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Insights into the Labour Relations Amendment Bill

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Introduction

- Employment Amendment Bill published 17 December 2010
- Open for comment until 17 February 2011
- Four bills
 - Labour Relations Amendment Bill (“LRAB”)
 - Basic Conditions of Employment Amendment Bill (“BCEAB”)
 - Employment Equity Amendment Bill (“EEAB”)
 - Employment Services Bill (“ESB”)





Introduction

- proposed amendments, if implemented, will dramatically change employment and labour law landscape we have known for the last 15 (fifteen) years





Prescribed earnings threshold (“PET”) (s187A)

- Employees earning in excess of prescribed earnings threshold (“PET”) cannot refer labour disputes in respect of :
 - Unfair dismissals (s185, 186 and 188)
 - Unfair labour practice (“ULP”) (s188)
 - Retrenchments (s189/189A)
 - Transfer of business (s197)to the CCMA
- Automatically unfair dismissal referrals (s187) not affected





Prescribed earnings threshold (s187A)

- Explanatory memorandum justifies exclusion of employees earning in excess of the PET on the basis that they can afford to “approach the courts”
- S157(1)(c) of the LRA and s77(3) of the BCEA, as to be amended, to give the Labour Court exclusive jurisdiction in respect of “the termination of a contract of employment”
- Do the Labour Courts have jurisdiction to hear an unfair dismissal / ULP in terms of s157(1)(c) and s77(3) in respect of employees earning in excess of PET?
- The terminology used suggests common law breaches of contract rather than unfair dismissals!





Prescribed earnings threshold (s187A)

- An ULP does not arise out of the termination of a contract of employment
- s191(5)(a) is pre-emptory in requiring all such matters referred to the Labour Court (other than contract disputes) to be conciliated at the CCMA
- The Labour Court does not appear to have jurisdiction in respect of such disputes
- S23 of the Constitution stipulates that everyone has the right to fair labour practices





Prescribed earnings threshold (s187A)

- S187A of the LRAB appears to negate such right in respect of employees who earn in excess of PET
- What about a purposive interpretation?
- Consideration should be given to a direct referral of employee who earns in excess of the threshold to the Labour Court





Labour brokers (“TES”)

- S198 of the LRA which deems employees to be employees of the TES is to be repealed
- TES will become private employment agencies in terms of the ESB and must register and a TES is limited to placement services
- The definition of private employment agency makes it clear that the persons provided by the service “tender services or perform work for the employer” (client)
- The effect of the above is that labour broking as it is practised will end and the client will become the employer





Labour brokers

- Is dual employment possible and does it matter?
- The provision may be unconstitutional in that it may breach s22 of the Constitution in respect of freedom of trade, occupation and profession. See *Africa Personnel Services (Pty) Ltd vs Government of the Republic of Namibia SA51/2008 2009 NASC17*
- Possible solution
 - Provide for increased regulation and extend joint and several liability of labour brokers
 - Impose PET excluding high earners e.g. IT industry from proposed repeal of s198





Transfers of business (s197)

- ““transfer” means the business **[by]** from one employer (“the old employer”) to another employer (“the new employer”) as a going concern”
- New definition negates the recent SCA decision in *SAA vs AUSA & Others* which required “at least two positive actors in the process”
- Whilst second generation transfers will be facilitated by the new definition it will also impact upon ordinary commercial contracts where a company (A) cancels a contract with a contractor (B) and appoints another contractor (C)





Transfers of business (s197)

- See *Sander vs Cell C Provider Company (Pty) Ltd & Others*
- To avoid such a possibility where the company cancelling the contracts has never been the employer it may be wise to define “transfer” “to exclude a transfer which arises solely as a consequence of the cancellation and award of a new contract by a person that was not the employer of the “transferring employees” prior to the cancellation of such contract”





Con arb proceedings (s191 5A)

- Con Arb becomes mandatory unless:
 - The Commissioner and the parties agree otherwise
 - The Commissioner concludes that it is unreasonable for the arbitration to commence immediately due to:
 - The nature of the questions of law
 - Complexity
 - Public interest
- The effect of such amendment will be:
 - The *de facto* abandonment of conciliation





Con arb proceedings (s191 5A)

- The need for employers to prepare for each and every matter at the CCMA as a defended matter and increased costs
- If such amendment is proceeded with consideration should be given to:
 - A mandatory pre-arb process
 - The filing of a simple statement of case
 - The determination of jurisdiction of matters at arbitration in advance of enrolment for arbitration on the merits





Fixed term contracts and ULP's (s186(1); s200B & s200C)

- Dismissal now includes an employee engaged under a fixed term contract who reasonably expected the employer “to offer the employee an indefinite contract of employment on the same or similar terms but the employer offered it on less favourable terms or did not offer it where there was a reasonable expectation”
- s200B provides “an employee must be employed permanently unless the employer can establish a justification for employment on a fixed term”





Fixed term contracts and ULP's (s186(1); s200B & s200C)

- s200C provides “an employee must have recourse against the employer and its client company where there is an unfair labour practice”
- Significant implications:
 - Reasonable expectation of permanent employment?
 - Ought the onus to be on the employer to establish a justification for fixed term employment?





Fixed term contracts and ULP's (s186(1); s200B & s200C)

- What is the definition of "Client Company"?
- A new right of recourse for employees in respect of ULP's against their employer clients?
- Constitutional issues?





Other important amendments

Representation

- S115 (2A) empowers the CCMA to make rules regulating “the representation of parties in conciliation and arbitration proceedings, including the limitation or prohibition of representation in those proceedings
 - What representation is to be prohibited?
 - Consultants and/or legal representatives?
 - *Mahumani vs MEC of Tourism* (SCA) and Constitutional issues?





Other important amendments

Conciliation in the public interest

- S150(1) permits the Director in the absence of a request to appoint a Commissioner to conciliate
- S150(5) provides that “unless the parties to the dispute agree otherwise, such appointment suspends the right to strike
- Questions that arise
 - For how long is the right to strike suspended?
 - Will the provisions pass Constitutional muster?
 - Is the provision open to abuse when the State is the employer?
e.g. recent public sector strike





Other important amendments

Right to review

- Section 157(e) limits the right to review to s145 i.e. no common law right to review
- S158(1A) prohibits any decision to be taken on review in respect of conciliation or arbitration proceedings until the dispute is finalised by the CCMA or Bargaining Council
- S158(1)(g) is deleted and the Labour Court's powers of review appear to be now limited to arbitration awards and not rulings





Other important amendments

Inquiry by arbitrator

- Inquiry by arbitrator is introduced to replace a pre-arbitration dismissal
- s188A(11) requires an inquiry by an arbitrator if an employee alleges a contravention of the Protected Disclosures Act or the victimisation provisions in s5 of the LRA





Other important amendments

Writs of Execution

- S143(3A) introduces the enforcement of CCMA awards or writs of execution in the Magistrates Courts
 - Proliferation of Magistrates Court writs
 - Stays of execution in Labour Court and/or Magistrates Court?



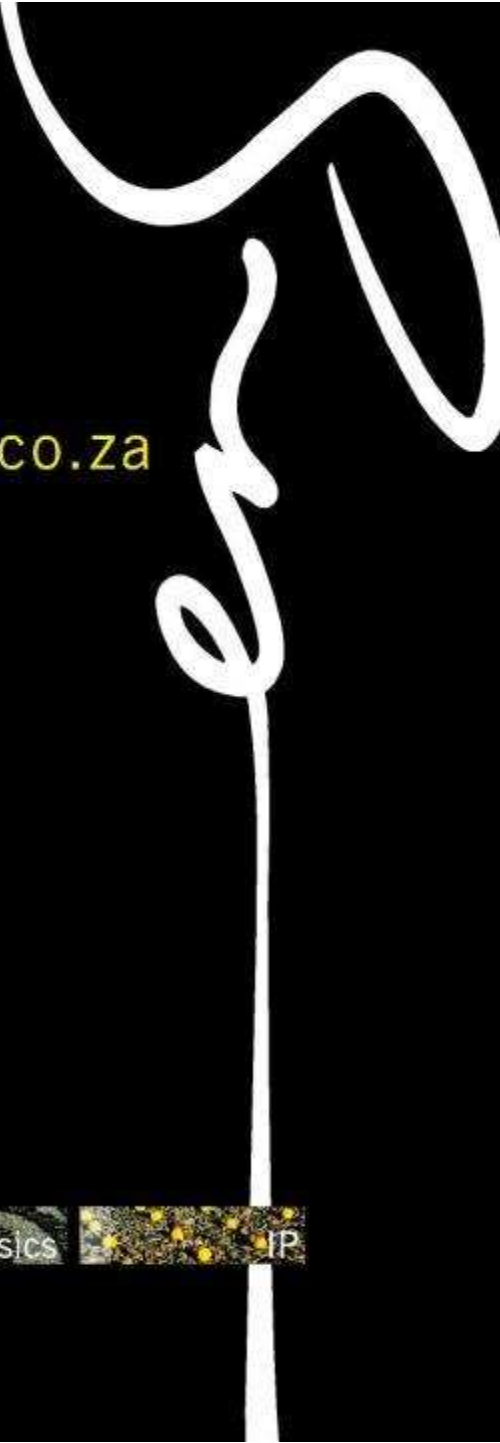


Conclusion





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