OFFICE OF THE PRESIDENT

No. 1877. 13 December 1995

NO. 66 OF 1995: LABOUR RELATIONS ACT, 1995.

It is hereby notified that the President has assented to the following Act which is hereby published for general information:-

No. 66 of 1995: *Labour Relations Act, 1995*.

ACT

To change the law governing labour relations and, for that purpose-

to give effect to section 27 of the Constitution;

to regulate the organisational rights of trade unions;

to promote and facilitate collective bargaining at the workplace and at sectoral level;

to regulate the right to strike and the recourse to lockout in conformity with the Constitution;

to promote employee participation in decision-making through the establishment of workplace forums;

to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose;

to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act;

to provide for a simplified procedure for the registration of trade unions and employers' organisations, and to provide for their regulation to ensure democratic practices and proper financial control;

to give effect to the public international law obligations of the Republic relating to labour relations;

to amend and repeal certain laws relating to labour relations; and

to provide for incidental matters.

(English text signed by the President. Assented to *29 November 1995*.)

BE IT ENACTED by the Parliament of the Republic of South Africa as follows:-

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CHAPTER I

PURPOSE, APPLICATION AND INTERPRETATION

1. Purpose of this Act

The purpose of this Act[1] is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are-

(a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution ;[2]

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

(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; and

(ii) formulate industrial policy; and

(d) to promote-

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the workplace; and

(iv) the effective resolution of labour disputes.

1 An italicised word or phrase indicates that the word or phrase is defined in section 213 of this Act.

2. Section 27, which is in the Chapter on Fundamental Rights in the Constitution entrenches the following rights:

"(1) Every person shall have the right to fair labour practices.

(2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.

(3) Workers and employers shall have the right to organise and bargain collectively.

(4) Workers shall have the right to strike for the purpose of collective bargaining.

(5) Employers' recourse to the lockout for the purpose of collective bargaining shall not be impaired, subject to subsection 33(l)."

2. Exclusion from application of this Act

This Act does not apply to members of-

(a) the National Defence Force;

(b) the National Intelligence Agency; and

(c) the South African Secret Service.

3. Interpretation of this Act

Any person applying this Act must interpret its provisions-

(a) to give effect to its primary objects;

(b) in compliance with the Constitution; and

(c) in compliance with the public international law obligations of the Republic.

CHAPTER II

FREEDOM OF ASSOCIATION AND GENERAL PROTECTIONS

4. Employees' right to freedom of association

(1) Every employee has the right-

(a) to participate in forming a trade union or federation of trade unions; and

(b) to join a trade union, subject to its constitution.

(2) Every member of a trade union has the right, subject to the constitution of that trade union-

(a) to participate in its lawful activities;

(b) to participate in the election of any of its office-bearers, officials or trade union representatives;

(c) to stand for election and be eligible for appointment as an office bearer or official and, if elected or appointed, to hold office; and

(d) to stand for election and be eligible for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in terms of this Act or any collective agreement.

(3) Every member of a trade union that is a member of a federation of trade unions has the right, subject to the constitution of that federation-

(a) to participate in its lawful activities;

(b) to participate in the election of any of its office-bearers or officials; and

(c) to stand for election and be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office.

5. Protection of employees and persons seeking employment

(1) No person may discriminate against an employee for exercising any right conferred by this Act.

(2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following-

(a) require an employee or a person seeking employment-

(i) not to be a member of a trade union or workplace forum;

(ii) not to become a member of a trade union or workplace, forum; or

(iii) to give up membership of a trade union or workplace forum;

(b) prevent an employee or a person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or

(c) prejudice an employee or a person seeking employment because of past, present or anticipated-

(i) membership of a trade union or workplace forum;

(ii) participation in forming a trade union or federation of trade unions or establishing a workplace forum;

(iii) participation in the lawful activities of a trade union, federation of trade unions or workplace forum;

(iv) failure or refusal to do something that an employer may not lawfully permit or require an employee to do;

(v) disclosure of information that the employee is lawfully entitled or required to give to another person;

(vi) exercise of any right conferred by this Act; or

(vii) participation in any proceedings in terms of this Act.

(3) No person may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act.

However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute.

(4) A provision in any contract, whether entered into before or after the commencement of this Act, that directly or indirectly contradicts or limits any provision of section 4, or this section, is invalid, unless the contractual provision is permitted by this Act.

6. Employers' right to freedom of association

(1) Every employer has the right -

(a) to participate in forming an employers' organisation or a federation of employers' organisations; and

(b) to an employers' organisation, subject to its constitution.

(2) Every member of an employers' organisation has the right, subject to the constitution of that employers' organisation-

(a) to participate in its lawful activities;

(b) to participate in the election of any of its office-bearers or officials; and

(c) if-

(i) a natural person, to stand for election and be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office;

(ii) a juristic person, to have a representative stand for election, and be eligible for appointment, as an office-bearer or official and, if elected or appointed, to hold office.

(3) Every member of an employers' organisation that is a member of a federation of employers' organisations has the right, subject to the constitution of that federation-

(a) to participate in its lawful activities;

(b) to participate in the election of any of its office-bearers or o and (c)

(i) a natural person, to stand for election and be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office; or

(ii) a juristic person, to have a representative stand for election, and be eligible for appointment, as an office-bearer or official and, if elected or appointed, to hold office.

7. Protection of employers' rights

(1) No person may discriminate against an employer for exercising any right conferred by this Act.

(2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following-

(a) require an employer-

(i) not to be a member of an employers' organisation;

(ii) not to become a member of an employers' organisation; or

(iii) to give up membership of an employers' organisation;

(b) prevent an employer from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or

(c) prejudice an employer because of past, present or anticipated-

(i) membership of an employers' organisation;

(ii) participation in forming an employers' organisation or a federation of employers' organisations;

(iii) participation in the lawful activities of an employers' organisation or a federation of employers' organisations;

(iv) disclosure of information that the employer is lawfully entitled or required to give to another person;

(v) exercise of any right conferred by this Act; or

(vi) participation in any proceedings in terms of this Act.

(3) No person may advantage, or promise to advantage, an employer in exchange for that employer not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute.

(4) A provision in any contract, whether entered into before or after the commencement of this Act, that directly or indirectly contradicts or limits any provision of section 6, or this section, is invalid, unless the contractual provision is permitted by this Act.

8. Rights of trade unions and employers' organisations

Every trade union and every employers' organisation has the right-

(a) subject to the provisions of Chapter VI –

(i) to determine its own constitution and rules; and
(ii) to hold elections for its office bearers, officials and representatives;

(b) to plan and organise its administration and lawful activities;

(c) to participate in forming a federation of trade unions or a federation of employers' organisations;

(d) to join a federation of trade unions or a federation of employers' organisations, subject to its constitution, and to participate in its lawful activities; and

(e) to affiliate with, and participate in the affairs of, any international workers' organisation or international employers' organisation or the International Labour Organisation, and contribute to, or receive financial assistance from, those organisations.

9. Procedure for disputes [3]

(1) If there is a dispute about the interpretation or application of any provision of this Chapter, any party to the dispute may refer the dispute in writing to-

(a) a council, if the parties to the dispute fall within the registered scope of that council; or

(b) the Commission, if no council has jurisdiction.

(2) The party who refers the dispute must satisfy the council or the Commission that a copy of the referral has been served on all the other parties to the dispute.

(3) The council or the Commission must attempt to resolve the dispute through conciliation.

(4) If the dispute remains unresolved, any party to the dispute may refer it to the Labour Court for adjudication.

3. See flow diagram No. 1 in Schedule 4.

10. Burden of proof

In any proceedings-

(a) a party who alleges that a right or protection conferred by this Chapter has been infringed must prove the facts of the conduct; and

(b) the party who engaged in that conduct must then prove that the conduct did not infringe any provision of this Chapter.

CHAPTER III

COLLECTIVE BARGAINING

PART A-ORGANISATIONAL RIGHTS

11. Trade union representativeness

In this Part, unless otherwise stated, "representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees employed by an employer in a workplace.

12. Trade union access to workplace

(1) Any office-bearer or official of a representative trade union is entitled to enter the employer's premises in order to recruit members or communicate with members, or otherwise serve members' interests.

(2) A representative trade union is entitled to hold meetings with employees outside their working hours at the employer's premises.

(3) The members of a representative trade union are entitled to vote at the employer's premises in any election or ballot contemplated in that trade union's constitution.

(4) The rights conferred by this section are subject to any conditions as to time and place that are reasonable and necessary to safeguard life or property or to prevent the undue disruption of work.

13. Deduction of trade union subscriptions or levies

(1) Any employee who is a member of a representative trade union may authorise the employer in writing to deduct subscriptions or levies payable to that trade union from the employee's wages.

(2) An employer who receives an authorisation in terms of subsection (1) must begin making the authorised deduction as soon as possible and must remit the amount deducted to the representative trade union by not later than the 15th day of the month first following the date each deduction was made.

(3) An employee may revoke an authorisation given in terms of subsection (1) by giving the employer and the representative trade union one month's written notice or, if the employee works in the public service, three months' written notice.

(4) An employer who receives a notice in terms of subsection (3) must continue to make the authorised deduction until the notice period has expired and then must stop making the deduction.

(5) With each monthly remittance, the employer must give the representative trade union-

(a) a list of the names of every member from whose wages the employer has made the deductions that are included in the remittance;

(b) details of the amounts deducted and remitted and the period to which the deductions relate; and

(c) a copy of every notice of revocation in terms of subsection (3).

14. Trade union representatives

(1) In this section, "representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.

(2) In any workplace in which at least 10 members of a representative trade union are employed, those members are entitled to elect from among themselves-

(a) if there are 10 members of the trade union employed in the workplace, one trade union representative;

(b) if there are more than 10 members of the trade union employed in the workplace, two trade union representatives;

(c) if there are more than 50 members of the trade union employed in the workplace, two trade union representatives for the first 50 members, plus a further one trade union representative for every additional 50 members up to a maximum of seven trade union representatives;

(d) if there are more than 300 members of the trade union employed in the workplace, seven trade union representatives for the first 300 members, plus one additional trade union representative for every 100 additional members up to a maximum of 10 trade union representatives;

(e) if there are more than 600 members of the trade union employed in the workplace, 10 trade union representatives for the first 600 members, plus one additional trade union representative for every 200 additional members up to a maximum of 12 trade union representatives; and if

there are more than 1000 members of the trade union employed in the workplace, 12 trade union representatives for the first 1000 members, plus one additional trade union representative for every 500 additional members up to a maximum of 20 trade union representatives.

(3) The constitution of the representative trade union governs the nomination, election, term of office and removal from office of a trade union representative.

(4) A trade union representative has the right to perform the following functions-

(a) at the request of an employee in the workplace, to assist and represent the employee in grievance and disciplinary proceedings;

(b) to monitor the employer's compliance with the workplace-related provisions of this Act, any law regulating terms and conditions of employment and any collective agreement binding on the employer;

(c) to report any alleged contravention of the workplace-related provisions of this Act, any law regulating terms and conditions of employment and any collective agreement binding on the employer to-

(i) the employer;

(ii) the representative trade union; and

(iii) any responsible authority or agency; and

(d) to perform any other function agreed to between the representative trade union and the employer.

(5) Subject to reasonable conditions, a trade union representative is entitled to take reasonable time off with pay during working hours-

(a) to perform the functions of a trade union representative; and

(b) to be trained in any subject relevant to the performance of the functions of a trade union representative.

15. Leave for trade union activities

(1) An employee who is an office-bearer of a representative trade union, or of a federation of trade unions to which the representative trade union is affiliated, is entitled to take reasonable leave during working hours for the purpose of performing the functions of that office.

(2) The representative trade union and the employer may agree to the number of days of leave, the number of days of paid leave and the conditions attached to any leave.

(3) An arbitration award in terms of section 21(7) regulating any of the matters referred to in subsection (2) remains in force for 12 months from the date of the award.

16. Disclosure of information

(1) For the purposes of this section, "representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.

(2) Subject to subsection (5), an employer must disclose to a trade union representative all relevant information that will allow the trade union representative to perform effectively the functions referred to in section 14(4).

(3) Subject to subsection (5), whenever an employer is consulting or bargaining with a representative trade union, the employer must disclose to the representative trade union all relevant information that will allow the representative trade union to engage effectively in consultation or collective bargaining.

(4) The employer must notify the trade union representative or the representative trade union in writing if any information disclosed in terms of subsection (2) or (3) is confidential.

(5) An employer is not required to disclose information-

(a) that is legally privileged;

(b) that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;

(c) that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or

(d) that is private personal information relating to an employee, unless that employee consents to the disclosure of that information.

(6) If there is a dispute about what information is required to be disclosed in terms of this section, any party to the dispute may refer the dispute in writing to the Commission.

(7) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(8) The Commission must attempt to resolve the dispute through conciliation.

(9) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration.

(10) In any dispute about the disclosure of information contemplated in subsection (6), the commissioner must first decide whether or not the information is relevant.

(11) If the commissioner decides that the information is relevant and if it is information contemplated in subsection (5)(c) or (d), the commissioner must balance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of a trade union representative to perform effectively the functions referred to in section 14(4) or the ability of a representative trade union to engage effectively in consultation or collective bargaining.

(12) If the commissioner decides that the balance of harm favours the disclosure of the information, the commissioner may order the disclosure of the information on terms designed to limit the harm likely to be caused to the employee or employer.

(13) When making an order in terms of subsection (I 2), the commissioner must take into account any breach of confidentiality in respect of information disclosed in terms of this section at that workplace and may refuse to order the disclosure of the information or any other confidential information which might otherwise be disclosed for a period specified in the arbitration award.

(14) In any dispute about an alleged breach of confidentiality, the commissioner may order that the right to disclosure of information in that workplace be withdrawn for a period specified in the arbitration award.

17. Restricted rights in domestic sector

(1) For the purposes of this section, "domestic sector" means the employment of employees engaged in domestic work in their employers' homes or on the property on which the home is situated.

(2) The rights conferred on representative trade unions by this Part in so far as they apply to the domestic sector are subject to the following limitations-

(a) the right of access to the premises of the employer conferred by section 12 on an office-bearer or official of a representative trade union does not include the right to enter the home of the employer, unless the employer agrees; and

(b) the right to the disclosure of information conferred by section 16 does not apply in the domestic sector.

18. Right to establish thresholds of representativeness

(1) An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a

threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.

(2) A collective agreement concluded in terms of subsection (1) is not binding unless the thresholds of representativeness in the collective agreement are applied equally to any registered trade union seeking any of the organisational rights referred to in that subsection.

19. Certain organisational rights for trade union party to council

Registered trade unions that are parties to a council automatically have the rights contemplated in sections 12 and 13 in respect of all workplaces within the registered scope of the council regardless of their representativeness in any particular workplace.

20. Organisational rights in collective agreements

Nothing in this Part precludes the conclusion of a collective agreement that regulates organisational rights.

21. Exercise of rights conferred by this Part [4]

(1) Any registered trade union may notify an employer in writing that it seeks to exercise one or more of the rights conferred by this Part in a workplace.

(2) The notice referred to in subsection (1) must be accompanied by a certified copy of the trade unions certificate of registration and must specify-

(a) the workplace in respect of which the trade union seeks to exercise the rights;

(b) the representativeness of the trade union in that workplace, and the facts relied upon to demonstrate that it is a representative trade union; and

(c) the rights that the trade union seeks to exercise and the manner in which it seeks to exercise those rights.

(3) Within 30 days of receiving the notice, the employer must meet the registered trade union and endeavour to conclude a collective agreement as to the manner in which the trade union will exercise the rights in respect of that workplace.

(4) If a collective agreement is not concluded, either the registered trade union or the employer may refer the dispute in writing to the Commission.

(5) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on the other party to the dispute.

(6) The Commission must appoint a commissioner to attempt to resolve the dispute through conciliation.

4. See flow diagram No. 2 in Schedule 4.

(7) If the dispute remains unresolved, either party to the dispute may request that the dispute be resolved through arbitration.

(8) If the unresolved dispute is about whether or not the registered trade union is a representative trade union, the commissioner-

(a) must seek

(i) to minimise the proliferation of trade union representation in a single workplace and, where possible, to encourage a system of a representative trade union in a workplace; and

(ii) to minimise the financial and administrative burden of requiring an employer to grant organisational rights to more than one registered trade union;

(b) must consider-

(i) the nature of the workplace;

(ii) the nature of the one or more organisational rights that the registered trade union seeks to exercise;

(iii) the nature of the sector in which the workplace is situated; and

(iv) the organisational history at the workplace or any other workplace of the employer; and

(c) may withdraw any of the organisational rights conferred by this Part and which are exercised by any other registered trade union in respect of that workplace, if that other trade union has ceased to be a representative trade union.

(9) In order to determine the membership or support of the registered trade union, the commissioner may-

(a) make any necessary inquiries;

(b) where appropriate, conduct a ballot of the relevant employees; and

(c) take into account any other relevant information.

(10) The employer must cooperate with the commissioner when the commissioner acts in terms of subsection (9), and must make available to the commissioner any information and facilities that are reasonably necessary for the purposes of that subsection.

(11) An employer who alleges that a trade union is no longer a representative trade union may apply to the Commission to withdraw any of the organisational

rights conferred by this Part, in which case the provisions of subsections (5) to (10) apply, read with the changes required by the context.

22. Disputes about organisational rights

(1) Any party to a dispute about the interpretation or application of any provision of this Part, other than a dispute contemplated in section 21, may refer the dispute in writing to the Commission.

(2) The party who refers a dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(3) The Commission must attempt to resolve the dispute through conciliation.

(4) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration as soon as possible.

PART B-COLLECTIVE AGREEMENTS

23. Legal effect of collective agreement

(1) A collective agreement binds-

(a) the parties to the collective agreement;

(b) each party to the collective agreement and the members of every other I party to the collective agreement, in so far as the provisions are applicable between them;

(c) the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates-

(i) terms and conditions of employment; or

(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;

(d) employees who are not members of the registered trade union or trade unions party to the agreement if-

(i) the employees are identified in the agreement;

(ii) the agreement expressly binds the employees; and

(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

(2) A collective agreement binds for the whole period of the collective agreement every person bound in terms of subsection (1)(c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union or registered employers' organisation for the duration of the collective agreement.

(3) Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.

(4) Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties.

24. Disputes about collective agreements

(1) Every collective agreement, excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26 or a settlement agreement contemplated in either section 142A or 158(1)(c), must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.

(2) If there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission if-

(a) the collective agreement does not provide for a procedure as required by subsection (1);

(b) the procedure provided for in the collective agreement is not operative; or

(c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.

(3) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(4) The Commission must attempt to resolve the dispute through conciliation.

(5) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration.[5]

(6) If there is a dispute about the interpretation or application of an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26, any party to the dispute may refer the

5. See flow diagram No. 3 in Schedule 4.

dispute in writing to the Commission, and subsections (3) to (5) will apply to that dispute.[6]

(7) Any person bound by an arbitration award about the interpretation or application of section 25(3)(c) and (d) or section 26(3)(d) may appeal against that award to the Labour Court.

(8) If there is a dispute about the interpretation or application of the settlement agreement contemplated in either section 142(A) or 158(1)(c), a party may refer the dispute to a council or the Commission and subsections (3) to (5), with the necessary changes, apply to that dispute.

25. Agency shop agreements

(1) A representative trade union and an employer or employers' organisation may conclude a collective agreement, to be known as an agency shop agreement, requiring the employer to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof.

(2) For the purposes of this section, "representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, whose members are a majority of the employees employed-

(a) by an employer in a workplace; or

(b) by the members of an employers' organisation in a sector and area in respect of which the agency shop agreement applies.

(3) An agency shop agreement is binding only if it provides that-

(a) employees who are not members of the representative trade union are not compelled to become members of that trade union;

(b) the agreed agency fee must be equivalent to, or less than-

(i) the amount of the subscription payable by the members of the representative trade union;

(ii) if the subscription of the representative trade union is calculated as a percentage of an employee's salary, that percentage; or

(iii) if there are two or more registered trade unions party to the agreement, the highest amount of the subscription that would apply to an employee;

(c) the amount deducted must be paid into a separate account administered by the representative trade union; and

6. See flow diagram No. 4 in Schedule 4.

(d) no agency fee deducted may be-

(i) paid to a political party as an affiliation fee;

(ii) contributed in cash or kind to a political party or a person standing for election to any political office; or

(iii) used for any expenditure that does not advance or protect the socio-economic interests of employees.

(4)(a) Despite the provisions of any law or contract, an employer may deduct the agreed agency fee from the wages of an employee without the employee's authorisation.

(b) Despite subsection 3(c) a conscientious objector may request the employer to pay the amount deducted from that employee's wages into a fund administered by the Department of Labour.

(5) The provisions of sections 98 and 100(b) and (c) apply, read with the changes required by the context, to the separate account referred to in subsection (3)(c).

(6) Any person may inspect the auditor's report, in so far as it relates to an account referred to in subsection (3)(c), in the registrar's office.

(7) The registrar must provide a certified copy of, or extract from, any of the documents referred to in subsection (6) to any person who has paid the prescribed fees.

(8) An employer or employers' organisation that alleges that a trade union is no longer a representative trade union in terms of subsection (1) must give the trade union written notice of the allegation, and must allow the trade union 90 days from the date of the notice to establish that it is a representative trade union.

(9) If, within the 90-day period, the trade union falls to establish that it is a representative trade union, the employer must give the trade union and the employees covered by the agency shop agreement 30 days' notice of termination, after which the agreement will terminate.

(10) If an agency shop agreement is terminated, the provisions of subsection (3)(c) and (d) and (5) apply until the money in the separate account is spent.

26. Closed shop agreements

(1) A representative trade union and an employer or employers' organisation may conclude a collective agreement, to be known as a closed shop agreement, requiring all employees covered by the agreement to be members of the trade union.

(2) For the purposes of this section, "representative trade union" means a registered trade union, or two or more registered trade unions acting Jointly, whose members are a majority of the employees employed-

(a) by an employer in a workplace; or

(b) by the members of an employers' organisation in a sector and area in respect of which the closed shop agreement applies.

(3) A closed shop agreement is binding only if-

(a) a ballot has been held of the employees to be covered by the agreement;

(b) two thirds of the employees who voted have voted in favour of the agreement;

(c) there is no provision in the agreement requiring membership of the representative trade union before employment commences; and

(d) it provides that no membership subscription or levy deducted may be-

(i) paid to a political party as an affiliation fee;

(ii) contributed in cash or kind to a political party or a person standing for election to any political office; or

(iii) used for any expenditure that does not advance or protect the socio-economic interests of employees.

(4) Despite subsection (3)(b), a closed shop agreement contemplated in subsection (2)(b) may be concluded between a registered trade union and a registered employers' organisation in respect of a sector and area to become binding in every workplace in which-

(a) a ballot has been held of the employees to be covered by the agreement; and

(b) two thirds of the employees who voted have voted in favour of the agreement.

(5) No trade union that is party to a closed shop agreement may refuse an employee membership or expel an employee from the trade union unless-

(a) the refusal or expulsion is in accordance with the trade union's constitution; and

(b) the reason for the refusal or expulsion is fair, including, but not limited to, conduct that undermines the trade union's collective exercise of its rights.

(6) It is not unfair to dismiss an employee-

(a) for refusing to join a trade union party to a closed shop agreement;

(b) who is refused membership of a trade union party to a closed shop agreement if the refusal is in accordance with the provisions of subsection (5); or

(c) who is expelled from a trade union party to a closed shop agreement if the expulsion is in accordance with the provisions of subsection (5).

(7) Despite subsection (6)-

(a) the employees at the time a closed shop agreement takes effect may not be dismissed for refusing to Join a trade union party to the agreement; and

(b) employees may not be dismissed for refusing to join a trade union party to the agreement on grounds of conscientious objection.

(8) The employees referred to in subsection (7) may be required by the closed shop agreement to pay an agreed agency fee, in which case the provisions of section 25(3)(b), (c) and (d) and (4) to (7) apply. (9) If the Labour Court decides that a dismissal is unfair because the refusal of membership of or the expulsion from a trade union party to a closed shop agreement was unfair, the provisions of Chapter VIII apply, except that any order of compensation in terms of that Chapter must be made against the trade union.

(10) A registered trade union that represents a significant interest in, or a substantial number of, the employees covered by a closed shop agreement may notify the parties to the agreement of its intention to apply to become a party to the agreement and, within 30 days of the notice, the employer must convene a meeting of the parties and the registered trade union in order to consider the application.

(11) If the parties to a closed shop agreement do not admit the registered trade union as a party, the trade union may refer the dispute in writing to the Commission.

(12) The registered trade union must satisfy the Commission that a copy of the referral has been served on all the parties to the closed shop agreement.

(13) The Commission must attempt to resolve the dispute through conciliation.

(14) If the dispute remains unresolved, any party to the dispute may refer it to the Labour Court for adjudication.

(15) The representative trade union must conduct a ballot of the employees covered by the closed shop agreement to determine whether the agreement should be terminated if-

(a) one third of the employees covered by the agreement sign a petition calling for the termination of the agreement; and

(b) three years have elapsed since the date on which the agreement commenced or the last ballot was conducted in terms of this section.

(16) If a majority of the employees who voted, have voted to terminate the closed shop agreement, the agreement will terminate.

(17) Unless a collective agreement provides otherwise, the ballot referred to in subsections (3)(a) and (15) must be conducted in accordance with the guidelines published by the Commission.

PART C-BARGAINING COUNCILS

27. Establishment of bargaining councils

(1) One or more registered trade unions and one or more registered employers' organisations may establish a bargaining council for a sector and area by-

(a) adopting a constitution that meets the requirements of section 30; and

(b) obtaining registration of the bargaining council in terms of section 29.

(2) The State may be a party to any bargaining council established in terms of this section if it is an employer in the sector and area in respect of which the bargaining council is established.

(3) If the State is a party to a bargaining council in terms of subsection (2), any reference to a registered employers' organisation includes a reference to the State as a party.

(4) A bargaining council may be established for more than one sector.

28. Powers and functions of bargaining council

(1) The powers and functions of a bargaining council in relation to its registered scope include the following-

(a) to conclude collective agreements;

(b) to enforce those collective agreements;

(c) to prevent and resolve labour disputes;

(d) to perform the dispute resolution functions referred to in section 51;

(e) to establish and administer a fund to be used for resolving disputes;

(f) to promote and establish training and education schemes;

(g) to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the bargaining council or their members;

(h) to develop proposals for submission to NEDLAC or any other appropriate forum on policy and legislation that may affect the sector and area;

(i) to determine by collective agreement the matters which may not be an issue in dispute for the purposes of a strike or a lock-out at the workplace; and

(j) to confer on workplace forums additional matters for consultation;

(k) to provide industrial support services within the sector; and

(l) to extend the services and functions of the bargaining council to workers in the informal sector and home workers.

(2) From the date on which the Labour Relations Amendment Act, 1998, comes into operation, the provisions of the laws relating to pension, provident or medical aid schemes or funds must be complied with in establishing any pension, provident or medical aid scheme or fund in terms of subsection (1)(g)

(3) The laws relating to pension, provident or medical aid schemes or funds will apply in respect of any pension, provident or medical aid scheme or fund established in terms of subsection (1)(g) after the coming into operation of the Labour Relations Amendment Act, 1998.

29. Registration of bargaining councils

(1) The parties referred to in section 27 may apply for registration of a bargaining council by submitting to the registrar-

(a) the prescribed form that has been properly completed;

(b) a copy of its constitution; and

(c) any other information that may assist the registrar to determine whether or not the bargaining council meets the requirements for registration.

(2) The registrar may require further information in support of the application.

(3) As soon as practicable after receiving the application, the registrar must publish a notice containing the material particulars of the application in the Government Gazette and send a copy of the notice to NEDLAC. The notice must inform the general public that they-

(a) may object to the application on any of the grounds referred to in subsection (4); and

(b) have 30 days from the date of the notice to serve any objection on the registrar and a copy on the applicant.

(4) Any person who objects to the application must satisfy the registrar that a copy of the objection has been served on the applicant and that the objection is on any of the following grounds-

(a) the applicant has not complied with the provisions of this section;

(b) the sector and area in respect of which the application is made is not appropriate;

(c) the applicant is not sufficiently representative in the sector and area in respect of which the application is made.

(5) The registrar may require further information in support of the objection.

(6) The applicant may respond to an objection within 14 days of the expiry of the period referred to in subsection (3)(b), and must satisfy the registrar that a copy of that response has been served on the person who objected.

(7) The registrar, as soon as practicable, must send the application and any objections, responses and further information to NEDLAC to consider.

(8) NEDLAC, within 90 days of receiving the documents from the registrar, must-

(a) consider the appropriateness of the sector and area in respect of which the application is made;

(b) demarcate the appropriate sector and area in respect of which the bargaining council should be registered; and

(c) report to the registrar in writing.

(9) If NEDLAC fails to agree on a demarcation as required in subsection (8)(b), the Minister must demarcate the appropriate sector and area and advise the registrar.

(10) In determining the appropriateness of the sector and area for the demarcation contemplated in subsection (8)(b), NEDLAC or the Minister must seek to give effect to the primary objects of this Act.

(11) The registrar-

(a) must consider the application and any further information provided by the applicant;

(b) must determine whether-

(i) the applicant has complied with the provisions of this section;

(ii) the constitution of the bargaining council complies with section 30;

(iii) adequate provision is made in the constitution of the bargaining council for the representation of small and medium enterprises;

(iv) the parties to the bargaining council are sufficiently representative of the sector and area determined by NEDLAC or the Minister; and

(v) there is no other council registered for the sector and area in respect of which the application is made; and

(c) if satisfied that the applicant meets the requirements for registration, must register the bargaining council by entering the applicant's name in the register of councils.

(12) If the registrar is not satisfied that the applicant meets the requirements for registration, the registrar-

(a) must send the applicant a written notice of the decision and the reasons for that decision; and

(b) in that notice, must inform the applicant that it has 30 days from the date of the notice to meet those requirements.

(13) If, within that 30-day period, the applicant meets those requirements, the registrar must register the applicant by entering the applicant's name in the register of councils.

(14) If, after the 30-day period, the registrar concludes that the applicant has failed to meet the requirements for registration, the registrar must-

(a) refuse to register the applicant; and

(b) notify the applicant and any person that objected to the application of that decision in writing.

(15) After registering the applicant, the registrar must-

(a) issue a certificate of registration in the applicant's name that must specify the registered scope of the applicant; and

(b) send the registration certificate and a certified copy of the registered constitution to the applicant.

(16) Subsections (3) to (10) and 11(b)(iii) and (iv) do not apply to the registration or amalgamation of bargaining councils in the public service.

30. Constitution of bargaining council

(1) The constitution of every bargaining council must at least provide for-

a) the appointment of representatives of the parties to the bargaining council, of whom half must be appointed by the trade unions that are party to the bargaining council and the other half by the employers' organisations that are party to the bargaining council, and the appointment of alternates to the representatives;

(b) the representation of small and medium enterprises;

(c) the circumstances and manner in which representatives must vacate their seats' and the procedure for replacing them;

(d) rules for the convening and conducting of meetings of representatives, including the quorum required for, and the minutes to be kept of, those meetings;

(e) the manner in which decisions are to be made; the appointment or election of office-bearers and officials, their functions, and the circumstances and manner in which they may be removed from office;

(g) the establishment and functioning of committees;

(h) the determination through arbitration of any dispute arising between the parties to the bargaining council about the interpretation or application of the bargaining council's constitution;

(i) the procedure to be followed if a dispute arises between the parties to the bargaining council;

(j) the procedure to be followed if a dispute arises between a registered trade union that is a party to the bargaining council, or its members, or both, on the one hand, and employers who belong to a registered employers' organisation that is a party to the bargaining council, on the other hand;

(k) the procedure for exemption from collective agreements;

(l) the banking and investment of its funds;

(m) the purposes for which its funds may be used;

(n) the delegation of its powers and functions;

(o) the admission of additional registered trade unions and registered employers' organisations as parties to the bargaining council, subject to the provisions of section 56;[7]

(p) a procedure for changing its constitution; and

(q) a procedure by which it may resolve to wind up.

(2) The requirements for the constitution of a bargaining council in subsection (1) apply to the constitution of a bargaining council in the public service except that-

(a) any reference to an "employers' organisation" must be read as a reference to the State as employer; and

(b) the requirement in subsection (1)(b) concerning the representation of small and medium enterprises does not apply.

(3) The constitution of the Public Service Co-ordinating Bargaining Council must include a procedure for establishing a bargaining council in a sector of the public service designated in terms of section 37(l).

(4) The constitution of a bargaining council in the public service may include provisions for the establishment and functioning of chambers of a bargaining council on national and regional levels.

(5) The procedures for the resolution of disputes referred to in subsection (1)(h), (i) and (j) may not entrust dispute resolution functions to the Commission unless the governing body of the Commission has agreed thereto.

31. Binding nature of collective agreement concluded in bargaining council

Subject to the provisions of section 32 and the constitution of the bargaining council, a collective agreement concluded in a bargaining council binds –

(a) the parties to the bargaining council who are also parties to the collective agreement;
(b) each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and
(c) the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employers' organisation that is such a party, if the collective agreement regulates-

7. Section 56 provides for a procedure for the admission of parties to a council.

(i) terms and conditions of employment; or
(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers.

32. Extension of collective agreement concluded in bargaining council

(1) A bargaining council may ask the Minister in writing to extend a collective agreement concluded in the bargaining council to any non-parties to the collective agreement that are within its registered scope and are identified in the if at a meeting of the bargaining council request, I

(a) one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favour of the extension; and

(b) one or more registered employers' organisations, whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension.

(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.

(3) A collective agreement may not be extended in terms of subsection (2) unless the Minister is satisfied that-

(a) the decision by the bargaining council to request the extension of the collective agreement complies with the provisions of subsection (1);

(b) 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;

(c) 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;

(d) the non-parties specified in the request fall within the bargaining council's registered scope;

(e) provision is made in the collective agreement for an independent body to hear and decide , as soon as possible, any appeal brought against -

(i) the bargaining council’s refusal of a non-party’s application for exemption from the provisions of the collective agreement;
(ii) the withdrawal of such an exemption by the bargaining council;

(f) the collective agreement contains criteria that must be applied by the independent body when it considers an appeal, and that those criteria are fair and promote the primary objects of this Act; and

(g) the terms of the collective agreement do not discriminate against non-parties.

(5) Despite subsection (3)(b) and (c), the Minister may extend a collective agreement in terms of subsection (2) if

(a) the parties to the bargaining council are sufficiently representative within the registered scope of the bargaining council; and

(b) the Minister is satisfied that failure to extend the agreement may undermine collective bargaining at sectoral level or in the public service as a whole.

(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.

(7) The Minister, at the request of the bargaining council, must publish a notice in the Government Gazette cancelling all or part of any notice published in terms of subsection (2) or (6) from a date specified in the notice.

(8) Whenever any collective agreement in respect of which a notice has been published in terms of subsection (2) or (6) is amended, amplified or replaced by a new collective agreement, the provisions of this section apply to that new collective agreement.

(9) For the purposes of extending collective agreements concluded in the Public Service Co-ordinating Bargaining Council or any bargaining council contemplated in section 37(3) or (4)-

(a) any reference in this section to an employers' organisation must be read as a reference to the State as employer; and
(b) subsections (3)(c), (e) and (f) and (4) of this section will not apply.

(10) If the parties to a collective agreement that has been extended in terms of this section terminate the agreement, they must notify the Minister in writing.

33. Appointment and powers of designated agents of bargaining councils

(1) The Minister may, at the request of a bargaining council, appoint any person as the designated agent of that bargaining council to promote, monitor and enforce compliance with any collective agreement concluded in that bargaining council.

(1A) A designated agent may –

(a) secure compliance with the council's collective agreements by –
(i) publicising the contents of the agreements;
(ii) conducting inspections;
(iii) investigating complaints; or
(iv) any other means the council may adopt; and

(b) perform any other functions that are conferred or imposed on the agent by the council.

(2) A bargaining council must provide each designated agent with a certificate signed by the secretary of the bargaining council stating that the agent has been appointed in terms of this Act as a designated agent of that bargaining council.

(3) Within the registered scope of the bargaining council, a designated agent of the bargaining council has all the powers set out in Schedule 10..

(4) The bargaining council may cancel the certificate provided to a designated agent in terms of subsection (2) and the agent then ceases to be a designated agent of the bargaining council and must immediately surrender the certificate to the secretary of the bargaining council.

33A. Enforcement of collective agreements by bargaining councils

(1) Despite any other provision in this Act, a bargaining council may monitor and enforce compliance with its collective agreements in terms of this section or a collective agreement concluded by the parties to the council.

(2) For purposes of this section, a collective agreement is deemed to include –

(a) any basic condition of employment which in terms of section 49(1) of the *Basic Conditions of Employment Act* constitutes a term of employment of any employee covered by the collective agreement; and

(b) the rules of any fund or scheme established by the bargaining council.

(3) A collective agreement in terms of this section may authorise a designated agent appointed in terms of section 33 to issue a compliance order requiring any person bound by that collective agreement to comply with the collective agreement within a specified period.

(4) (a) The council may refer any unresolved dispute concerning compliance with any provision of a collective agreement to arbitration by an arbitrator appointed by the council.

(b) If a party to an arbitration in terms of this section, that is not a party to the council, objects to the appointment of an arbitrator in terms of paragraph (a), the Commission, on request by the council, must appoint an arbitrator.

(c) If an arbitrator is appointed in terms of subparagraph (b) –
(i) the Council remains liable for the payment of the arbitrator's fee; and
(ii) the arbitration is not conducted under the auspices of the Commission.

(5) An arbitrator conducting an arbitration in terms of this section has the powers of a commissioner in terms of section 142, read with the changes required by the context.

(6) Section 138, read with the changes required by the context, applies to any arbitration conducted in terms of this section.

(7) An arbitrator acting in terms of this section may determine any dispute concerning the interpretation or application of a collective agreement.

(8) An arbitrator conducting an arbitration in terms of this section may make an appropriate award, including -

(a) ordering any person to pay any amount owing in terms of a collective agreement;
(b) imposing a fine for a failure to comply with a collective agreement in accordance with subsection (13);
(c) charging a party an arbitration fee;
(d) ordering a party to pay the costs of the arbitration;
(e) confirming, varying or setting aside a compliance order issued by a designated agent in accordance with subsection (4)
(f) any award contemplated in section 138(9).

(9) Interest on any amount that a person is obliged to pay in terms of a collective agreement accrues from the date on which the amount was due and payable at the rate prescribed in terms of section 1 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), unless the arbitration award provides otherwise.

(10) An award in an arbitration conducted in terms of this section is final and binding and may be enforced in terms of section 143.

(11) Any reference in section 138 or 142 to the director must be read as a reference to the secretary of the bargaining council.

(12) If an employer, upon whom a fine has been imposed in terms of this section, files an application to review and set aside an award made in terms of subsection (8), any obligation to pay a fine is suspended pending the outcome of the application.

(13) (a) The Minister may, after consulting NEDLAC, publish in the Government Gazette a notice that sets out the maximum fines that may be imposed by an arbitrator acing in terms of this section.

(c) A notice in terms of paragraph (a) may specify the maximum fine that may be imposed –

(i) for a breach of a collective agreement –

(aa) not involving a failure to pay any amount of money;

(bb) involving a failure to pay any amount of money; and

(ii) for repeated breaches of the collective agreement contemplated in subparagraph (i).

34. Amalgamation of bargaining councils

(1) Any bargaining council may resolve to amalgamate with one or more other bargaining councils.

(2) The amalgamating bargaining councils may apply to the registrar for registration of the amalgamated bargaining council and the registrar must treat the application as an application in terms of section 29.

(3) If the registrar has registered the amalgamated bargaining council, the registrar must cancel the registration of each of the amalgamating bargaining councils by removing their names from the register of councils.

(4) The registration of an amalgamated bargaining council takes effect from the date that the registrar enters its name in the register of councils.

(5) When the registrar has registered an amalgamated bargaining council-

(a) all the assets, rights, liabilities and obligations of the amalgamating bargaining councils devolve upon and vest in the amalgamated bargaining council; and

(b) all the collective agreements of the amalgamating bargaining councils, regardless of whether or not they were extended in terms of section 32, remain in force for the duration of those collective agreements, unless amended or terminated by the amalgamated bargaining council.

PART D-BARGAINING COUNCILS IN THE PUBLIC SERVICE

35. Bargaining councils in public service

There will be a bargaining council for-

(a) the public service as a whole, to be known as the Public Service Co-ordinating Bargaining Council; and

(b) any sector within the public service that may be designated in terms of section 37.

36. Public Service Co-ordinating Bargaining Council

(1) The Public Service Co-ordinating Bargaining Council must be established in accordance with Schedule 1.[8]

(2) The Public Service Co-ordinating Bargaining Council may perform all the functions of a bargaining council in respect of those matters that-

(a) are regulated by uniform rules, norms and standards that apply across the public service; or

(b) apply to terms and conditions of service that apply to two or more sectors; or

(c) are assigned to the State as employer in respect of the public service that are not assigned to the State as employer in any sector.

37. Bargaining councils in sectors in public service

8. Schedule 1 deals with the procedure for the establishment of the Public Service Co-ordinating Bargaining Council.

(1) The Public Service Co-ordinating Bargaining Council may, in terms of its constitution and by resolution -

(a) designate a sector of the public service for the establishment of a bargaining council; and
(b) vary the designation of, amalgamate or disestablish bargaining councils so established.

(2) A bargaining council for a sector designated in terms of subsection (1)(a) must be established in terms of the constitution of the Public Service Co-ordinating Bargaining Council.

(3) If the parties in the sector cannot agree to a constitution for the bargaining council for a sector designated in terms of subsection (1)(a), the Registrar must determine its constitution

(4) The relevant resolution made in terms of subsection (1) must accompany any application to register or vary the registration of a bargaining council or to register an amalgamated bargaining council.

(5) A bargaining council established in terms of subsection (2) has exclusive jurisdiction in respect of matters that are specific to that sector and in respect of which the State as employer in that sector has the requisite authority to conclude collective agreements and resolve labour disputes.

38. Disputes between bargaining councils in public service

(1) If there is a jurisdictional dispute between two or more bargaining councils in the public service, including the Public Service Co-ordinating Bargaining Council, any party to the dispute may refer the dispute in writing to the Commission.

(2) The party who refers the dispute to the Commission must satisfy the Commission that a copy of the referral has been served on all other bargaining councils that are parties to the dispute.

(3) The Commission must attempt to resolve the dispute as soon as possible through conciliation.

(4) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration by the Commission.

PART E-STATUTORY COUNCILS

39. Application to establish statutory council

(1) For the purposes of this Part-

(a) "representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, whose members constitute at least 30 per cent of the employees in a sector and area; and

(b) "representative employers' organisation" means a registered employers' organisation, or two or more registered employers' organisations acting jointly, whose members employ at least 30 per cent of the employees in a sector and area.

(2) A representative trade union or representative employers' organisation may apply to the registrar in the prescribed form for the establishment of a statutory council in a sector and area in respect of which no council is registered.

(3) The registrar must apply the provisions of section 29(2) to (10)[9] to the application-

(a) read with the changes required by the context; and

(b) subject to the deletion of the word "sufficiently" in section 29(4)(c).

(4) The registrar must-

(a) consider the application and any further information provided by the applicant; and

(b) determine whether-

(i) the applicant has complied with section 29 and of this section;

(ii) the applicant is representative of the sector and area determined by NEDLAC or the Minister; and

(iii) there is no other council registered for the sector and area in respect of which the application is made.

(5) If the registrar is not satisfied that the applicant meets the requirements for establishment, the registrar must-

(a) send the applicant a written notice of the decision and the reasons for that decision; and

(b) in that notice, inform the applicant that it has 30 days from the date of the notice to meet those requirements.

(6) If, after the 30-day period, the registrar concludes that the applicant has failed to meet the requirements for establishment, the registrar must-

(a) refuse to register the applicant; and

9. The provisions of section 29 deal with the procedure for the registration of a bargaining council.

(b) notify the applicant and any person that objected to the application in writing of that decision.

40. Establishment and registration of statutory council

(1) If the registrar is satisfied that the applicant meets the requirements for the establishment of a statutory council, the registrar, by notice in the Government Gazette, must establish the statutory council for a sector and area.

(2) The notice must invite-

(a) registered trade unions and registered employers' organisations in that sector and area to attend a meeting; and

(b) any interested parties in that sector and area to nominate representatives for the statutory council.

(3) The Commission must appoint a commissioner to chair the meeting and facilitate the conclusion of an agreement on-

(a) the registered trade unions and registered employers' organisations to be parties to the statutory council; and

(b) a constitution that meets the requirements of section 30, read with the changes required by the context.

(4) If an agreement is concluded, the Minister may advise the registrar to register the statutory council in accordance with the agreement if the Minister is satisfied that-

(a) every registered trade union and registered employers' organisation that ought to have been included has been included in the agreement; and

(b) the constitution meets the requirements of section 30, read with the changes required by the context.

(5) In considering the requirements in subsection (4)(a), the Minister must take into account-

(a) the primary objects of this Act;

(b) the diversity of registered trade unions and registered employers' organisations in the sector and area; and

c) the principle of proportional representation.

(6) If the Minister is not satisfied in terms of subsection (4), the Minister must advise the Commission of the decision and the reasons for that decision and

direct the Commission to reconvene the meeting in terms of subsection (3) in order to facilitate the conclusion of a new agreement.

(7) If advised by the Minister in terms of subsection (4), the registrar must register the statutory council by entering its name in the register of councils.

41. Establishment and registration of statutory council in absence of agreement

(1) If no agreement is concluded in terms of section 40(3), the commissioner must convene separate meetings of the registered trade unions and employers' organisations to facilitate the conclusion of agreements on-

(a) the registered trade unions to be parties to the statutory council;

(b) the registered employers' organisations to be parties to the statutory council; and

(c) the allocation to each party of the number of representatives of the statutory council.

(2) If an agreement is concluded on-

(a) the registered trade unions to be parties to the statutory council, the Minister must admit as parties to the statutory council the agreed registered trade unions;

(b) the registered employers' organisations to be parties to the statutory council, the Minister must admit as parties to the statutory council the agreed registered employers' organisations.

(3) If no agreement is concluded on-

(a) the registered trade unions to be parties to the statutory council, the Minister must admit as parties to the statutory council-

(i) the applicant, if it is a registered trade union; and

(ii) any other registered trade union in the sector and area that ought to be admitted, taking into account the factors referred to in section 40(5);

(b) the registered employers' organisations to be parties to the statutory council, the Minister must admit as parties to the statutory council-

(i) the applicant, if it is a registered employers' organisation; and

(ii) any other registered employers' organisation in the sector and area that ought to be admitted, taking into account the factors referred to in section 40(5).

(4)(a) The Minister must determine an even number of representatives of the statutory council, taking into account the factors referred to in section 40(5).

(b) One half of the representatives must be allocated to the registered trade unions that are parties to the statutory council and the other half of the representatives must be allocated to the registered employers' organisations that are parties to the statutory council.

(5) If no agreement is concluded in respect of the allocation of the number of representatives of the statutory council-

(a) between the registered trade unions that are parties to the council, the Minister must determine this allocation on the basis of proportional representation;

(b) between the registered employers' organisations that are parties to the council, the Minister must determine this allocation on the basis of proportional representation and taking into account the interests of small and medium enterprises.

(6) If the applicant is a trade union and there is no registered employers' organisation that is a party to the statutory council, the Minister, after consulting the Commission, must appoint suitable persons as representatives and alternates, taking into account the nominations received from employers and employers' organisations in terms of section 40(2).

(7) If the applicant is an employers' organisation and there is no registered trade union that is a party to the statutory council, the Minister, after consulting the Commission, must appoint suitable persons as representatives and alternates, taking into account the nominations received from employees and trade unions in terms of section 40(2).

(8) The Minister must notify the registrar of agreements concluded and decisions made in terms of this section, and the registrar must-

(a) adapt the model constitution referred to in section 207(3) to the extent necessary to give effect to the agreements and decisions made in terms of this section;

(b) register the statutory council by entering its name in the register of councils; and

(c) certify the constitution as the constitution of the statutory council.

42. Certificate of registration of statutory council

After registering a statutory council, the registrar must -

(a) issue a certificate of registration that must specify the registered scope of the statutory council; and

(b) send the certificate and a certified copy of the registered constitution to all the parties to the statutory council and any representatives appointed to the statutory council.

43. Powers and functions of statutory councils

(1) The powers and functions of a statutory council are-

(a) to perform the dispute resolution functions referred to in section 51;

(b) to promote and establish training and education schemes; and

(c) to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the statutory council or their members; and

(d) to conclude collective agreements to give effect to the matters mentioned in paragraphs (a), (b), and (c).

(2) A statutory council, in terms of its constitution, may agree to the inclusion of any of the other functions of a bargaining council referred to in section 28.

(3) If a statutory council concludes a collective agreement in terms of subsection (1)(d), the provisions of sections 31, 32 and 33 apply, read with the changes required by the context.

(4)(a) From the date on which the Labour Relations Amendment Act, 1998, comes into operation, the provisions of the laws relating to pension, provident or medical aid schemes or funds must be complied with in establishing any pension, provident or medical aid scheme or fund in terms of subsection (1)(c).

(b) The provisions of the laws relating to pension, provident or medical aid schemes or funds will apply in relation to any pension, provident or medical aid scheme or fund established in terms of subsection (1)(c) after the coming into operation of the Labour Relations Amendment Act, 1998.

44. Ministerial determinations

(1) A statutory council that is not sufficiently representative within its registered scope may submit a collective agreement on any of the matters mentioned in section 43(1)(a), (b) or (c) to the Minister. The Minister must treat the collective agreement as a recommendation made by the Employment Conditions Commission in terms of section 54(4) of the Basic Conditions of Employment Act.

(2) The Minister may promulgate the statutory council's recommendations as a determination under the *Basic Conditions of Employment Act* if satisfied that the statutory council has complied with section 54(3) of the Basic Conditions of Employment Act, read with the changes required by the context.

(3) The determination must provide for -

(a) exemptions to be considered by an independent body appointed by the Minister; and

(b) criteria for exemption that are fair and promote the primary objects of this Act.

(4) The Minister may in a determination impose a levy on all employers and employees in the registered scope of the statutory council to defray the operational costs of the statutory council.

(5) A statutory council may submit a proposal to the Minister to amend or extend the period of any determination and the Minister may make the amendment to the determination or extend the period by notice in the Government Gazette.

45. Disputes about determinations

(1) If there is a dispute about the interpretation or application of a determination promulgated in terms of section 44(2), any party to the dispute may refer the dispute in writing to the Commission.

(2) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(3) The Commission must attempt to resolve the dispute through conciliation.

(4) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration.

46. Withdrawal of party from statutory council

(1) If a registered trade union or registered employers' organisation that is a party to a statutory council withdraws from that statutory council, the Minister may request the Commission to convene a meeting of the remaining registered trade unions or registered employers' organisations in the sector and area, in order to facilitate the conclusion of an agreement on the registered trade unions or the registered employers' organisations to be parties and the allocation of representatives to the statutory council.

(2) If no agreement is concluded, the provisions of section 41 apply, read with the changes required by the context.

47. Appointment of new representative of statutory council

(1) If a representative appointed in terms of section 41(6) or (7) for any reason no longer holds office, the Minister must publish a notice in the Government Gazette inviting interested parties within the registered scope of the statutory council to nominate a new representative.

(2) The provisions of section 41(6) or (7) apply, read with the changes required by the context, in respect of the appointment of a new representative.

48. Change of status of statutory council

(1) A statutory council may resolve to apply to register as a bargaining council.

(2) The registrar must deal with the application as if it were an application in terms of section 29,[10] except for section 29(4)(b), (7) to (10) and (15).

(3) If the registrar has registered the statutory council as a bargaining council, the registrar must alter the register of councils and its certificate to reflect its change of status.

(4) Any determination in force at the time of the registration of the bargaining council or any agreement extended by the Minister in terms of section 43(3)-

(a) continues to have force for the period of its operation unless superseded by a collective agreement; and

(b) may be extended for a further period.

(5) The bargaining council must perform any function or duty of the statutory council in terms of a determination during the period in which the determination is still in effect.

(6) If any dispute in terms of a determination is unresolved at the time the determination ceases to have effect, the dispute must be dealt with as if the determination was still in effect.

PART F-GENERAL PROVISIONS CONCERNING COUNCILS

49. Representativeness of council

(1) When considering the representativeness of the parties to a council, or parties seeking registration of a council, the registrar, having regard to the nature of the sector and the situation of the area in respect of which registration is sought, may regard the parties to a council as representative in respect of the whole area, even if a trade union or employers' organisation that is a party to the council has no members in part of that area.

(2) A bargaining council, having a collective agreement that has been extended by the Minister in terms of section 32, must inform the registrar

10. Section 29 deals with the procedure for the registration of bargaining councils.

annually, in writing, on a date to be determined by the registrar, as to the number of employees who are –

(a) covered by the collective agreement;

(b) members of the trade unions that are parties to the agreement;

(c) employed by members of the employers' organisations that are party to the agreement.

(3) A bargaining council must, on request by the registrar, inform the registrar in writing within the period specified in the request as to the number of employees who are -

(a) employed within the registered scope of the council;
(b) members of the trade unions that are parties to the council;
(c) employed by members of the employers' organisations that are party to the council.

(4) A determination of the representativeness of a bargaining council in terms of this section is sufficient proof of the representativeness of the council for the year following the determination.

(5) This section does not apply to the public service.

50. Effect of registration of council

(1) A certificate of registration is sufficient proof that a registered council is a body corporate.

(2) A council has all the powers, functions and duties that are conferred or imposed on it by or in terms of this Act, and it has jurisdiction to exercise and perform those powers, functions and duties within its registered scope.

(3) A party to a council is not liable for any of the obligations or liabilities of the council by virtue of it being a party to the council.

(4) A party to, or office-bearer or official of, a council is not personally liable for any loss suffered by any person as a result of an act performed or omitted in good faith by a party to, or office-bearer or official of, a council while performing their functions for the council.

(5) Service of any document directed to a council at the address most recently provided to the registrar will be for all purposes service of that document on that council.

51. Dispute resolution functions of council

(1) In this section, dispute means any dispute about a matter of mutual interest between-

(a) on the one side(i) one or more trade unions; one or more employees; or one or more trade unions and one or more employees; and

(b) on the other side-

(i) one or more employers' organisations;

(ii) one or more employers; or

(iii) one or more employers' organisations and one or more employers.

(2)(a) (i) The parties to a council must attempt to resolve any dispute between themselves in accordance with the constitution of the council.

(ii) For the purposes of subparagraph (i), a party to a council includes the members of any registered trade union or registered employers' organisation that is a party to the council.

(b) Any party to a dispute who is not a party to a council but who falls within the registered scope of the council may refer the dispute to the council in writing.

(c) The party who refers the dispute to the council must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(3) If a dispute is referred to a council in terms of this Act[11] and any party to that dispute is not a party to that council, the council must attempt to resolve the dispute -

(a) through conciliation; and

(b) if the dispute remains unresolved after conciliation, the council must arbitrate the dispute if-

11. The following disputes contemplated by subsection (3) must be referred to a council: disputes about the interpretation or application of the provisions of Chapter II (see section 9); disputes that form the subject matter of a proposed strike or lock out (see section 64(1)); disputes in essential services (see section 74); disputes about unfair dismissals (see section 191); disputes about severance pay (see section 196); and disputes about unfair labour practices (see item 2 in Schedule 7).

The following disputes contemplated by subsection (3) may not be referred to a council: disputes about organisational rights (see sections 16, 21 and 22); disputes about collective agreements where the agreement does not provide for a procedure or the procedure is inoperative or any party frustrates the resolution of the dispute (see section 24(2) to (5); disputes about agency shops and closed shops (see section 24(6) and (7) and section 26(11); disputes about determinations made by the Minister in respect of proposals made by a statutory council (see section 45); disputes about the interpretation or application of collective agreements of a council whose registration has been cancelled (see section 61 (5) to (8)); disputes about the demarcation of sectors and areas of councils (see section 62); disputes about the interpretation or application of Part C (bargaining councils), Part D (bargaining councils in the public service), Part E (statutory councils) and Part F (general provisions concerning councils) (see section 63); disputes concerning pickets (see section 69 (8) to (10)); disputes about proposals that are the subject of joint decision-making in workplace forums (see section 86); disputes about the disclosure of information to workplace forums (see section 89); and disputes about the interpretation or application of the provisions of Chapter V which deals with workplace forums (see section 94).

(i) this Act requires arbitration and any party to the dispute has requested that it be resolved through arbitration; or

(ii) all the parties to the dispute consent to arbitration under the auspices of the council.

(4) If one or more of the parties to a dispute that has been referred to the council do not fall within the registered scope of that council, it must refer the dispute to the Commission.

(5) The date on which the referral in terms of subsection (4) was received by a council is, for all purposes, the date on which the council referred the dispute to the Commission.

(6) A council may enter into an agreement with the Commission or an accredited agency in terms of which the Commission or accredited agency is to perform, on behalf of the council, its dispute resolution functions in terms of this section.

(7) Subject to this Act, a council may not provide in a collective agreement for the referral of disputes to the Commission, without prior consultation with the director.

(8) Unless otherwise agreed to in a collective agreement, sections 142A and 143 to 146 apply to any arbitration conducted under the auspices of a bargaining council.

(9) A bargaining council may, by collective agreement, establish procedures to resolve any dispute contemplated in this section.

52. Accreditation of council or appointment of accredited agency. Every council must-

(a) apply to the Commission for accreditation to perform any of the functions referred to in section 51; or

(b) appoint an accredited agency to perform any of the functions referred to in section 51.

52. Accreditation of council or appointment of accredited agency

(1) With a view to performing its dispute resolution functions in terms of section 51(3), every council must –

(a) apply to the governing body of the Commission for accreditation to perform those functions; or
(b) appoint an accredited agency to perform those of the functions referred to in section 51(3) for which the council is not accredited.

(2) The council must advise the Commission in writing as soon as possible of the appointment of an accredited agency in terms of subsection (1)(b), and the terms of that appointment.

53. Accounting records and audits

(1) Every council must, to the standards of generally accepted accounting practice, principles and procedures (a) keep books and records of its income, expenditure, assets and liabilities; and

(b) within six months after the end of each financial year, prepare financial statements, including at least-

(i) a statement of income and expenditure for the previous financial year; and

(ii) balance sheet showing its assets, liabilities and financial position as at the end of the previous financial year.

(2) Each council must arrange for an annual audit of its books and records of account and its financial statements by an auditor who must-

(a) conduct the audit in accordance with generally accepted auditing standards; and

(b) report in writing to the council and in that report express an opinion as to whether or not the council has complied with those provisions of its constitution relating to financial matters.

(3) Every council must-

(a) make the financial statements and the auditor's report available to the parties to the council or their representatives for inspection; and

(b) submit those statements and the auditor's report to a meeting of the council as provided for in its constitution.

(4) Every council must preserve each of its books of account, supporting vouchers, income and expenditure statements, balance sheets, and auditor's reports, in an original or reproduced form, for a period of three years from the end of the financial year to which they relate.

(5) The money of a council or of any fund established by a council that is surplus to its requirements or the expenses of the fund may be invested only in-

(a) savings accounts, permanent shares or fixed deposits in any registered bank or financial institution;

(b) internal registered stock as contemplated in section 21 of the Exchequer Act, 1975 (Act No. 66 of 1975);

(c) a registered unit trust; or

(d) any other manner approved by the registrar.

(6) A council must comply with subsections (1) to (5) in respect of all funds established by it, except funds referred to in section 28(3).

54. Duty to keep records and provide information to registrar

(1) In addition to the records required by section 53(4), every council must keep minutes of its meetings, in an original or reproduced form, for a period of three years from the end of the financial year to which they relate.

(2) Every council must provide to the registrar-

(a) within 30 days of receipt of its auditor's report, a certified copy of that report and of the financial statements;

(b) within 30 days of receipt of a written request by the registrar, an explanation of anything relating to the auditor's report or the financial statements;

(c) upon registration, an address within the Republic at which it will accept service of any document that is directed to it;

(d) within 30 days of any appointment or election of its national office bearers, the names and work addresses of those office-bearers, even if their appointment or election did not result in any changes to its office-bearers;

(e) 30 days before a new address for service of documents will take effect, notice of that change of address; and

(f) each year and on a date to be determined by the registrar, a report in the prescribed form specifying -

(i) the number of employees who are employed by small enterprises that fall within the registered scope of the council and the number of employees of those enterprises who are members of trade unions;

(ii) the number of employees employed by small enterprises that are covered by a collective agreement that was concluded by the council and extended by the \minister in terms of section 2;

(iii) the number of small enterprises that are members of the employers' organisations that are parties to the council; and

(iv) the number of applications for exemptions received from small enterprises and the number of applications that were granted and the number rejected.

(3) Every council must provide to the Commission-

(a) certified copies of every collective agreement concluded by the parties to the council, within 30 days of the signing of that collective agreement; and

(b) the details of the admission and resignation of parties to the council, within 30 days of their admission or resignation.

(4) If a council fails to comply with any of the provisions of section 49(2) or (3), section 53 or subsections (1) or (2) of this section, the registrar may -

(a) conduct an inquiry into the affairs of that council;
(b) order the production of the council's financial records and any other relevant documents;
(c) deliver a notice to the council requiring the council to comply with the provisions concerned;
(d) compile a report o the affairs of the council; or
(e) submit the report to the Labour Court in support of any application made in terms of section 59(1)(b).

(5) The registrar may use the powers referred to in subsection (4) in respect of any fund established by a council, except a fund referred to in section 28(3).

55. Delegation of functions to committee of council

(1) A council may delegate any of its powers and functions to a committee on any conditions, imposed by the council in accordance with its constitution.

(2) A committee contemplated by subsection (1) must consist of equal numbers of representatives of employees and employers.

56. Admission of parties to council [12]

(1) Any registered trade union or registered employers' organisation may apply in writing to a council for admission as a party to that council.

(2) The application must be accompanied by a certified copy of the applicant's registered constitution and certificate of registration and must include-

(a) details of the applicant's membership within the registered scope of the council and, if the applicant is a registered employers' organisation, the number of employees that its members employ within that registered scope;

(b) the reasons why the applicant ought to be admitted as a party to the council; and

(c) any other information on which the applicant relies in support of the application.

12. See flow diagram No. 5 in Schedule 4.

(3) A council, within 90 days of receiving an application for admission, must decide whether to grant or refuse an applicant admission, and must advise the applicant of its decision, failing which the council is deemed to have refused the applicant admission.

(4) If the council refuses to admit an applicant it must within 30 days of the date of the refusal, advise the applicant in writing of its decision and the reasons for that decision.

(5) The applicant may apply to the Labour Court for an order admitting it as a party to the council.

(6) The Labour Court may admit the applicant as a party to the council, adapt the constitution of the council and make any other appropriate order.

57. Changing constitution or name of council

(1) Any council may resolve to change or replace its constitution.

(2) The council must send the registrar a copy of the resolution and a certificate signed by its secretary stating that the resolution complies with its constitution.

(3) The registrar must-

a) register the changed or new constitution of a council if it meets the requirements of section 30 or if it is a statutory council established in terms of section 41 if it meets the requirements of the model constitution referred to in section 207(3); and

(b) send the council a copy of the resolution endorsed by the registrar, certifying that the change or replacement has been registered.

(4) The changed or new constitution takes effect from the date of the registrar's certification.

(5) Any council may resolve to change its name.

(6) The council must send the registrar a copy of the resolution and the original of its current certificate of registration.

(7) The registrar must-

(a) enter the new name in the register of councils, and issue a certificate of registration in the new name of the council;

(b) remove the old name from that register and cancel the earlier certificate of registration; and

(c) send the new certificate to the council.

(8) The new name takes effect from the date that the registrar enters it in the register of councils.

58. Variation of registered scope of council

(1) If the registrar is satisfied that the sector and area within which a council is representative does not coincide with the registered scope of the council, the registrar, acting independently or in response to an application from the council, may vary the registered scope of the council.

(2) The provisions of section 29 apply, read with the changes required by the context, to a variation in terms of this section.

(3) Despite subsection (2), if within the stipulated period no material objection is lodged to any notice published by the registrar in terms of section 29(3), the registrar -

(i) may vary the registered scope of the council;

(ii) may issue a certificate specifying the scope of the council as varied; and

(iii) need not comply with the procedure prescribed by section 29.

59. Winding-up of council

(1) The Labour Court may order a council to be wound up if-

(a) the council has resolved to wind up its affairs and has applied to the Court for an order giving effect to that resolution; or

(b) the registrar of labour relations or any party to the council has applied to the Court and the Court is satisfied that the council is unable to continue to function for any reason that cannot be remedied.

(2) If there are any persons not represented before the Labour Court whose interests may be affected by an order in terms of subsection (1), the Court must-

(a) consider those interests before deciding whether or not to grant the order; and

(b) if it grants the order, include provisions in the order disposing of each of those interests.

(3) If it makes an order in terms of subsection (1), the Labour Court may appoint a suitable person as liquidator, on appropriate conditions.

(4) (a) The registrar of the Labour Court must determine the liquidator's fees.

(b) The Labour Court, in chambers, may review the determination of the registrar of the Labour Court.

(c) The liquidator's fees are a first charge against the assets of the council.

(5) If, after all the liabilities of the council have been discharged, any assets remain that cannot be disposed of in accordance with the constitution of that council, the liquidator must realise those assets and pay the proceeds to the Commission for its own use.

(6) For the purposes of this section, the assets and liabilities of any pension, provident or medical aid scheme or fund established by a council will be regarded and treated as part of the assets and liabilities of the council unless –

(a) the parties to the council have agreed to continue with the operation of the pension, provident or medical aid scheme or fund as a separate scheme or fund despite the winding up of the council; and
(b) the Minister has approved the continuation of the scheme or fund; and
(c) application has been made in accordance with the provisions of the laws applicable to pension, provident or medical aid schemes or funds, for the registration of that scheme or fund in terms of those provisions.

(7) A pension, provident or medical aid scheme or fund, registered under the provisions of those laws after its application in terms of subsection 6(c), will continue to be a separate scheme or fund despite the winding up of the council by which it was established.

(8) The Minister, by notice in the Government Gazette, may declare the rules of a pension, provident or medical aid scheme or fund mentioned in subsection (7) to be binding on any employees and employer or employers that fell within the registered scope of the relevant council immediately before it was wound up.

60. Winding-up of council by reason of insolvency

Any person who seeks to wind-up a council by reason of insolvency must comply with the Insolvency Act, 1936 (Act No. 24 of 1936), and, for the purposes of this section, any reference to the court in that Act must be interpreted as referring to the Labour Court.

61. Cancellation of registration of council

(1) The registrar of the Labour Court must notify the registrar of labour relations if the Court has ordered a council to be wound up.

(2) When the registrar receives a notice from the Labour Court in terms of subsection (1), the registrar must cancel the registration of the council by removing its name from the register of councils.

(3) The registrar may notify a council and every party to the council that the registrar is considering cancelling the council's registration, if the registrar believes that-

(a) the council has ceased to perform its functions in terms of this Act for a period longer than 90 days before the date of the notice; or

(b) the council has ceased to be representative in terms of the provisions of the relevant Part, for a period longer than 90 days prior to the date of the notice.

(4) In a notice in terms of subsection (3), the registrar must state the reasons for the notice and inform the council and every party to the council that they have 60 days to show cause why the council's registration should not be cancelled.

(5) After the expiry of the 60-day period, the registrar, unless cause has been shown why the council's registration should not be cancelled, must notify the council and every party to the council that the registration will be cancelled unless an appeal to the Labour Court is noted and the Court reverses the decision.

(6) The cancellation takes effect-

a) if no appeal to the Labour Court is noted within the time contemplated in section III (3), on the expiry of that period; or

(b) if the council or any party has appealed and the Labour Court has confirmed the decision of the registrar, on the date of the Labour Court's decision.

(7) If either event contemplated in subsection (6) occurs, the registrar must cancel the council' s registration by removing the name of the council from the register of councils.

(8) Any collective agreement concluded by parties to a council whose registration has been cancelled, whether or not the collective agreement has been extended to non-parties by the Minister in terms of section 32, lapses 60 days after the council's registration has been cancelled.

(9) Despite subsection (8), the provisions of a collective agreement that regulates terms and conditions of employment remain in force for one year after the date that the council' s registration was cancelled, or until the expiry of the agreement, if earlier.

(10) Any party to a dispute about the interpretation or application of a collective agreement that regulates terms and conditions of employment referred to in subsection (8) may refer the dispute in writing to the Commission.

(11) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(12) The Commission must attempt to resolve the dispute through conciliation.

(13) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration.

(14) The registrar must cancel the registration of a bargaining council in the public service by removing its name from the register of councils when the registrar receives a resolution from the Public Service Co-ordinating Bargaining Council disestablishing a bargaining council established in terms of section 37(2).

(15) The provisions of subsections (3) to (7) do not apply to bargaining councils in the public service.

62. Disputes about demarcation between sectors and areas

(1) Any registered trade union, employer, employee, registered employers' organisation or council that has a direct or indirect interest in the application contemplated in this section may apply to the Commission in the prescribed form and manner for a determination as to-

(a) whether any employee, employer, class of employees or class of employers, is or was employed or engaged in a sector or area;

(b) whether any provision in any arbitration award, collective agreement or wage determination made in terms of the Wage Act is or was binding on any employee, employer, class of employees or class of employers.

(2) If two or more councils settle a dispute about a question contemplated in subsection (1)(a) or (b), the councils must inform the Minister of the provisions of their agreement and the Minister may publish a notice in the Government Gazette stating the particulars of the agreement.

(3) In any proceedings in terms of this Act before the Labour Court, if a question contemplated in subsection (1)(a) or (b) is raised, the Labour Court must adjourn those proceedings and refer the question to the Commission for determination if the Court is satisfied that-

(a) the question raised-

(i) has not previously been determined by arbitration in terms of this section; and

(ii) is not the subject of an agreement in terms of subsection (2); and

(iii) the determination of the question raised is necessary for the purposes of the proceedings.

(3A) In any proceedings before an arbitrator about the interpretation or application of a collective agreement, if a question contemplated in subsection (1)(a) or (b) is raised, the arbitrator must adjourn those proceedings and refer the question to the Commission if the arbitrator is satisfied that-

(a) the question raised-
    (i) has not previously been determined by arbitration in terms of this section; and
    (ii) is not the subject of an agreement in terms of subsection (2); and
(b) the determination of the question raised is necessary of the purposes of the proceedings.

(4) When the Commission receives an application in terms of subsection (1) or a referral in terms of subsection (3), it must appoint a commissioner to hear the application or determine the question, and the provisions of section 138 apply, read with the changes required by the context.

(5) In any proceedings in terms of this Act before a commissioner, if a question contemplated in subsection (1)(a) or (b) is raised, the commissioner must adjourn the proceedings and consult the director, if the commissioner is satisfied that-

(a) the question raised-

    (i) has not previously been determined by arbitration in terms of this section; and

    (ii) is not the subject of an agreement in terms of subsection (2); and

(b) the determination of the question raised is necessary for the purposes of the proceedings.

(6) The director must either order the commissioner concerned to determine the question or appoint another commissioner to do so, and the provisions of section 138 apply, read with the changes required by the context.

(7) If the Commission believes that the question is of substantial importance, the Commission must publish a notice in the Government Gazette stating the particulars of the application or referral and stating the period within which written representations may be made and the address to which they must be directed.

(8) If a notice contemplated in subsection (7) has been published, the commissioner may not commence the arbitration until the period stated in the notice has expired.

(9) Before making an award, the commissioner must consider any written representations that are made, and must consult NEDLAC.

(10) The commissioner must send the award, together with brief reasons, to the Labour Court and to the Commission.

(11) If the Commission believes that the nature of the award is substantially important, it may publish notice of the award in the Government Gazette.

(12) The registrar must amend the certificate of registration of a council in so far as is necessary in light of the award.

63. Disputes about Parts A and C to F

(1) Any party to a dispute about the interpretation or application of Parts A and C to F of this Chapter, may refer the dispute in writing to the Commission unless-

(a) the dispute has arisen in the course of arbitration proceedings or proceedings in the Labour Court; or

(b) the dispute is otherwise to be dealt with in terms of Parts A and C to F.

(2) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(3) The Commission must attempt to resolve the dispute through conciliation.

(4) If the dispute remains unresolved, any party to the dispute may refer it to the Labour Court for adjudication.

Chapter IV

STRIKES AND LOCK OUTS

64. Right to strike and recourse to lock out

(1) Every employee has the right to strike and every employer has recourse to lock out if-

(a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and-

(i) a certificate stating that the dispute remains unresolved has been issued; or

(ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that-

(b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless-

(i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or

(ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or

(c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or

(d) the case of a proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c).

(2) If the issue in dispute concerns a refusal to bargain, an advisory award must have been made in terms of section 135(3)(c) before notice is given in terms of subsection (1)(b) or (c). A refusal to bargain includes-

(a) a refusal-

(i) to recognise a trade union as a collective bargaining agent; or

(ii) to agree to establish a bargaining council;

(b) a withdrawal of recognition of a collective bargaining agent;

(c) a resignation of a party from a bargaining council;

(d) a dispute about-

(i) appropriate bargaining units;

(ii) appropriate bargaining levels; or

(iii) bargaining subjects.

(3) The requirements of subsection (1) do not apply to a strike or a lock-out if-

(a) the parties to the dispute are members of a council, and the dispute has been dealt with by that council in accordance with its constitution;

(b) the strike or lock-out conforms with the procedures in a collective agreement;

(c) the employees strike in response to a lock-out by their employer that does not comply with the provisions of this Chapter;

(d) the employer locks out its employees in response to their taking part in a strike that does not conform with the provisions of this Chapter; or

(e) the employer fails to comply with the requirements of subsections (4) and (5).

(4) Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a council or the Commission in terms of subsection (1)(a) may, in the referral, and for the period referred to in subsection (1)(a)-

(a) require the employer not to implement unilaterally the change to terms and conditions of employment; or

(b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.

(5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of service of the referral on the employer.

65. Limitations on right to strike or recourse to lock-out

(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if-

(a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;

(b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;

(c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;

(d) that person is engaged in-

(i) an essential service; or

(ii) a maintenance service. [13]

(2) (a) Despite section 65(l)(c), a person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or lock

13. Essential services, agreed minimum services and maintenance services are regulated in sections 71 to 75.

out if the issue in dispute is about any matter dealt with in sections 12 to 15. [14]

(b) If the registered trade union has given notice of the proposed strike in terms of section 64(l) in respect of an issue in dispute referred to in paragraph (a), it may not exercise the right to refer the dispute to arbitration in terms of section 21 for a period of 12 months from the date of the notice.

(3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out-

(a) if that person is bound by-

(i) any arbitration award or collective agreement that regulates the issue in dispute; or

(ii) any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or

(b) any determination made in terms of the Wage Act and that regulates the issue in dispute, during the first year of that determination.

66. Secondary strikes

(1) In this section "secondary strike" means a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in that demand.

(2) No person may take part in a secondary strike unless-

(a) the strike that is to be supported complies with the provisions of sections 64 and 65;

(b) the employer of the employees taking part in the secondary strike or, where appropriate, the employers' organisation of which that employer is a member, has received written notice of the proposed secondary strike at least seven days prior to its commencement; and

(c) the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.

(3) Subject to section 68(2) and (3), a secondary employer may apply to the Labour Court for an interdict to prohibit or limit a secondary strike that contravenes subsection (2).

14. These sections deal with organisational rights.

(4) Any person who is a party to proceedings in terms of subsection (3), or the Labour Court, may request the Commission to conduct an urgent investigation to assist the Court to determine whether the requirements of subsection (2)(c) have been met.

(5) On receipt of a request made in terms of subsection (4), the Commission must appoint a suitably qualified person to conduct the investigation, and then submit, as soon as possible, a report to the Labour Court.

(6) The Labour Court must take account of the Commission's report in terms of subsection (5) before making an order.

67. Strike or lock-out in compliance with this Act

(1) In this Chapter, "protected strike" means a strike that complies with the provisions of this Chapter and "protected lock-out" means a lock-out that complies with the provisions of this Chapter.

(2) A person does not commit a defect or a breach of contract by taking part in-

(a) a protected strike or a protected lock-out; or

(b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.

(3) Despite subsection (2), an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or a protected lock-out, however-

(a) if the employee's remuneration includes payment in kind in respect of accommodation, the provision of food and other basic amenities of life, the employer, at the request of the employee, must not discontinue payment in kind during the strike or lock-out; and

(b) after the end of the strike or lock-out, the employer may recover the monetary value of the payment in kind made at the request of the employee during the strike or lock-out from the employee by way of civil proceedings instituted in the Labour Court.

(4) An employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike.

(5) Subsection (4) does not preclude an employer from fairly dismissing an employee in accordance with the provisions of Chapter VIII for a reason related to the employee's conduct during the strike, or for a reason based on the employer's operational requirements.

(6) Civil legal proceedings may not be instituted against any person for-

(a) participating in a protected strike or a protected lock-out; or

(b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.

(7) The failure by a registered trade union or a registered employers' organisation to comply with a provision in its constitution requiring it to conduct a ballot of those of its members in respect of whom it intends to call a strike or lock-out may not give rise to, or constitute a ground for, any litigation that will affect the legality of, and the protection conferred by this section on, the strike or lock-out.

(8) The provisions of subsections (2) and (6) do not apply to any act in contemplation or in furtherance of a strike or a lock-out, if that act is an offence.

(9) Any act in contemplation or in furtherance of a protected strike or a protected lock-out that is a contravention of the Basic Conditions of Employment Act or the Wage Act does not constitute an offence.

68. Strike or lock-out not in compliance with this Act

(1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction-

(a) to grant an interdict or order to restrain-[15]

(i) any person from participating in a strike or any conduct in contemplation or in furtherance of a strike; or

(ii) any person from participating in a lock-out or any conduct in contemplation or in furtherance of a lock-out;

(b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct, having regard to-

(i) whether -

(aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;

(bb) the strike or lock-out or conduct was premeditated;

(cc) the strike or lock out, or conduct was in response to unjustified conduct by another party to the dispute; and

(dd) there was compliance with an order granted in terms of paragraph (a);

15. See flow diagram No. 6 in Schedule 4.

(ii) the interests of orderly collective bargaining;

(iii) the duration of the strike or lock out or conduct; and

(iv) the financial position of the employer, trade union or employees respectively.

(2) The Labour Court may not grant any order in terms of subsection (1)(a) unless 48 hours' notice of the application has been given to the respondent: However, the Court may permit a shorter period of notice if-

(a) the applicant has given written notice to the respondent of the applicant's intention to apply for the granting of an order;

(b) the respondent has been given a reasonable opportunity to be heard before a decision concerning that application is taken; and

(c) the applicant has shown good cause why a period shorter than 48 hours should be permitted.

(3) Despite subsection (2), if written notice of the commencement of the proposed strike or lock-out was given to the applicant at least 10 days before the commencement of the proposed strike or lock-out, the applicant must give at least five days' notice to the respondent of an application for an order in terms of subsection (1)(a).

(4) Subsections (2) and (3) do not apply to an employer or an employee engaged in an essential service or a maintenance service.

(5) Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.

69. Picketing [16]

(1) A registered trade union may authorise a picket by its members and supporters for the purposes of peacefully demonstrating-

(a) in support of any protected strike; or

(b) in opposition to any lockout.

(2) Despite any law regulating the right of assembly, a picket authorised terms of I subsection (1), may be held-

(a) in any place to which the public has access but outside the premises of an employer; or

16. See flow diagram No. 7 in Schedule 4.

(b) with the permission of the employer, inside the employer's premises.

(3) The permission referred to in subsection (2)(b) may not be unreasonably withheld.

(4) If requested to do so by the registered trade union or the employer, the Commission must attempt to secure an agreement between the parties to the dispute on rules that should apply to any picket in relation to that strike or lock-out.

(5) If there is no agreement, the Commission must establish picketing rules, and in doing so must take account of-

(a) the particular circumstances of the workplace or other premises where it is intended that the right to picket is to be exercised; and

(b) any relevant code of good practice.

(6) The rules established by the Commission may provide for picketing by employees on their employer's premises if the Commission is satisfied that the employer's permission has been unreasonably withheld.

(7) The provisions of section 67, read with the changes required by the context, apply to the call for, organisation of, or participation in a picket that complies I with the provisions of this section.

(8) Any party to a dispute about any of the following issues may refer the dispute in writing to the Commission-

(a) an allegation that the effective use of the right to picket is being undermined;

(b) an alleged material contravention of subsection (1) or (2);

(c) an alleged material breach of an agreement concluded in terms of subsection (4); or

(d) an alleged material breach of a rule established in terms of subsection (5).

(9) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(10) The Commission must attempt to resolve the dispute through conciliation.

(11) If the dispute remains unresolved, any party to the dispute may refer it to the Labour Court for adjudication.

70. Essential services committee

(1) The Minister, after consulting NEDLAC, and in consultation with the Minister for the Public Service and Administration, must establish an essential services committee under the auspices of the Commission and -

(a) appoint to that committee, on any terms that the Minister considers fit, persons who have knowledge and experience of labour law and labour relations; and

(b) designate one of the members of the committee as its chairperson.

(2) The functions of the essential services committee are-

(a) to conduct investigations as to whether or not the whole or a part of any service is an essential service, and then to decide whether or not to designate the whole or a part of that service as an essential service;

(b) to determine disputes as to whether or not the whole or a part of any service is an essential service; and

(c) to determine whether or not the whole or a part of any service is a maintenance service. [17]

(3) At the request of a bargaining council, the essential services committee must conduct an investigation in terms of subsection (2)(a).

71. Designating a service as an essential service

(1) The essential services committee must give notice in the Government Gazette of any investigation that it is to conduct as to whether the whole or a part of a service is an essential service.

(2) The notice must indicate the service or the part of a service that is to be the subject of the investigation and must invite interested parties, within a period stated in the notice-

(a) to submit written representations; and

(b) to indicate whether or not they require an opportunity to make oral representations.

(3) Any interested party may inspect any written representations made pursuant to the notice, at the Commission's offices.

(4) The Commission must provide a certified copy of, or extract from, any written representations to any person who has paid the prescribed fee.

(5) The essential services committee must advise parties who wish to make oral representations of the place and time at which they may be made.

17. A maintenance service is defined I section 75.

(6) Oral representations must be made in public.

(7) After having considered any written and oral representations, the essential services committee must decide whether or not to designate the whole or a part of the service that was the subject of the investigation as an essential service.

(8) If the essential services committee designates the whole or a part of a service as an essential service, the committee must publish a notice to that effect in the Government Gazette.

(9) The essential services committee may vary or cancel the designation of the whole or a part of a service as an essential service, by following the provisions set out in subsections (1) to (8), read with the changes required by the context.

(10) The Parliamentary service and the South African Police Service are deemed to have been designated an essential service in terms of this section.

72. Minimum services. The essential services committee may ratify any collective agreement that provides for the maintenance of minimum services in a service designated as an essential service, in which case-

(a) the agreed minimum services are to be regarded as an essential service in respect of the employer and its employees; and

(b) the provisions of section 74 do not apply.

73. Disputes about whether a service is an essential service

(1) Any party to a dispute about either of the following issues may refer the dispute in writing to the essential services committee-

(a) whether or not a service is an essential service; or

(b) whether or not an employee or employer is engaged in a service designated as an essential service.

(2) The party who refers the dispute to the essential services committee must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(3) The essential services committee must determine the dispute as soon as possible.

74. Disputes in essential services[18]

(1) Any party to a dispute that is precluded from participating in a strike or a lock-out because that party is engaged in an essential service may refer the dispute in writing to

18. See flow diagram No. 8 in Schedule 4.

(a) a council, if the parties to the dispute fall within the registered scope of that council; or

(b) the Commission, if no council has

(2) The party who refers the dispute must satisfy the council or the Commission that a copy of the referral has been served on all the other parties to the dispute.

(3) The council or the Commission must attempt to resolve the dispute through conciliation.

(4) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration by the council or the Commission.

(5) Any arbitration award in terms of subsection (4) made in respect of the State and that has financial implications for the State becomes binding-

(a) 14 days after the date of the award, unless a Minister has tabled the award in Parliament within that period; or

(b) 14 days after the date of tabling the award, unless Parliament has passed a resolution that the award is not binding.

(6) If Parliament passes a resolution that the award is not binding, the dispute must be referred back to the Commission for further conciliation between the parties to the dispute and if that fails, any party to the dispute may request the Commission to arbitrate.

(7) If Parliament is not in session on the expiry of (a) the period referred to in subsection (5)(a), that period or the balance of that period will run from the beginning of the next session of Parliament;

(b) the period referred to in subsection (5)(b), that period will run from the expiry of the period referred to in paragraph (a) of this subsection or from the beginning of the next session of Parliament.

75. Maintenance services

(1) A service is a maintenance service if the interruption of that service has the effect of material physical destruction to any working area, plant or machinery.

(2) If there is no collective agreement relating to the provision of a maintenance service, an employer may apply in writing to the essential services committee for a determination that the whole or a part of the employer's business or service is a maintenance service.

(3) The employer must satisfy the essential services committee that a copy of the application has been served on all interested parties.

(4) The essential services committee must determine, as soon as possible, whether or not the whole or a part of the employer's business or service is a maintenance service.

(5) As part of its determination in terms of subsection (4), the essential services committee may direct that any dispute in respect of which the employees engaged in a maintenance service would have had the right to strike, but for the provisions of section 65(1)(d)(ii), be referred to arbitration.

(6) The committee may not make a direction in terms of subsection (5) if –

(a) the terms and conditions of employment of the employees engaged in the maintenance service are determined by collective bargaining; or

(b) if the number of employees prohibited from striking because they are engaged in the maintenance service does not exceed the number of employees who are entitled to strike.

(7) If a direction in terms of subsection (5) requires a dispute to be resolved by arbitration –

(a) the provisions of section 74 will apply to the arbitration; and
(b) any arbitration award will be binding on the employees engaged in the maintenance service and their employer, unless the terms of the award are varied by a collective agreement.

76. Replacement labour

(1) An employer may not take into employment any person-

(a) to continue or maintain production during a protected strike if the whole or a part of the employer's service has been designated a maintenance service; or

(b) for the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike.

(2) For the purpose of this section, "take into employment" includes engaging the I services of a temporary employment service or an independent contractor.

77. Protest action to promote or defend socio-economic interests of workers

(1) Every employee who is not engaged in an essential service or a maintenance service has the right to take part in protest action if-

(a) the protest action has been called by a registered trade union or federation of trade unions;

(b) the registered trade union or federation of trade unions has served a notice on NEDLAC stating-

(i) the reasons for the protest action; and

(ii) the nature of the protest action;

(c) the matter giving rise to the intended protest action has been considered by NEDLAC or any other appropriate forum in which the parties concerned are able to participate in order to resolve the matter; and

(d) at least 14 days before the commencement of the protest action, the registered trade union or federation of trade unions has served a notice on NEDLAC of its intention to proceed with the protest action.

(2) The Labour Court has exclusive jurisdiction-

(a) to grant any order to restrain any person from taking part in protest action or in any conduct in contemplation or in furtherance of protest action that does not comply with subsection (1);

(b) in respect of protest action that complies with subsection (1), to grant a declaratory order contemplated by subsection (4), after having considered-

(i) the nature and duration of the protest action;

(ii) the steps taken by the registered trade union or federation of trade unions to minimise the harm caused by the protest action; and

(iii) the conduct of the participants in the protest action.

(3) A person who takes part in protest action or in any conduct in contemplation or in furtherance of protest action that complies with subsection (1), enjoys the protections conferred by section 67.

(4) Despite the provisions of subsection (3), an employee forfeits the protection against dismissal conferred by that subsection, if the employee-

(a) takes part in protest action or any conduct in contemplation or in furtherance of protest action in breach of an order of the Labour Court; or

(b) otherwise acts in contempt of an order of the Labour Court made in terms of this section.

CHAPTER V

WORKPLACE FORUMS

78. Definitions in this Chapter

In this Chapter-

(a) "**employee**" means any person who is employed in a workplace, except a senior managerial employee whose contract of employment or status confers the authority to do any of the following in the workplace-

(ii) represent the employer in dealings with the workplace forum; or

(iii) determine policy and take decisions on behalf of the employer that may be in conflict with the representation of employees in the workplace; and

(b) "**representative trade union**" means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.

79. General functions of workplace forum

A workplace, forum established in terms of this Chapter-

(a) must seek to promote the interests of all employees in the workplace, whether or not they are trade union members;

(b) must seek to enhance efficiency in the workplace;

(c) is entitled to be consulted by the employer, with a view to reaching consensus, about the matters referred to in section 84; and

(d) is entitled to participate in joint decision-making about the matters referred to in section 86.

80. Establishment of workplace forum

(1) A workplace forum may be established in any workplace in which an employer employs more than 100 employees.

(2) Any representative trade union may apply to the Commission in the prescribed form for the establishment of a workplace, forum.

(3) The applicant must satisfy the Commission that a copy of the application has been served on the employer.

(4) The Commission may require further information in support of the application.

(5) The Commission must-

(a) consider the application and any further information provided by the applicant; and

(b) consider whether, in the workplace in respect of which the application has been made-

(i) the employer employs 100 or more employees;

(ii) the applicant is a representative trade union; and

(iii) there is no functioning workplace forum established in terms of this Chapter.

(6) If satisfied that the requirements of subsection (5) are met, the Commission must appoint a commissioner to assist the parties to establish a workplace forum by collective agreement or, failing that, to establish a workplace forum in terms of this Chapter.

(7) The commissioner must convene a meeting with the applicant, the employer and any registered trade union that has members employed in the workplace, in order to facilitate the conclusion of a collective agreement between those parties, or at least between the applicant and the employer.

(8) If a collective agreement is concluded, the provisions of this Chapter do not apply.

(9) If a collective agreement is not concluded, the commissioner must meet the parties referred to in subsection (7) in order to facilitate agreement between them, or at least between the applicant and the employer, on the provisions of a constitution for a workplace forum in accordance with this Chapter, taking into account the guidelines in Schedule 2.

(10) If no agreement is reached on any of the provisions of a constitution, the commissioner must establish a workplace forum and determine the provisions of the constitution in accordance with this Chapter, taking into account the guidelines in Schedule 2.

(11) After the workplace forum has been established, the commissioner must set a date for the election of the first members of the workplace forum and appoint an election officer to conduct the election.

(12) The provisions of this section do not apply to the public service. The establishment of workplace forums in the public service will be regulated in a Schedule promulgated by the Minister for the Public Service and Administration in terms of section 207(4).

81. Trade union based workplace forum

(1) If a representative trade union is recognised in terms of a collective agreement by an employer for the purposes of collective bargaining in respect of a] I employees in a workplace, that trade union may apply to the Commission in the prescribed form for the establishment of a workplace forum.

(2) The applicant may choose the members of the workplace forum from among its elected representatives in the workplace.

(3) If the applicant makes this choice, the provisions of this Chapter apply, except for section 80(l 1) and section 82(1)(b) to (m).

(4) The constitution of the applicant governs the nomination, election and removal from office of elected representatives of the applicant in the workplace.

(5) A workplace forum constituted in terms of this section will be dissolved if-

(a) the collective agreement referred to in subsection (1) is terminated;

(b) the applicant is no longer a representative trade union.

(6) The provisions of this section do not apply to the public service.

82. Requirements for constitution of workplace forum

(1) The constitution of every workplace forum must-

(a) establish a formula for determining the number of seats in the workplace forum;

(b) establish a formula for the distribution of seats in the workplace forum so as to reflect the occupational structure of the workplace;

(c) provide for the direct election of members of the workplace forum by the employees in the workplace;

(d) provide for the appointment of an employee as an election officer to conduct elections and define that officer's functions and powers;

(e) provide that an election of members of the workplace forum must be held not later than 24 months after each preceding election; provide that if another registered trade union becomes representative, it may demand a new election at any time within 21 months after each preceding election;

(g) provide for the procedure and manner in which elections and ballots must be conducted;

(h) provide that any employee, including any former or current member of the workplace forum, may be nominated as a candidate for election as a member of the workplace forum by-

(i) any registered trade union with members employed in the work- place; or

(ii) a petition signed by not less than 20 per cent of the employees in the workplace or 100 employees, whichever number of employees is the smaller;

(i) provide that in any ballot every employee is entitled-

(i) to vote by secret ballot; and

(ii) to vote during working hours at the employer's premises;

(j) provide that in an election for members of the workplace forum every employee is entitled, unless the constitution provides otherwise-

(i) to cast a number of votes equal to the number of members to be elected; and

(ii) to cast one or more of those votes in favour of any candidate;

(k) establish the terms of office of members of the workplace forum f and the circumstances in which a member must vacate that office;

(l) establish the circumstances and manner in which members of the workplace forum may be removed from office, including the right of an representative trade union that nominated a member for election to remove that member at any time;

(m) establish the manner in which vacancies in the workplace forum ma be filled, including the rules for holding by-elections;

(n) establish the circumstances and manner in which the meetings referred to in section 83 must be held;

(o) provide that the employer must allow the election officer reasonable time off with pay during working hours to prepare for and conduct elections;

(p) provide that the employer must allow each member of the workplace forum reasonable time off with pay during working hours to perform the functions of a member of the workplace, forum and to receive training relevant to the performance of those functions;

(q) require the employer to take any steps that are reasonably necessary to assist the election officer to conduct elections;

(r) require the employer to provide facilities to enable the workplace forum to perform its functions;

(s) provide for the designation of full-time members of the workplace forum if there are more than 1 000 employees in a workplace;

(t) provide that the workplace forum may invite any expert to attend its meetings, including meetings with the employer or the employees, and that an expert is entitled to any information to which the workplace forum is entitled and to inspect and copy any document that members of the workplace forum are entitled to inspect and copy;

(u) provide that office-bearers or officials of the representative trade union may attend meetings of the workplace forum, including meetings with the employer or the employees;

(v) provide that the representative trade union and the employer, by agreement, may change the constitution of the workplace forum; and

(w) establish the manner in which decisions are to be made.

(2) The constitution of a workplace forum may-

(a) establish a procedure that provides for the conciliation and arbitration of proposals in respect of which the employer and the workplace forum do not reach consensus;

(b) establish a coordinating workplace forum to perform any of the general functions of a workplace forum and one or more subsidiary workplace forums to perform any of the specific functions of a workplace forum; and

(c) include provisions that depart from sections 83 to 92.

(3) The constitution of a workplace forum binds the employer.

(4) The Minister for the Public Service and Administration may amend the requirements for a constitution in terms of this section for workplace forums in the public service by a Schedule promulgated in terms of section 207(4).

83. Meetings of workplace forum

(1) There must be regular meetings of the workplace forum.

(2) There must be regular meetings between the workplace forum and the employer, at which the employer must-

(a) present a report on its financial and employment situation, its performance since the last report and its anticipated performance in the short term and in the long term; and

(b) consult the workplace forum on any matter arising from the report that may affect employees in the workplace.

(3)(a) There must be meetings between members of the workplace forum and the employees employed in the workplace at regular and appropriate intervals. At the meetings with employees, the workplace forum must report on-

(i) its activities generally;

(ii) matters in respect of which it has been consulted by the employer; and

(iii) matters in respect of which it has participated in joint decision-making with the employer.

(b) Each calendar year, at one of the meetings with the employees, the employer must present an annual report of its financial and employment situation, its performance generally and its future prospects and plans.

(c) The meetings of employees must be held during working hours at a time and place agreed upon by the workplace forum and the employer without loss of pay on the part of the employees.

84. Specific matters for consultation

(1) Unless the matters for consultation are regulated by a collective agreement with the representative trade union, a workplace forum is entitled to be consulted by the employer about proposals relating to any of the following matters-

(a) restructuring the workplace, including the introduction of new technology and new work methods;

(b) changes in the organisation of work;

(c) partial or total plant closures;

(d) mergers and transfers of ownership in so far as they have an impact on the employees;

(e) the dismissal of employees for reasons based on operational requirements; exemptions from any collective agreement or any law;

(g) job grading;

(h) criteria for merit increases or the payment of discretionary bonuses;

(i) education and training;

(j) product development plans; and

(k) export promotion.

(2) A bargaining council may confer on a workplace forum the right to be consulted about additional matters in workplaces that fall within the registered scope of the bargaining council.

(3) A representative trade union and an employer may conclude a collective agreement conferring on the workplace forum the right to be consulted about any additional matters in that workplace.

(4) Any other law may confer on a workplace forum the right to be consulted about additional matters.

(5) Subject to any applicable occupational health and safety legislation, a representative trade union and an employer may agree-

(a) that the employer must consult with the workplace forum with a view to initiating, developing, promoting, monitoring and reviewing measures to ensure health and safety at work;

(b) that a meeting between the workplace forum and the employer constitutes a meeting of a health and safety committee required to be established in the workplace by that legislation; and

(c) that one or more members of the workplace forum are health and safety representatives for the purposes of that legislation.

(6) For the purposes of workplace forums in the public service-

(a) the collective agreement referred to in subsection (1) is a collective agreement concluded in a bargaining council;

(b) a bargaining council may remove any matter from the list of matters referred to in subsection (1) in respect of workplaces that fall within its registered scope; and

(c) subsection (3) does not apply.

85. Consultation

(1) Before an employer may implement a proposal in relation to any matter referred to in section 84(l), the employer must consult the workplace forum and attempt to reach consensus with it.

(2) The employer must allow the workplace forum an opportunity during the consultation to make representations and to advance alternative proposals.

(3) The employer must consider and respond to the representations or alternative proposals made by the workplace forum and, if the employer does not agree with them, the employer must state the reasons for disagreeing.

(4) If the employer and the workplace forum do not reach consensus, the employer must invoke any agreed procedure to resolve any differences before implementing the employer's proposal.

86. Joint decision-making

(1) Unless the matters for joint decision-making are regulated by a collective agreement with the representative trade union, an employer must consult and reach consensus with a workplace forum before implementing any proposal concerning-

(a) disciplinary codes and procedures;

(b) rules relating to the proper regulation of the workplace in so far as they apply to conduct not related to the work performance of employees;

(c) measures designed to protect and advance persons disadvantaged by unfair discrimination; and

(d) changes by the employer or by employer-appointed representatives on trusts or boards of employer-controlled schemes, to the rules regulating social benefit schemes.

(2) A representative trade union and an employer may conclude a collective agreement-

(a) conferring on the workplace forum the right to joint decision-making in respect of additional matters in that workplace;

(b) removing any matter referred to in subsection (1)(a) to (d) from the list of matters requiring joint decision-making.

(3) Any other law may confer on a workplace forum the right to participate in joint decision-making about additional matters.

(4) If the employer does not reach consensus with the workplace forum, the employer may-

(a) refer the dispute to arbitration in terms of any agreed procedure; or

(b) if there is no agreed procedure, refer the dispute to the Commission.

(5) The employer must satisfy the Commission that a copy of the referral has been served on the chairperson of the workplace forum.

(6) The Commission must attempt to resolve the dispute through conciliation.

(7) If the dispute remains unresolved, the employer may request that the dispute be resolved through arbitration. [19]

(8)(a) An arbitration award is about a proposal referred to in subsection (1)(d) takes effect 30 days after the date of the award.

(b) Any representative on the trust or board may apply to the Labour Court for an order declaring that the implementation of the award constitutes a breach of a fiduciary duty on the part of that representative.

(c) Despite paragraph (a), the award will not take effect pending the determination by the Labour Court of an application made in terms of paragraph (b).

(9) For the purposes of workplace forums in the public service, a collective agreement referred to in subsections (1) and (2) is a collective agreement concluded in a bargaining council.

87. Review at request of newly established workplace forum

(1) After the establishment of a workplace forum, the workplace forum may request a meeting with the employer to review-

(a) criteria for merit increases or the payment of discretionary bonuses;

(b) disciplinary codes and procedures; and

(c) rules relating to the proper regulation of the workplace in so far as they apply to conduct not related to work performance of employees in the workplace.

(2) The employer must submit its criteria, disciplinary codes and procedures, and rules, referred to in subsection (1), if any, in writing to the workplace forum for its consideration.

(3) A review of the criteria must be conducted in accordance with the provisions of section 85.

(4) A review of the disciplinary codes and procedures, and rules, must be conducted in accordance with the provisions of section 86(2) to (7) except that, in applying section 86(4), either the employer or the workplace forum may refer a dispute between them to arbitration or to the Commission..

88. Matters affecting more than one workplace forum in an employer's operation

(1) If the employer operates more than one workplace and separate workplace forums have been established in two or more of those workplaces, and if a matter has been referred to arbitration in terms of section 86(4)(a) or (b) or by a workplace forum in terms of section 87(4), the employer may give notice in writing to the chairpersons of all the workplace forums that no other

19. See flow diagram No. 9 in Schedule 4.

workplace forum ma refer a matter that is substantially the same as the matter referred to arbitration.

(2) If the employer gives notice in terms of subsection (1)-

(a) each workplace forum is entitled to make representations and participate in the arbitration proceedings; and

(b) the arbitration award is binding on the employer and the employees in each workplace.

89. Disclosure of information

(1) An employer must disclose to the workplace forum all relevant information that will allow the workplace forum to engage effectively in consultation and joint decision-making.

(2) An employer is not required to disclose information-

(a) that is legally privileged;

(b) that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;

(c) that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or

(d) that is private personal information relating to an employee, unless that employee consents to the disclosure of that information.

(2A) The employer must notify the workplace forum in writing if of the view that any information disclosed in terms of subsection (1) is confidential.

(3) If there is a dispute about the disclosure of information, any party to the dispute may refer the dispute in writing to the Commission.

(4) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(5) The Commission must attempt to resolve the dispute through conciliation.

(6) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration.

(7) In any dispute about the disclosure of information contemplated in subsection (3), the commissioner must first decide whether or not the information is relevant.

(8) If the commissioner decides that the information is relevant and if it is information contemplated in subsection (2)(c) or (d), the commissioner must

balance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of the workplace forum to engage effectively in consultation and joint decision-making.

(9) If the commissioner decides that the balance of harm favours the disclosure of the information, the commissioner may order the disclosure of the information on terms designed to limit the harm likely to be caused to the employee or employer.

(10) When making an order in terms of subsection (9), the commissioner must take into account any breach of confidentiality in respect of information disclosed in terms of this section at that workplace and may refuse to order the disclosure of the information or any other confidential information, that might otherwise be disclosed, for a period specified in the arbitration award.

90. Inspection and copies of documents

(1) Any documented information that is required to be disclosed by the employer in terms of section 89 must be made available on request to the members of the workplace forum for inspection.

(2) The employer must provide copies of the documentation on request to the members of the workplace forum.

91. Breach of confidentiality

In any dispute about an alleged breach of confidentiality, the commissioner may order that the right to disclosure of information in that workplace be withdrawn for a period specified in the arbitration award.

92. Full-time members of workplace forum

(1) In a workplace in which 1000 or more employees are employed, the members of the workplace forum may designate from their number one full-time member.

(2)(a) The employer must pay a full-time member of the workplace forum the same remuneration that the member would have earned in the position the member held immediately before being designated as a full-time member.

(b) When a person ceases to be a full-time member of a workplace forum, the employer must reinstate that person to the position that person held immediately before election or appoint that person to any higher position to which, but for the election, that person would have advanced.

93. Dissolution of workplace forum

(1) A representative trade union in a workplace may request a ballot to dissolve a workplace forum.

(2) If a ballot to dissolve a workplace forum has been requested, an election officer must be appointed in terms of the constitution of the workplace forum.

(3) Within 30 days of the request for a ballot to dissolve the workplace forum, the election officer must prepare and conduct the ballot.

(4) If more than 50 per cent of the employees who have voted in the ballot support the dissolution of the workplace forum, the workplace forum must be dissolved.

94. Disputes about workplace forums

(1) Unless a collective agreement or this Chapter provides otherwise, any party to a dispute about the interpretation or application of this Chapter may refer that dispute to the Commission in writing, if that party is-

(a) one or more employees employed in the workplace;

(aA) a workplace forum;

(b) a registered trade union with members employed in the workplace;

(c) the representative trade union; or

(d) the employer.

(2) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(3) The Commission must attempt to resolve the dispute through conciliation.

(4) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration.

CHAPTER VI

TRADE UNIONS AND EMPLOYERS' ORGANISATIONS

PART A-REGISTRATION AND REGULATION OF TRADE UNIONS AND EMPLOYERS' ORGANISATIONS

95. Requirements for registration of trade unions or employers' organisations

(1) Any trade union may apply to the registrar for registration if-

(a) it has adopted a name that meets the requirements of subsection (4);

(b) it has adopted a constitution that meets the requirements of subsections (5) and (6);

(c) it has an address in the Republic; and

(d) it is independent.

(2) A trade union is independent if-

(a) it is not under the direct or indirect control of any employer or employers' organisation; and

(b) it is free of any interference or influence of any kind from any employer or employers' organisation.

(3) Any employers' organisation may apply to the registrar for registration if-

(a) it has adopted a name that meets the requirements of subsection (4);

(b) it has adopted a constitution that meets the requirements of subsections (5) and (6), and

(c) it has an address in the Republic.

(4) Any trade union or employers' organisation that intends to register may not have a name or shortened form of the name that so closely resembles the name or shortened form of the name of another trade union or employers' organisation that it is likely to mislead or cause confusion.

(5) The constitution of any trade union or employers' organisation that intends to register must-

(a) state that the trade union or employers' organisation is an association not for gain;

(b) prescribe qualifications for, and admission to, membership;

(c) establish the circumstances in which a member will no longer be entitled to the benefits of membership;

(d) provide for the termination of membership;

(e) provide for appeals against loss of the benefits of membership or against termination of membership, prescribe a procedure for those appeals and determine the body to which those appeals may be made; provide for membership fees and the method for determining membership fees and other payments by members;

(g) prescribe rules for the convening and conducting of meetings of members and meetings of representatives of members, including the quorum required for, and the minutes to be kept of, those meetings;

(h) establish the manner in which decisions are to be made;

(i) establish the office of secretary and define its functions;

(j) provide for other office-bearers, officials and, in the case of a trade union, trade union representatives, and define their respective functions;

(k) prescribe a procedure for nominating or electing office-bearers and, in the case of a trade union, trade union representatives;

(l) prescribe a procedure for appointing, or nominating and electing, officials;

(m) establish the circumstances and manner in which office-bearers, officials and, in the case of a trade union, trade union representatives, may be removed from office;

(n) provide for appeals against removal from office of office-bearers, officials and, in the case of a trade union, trade union representatives, prescribe a procedure for those appeals and determine the body to which those appeals may be made;

(o) establish the circumstances and manner in which a ballot must be conducted;

(p) provide that the trade union or employers' organisation, before calling a strike or lock-out, must conduct a ballot of those of its members in respect of whom it intends to call the strike or lock-out;

(q) provide that members of the trade union or employers' organisation may not be disciplined or have their membership terminated for failure or refusal to participate in a strike or lock-out if-

(i) no ballot was held about the strike or lock-out; or

(ii) a ballot was held but a majority of the members who voted did not vote in favour of the strike or lock-out;

(r) provide for banking and investing its money;

(s) establish the purposes for which its money may be used;

(t) provide for acquiring and controlling property;

(u) determine a date for the end of its financial year;

(v) prescribe a procedure for changing its constitution; and

(w) prescribe a procedure by which it may resolve to wind up.

(6) The constitution of any trade union or employers' organisation which intends to register may not include any provision that discriminates directly or indirectly against any person on the grounds of race or sex.

(7) The registrar must not register a trade union or an employers' organisation unless the registrar is satisfied that the applicant is a genuine trade union or a genuine employers' organisation.

(8) The Minister, in consultation with NEDLAC, may by notice in the Government Gazette publish guidelines to be applied by the registrar in determining whether an applicant is a genuine trade union or a genuine employers' organisation.

96. Registration of trade unions or employers' organisations

(1) Any trade union or employers' organisation may apply for registration by submitting to the registrar-

(a) a prescribed form that has been properly completed;

(b) a copy of its constitution; and

(c) any other information that may assist the registrar to determine whether or not the trade union or employers' organisation meets the requirements for registration.

(2) The registrar may require further information in support of the application.

(3) The registrar-

(a) must consider the application and any further information provided by the applicant; and

(b) if satisfied that the applicant meets the requirements for registration, must register the applicant by entering the applicant's name in the register of trade unions or the register of employers' organisations.

(4) If the registrar is not satisfied that the applicant meets the requirements for registration, the registrar-

(a) must send the applicant a written notice of the decision and the reasons for that decision; and

(b) in that notice, must inform the applicant that it has 30 days from the date of the notice to meet those requirements.

(5) If, within that 30-day period, the applicant meets the requirements for registration, the registrar must register the applicant by entering the applicant's name in the appropriate register.

(6) If, within that 30-day period, an applicant has attempted to meet the requirements for registration but the registrar concludes that the applicant has failed to do so, the registrar must-

(a) refuse to register the applicant; and

(b) notify the applicant in writing of that decision.

(7) After registering the applicant, the registrar must-

(a) issue a certificate of registration in the applicant's name; and

(b) send the certificate and a certified copy of the registered constitution to the applicant.

97. Effect of registration of trade union or employers' organisation

(1) A certificate of registration is sufficient proof that a registered trade union or registered employers' organisation is a body corporate.

(2) The fact that a person is a member of a registered trade union or a registered employers' organisation does not make that person liable for any of the obligations or liabilities of the trade union or employers' organisation.

(3) A member, office-bearer or official of a registered trade union or a registered employers' organisation or, in the case of a trade union, a trade union representative is not personally liable for any loss suffered by any person as a result of an act performed or omitted in good faith by the member, office-bearer, official or trade union representative while performing their functions for or on behalf of the trade union or employers' organisation.

(4) Service of any document directed to a registered trade union or employers' organisation at the address most recently provided to the registrar will be for all purposes service of that document on that trade union or employers' organisation.

98. Accounting records and audits

(1) Every registered trade union and every registered employers' organisation must, to the standards of generally accepted accounting practice, principles and procedures-

(a) keep books and records of its income, expenditure, assets and liabilities; and

(b) within six months after the end of each financial year, prepare financial statements, including at least-

(i) a statement of income and expenditure for the previous financial year; and

(ii) a balance sheet showing its assets, liabilities and financial position as at the end of the previous financial year.

(2) Every registered trade union and every registered employers' organisation must arrange for an annual audit of its books and records of account and its financial statements by an auditor who must-

(a) conduct the audit in accordance with generally accepted auditing standards; and

(b) report in writing to the trade union or employers' organisation and in that report-

(i) express an opinion as to whether or not the trade union or employers' organisation has complied with those provisions of its constitution relating to financial matters; and

(ii) if the trade union is a party to an agency shop agreement referred to in section 25 or a closed shop agreement referred to in section 26 express an opinion as to whether or not the trade union has complied with the provisions of those sections.

(3) Every registered trade union and every registered employers' organisation must-

(a) make the financial statements and the auditor's report available to its members for inspection; and

(b) submit those statements and the auditor's report to a meeting or meetings of its members or their representatives as provided for in its constitution.

(4) Every registered trade union and every registered employers' organisation must preserve each of its books of account, supporting vouchers, records of subscriptions or levies paid by its members, income and expenditure statements, balance sheets, and auditor's reports, in an original or reproduced form, for a period of three years from the end of the financial year to which they relate.

99. Duty to keep records. In addition to the records required by section 98, every registered trade union and every registered employers' organisation must keep-

(a) a list of its members;

(b) the minutes of its meetings, in an original or reproduced form, for a period of three years from the end of the financial, year to which they relate; and

(c) the ballot papers for a period of three years from the date of every ballot.

100. Duty to provide information to registrar. Every registered trade union and every registered employers' organisation must provide to the registrar-

(a) by 31 March each year, a statement, certified by the secretary that it accords with its records, showing the number of members as at 31 December of the previous year and any other related details that may be required by the registrar;

(b) within 30 days of receipt of its auditor's report, a certified copy of that report and of the financial statements;

(c) within 30 days of receipt of a written request by the registrar, an explanation of anything relating to the statement of membership, the auditor's report or the financial statements;

(d) within 30 days of any appointment or election of its national office-bearers, the names and work addresses of those office-bearers, even if their appointment or election did not result in any changes to its office-bearers; and

(e) 30 days before a new address for service of documents will take effect, notice of that change of address.

101. Changing constitution or name of registered trade unions or employers' organisations

(1) A registered trade union or a registered employers' organisation may resolve to change or replace its constitution.

(2) The registered trade union or the registered employers' organisation must send the registrar a copy of the resolution and a certificate signed by its secretary stating that the resolution complies with its constitution.

(3) The registrar must-

(a) register the changed or new constitution if it meets the requirements for registration; and

(b) send the registered trade union or registered employers' organisation a copy of the resolution endorsed by the registrar, certifying that the change or replacement has been registered.

(4) The changed or new constitution takes effect from the date of the registrar's certification.

(5) A registered trade union or registered employers' organisation may resolve to change its name.

(6) The registered trade union or registered employers' organisation must send the registrar a copy of the resolution and the original of its current certificate of registration.

(7) If the new name of the trade union or employers' organisation meets the requirements of section 95(4),[20] the registrar must-

(a) enter the new name in the appropriate register and issue a certificate of registration in the new name of the trade union or employers' organisation;

(b) remove the old name from that register and cancel the earlier certificate of registration; and

(c) send the new certificate to the trade union or employers' organisation.

(8) The new name takes effect from the date that the registrar enters it in the appropriate register.

102. Amalgamation of trade unions or employers' organisations

(1) Any registered-

(a) trade union may resolve to amalgamate with one or more other trade unions, whether or not those other trade unions are registered; and

(b) employers' organisation may resolve to amalgamate with one or more other employers' organisations, whether or not those other employers' organisations are registered.

(2) The amalgamating trade unions or amalgamating employers' organisations may apply to the registrar for registration of the amalgamated trade union or amalgamated employers' organisation, even if any of the amalgamating trade unions or amalgamating employers' organisations is itself already registered, and the registrar must treat the application as an application in terms of section 96.

(3) After the registrar has registered the amalgamated trade union or amalgamated employers' organisation, the registrar must cancel the registration of each of the amalgamating trade unions or amalgamating employers' organisations by removing their names from the appropriate register.

20. These are the requirements relating to the name of a trade union or employers' organisation to be registered.

(4) The registration of an amalgamated trade union or an amalgamated employers' organisation takes effect from the date that the registrar enters its name in the appropriate register.

(5) When the registrar has registered an amalgamated trade union or amalgamated employers' organisation-

(a) all the assets, rights, obligations and liabilities of the amalgamating trade unions or the amalgamating employers' organisations devolve upon and vest in the amalgamated trade union or amalgamated employers' organisation; and

(b) the amalgamated trade union or amalgamated employers' organisation succeeds the amalgamating trade unions or the amalgamating employers' organisations in respect of-

(i) any right that the amalgamating trade unions or the amalgamating employers' organisations enjoyed;

(ii) any fund established in terms of this Act or any other law;

(iii) any arbitration award or court order;

(iv) any collective agreement or other agreement;

(v) membership of any council; and

(vi) any written authorisation by a member for the periodic deduction of levies or subscriptions due to the amalgamating trade unions or amalgamating employers' organisations.

103. Winding-up of trade unions or employers' organisations

(1) The Labour Court may order a trade union or employers' organisation to be wound up if-

(a) the trade union or employers' organisation has resolved to wind-up its affairs and has applied to the Court for an order giving effect to that resolution; or
(b) the registrar or any member of the trade union or employers' organisation has applied to the Court for its winding up and the Court is satisfied that the trade union or employers' organisation, for some reason that cannot be remedied is unable to continue to function.

(1A) If the registrar has cancelled the registration of a trade union or employers' organisation in terms of section 106(2A), any person opposing its winding up is required to prove that the trade union or employers' organisation is able to continue to function.

(2) If there are any persons not represented before the Labour Court whose interests may be affected by an order in terms of subsection (1), the Court must-

(a) consider those interests before deciding whether or not to grant the order applied for; and

(b) if it grants the order applied for, include provisions in the order disposing of each of those interests.

(3) In granting an order in terms of subsection (1), the Labour Court may appoint a suitable person as liquidator, on appropriate conditions.

(4)(a) The registrar of the Labour Court must determine the liquidator's fees.

(b) The Labour Court, in chambers, may review the determination of the registrar of the Labour Court.

(c) The liquidator's fees are a first charge against the assets of the trade union or employers' organisation.

(5) If, after all the liabilities of the trade union or employers' organisation have been discharged, any assets remain which cannot be disposed of in accordance with the constitution of that trade union or employers' organisation, the liquidator must realise those assets and pay the proceeds to the Commission for its own use.

(6)(a) The Labour Court may direct that the costs of the registrar or any other person who has brought an application in terms of subsection (1)(b) be paid from the assets of the trade union or employers' organisation.

(b) Any costs in terms of paragraph (a) rank concurrently with the liquidator's fees

104. Winding-up of trade unions or employers' organisations by reason of insolvency

Any person who seeks to wind-up a trade union or employers' organisation by reason of insolvency must comply with the Insolvency Act, 1936 (Act No. 24 of 1936), and, for the purposes of this section, any reference to the court in that Act must be interpreted as referring to the Labour Court.

105. Declaration that trade union is no longer independent

(1) Any registered trade union may apply to the Labour Court for an order declaring that another trade union is no longer independent.

(2) If the Labour Court is satisfied that a trade union is not independent, the Court must make a declaratory order to that effect.

106. Cancellation of registration of trade unions or employers' organisations

(1) The registrar of the Labour Court must notify the registrar if the Court

(a) in terms of section 103 or 104 has ordered a registered trade union or a registered employers' organisation to be wound up; or

(b) in terms of section 105 has declared that a registered trade union is not independent.

(2) When the registrar receives a notice from the Labour Court in terms of subsection (1), the registrar must cancel the registration of the trade union or employers' organisation by removing its name from the appropriate register.

(2A) The registrar may cancel the registration of a trade union or employers' organisation by removing its name from the appropriate register if the registrar –

(a) is satisfied that the trade union or employers' organisation is not, or has ceased to function as, a genuine trade union or employers' organisation, as the case may be; or
(b) has issued a written notice requiring the trade union or employers' organisation to comply with sections 98, 99 and 100 within a period of 60 days of the notice and the trade union or employers' organisation has, despite the notice, not complied with those sections.

(2B) The registrar may not act in terms of subsection (2A) unless the registrar has published a notice in the Government Gazette at least 60 days prior to such action –

(a) giving notice of the registrar's intention to cancel the registration of the trade union or employers' organisation; and
(b) inviting the trade union or employers' organisation or any other interested parties to make written representations as to why the registration should not be cancelled.

(3) When a trade union's or employers' organisation' s registration is cancelled, all the rights it enjoyed as a result of being registered will end.

PART B-REGULATION OF FEDERATIONS OF TRADE UNIONS AND EMPLOYERS' ORGANISATIONS

107. Regulation of federations of trade unions or employers' organisations

(1) Any federation of trade unions that has the promotion of the interests of employees as a primary object, and any federation of employers' organisations that has the promotion of the interests of employers as a primary object, must provide to the registrar-

(a) within three months of its formation, and after that by 31 March each year, the names and addresses of its members and the number of persons each member in the federation represents;

(b) within three months of its formation, and after that within 30 days of any appointment or election of its national office-bearers, the names and work addresses of those office-bearers, even if their appointment or election did not result in any changes to its office-bearers;

(c) within three months of its formation, a certified copy of its constitution and an address in the Republic at which it will accept service of any document that is directed to it;

(d) within 30 days of any change to its constitution, or of the address provided to the registrar as required in paragraph (c), notice of that change; and

(e) within 14 days after it has resolved to wind up, a copy of that resolution.

(2) Service of any document directed to a federation of trade unions or a federation of employers' organisations at the address most recently provided to the registrar will be, for all purposes, service of that document on that federation.

(3) The registrar must remove from the appropriate register the name of any federation that the registrar believes has been wound up or sequestrated.

PART C-REGISTRAR OF LABOUR RELATIONS

108. Appointment of registrar of labour relations

(1) The Minister must designate an officer of the Department of Labour as the registrar of labour relations to perform the functions conferred on the registrar by or in terms of this Act.

(2)(a) The Minister may designate any number of officers in the Department as deputy registrars of labour relations to assist the registrar to perform the functions of registrar in terms of this Act.

(b) A deputy registrar may exercise any of the functions of the registrar that have been generally or specifically delegated to the deputy.

(3) The deputy registrar of labour relations or if there is more than one, the most senior of them, will act as registrar whenever-

(a) the registrar is absent from the Republic or from duty, or for any reason is temporarily unable to perform the functions of registrar; or

(b) the office of registrar is vacant.

109. Functions of registrar

(1) The registrar must keep-

(a) a register of registered trade unions;

(b) a register of registered employers' organisations;

(c) a register of federations of trade unions containing the names of the federations whose constitutions have been submitted to the registrar;

(d) a register of federations of employers' organisations containing the names of the federations whose constitutions have been submitted to the registrar; and

(e) a register of councils.

(2) Within 30 days of making an entry in, or deletion from, a register, the registrar must give notice of that entry or deletion in the Government Gazette.

(3) The registrar, on good cause shown, may extend or condone late compliance with any of the time periods established in this Chapter, except the period within which a person may note an appeal against a decision of the registrar.

(4) The registrar must perform all the other functions conferred on the registrar by or in terms of this Act.

110. Access to information

(1) Any person may inspect any of the following documents in the registrar's office-

(a) the registers of registered trade unions, registered employers organisations, federations of trade unions, federations of employers' organisations and councils;

(b) the certificates of registration and the registered constitutions of registered trade unions, registered employers' organisations, and councils, and the constitutions of federations of trade unions and federations of employers' organisations; and

(c) the auditor's report in so far as it expresses an opinion on the matters referred to in section 98(2)(b)(ii).

(2) The registrar must provide a certified copy of, or extract from, any of the documents referred to in subsection (1) to any person who has paid the prescribed fee.

(3) Any person who is a member, office-bearer or official of a registered trade union or of a registered employers' organisation, or is a member of a party to a

council, may inspect any document that has been provided to the registrar in compliance with this Act by that person's registered trade union, registered employers' organisation or council.

(4) The registrar must provide a certified copy of, or extract from, any document referred to in subsection (3) to any person who has a right in terms of that subsection to inspect that document and who has paid the prescribed fee.

(4) The registrar must provide any of the following information to any person free of charge –

(a) the names and work addresses of persons who are national office-bearers of any registered trade union, registered employers' organisation, federation or council;

(b) the address in the Republic at which any registered trade union, registered employers' organisation, federation or council will accept service of any document that is directed to it; and

(c) any of the details of a federation of trade unions or a federation of employers' organisations referred to in section 107(l)(a), (c), and (e).

PART D -APPEALS FROM REGISTRAR'S DECISION

111. Appeals from registrar's decision

(1) Within 30 days of the written notice of a decision of the registrar, any person who is aggrieved by the decision may demand in writing that the registrar provide written reasons for the decision.

(2) The registrar must give the applicant written reasons for the decision within 30 days of receiving a demand in terms of subsection (1).

(3) Any person who is aggrieved by a decision of the registrar may appeal to the Labour Court against that decision, within 60 days of-

(a) the date of the registrar's decision; or

(b) if written reasons for the decision are demanded, the date of those reasons.

(4) The Labour Court, on good cause shown, may extend the period within which a person may note an appeal against a decision of the registrar.

CHAPTER VII

DISPUTE RESOLUTION

PART A-COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

112. Establishment of Commission for Conciliation, Mediation and Arbitration

The Commission for Conciliation, Mediation and Arbitration is hereby established as a juristic person.

113. Independence of Commission

The Commission is independent of the State, any political party, trade union, employer, employers' organisation, federation of trade unions or federation of employers' organisations.

114. Area of jurisdiction and offices of Commission

(1) The Commission has jurisdiction in all the provinces of the Republic.

(2) The Minister, after consulting the governing body, must determine the location for the Commission's head office.

(3) The Commission must maintain an office in each province of the Republic and as many local offices as it considers necessary.

115. Functions of Commission

(1) The Commission must-

(a) attempt to resolve, through conciliation, any dispute referred to it in terms of this Act;

(b) if a dispute that has been referred to it remains unresolved after conciliation, arbitrate the dispute if-

(i) this Act requires arbitration and any party to the dispute has requested that the dispute be resolved through arbitration; or

(ii) all the parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration under the auspices of the Commission;

(c) assist in the establishment of workplace forums in the manner contemplated in Chapter V; and

(d) compile and publish information and statistics about its activities.

(2) The Commission may-

(a) if asked, advise a party to a dispute about the procedure to follow in terms of this Act; [21]

(b) if asked, assist a party to a dispute to obtain legal advice, assistance or representation; [22]

(c) offer to resolve a dispute that has not been referred to the Commission through conciliation; [23]

(cA) make rules –

(i) to regulate, subject to Schedule 3, the proceedings at its meetings and at the meetings of any committee of the Commission;
(ii) regulating the practice and procedure of the essential services committee;
(iii) regulating the practice and procedure –
(aa) for any process to resolve a dispute through conciliation;
(bb) at arbitration proceedings; and

(iv) determining the amount of any fee that the Commission may charge under section 147, and regulating the payment of such a fee in detail;

(g) publish guidelines in relation to any matter dealt with in this Act;

(h) conduct and publish research into matters relevant to its functions; and

(2A) The Commission may make rules regulating –

(a) the practice and procedure in connection with the resolution of a dispute through conciliation or arbitration;
(b) the process by which conciliation is initiated, and the form, content and use of that process;
(c) the process by which arbitration or arbitration proceedings are initiated, and the form, content and use of that process;
(d) the joinder of any person having an interest in the dispute in any conciliation and arbitration proceedings;
(e) the intervention of any person as an applicant or respondent in conciliation or arbitration proceedings;
(f) the amendment of any citation and the substitution of any party for another in conciliation or arbitration proceedings;
(g) the hours during which offices of the Commission will be open to receive any process;
(h) any period that is not to be counted for the purpose of calculating time or periods for delivering any process or notice relating to any proceedings;

21. See section 148.
22. See section 149.
23. See section 150.

(i) the forms to be used by parties and the Commission;
(j) the basis on which a commissioner may make any order as to costs in any arbitration.
(k) the right of any person or category of persons to represent any party in any conciliation or arbitration proceedings;
(l) the circumstances in which the Commission may charge a fee in relation to any conciliation or arbitration proceedings or for any services the Commission provides; and
(m) all other matters incidental to performing the functions of the Commission.

(3) If asked, the Commission may provide employees, employers, registered trade unions, registered employers' organisations, federations of trade unions, federations of employers' organisations or councils with advice or training relating to the primary objects of this Act, including but not limited to –

(a) establishing collective bargaining structures;

(b) designing, establishing and electing workplace forums and creating deadlock-breaking mechanisms;

(c) the functioning of workplace forums;

(d) preventing and resolving disputes and employees' grievances;

(e) disciplinary procedures;

(f) procedures in relation to dismissals;

(g) the process of restructuring the workplace;

(h) affirmative action and equal opportunity programmes; and

(i) the prevention of sexual harassment in the workplace.

(4) The Commission must perform any other duties imposed, and may exercise any other powers conferred, on it by or in terms of this Act and is competent to perform any other function entrusted to it by any other law.

(5) The governing body's rules of procedure, the terms of appointment of its members and other administrative matters are dealt with in Schedule 3.

(6)(a) A rule made under subsection (2)(cA) or (2A) must be published in the Government Gazette. The Commission will be responsible to ensure that the publication occurs.

(b) A rule so made will not have any legal force or effect unless it has been so published.

(c) A rule so made takes effect from the date of publication unless a later date is stipulated.

116. Governing body of Commission

(1) The Commission will be governed by the governing body, whose acts are acts of the Commission.[26]

(2) The governing body consists of(a) a chairperson and nine other members, each nominated by NEDLAC and appointed[27] by the Minister to hold office for a period of three years; and

(b) the director of the Commission, who-

(i) is a member of the governing body only by virtue of having been appointed director; and

(ii) may not vote at meetings of the governing body.

(3) NEDLAC must nominate(a) one independent person for the office of chairperson;

(b) three persons proposed by those voting members of NEDLAC who represent organised labour; and

(c) three persons proposed by those voting members of NEDLAC who represent organised business;

(d) three persons proposed by those voting members of NEDLAC who represent the State.

117. Commissioners of Commission

(1) The governing body must appoint as Commissioners as many adequately qualified persons as it considers necessary to perform the functions of commissioners by or in terms of this Act or any other law.

(2) The governing body-

(a) may appoint each commissioner-

(i) on either a full-time or a part-time basis; and

(ii) to be either a commissioner or a senior commissioner;

(b) must appoint each commissioner for a fixed term determined by the governing body at the time of appointment;

26. See item 4 of Schedule 3 for the governing body's rules of procedure.

27. See items 1 to 3 of Schedule 3 for the terms of appointment of members of the governing body.

(c) may appoint a commissioner, who is not a senior commissioner, for a probationary period; and

(d) when making appointments, must have due regard to the need to constitute a Commission that is independent and competent and representative in respect of race and gender.

(3) Any reference in this Act to a commissioner must be interpreted also to mean a senior commissioner, unless otherwise indicated.

(4) The governing body must determine the commissioners' remuneration, allowances and any other terms and conditions of appointment not contained in this section.

(5) A commissioner may resign by giving written notice to the governing body.

(6) The governing body must prepare a code of conduct for the commissioners and ensure that they comply with the code of conduct in performing their functions.

(7) The governing body may remove a commissioner from office for-

(a) serious misconduct;

(b) incapacity; or

(c) a material violation of the Commission's code of conduct.

(8) Each commissioner is responsible to the director for the performance of the commissioner's functions.

118. Director of Commission

(1) The governing body must appoint, as director of the Commission, a person who –

(a) is skilled and experienced in labour relations and dispute resolution; and

(b) has not been convicted of any offence involving dishonesty.

(2) The director must –

(a) perform the functions that are

(i) conferred on the director by or in terms of this Act or by any other law;

(ii) delegated to the director by the governing body;

(b) manage and direct the activities of the Commission; and

(c) supervise the Commission's staff.

(3) The governing body must determine the director's remuneration, allowances and any other terms and conditions of appointment not contained in Schedule 3.

(4) A person appointed director automatically holds the office of a senior commissioner.

(5) Despite subsection (4), the provisions of section 117, with the exception of section 117(6), do not apply to the director.

(6) The director, in consultation with the governing body, may delegate any of the functions of that office, except the functions mentioned in sections 120 and 138(8), to a commissioner.

119. Acting director of Commission

(1) The chairperson of the governing body may appoint any suitable person to act as director whenever -

(a) the director is absent from the Republic or from duty, or for any reason is temporarily unable to perform the functions of director; or

(b) the office of director is vacant.

(2) Only a senior commissioner may be appointed as acting director.

(3) An acting director is competent to exercise and perform any of the powers and functions of the director.

120. Staff of Commission

(1) The director may appoint staff after consulting the governing body.

(2) The governing body must determine the remuneration and allowances and any other terms and conditions of appointment of staff members.

121. Establishment of committees of Commission

(1) The governing body may establish committees to assist the Commission.

(2) A committee may consist of any combination of the following persons-

(a) a member of the governing body;

(b) the director;

(c) a commissioner;

(d) a staff member of the Commission; and

(e) any other person.

(3) The governing body must determine the remuneration and allowances and any other terms and conditions of appointment of committee members referred to in subsection (2)(e).

(4) The governing body may at any time vary or set aside a decision of a committee.

(5) The governing body may dissolve any committee.

122. Finances of Commission

(1) The Commission will be financed and provided with working capital from-

(a) the moneys that the Minister, with the agreement of the Minister of Finance, must allocate to the Commission from public funds at the commencement of this Act;

(b) the moneys that Parliament may appropriate to the Commission from time to time;

(c) fees payable to the Commission in terms of this Act;

(d) grants, donations and bequests made to it; and

(e) income earned on the surplus moneys deposited or invested.

(2) The financial year of the Commission begins on I April in each year and ends on 31 March of the following year, except the first financial year which begins on the day this Act commences and ends on the first following 31 March.

(3) In each financial year, at a time determined by the Minister, the Commission must submit to the Minister a statement of the Commission's estimated income and expenditure, and requested appropriation from Parliament, for the following financial year.

123. Circumstances in which Commission may charge fees

(1) The Commission may charge a fee only for-

(a) resolving disputes which are referred to it, In circumstances in which this Act allows the Commission, or a commissioner, to charge a fee;

(b) conducting, overseeing or scrutinising any election or ballot at the request of a registered trade union or employers' organisation; and

(c) providing advice or training in terms of section 115(3).

(2) The Commission may not charge a fee unless-

(a) the governing body has established a tariff of fees; and

(b) the fee that is charged is in accordance with that tariff.

(3) The Commission must publish the tariff in the Government Gazette.

124. Contracting by Commission, and Commission working in association with any person

(1) The governing body may-

(a) contract with any person to do work for the Commission or contract with an accredited agency to perform, whether for reward or otherwise, any function of the Commission on its behalf; and

(b) perform any function of the Commission in association with any person.

(2) Every person with whom the Commission contracts or associates is bound by the requirement of independence that binds the Commission.

125. Delegation of governing body's powers, functions and duties

(1) The governing body may delegate in writing any of its functions, other than the functions listed below, to any member of the governing body, the director, a commissioner, or any committee established by the Commission. The functions that the governing body may not delegate are-

(a) appointing the director;

(b) appointing commissioners, or removing a commissioner from office;

(c) depositing or investing surplus money;

(d) accrediting councils or private agencies, or amending, withdrawing or renewing their accreditation; or

(e) subsidising accredited councils or accredited agencies.

(2) The governing body may attach conditions to a delegation and may amend or revoke a delegation at any time.

(3) A function delegated to the director may be performed by any commissioner or staff member of the Commission authorised by the director, unless the terms of that delegation prevent the director from doing so.

(4) The governing body may vary or set aside any decision made by a person acting in terms of any delegation made in terms of subsection (1).

(5) The governing body, by delegating any function, is not divested of any of its powers, nor is it relieved of any function or duty that it may have delegated. This rule also applies if the director sub-delegates the performance of a function in terms of subsection (3).

126. Limitation of liability and limitation on disclosure of information

(1) In this section, "**the Commission**" means-

(a) the governing body;

(b) a member of the governing body;

(c) the director;

(d) a commissioner;

(e) a staff member of the Commission;

(f) a member of any committee established by the governing body; and

(g) any person with whom the governing body has contracted to do work for, or in association with whom it performs a function of, the Commission.

(2) The Commission is not liable for any loss suffered by any person as a result of any act performed or omitted in good faith in the course of exercising the functions of the Commission.

(3) The Commission may not disclose to any person or in any court any information, knowledge or document that it acquired on a confidential basis or without prejudice in the course of performing its functions except on the order of a court.

PART B-ACCREDITATION OF AND SUBSIDY TO COUNCILS AND PRIVATE AGENCIES

127. Accreditation of councils and private agencies

(1) Any council or private agency may apply to the governing body in the prescribed form for accreditation to perform any of the following functions-

(a) resolving disputes through conciliation; and

(b) arbitrating disputes that remain unresolved after conciliation, if this Act requires arbitration.

(2) For the purposes of this section, the reference to disputes must be interpreted to exclude disputes as contemplated in-

(a) sections 16, 21 and 22;[28]

(b) section 24(2) to (5);[29]

(c) section 24(6) and (7) and section 26(11);[30]

(d) section 45;[31]

(e) section 61(5) to (8) ;[32]

(f) section 62;[33];

(g) section 63, [34]

(h) section 69 (8) to (10); [35]

(i) section 86; [36]

(j) section 89; [37]

(k) section 94. [38]

(3) The governing body may require further information in support and, for that purpose, may require the applicant to attend one or more meetings of the governing body.

28. These sections deal with disputes about organisational rights.

29. These subsections deal with disputes about collective agreements where the agreement does not provide for a procedure, the procedure is inoperative or any party frustrates the resolution of the dispute.

30. These subsections deal with disputes about agency shops and closed shops.

31. This section deals with disputes about determinations made by the Minister in respect of proposals made by a statutory council.

32. These subsections deal with disputes about the interpretation or application of collective agreements of a council whose registration has been cancelled.

33. This section deals with disputes about the demarcation of sectors and areas of councils.

34. This section deals with disputes about the interpretation or application of Parts C to IF of Chapter Ill. Part C deals with bargaining councils, Part D with bargaining councils in the public service, Part E with statutory councils and Part IF with general provisions concerning councils.

35. This section concerns disputes about pickets during strikes and lock outs.

36. This section deals with disputes about proposals that are the subject of joint decision-making.

37. This section deals with disputes about the disclosure of information to workplace forums.

38. This section deals with disputes about the interpretation or application of Chapter V which deals with workplace forums.

(4) The governing body may accredit an applicant to perform any function for which it seeks accreditation, after considering the application, any further information provided by the applicant and whether-

(a) the services provided by the applicant meet the Commission's standards;

(b) the applicant is able to conduct its activities effectively;

(c) the persons appointed by the applicant to perform those functions will do so in a manner independent of the State, any political party, trade union,

(d) the persons appointed by the applicant to perform those functions will be competent to perform those functions and exercise any associated powers;

(e) the applicant has an acceptable code of conduct to govern the persons whom it appoints to perform those functions; the applicant uses acceptable disciplinary procedures to ensure that each person it appoints to perform those functions will subscribe, and adhere, to the code of conduct;

(f) the applicant uses acceptable disciplinary procedures to ensure that each person it appoints to perform those functions will subscribe, and adhere, to the code of conduct; and

(g) the applicant promotes a service that is broadly representative of South African society.

(5) If the governing body decides-

(a) to accredit the applicant, the governing body must-

(i) enter the applicant's name in the register of accredited councils or the register of accredited agencies;

(ii) issue a certificate of accreditation in the applicant's name stating the period and other terms of accreditation;

(iii) send the certificate to the applicant; and

(c) not to accredit the applicant, the governing body must advise the unsuccessful applicant in writing of its decision.

(5A) The governing body must annually publish a list of accredited councils and accredited agencies.

(6) The terms of accreditation must state the extent to which the provisions of each section in Part C of this Chapter apply to the accredited council or accredited agency.

(7)(a) Any person may inspect the registers and certificates of accredited councils and accredited agencies kept in the Commission's offices.

(b) The Commission must provide a certified copy of, or extract from, any of the documents referred to in paragraph (a) to any person who has paid the prescribed fee.

128. General provisions relating to accreditation

(1)(a) An accredited council or accredited agency may charge a fee for performing any of the functions for which it is accredited in circumstances in which this Act allows a commissioner to charge a fee.

(b) A fee charged in terms of paragraph (a) must be in accordance with the tariff of fees determined by the Commission.

(2)(a) An accredited council, accredited agency, or any person engaged by either of them to perform the functions for which it has been accredited, is not liable for any loss suffered by any person as a result of any act performed or omitted in good faith in the course of exercising those functions.

(b) An accredited council, accredited agency, or any person engaged by either of them to perform the functions for which it has been accredited, may not disclose to any person or in any court any information, knowledge or document that it or that person acquired on a confidential basis or without prejudice in the course of performing those functions except on the order of a court.

(3)(a)(i) An accredited council may confer on any person appointed by it to resolve a dispute, the powers of a commissioner in terms of section 142, read with the changes required by the context.

(ii) For this purpose, any reference in that section to the director must be read as a reference to the secretary of the bargaining council.

(b) An accredited private agency may confer on any person appointed by it to resolve a dispute, the posers of a commissioner in terms of section 42(1)(a) to (e), (2) and (7) to (9), read with the changes required by the context.

129. Amendment of accreditation

(1) An accredited council or accredited agency may apply to the governing body in the prescribed form to amend its accreditation.

(2) The governing body must treat the application as an application in terms of section 127.

130. Withdrawal of accreditation. If an accredited council or accredited agency fails to comply to a material extent with the terms of its accreditation, the governing body may withdraw its accreditation after having given reasonable notice of the withdrawal to that council or accredited agency.

131. Application to renew accreditation

(1) An accredited council or accredited agency may apply to the governing body in the prescribed form to renew its accreditation either in the current or in an amended form.

(2) The governing body must treat the application for renewal as an application in terms of section 127.

132. Subsidy to council or private agency

(1)(a) Any council may apply to the governing body in the prescribed form for a subsidy for performing any dispute resolution functions that the council is required to perform in terms of this Act, and for training persons to perform those functions.

(b) Any accredited agency, or a private agency that has applied for accreditation, may apply to the governing body in the prescribed form for a subsidy for performing any dispute resolution functions for which it is accredited or has applied for accreditation; and for training persons to perform those functions.

(2) The governing body may require further information in support of the application and, for that purpose, may require the applicant to attend one or more meetings of the governing body.

(3) The governing body may grant a subsidy to the applicant after considering the application, any further information provided by the applicant and-

(a) the need for the performance by the applicant of the functions for which it is accredited;

(b) the extent to which the public uses the applicant to perform the functions for which it is accredited;

(c) the cost to users for the performance by the applicant of the functions for which it is accredited;

(d) the reasons for seeking the subsidy;

(e) the amount requested; and the applicant's ability to manage its financial affairs in accordance with established accounting practice, principles and procedures.

(4) If the governing body decides-

(a) to grant a subsidy to the applicant, the governing body must-

(i) notify the applicant in writing of the amount, duration and the terms of the subsidy; and

(ii) as soon as practicable after the decision, publish the written notice in the Government Gazette; or

(b) not to grant a subsidy to the applicant, the governing body must advise the unsuccessful applicant in writing of its decision.

(5) A subsidy granted in terms of subsection (4)(a)-

(a) may not be paid to a council or private agency unless it has been accredited; and

(b) lapses at the end of the Commission's financial year within which it was granted.

(6)(a) Any person may inspect a written notice referred to in subsection (4)(a) in the Commission's offices.

(b) The Commission must provide a certified copy of, or extract from, any written notice referred to in paragraph (a) to any person who has paid the prescribed fee.

(7) If an accredited council or accredited agency fails to comply to a material extent with the terms of its subsidy, the governing body may withdraw the subsidy after having given reasonable notice of the withdrawal to that council or agency.

(8)(a) An accredited council or accredited agency that has been granted a subsidy may apply to the governing body in the prescribed form to renew its subsidy, either in the current or in an amended form and amount.

(b) The governing body must treat the application for renewal as an application in terms of subsections (1) to (4).

PART C-RESOLUTION OF DISPUTES UNDER AUSPICES OF COMMISSION

133. Resolution of disputes under auspices of Commission

(1) The Commission must appoint a commissioner to attempt to resolve through conciliation-

(a) any dispute referred to it in terms of section 134; and

(b) any other dispute that has been referred to it in terms of this Act.

(2) If a dispute remains unresolved after conciliation, the Commission must arbitrate the dispute if -

(a) this Act requires the dispute to be arbitrated and any party to the dispute has requested that the dispute be resolved through arbitration; or

(b) all the parties to the dispute in respect of which the Labour Court has jurisdiction consent in writing to arbitration under the auspices of the Commission.

134. Disputes about matters of mutual interest

(1) Any party to a dispute about a matter of mutual interest may refer the dispute in writing to the Commission, if the parties to the dispute are-

(a) on the one side-

(i) one or more trade unions;

(ii) one or more employees; or 2 one or more trade unions and one or more employees; and

(b) on the other side -

(i) one or more employers' organisations;

(ii) one or more employers; or

(iii) one or more employers' organisations and one or more employers.

(2) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

135. Resolution of disputes through conciliation

(1) When a dispute has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve it through conciliation.

(2) The appointed commissioner must attempt to resolve the dispute through conciliation within 30 days of the date the Commission received the referral:

However the parties may agree to extend the 30-day period.

(3) The commissioner must determine a process to attempt to resolve the dispute, which may include

(a) mediating the dispute;

(b) conducting a fact-finding exercise; and

(c) making a recommendation to the parties, which may be in the form of an advisory arbitration award.

(3A) If a single commissioner has been appointed in terms of subsection (1), in respect or more than one dispute involving the same parties, that commissioner may consolidate the conciliation proceeding so that all the disputes concerned may be dealt with in the same proceedings.

(5) When conciliation has failed, or at the end of the 30-day period or any further period agreed between the parties-

(a) the commissioner must issue a certificate stating whether or not the dispute has been resolved;

(b) the Commission must serve a copy of that certificate on each party to the dispute or the person who represented a party in the conciliation proceedings; and

(c) the commissioner must file the original of that certificate with the Commission.

(6)(a) If a dispute about a matter of mutual interest has been referred to the Commission and the parties to the dispute are engaged in an essential service then, despite subsection (1), the parties may consent within seven days of the date the Commission received the referral-

(i) to the appointment of a specific commissioner by the Commission to attempt to resolve the dispute through conciliation; and

(ii) to that commissioner's terms of reference.

(b) If the parties do not consent to either of those matters within the seven-day period, the Commission must as soon as possible-

(i) appoint a commissioner to attempt to resolve the dispute; and

(ii) determine the commissioner's terms of reference.

136. Appointment of commissioner to resolve dispute through arbitration

(1) If this Act requires a dispute to be resolved through arbitration, the Commission must appoint a commissioner to arbitrate that dispute, if-

(a) a commissioner has issued a certificate stating that the dispute remains unresolved; and

(b) within 90 days after the date on which that certificate was issued, any party to the dispute has requested that the dispute be resolved through arbitration. However, the Commission on good cause shown, may condone a party's non-observance of that timeframe and allow a request for arbitration filed by the party after the expiry of the 90-day period.

(2) A commissioner appointed in terms of subsection (1) may be the same commissioner who attempted to resolve the dispute through conciliation.

(3) Any party to the dispute, who wants to object to the arbitration also being conducted by the commissioner who had attempted to resolve the dispute through conciliation, may do so by filing an objection in that regard with the Commission within seven days after the date on which the commissioner's certificate was issued, and must satisfy the Commission that a copy of the objection has been served on all the other parties to the dispute.

(4) When the Commission receives an objection it must appoint another commissioner to resolve the dispute by arbitration.

(5)(a) The parties to a dispute may request the Commission, in appointing a commissioner in terms of subsection (1) or (4), to take into account their stated preference, to the extent that this is reasonably practicable in all the circumstances.

(b) The stated preference contemplated in paragraph (a) must-

(i) be in writing;

(ii) list no more than five commissioners;

(iii) state that the request is made with the agreement of all the parties to the dispute; and

(iv) be submitted within 48 hours of the date of the certificate referred to in subsection (1)(a).

(6) If the circumstances contemplated in subsection (1) exist and the parties to the dispute are engaged in an essential service, then the provisions of section 135 (6) apply, read with the changes required by the context, to the appointment of a commissioner to resolve the dispute through arbitration.

137. Appointment of senior commissioner to resolve dispute through arbitration

(1) In the circumstances contemplated in section 136(l), any party to the dispute may apply to the director to appoint a senior commissioner to attempt to resolve the dispute through arbitration.

(2) When considering whether the dispute should be referred to a senior commissioner, the director must hear the party making the application, any other party to the dispute and the commissioner who conciliated the dispute.

(3) The director may appoint a senior commissioner to resolve the dispute through arbitration, after having considered-

(a) the nature of the questions of law raised by the dispute;

(b) the complexity of the dispute;

(c) whether there are conflicting arbitration awards that are relevant to the dispute; and

(d) the public interest.

(4) The director must notify the parties to the dispute of the decision and-

(a) if the application has been granted, appoint a senior commissioner to arbitrate the dispute; or

(b) if the application has been refused, confirm the appointment of the commissioner initially appointed, subject to section 136(4).

(5) The director's decision is final and binding.

(6) No person may apply to any court of law to review the director's decision until the dispute has been arbitrated.

138. General provisions for arbitration proceedings

(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.

(2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question

the witnesses of any other party, and address concluding arguments to the commissioner.

(3) If all the parties consent, the commissioner may suspend the arbitration proceedings and attempt to resolve the dispute through conciliation.

(4) In any arbitration proceedings, a party to the dispute may appear in person or be represented only by -

(a) a legal practitioner;
(b) a director or employee of the party; or
(c) any member, office bearer or official of that party's registered trade union or registered employers' organisation.

(5) If a party to the dispute fails to appear in person or to be represented at the arbitration proceedings, and that party -

(a) had referred the dispute to the Commission, the commissioner may dismiss the matter; or
(b) had not referred the dispute to the Commission, the commissioner may -

(i) continue with the arbitration proceedings in the absence of that party; or

(ii) adjourn the arbitration proceedings o a later date.

(6) The commissioner must take into account any code of good practice that has been issued by NEDLAC or guidelines published by the Commission in accordance with the provisions of this Act that is relevant to a matter being considered in the arbitration proceedings.

(7) Within 14 days of the conclusion of the arbitration proceedings-

(a) the commissioner must issue an arbitration award with brief reasons, signed by that commissioner;

(b) the Commission must serve a copy of that award on each party to the dispute or the person who represented a party in the arbitration proceedings; and

(c) the Commission must file the original of that award with the registrar of the Labour Court.

(8) On good cause shown, the director may extend the period within which the arbitration award and the reasons are to be served and filed.

(9) The commissioner may make any appropriate arbitration award in terms of this Act, including, but not limited to, an award-

(a) that gives effect to any collective agreement;

(b) that gives effect to the provisions and primary objects of this Act;

(c) that includes, or is in the form of, a declaratory order.

(10) The commissioner may make an order for the payment of costs according to the requirements of law and fairness in accordance with rules made by the Commission in terms of section 115(2A)(j) and having regard to -

(a) any relevant Code of Good Practice issued by NEDLAC in terms of section 203; or

(b) any relevant guideline issued by the Commission.

139. Special provisions for arbitrating disputes in essential services

(1) If a dispute about a matter of mutual interest proceeds to arbitration and any party is engaged in an essential service-

(a) within 30 days of the date of the certificate referred to in section 136(l)(a), or within a further period agreed between the parties to the dispute, the commissioner must complete the arbitration and issue an arbitration award with brief reasons signed by that commissioner;

(b) the Commission must serve a copy of that award on each party to the dispute or the person who represented a party in the arbitration proceedings; and

(c) the Commission must file the original of that award with the registrar of the Labour Court.

(2) The commissioner may not include an order for costs in the arbitration award unless a party, or the person who represented the party in the arbitration proceedings, acted in a frivolous or vexatious manner in its conduct during the arbitration proceedings.

140. Special provisions for arbitrations about dismissals for reasons related to conduct or capacity

(2) If, in terms of section 194(l), the commissioner finds that the dismissal is procedurally unfair, the commissioner may charge the employer an arbitration fee.

141. Resolution of disputes if parties consent to arbitration under auspices of Commission

(1) If a dispute remains unresolved after conciliation, the Commission must arbitrate the dispute if a party to the dispute would otherwise be entitled to refer the dispute to the Labour Court for adjudication and, instead, all the parties agree in writing to arbitration under the auspices of the Commission.

(2) The arbitration proceedings must be conducted in accordance with the provisions of sections 136, 137 and 138, read with the changes required by the context.

(3) The arbitration agreement contemplated in subsection (1) may be terminated only with the written consent of all the parties to that agreement, unless the agreement itself provides otherwise.

(4) Any party to the arbitration agreement may apply to the Labour Court at any time to vary or set aside that agreement, which the Court may do on good cause.

(5)(a) If any party to an arbitration agreement commences proceedings in the Labour Court against any other party to that agreement about any matter that the parties agreed to refer to arbitration, any party to those proceedings may ask the Court-

(i) to stay those proceedings and refer the dispute to arbitration; or

(ii) with the consent of the parties and where it is expedient to do so, continue with the proceedings with the Court acting as arbitrator, in which case the Court may only make an order corresponding to the award that an arbitrator could have made.

(b) If the Court is satisfied that there is sufficient reason for the dispute to be referred to arbitration in accordance with the arbitration agreement, the Court may stay those proceedings, on any conditions.

(6) If the provisions of subsection (1) apply, the commissioner may make an award that the Labour Court could have made.

142. Powers of commissioner when attempting to resolve disputes

(1) A commissioner who has been appointed to attempt to resolve a dispute may-

(a) subpoena for questioning any person who may be able to give information or whose presence at the conciliation or arbitration proceedings may help to resolve the dispute;

(b) subpoena any person who is believed to have possession or control of any book, document or object relevant to the resolution of the dispute, to appear before the commissioner to be questioned or to produce that book, document or object;

(c) call, and if necessary subpoena, any expert to appear before the commissioner to give evidence relevant to the resolution of the dispute;

(d) call any person present at the conciliation or arbitration proceedings or who was or could have been subpoenaed for any purpose set out in this section, to be questioned about any matter relevant to the dispute;

(e) administer an oath or accept an affirmation from any person called to give evidence or be questioned;

(f) at any reasonable time, but only after obtaining the necessary written authorisation-

(i) enter and inspect any premises on or in which any book, document or object, relevant to the resolution of the dispute is to be found or is suspected on reasonable grounds of being found there; and

(ii) examine, demand the production of, and seize any book, document or object that is on or in those premises and that is relevant to the resolution of the dispute; and

(iii) take a statement in respect of any matter relevant to the resolution of the dispute from any person on the premises who is willing to make a statement; and

(g) inspect, and retain for a reasonable period, any of the books, documents or objects that have been produced to, or seized by, the Commission.

(2) A subpoena issued for any purpose in terms of subsection (1) must be signed by the director and must-

(a) specifically require the person named in it to appear before the commissioner;

(b) sufficiently identify the book, document or object to be produced; and

(c) state the date, time and place at which the person is to appear.

(3) The written authorisation referred to in subsection (1)(f)-

(a) if it relates to residential premises, may be given only by a judge of the Labour Court and with due regard to section 13 of the Constitution, and then only on the application of the commissioner setting out under oath or affirmation the following information-

(i) the nature of the dispute;

(ii) the relevance of any book, document or object to the resolution of the dispute;

(iii) the presence of any book, document or object on the premises;

(iv) the need to enter, inspect or seize the book, document or object; and

(b) in all other cases, may be given by the director.

(4) The owner or occupier of any premises that a commissioner is authorised to enter and inspect, and every person employed by that owner or occupier, must provide any facilities that a commissioner requires to enter those premises and to carry out the inspection or seizure.

(5) The commissioner must issue a receipt for any book, document or object seized in terms of subsection (4).

(6) The law relating to privilege, as it applies to a witness subpoenaed to give evidence or to produce any book, document or object before a court of law, applies equally to the questioning of any person or the production or seizure of any book, document or object in terms of this section.

(7)(a) The Commission must pay the prescribed witness fee to each person who appears before a commissioner in response to a subpoena issued by the commissioner.

(b) Any person who requests the Commission to issue a subpoena must pay the prescribed witness fee too each person who appears before a commissioner in response to the subpoena and who remains in attendance until excused by the commissioner.

(c) The Commission may on good cause shown waive the requirement in paragraph (b) and pay to the witness the prescribed witness fee.

(8) A person commits contempt of the Commission-

(a) if, after having been subpoenaed to appear before the commissioner, the person without good cause does not attend at the time and place stated in the subpoena;

(b) if, after having appeared in response to a subpoena, that person fails to remain in attendance until excused by the commissioner;

(c) by refusing to take the oath or to make an affirmation as a witness when a commissioner so requires;

(d) by refusing to answer any question fully and to the best of that person's knowledge and belief subject to subsection (6);

(e) if the person, without good cause, fails to produce any book, document or object specified in a subpoena to a commissioner; if the person willfully hinders a commissioner in performing any function conferred by or in terms of this Act;

(g) if the person insults, disparages or belittles a commissioner, or prejudices or improperly influences the proceedings or improperly anticipates the commissioner's award;

(h) by wilfully interrupting the conciliation or arbitration proceedings or misbehaving in any other manner during those proceedings;

(i) by doing anything ease in relation to the Commission which, if done in relation to a court of law, would have been contempt of court.

(9)(a) The commissioner may make a finding that a party is in contempt of the Commission for any of the reasons set out in subsection (8).

(b) The commissioner may refer the finding, together with the record of proceedings, to the Labour Court for its decision in terms of subsection (11).

(10) Before making a decision in terms of subsection (11), the Labour Court -

(a) must subpoena any person found in contempt to appear before it on a date determined by the Court;
(b) may subpoena any other person to appear before it on a date determined by the Court; and
(c) may make any order that it deems appropriate, including an order in the case of a person who is not a legal practitioner that the person's right to represent a party in the Commission and the Labour Court be suspended.

(11) The Labour Court may confirm, vary or set aside the finding of a commissioner.

(12) If any person fails to appear before the Labour Court pursuant to a subpoena issued in terms of subsection (10(a), the Court may make any order that it deems appropriate in the absence of that person.

142A. Making settlement agreement arbitration award

(1) The Commission may, by agreement between the parties or on application by a party, make any settlement agreement in respect of any dispute that has been referred to the Commission, an arbitration award.

(2) For the purposes of subsection (1), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is entitled to refer to arbitration in terms of either section 74(4) or 75(7).

143. Effect of arbitration awards

(1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award.

(2) If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from

time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), unless the award provides otherwise.

(3) An arbitration award may only be enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1).

(4) If a party fails to comply with an arbitration award that order the performance of an act, other than the payment of an amount of money, any other party to the award may enforce it by way of contempt proceedings instituted in the Labour Court.

144. Variation and rescission of arbitration awards and rulings. Any commissioner who has issued an arbitration award or ruling or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling -

(a) erroneously sought or erroneously made in the absence of any party affected by that award;

(b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or

(c) granted as a result of a mistake common to the parties to the proceedings.

145. Review of arbitration awards

(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-

(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or

(b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.

(1A) The Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1)

(2) A defect referred to in subsection (1), means-

(a) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained.

(3) The Labour Court may stay the enforcement of the award pending its decision.

(4) If the award is set aside, the Labour Court may-

(a) determine the dispute in the manner it considers appropriate; or

(b) make any order it considers appropriate about the procedures to be followed to determine the dispute.

146. Exclusion of Arbitration Act. The Arbitration Act, 1965 (Act No. 42 of 1965), does not apply to any arbitration under the auspices of the Commission.

147. Performance of dispute resolution functions by Commission in exceptional circumstances

(1)(a) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the dispute is about the interpretation or application of a collective agreement, the Commission may-

(i) refer the dispute for resolution in terms of the procedures provided for in that collective agreement; or

(ii) appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the dispute in terms of this Act.

(b) The Commission may charge the parties to a collective agreement a fee for performing the dispute resolution functions if-

(i) their collective agreement does not provide a procedure as required by section 24(1); [39] or

(ii) the procedure provided in the collective agreement is not operative.

(c) The Commission may charge a party to a collective agreement a fee if that party has frustrated the resolution of the dispute.

(2)(a) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the parties to the dispute are parties to a council, the Commission may-

(i) refer the dispute to the council for resolution; or

39 Section 24(l) states that every collective agreement must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement.

(ii) appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the dispute in terms of this Act.

(b) The Commission may charge the parties to a council a fee for performing the dispute resolution functions if the council's dispute resolution procedures are not operative.

(3)(a) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the parties to the dispute fall within the registered scope of a council and that one or more parties to the dispute are not parties to the council, the Commission may-

(i) refer the dispute to the council for resolution; or

(ii) appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the dispute in terms of this Act.

(b) The Commission may charge the parties to a council a fee for performing the dispute resolution functions if the council's dispute resolution procedures are not operative.

(4)(a) If a dispute has been referred to the Commission and not all the parties to the dispute fall within the registered scope of a council or fall within the registered scope of two or more councils, the Commission must resolve the dispute in terms of this Act.

(b) In the circumstances contemplated in paragraph (a), the Commission has exclusive Jurisdiction to resolve that dispute.

(5)(a) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the dispute ought to have been referred to an accredited agency, the Commission may-

(i) refer the dispute to the accredited agency for resolution; or

(ii) appoint a commissioner to resolve the dispute in terms of this Act.

(b) The Commission may-

(i) charge the accredited agency a fee for performing the dispute resolution functions if the accredited agency's dispute resolution procedures are not operative; and

(ii) review the continued accreditation of that agency.

(6) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the dispute ought to have been resolved through private dispute

resolution in terms of a private agreement between the parties to the dispute, the Commission may-

(a) refer the dispute to the appropriate person or body for resolution through private dispute resolution procedures; or

(b) appoint a commissioner to resolve the dispute in terms of this Act.

(7) Where the Commission refers the dispute in terms of this section to a person or body other than a commissioner the date of the Commission's initial receipt of the dispute will be deemed to be the date on which the Commission referred the dispute elsewhere.

(8) The Commission may perform any of the dispute resolution functions of a council or an accredited agency appointed by the council if the council or accredited agency fails to perform its dispute resolution functions in circumstances where, in law, there is an obligation to perform them.

(9) For the purposes of subsections (2) and (3), a party to a council includes the members of a registered trade union or registered employers' organisation that is a party to the council.

148. Commission may provide advice

(1) If asked, the Commission may advise any party to a dispute in terms of this Act about the procedure to be followed for the resolution of that dispute.

(2) In response to a request for advice, the Commission may provide the advice that it considers appropriate.

149. Commission may provide assistance

(1) If asked, the Commission may assist an employee or employer who is a party to a dispute -

(a) together with the Legal Aid Board[40] to arrange for advice or assistance by a legal practitioner;

(b) together with the Legal Aid Board, to arrange for a legal practitioner-

(i) to attempt to avoid or settle any proceedings being instituted against an employee or employer in terms of this Act;

(ii) to attempt to settle any proceedings instituted against an employee or employer in terms of this Act;

(iii) to institute on behalf of the employee or employer any proceedings in terms of this Act;

40. The Legal Aid Board is established in terms of section 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969).

(iv) to defend or oppose on behalf of the employee or employer any proceedings instituted against the employee or employer in terms of this Act; or

(c) by providing any other form of assistance that the Commission considers appropriate.

(2) The Commission may provide the assistance referred to in subsection (1) after having considered-

(a) the nature of the questions of law raised by the dispute;

(b) the complexity of the dispute;

(c) whether there are conflicting arbitration awards that are relevant to the dispute; and

(d) the public interest.

(3) As soon as practicable after having received a request in terms of subsection (1), but not later than 30 days of the date the Commission received the request, the Commission must advise the applicant in writing whether or not it will assist the applicant and, if so, the form that the assistance will take.

150. Commission may offer to resolve dispute through conciliation

(1) If the Commission is aware of a dispute that has not been referred to it, and if resolution of the dispute would be in the public interest, the Commission may offer to appoint a commissioner to attempt to resolve the dispute through conciliation.

(2) The Commission may offer to appoint a commissioner to assist the parties to resolve through further conciliation a dispute that has been referred to the Commission or a council and in respect of which -

(a) a certificate has been issued in terms of section 135(5)(a) stating that the dispute remains unresolved; or
(b) the period contemplated in section 135(2) has elapsed;

(3) The Commission may appoint a commissioner in terms of subsection (1) or (2) if all the parties to the dispute consent to that appointment.

PART D - LABOUR COURT

151. Establishment and status of Labour Court

(1) The Labour Court is hereby established as a court of law and equity.

(2) The Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a

court of a provincial division of the High Court has in relation to the matters under its jurisdiction.

(3) The Labour Court is a court of record.

152. Composition of Labour Court

(1) The Labour Court consists of-

(a) a Judge President;

(b) a Deputy Judge President; and

(c) as many judges as the President may consider necessary, acting on the advice of NEDLAC and in consultation with the Minister of Justice and the Judge President of the Labour Court.

(2) The Labour Court is constituted before a single judge.

(3) The Labour Court may sit in as many separate courts as the available judges may allow.

153. Appointment of judges of Labour Court

(1)(a) The President, acting on the advice of NEDLAC and the Judicial Service Commission provided for in the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) (in this Part and Part E called the Judicial Service Commission) and after consultation with the Minister of Justice, must appoint a Judge President of the Labour Court.

(b) The President, acting on the advice of NEDLAC and the Judicial Service Commission and after consultation with the Minister of Justice and the Judge President of the Labour Court, must appoint the Deputy Judge President of the Labour Court.

(2) The Judge President and the Deputy Judge President of the Labour Court-

(a) must be judges of the High Court; and

(b) must have knowledge, experience and expertise in labour law.

(3) The Deputy Judge President must act as Judge President of the Labour Court whenever the Judge President is unable to do so for any reason.

(4) The President, acting on the advice of NEDLAC and the Judicial Service Commission and after consultation with the Minister of Justice and the Judge President of the Labour Court, may appoint one or more persons who meet the requirements of subsection (6) as judges of the Labour Court.

(5) The Minister of Justice, after consultation with the Judge President of the Labour Court may appoint one or more persons who meet the requirements of subsection (6) to serve as acting judges of the Labour Court for such a period as the Minister of Justice in each case may determine.

(6) A judge of the Labour Court must-

(a) (i) be a judge of the High Court; or

(ii) be a person who is a legal practitioner; and

(b) have knowledge, experience and expertise in labour law.

154. Tenure, remuneration and terms and conditions of appointment of Labour Court judges

(1) A judge of the Labour Court must be appointed for a period determined by the President at the time of appointment.

(2) A judge of the Labour Court may resign by giving written in the office to the President.

(3)(a) Any judge of the Labour Court who is also a judge of the High Court holds office until-

(i) the judge's period of office in the Labour Court ends;

(ii) the judge's resignation takes effect;

(iii) the judge is removed from office;

(iv) the judge ceases to be a judge of the High Court; or

(v) the judge dies.

(b) Any other judge of the Labour Court holds office until-

(i) the judge's period of office ends;

(ii) the judge's resignation takes effect;

(iii) the judge is removed from office; or

(iv) the judge dies.

(4) Neither the tenure of office nor the remuneration and terms and conditions of appointment applicable to a judge of the High Court in terms of the Judges' Remuneration and Conditions of Employment Act, 1989 (Act No. 88 of 1989), is affected by that judge's appointment and concurrent tenure of office as a judge of the Labour Court.

(5)(a) The remuneration payable to a judge of the Labour Court who is a person referred to in section 153(6)(a)(ii) must be the same as that payable to a judge of the High Court.

(b) The terms and conditions of appointment of a judge of the Labour Court refer-red to in paragraph (a) must be similar to those of a judge of the High Court.

(6) A person who has been appointed a judge of the Labour Court and who is not a judge of the High Court may perform the functions of a judge of the Labour Court only after having taken an oath or made a solemn affirmation in the prescribed form before the Judge President of the Labour Court.

(7)(a) A judge of the Labour Court who is also a judge of the High Court-

(i) may be removed from the office of judge of the Labour Court only if that person has first been removed from the office of a judge of the High Court; and

(ii) upon having been removed as judge of the High Court must be removed from office as a judge of the Labour Court.

(b) The President, acting on the advice of NEDLAC, and in consultation with the Minister of Justice and the Judge President of the Labour Court, may remove any other judge of the Labour Court from office for misbehaviour or incapacity.

(8) Despite the expiry of the period of a person's appointment as a judge of the Labour Court, that person may continue to perform the functions of a judge of that Court, and will be regarded as such in all respects, only –

(a) for the purposes of disposing of any proceedings in which that person has taken part as a judge of that Court and which are still pending upon the expiry of that person's appointment or which, having been so disposed of before or after the expiry of that person's appointment, have been re-opened; and
(b) for as long as that person will be necessarily engaged in connection with the disposal of the proceedings so pending or re-opened.

(9) The provisions of subsections (2) to (8) apply, read with the changes required by the context, to acting judges appointed in terms of section 153(5).

155. Officers of Labour Court

(1) The Minister of Justice, subject to the laws governing the public service, must appoint the following officers of the Labour Court-

(a) a person who has experience and expertise in labour law and administration to be the registrar of the Labour Court; and

(b) one or more deputy registrars and so many other officers of the Labour Court as the administration of justice requires.

(2)(a) The officers of the Labour Court, under the supervision and control of the registrar of that Court must perform the administrative functions of the Labour Court.

(b) A deputy registrar of the Labour Court may perform any of the functions of the registrar of that Court that have been delegated generally or specifically to the deputy registrar.

(3) The deputy registrar of the Labour Court or, if there is more than one, the most senior will act as registrar of the Labour Court whenever-

(a) the registrar is absent from the Republic or from duty, or for any reason is temporarily unable to perform the functions of registrar; or

(b) the office of registrar is vacant.

(4) The officers of the Labour Court must provide secretarial and administrative assistance to the Rules Board for Labour Courts.

156. Area of jurisdiction and seat of Labour Court

(1) The Labour Court has jurisdiction 'in all the provinces of the Republic.

(2) The Minister of Justice, acting on the advice of NEDLAC, must determine the seat of the Labour Court.

(3) The functions of the Labour Court may be performed at any place in the Republic.

157. Jurisdiction of Labour Court

(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from -

(a) employment and from labour relations;

(b) any dispute over the constitutionally of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and

(c) the application of any law for the administration of which the Minister is responsible.

(3) Any reference to the court in the Arbitration Act, 1965 (Act No. 42 of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act.

(4)(a) The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.

(b) A certificate issued by a commissioner or a council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation.

(5) Except as provided in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration.

158. Powers of Labour Court

(1) The Labour Court may-

(a) make any appropriate order, including

(i) the grant of urgent interim relief;

(ii) an interdict;

(iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated in this Act;

(vi) an award of damages in any circumstances contemplated in this Act; and

(vii) an order for costs;

(b) order compliance with any provision of this Act;

(c) make any arbitration award or any settlement agreement an order of the Court;

(d) request the Commission to conduct an investigation to assist the Court and to submit a report to the Court;

(e) determine a dispute between a registered trade union or registered employers' organisation, and any one of the members or applicants for membership thereof, about any alleged non-compliance with -

(i) the constitution of that trade union or employers' organisation (as the case may be); or
(ii) section 26(5)(b);

(f) subject to the provisions of this Act, condone the late filing of any document with, or the late referral of any dispute to, the Court;

(g) subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law;

(h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;

(i) hear and determine any appeal in terms of section 35 of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993); and

(j) deal with all matters necessary or incidental to performing its functions in terms of this Act or any other law.

(1A) For the purposes of subsection (1)(c), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is only entitled to refer to arbitration in terms of section 22(4), 74(4) or 75(7).

(2) If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may-

(a) stay the proceedings and refer the dispute to arbitration; or

(b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make.

(3) The reference to "arbitration" in subsection (2) must be interpreted to include arbitration-

(a) under the auspices of the Commission;

(b) under the auspices of an accredited council;

(c) under the auspices of an accredited agency;

(d) in accordance with a private dispute resolution procedure; or

(e) if the dispute is about the interpretation or application of a collective agreement.

(4)(a) The Labour Court, on its own accord or, at the request of any party to the proceedings before it may reserve for the decision of the Labour Appeal Court any question of law that arises in those proceedings.

(b) A question may be reserved only if it is decisive for the proper adjudication of the dispute.

(c) the decision of the Labour Appeal Court on any question of law reserved in terms of paragraph (a), the Labour Court may make any interim order.

159. Rules Board for Labour Courts and rules for Labour Court

(1) The Rules Board for Labour Courts is hereby established.

(2) The Board consists of-

(a) the Judge President of the Labour Court, who is the chairperson;

(b) the Deputy Judge President of the Labour Court; and

(c) the following persons, to be appointed for a period of three years by the Minister of Justice, acting on the advice of NEDLAC-

(i) a practising advocate with knowledge, experience and expertise in labour law;

(ii) a practising attorney with knowledge, experience and expertise in labour law;

(iii) a person who represents the interests of employees;

(iv) a person who represents the interests of employers; and

(v) a person who represents the interests of the State.

(3) The Board may make rules to regulate the conduct of proceedings in the Labour Court, including, but not limited to-

(a) the process by which proceedings are brought before the Court, and the form and content of that process;

(b) the period and process for noting appeals;

(c) the taxation of bills of costs;

(d) after consulting with the Minister of Finance, the fees payable and the costs and expenses allowable in respect of the service or execution of any process of the Labour Court, and the tariff of costs and expenses that may be allowed in respect of that service or execution; and

(e) all other matters incidental to performing the functions of the Court, including any matters not expressly mentioned in this subsection that are similar to matters about which the Rules Board for Courts of Law may make rules in terms of section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985).

(4) The Board may alter or repeal any rule that it makes.

(5) Five members of the Board are a quorum at any meeting of the Board.

(6) The Board must publish any rules that it makes, alters or repeals in the Government Gazette.

(7)(a) A member of the Board who is a judge of the High Court may be paid an allowance determined in terms of subsection (9) in respect of the performance of the functions of a member of the Board.

(b) Notwithstanding anything to the contrary in any other law, the payment, in terms of paragraph (a), of an allowance to a member of the Board who is a judge of the High Court will be in addition to any salary or allowances, including allowances for reimbursement of travelling and subsistence expenses, that is paid to that person in the capacity of a judge of that Court.

(8) A member of the Board who is not a judge of the High Court nor subject to the Public Service Act, 1994, will be entitled to the remuneration, allowances (including allowances for reimbursement of travelling and subsistence expenses), benefits and privileges determined in terms of subsection (9).

(9) The remuneration, allowances, benefits and privileges of the members of the Board –

(a) are determined by the Minister of Justice with the concurrence of the Minister of Finance;
(b) may vary according to the rank, functions to be performed and whether office is held in a full-time or part-time capacity; and
(c) may be varied by the Minister of Justice under any law in respect of any person or category of persons.

(10)(a) Pending publication in the Government Gazette of rules made by the Board, matters before the Court will be dealt with in accordance with such general directions as the Judge President of the Labour Court, or any other

judge or judges of that Court designated by the Judge President for that purpose, may consider appropriate and issue in writing;

(b) Those directions will cease to be of force on the date of the publication of the Board's rules in the Government Gazette, except in relation to proceedings already instituted before that date. With regard to those proceedings, those directions will continue to apply unless the Judge President of the Labour Court has withdrawn them in writing.

160. Proceedings of Labour Court to be carried on in open court

(1) The proceedings in the Labour Court must be carried on in open court.

(2) Despite subsection (1), the Labour Court may exclude the members of the general public, or specific persons, or categories of persons from the proceedings in any case where a court of a provincial division of the High Court could have done so.

161. Representation before Labour Court

In any proceedings before the Labour Court, a party to the proceedings may appear in person or be represented only by -

(a) a legal practitioner;
(b) a director or employee of the party;
(c) any member, office-bearer or official of that party's registered trade union or registered employers' organisation;
(d) a designated agent or official of a council; or
(e) an official of the Department of Labour.

162. Costs

(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account-

(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and

(b) the conduct of the parties-

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.

(3) The Labour Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court.

163. Service and enforcement of orders of Labour Court. Any decision, judgment or order of the Labour Court may be served and executed as if it were a decision, judgment or order of the High Court.

164. Seal of Labour Court

(1) The Labour Court for use as occasion may require will have an official seal of a design prescribed by the President by proclamation in the Government Gazette.

(2) The registrar of the Labour Court must keep custody of the official seal of the Labour Court.

165. Variation and rescission of orders of Labour Court. The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order -

(a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;

(b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or

(c) granted as a result of a mistake common to the parties to the proceedings.

166. Appeals against judgment or order of Labour Court

(1) Any party to any proceedings before the Labour Court may apply to the Labour Court for leave to appeal to the Labour Appeal Court against any final judgment or final order of the Labour Court.

(2) If the application for leave to appeal is refused, the applicant may petition the Labour Appeal Court for leave to appeal.

(3) Leave to appeal may be granted subject to any conditions that the Court concerned may determine.

(4) Subject to the Constitution and despite any other law, an appeal against any final judgment or final order of the Labour Court in any matter in respect of which the Labour Court has exclusive jurisdiction may be brought only to the Labour Appeal Court.

Part E - Labour Appeal Court

167. Establishment and status of Labour Appeal Court

(1) The Labour Appeal Court is hereby established as a court of law and equity.

(2) The Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court in respect of the matters within its exclusive jurisdiction.

(3) The Labour Appeal Court is a superior court that has authority, inherent powers and standing, in relation to matters under its equal to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction.

(4) The Labour Appeal Court is a court of record.

168. Composition of Labour Appeal Court

(1) The Labour Appeal Court consists of-

(a) the Judge President of the Labour Court, who by virtue of that office is Judge President of the Labour Appeal Court;

(b) the Deputy Judge President, who by virtue of that office is Deputy Judge President of the Labour Appeal Court; and

(c) such number of other judges who are judges of the High Court, as may be required for the effective functioning of the Labour Appeal Court.

(2) The Labour Appeal Court is constituted before any three judges whom the Judge President designates from the panel of judges contemplated in subsection (1).

(3) No judge of the Labour Appeal Court may sit in the hearing of an appeal against a judgment or an order given in a case that was heard before that judge.

169. Appointment of judges of Labour Appeal Court

(1) The President, acting on the advice of NEDLAC-AC and the Judicial Service Commission after consultation with the Minister of Justice and the Judge President of the Labour Appeal Court, must appoint the three judges of the Labour Appeal Court referred to in section 168(l)(c).

(2) The Minister of Justice, after consultation with the Judge President of the Labour Appeal Court, may appoint one or more judges of the High Court to serve as acting judges of the Labour Appeal Court.

170. Tenure, remuneration and terms and conditions of appointment of Labour Appeal Court judges

(1) A judge of the Labour Appeal Court must be appointed for a fixed term determined by the President at the time of appointment.

(2) A judge of the Labour Appeal Court may resign by giving written notice to the President.

(3)(a) A judge of the Labour Appeal Court holds office until-

(i) the judge's term of office in the Labour Appeal Court ends;

(ii) the judge's resignation takes effect;

(iii) the judge is removed from office;

(iv) the judge ceases to be a judge of the High Court; or

(v) the judge dies.

(b) The Judge President and the Deputy Judge President of the Labour Appeal Court hold their offices for as long as they hold their respective offices of Judge President and Deputy Judge President of the Labour Court.

(4) Neither the tenure of office nor the remuneration and terms and conditions of appointment applicable to a judge of the High Court in terms of the Judges' Remuneration and Conditions of Employment Act, 1989 (Act No. 88 of 1989), is affected by that judge's appointment and concurrent tenure of office as a judge of the Labour Appeal Court.

(5) A judge of the Labour Appeal Court-

(a) may be removed from the office of judge of the Labour Appeal Court only if that person has first been removed from the office of a judge of the High Court; and

(a) upon having been removed as judge of the High Court must be removed from office as a judge of the Labour Appeal Court.

(6) Despite the expiry period of a person’s appointment as a judge of the Labour Appeal Court, that person may continue to perform the functions of a judge of that Court, and will be regarded as such in all respects, only –

(a) for the purposes of disposing of any proceedings in which that person has taken part as a judge of that Court and which are still pending upon the expiry of that person’s appointment or which, having been so disposed of before or after the expiry of that person’s appointment, have been re-opened; and

(b) for as long as that person will be necessarily engaged in connection with the disposal of the proceedings so pending or re-opened

(7) The provisions of subsections (2) to (6) apply, read with the changes required by the context, to acting judges appointed in terms of section 169(2).

171. Officers of Labour Appeal Court

(1) The registrar of the Labour Court is also the registrar of the Labour Appeal Court.

(2) Each of the deputy registrars and other officers of the Labour Court also holds the corresponding office in relation to the Labour Appeal Court.

(3)(a) The officers of the Labour Appeal Court, under the supervision and control of the registrar of that Court must perform the administrative functions of the Labour Appeal Court.

(b) A deputy registrar of the Labour Appeal Court may perform any of the functions of the registrar of that Court that have been delegated generally or specifically to the deputy registrar.

(4) The deputy registrar of the Labour Appeal Court or, if there is more than one, the most senior will act as registrar of the Labour Appeal Court whenever-

(a) the registrar is absent from the Republic or from duty, or for any reason is temporarily unable to perform the functions of registrar; or

(b) the office of registrar is vacant.

172. Area of jurisdiction and seat of Labour Appeal Court

(1) The Labour Appeal Court has jurisdiction in all the provinces of the Republic.

(2) The seat of the Labour Court is also the seat of the Labour Appeal Court.

(3) The functions of the Labour Appeal Court may be performed at any place in the Republic.

173. Jurisdiction of Labour Appeal Court

(1) Subject to the Constitution and despite any other law, the Labour Appeal Court has exclusive jurisdiction-

(a) to hear and determine all appeals against the final judgments and the final orders of the Labour Court; and (b) to decide any question of law reserved in terms of section 158 (4).

(4) A decision to which any two judges of the Labour Appeal Court agree is the decision of the Court.

174. Powers of Labour Appeal Court on hearing of appeals. The Labour Appeal Court has the power-

(a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by the Labour Appeal Court, or to remit the case to the Labour Court for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Labour Appeal Court considers necessary; and

(b) to confirm, amend or set aside the judgment or order that is the subject of the appeal and to give any judgment or make any order that the circumstances may require.

175. Labour Appeal Court may sit as court of first instance

Despite the provisions of this Part, the Judge President may direct that any matter before the Labour Court be heard by the Labour Appeal Court sitting as a court of first instance, in which case the Labour Appeal Court is entitled to make any order that the Labour Court would have been entitled to make.

176. Rules for Labour Appeal Court

(1) The Rules Board for Labour Courts established by section 159 may make rules to regulate the conduct of proceedings in the Labour Appeal Court.

(2) The Board has all the powers referred to in section 159 when it makes rules for the Labour Appeal Court.

(3) The Board must publish in the Government Gazette any rules that it makes, alters or repeals.

177. Proceedings of Labour Appeal Court to be carried on in open court

(1) The proceedings in the Labour Appeal Court must be carried on in open court.

(2) Despite subsection (1), the Labour Appeal Court may exclude the members of the general public, or specific persons, or categories of persons from the proceedings in any case where a High Court could have done so.

178. Representation before Labour Appeal Court

Any person who, in terms of section 161, may appear before the Labour Court has the right to appear before the Labour Appeal Court.

179. Costs

(1) The Labour Appeal Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Appeal Court may take into account-

(a) whether the matter referred to the Court should have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and

(b) the conduct of the parties-

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.

(3) The Labour Appeal Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court.

180. **Service and enforcement of orders.** Any decision, judgment or order of the Labour Appeal Court may be served and executed as if it were a decision, judgment or order of the High Court.

181. **Seal of Labour Appeal Court**

(1) The Labour Appeal Court for use as the occasion may require will have an official seal of a design prescribed by the President by proclamation in the Government Gazette.

(2) The registrar of the Labour Appeal Court must keep custody of the official seal of the Labour Appeal Court.

182. Judgments of Labour Appeal Court binding on Labour Court

A judgment of the Labour Appeal Court is binding on the Labour Court.

183. Labour Appeal Court final court of appeal

Subject to the Constitution and despite any other law, no appeal lies against any decision, judgment or order given by the Labour Appeal Court in respect of-

(a) any appeal in terms of section 173(l)(a);

(b) its decision on any question of law in terms of section 173(l)(b); or

(c) any judgment or order made in terms of section 175.

PART F - GENERAL PROVISIONS APPLICABLE TO COURTS ESTABLISHED BY THIS ACT

184. General provisions applicable to courts established by this Act

Sections 5,[41] 18,[42] 25,[43] 30,[44] 31,[45] 39,[46] 40[47] and 42[48] of the Supreme Court Act, 1959 (Act No. 59 of 1959) apply, read with the changes required by the context, in relation to the Labour Court, or the Labour Appeal Court, or both, to the extent that they are not inconsistent with this Act.

41. Scope and execution of process.

42. Certified copies of court records admissible as evidence.

43. No process to be issued against judge except with consent of court.

44. Manner of securing attendance of witnesses or the production of any document.

45. Manner in which witness may be dealt with on refusal to give evidence or produce document.

46. Property not liable to be seized in execution.

47. Offences relating to execution.

48. Witness fees.

CHAPTER VIII

UNFAIR DISMISSAL AND UNFAIR LABOUR PRACTICE

185. Right not to be unfairly dismissed or subjected to unfair labour practice

Every employee has the right not to be

(a) unfairly dismissed; and
(b) subjected to unfair labour practice.

186. Meaning of dismissal and unfair labour practice

(1) "Dismissal" means that-

(a) an employer has terminated a contract of employment with or without notice;

(b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;

(c) an employer refused to allow an employee to resume work after she-

(i) took maternity leave in terms of any law, collective agreement or her contract of employment; or

(ii) was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child;

(d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or

(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.

(f) an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.

(2) “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) 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.

187. Automatically unfair dismissals

(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5[49] or, if the reason for the dismissal is-

(a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV;[50]

(b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;

(c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee;

(d) that the employee took action, or indicated an intention to take action, against the employer by-

(i) exercising any right conferred by this Act; or

(ii) participating in any proceedings in terms of this Act;

49. Section 5 confers protections relating to the right to freedom of association and on members of workplace forums.

50. Chapter IV deals with industrial action and conduct in support of industrial action. Section 67(4) and (5) provide-

(4) An employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike.

(5) Subsection (4) does not preclude an employer from fairly dismissing an employee in compliance with the provisions of Chapter VIII for a reason related to the employee's conduct during the strike, or for a reason based on the employer's operational requirements."

Section 77(3) provides-

"A person who takes part in protest action or in any conduct in contemplation or in furtherance of protest action that complies with subsection (1), enjoys the protections conferred by section 67."

(e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;
(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
(g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or
(h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.

(2) Despite subsection (1)(f)-

(a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;

(b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.

188. Other unfair dismissals

(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-

(a) that the reason for dismissal is a fair reason-

(i) related to the employee's conduct or capacity; or

(ii) based on the employer's operational requirements; and

(b) that the dismissal was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.[51]

188A. Agreement for pre-dismissal arbitration

(1) An employer may, with the consent of the employee, request a council, an accredited agency or the Commission to conduct an arbitration into allegations about the conduct or capacity of that employee.

(2) The request must be in the prescribed form.

(3) The council, accredited agency or the Commission must appoint an arbitrator on receipt of -

51. See Schedule 8, the Code of Good Practice: Dismissal.

(a) payment by the employer of the prescribed fee; and
(b) the employee's written consent to the inquiry.

(4)(a) An employee may only consent to a pre-dismissal arbitration after the employee has been advised of the allegation referred to in subsection (1) and in respect of a specific arbitration.

(b) Despite subparagraph (a), an employee earning more than the amount determined by the Minister in terms of section 6(3) of the *Basic Conditions of Employment Act*, may consent to the holding of a pre-dismissal arbitration in a contract of employment.

(5) In any arbitration in terms of this section a party to the dispute may appear in person or be represented only by -

(a) a co-employee
(b) a director or employee, if the party is a juristic person
(c) any member, officer bearer or official of that party's registered trade union or registered employers' organisation; or
(d) a legal practitioner, o agreement between the parties.

(6) Section 138, read with the changes required by the context, applies to any arbitration in terms of this section.

(7) An arbitrator appointed in terms of this section has all the powers conferred on a commissioner by section 142(1)(a) to (e), (2) and (7) to (9), read with the changes required by the context, and any reference in that section to the director for the purpose of this section, must be read as a reference to -

(a) the secretary of the council, it the arbitration is held under the auspices of the council;
(b) the director of the accredited agency, if the arbitration is held under the auspices of an accredited agency.

(8) The provision of sections 143 to 146 apply to any award made by an arbitrator in terms of this section.

(9) An arbitrator conducting an arbitration in terms of this section must, in the light of the evidence presented and by reference to the criteria of fairness in the Act, direct what action, if any, should be taken against the employee.

(10)(a) A private agency may only conduct an arbitration in terms of this section if it is accredited for this purpose by the Commission.

(b) A council may only conduct an arbitration in terms of this section in respect of which the employer or the employee is not a party to the council, if the council has been accredited for this purpose by the Commission.

189. Dismissals based on operational requirements

(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult-

(a) any person whom the employer is required to consult in terms of a collective agreement;

(b) if there is no collective agreement that requires consultation –

(i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and

(ii) any registered trade union whose members are likely to be affected by the proposed dismissals;

(c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or

(d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

(2) The employer and the other consulting parties must, in the consultation envisaged by subsections (1) and (3), engage in a meaningful joint consensus-seeking process and attempt to reach consensus on -

(a) appropriate measures-

(i) to avoid the dismissals;

(ii) to minimise the number of dismissals;

(iii) to change the timing of the dismissals; and

(iv) to mitigate the adverse effects of the dismissals;

(b) the method for selecting the employees to be dismissed; and

(c) the severance pay for dismissed employees.

(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-

(a) the reasons for the proposed dismissals;

(b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;

(c) the number of employees likely to be affected and the job categories in which they are employed;

(d) the proposed method for selecting which employees to dismiss;

(e) the time when, or the period during which, the dismissals are likely to take effect; the severance pay proposed;

(g) any assistance that the employer proposes to offer to the employees likely to be dismissed;

(h) the possibility of the future re-employment of the employees who are dismissed;

(i) the number of employees employed by the employer; and
(j) the number of employees that the employer has dismissed for reasons based on its operation requirements in the preceding 12 months.

(4)(a) The provisions of section 16 apply, read with the changes required by the context, to the disclosure of information in terms of subsection (3).

(b) In any dispute in which in which an arbitrator or the Labour Court is required to decide whether or not any information is relevant, the onus is on the employer to prove that any information that it has refused to disclose is not relevant for the purposes for which it is sought.

(5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter dealt with in subsections (2), (3) and (4), as well as any other matter relating to the proposed dismissals..

(6)(a) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.

(b) If any representation is made in writing, the employer must respond in writing.

(7) The employer must select the employees to be dismissed according to selection criteria-

(a) that have been agreed to by the consulting parties; or

(b) if no criteria have been agreed, criteria that are fair and objective.

189A. Dismissals based on operational requirements by employers with more than 50 employees.

(1) This section applies to employers employing more than 50 employees if -

(a) the employer contemplates dismissing by reason of the employer's operational requirements, at least –

(i) 10 employees, if the employer employs up to 200 employees;

(ii) 20 employees, if the employer employs more than 200, but not more than 300 employees;

(iii) 30 employees, if the employer employs more than 300, but not more than 400, employees.

(iv) 40 employees, if the employer employs more than 400, but not more than 500, employees; or

(v) 50 employees if the employer employs more than 500 employees; or

(b) the number of employees that the employer contemplates dismissing, together with the number of employees that have been dismissed by reason of the employer's operational requirements in the 12 months prior to the employer issuing a notice in terms of section 189(3), is equal to or exceeds the relevant number specified I paragraph (a).

(2) In respect of any dismissal covered by this section -

(a) an employer must give notice of termination of employment in accordance with the provisions of this section;

(b) despite section 65(1)(c), an employee may participate in a strike and an employer may lock out in accordance with the provisions of this section;

(c) the consulting parties may agree to vary the time periods for facilitation or consultation.

(3) The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if -

(a) the employer has in its notice in terms of section 189(3) requested facilitation; or

(b) consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the Commission within 15 days of the notice.

(4) This section does not prevent an agreement to appoint a facilitator in circumstances not contemplated in subsection (3).

(5) If a facilitator is appointed in terms of subsection (3) or (4) the facilitation must be conducted in terms of any regulations made by the Minister under subsection (6) for the conduct of such facilitations.

(6) The Minister, after consulting NEDLAC and the Commission, may make regulations relating to -

(a) the time period and the variation of time periods, for facilitation;
(b) the powers and duties of facilitators;
(c) the circumstances in which the Commission may charge a fee for appointing a facilitator and the amount of the fee; and
(d) any other matter necessary for the conduct of facilitations.

(7) If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189(3) -

(a) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the *Basic Conditions of Employment Act*; and
(b) a registered trade union or the employees who have received notice of termination may either –

(i) give notice of a strike in terms of section 64(1)(b) or (d); or

(ii) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11).

(8) If a facilitator is not appointed -

(a) a party may not refer a dispute to a council or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189(3); and
(b) once the periods mentioned in section 64(1)(a) have elapsed –

(i) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the *Basic Conditions of Employment Act*; and

(ii) a registered trade union or the employees who have received notice of termination may -

(aa) give notice of a strike in terms of section 64(1)(b) or (d); or
(bb) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191(11).

(9) Notice of the commencement of a strike may be given if the employer dismisses or gives notice of dismissal before the expiry of the periods referred to in subsections (7)(a) or (8)(b)(i).

(10)(a) A consulting party may not –

(i) give notice of a strike in terms of this section in respect of a dismissal, if it has referred a dispute concerning whether there is a fair reason for that dismissal to the Labour Court;

(ii) refer a dispute about whether there is a fair reason for a dismissal to the Labour Court, if it has given notice of a strike in terms of this section in respect of that dismissal.

(b) If a trade union gives notice of a strike in terms of this section -

(i) no member of that trade union and no employee, to whom a collective agreement concluded by that trade union dealing with consultation or facilitation in respect of dismissals by reason of the employers' operational requirements has been extended in terms of section 23(1)(d), may refer a dispute concerning whether there is a fair reason for dismissal to the Labour Court;

(ii) any referral to the Labour Court contemplated by subparagraph (i) that has been made is deemed to be withdrawn.

(11) The following provisions of Chapter IV apply to any strike or lock-out in terms of this section:

(a) Section 64(1) and (3)(a) to (d), except that -

(i) section 64(1)(a) does not apply if a facilitator is appointed in terms of this section;

(ii) an employer may only lock out in respect of a dispute in which a strike notice has been issued;

(b) subsection (2)(a), section 65(1) and (3);

(c) section 66, except that written notice of any proposed secondary strike must be given at least 14 days prior to the commencement of the strike;

(d) sections 67, 68, 69 and 76.

(12)(a) During the 14-day period referred to in subsection (11)(c), the director must, if requested by an employer who has received notice of any intended secondary strike, appoint a commissioner to attempt to resolve any dispute between the employer and the party who gave the notice, through conciliation.

(b) A request to appoint a commissioner or the appointment of a commissioner in terms of paragraph (a) does not affect the right of employees to strike on the expiry of the 14-day period.

(13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order -

(a) compelling the employer to comply with a fair procedure;
(b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
(c) directing the employer to reinstate an employee until it has complied with a fair procedure;
(d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.

(14) Subject to this section, the Labour Court may make any appropriate order referred to I section 158(1)(a).

(15) An award of compensation made to an employee in terms of subsection (14) must comply with section 194.

(16) The Labour Court may not make an order in respect of any matter concerning the disclosure of information in terms of section 189(4) that has been the subject of an arbitration award in terms of section 16.

(17)(a) An application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the employee's services or, if notice is not given, the date on which the employees are dismissed.

(b) The Labour Court may, on good cause shown, condone a failure to comply with the time limit mentioned in paragraph (a).

(18) The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii).

(19) In any dispute referred to the \labour Court in terms of section 191(5)(b)(ii) that concerns the dismissal of the number of employees specified in subsection (1), the Labour Court must find that the employee was dismissed for a fair reason if -

(a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
(b) the dismissal was operationally justifiable on rational grounds;
(c) there was a proper consideration of alternatives; and
(d) selection criteria were fair and objective.

(20) For the purposes of this section, an 'employer' in the public service is the executing authority of a national department, provincial administration, provincial department or organisational component contemplated in section

7(2) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994).

190. Date of dismissal

(1) The date of dismissal is the earlier of-

(a) the date on which the contract of employment terminated; or

(b) the date on which the employee left the service of the employer.

(2) Despite subsection (i)-

(a) if an employer has offered to renew on less favourable terms, or has failed to renew, a fixed-term contract of employment, the date of dismissal is the date on which the employer offered the less favourable terms or the date the employer notified the employee of the intention not to renew the contract;

(b) if the employer refused to allow an employee to resume work, the date of dismissal is the date on which the employer first refused to allow the employee to resume work;

(c) if an employer refused to reinstate or re-employ the employee, the date of dismissal is the date on which the employer first refused to reinstate or re-employ that employee.

191. Disputes about unfair dismissals and unfair labour practices[52]

(1)(a) If there is a dispute about the fairness of a dismissal or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing within to-

(i) a council, if the parties to the dispute fall within the registered scope of that council; or

(ii) the Commission, if no council has jurisdiction.

(b) A referral in terms of paragraph (a) must be made within -

(i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;

(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.

52. See flow diagrams Nos. 10, 11, 12 and 13 in Schedule 4.

(2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired.

(2A) Subject to subsections (1) and (2), an employee whose contract of employment is terminated by notice, may refer the dispute to the council or the Commission once the employee has received that notice.

(3) The employee must satisfy the council or the Commission that a copy of the referral has been served on the employer.

(4) The council or the Commission must attempt to resolve the dispute through conciliation.

(5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved-

(a) the council or the Commission must arbitrate the dispute at the request of the employee if-

(i) the employee has alleged that the reason for dismissal related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;

(ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;

(iii) the employee does not know the reason for dismissal; or

(iv) the dispute concerns an unfair labour practice; or

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is-

(i) automatically unfair;

(ii) based on the employer's operational requirements;

(iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or

(iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement.

(5A) Despite any other provision in the Act, the council or Commission must commence the arbitration immediately after certifying that the dispute remains unresolved if the dispute concerns –

(a) the dismissal of an employee for any reason relating to probation;
(b) any unfair labour practice relating to probation;
(c) any other dispute contemplated in subsection (5)(a) in respect of which no party has objected to the matter being dealt with in terms of this subsection.

(6) Despite subsection (5)(a) or (5A), the director must refer the dispute to the Labour Court, if the director decides, on application by any party to the dispute, that to be appropriate after considering-

(a) the reason for dismissal;

(b) whether there are questions of law raised by the dispute;

(c) the complexity of the dispute;

(d) whether there are conflicting arbitration awards that need to be resolved;

(e) the public interest.

(7) When considering whether the dispute should be referred to the Labour Court, the director must give the parties to the dispute and the commissioner who attempted to conciliate the dispute, an opportunity to make representations.

(8) The director must notify the parties of the decision and refer the dispute-

(a) to the Commission for arbitration; or

(b) to the Labour Court for adjudication.

(9) The director's decision is final and binding.

(10) No person may apply to any court of law to review the director's decision until the dispute has been arbitrated or adjudicated, as the case may be.

(11)(a) The referral, in terms of subsection (5)(b), of a dispute to the Labour Court for adjudication must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved.

(b) However, the Labour Court may condone non-observance of that timeframe on good cause shown.

(12) If an employee is dismissed by reason of the employer's operational requirements following a consultation procedure in terms of section 189 that applied to that employee only, the employee may elect to refer the dispute either to arbitration or to the Labour Court.

(13)(a) An employee may refer a dispute concerning an alleged unfair labour practice to the Labour Court for adjudication if the employee has alleged that the employee has been subjected to an occupational detriment by the employer in contravention of section 3 of the *Protected Disclosures Act, 2000*, for having made a protected disclosure defined in that Act.

(b) A referral in terms of paragraph (a) is deemed to be made in terms of subsection (5)(b).

192. Onus in dismissal disputes

(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.

(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.

193. Remedies for unfair dismissal and unfair labour practice

(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may-

(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;

(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or

(c) order the employer to pay compensation to the employee.

(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure.

(3) If a dismissal is automatically unfair or, if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.[53]

(4) An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.

194. Limits on compensation

(1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

(3) The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

(4) The compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months' remuneration.

195. Compensation is in addition to any other amount

An order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.

196. Severance pay

(1) An employer must pay an employee who dismissed for reasons based on the employer's operational requirements severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, unless the employer has been exempted from the provisions of this subsection.

53. The Court, for example, in the case of a dismissal that constitutes an act of discrimination, may wish to issue an interdict obliging the employer to stop the discriminatory practice in addition to one of the other remedies it may grant.

(2) The Minister, after consulting NEDLAC and the Public Service Co-ordinating Bargaining Council, may vary the amount of severance pay in terms of subsection (1) by notice in the Government Gazette.

(3) An employee who unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer is not entitled to severance pay in terms of subsection (1).

(4) The payment of severance pay in compliance with this section does not affect an employee's right to any other amount payable according to law.

(5) An employer or a category of employers may apply to the Minister for exemption from the provisions of subsection (1) as if the application is one in terms of the *Basic Conditions of Employment Act* and the Minister may grant an exemption as if it were an exemption granted in terms of that Act.

(6) If there is a dispute only about the entitlement to severance pay in terms of this section, the employee may refer the dispute in writing to-

(a) a council, if the parties to the dispute fall within the registered scope of that council; or

(b) the Commission, if no council has

(7) The employee who refers the dispute to the council or the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(8) The council or the Commission must attempt to resolve the dispute through conciliation.

(9) If the dispute remains unresolved, the employee may refer it to arbitration.

(10) If the Labour Court is adjudicating a dispute about a dismissal based on the employer's operational requirements, the Court may inquire into and determine the amount of any severance pay to which the dismissed employee may be entitled and the Court may make an order directing the employer to pay that amount.

197. Transfer of contract of employment

(1) In this section and in section 197A -

(a) '**business'** includes the whole or a part of any business, trade, undertaking or service; and
(b) '**transfer'** means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) -

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;
(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and
(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.

(3)(a) The new employer complies with subsection (2) if that employer employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer.

(b) Paragraph (a) does not apply to employees if any of their conditions of employment are determined by a collective agreement.

(4) Subsection (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14(1)(c) of the *Pension Funds Act, 1956* (Act No. 24 of 1956), are satisfied[53a].

(5)(a) For the purposes of this subsection, the collective agreements and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the employees to be transferred, immediately before the date of transfer.

(b) Unless otherwise agreed in terms of subsection (6), the new employer is bound by -

(i) any arbitration award made in terms of this Act, the common law or any other law;

(ii) any collective agreement binding in terms of section 23; and
(iii) any collective agreement binding in terms of section 32, unless a commissioner acting in terms of section 62 decides otherwise.

(6)(a) An agreement contemplated in subsection (2) must be in writing and concluded between -

53a. Section 14(1)(c) of the Pensions Funds Act requires the registrar to be satisfied that any scheme to amalgamate or transfer funds is reasonable and equitable, and accords full recognition to the rights and reasonable benefit expectations of the persons concerned in terms of the fund rules, and to additional benefits which have become established practice.

(i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and

(ii) the appropriate person or body referred to in section 189(1), on the other.

(b) In any negotiations to conclude an agreement contemplated by paragraph (a), the employer or employers contemplated in subparagraph (i), all relevant information that will allow it to engage effectively in the negotiations.

(c) Section 16(4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph (b).

(7) The old employer must -

(a) agree with the new employer to a valuation as at the date of transfer of -

(i) the leave pay accrued to the transferred employees of the old employer;

(ii) the severance pay that would have been payable to the transferred employees of the old employer in the event of a dismissal by reason of the employer's operational requirements; and

(iii) any other payments that have accrued to the transferred employees but have not been paid to employees of the old employer.

(b) conclude a written agreement that specifies -

(i) which employer is liable for paying any amount referred to in paragraph (a), and in the case of the apportionment of liability between them, the terms of the apportionment; and

(ii) what provision has been made for any payment contemplated in paragraph (a) if any employee becomes entitled to receive a payment;

(c) disclose the terms of the agreement contemplated in paragraph (b) to each employee who after the transfer becomes employed by the new employer; and

(d) take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of paragraph (a).

(8) For a period of 12 months after the date of the transfer, the old employer is jointly and severally liable with the new employer to any employee who

becomes entitled to receive a payment contemplated in subsection (7)(a) as a result of the employee's dismissal for a reason relating to the employer's operational requirements or the employer's liquidation or sequestration, unless the old employer is able to show that it has complied with the provisions of this section

(9) The old and new employer are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer.

(10) This section does not affect the liability of any person to be prosecuted for, convicted of and sentenced for, any offence.

197A Transfer of contract of employment in circumstances of insolvency

(1) This section applies to the transfer of a business -

(a) if the old employer is insolvent; or
(b) if a scheme of arrangement or compromise is being entered into to avoid winding up sequestration for reasons of insolvency.

(2) Despite the *Insolvency Act, 1936* (Act No. 24 of 1936), if a transfer of a business takes place in the circumstances contemplated in subsection (1), unless otherwise agreed in terms of section 197(6) -

(a) the new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer's provisional winding up or sequestration;
(b) all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee;
(c) anything done before the transfer by the old employer in respect of each employee is considered to have been done by the old employer;
(d) the transfer does not interrupt the employee's continuity of employment and the employee's contract of employment continues with the new employer as if with the old employer.

(3) Section 197(3), (4), (5) and (10) applies to a transfer in terms of this section any reference to an agreement in that section must be read as a reference to an agreement contemplated in section 197(6).

(4) Section 197(5) applies to a collective agreement or arbitration binding on the employer immediately before the employer's provisional winding up or sequestration.

(5) Section 197(7), (8) and (9) does not apply to a transfer in accordance with this section.

197B Disclosure of information concerning insolvency

(1) An employer that is facing financial difficulties that may reasonably result in the winding up or sequestration of the employer must advise a consulting party contemplated in section 189(1).

(2)(a) An employer that applies to be wound up or sequestrated, whether in terms of the *Insolvency Act, 1936* or any other law, must at the time of making application, provide a consulting party contemplated in section 189(1) with a copy of the application.

(b) An employer that receives an application for its winding up or sequestration must supply a copy of the application to any consulting party contemplated in section 189(1), within two days of receipt, or if the proceedings are urgent, within 12 hours.

CHAPTER IX

GENERAL PROVISIONS

198. Temporary Employment Services

(1) In this section, "temporary employment service" means any person who, for reward, procures for or provides to a client other persons-

(a) who render services to, or perform work for, the client; and

(b) who are remunerated by the temporary employment service.

(2) For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.

(3) Despite subsections (1) and (2), a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person.

(4) The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its employees, contravenes-

(a) a collective agreement concluded in a bargaining council that regulates terms and conditions of employment;

(b) a binding arbitration award that regulates terms and conditions of employment;

(c) the Basic Conditions o Employment Act; or

(d) a determination made in terms of the Wage Act.

(5) Two or more bargaining councils may agree to bind the following persons, if they fall within the combined registered scope of those bargaining councils, to a collective agreement concluded in any one of them-

(a) temporary employment service;

(b) a person employed by a temporary employment service; and

(c) a temporary employment service client.

(6) An agreement concluded in terms of subsection (5) is binding only if the collective agreement has been extended to non-parties within the registered scope of the bargaining council.

(7) Two or more bargaining councils may agree to bind the following persons, who fall within their combined registered scope, to a collective agreement-

(a) temporary employment service;

(b) a person employed by a temporary employment service; and

(c) a temporary employment service's client.

(8) An agreement concluded in terms of subsection (7) is binding only if-

(a) each of the contracting bargaining councils has requested the Minister to extend the agreement to non-parties falling within its registered scope;

(b) the Minister is satisfied that the terms of the agreement are not substantially more onerous than those prevailing in the corresponding collective agreements concluded in the bargaining councils; and

(c) the Minister, by notice in the Government Gazette, has extended the agreement as requested by all the bargaining councils that are parties to the agreement.

199. Contracts of employment may not disregard or waive collective agreements or arbitration awards

(1) A contract of employment, whether concluded before or after the coming into operation of any applicable collective agreement or arbitration award, may not-

(a) permit an employee to be paid remuneration that is less than that prescribed by that collective agreement or arbitration award;

(b) permit an employee to be treated in a manner, or to be granted any benefit, that is less favourable than that prescribed by that collective agreement or arbitration award; or

(c) waive the application of any provision of that collective agreement or arbitration award.

(2) A provision in any contract that purports to permit or grant any payment, treatment, benefit, waiver or exclusion prohibited by subsection (1) is invalid.

200. Representation of employees or employers

(1) A registered trade union or registered employers' organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party-

(a) in its own interest;

(b) on behalf of any of its members;

(c) in the interest of any of its members.

(2) A registered trade union or a registered employers' organisation is entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to those proceedings.

200A. Presumption as to who is employee

(1) Until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

(a) the manner in which the person works is subject to the control or direction of another person;
(b) the person's hours of work are subject to the control or direction of another person
(c) in the case of a person who works for an organisation, the person forms part of that organisation;
(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
(e) the person is economically dependent on the other person for whom he or she works or renders services;
(f) the person is provided with tools of trade or work equipment by the other person; or
(g) the person only works for or renders services to one person.

(2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6(3) of the *Basic Conditions of Employment Act*.

(3) If a proposed or existing work arrangement involves persons who earn amounts equal to or below the amounts determined by the Minister in terms of section 6(3) of the *Basic Conditions of Employment Act*, any of the contracting parties may approach the Commission for an advisory award on whether the persons involved in the arrangement are employees.

(4) NEDLAC must prepare and issue a Code of Good Practice that sets out guidelines for determining whether persons, including those who earn in excess of the amount determined in subsection (2) are employees.

201. Confidentiality

(1) A person commits an offence by disclosing any information relating to the financial or business affairs of any other person or any business, trade or undertaking if the information was acquired by the first-mentioned person in

the performance of any function or exercise of any power in terms of this Act, in any capacity, by or on behalf of-

(a) a council;

(b) any independent body established by a collective agreement or determination to grant exemptions from the provisions of the collective agreement or determination;

(c) the registrar;

(d) the Commission; and

(e) an accredited agency.

(2) Subsection (1) does not apply if the information was disclosed to enable a person to perform a function or exercise a power in terms of this Act.

(3) (a) A person convicted of an offence in terms of this section may be sentenced to a fine not exceeding R10 000.

(b) The Minister, in consultation with the Minister of Justice, may from time to time by notice in the Government Gazette, amend the maximum amount of the fine referred to in paragraph (a).

202. Service of documents

(1) If a registered trade union or a registered employers' organisation acts on behalf of any of its members in a dispute, service on that trade union or employers' organisation of any document directed to those members in connection with that dispute, will be sufficient service on those members for the purposes of this Act.

(2) Service on the Office of the State Attorney of any legal process directed to the State in its capacity as an employer is service on the State for the purposes of this Act.

203. Codes of good practice

(1) NEDLAC may-

(a) prepare and issue codes of good practice; and

(b) change or replace any code of good practice.

(2) Any code of good practice, or any change to or replacement of a code of good practice, must be published in the Government Gazette.

(3) Any person interpreting or applying this Act must take into account any relevant code of good practice.

(4) A Code of Good Practice issued in terms of this section may provide that the code must be taken into account in applying or interpreting any employment law.

204. Collective agreement, arbitration award or wage determination to be kept by employer. Unless a collective agreement, arbitration award or determination made in terms of the *Basic Conditions of Employment Act* provides otherwise, every employer on whom the collective agreement, arbitration award, or determination is binding must-

(a) keep a copy of that collective agreement, arbitration award or determination available in the workplace at all times;

(b) make that copy available for inspection by any employee; and

(c) give a copy of that collective agreement, arbitration award or determination-

(i) to an employee who has paid the prescribed fee; and

(ii) free of charge, on request, to an employee who is a trade union representative or a member of a workplace forum.

205. Records to be kept by employer

(1) Every employer must keep the records that an employer is required to keep in compliance with any applicable-

(a) collective agreement;

(b) arbitration award;

(c) determination made in terms of the Wage Act.

(2) An employer who is required to keep records in terms of subsection (1) must-

(a) retain those records in their original form or a reproduced form for a period of three years from the date of the event or end of the period to which they relate; and

(b) submit those records in their original form or a reproduced form in response to a demand made at any reasonable time, to any agent of a bargaining council, commissioner or any person whose functions in terms of this Act include the resolution of disputes.

(3) (a) An employer must keep a record of the prescribed details of any strike, lock-out or protest action involving its employees.

(b) An employer must submit those records in the prescribed manner to the registrar.

206. Effect of certain defects and irregularities

(1) Despite any provision in this Act or any other law, a defect does not invalidate-

(a) the constitution or the registration of any registered trade union, registered employers' organisation or council;

(b) any collective agreement or arbitration award that would otherwise be binding in terms of this Act;

(c) any act of a council; or

(d) any act of the director or a commissioner.

(2) A defect referred to in subsection (1) means-

(a) a defect in, or omission from, the constitution of any registered trade union, registered employers' organisation or council;

(b) a vacancy in the membership of any council; or

(c) any irregularity in the appointment or election of-

(i) a representative to a council;

(ii) an alternate to any representative to a council;

(iii) a chairperson or any other person presiding over any meeting of a council or a committee of a council; or

(iv) the director or a commissioner.

207. Ministers empowered to add and change to Schedules

(1) The Minister, after consulting NEDLAC, by notice in the Government Gazette, may change, replace or add to Schedules 2 and 4 to this Act and the Schedule envisaged in subsection (3).

(3) The Minister, after consulting NEDLAC, by notice in the Government Gazette, may add to this Act a further Schedule containing a model constitution for a statutory council.

(4) The Minister for the Public Service and Administration, after consulting the Public Service Co-ordinating Bargaining Council, by notice in the Government Gazette, may add to this Act a further schedule regulating the establishment and the constitutions of workplace forums in the public service.

(5) The *Minister* may add to, change or replace any page header or footnote.

208. Regulations

The Minister, after consulting NEDLAC and when appropriate, the Commission, may make regulations not inconsistent with this Act relating to-

(a) any matter that in terms of this Act may or must be prescribed; and

(b) any matter that the Minister considers necessary or expedient to prescribe or have governed by regulation in order to achieve the primary objects of this Act.

208A. Delegations

(1) The Minister, in writing, may delegate to the Director-General or any other officer of the Department of Labour any power, function or duty conferred or imposed upon the Minister in terms of this Act, except the powers, functions and duties contemplated in section 32 (but excluding subsection (6)), and sections 44, 207 and 208.

(2) A delegation in terms of subsection (1) does not limit or restrict the competence of the Minister to exercise or perform any power, function or duty that has been delegated.

(3) The Minister may make a delegation subject to any conditions or restrictions that are deemed fit.

(4) The Minister may at any time –

(a) withdraw a delegation made in terms of subsection (1); and

(b) withdraw or amend any decision made by a person in exercising a power or performing a function or duty delegated in terms of subsection (1).

209. This Act binds the State

This Act binds the State.

210. Application of Act when in conflict with other laws

If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any act expressly amending this Act, the provisions of this Act will prevail.

211. Amendment of laws

Each of the laws referred to in items I and 2 of Schedule 5 is hereby amended to the extent specified in those items.

212. Repeal of laws, and transitional arrangements

(1) Each of the laws referred to in the first two columns of Schedule 6 is hereby repealed to the extent specified opposite that law in the third column of that Schedule.

(2) The repeal of those laws does not affect any transitional arrangements made in Schedule 7.

(3) The transitional arrangements in Schedule 7 must be read and applied as substantive provisions of this Act.

213. **Definitions.** In this Act, unless the context otherwise indicates -

"**area**" includes any number of areas, whether or not contiguous;

"**auditor**" means any person who is registered to practise in the Republic as a public accountant and auditor;

"**bargaining council**" means a bargaining council referred to in section 27 and includes, in relation to the public service, the bargaining councils referred to in section 35;

"**Basic Conditions of Employment Act**" means the *Basic Conditions of Employment Act, 1997* (Act No.75 of 1997);

"**code of good practice**" means a code of practice issued by NEDLAC in terms of section 203(1) of this Act;

"**collective agreement**" means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-

(a) one or more employers;

(b) one or more registered employers' organisations; or

(c) one or more employers and one or more registered employers' organisations; " council" includes a bargaining council and a statutory council;

"**director**" means the director of the Commission appointed in terms of section II 8(1) and includes any acting director appointed in terms of section 119; "dismissal" means dismissal as defined in section 186;

"**dispute**" includes an alleged dispute;

"**employee** "[54] means –

(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

54. "Employee" is given a different and specific meaning in section 78 in Chapter V.

(b) any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of " employee";

"**employers' organisation**" means any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and employees or trade unions;

"**employment law**" includes this Act, any other act the administration of which has been assigned to the Minister, and nay of the following acts:

(a) the *Unemployment Insurance Act, 1966* (Act No. 30 of 1966);
(b) the *Skills Development Act, 1998* (Act No. 97 of 1998);
(c) the *Employment Equity Act, 1998* (Act No. 55 of 1998);
(d) the *Occupational Health and Safety Act, 1993* (Act No. 85 of 1993); and
(e) the *Compensation for Occupational Injuries and Diseases Act, 1993* (Act No. 130 of 1993);

"**essential service**" means –

(a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;

(b) the Parliamentary service;

(c) the South African Police Services;

"**issue in dispute**", in relation to a strike or lock-out, means the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out;

"**legal practitioner**" means any person admitted to practise as an advocate or an attorney in the Republic;

"**lock out**" means the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion;

"**Minister**" means the Minister of Labour;

"**NEDLAC**" means the National Economic Development and Labour Council established by section 2 of the National Economic, Development and Labour Council Act, 1994 (Act No. 35 of 1994);

"**office-bearer**" means a person who holds office in a trade union, employers' organisation, federation of trade unions, federation of employers' organisations or council and who is not an official;

"**official**", in relation to a trade union, employers' organisation, federation of trade unions or federation of employers' organisations means a person employed as the secretary, assistant secretary or organiser of a trade union, employers' organisation or federation, or in any other prescribed capacity, whether or not that person is employed in a full-time capacity. And, in relation to a council means a person employed by a council as secretary or in any other prescribed capacity, whether or not that person is employed in a full-time capacity;

"**operational requirements**" means requirements based on the economic, technological, structural or similar needs of an employer;

"**prescribed**" means prescribed from time to time by regulation in terms of section 208;

"**protest action**" means the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of strike;

"**public service**" means the national departments, provincial administrations, provincial departments and organisational components contemplated in section 7(2) of the *Public Service Act, 1994* (promulgated by Proclamation No. 103 of 1994), but excluding-

(a) the members of the South African National Defence Force;

(b) the National Intelligence Agency; and

(c) the South African Secret Service.

"**registered scope**" means-

(a) in the case of the Public Service Co-ordinating Bargaining Council, the public service as a whole, subject to section 36;

(b) in the case of bargaining councils established for sectors in the public service, the sector designated by the Public Service Co-ordinating Bargaining Council in terms of section 37(1);

(c) in the case of any other council, the sector and area in respect of which it is registered in terms of this Act;

"**registrar**" means the registrar of labour relations appointed in terms of section 108 and includes-

(a) any deputy registrar appointed in terms of that section when acting on the direction or under a general or special delegation of the registrar; and

(b) any acting registrar appointed in terms of that section;

"**remuneration**" means any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State, and "remunerate" has a corresponding meaning;

"**Republic**"-

(a) when used to refer to the State as a constitutional entity, means the Republic of South Africa as defined in section I of the Constitution; and

(b) when used in the territorial sense, means the national territory of the Republic as defined in section I of the Constitution;

"**sector**" means, subject to section 37, an industry or a service;

"**serve** " means to send by registered post, telegram, telex, telefax or to deliver by hand;

"**statutory** council" means a council established in terms of Part E of Chapter 111;

"**strike**" means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory;

"**this Act**" includes the section numbers, the Schedules, except Schedules 4 and 8, and any regulations made in terms of section 208, but does not include the page headers, the headings or footnotes;

"**trade union**" means an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations;

"**trade union representative**" means a member of a trade union who is elected to represent employees in a workplace-,

"**Wage Act**" means the *Wage Act, 1957* (Act No. 5 of 1957);

"**working hours**" means those hours during which an employee is obliged to work;

"**workplace**"-

(a) in relation to the public service –

(i) for the purposes of collective bargaining and dispute resolution, the registered scope of the Public Service Co-ordinating Bargaining Council or a bargaining council in a sector in the public service, as the case may be; or

(ii) for any other purpose, a national department, provincial administration, provincial department or organisational component contemplated in section 7(2) of the *Public Service Act, 1994* (promulgated by *Proclamation No. 103 of 1994*), or any other part of the public service that the Minister for Public Service and Administration, after consultation with the Public Service Co-ordinating Bargaining Council, demarcates as a workplace.;

(c) in all other instances means the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation; and

"**workplace forum**" means a workplace forum established in terms of Chapter V.

214. Short title and commencement

(1) This Act is called the *Labour Relations Act, 1995*.

(2) This Act will come into operation on a date to be determined by the President by proclamation in the Government Gazette, except in the case of any provision in relation to which some other arrangement regarding commencement is made elsewhere in this Act.

SCHEDULE I

ESTABLISHMENT OF BARGAINING COUNCILS FOR PUBLIC SERVICE

1. Definitions for this Schedules

In this Schedule, unless the context otherwise indicates

"**Education Labour Relations Act**" means the *Education Labour Relations Act, 1993* (Act No. 146 of 1993);

"**Education Labour Relations Council**" means the council established by section 6(1) of the *Education Labour Relations Act*;

"**National Negotiating Forum**" means the National Negotiating Forum established for the South African Police Service by the South African Police Service Labour Relations Regulations, 1995;

"**Public Service Bargaining Council**" means the council referred to in section 5(l) of the *Public Service Labour Relations Act*;

"**Public Service Labour Relations Act**" means the *Public Service Labour Relations Act, 1994* (promulgated by *Proclamation No. 105 of 1994*).

2. Establishment of Public Service Co-ordinating Bargaining Council

(1) As soon as practicable after the commencement of this Act, the Commission, by notice in the Government Gazette, must invite the employee and employer representatives in the Education Labour Relations Council, the National Negotiating Forum and the central chamber of the Public Service Bargaining Council to attend a meeting, with a view to those representatives agreeing on a constitution for the Public Service Co-ordinating Bargaining Council.

(2) The Commission must appoint a commissioner to chair the meeting and facilitate the conclusion of an agreement on a constitution that meets the requirements of section 30, read with the changes required by the context.

(3) The parties to the Education Labour Relations Council, the National Negotiating Forum and the central chamber of the Public Service Bargaining Council will be the founding parties to the Public Service Co-ordinating Bargaining Council.

(4) If an agreement is concluded and the registrar is satisfied that the constitution meets the requirements of section 30, the registrar must register the Public Service Co-ordinating Bargaining Council by entering its name in the register of councils.

(5) If no agreement is concluded on a constitution, the registrar must-

(a) determine the constitution for the Public Service Co-ordinating Bargaining Council;

(b) register the Public Service Co-ordinating Bargaining Council by entering its name in the register of councils; and

(c) certify the constitution as the constitution of the Public Service Co-ordinating Bargaining Council.

(6) After registering the Public Service Co-ordinating Bargaining Council, the registrar must-

(a) issue a certificate of registration that must specify the registered scope of the Public Service Co-ordinating Bargaining Council; and

(b) send the certificate and a certified copy of the constitution to the Public Service Co-ordinating Bargaining Council.

3. Establishment of bargaining councils in sectors

(1) The departmental and provincial chambers of the Public Service Bargaining Council are deemed to be bargaining councils established in terms of section 37(3)(a) of this Act, subject to any designation in terms of section 37(l) of this Act.

(2) The Education Labour Relations Council is deemed to be a bargaining council established in terms of section 37(3)(b) of this Act.

(3) The National Negotiating Forum is deemed to be a bargaining council established for a sector designated in terms of section 37(2).

(4) If the President designates a sector in terms of section 37(2), the President must inform the Commission and instruct it to convene a meeting of the representatives of the registered trade unions with members employed in the sector.

(5) The Commission must publish a notice in the Government Gazette inviting registered trade unions with members employed in the sector to attend the meeting.

(6) The Commission must appoint a commissioner to chair the meeting and facilitate the conclusion of an agreement on-

(a) the registered trade unions to be parties to the bargaining council; and

(b) a constitution that meets the requirements of section 30, read with the changes required by the context.

(7) If agreement is concluded, the registrar must-

(a) admit the registered trade unions as parties to the bargaining council; and

(b) if satisfied that the constitution meets the requirements of section 30, register the bargaining council by entering its name in the register of councils.

(8) If no agreement is concluded on-

(a) the registered trade unions to be admitted, the Commission must decide which trade unions should be admitted;

(b) a constitution, the registrar, in accordance with the decisions made by the Commission in paragraph (a), must determine a constitution that meets the requirements of section 30, read with the changes required by the context.

(9) The registrar must register the bargaining council for the sector by entering its name in the register of councils.

(10) After registering the bargaining council, the registrar must-

(a) issue a certificate of registration that must specify the registered scope of the bargaining council; and

(b) send the certificate and a certified copy of the constitution to the bargaining council.

SCHEDULE 2

GUIDELINES FOR CONSTITUTION OF WORKPLACE FORUM

1. Introduction

(1) This Schedule contains guidelines for the constitution of a workplace, forum. It Is intended to guide representative trade unions that wish to establish a workplace forum, employers and commissioners.

(2) This Act places the highest value on the establishment of workplace forums by agreement between a representative trade union and an employer. The role of the commissioner is to facilitate an agreement establishing the structure and functions of a workplace forum. If agreement is not possible, either in whole or in part, the commissioner must refer to this Schedule, using its guidelines in a manner that best suits the particular workplace involved.

(3) For convenience, the guidelines follow the sequence of the paragraphs in section 82 of this Act.

2. Number of seats in workplace forums (section 82(1)(a))

The formula to determine the number of seats in the workplace forum should reflect the size, nature, occupational structure and physical location of the workplace. A guideline may be-

(a) in a workplace in which 100 to 200 employees are employed, five members;

(b) in a workplace in which 201 to 600 employees are employed, eight members;

(c) in a workplace in which 601 to 1 000 employees are employed, IO members;

(d) in a workplace in which more than 1 000 employees are employed, 10 members for the first 1 000 employees, plus an additional member for every additional 500 employees, up to a maximum of 20 members.

3. Distribution of seats to reflect occupational structure (section 82(1)(b))

The formula to determine the distribution of seats in the workplace forum must reflect the I occupational structure of the workplace.

Example:

There are 300 employees in a workplace. The occupational structure is as follows: 200 employees are manual employees; 50 are administrative and clerical employees; and 50 are supervisory, managerial and technical employees. The six seats may be distributed as follows4 seats for members to be elected from candidates nominated from among the manual employees

I seat for members to be elected from candidates nominated from among the administrative and clerical employees

I seat for members to be elected from candidates nominated from among the supervisory, managerial and technical employees.

4. Elections (section 82(1)(c), (d), (g), (h), (i) and (j))

(1) The constitution must include provisions concerning the appointment of an election officer.

Example:

(a) Every election or by-election in relation to a workplace forum must be conducted by an election officer appointed by agreement between the representative trade union and the employer.

(b) If the trade union and the employer cannot agree, the trade union may apply to the Commission to appoint an election officer.

(c) The Commission must appoint an election officer to conduct a by-election only if it is satisfied that the workplace forum cannot function adequately without a by-election.

(2) The constitution must set out what the election officer should do and the procedure for an election.

Example:

(a) Thirty days before each election of members of the workplace forum, the election officer must-

(i) prepare a list of all employees in the workplace; and

(ii) call for nominations for members of the workplace, forum.

(b) Any employee may be nominated as a candidate for election as a member of the workplace forum by-

(i) any registered trade union with members employed in the work- place;

(ii) a petition signed by not less than 20 per cent of the employees in the workplace or 100 employees, whichever number of employees is the smaller.

(c) Any employee who is a member or has previously served as a member of a workplace forum is eligible for re-election.

(d) Fourteen days before each election of members of the workplace forum, the election officer must-

(i) confirm that the nominated candidates qualify for election;

(ii) publish a list of all qualified candidates who have been properly nominated; and

(iii) prepare a ballot for the election, listing the nominated candidates in alphabetical order by surname.

(e) Voting must be by secret ballot.

Every employee is entitled to vote in the election of the workplace forum during working hours at the employer's premises.

(g) Every employee in the workplace is entitled to cast a number of votes equal to the number of members to be elected to the workplace forum.

(h) Every employee may cast one or more of those votes in favour of any candidate.

5. Terms of office (section 82(1)(k), (l) and (m))

(1) The constitution must provide that the members of a workplace forum remain in office until the first meeting of the newly elected workplace forum.

(2) The constitution must include provisions allowing the members to resign as well as provisions for the removal of members from office.

Example:

(a) A member of a workplace forum may resign by giving written notice to the chairperson.

(b) A member of a workplace forum must vacate that office-

(i) when the member's resignation takes effect;

(ii) if the member is promoted to senior managerial status;

(iii) if the member is transferred from the workplace;

(iv) if the member's employment is terminated;

(v) as a result of an award of a commissioner; or

(vi) if the representative trade union that nominated a member removes the member.

(c) The representative trade union, the employer, or the workplace forum may apply to the Commission to have a member of the workplace forum removed from office on the grounds of gross dereliction of the duties of office.

(d) Twenty percent of the employees in the workplace may submit a signed petition to the Commission applying for the removal from office of a member of the workplace forum on the grounds of gross dereliction of the duties of office.

(e) An application to remove a member of a workplace forum from office must be decided by arbitration under the auspices of the Commission.

A by-election to fill any vacancy in the workplace forum must be conducted by an election officer.

6. Meetings of workplace forum (section 82(1)(n))

The constitution must include provisions governing meetings of the workplace forum.

Example:

(a) The first meeting of a newly elected workplace forum must be convened by the election officer as soon as practicable after the election.

(b) At that meeting the members of the workplace forum must elect from among their number a chairperson and a deputy chairperson.

(c) The workplace forum must meet whenever necessary, but at least once a month.

(d) A quorum of the workplace forum must be a majority of the members of the workplace forum holding office at any time.

(e) A decision of the majority of the members of the workplace forum present at the meeting must be the decision of the workplace forum.

The meetings between members of the workplace forum and the employees should be at least four times a year.

Example 1:

In a workplace that is a single place, the meetings with the employees should be with all the members of the workplace forum.

Example 2:

In a workplace that is geographically dispersed, the meetings with the employees need not be with all the members of the workplace forum, but with one or more members of the workplace forum.

7. Time off for members of workplace forum (section 82(1)(p))

The constitution must include provisions governing time off for members to perform their functions.

Example:

(a) A member of a workplace forum is entitled to take reasonable time off during working hours with pay for the purpose of

(i) performing the functions and duties of a member; and

(ii) undergoing training relevant to the performance of those functions and duties.

(b) The right to time off is subject to conditions that are reasonable, so as to prevent the undue disruption of work.

(c) The costs associated with the training must be paid by the employer, if those costs are reasonable, having regard to the size and capabilities of the employer.

8. Facilities to be provided to workplace forum (section 82(1)(r))

The constitution must require the employer to provide adequate facilities to the workplace forum to perform its functions.

Example:

(a) The employer must provide, at its cost-

(i) fees, facilities and materials that are necessary for the conduct of elections and by-elections of the workplace forum; and

(ii) administrative and secretarial facilities that are appropriate to enable the members of the workplace forum to perform their functions and duties.

(b) These facilities must include, but are not limited to, a room in which the workplace forum may meet and access to a telephone.

(c) The costs incurred by the employer in complying with the provisions of paragraphs (a) and (b) must be reasonable, having regard to the size and capabilities of the employer.

9. Experts (section 82(1)(t))

The constitution may provide for the use of experts.

Example:

(a) A workplace forum may ask experts to assist it in the performance of any of its functions.

(b) An expert must ensure that there is no conflict of interest between the assistance given to one workplace forum and another.

(c) An expert may attend any meeting of the workplace forum and, at its request, address any meetings of the workplace forum including a meeting with the employer or the employees.

(d) An expert is entitled to any information to which the workplace forum is entitled and may inspect and copy any document.

10. Establishment of coordinating and subsidiary workplace forums (section 82(2)(b))

(1) Where an employer carries on or conducts two or more operations that are independent of each other by reason of their size, function or organisation, the constitution may provide for the establishment of a coordinating workplace forum with jurisdiction over those matters mentioned in sections 84 and 86 that affect the employees generally and for the establishment of a subsidiary workplace forum in each of the workplaces with jurisdiction over those matters that affect only the employees in that workplace.

(2) Where the employer has a workplace that is geographically dispersed and there are matters that are of local interest rather than general interest, the constitution may establish a coordinating workplace forum with general jurisdiction and subsidiary workplace forums with local interest jurisdiction.

Example:

A bank with a head office may have many branches dispersed around the country.

If the branches are not regarded as separate workplaces, the bank may have one workplace forum for all its employees or the constitution may allow for the establishment of a coordinating workplace forum at head office level and in certain or all of the branches allow the establishment of subsidiary workplace forums that will deal with matters that affect only the employees in those branches.

SCHEDULE 3

COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION

1. Remuneration and allowances of members of governing body. The Minister, after consulting the Minister of Finance, must determine the remuneration and allowances and any other terms and conditions of appointment of members of the governing body.

2. Resignation and removal from office of member of governing body

(1) A member of the governing body may resign by giving notice to the governing body.

(2) The Minister, acting on the advice of NEDLAC, may remove a member of the governing body from office for

(a) serious misconduct;

(b) incapacity; or

(c) being absent from three consecutive meetings of the governing body without good cause or prior permission from the chairperson.

3. Vacancies in governing body

(1) A vacancy in the governing body exists whenever

(a) a member's term of office ends;

(b) a member's resignation takes effect;

(c) a member is removed from office; or

(d) a member dies.

(2) The Minister must fill a vacancy in the governing body as soon as is practicable.

In the meantime, the Commission's proceedings and decisions continue to be valid.

(3) If a vacancy-

(a) is owing to the end of a member's term of office, the Minister may reappoint the member, or appoint another person nominated by NEDLAC in accordance with section 116(2) and (3);

(b) is owing to any other cause, the Minister must appoint another person nominated by NEDLAC in accordance with section 116(2) and (3) to

replace the member and serve the unexpired portion of the replaced member's term of office.

4. Proceedings of governing body

(1) The governing body must determine procedures for its meetings.

(2) A quorum for a meeting of the governing body is three members of the governing body. The quorum must include-

(a) one member who was nominated by those voting members of NEDLAC who represent organised business;

(b) one member who was nominated by those voting members of NEDLAC who represent organised labour; and

(c) one member who was nominated by those voting members of NEDLAC who represent the State.

(3) Despite subitem (2), a meeting of the governing body may be held in the absence of any member representing organised business or organised labour or the State, if those members have agreed to the meeting proceeding in the absence of that member and to the issues which may be dealt with in the absence of that member.

(4) If the chairperson is absent from a meeting of the governing body, the members present must elect one of themselves to preside at that meeting, and at that meeting that member may exercise or perform any function of the chairperson.

(5) A defect or error in the appointment of a member of the Commission does not affect the validity of the Commission's proceedings or decisions.

5. Director of Commission

(1) The director may resign by giving written notice to the governing body.

(2) The governing body may remove the director from office for-

(a) serious misconduct;

(b) incapacity;

(c) a material violation of the Commission's code of conduct; or

(d) being absent from three consecutive meetings of the governing body without good cause or prior permission from the chairperson.

(3) A vacancy in the office of director exists whenever-

(a) the director reaches the age of 65;

(b) the director's resignation takes effect;

(c) the governing body removes the director from office; or

(d) the director dies.

(4) The governing body must appoint a director in accordance with the provisions of section II 8 as soon as practicable after the office of the director becomes vacant.

6. Bank account. The governing body must open and maintain an account in the name of the Commission with a bank registered in the Republic, or with another registered financial institution approved by the Minister of Finance and, subject to item 7, must

(a) deposit to that account any money that the Commission receives; and

(b) make all payments on behalf of the Commission from that account.

7. Investment of surplus money. The governing body may resolve to invest any money that the Commission does not immediately require to meet current expenditure or contingencies

(a) on call or short-term deposit with any bank that meets the requirements stated in item 6;

(b) if the Minister, with the concurrence of the Minister of Finance, gives written approval of the duration and other terms of the investment, in an investment account with the Corporation for Public Deposits.

8. Accounting and auditing. The Commission must, to the standards of generally accepted accounting practice, principles and procedures

(a) keep books and records of its income, expenditure, assets and liabilities;

(b) as soon as practicable after the end of each financial year, prepare financial statements, including at least a statement of income and expenditure for the previous financial year and a balance sheet showing its assets, liabilities and financial position as at the end of the previous financial year-, and

(c) each year, arrange for the Auditor-General to audit its books and records of account and its financial statements.

9. Annual report

(1) As soon as practicable after the end of each financial year, the Commission must provide the Minister with a report concerning the activities and the financial position of the Commission during the previous financial year.

(2) The Minister must table the Commission's annual report in Parliament within 14 days of receiving it from the Commission, but if Parliament is not in session at that time, the Minister must table the report within 14 days of the beginning of the next session of Parliament.

SCHEDULE 4

DISPUTE RESOLUTION: FLOW DIAGRAMS

This Schedule contains flow diagrams that provide guidelines to the procedures for the resolution of some of the more important disputes that may arise under this Act. This Schedule is not part of this Act. It does not have the force of law. The flow diagrams are intended only to provide assistance to those parties who may become involved in a dispute.

The flow diagrams do not indicate the rights that parties may have to seek urgent interim relief, nor do they indicate the right of review or appeal that parties have to the Labour Court or the Labour Appeal Court in certain cases. This Act sets out the circumstances in which these rights are available.

Awards and determinations by arbitrators are enforceable ultimately by the Labour Court.

FLOW DIAGRAMS I TO 14 [*Currently unavailable*]

SCHEDULE 5

AMENDMENT OF LAWS

1. Amendment of section 1 of Basic Conditions of Employment Act

Section 1 of the *Basic Conditions of Employment Act* is hereby amended by the substitution for subsection (3) of the following subsection -

"(3) *The Mines and Works Act, 1956* (Act No. 27 of 1956), the *Wage Act, 1957* (Act No. 5 of 1957), the *Manpower Training Act*, 1981 (Act No. 56 of 1981) and the *Labour Relations Act, 1995*, as well as any matter regulated under any of them in respect of an employee, shall not be affected by this Act, but this Act shall apply in respect of any such employee in so far as a provision thereof provides for any matter which is not regulated by or under any of the said Acts in respect of such employee.".

2. Amendment of section 35 of *Occupational Health and Safety Act, 1993*

Section 35 of the *Occupational Health and Safety Act, 1993* (Act No. 85 of 1993), is hereby amended-

(a) by the substitution for the words "Industrial court", wherever they occur in subsection (3), of the words "Labour Court"; and

(b) by the substitution for subsection (4) of the following subsection-

"(4) Any person who wishes to appeal in terms of subsection (3), shall within 60 days after the chief inspector's decision was given, lodge the appeal with the registrar of the Labour Court in accordance with the Labour Relations Act, 1995, and the rules of the Labour Court. ".

3. Amendment of section 2 of Pension Funds Act, 1956

Section 2 of the *Pension Funds Act, 1956* (Act No. 24 of 1956), is hereby amended by the substitution for subsection (1) of the following subsection:

(1) The provisions of this Act shall not apply in relation to any pension fund which has been established or continued in terms of a collective agreement concluded in a council in terms of the *Labour Relations Act 1995* (Act No. 66 of 1995), before the *Labour Relations Amendment Act, 1998*, has come into operation, nor in relation to a pension fund so established or continued and which, in terms of a collective agreement concluded in that council after the coming into operation of the labour *Relations Amendment Act, 1998*, is continued or further continued (as the case may be). However, such a pension fund shall from time to time furnish the Registrar with such statistical information as may be requested by the Minister.

4. Amendment of section 2 of *Medical Schemes Act, 1967*

Section 2(1) of the *Medical Schemes Act, 1967* (Act No. 72 of 1967), is hereby amended by the substitution for paragraph (g) of the following paragraph:

(f) shall, subject to the provisions of subsection (2A) apply with reference to -

(i) a particular medical scheme established or continued in terms of a collective agreement concluded in a council in terms of the *Labour Relations Act, 1995* (Act No. 66 of 1995), before the *Labour Relations Amendment Act, 1998*, has come into operation;

(ii) a particular medical scheme which was established or continued in the circumstances mentioned in subparagraph (i) and which, in terms of a collective agreement so concluded in that council after the coming into operation of the *Labour Relations Amendment Act, 1998*, is continued or further continued (as the case may be), only if the Minister, at the request of the Minister of Labour and by notice in the Gazette, has declared the said provisions to be applicable with reference to such a particular medical scheme;

5. Amendment of section 1 of *Insurance Act, 1943*

Section 1(1) of the *Insurance Act, 1943* (Act No. 27 of 1943), is hereby amended by the substitution for paragraph (d) of the definition of 'insurance business' of the following paragraph:

'(d) any transaction under the *Labour Relations Act, 1995* (Act No. 66 of 1995);'

6. Amendment of section 2 of *Friendly Societies Act, 1956*

Section 2(1) of the *Friendly Societies Act, 1956* (Act No. 25 of 1956), is hereby amended by the substitution for paragraph (g) of the following paragraph:

'(g) the relief or maintenance of members, or any group of members, when unemployed or in distressed circumstances, otherwise than in consequence of the existence of a strike or lockout as defined in section 213 of the *Labour Relations Act, 1995* (Act No. 66 of 1995);'

7. Amendment of section 3 of *Friendly Societies Act, 1956*

Section 3(1) of the *Friendly Societies Act, 1956*, is hereby amended by the substitution for paragraph (a) of the following paragraph:

'(a) which has been established or continued in terms of a collective agreement concluded in a council in terms of the *Labour Relations Act, 1995*. However, such a friendly society shall from time to time furnish

the registrar with such statistical information as may be requested by the Minister;'

Schedule 6

Laws Repealed By Section 212

Number and year of law Short title *Extent of repeal*

Act No.28 of 1956 Labour Relations Act, 1956 *The whole*

Act No.41 of 1959 Industrial Conciliation Amendment Act, 1959 *The whole*

Act No.18 of 1961 Industrial Conciliation Amendment Act, 1961 *The whole*

Act No.43 of 1966 Industrial Conciliation Amendment Act, 1966 *The whole*

Act No.61 of 1966 Industrial Conciliation Further Amendment Act, 1966 *The whole*

Act No.104 of 1967 Industrial Conciliation Amendment Act, 1967 *The whole*

Act No.21 of 1970 Industrial Conciliation Amendment Act, 1970 *The whole*

Act No.94 of 1979 Industrial Conciliation Amendment Act, 1979 *The whole*

Act No.95 of 1980 Industrial Conciliation Amendment Act, 1980 *The whole*

Act No.57 of 1981 Labour Relations Amendment Act, 1981 *The whole*

Act No.51 of 1982 Labour Relations Amendment Act, 1982 *The whole*

Act No. 2 of 1983 Labour Relations Amendment Act, 1983 *The whole*

Act No.81 of 1984 Labour Relations Amendment Act, 1984 *The whole*

Act No.83 of 1988 Labour Relations Amendment Act, 1988 *The whole*

Act No. 9 of 1991 Labour Relations Amendment Act, 1991 *The whole*

Act No.129 of 1993 General Law Third Amendment Act, 1993 *Section 9 only*

Act No.146 of 1993 Education Labour Relations Act, 1993 *The whole*

Act No.147 of 1993 Agricultural Labour Act, 1993 *Chapter I only*

Act No.50 of 1994 Agricultural Labour Amendment Act, 1994 *Section I only*

Proclamation No.105 Public Service Labour Relations Act, 1994 *The whole of 1994*

Proclamation No.128 Education Labour Relations Act, Amendment *The whole except of 1994*

Proclamation, 1994 *section 6*

Proclamation No.134 *Sections 1 and 2 only of 1994*

South African Police Service Labour Relations Regulations, *The whole 1995*

SCHEDULE 7

TRANSITIONAL ARRANGEMENTS

PART A – DEFINITIONS FOR THIS SCHEDULE

Definitions for this Schedule

In this Schedule, unless the context otherwise indicates -

"**Agricultural Labour Act**" means the *Agricultural Labour Act, 1993* (Act No. 147 of 1993);

"**Education Labour Relations Act**" means the *Education Labour Relations Act, 1993* (Act No. 146 of 1993);

"**Education Labour Relations Council**" means the council established by section 6(1) of the *Education Labour Relations Act*;

"**Labour Relations Act**" means the *Labour Relations Act, 1956* (Act No. 28 of 1956);

"**labour relations laws**" means the *Labour Relations Act*, the *Education Labour Relations Act*, Chapter I of the *Agricultural Labour Act* and the *Public Service Labour Relations Act*;

"**National Negotiating Forum**" means the National Negotiating Forum established for the South African Police Service by the South African Police Service Labour Relations Regulations, 1995;

"**pending**" means pending immediately before this Act comes into operation;

"**public service**" does not include the education sector;

"**Public Service Bargaining Council**" means the bargaining council referred to in section 5(1) of the *Public Service Labour Relations Act*;

"**Public Service Labour Relations Act**" means the *Public Service Labour Relations Act, 1994* (promulgated by *Proclamation No. 105 of 1994*);

"**registrar**" means the registrar of labour relations designated in terms of section 108; and

"**trade union**" includes an employee organisation.

PART B – UNFAIR LABOUR PRACTICES

PART C-PROVISIONS CONCERNING EXISTING TRADE UNIONS, EMPLOYERS' ORGANISATIONS, INDUSTRIAL COUNCILS AND CONCILIATION BOARDS

5. Existing registered trade unions and employers' organisations

(1) A trade union or employers' organisation registered or deemed to be registered in terms of the labour relations laws immediately before the commencement of this Act will be deemed to be a registered trade union or registered employers' organisation under this Act and continues to be a body corporate.

(2) As soon as practicable after the commencement of this Act, the registrar must enter-

(a) the name of the trade union in the register of trade unions;

(b) the name of the employers' organisation in the register of employers' organisations.

(3) A trade union or employers' organisation whose name has been entered in the appropriate register must be issued with a new certificate of registration.

(4) If any provision of the constitution of the trade union or employers' organisation does not comply with the requirements of section 95, the registrar may direct that trade union or employers' organisation, in writing, to rectify its constitution and submit it to the registrar within a period specified in the direction, which period may not be shorter than three months.

(5) If a trade union or employers' organisation falls to comply with a direction issued to it in terms of subitem (4), the registrar must notify the trade union or employers' organisation that cancellation of its registration is being considered because of the failure, and give the trade union or employers' organisation an opportunity to show cause why its registration should not be cancelled within 30 days of the notice.

(6) If, when the 30-day period expires, the relevant trade union or employers' organisation has not shown cause why its registration should not be cancelled, the registrar must cancel the registration of that trade union or employers' organisation by removing its name from the appropriate register or take other lesser steps that are appropriate and not inconsistent with this Act.

(7) The registrar must notify the relevant trade union or employers' organisation whether the registration of the trade union or employers' organisation has been cancelled.

(8) Cancellation in terms of subitem (6) takes effect-

(a) if the trade union or the employers' organisation has failed, within the time contemplated in section 111 (3), to appeal to the Labour Court against the cancellation, when that period expires; or

(b) if the trade union or the employers' organisation has lodged an appeal, when the decision of the registrar has been confirmed by the Labour Court.

6. Pending applications by trade unions or employers' organisations for registration, variation of scope, alteration of constitution or name

(1) Any pending application in terms of the labour relations laws for the registration, variation of scope of registration or alteration of the constitution or name of a trade union or an employers' organisation must be dealt with by the registrar as if the application had been made in terms of this Act.

(2) The registrar appointed in terms of the Public Service Labour Relations Act and the secretary of the Education Labour Relations Council appointed in terms of the *Education Labour Relations Act* must forward any pending application referred to in subitem (1) to the registrar.

(3) In any pending appeal in terms of section 16 of the *Labour Relations Act* or in terms of section 11 of the *Education Labour Relations Act* or in terms of section 11 of the *Public Service Labour Relations Act*, the Minister or the registrar of the industrial court or the registrar of the High Court, as the case may be, must refer the matter back to the registrar who must deal with the application as if it were an application made in terms of this Act.

(4) When dealing with any application referred to in subitem (1) or (2), the registrar-

(a) may condone any technical non-compliance with the provisions of this Act; and

(b) may require the applicant to amend its application within 60 days in order to comply with the provisions of this Act.

7. Industrial councils

(1) An industrial council registered or deemed to be registered in terms of the *Labour Relations Act* immediately before the commencement of this Act will be deemed to be a bargaining council under this Act and continues to be a body corporate.

(2) As soon as practicable after the commencement of this Act, the registrar must enter the name of the bargaining council in the register of councils.

(3) A bargaining council whose name has been entered in the register of councils must be issued with a certificate of registration.

(4) If any provision of the constitution of a bargaining council does not comply with the requirements of section 30, the registrar may direct the bargaining council, in writing, to rectify its constitution and submit it to the registrar within a period specified in the direction, which period may not be shorter than three months.

(5) If a bargaining council fails to comply with a direction issued to it in terms of subitem (4), the registrar must notify the bargaining council that cancellation of its registration is being considered because of the failure, and give the bargaining council an opportunity to show cause why its registration should not be cancelled within 30 days of the notice.

(6) If, when the 30-day period expires, the bargaining council has not shown cause why its registration should not be cancelled, the registrar must cancel the registration of that bargaining council by removing its name from the register of councils or take other lesser steps that are appropriate and not inconsistent with this Act.

(7) The registrar must notify the bargaining council whether the registration of the bargaining council has been cancelled.

(8) Cancellation in terms of subitem (6) takes effect-

(a) if the bargaining council has failed, within the time contemplated in section 111(3), to appeal to the Labour Court against the cancellation, when that period expires; or

(b) if the bargaining council has lodged an appeal, when the decision of the registrar has been confirmed by the Labour Court.

8. Pending applications by industrial councils for registration and variation of scope

(1) Any pending application for the registration or the variation of the scope of registration of an industrial council in terms of the *Labour Relations Act* must be dealt with as if it were an application made in terms of this Act.

(2) In any pending appeal in terms of section 16 of the *Labour Relations Act* against the refusal to register or vary the scope an industrial council, the Minister or the registrar of the Supreme [High] Court, as the case may be, must refer the matter to the registrar of labour relations who must consider the application anew as if it were an application for registration made in terms of this Act.

(3) When dealing with the application referred to in subitem (1) or (2), the registrar may-

(a) require the applicant to amend its application within 60 days in order to comply with the provisions of this Act; and

(b) condone technical non-compliance with the provisions of this Act.

8A. Pending enquiries by industrial registrar

Any pending inquiry conducted by the industrial registrar under section 12(3) of the *Labour Relations Act* must, after the commencement of this Act, be continued and dealt with further by the same person in terms of the *Labour Relations Act* as if it had not been repealed.

9. Pending applications by industrial councils for alteration of constitution or name

The provisions in item 6 apply, read with the changes required by the context, to any pending application for the alteration of the constitution or the name of an industrial council in terms of the Labour Relations Act.

10. Pending applications for admission of parties to industrial councils

(1) Any pending application for admission of a party to an industrial council in terms of section 21 A of the *Labour Relations Act* must be dealt with by the industrial council as if it were an application made in terms of this Act.

(2) Any pending appeal before the industrial court against a decision of an industrial council in terms of section 21 A of the *Labour Relations Act* must be with by council in the industrial court as if the application had been made for admission as a party to a bargaining council in terms of this Act.

(3) An appeal against a decision of an industrial council as contemplated in section 21 A of the *Labour Relations Act* may, despite the repeal of that Act, be instituted after the commencement of this Act, and must be heard by the Labour Court and dealt with as if the application for admission had been made in terms of this Act.

11. Pending applications to wind up and cancel registration of trade unions, employers' organisations and industrial councils

Any pending application to wind up or to cancel the registration of a trade union, employers' organisation or industrial council registered in terms of any labour relations law must be dealt with by the registrar as if the labour relations laws had not been repealed.

12. Existing agreements and awards of industrial councils and conciliation boards

(1)(a) Any agreement promulgated in terms of section 48, any award binding in terms of sections 49 and 50, and any order made in terms of section 51A, of the *Labour Relations Act* and in force immediately before the commencement of this Act, remains in force and enforceable, subject to paragraphs (b) and (c) of this subitem, and to subitem (5B), for a period of 18 months after the commencement of this Act or until the

expiry of that agreement, award or order, whichever is the shorter period, in all respects, as if the *Labour Relations Act* had not been repealed.

(b) On the request of any Council deemed by item 7(1) to be a bargaining council, an agreement referred to in paragraph (a) that had been concluded in that council -

(i) if it expires before the end of the 18-month period referred to in paragraph (a) may be extended or declared effective in accordance with the provisions of subsection (4)(a) of section 48 of the Labour Relations Act, for a period ending before or on the expiry of that 18-month period, which provisions, as well as any other provisions of the Labour Relations Act relating to the industrial council agreements extended or declared effective in terms of that subsection, will apply in all respects, read with the changes required by the context, in relation to any agreement extended or declared effective on the authority of this subparagraph as if those various provisions had not been repealed. However, the Minister may not on the authority of this subparagraph declare an agreement to be effective if it expires after 31 March 1997;

(ii) may be cancelled, in whole or in part, in accordance with the provisions of subsection (5) of section 48 of the Labour Relations Act, which provisions, as well as any other provisions of the Labour Relations Act relating to industrial council agreements wholly or partly cancelled in terms of that subsection, will apply in all respects, read with the changes required by the context, in relation to any agreement wholly or partly cancelled on the authority of this subparagraph as if those various provisions had not been repealed.

(c) An agreement referred to in paragraph (a) that had been concluded by parties to a conciliation board –

(i) if it expires before the end of the 18-month period referred to in paragraph (a), may, at the request of the parties that were represented on that conciliation board at the time of the conclusion of that agreement, be extended in accordance with, and in the manner provided for in, paragraph (b)(i) which will apply, read with the changes required by the context, in relation to the extension of agreements of that nature;

(ii) may, at the request of those parties, be cancelled, in whole or in part, in accordance with paragraph (b)(ii), which will apply, read with the changes required by the context, in relation to the cancellation of agreements of that nature.

(1A)(a) An agreement referred to in subitem (1) that had been concluded in a council deemed by item 7(1) to be a bargaining council, may be amended or amplified by a further agreement concluded in that

bargaining council and promulgated in accordance with the provisions of subsections (1) and (2) of section 48 of the Labour Relations Act, which provisions will apply, in all respects, read with the changes required by the context, for the purposes of this paragraph as if they had not been repealed.

(b) Subitems (1)(b), (3) and (8)(a) will apply to any further agreement concluded and promulgated on the authority of paragraph (a) of this subitem, in all respects, as if it were an agreement referred to in subitem (1)(a).

(2) An agreement promulgated in terms of section 12 of the Education Labour Relations Act and in force immediately before the commencement of this Act remains in force for a period of 18 months after the commencement of this Act or until the expiry of that agreement, whichever is the shorter period, as if the provisions of that Act had not been repealed.

(3) Despite the provisions of subitem (1), an agreement referred to in section 24(l)(x) of the Labour Relations Act that is in force immediately before the commencement of this Act will be deemed to be a closed shop agreement concluded in compliance with section 26 of this Act except that-

(a) the requirements in section 26(3)(d) and section 98(2)(b)(ii) become applicable at the commencement of the next financial year of the trade union party to the agreement; and

(b) the commencement date of the closed shop agreement shall be deemed to be the commencement date of this Act.

(4) Any pending request for the promulgation of an agreement in terms of section 48 of the Labour Relations Act must be dealt with as if the Labour Relations Act had not been repealed.

(5) Any request made before the expiry of six months after the commencement of this Act for the promulgation of an agreement entered into before the commencement of this Act must be dealt with as if the Labour Relations Act had not been repealed.

(5A) Any exemption from an agreement or award, or from an order, contemplated in subitem (1), that was in force immediately before the commencement of this Act, will remain in force for a period of 18 months after the commencement of this Act or until the period for which the exemption has been granted, has expired, whichever is the shorter period, as if the Labour Relations Act had not been repealed.

(5B) Any one or more of or all the provisions of an order referred to in subitem (1)(a) may be cancelled, suspended or amended by the Minister in accordance with the provisions of section 51A(4)(a) if the Labour Relations Act, which provisions will apply for the purposes of this subitem as if they had not been repealed.

(6) Any pending application for an exemption from all or any of the provisions of any agreement or award remaining in force in terms of subitem (1), or for an exemption from any provision of an order remaining in force in terms of that subitem, must -

(a) in the case if that agreement or award, be dealt with in terms of the provisions of section 51 and, whenever applicable, any other relevant provisions, of the Labour Relations Act, in all respects, read with the changes required by the context, as if the provisions in question had not been repealed;

(b) in the case of that order, be dealt with in terms of the provisions of section 51A and whenever applicable, any other relevant provisions of the Labour Relations Act, as if the provisions in question had not been repealed.

(7) An exclusion granted in terms of section 51(12) of the *Labour Relations Act* will remain in force until it is withdrawn by the Minister.

(8) After the commencement of this Act and despite the repeal of the Labour Relations Act –

(a) any person or class of persons bound by an agreement or award remaining in force in terms of subitem (1) may apply, in accordance with the provisions of section 51 of the Labour Relations Act, for an exemption from all or any of the provisions of that agreement or award (as the case may be). Any application so made must be dealt with in terms of the provisions of section 51 and, whenever applicable, any other relevant provisions of the Labour Relations Act, in all respects, as if the provisions in question had not been repealed;

(b) any person, bound by an order remaining in force in terms of subitem (1), may apply, in accordance with the provisions of section 51A of the Labour Relations Act, for an exemption from any provision of that order. Any application so made must be dealt with in terms of the provisions of section 51A and, whenever applicable, any other relevant provisions of the Labour Relations Act, in all respects, as if the provisions in question had not been repealed.

12A. Designated agents

(1) Any person appointed under section 62 of the *Labour Relations Act* as a designated agent of an industrial council deemed by item 7(1) to be a bargaining council, who holds that office immediately before the commencement of this Act, will be deemed to be a designated agent appointed for the bargaining council under section 33 of this Act.

(2) The certificate of appointment that had been issued in terms of section 62(2) of the *Labour Relations Act* to that designated agent, will be deemed to have been issued in terms of section 33(2) of this Act.

13. Existing agreements including recognition agreements

(1) For the purposes of this section, an agreement-

(a) includes a recognition agreement;

(b) excludes an agreement promulgated in terms of section 48 of the Labour Relations Act;

(c) means an agreement about terms and conditions of employment or any other matter of mutual interest entered into between one or more registered trade unions, on the one hand, and on the other hand-

(i) one or more employers;

(ii) one or more registered employers' organisations; or

(iii) one or more employers and one or more registered employers' organisations.

(2) Any agreement that was in force immediately before the commencement of this Act is deemed to be a collective agreement concluded in terms of this Act.

(3) Any registered trade union that is party to an agreement referred to in subitems (1) and (2) in terms of which that trade union was recognised for the purposes of collective bargaining is entitled to the organisational rights conferred by sections I I to 16 of Chapter III and in respect of employees that it represents in terms of the agreement, for so long as the trade union remains recognised in terms of the agreement as the collective bargaining agent of those employees.

(4) If the parties to an agreement referred to in subsection (1) or (2) have not provided for a procedure to resolve any dispute about the interpretation or application of the agreement as contemplated in section 24(l), the parties to the agreement must attempt to agree a procedure as soon as practicable after the commencement of this Act.

(5) An existing non-statutory agency shop or closed shop agreement is not binding unless the agreement complies with the provisions of this item. Sections 25 and 26 of this Act become effective 180 days after the commencement of this item.

PART D-MATTERS CONCERNING PUBLIC SERVICE

14. Public Service Bargaining Council

(1) The Public Service Bargaining Council will continue to exist, subject to item 20.

(2) The departmental and provincial chambers of the Public Service Bargaining Council will continue to exist, subject to item 20.

(3) Within 30 days after the commencement of this Act, the chambers of the Public Service Bargaining Council must furnish the registrar with copies of their constitutions signed by their authorised representatives.

(4) The constitutions of the chambers of the Public Service Bargaining Council, are deemed to be in compliance with section 30. However, where any provision of the constitution of a chamber does not comply with the requirements of section 30, the registrar may direct the chamber to rectify its constitution and re-submit the rectified constitution within the period specified in the direction, which period may not be shorter than three months.

(5) If a chamber fails to comply with a direction issued to it in terms of subitem (5), the registrar must-

(a) determine the amendments to the constitution in order to meet the requirements of section 30; and

(b) send a certified copy of the constitution to the chamber.

(6) A chamber of the Public Service Bargaining Council must deal with any pending application for admission of a party to it in terms of section 10 of the *Public Service Labour Relations Act* as if the application had been made in terms of this Act.

(7) Any pending appeal before the industrial court or an arbitrator against a decision of the Public Service Bargaining Council in terms of section 10 of the *Public Service Labour Relations Act* must, despite the repeal of any of the labour relations laws, be dealt with by the industrial court or arbitrator as if the application had been made in terms of this Act.

(8) Despite the repeal of the *Public Service Labour Relations Act*, an appeal in terms of section 10 of that Act against a decision of a chamber of the Public Service Bargaining Council may be instituted after the commencement of this Act and must be heard by the Labour Court and dealt with as if the application had been made in terms of this Act.

15. Collective agreements in the public service

The following provisions, read with the changes required by the context, of the Public Service Labour Relations Act, despite the repeal of that Act, will have the effect and status of a collective agreement binding on the State, the parties to the chambers of the Public Service Bargaining Council and all employees in the public service-

(a) section I for the purposes of this item unless the context otherwise indicates;

(b) section 4(10);

(c) section 5(2), (3), (4)(a) and (5);

(d) section 7;

(e) section 8, except that the reference to section 5(l) should be a reference to item 14(l);

(f) section 9(3);

(g) section 10(4) and (5);

(h) section 12;

(i) section 13, except that the reference to agreements should be a reference to collective agreements including the collective agreement contemplated in this item;

(j) sections 14, 15 and 16(2);

(k) section 17, except that the following subsection must be substituted for subsection (4)(b)- "If the application of a trade union for recognition is refused, the trade union, within 90 days of the notice of the refusal, may refer the dispute to arbitration."; and

(l) section 18, except that-

(i) the following subsection must be substituted for sub- section (10)(a)- "An employee who or the employee organisation which in terms of subsection (1) has declared a dispute, requested that a conciliation board be established and submitted the completed prescribed form, may refer the dispute to arbitration or to the Labour Court in terms of the provisions of this Act and, in respect of a dispute not contemplated by this Act, to any other court if-

(i) a meeting of a conciliation board is not convened as contemplated in subsection (3);

(ii) the head of department concerned falls to request the appointment of a chairperson in terms of subsection (5);

(iii) where applicable, the Commission fails to appoint a chairperson of the conciliation board in terms of subsection (5);

(iv) the parties involved in the conciliation board have failed to agree to extend the period of office of the conciliation board in terms of subsection (7) until a settlement is reached;

(v) the conciliation board does not succeed in settling the dispute within the period contemplated in subsection (7); or

(vi) the parties to the dispute agree that they will not be able to settle the dispute and submit written proof thereof to the Commission or relevant court."; and

(ii) any reference to the Department of Labour should be a reference to Commission.

16. Education Labour Relations Council

(1) The Education Labour Relations Council will continue to exist, subject to item 20.

(2) The registered scope of the Education Labour Relations Council is the State and those employees in respect of which the Educators' Employment Act, 1994 (Proclamation No. 138 of 1994), applies.

(3) Within 30 days after the commencement of this Act, the Education Labour Relations Council must furnish the registrar with a copy of its constitution signed by its authorised representatives, and with the other information or documentation.

(4) The constitution agreed on between the parties to the Education Labour Relations Council is deemed to be in compliance with this Act: However, where any provision of the constitution does not comply with the requirements of section 30, the registrar may direct the Council to rectify its constitution and re-submit the rectified constitution within the period specified in the direction, which period may not be shorter than three months.

(5) If the Education Labour Relations Council fails to comply with a direction issued to It in terms of subitem (5), the registrar must-

(a) determine the amendments to the constitution in order to meet the requirements of section 30; and

(b) send a certified copy of the constitution to the Council.

(6) The Education Labour Relations Council must deal with any pending application for admission to it in terms of the *Education Labour Relations Act* as if the application had been made in terms of this Act.

(7) Any pending appeal before the industrial court or an arbitrator against a decision of the Education Labour Relations Council must, despite the repeal of any of the labour relations laws, be dealt with by the industrial court or arbitrator as if the application had been made in terms of this Act.

(8) Despite the repeal of the Education Labour Relations Act, any appeal against a decision of the Education Labour Relations Council may be instituted after the commencement of this Act and must be heard by the Labour Court and dealt with as if the application had been made in terms of this Act.

17. Education sector collective agreements

The following provisions, read with the changes required by the context, of the Education Labour Relations Act, despite the repeal of that Act, will have the effect and status of a collective agreement binding on the State, the parties to the Education Labour Relations Council and all employees within registered scope-

(a) section 6(2) and (3);

(b) section 8(3), (4) and (5)(a);

(c) section 10(3) and (4);

(d) section 12(1) to (4), except that the disputes referred to in subsections (2) and (4) may be referred to arbitration only; and

(e) section 13 and section 14(2).

18. Negotiating Forums in South African Police Service

(1) The National Negotiating Forum will continue to exist subject to item 20.

(2) The registered scope of the National Negotiating Forum is the State and those employees in respect of whom the South African Police Service Rationalisation Proclamation, 1995 and the Act contemplated in section 214 of the Constitution applies.

(3) Within fourteen days of the commencement of this Act, or signing of its constitution by its authorised representatives, whichever is the later, the National Negotiating Forum must furnish the registrar with a copy of its constitution signed by its authorised representatives, and with the other information or documentation.

(4) The constitution agreed to by the National Negotiating Forum is deemed to be in compliance with this Act. However where any provision of the constitution does not comply with the requirements of section 30, the registrar may direct the National Negotiating Forum to rectify its constitution and re-submit the rectified constitution within fourteen days.

(5) The National Commissioner of the South African Police Service must deal with any pending application for registration and recognition in terms of the South made' African Police Service Labour Regulations as if the application had been in terms of this Act

19. Collective agreement in South African Police Service

The provisions of the South African Police Service Labour Relations Regulations, read with the changes required by the context, despite the repeal of those regulations, will have the effect and status of a collective agreement binding on the State, the

parties to the National Negotiating Forum and all the employees within its registered scope.

20. Consequences for public service bargaining institutions when Public Service Co-ordinating Bargaining Council is established

When the Public Service Co-ordinating Bargaining Council is established in terms of item 2 of Schedule I-

(a) the Public Service Bargaining Council and its chamber at central level will cease to exist; and

(b) the following chambers of the former Public Service Bargaining Council will continue to exist as juristic persons, despite paragraph (a), namely-

(i) the chamber for each department, which will be deemed to be a bargaining council that has been established under section 37(3)(a) of this Act for that department;

(ii) the chamber for each provincial administration, which will be deemed to be a bargaining council that has been established under section 37(3)(a) for that provincial administration; and

(c) the Education Labour Relations Council will be deemed to be a bargaining council that has been established in terms of section 37(3)(b) of this Act for the education sector;

(d) the National Negotiating Forum will be deemed to be a bargaining council that has been established in terms of section 37(3)(b) of this Act for the South African Police Service.

PART E-DISPUTES AND COURTS

21. Disputes arising before commencement of this Act

(1) Any dispute contemplated in the labour relations laws that arose before the commencement of this Act must be dealt with as if those laws had not been repealed.

(2) Despite subsection (1), a strike or lock-out that commences after this Act comes into operation will be dealt with in terms of this Act. This rule applies even if the dispute giving rise to the strike or lock-out arose before this Act comes into operation.

(3) For the purposes of a strike or lock-out referred to in subitem (2), compliance with section 65(l)(d) of the Labour Relations Act, section 19(l)(b) of the *Public Service Labour Relations Act* and section 15(l)(b) of the *Education Labour Relations Act* will be deemed to be compliance with section 64(l)(a) of this Act.

21A. Dispute resolution by councils before their accreditation

(1) Despite the provisions of section 52, a council may attempt to resolve through conciliation -

(a) any dispute that may be referred to it in terms of this Act before 1 December 1996; and

(b) if the council has applied for accreditation in terms of section 127 of this Act before 1 December 1996, also any dispute so referred to it after 1 December 1996 but before the governing body of the Commission has made a decision on that application in terms of section 127(5) of this Act.

(2) For the purposes of subitem (1), any person appointed by a council to perform on its behalf the dispute resolution function referred to in that subitem will be competent to exercise any of the powers conferred on a commissioner by section 142 of this Act, except the powers contemplated in subsection (1)(c) and (d) of that section. In applying that section for the purposes of this subitem, that section must be read with the changes required by the context, and any reference in that section to the director must be read as a reference to the secretary of the council.

(3) A council must refer to the Commission, for arbitration, any dispute that -

(a) was referred to the council in terms of this Act on the authority of subitem (1); and
(b) remains unresolved after the council has attempted to resolve it through conciliation; and
(c) is by this Act required to be resolved through arbitration.

22. Courts

(1) In any pending dispute in respect of which the industrial court or the agricultural labour court had jurisdiction and in respect of which proceedings had not been instituted before the commencement of this Act, proceedings must be instituted in the industrial court or agricultural labour court (as the case may be) and dealt with as if the labour relations laws had not been repealed. The industrial court or the agricultural labour court may perform or exercise any of the functions and powers that it had in terms of the labour relations laws when it determines the dispute.

(2) Any dispute in respect of which proceedings were pending in the industrial court or the agricultural labour court must be proceeded with as if the labour relations laws had not been repealed.

(2A) In relation to any proceedings which, in terms of this Schedule, are brought or continued before the industrial court, the rules which, immediately before the commencement of this Act, were in force under the provisions of paragraphs

(c) or (d) of section 17(22) of the Labour Relations Act will apply as if those provisions had not been repealed, subject to subitem (2B).

(2B) The Minister, after consultation with the president of the industrial court, may make rules in accordance with the provisions of paragraph (c) of section 17(22) of the Labour Relations Act and, in accordance with the provisions of paragraph (d) of that section, may repeal or alter any rule so made, as well as any of the rules contemplated in subitem (2A), as if those provisions had not been repealed and the Minister where the Board contemplated in those provisions.

(3) Any pending appeal before the Labour Appeal Court established by section 17A of the Labour Relations Act must be dealt with by the Labour Appeal Court as if the labour relations laws had not been repealed.

(4) Any pending appeal from a decision of that Labour Appeal Court or any appeal to the Appellate Division from a decision of the Labour Appeal Court in terms of section 17C and section 64 of the Labour Relations Act must be dealt with as if the labour relations laws had not been repealed.

(5) Any appeal from a decision of the industrial court or the agricultural labour court in terms of subitem (1) or (2), must be made to the Labour Appeal Court established by section 167 of this Act, and that Labour Appeal Court must deal with the appeal as if the labour relations laws had not been repealed.

(6) Despite the provisions of any other law, but subject to the Constitution, no appeal will lie against any judgement or order given or made by the Labour Appeal Court established by this Act in determining any appeal brought in terms of subitem (5).

22A. Minister may authorise Commission to perform industrial court's functions

(1) The Minister, after consulting the Commission, may authorise the Commission, by notice in the Government Gazette, to perform the industrial court's functions in terms of item 22(1) -

(a) in respect of the Republic as a whole or any province specified in the notice; and
(b) with effect from a date so specifies.

(2) The authorisation of the Commission in terms of subitem (1) -

(a) does not affect the competence of the industrial court in terms of item 22(1) to decide and finalise all pending matters that are partly heard by it as at the date when the authorisation takes effect, nor does it relieve that court of its functions, duties and responsibility with regard to those matters;

(b) does not empower the Commission to perform any of the industrial court's functions with regard to the matters mentioned in paragraph (a); and

(c) has the effect of substituting the Commission for the industrial court in so far as all other pending matters are concerned.

(3) In the application of this item -

(a) the provisions of item 22(1) will apply to the Commission in all respects as if it were the industrial court; and

(b) the rules governing the proceedings at the industrial court in terms of item 22(2A) and (2B) will apply to the proceeding at all pending matters to be decided by the Commission by virtue of its authorisation in terms of this item.

PART F-PENSION MATTERS

23. Continuation of existing pension rights of staff members of Commission upon assuming employment

(1) Any staff member of the Commission who, immediately before assuming employment with the Commission, is a member of the Government Service Pension Fund, the Temporary Employees Pension Fund or any other pension fund or scheme administered by the Department of Finance (hereinafter referred to as an officer or employee), may upon assuming that employment-

(a) choose to remain a member of that pension fund, and from the date of exercising the choice, the officer or employee, despite the provisions of any other law, will be deemed to be a dormant member of the relevant pension fund within the contemplation of section 15(l)(a) of the *General Pensions Act, 1979* (Act No. 29 of 1979);

(b) request to become a member of the Associated Institutions Pension Fund established under the *Associated Institutions Pension Fund Act, 1963* (Act No. 41 of 1963), as if the Commission had been declared an associated institution under section 4 of that Act; or

(c) request to become a member of any other pension fund registered under the *Pension Funds Act, 1956* (Act No. 24 of 1956).

(2) In the case where an officer or employee becomes a member of a fund after making a request in terms of subitem (1)(b) or (c)-

(a) the pension fund of which the officer or employee was a member ("the former fund") must transfer to the pension fund of which the officer or

employee becomes a member of ("the new fund") an amount equal to the funding level of the former fund multiplied by its actuarial liability in respect of that officer or employee at the date the officer or employee assumes office with the Commission, increased by the amount of interest calculated on that amount at the prime rate of interest from the date when employment with the Commission commenced up to the date of transfer of the amount;

(b) membership of the officer or employee of the former fund will lapse from the date when employment with the Commission commenced, and from that date the officer or employee will cease to have any further claim against the former fund except as provided in paragraph (a); and

(c) the former fund must transfer any claim it may have against the officer or employee, to the new fund.

(3) In the case where an officer or employee becomes a member of a new fund after a request in terms of subitem (1)(c) the State must pay the new fund an amount equal to the difference between the actuarial liability of the former fund in respect of the officer or employee as on the date of the commencement of employment with the Commission, and the amount transferred in terms of subitem (2)(c) to the new fund, increased by the amount of interest thereon calculated at the prime rate from the date of commencement of employment up to the date of the transfer of the amount.

(4) Subitems (2) and (3) will apply, read with the changes required by the context, in respect of any officer or employee who, by reason of having made a choice in terms of subitem (1)(a), has become a dormant member and thereafter requests that the pension benefits that had accrued, be transferred in terms of section 15A(1) of the General Pensions Act, 1979, to another pension fund referred to in that Act or a pension fund registered in terms of the *Pension Funds Act, 1956*.

(5) If, after an officer or employee has become a member of any other pension fund, by reason of having made a choice in terms of subitem (1)(c), a lump sum benefit has become payable by that pension fund by reason of the death, or the withdrawal or resignation from the pension fund, or retirement, of the officer or employee, or the winding-up of the pension fund, then, for the purposes of paragraph (e) of the definition of "gross income" in section I of the *Income Tax Act, 1962* (Act No. 58 of 1962), the pension fund will be deemed, in relation to such officer or employee, to be a fund referred to in paragraph (a) of the definition of "pension fund" in section I of that Act.

(6) For the purposes of this item-

"**actuarial liability**" of a pension fund in respect of a particular member or a group of members of the fund, means the actuarial liability that is determined by an actuary who the Minister has nominated for that purpose;

"**funding level**", in relation to a pension fund, means the market value of the assets of the fund stated as a percentage of the total actuarial liability of the fund, after those assets and liabilities have been reduced by the amount of the liabilities of the fund in respect of all its pensioners, as determined at the time of the most recent actuarial valuation of the fund or any review thereof carried out under direction of the responsible Minister; and

"**prime rate of interest**" means the average prime rate of interest of the three largest banks in the Republic.

PART G: ESSENTIAL SERVICES

24. Essential ser vices in the public service

(1) An essential service contemplated in section 20(1) of the Public Service *Labour Relations Act* will be deemed to have been designated an essential service in terms of this Act for a period ending on a date 10 months after the commencement of this Act or on the date of the publication of the notice of designation mentioned in subitem (2), in the Government Gazette, whichever date occurs first

(2) The essential services committee must, in the case of the services contemplated in section 20(1) of the Public Service Labour Relations Act, as soon as possible after the commencement of this Act, make a new designation, under section 71 of this Act, of services that are essential services. Such a designation will be effective from the date of the publication of the notice of designation in the Government Gazette in terms of section 71(8) of this Act.

25. Essential services provided for in Labour Relations Act

(1) The services, in which employers referred to in paragraphs (a) and (b) of section 46(1) of the Labour Relations Act, and employees referred to in paragraphs (e) and (f) of that section, are engaged, as well as any service contemplated in paragraphs (a) or (b) of section 46 (7) of that Act in which the employers and employees to whom a notice in terms of the latter section applied immediately before the commencement of this Act, are engaged, will be deemed to have been designated essential services in terms of this Act for a period ending on a date 10 months after the commencement of this Act or on the date of the publication of the notice of designation mentioned in subitem (2), in the Government Gazette, whichever date occurs first

(2) The essential services committee must, in the case of the services contemplated in subitem (1), as soon as possible after the commencement of this Act, make a new designation, under section 71 of this Act, of services that are essential services. Such a designation will be effective from the date of the

publication of the notice of the designation in the Government Gazette in terms of section 71 (8) of this Act.

PART H -TRANSITIONAL PROVISIONS ARISING OUT OF THE APPLICATION OF THE LABOUR RELATIONS AMENDMENT ACT, 2002

26. Definitions

In this part -

(a) 'Act' means the *Labour Relations Act, 1995* (Act No. 66 of 1995); and
(b) 'Amendment Act' means the *Labour Relations Amendment Act, 2002.*

27. Representation in conciliation and arbitration

(1) Until such time as rules made by the Commission in terms of section 115(2A)(m) of the Act come into force -

(a) sections 135(4), 138(4) and 140(1) of the Act remain in force as if they had not been repealed, and any reference in this item to those sections is a reference to those sections prior to amendment by this Amendment Act;
(b) a bargaining council may be represented in arbitration proceedings in terms of section 33A of the Act by a person specified in section 138(4) of the Act or by a designated agent or an official of the council;
(c) the right of any party to be represented in proceedings in terms of section 191 of the Act must be determined by -

(i) section 138(4) read with section 140(1) of the Act for disputes about a dismissal; and

(ii) section 138(4) of the Act for disputes about an unfair labour practice.

(2) Despite subitem 1(a), section 138(4) of the Act does not apply to an arbitration conducted in terms of section 188A of the Act.

28. Order for costs in arbitration

Section 138(10) of the Act, before amendment by the Amendment Act, remains in effect as if it had not been amended until such time as the rules made by the Commission in terms of section 115(2A)(j) of the Act came into effect.

29. Arbitration in terms of section 33A

(1) Until such time as the Minister promulgates a notice in terms of section 33A(13) of the Act, an arbitrator conducting an arbitration in terms of section 33A of the Act may impose a fine in terms of section 33A(8)(b) of the Act subject to the maximum fines set out in Table One and Two of this item.

(2) The maximum fine that may be imposed by an arbitrator in terms of section 33A(8)(b) of the Act -

(a) for a failure to comply with a provision of a collective agreement not involving a failure to pay any amount of money, it the fine determined in terms of Table One; and

(b) involving a failure to pay an amount due in terms of a collective agreement, is the greater of the amounts determined in terms of Table One and Table Two.

TABLE ONE: MAXIMUM PERMISSABLE FINE NOT INVOLVING AN UNDERPAYMENT

No previous failure to comply	R100 per employee in respect of whom the failure to comply occurs
A previous failure to comply in respect of the same provision	R200 per employee in respect of whom the failure to comply occurs
A previous failure to comply within the previous 12 months or two previous failures to comply in respect of the same provisions within three years	R300 per employee in respect of whom the failure to comply occurs
Three previous failures to comply in respect of the same provision within three years	R400 per employee in respect of whom the failure to comply occurs
Four or more previous failures to comply in respect of the same provision within three years	R500 per employee in respect of whom the failure to comply occurs

TABLE TWO: MAXIMUM PERMISSIBLE FINE INVOLVING AN UNDERPAYMENT

No previous failure to comply	25% of the amount due, including any interest owing on the amount at the date of the order
A previous failure to comply in respect of the same provision	50% of the amount due, including any interest owing on the amount at the date of the order
A previous failure to comply within the previous 12 months or two previous failures to comply in respect of the same provisions within three years	75% of the amount due, including any interest owing on the amount at the date of the order
Three previous failures to comply in respect of the same provision within three years	100% of the amount due, including any interest owing on the amount at the date of the order
Four or more previous failures to comply in respect of the same provision within three years	200% of the amount due, including any interest owing on the amount at the date of the order

30. Unfair labour practice

(1) Any dispute about an unfair labour practice referred to a council or Commission in accordance with items 3(1) and (2) of this Schedule prior to the commencement of the Amendment Act must be dealt with as if items 2,3 and 4 of this Schedule had not been repealed.

(2)(a) A dispute concerning any act or omission constituting an alleged unfair labour practice that occurred prior to the commencement of the Amendment Act that had not been referred to a council or Commission in terms of item 3(1) and 3(2) prior to the commencement of the Amendment Act must be dealt with in terms of section 191 of the Act.

(b) If a dispute contemplated in paragraph (a) is not referred to conciliation in terms of section 191(a) of the Act within 90 days of the commencement of the Amendment Act, the employee alleging the unfair labour practice must apply for condonation in terms of section 191(2) of the Act.

(c) Subitem (a) does not apply to an unfair labour practice in relation to probation.

31. Bargaining councils in public service

Any bargaining council that was established or deemed to be established in terms of section 37(3) of the Act prior to the Amendment Act coming into force is deemed to have been established in terms of section 37(2) of the Act.

32. Expedited applications in terms of section 189A(13)

Until such time as rules are made in terms of section 159 of the Act –

(a) the Labour Court may not grant any order in terms of section 189A(13) or (14) of the Act unless the applicant has given at least four days' notice to the respondent of an application for an order in terms of subsection (1). However, the Court may permit a sorter period of notice if -

(i) the applicant has given written notice to the respondent of the applicant's intention to apply for the granting of an order;

(ii) the respondent has been given a reasonable opportunity to be heard before a decision concerning that application is taken; and

(iii) the applicant has shown good cause why a period shorter than four days should be permitted;

(b) an application made in terms of section 189A(13) must be enrolled by the Labour Court on an expedited basis.

SCHEDULE 8

CODE OF GOOD PRACTICE: DISMISSAL

Introduction

(1) This code of good practice deals with some of the key aspects of dismissals for reasons related to conduct and capacity. It is intentionally general. Each case is unique, and departures from the norms established by this Code may be justified in proper circumstances. For example, the number of employees employed in an establishment may warrant a different approach.

(2) This Act emphasises the primacy of collective agreements. This Code is not intended as a substitute for disciplinary codes and procedures where these are the subject of collective agreements, or the outcome of joint decision-making by an employer and a workplace forum.

(3) The key principle in this Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees.

2. Fair reasons for dismissal

(1) A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty. Whether or not the procedure is fair is determined by referring to the guidelines set out below.

(2) This Act recognises three grounds on which a termination of employment might be legitimate. These are: the conduct of the employee, the capacity of the employee, and the operational requirements of the employer's business.

(3) This Act provides that a dismissal is automatically unfair if the reason for the dismissal is one that amounts to an infringement of the fundamental rights of employees and trade unions, or if the reason is one of those listed in section 187.

The reasons include participation in a lawful strike, intended or actual pregnancy and acts of discrimination.

(4) In cases where the dismissal is not automatically unfair, the employer must show that the reason for dismissal is a reason related to the employee's conduct or capacity, or is based on the operational requirements of the business. If the employer fails to do that, or fails to prove that the dismissal was effected in accordance with a fair procedure, the dismissal is unfair.

3. Disciplinary measures short of dismissal

Disciplinary procedures prior to dismissal

(1) All employers should adopt disciplinary rules that establish the standard of conduct required of their employees. The form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business.

In general, a larger business will require a more formal approach to discipline. An employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood. Some rules or standards may be so well established and known that it is not necessary to communicate them.

(2) The courts have endorsed the concept of corrective or progressive discipline.

This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings.

(3) Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences.

Dismissals for misconduct

(4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188.

(5) When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.

(6) The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.

4. Fair procedure

(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

(2) Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union.

(3) If the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the Commission or to any dispute resolution procedures established in terms of a collective agreement.

(4) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.

5. Disciplinary records

Employers should keep records for each employee specifying the nature of any disciplinary transgressions, the actions taken by the employer and the reasons for the actions.

6. Dismissals and industrial action

(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including-

(a) the seriousness of the contravention of this Act;

(b) attempts made to comply with this Act; and

(c) whether or not the strike was in response to unjustified conduct by the employer.

(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.

7. Guidelines in cases of dismissal for misconduct

Any person who is determining whether a dismissal for misconduct is unfair should consider-

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) if a rule or standard was contravened, whether or not-

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.

8. Incapacity: Poor work performance

(1) **Probation**

(a) An employer may require a newly-hired employee to serve a period of probation before the appointment of the employee is confirmed.

(b) The purpose of the probation is to give the employer an opportunity to evaluate the employee's performance before confirming the appointment.

(c) Probation should not be used for purposes not contemplated by this Code to deprive employees of the status of permanent employment. For example, a practice of dismissing employees who complete their probation periods and replacing them with newly-hired employees, is not consistent with the purpose of probation and constitutes an unfair labour practice.

(d) The period of probation should be determined in advance and be of reasonable duration. The length of the probationary period should be determined with reference to the nature of the job and the time it takes to determine the employee's suitability for continued employment.

(e) During the probationary period, the employee's performance should be assessed. An employer should give an employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service.

(f) If the employer determines that the employee's performance is below standard, the employer should advise the employee of any aspects in which the employer considers the employee to be failing to meet the required performance standards. If the employer believes that the employee is incompetent, the employer should advise the employee of the respects in which the employee is not competent. The employer may either extend the probationary period or dismiss the employee after complying with subitems (g) or (h), as the case may be.

(g) The period of probation may only be extended for a reason that relates to the purpose of probation. The period of extension should not be disproportionate to the legitimate purpose that the employer seeks to achieve.

(h) An employer may only decide to dismiss an employee or extend the probationary period after the employer has invited the employee to make representations and has considered any representations made. A trade union representative or fellow employee may make the representations on behalf of the employee.

(i) If the employer decides to dismiss the employee or to extend the probationary period, the employer should advise the employee of his or her rights to refer the matter to a council having jurisdiction, or to the Commission.

(j) Any person making a decision about the fairness of a dismissal of an employee for poor work performance during or on expiry of the probationary period ought to accept reason for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.

(2) After probation, an employee should not be dismissed for unsatisfactory performance unless the employer has-

(a) given the employee appropriate evaluation, instruction, training, guidance or counselling; and

(b) after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily.

(3) The procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter.

(4) In the process, the employee should have the right to be heard and to be assisted by a trade union representative or a fellow employee.

9. Guidelines in cases of dismissal for poor work performance

Any person determining whether a dismissal for poor work performance is unfair should consider –

(a) whether or not the employee failed to meet a performance standard; and

(b) if the employee did not meet a required performance standard whether or not-

(i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;

(ii) the employee was given a fair opportunity to meet the required performance standard; and

(iii) dismissal was an appropriate sanction for not meeting the required performance standard.

10. Incapacity: Ill health or injury

(1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.

(2) In the process of the investigation referred to in subsection (1) the employee I should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.

(3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.

(4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.

11. Guidelines in cases of dismissal arising from ill health or injury

Any person determining whether a dismissal arising from ill health or injury is unfair should consider-

(a) whether or not the employee is capable of performing the work; and

(b) if the employee is not capable-

(i) the extent to which the employee is able to perform the work;

(ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and

(iii) the availability of any suitable alternative work.

SCHEDULE 10

POWERS OF DESIGNATED AGENT OF BARGAINING COUNCIL

(Section 33)

(1) A designated agent may, without warrant or notice at any reasonable time, enter any workplace or any other place where an employer carries on business or keeps employment records, that is not a home, in order to monitor or enforce compliance with a collective agreement concluded in the bargaining council.

(2) A designated agent may only enter a home or any place other than a place referred to in subitem (1) -

(a) with the consent of the owner or occupier; or
(b) if authorised to do so by the Labour Court in terms of subitem (3);

(3) The Labour Court may issue an authorisation contemplated in subitem (2)(b) only on written application by a designated agent who states under oath or affirmation the reasons for the need to enter a place, in order to monitor or enforce compliance with a collective agreement concluded in the bargaining council.

(4) If it is practicable to do so, the employer and a trade union representative must be notified that the designated agent is present at a workplace and of the reason for the designated agent’s presence.

(5) In order to monitor or enforce compliance with a collective agreement, a designated agent may -

(a) require a person to disclose information, either orally or in writing, and either alone or in the presence of witnesses, on a matter to which a collective agreement relates, and require that disclosure to be under oath or affirmation;
(b) inspect and question a person about any record or document to which a collective agreement relates;
(c) copy any record or document referred to in paragraph (b) or remove these to make copies or extracts;
(d) require a person to produce or deliver to a place specified by the designated agent any record or document referred to in paragraph (b) for inspection;
(e) inspect, question a person about, and if necessary remove, an article, substance or machinery present at a place referred to in subitems (1) and (2);
(f) question a person about any work performed; and
(g) perform any other prescribed function necessary for monitoring or enforcing compliance with a collective agreement.

(6) A designated agent may be accompanied by an interpreter and any other person reasonably required to assist in conducting an inspection.

(7) A designated agent must -

(a) produce on request a copy of the authorisation referred to in subitem (3);
(b) provide a receipt for any record or document removed in terms of subitem (5)(e); and
(c) return any removed record, document or item within a reasonable time.

(8) Any person who is questioned by a designated agent in terms of subitem (5) must answer all questions lawfully put to that person truthfully and to the best of that person's ability.

(9) An answer by any person to a question by a designated agent in terms of this item may not be used against that person in any criminal proceedings, except proceedings in respect of a charge of perjury or making a false statement.

(10) Every employer and each employee must provide any facility and assistance at a workplace that is reasonably required by a designated agent to effectively perform the designated agent's functions.

(11) The bargaining council may apply to the Labour Court for an appropriate order against any person who -

(a) refuses or fails to answer all questions lawfully put to that person truthfully and to the best of that person's ability;
(b) refuses or fails to comply with any requirement of the designated agent in terms of this item; or

(c) hinders the designated agent in the performance of the agent's functions in terms of this item.

(12) For the purposes of this Schedule, a collective agreement is deemed to include any basic condition of employment which constitutes a term of a contract of employment in terms of section 49(1) of the Basic Conditions of Employment Act.