 64(4) of the LRA with regard to how the LRA treats disputes relating to a unilateral change to terms and conditions of employment. The resolution process that the LRA envisages for this kind of conduct by an employer is that of dispute resolution. It is arguable that a change in working hours may permissibly fall under a change in conditions rather than

benefits. The point is that a change in the conditions of employment of an employee does not constitute an unfair labour practice as envisaged in the LRA. Section 4(8) of the principal Act however treats both these types of conduct as an unfair labour practice, and in terms of the current legal position, in the absence of the enactment of the amendment Bill, that change would be prospective.

9. South African case law distinguishes between retrospectivity in the "weak" sense and in the "strong" sense. A provision is retrospective in the "weak" sense, if it "*prospectively [affects], or changes the consequences for the future of, pre-existing transactions and matters*".¹ An example of this is where a provision states that "[a] person convicted of driving while under the influence of alcohol is disqualified from holding a driver's licence".² A provision is retrospective in the "strong" sense (i.e. retroactive), if the provision "*is deemed to be in force from an earlier date than that on which it was in fact enacted*".³ Clause 1 of the amendment Bill would fall within the scope of a provision that will be retrospective in the "strong" sense (i.e. retroactive).
10. It is acknowledged that retrospective laws are not necessarily unconstitutional,⁴ whether they are retrospective in the "weak" sense or in the "strong" sense.
11. The court in *Pienaar Brothers*⁵ held that the constitutional validity of retrospective legislation should be judged according to certain standards. Reference was made to *Robertson v City of Cape Town* 2004 (5) SA 412 (C) (at para 135) ("*Robertson*"), in which it was stated that "*[i]t appears that retrospective legislation may contravene the rule of law where it unreasonably or unfairly impairs the ability of those bound by the law to regulate their conduct in accordance therewith*".⁶ In regard to this test, the court in *Pienaar Brothers* held that "*there are obviously degrees of unfairness and not all laws are "fair" and the real question would be whether a law is "unjust" i.e. whether it passes constitutional muster, i.e. was the law, accepting its language clear, passed for a rational reason*"? *I do not agree, if that was suggested, that "unfair impairment" is the appropriate test in our constitutional dispensation*" (emphasis added).
12. The following standards can be distilled from *Pienaar Brothers*:⁷

¹ See *Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue and Another (GNP)* unreported case 87760/2014 of 29 May 2017 ("*Pienaar Brothers*"), at para 16.

² Burger *A Guide to Legislative Drafting in South Africa*, on page 110.

³ See *Pienaar Brothers supra*.

⁴ The court in *Pienaar Brothers* stated, amongst other things, that "*[t]he Constitution itself certainly does not prohibit retrospective legislation in civil law*" (at para 85), "*[t]he Constitution obviously does not prohibit the passing of legislation in the civil sphere that has retrospective effect*" (at para 88), "*[t]here is nothing in our Constitution which prohibits parliament from passing retroactive or retrospective legislation*" and "*...there is nothing internal in the Rule of Law which renders retrospective legislation per se unconstitutional*" (at para 102).

⁵ In this case, the Income Tax Act, 1962 (Act 58 of 1962) was amended so as to close a loophole that taxpayers could potentially exploit in order to avoid paying secondary tax on companies. The amendment was made retroactive to the day that the (National) Minister of Finance announced to the public that legislation was being prepared to close the loophole. The intention was, therefore, to prevent taxpayers from exploiting the loophole from the date when the Minister made the announcement, to the date on which the amendment came into operation.

⁶ See *Robertson*, at para 135.

⁷ See paras 80 - 82.



- (a) Where the legislation does not limit fundamental rights in the Bill of Rights, the “*rationality*” test⁸ applies. This is “*a basic threshold enquiry, roughly to ensure that the means chosen in legislation are rationally connected to the ends sought to be achieved*”.⁹
- (b) Where the legislation limits a fundamental right in the Bill of Rights, the standard of “*reasonableness*” or “*proportionality*” applies.¹⁰ One must then have regard to section 36 of the Constitution of the Republic of South Africa.¹¹
13. The effect of clause 1 of the amendment Bill is that the conduct envisaged in section 4(8) of the principal Act will constitute an unfair labour practice as from 1 May 2017, before the assent to the principal Act by the President on 23 November 2018 and its commencement on 1 January 2019. The impact of clause 1 is that it is retroactive because it changes the law as it was at 1 May 2017 which was that a change in employee conditions did not constitute an unfair labour practice. Once enacted, clause 1 of the amendment Bill will have the effect that as of 1 May 2017 it does constitute an unfair labour practice. It is not apparent whether clause 1 affects any of the fundamental rights in the Bill of Rights. However, as is evident in *Pienaar Brothers*, clause 1 still needs to be rationally based.
14. The Memorandum on the Objects of the Amendment Bill does not indicate what the rationale is for the change except to state that it is a technical correction. What is lacking in the Memorandum on the Objects of the amendment Bill is an indication of the rationality for the retroactivity i.e. neither the amendment Bill nor its Memorandum on the Objects of the amendment Bill establishes a reason for the retroactivity.
15. It is particularly difficult to understand why the retroactivity is required—
- (a) in respect of a unilateral change to the wages of an employee in connection with the implementation of the national minimum wage when the LRA already as at 1 May 2017 regards such conduct as an unfair labour practice. In that regard, the retroactivity appears unnecessary and superfluous.
- (b) in respect of a unilateral change to conditions of employment in connection with the implementation of the national minimum wage. Section 4(8) classifies certain conduct as constituting an unfair labour practice when it relates to the implementation of the national minimum wage. The classification in section 4(8) turns on the implementation of the national minimum wage. Section 4(8) therefore links unfair labour practice in respect of a unilateral change to conditions of employment to the implementation of the national minimum wage. The principal Act took effect on 1 January 2019. National minimum wage was not operational before this date and therefore not implementable. Having been non-existent as at 1 May 2017, any conduct regarding the unilateral change of conditions of employment could not possibly have transpired in connection with the implementation of the national minimum wage. It is therefore not clear why, in so far as section 4(8) relates to a unilateral change in conditions of

⁸ See para 80.

⁹ *Ibid.*

¹⁰ *Ibid.* The court indicated that this is a “*more exacting standard*”.

¹¹ *Ibid.*



employment in connection with the implementation of the national minimum wage, the section should operate retroactively.

In the absence of rationality being established or capable of being established, as is clear from the case law, clause 1 is arguably unconstitutional.

16. It is proposed that clause 1 of the amendment Bill is reconsidered.

Yours sincerely

A handwritten signature in black ink, appearing to read 'DM', with a large, stylized initial 'D'.

MR DAVID MAYNIER

PROVINCIAL MINISTER OF FINANCE AND ECONOMIC OPPORTUNITIES

WESTERN CAPE PROVINCE

DATE: 13 12 19