

## LABOUR RELATIONS ACT 66 OF 1995

[ASSENTED TO 29 NOVEMBER 1995]

[DATE OF COMMENCEMENT: 11 NOVEMBER 1996]

(Unless otherwise indicated)

*(English text signed by the President)*

### **as amended by**

Labour Relations Amendment Act 42 of 1996  
Basic Conditions of Employment Act 75 of 1997  
Labour Relations Amendment Act 127 of 1998  
Labour Relations Amendment Act 12 of 2002  
Intelligence Services Act 65 of 2002  
Electronic Communications Security (Pty) Ltd Act 68 of 2002  
General Intelligence Laws Amendment Act 52 of 2003  
Prevention and Combating of Corrupt Activities Act 12 of 2004  
Public Service Amendment Act 30 of 2007

### **Regulations under this Act**

CODE OF GOOD PRACTICE ON DISMISSAL BASED ON OPERATIONAL REQUIREMENTS <sup>i\*</sup> (GenN 1517 in GG 20254 of 16 July 1999)

CODE OF GOOD PRACTICE ON PICKETING (GenN 765 in GG 18887 of 15 May 1998)

CODE OF GOOD PRACTICE ON KEY ASPECTS OF HIV/AIDS AND EMPLOYMENT (GN R1298 in GG21815 of 1 December 2000)

CODE OF GOOD PRACTICE ON THE HANDLING OF SEXUAL HARASSMENT CASES (GenN 1367 in GG 19049 of 17 July 1998)

CODE OF GOOD PRACTICE: WHO IS AN EMPLOYEE (GenN 1774 in GG 29445 of 1 December 2006)

ESSENTIAL SERVICES COMMITTEE REGULATIONS (GN R1865 in GG 17576 of 15 November 1996)

FACILITATION REGULATIONS (GN R1445 in GG 25515 of 10 October 2003)

GUIDELINES ISSUED IN TERMS OF SECTION 95(8) (GN R1446 in GG25515 of 10 October 2003)

LABOUR RELATIONS REGULATIONS (GN R1442 in GG 25515 of 10 October 2003)

RULES FOR THE CONDUCT OF PROCEEDINGS BEFORE THE CCMA (GN R1448 in GG 25515 of 10 October 2003)

RULES FOR THE CONDUCT OF PROCEEDINGS IN THE INDUSTRIAL COURT (GN R771 in GG 12408 of 5 April 1990)

RULES FOR THE CONDUCT OF PROCEEDINGS IN THE LABOUR COURT (GN 1665 in GG 17495 of 14 October 1996)

RULES REGULATING THE CONDUCT OF THE PROCEEDINGS OF THE LABOUR APPEAL COURT (GN 1666 of 14 October 1996)

TARIFF OF FEES (GN R1444 in GG 25515 of 10 October 2003)

### **ACT**

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

**to give effect to section 27 of the Constitution<sup>ii\*</sup>;**

**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 lock-out in conformity with the Constitution<sup>iii\*</sup>;**

**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 [sic] 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.**

#### ARRANGEMENT OF SECTIONS

[Arrangement of sections amended by s. 29 of Act 127 of 1998.]

*Section*

#### CHAPTER I

##### PURPOSE, APPLICATION AND INTERPRETATION

- 1 Purpose of this Act
- 2 Exclusion from application of this Act
- 3 Interpretation of this Act

#### CHAPTER II

##### FREEDOM OF ASSOCIATION AND GENERAL PROTECTIONS

- 4 Employees' right to freedom of association
- 5 Protection of employees and persons seeking employment
- 6 Employers' right to freedom of association
- 7 Protection of employers' rights
- 8 Rights of trade unions and employers' organisations
- 9 Procedure for disputes
- 10 Burden of proof

#### CHAPTER III

##### COLLECTIVE BARGAINING

##### PART A - ORGANISATIONAL RIGHTS

- 11 Trade union representativeness
- 12 Trade union access to workplace
- 13 Deduction of trade union subscriptions or levies
- 14 Trade union representatives
- 15 Leave for trade union activities
- 16 Disclosure of information
- 17 Restricted rights in domestic sector
- 18 Right to establish thresholds of representativeness
- 19 Certain organisational rights for trade union party to council
- 20 Organisational rights in collective agreements
- 21 Exercise of rights conferred by this Part
- 22 Disputes about organisational rights

##### PART B - COLLECTIVE AGREEMENTS

- 23 Legal effect of collective agreement
- 24 Disputes about collective agreements
- 25 Agency shop agreements
- 26 Closed shop agreements

##### PART C - BARGAINING COUNCILS

- 27 Establishment of bargaining councils
- 28 Powers and functions of bargaining council
- 29 Registration of bargaining councils

30	Constitution of bargaining council
31	Binding nature of collective agreement concluded in bargaining council
32	Extension of collective agreement concluded in bargaining council
33	Appointment and powers of designated agents of bargaining councils
33A	Enforcement of collective agreements by bargaining councils [S. 33A inserted by s. 7 of Act 12 of 2002.]
34	Amalgamation of bargaining councils
	<b>PART D - BARGAINING COUNCILS IN THE PUBLIC SERVICE</b>
35	Bargaining councils in public service
36	Public Service Co-ordinating Bargaining Council
37	Bargaining councils in sectors in public service
38	Disputes between bargaining councils in public service [S. 38 substituted by s. 9 of Act 12 of 2002.]
	<b>PART E - STATUTORY COUNCILS</b>
39	Application to establish statutory council
40	Establishment and registration of statutory council
41	Establishment and registration of statutory council in absence of agreement
42	Certificate of registration of statutory council
43	Powers and functions of statutory councils
44	Ministerial determinations
45	Disputes about determinations
46	Withdrawal of party from statutory council
47	Appointment of new representative of statutory council
48	Change of status of statutory council
	<b>PART F - GENERAL PROVISIONS CONCERNING COUNCILS</b>
49	Representativeness of council
50	Effect of registration of council
51	Dispute resolution functions of council
52	Accreditation of council or appointment of accredited agency
53	Accounting records and audits
54	Duty to keep records and provide information to registrar
55	Delegation of functions to committee of council
56	Admission of parties to council
57	Changing constitution or name of council
58	Variation of registered scope of council
59	Winding-up of council
60	Winding-up of council by reason of insolvency
61	Cancellation of registration of council
62	Disputes about demarcation between sectors and areas
63	Disputes about Parts A and C to F
	<b>CHAPTER IV</b>
	<b>STRIKES AND LOCK-OUTS</b>
64	Right to strike and recourse to lock-out
65	Limitations on right to strike or recourse to lock-out
66	Secondary strikes
67	Strike or lock-out in compliance with this Act
68	Strike or lock-out not in compliance with this Act
69	Picketing
70	Essential services committee
71	Designating a service as an essential service
72	Minimum services
73	Disputes about whether a service is an essential service
74	Disputes in essential services

- 75 Maintenance services
- 76 Replacement labour
- 77 Protest action to promote or defend socio-economic interests of workers

#### CHAPTER V

#### WORKPLACE FORUMS

- 78 Definitions in this Chapter
- 79 General functions of workplace forum
- 80 Establishment of workplace forum
- 81 Trade union based workplace forum
- 82 Requirements for constitution of workplace forum
- 83 Meetings of workplace forum
- 84 Specific matters for consultation
- 85 Consultation
- 86 Joint decision-making
- 87 Review at request of newly established workplace forum
- 88 Matters affecting more than one workplace forum in an employer's operation
- 89 Disclosure of information
- 90 Inspection and copies of documents
- 91 Breach of confidentiality
- 92 Full-time members of workplace forum
- 93 Dissolution of workplace forum
- 94 Disputes about workplace forums

#### 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
- 96 Registration of trade unions or employers' organisations
- 97 Effect of registration of trade union or employers' organisation
- 98 Accounting records and audits
- 99 Duty to keep records
- 100 Duty to provide information to registrar
- 101 Changing constitution or name of registered trade unions or employers' organisations
- 102 Amalgamation of trade unions or employers' organisations
- 103 Winding-up of trade unions or employers' organisations  
[Heading substituted by s. 19 (a) of Act 12 of 2002.]
- 104 Winding-up of trade unions or employers organisations by reason of insolvency
- 105 Declaration that trade union is no longer independent  
[Heading substituted by s. 20 of Act 12 of 2002.]
- 106 Cancellation of registration of trade unions or employers' organisations

#### PART B - REGULATION OF FEDERATIONS OF TRADE UNIONS AND EMPLOYERS' ORGANISATIONS

- 107 Regulation of federations of trade unions or employers' organisations

#### PART C - REGISTRAR OF LABOUR RELATIONS

- 108 Appointment of registrar of labour relations
- 109 Functions of registrar
- 110 Access to information

#### PART D - APPEALS FROM REGISTRAR'S DECISION

- 111 Appeals from registrar's decision

#### CHAPTER VII

#### DISPUTE RESOLUTION

#### PART A - COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

- 112 Establishment of Commission for Conciliation, Mediation and Arbitration

113	Independence of Commission
114	Area of jurisdiction and offices of Commission
115	Functions of Commission
116	Governing body of Commission
117	Commissioners of Commission
118	Director of Commission
119	Acting director of Commission
120	Staff of Commission
121	Establishment of committees of Commission
122	Finances of Commission
123	Circumstances in which Commission may charge fees
124	Contracting by Commission, and Commission working in association with any person
125	Delegation of governing body's powers, functions and duties
126	Limitation of liability and limitation on disclosure of information
<b>PART B - ACCREDITATION OF AND SUBSIDY TO COUNCILS AND PRIVATE AGENCIES</b>	
127	Accreditation of councils and private agencies
128	General provisions relating to accreditation
129	Amendment of accreditation
130	Withdrawal of accreditation
131	Application to renew accreditation
132	Subsidy to council or private agency
<b>PART C - RESOLUTION OF DISPUTES UNDER AUSPICES OF COMMISSION</b>	
133	Resolution of disputes under auspices of Commission
134	Disputes about matters of mutual interest
135	Resolution of disputes through conciliation
136	Appointment of commissioner to resolve dispute through arbitration
137	Appointment of senior commissioner to resolve dispute through arbitration
138	General provisions for arbitration proceedings
139	Special provisions for arbitrating disputes in essential services
140	Special provisions for arbitrations about dismissals for reasons relating to conduct or capacity
141	Resolution of disputes if parties consent to arbitration under auspices of Commission
142	Powers of commissioner when attempting to resolve disputes
142A	Making settlement agreement arbitration award [S. 142A inserted by s. 31 of Act 12 of 2002.]
143	Effect of arbitration awards
144	Variation and rescission of arbitration awards and rulings [S. 144 substituted by s. 33 of Act 12 of 2002.]
145	Review of arbitration awards
146	Exclusion of Arbitration Act
147	Performance of dispute resolution functions by Commission in exceptional circumstances
148	Commission may provide advice
149	Commission may provide assistance
150	Commission may offer to resolve dispute through conciliation
<b>PART D - LABOUR COURT</b>	
151	Establishment and status of Labour Court
152	Composition of Labour Court
153	Appointment of judges of Labour Court
154	Tenure, remuneration and terms and conditions of appointment of Labour Court judges
155	Officers of Labour Court
156	Area of jurisdiction and seat of Labour Court
157	Jurisdiction of Labour Court
158	Powers of Labour Court

159	Rules Board for Labour Courts and rules for Labour Court
160	Proceedings of Labour Court to be carried on in open court
161	Representation before Labour Court
162	Costs
163	Service and enforcement of orders of Labour Court
164	Seal of Labour Court
165	Variation and rescission of orders of Labour Court
166	Appeals against judgment or order of Labour Court
	<b>PART E - LABOUR APPEAL COURT</b>
167	Establishment and status of Labour Appeal Court
168	Composition of Labour Appeal Court
169	Appointment of other judges of Labour Appeal Court [S. 169 substituted by s. 47 of Act 42 of 1996.]
170	Tenure, remuneration and terms and conditions of appointment of Labour Appeal Court judges
171	Officers of Labour Appeal Court
172	Area of jurisdiction and seat of Labour Appeal Court
173	Jurisdiction of Labour Appeal Court
174	Powers of Labour Appeal Court on hearing of appeals
175	Labour Appeal Court may sit as court of first instance
176	Rules for Labour Appeal Court
177	Proceedings of Labour Appeal Court to be carried on in open court
178	Representation before Labour Appeal Court
179	Costs
180	Service and enforcement of orders
181	Seal of Labour Appeal Court
182	Judgments of Labour Appeal Court binding on Labour Court
183	Labour Appeal Court final court of appeal
	<b>PART F - GENERAL PROVISIONS APPLICABLE TO COURTS ESTABLISHED BY THIS ACT</b>
184	General provisions applicable to courts established by this Act
	<b>CHAPTER VIII</b>
	<b>UNFAIR DISMISSAL AND UNFAIR LABOUR PRACTICE</b>
	[Heading substituted by s. 39 of Act 12 of 2002.]
185	Right not to be unfairly dismissed or subjected to unfair labour practice [S. 185 substituted by s. 40 of Act 12 of 2002.]
186	Meaning of dismissal and unfair labour practice [Heading substituted by s. 41 (a) of Act 12 of 2002.]
187	Automatically unfair dismissals
188	Other unfair dismissals
188A	Agreement for pre-dismissal arbitration [S. 188A inserted by s. 43 of Act 12 of 2002.]
189	Dismissals based on operational requirements
189A	Dismissals based on operational requirements by employers with more than 50 employees [S. 189A inserted by s. 45 of Act 12 of 2002.]
190	Date of dismissal
191	Disputes about unfair dismissals and unfair labour practices [Heading substituted by s. 46 (a) of Act 12 of 2002.]
192	Onus in dismissal disputes
193	Remedies for unfair dismissal and unfair labour practice [Heading substituted by s. 47 (a) of Act 12 of 2002.]
194	Limits on compensation
195	Compensation is in addition to any other amount
196	Severance pay

- 197 Transfer of contract of employment  
197A Transfer of contract of employment in circumstances of insolvency  
[S. 197A inserted by s. 50 of Act 12 of 2002.]  
197B Disclosure of information concerning insolvency  
[S. 197B inserted by s. 50 of Act 12 of 2002.]

CHAPTER IX  
GENERAL PROVISIONS

- 198 Temporary employment services  
199 Contracts of employment may not disregard or waive collective agreements or arbitration awards  
200 Representation of employees or employers  
200A Presumption as to who is employee  
[S. 200A inserted by s. 51 of Act 12 of 2002.]  
201 Confidentiality  
202 Service of documents  
203 Codes of good practice  
204 Collective agreement, arbitration award or wage determination to be kept by employer  
205 Records to be kept by employer  
206 Effect of certain defects and irregularities  
207 Ministers empowered to add and change to Schedules  
208 Regulations  
208A Delegations  
[S. 208A inserted by s. 51 of Act 42 of 1996.]  
209 This Act binds the State  
210 Application of Act when in conflict with other laws  
211 Amendment of laws  
212 Repeal of laws, and transitional arrangements  
213 Definitions  
214 Short title and commencement

Schedule 1

ESTABLISHMENT OF BARGAINING COUNCILS FOR PUBLIC SERVICE

- 1 Definitions for this Schedule  
2 Establishment of Public Service Co-ordinating Bargaining Council  
3 Establishment of bargaining councils in sectors

Schedule 2

GUIDELINES FOR CONSTITUTION OF WORKPLACE FORUM

- 1 Introduction  
2 Number of seats in workplace forums (section 82 (1) (a))  
3 Distribution of seats to reflect occupational structure (section 82 (1) (b))  
4 Elections (section 82 (1) (c), (d), (g), (h), (i) and (j))  
5 Terms of office (section 82 (1) (k), (l) and (m))  
6 Meetings of workplace forum (section 82 (1) (n))  
7 Time off for members of workplace forum (section 82 (1) (p))  
8 Facilities to be provided to workplace forum (section 82 (1) (r))  
9 Experts (section 82 (1) (t))  
10 Establishment of co-ordinating and subsidiary workplace forums (section 82 (2) (b))

Schedule 3

COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION

- 1 Remuneration and allowances of members of governing body  
2 Resignation and removal from office of member of governing body  
3 Vacancies in governing body  
4 Proceedings of governing body  
5 Director of Commission

- 6 Bank account
- 7 Investment of surplus money
- 8 Accounting and auditing
- 9 Annual report

Schedule 4

DISPUTE RESOLUTION: FLOW DIAGRAMS

Schedule 5

AMENDMENT OF LAWS

- 1 Amendment of section 1 of Basic Conditions of Employment Act, 1983
- 2 Amendment of section 35 of Occupational Health and Safety Act, 1993
- 3 Amendment of section 2 of Pension Funds Act, 1956
- 4 Amendment of section 2 of Medical Schemes Act, 1967
- 5 Amendment of section 1 of Insurance Act, 1943
- 6 Amendment of section 2 of Friendly Societies Act, 1956
- 7 Amendment of section 3 of Friendly Societies Act, 1956

Schedule 6

LAWS REPEALED BY SECTION 212

Schedule 7

TRANSITIONAL ARRANGEMENTS

PART A - DEFINITIONS FOR THIS SCHEDULE

- 1 Definitions for this Schedule

PART B - UNFAIR LABOUR PRACTICES

- 2 to 4 inclusive .....

[Items 2 to 4 inclusive deleted by s. 55 (a) of Act 12 of 2002.]

PART C - PROVISIONS CONCERNING EXISTING TRADE UNIONS, EMPLOYERS' ORGANISATIONS, INDUSTRIAL COUNCILS AND CONCILIATION BOARDS

- 5 Existing registered trade unions and employers' organisations
- 6 Pending applications by trade unions or employers' organisations for registration, variation of scope, alteration of constitution or name
- 7 Industrial councils
- 8 Pending applications by industrial councils for registration and variation of scope
- 8A Pending enquiries by industrial registrar  
[Item 8A inserted by s. 28 (1) (a) of Act 127 of 1998.]
- 9 Pending applications by industrial councils for alteration of constitution or name
- 10 Pending applications for admission of parties to industrial councils
- 11 Pending applications to wind up and cancel registration of trade unions, employers' organisations and industrial councils
- 12 Existing agreements and awards of industrial councils and conciliation boards
- 12A Designated agents  
[Item 12A inserted by s. 28 (1) (a) of Act 127 of 1998.]
- 13 Existing agreements including recognition agreements

PART D - MATTERS CONCERNING PUBLIC SERVICE

- 14 Public Service Bargaining Council
- 15 Collective agreements in the public service
- 16 Education Labour Relations Council
- 17 Education sector collective agreements
- 18 Negotiating Forums in South African Police Service
- 19 Collective agreements in South African Police Service
- 20 Consequences for public service bargaining institutions when Public Service Co-ordinating Bargaining Council is established

PART E - DISPUTES AND COURTS

- 21 Disputes arising before commencement of this Act
- 21A Dispute resolution by councils before their accreditation



[Item 21A inserted by s. 28 (1) (a) of Act 127 of 1998.]

22 Courts

22A Minister may authorise Commission to perform industrial court's functions

[Item 22A inserted by s. 28 (2) of Act 127 of 1998.]

**PART F - PENSION MATTERS**

23 Continuation of existing pension rights of staff members of Commission upon assuming employment

**PART G - ESSENTIAL SERVICES**

24 Essential services in the public service

25 Essential services provided for in Labour Relations Act

**PART H - TRANSITIONAL PROVISIONS ARISING OUT OF THE APPLICATION OF THE LABOUR RELATIONS AMENDMENT ACT, 2002**

[Part H added by s. 55 (b) of Act 12 of 2002.]

26 Definitions

27 Representation in conciliation and arbitration

28 Order for costs in arbitration

29 Arbitration in terms of section 33A

30 Unfair labour practice

31 Bargaining councils in public service

32 Expedited applications in terms of section 189A (13)

Schedule 8

**CODE OF GOOD PRACTICE: DISMISSAL**

1 Introduction

2 Fair reasons for dismissal

3 Disciplinary measures short of dismissal

4 Fair procedure

5 Disciplinary records

6 Dismissals and industrial action

7 Guidelines in cases of dismissal for misconduct

8 Probation

9 Guidelines in cases of dismissal for poor work performance

10 Incapacity: Ill health or injury

11 Guidelines in cases of dismissal arising from ill health or injury

Schedule 9

**MODEL CONSTITUTION OF A STATUTORY COUNCIL**

Schedule 10

**POWERS OF DESIGNATED AGENT OF BARGAINING COUNCIL**

(Section 33)

[Schedule 10 substituted by s. 57 of Act 12 of 2002.]

**CHAPTER I**

**PURPOSE, APPLICATION AND INTERPRETATION (ss 1-3)**

**1 Purpose of this Act**

The purpose of *this Act*<sup>iv\*</sup> 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;<sup>v\*</sup>
- (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.

## 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;
- (c) the South African Secret Service;
- (d) the South African National Academy of Intelligence;
 

[Para. (d) added by s. 40 (1) of Act 65 of 2002.]
- (e) Comsec.

[Para. (e) added as para. (d) by s. 26 of Act 68 of 2002 and added as para. (e) by s. 25 (2) of Act 52 of 2003.]

## 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 (ss 4-10)

## 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 join 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 *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; 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<sup>vi\*</sup>**

(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.

## **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 (ss 11-63)**

### **Part A**

#### **Organisational rights (ss 11-22)**

## **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
- (f) if there are more than 1 000 members of the *trade union* employed in the *workplace*, 12 *trade union representatives* for the first 1 000 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 (12), 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<sup>vii\*</sup>**

(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 union's* 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.



(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 co-operate 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 (ss 23-26)**

## **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 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.

[Sub-s. (4) substituted by s. 1 of Act 12 of 2002.]

## 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.

[Sub-s. (1) substituted by s. 2 (a) of Act 12 of 2002.]

(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.<sup>viii\*</sup>

(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 *dispute* in writing to the Commission, and subsections (3) to (5) will apply to that *dispute*.<sup>ix#</sup>

(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 a settlement agreement contemplated in either section 142A 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*.

[Sub-s. (8) added by s. 2 (b) of Act 12 of 2002.]

## 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.

[Sub-s. (1) substituted by s. 1 (a) of Act 42 of 1996.]

(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
- (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*.

[Para. (d) amended by s. 1 (b) of Act 42 of 1996.]

(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* fails 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*.

[Para. (d) amended by s. 2 of Act 42 of 1996.]

(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 (ss 27-34)**

#### **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*.

[Sub-s. (4) added by s. 3 of Act 42 of 1996.]

#### **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*;
- (j) to confer on *workplace forums* additional matters for consultation;
- (k) to provide industrial support services within the sector; and  
[Para. (k) added by s. 3 (b) of Act 12 of 2002.]
- (l) to extend the services and functions of the *bargaining council* to workers in the informal sector and home workers.  
[Para. (l) added by s. 3 (b) of Act 12 of 2002.]

(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).

[Sub-s. (2) added by s. 1 of Act 127 of 1998.]

(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.

[Sub-s. (3) added by s. 1 of Act 127 of 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.

[Sub-s. (3) substituted by s. 4 (a) of Act 12 of 2002.]

(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.

[Sub-s. (16) added by s. 4 (b) of Act 12 of 2002.]

### 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' [sic] 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;
- (f) 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;<sup>x\*</sup>
- (p) a procedure for changing its constitution; and
- (q) a procedure by which it may resolve to wind up.

[Sub-s. (1) amended by s. 5 (a) of Act 42 of 1996.]

(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 (1).

(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.



[Sub-s. (5) added by s. 5 (b) of Act 42 of 1996.]

### **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-
  - (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.

[S. 31 substituted by s. 6 of Act 42 of 1996.]

### **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 request, if at a meeting of the *bargaining council*-

- (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*;

[Para. (b) substituted by s. 7 (a) of Act 42 of 1996.]

- (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*;

[Para. (c) substituted by s. 7 (a) of Act 42 of 1996.]

- (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*;

[Para. (e) substituted by s. 2 (a) of Act 127 of 1998.]

- (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

[Para. (f) substituted by s. 2 (a) of Act 127 of 1998.]

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

(4) .....

[Sub-s. (4) deleted by s. 2 (b) of Act 127 of 1998.]

(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

[Para. (a) substituted by s. 7 (b) of Act 42 of 1996 and by s. 5 (a) of Act 12 of 2002.]

- (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.

[Para. (b) substituted by s. 7 (b) of Act 42 of 1996.]

(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.

[Sub-s. (9) added by s. 7 (c) of Act 42 of 1996.]

(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.

[Sub-s. (10) added by s. 5 (b) of Act 12 of 2002.]

### **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*.

[Sub-s. (1) substituted by s. 6 (a) of Act 12 of 2002.]

(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.  
[Sub-s. (1A) inserted by s. 6 (b) of Act 12 of 2002.]

(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 a *bargaining council*, a designated agent of the *bargaining council* has all the powers set out in Schedule 10.  
[Sub-s. (3) substituted by s. 6 (c) of Act 12 of 2002.]

(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 the 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 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 acting in terms of this section.

(b) 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).

[S. 33A inserted by s. 7 of Act 12 of 2002.]

### **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 (ss 35-38)***

### **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.<sup>xix</sup>

(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**

(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*.

[S. 37 amended by s. 8 of Act 42 of 1996 and substituted by s. 8 of Act 12 of 2002.]

### **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.

[S. 38 amended by s. 9 of Act 42 of 1996 and substituted by s. 9 of Act 12 of 2002.]

## **Part E**

### **Statutory councils (ss 39-48)**

### **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)<sup>xii\*</sup> 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 [sic];
  - (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
- (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.

[Sub-s. (3) substituted by s. 10 of Act 42 of 1996.]

(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.

[Sub-s. (4) added by s. 3 of Act 127 of 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*.

[Sub-s. (1) substituted by s. 10 (a) of Act 12 of 2002.]

(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.

[Sub-s. (2) substituted by s. 10 (b) of Act 12 of 2002.]



(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<sup>xiii\*</sup>, 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 (ss 49-63)**

## 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* 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.

[Sub-s. (2) substituted by s. 11 (a) of Act 12 of 2002.]

(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*.

[Sub-s. (3) substituted by s. 11 (b) of Act 12 of 2002.]

(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.

[Sub-s. (4) added by s. 11 (c) of Act 12 of 2002.]

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

[Sub-s. (5) added by s. 11 (c) of Act 12 of 2002.]

## 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*;
  - (ii) one or more *employees*; or
  - (iii) 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*.

[Sub-para. (ii) added by s. 11 (a) of Act 42 of 1996.]

(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*<sup>xiv\*</sup> 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-

(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.

[Sub-s. (6) added by s. 11 (b) of Act 42 of 1996.]

(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.

[Sub-s. (7) added by s. 12 of Act 12 of 2002.]

(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*.

[Sub-s. (8) added by s. 12 of Act 12 of 2002.]

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

[Sub-s. (9) added by s. 12 of Act 12 of 2002.]

## **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.

[S. 52 substituted by s. 12 of Act 42 of 1996.]

## **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) a 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 66 of 1975);
- (c) a registered unit trust; or
- (d) any other manner approved by the *registrar*.

[Sub-s. (5) amended by s. 13 of Act 42 of 1996.]

(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).

[Sub-s. (6) added by s. 13 of Act 12 of 2002.]

#### **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 32;
- (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.

[Para. (f) added by s. 14 (b) of Act 12 of 2002.]

(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 on 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).

[Sub-s. (4) added by s. 14 (c) of Act 12 of 2002.]

(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).

[Sub-s. (5) added by s. 14 (c) of Act 12 of 2002.]

## 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.

[Sub-s. (1) substituted by s. 14 (a) of Act 42 of 1996.]

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

(3) .....

[Sub-s. (3) deleted by s. 14 (b) of Act 42 of 1996.]

## 56 Admission of parties to council<sup>xv\*</sup>

(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.



(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*.

[Sub-s. (1) substituted by s. 15 of Act 42 of 1996.]

(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.

[Sub-s. (3) added by s. 15 of Act 12 of 2002.]

### **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.

[Sub-s. (6) added by s. 4 of Act 127 of 1998.]

(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.

[Sub-s. (7) added by s. 4 of Act 127 of 1998.]

(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.

[Sub-s. (8) added by s. 4 of Act 127 of 1998.]

## **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 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 111 (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).

[Sub-s. (14) added by s. 16 of Act 12 of 2002.]

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

[Sub-s. (15) added by s. 16 of Act 12 of 2002.]

## **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.



[Sub-s. (1) amended by s. 16 (a) of Act 42 of 1996.]

(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
- (b) 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 for the purposes of the proceedings.

[Sub-s. (3A) inserted by s. 16 (b) of Act 42 of 1996.]

(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

[Para. (a) substituted by s. 17 of Act 42 of 1996.]

(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 (ss 64-77)**

### **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) in 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.<sup>xvi\*</sup>

(2) (a) Despite section 65 (1) (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-out* if the *issue in dispute* is about any matter dealt with in sections 12 to 15.<sup>xvii#</sup>

(b) If the registered *trade union* has given notice of the proposed *strike* in terms of section 64 (1) 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.

[Sub-s. (1) substituted by s. 19 of Act 42 of 1996.]

(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).

(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 delict 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*.

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<sup>xviii.\*</sup>
    - (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);
    - (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.
- [Para. (b) substituted by s. 17 of Act 12 of 2002.]

(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<sup>xix\*</sup>

(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 *lock-out*.

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

- (a) in any place to which the public has access but outside the premises of an employer; or
- (b) with the permission of the employer, inside the employer's premises.

[Sub-s. (2) amended by s. 20 of Act 42 of 1996.]

(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 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.

[Sub-s. (1) substituted by s. 5 of Act 127 of 1998.]

(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*;

[Date of commencement of para. (a): 1 January 1996.]

- (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.<sup>xx\*</sup>

(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.

(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.

[Date of commencement of s. 71: 1 January 1996.]

### **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<sup>xxi\*</sup>**

(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-

- (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 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.

[Para. (b) substituted by s. 21 (b) of Act 42 of 1996.]

#### **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.

[Sub-s. (2) substituted by s. 22 (a) of Act 42 of 1996.]

(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.

[Sub-s. (4) substituted by s. 22 (b) of Act 42 of 1996.]

(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.

[Sub-s. (5) added by s. 22 (c) of Act 42 of 1996.]

(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) 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.

[Sub-s. (6) added by s. 22 (c) of Act 42 of 1996.]

- (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*.

[Sub-s. (7) added by s. 22 (c) of Act 42 of 1996.]

## **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 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 (ss 78-94)

### 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*-
- (i) .....
- [Sub-para. (i) deleted by s. 23 of Act 42 of 1996.]
- (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.

[Sub-s. (8) amended by s. 24 of Act 42 of 1996.]

(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 all *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 (11) 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;

(f) 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 *workplace*; 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* 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 any 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* may 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*;  
 [Para. (s) substituted by s. 25 (a) of Act 42 of 1996.]
  - (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;  
 [Para. (t) substituted by s. 25 (b) of Act 42 of 1996.]
  - (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.  
 [Para. (w) added by s. 25 (e) of Act 42 of 1996.]
- (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 co-ordinating *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*;

(f) 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 (1), 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.<sup>xxii\*</sup>

(8) (a) An arbitration award is [sic] 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.

[Sub-s. (4) substituted by s. 26 of Act 42 of 1996.]

### **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 *workplace forum* may refer a matter that is substantially the same as the matter referred to arbitration.

[Sub-s. (1) substituted by s. 27 of Act 42 of 1996.]

(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.

[Sub-s. (2A) inserted by s. 28 of Act 42 of 1996.]

(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 1 000 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*;

[Para. (aA) inserted by s. 29 of Act 42 of 1996.]

(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 (ss 95-111)**

#### **Part A**

#### **Registration and regulation of trade unions and employers' organisations (ss 95-106)**

#### **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;
- (f) 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*.

[Sub-s. (7) added by s. 18 of Act 12 of 2002.]

(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*.

[Sub-s. (8) added by s. 18 of Act 12 of 2002.]

## 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),<sup>xxiii\*</sup> 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.

(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.

[Sub-s. (1) substituted by s. 19 (b) of Act 12 of 2002.]

(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.

[Sub-s. (1A) inserted by s. 19 (c) of Act 12 of 2002.]

(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.

[Sub-s. (3) amended by s. 30 of Act 42 of 1996.]

(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.

[Sub-s. (5) substituted by s. 19 (d) of Act 12 of 2002.]

(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.

[Sub-s. (6) added by s. 19 (e) of Act 12 of 2002.]

[S. 103 amended by s. 19 (a) of Act 12 of 2002.]

### 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 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.

[S. 105 amended by s. 20 of Act 12 of 2002.]

## 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.

[Sub-s. (1) substituted by s. 21 (a) of Act 12 of 2002.]

(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.

[Sub-s. (2A) inserted by s. 21 (b) of Act 12 of 2002.]

(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.

[Sub-s. (2B) inserted by s. 21 (b) of Act 12 of 2002.]

(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 (s 107)

## 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 sequestered.

### **Part C**

#### **Registrar of labour relations (ss 108-110)**

#### **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.

[Date of commencement of s. 108: 1 January 1996.]

#### **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*.

[Date of commencement of s. 109: 1 January 1996.]

#### **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.

(5) 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 (1) (a), (c), and (e).

#### **Part D**

#### **Appeals from registrar's decision (s 111)**

### **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 (ss 112-184)**

#### **Part A**

#### **Commission for Conciliation, Mediation and Arbitration (ss 112-126)**

### **112 Establishment of Commission for Conciliation, Mediation and Arbitration**

The Commission for Conciliation, Mediation and Arbitration is hereby established as a juristic person.

[Date of commencement of s. 112: 1 January 1996.]

### **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*;<sup>xxiv\*</sup>
- (b) if asked, assist a party to a *dispute* to obtain legal advice, assistance or representation;<sup>xxv#</sup>
- (c) offer to resolve a *dispute* that has not been referred to the Commission through conciliation;<sup>xxvi+</sup>
- (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;  
[Para. (cA) inserted by s. 6 (a) of Act 127 of 1998.]
- (d) and (e) .....  
[Paras. (d) and (e) deleted by s. 31 (a) of Act 42 of 1996.]
- (f) conduct, oversee or scrutinise any election or ballot of a registered *trade union* or registered *employers' organisation* if asked to do so by that *trade union* or employers' organisation;
- (g) publish guidelines in relation to any matter dealt with in *this Act*; and
- (h) conduct and publish research into matters relevant to its functions; and
- (i) .....  
[Para. (i) deleted by s. 31 (a) of Act 42 of 1996.]

(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;
- (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.

[Sub-s. (2A) inserted by s. 22 (a) of Act 12 of 2002.]

(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*.

[Para. (i) substituted by s. 31 (b) of Act 42 of 1996.]

(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.

[Sub-s. (6) added by s. 6 (b) of Act 127 of 1998 and substituted by s. 22 (b) of Act 12 of 2002.]

## 116 Governing body of Commission

(1) The Commission will be governed by the governing body, whose acts are acts of the Commission.<sup>xxvii.\*</sup>

(2) The governing body consists of-

- (a) a chairperson and nine other members, each nominated by *NEDLAC* and appointed<sup>xxviii#</sup>

- 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.
- [Date of commencement of s. 116: 1 January 1996.]

### 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;
  - (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.

[Date of commencement of s. 117: 1 January 1996.]

### 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*.

[Date of commencement of s. 118: 1 January 1996.]

(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.

[Sub-s. (6) added by s. 7 of Act 127 of 1998.]

### 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*.

[Date of commencement of s. 119: 1 January 1996.]

### 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.

[Date of commencement of s. 120: 1 January 1996.]

### 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.

[Date of commencement of s. 121: 1 January 1996.]

### 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 1 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.

[Date of commencement of s. 122: 13 September 1996.]

### **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

[Para. (a) substituted by s. 32 of Act 42 of 1996.]

- (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.

[Date of commencement of s. 124: 1 January 1996.]

### **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).

[Date of commencement of s. 125: 1 January 1996.]

## **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 (ss 127-132)***

## **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;<sup>xxix\*</sup>
- (b) section 24 (2) to (5);<sup>xxx\*\*</sup>
- (c) section 24 (6) and (7) and section 26 (11);<sup>xxxi\*\*\*</sup>
- (d) section 45;<sup>xxxii\*\*\*\*</sup>
- (e) section 61 (5) to (8);<sup>xxxiii#</sup>
- (f) section 62;<sup>xxxiv##</sup>
- (g) section 63;<sup>xxxv###</sup>
- (h) section 69 (8) to (10);<sup>xxxvi####</sup>
- (i) section 86;<sup>xxxvii+</sup>
- (j) section 89;<sup>xxxviii++</sup>
- (k) section 94.<sup>xxxix+++</sup>

(3) 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.

(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*, employer, *employers'*

- organisation, federation of trade unions or federation of employers' organisations;*
- (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;
- (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.
- (h) .....

[Para. (h) deleted by s. 33 (c) of Act 42 of 1996.]

(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
  - (iv) .....

[Sub-para. (iv) deleted by s. 23 (a) of Act 12 of 2002.]

- (b) 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.

[Sub-s. (5A) inserted by s. 23 (b) of Act 12 of 2002.]

(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.

[Date of commencement of s. 127: 13 September 1996.]

## **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.

[Para. (a) substituted by s. 34 of Act 42 of 1996 and by s. 24 (a) of Act 12 of 2002.]

(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 powers of a commissioner in terms of section 142 (1) (a) to (e), (2) and (7) to (9), read with the changes required by the context.

[Sub-s. (3) added by s. 24 (b) of Act 12 of 2002.]

[Date of commencement of s. 128: 13 September 1996.]

### **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.

[Sub-s. (1) substituted by s. 35 of Act 42 of 1996.]

(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
- (f) 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).

[Date of commencement of s. 132: 13 September 1996.]

### **Part C**

#### **Resolution of disputes under auspices of Commission (ss 133-150)**

#### **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.

[Sub-s. (2) substituted by s. 25 of Act 12 of 2002.]

#### **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

(iii) 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 of more than one *dispute* involving the same parties, that commissioner may consolidate the conciliation proceedings so that all the *disputes* concerned may be dealt with in the same proceedings.

[Sub-s. (3A) inserted by s. 8 (a) of Act 127 of 1998.]

(4) .....

[Sub-s. (4) substituted by s. 8 (b) of Act 127 of 1998 and deleted by s. 26 of Act 12 of 2002.]

(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.

[Sub-s. (5) amended by s. 36 (b) of Act 42 of 1996.]

(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.

[Para. (b) substituted by s. 9 (a) of Act 127 of 1998.]

(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*.

[Sub-s. (3) substituted by s. 9 (b) of Act 127 of 1998.]

(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 (1), 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).

[Para. (b) substituted by s. 37 of Act 42 of 1996.]

(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) .....



[Sub-s. (4) substituted by s. 10 of Act 127 of 1998 and deleted by s. 27 (a) of Act 12 of 2002.]

(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 to 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;
- (b) any relevant guideline issued by the Commission.

[Sub-s. (10) substituted by s. 27 (b) of Act 12 of 2002.]

### **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 (1) (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**

(1) .....

[Sub-s. (1) deleted by s. 28 of Act 12 of 2002.]

(2) If, in terms of section 194 (1), 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.

[Sub-s. (1) substituted by s. 29 (a) of Act 12 of 2002.]

(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.

[Sub-s. (3) substituted by s. 29 (b) of Act 12 of 2002.]

(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.

[Sub-s. (6) amended by s. 39 of Act 42 of 1996.]

#### **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
- [Sub-para. (iii) added by s. 40 of Act 42 of 1996.]

- (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<sup>xl\*</sup>, 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; and
- (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 to 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.

[Sub-s. (7) substituted by s. 30 (a) of Act 12 of 2002.]

(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;

- (f) if the person wilfully 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 else in relation to the Commission which, if done in relation to a court of law, would have been contempt of court.

(9) (a) A 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 the proceedings, to the Labour Court for its decision in terms of subsection (11).

[Sub-s. (9) substituted by s. 30 (b) of Act 12 of 2002.]

(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.

[Sub-s. (10) added by s. 30 (c) of Act 12 of 2002.]

(11) The Labour Court may confirm, vary or set aside the finding of a commissioner.

[Sub-s. (11) added by s. 30 (c) of Act 12 of 2002.]

(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.

[Sub-s. (12) added by s. 30 (c) of Act 12 of 2002.]

#### **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).

[S. 142A inserted by s. 31 of Act 12 of 2002.]

#### **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.

[Sub-s. (1) substituted by s. 32 (a) of Act 12 of 2002.]

(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 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).

[Sub-s. (3) added by s. 32 (b) of Act 12 of 2002.]

(4) If a party fails to comply with an arbitration award that orders 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.

[Sub-s. (4) added by s. 32 (b) of Act 12 of 2002.]

#### **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.

[S. 144 substituted by s. 33 of Act 12 of 2002.]

#### **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 the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or

[Para. (a) substituted by s. 36 (1) of Act 12 of 2004.]

- (b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence.

[Para. (b) substituted by s. 36 (1) of Act 12 of 2004.]

(1A) The Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1).

[Sub-s. (1A) inserted by s. 34 of Act 12 of 2002.]

(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 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);<sup>xli\*</sup> 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
- (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*.

[Para. (a) amended by s. 41 (a) of Act 42 of 1996.]

(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*.

[Sub-s. (6) substituted by s. 41 (b) of Act 42 of 1996.]

(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.

[Sub-s. (8) added by s. 41 (c) of Act 42 of 1996.]

(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*.

[Sub-s. (9) added by s. 41 (c) of Act 42 of 1996.]

#### **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,<sup>xlii\*</sup> 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*;

(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;

[Sub-s. (2) substituted by s. 35 (a) of Act 12 of 2002.]

(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.

[Sub-s. (3) added by s. 35 (b) of Act 12 of 2002.]

#### **Part D**

#### **Labour Court (ss 151-166)**

#### **151 Establishment and status of Labour Court**

(1) The Labour Court is hereby established as a court of law and equity.

[Sub-s. (1) amended by s. 11 of Act 127 of 1998.]

(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 Supreme 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 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.

[Para. (a) substituted by s. 12 (a) (i) of Act 127 of 1998.]

(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.

[Para. (b) amended by s. 12 (a) (ii) of Act 127 of 1998.]

(2) The Judge President and the Deputy Judge President of the Labour Court-

(a) must be judges of the Supreme 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.

[Sub-s. (4) amended by s. 12 (b) of Act 127 of 1998.]

(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.

[Sub-s. (5) substituted by s. 42 (a) of Act 42 of 1996.]

(6) A judge of the Labour Court must-

(a) (i) be a judge of the High Court; or

[Sub-para. (i) amended by s. 12 (c) of Act 127 of 1998.]

(ii) be a person who is a *legal practitioner*; and

[Sub-para. (ii) substituted by s. 42 (b) of Act 42 of 1996.]

(b) have knowledge, experience and expertise in labour law.

[Date of commencement of s. 153: 1 January 1996.]

#### **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 notice 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.

[Sub-s. (3) amended by s. 13 of Act 127 of 1998.]

(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 88 of 1989), is affected by that judge's appointment and concurrent tenure of office as a judge of the Labour Court.

[Sub-s. (4) amended by s. 13 of Act 127 of 1998.]

(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.

[Para. (a) substituted by s. 43 (a) of Act 42 of 1996.]

(b) The terms and conditions of appointment of a judge of the Labour Court referred to in paragraph (a) must be similar to those of a judge of the High Court.

[Sub-s. (5) amended by s. 13 of Act 127 of 1998.]

(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.

[Sub-s. (6) amended by s. 13 of Act 127 of 1998.]

(7) (a) A judge of the Labour Court who is also a judge of the Supreme 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 Supreme Court; and
- (ii) upon having been removed as judge of the Supreme 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.

[Sub-s. (7) amended by s. 13 of Act 127 of 1998.]

(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.

[Sub-s. (8) added by s. 43 (b) of Act 42 of 1996.]

(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).

[Sub-s. (9) added by s. 43 (b) of Act 42 of 1996.]

[Date of commencement of s. 154: 1 January 1996.]

### **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.

[Date of commencement of s. 155: 1 January 1996.]

### **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*.

[Date of commencement of s. 156: 1 January 1996.]

### **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 constitutionality 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.

[Sub-s. (2) substituted by s. 14 of Act 127 of 1998.]

(3) Any reference to the court in the Arbitration Act, 1965 (Act 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;  
[Para. (c) substituted by s. 36 (a) of Act 12 of 2002.]
- (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);  
[Para. (e) substituted by s. 44 of Act 42 of 1996.]
- (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;  
[Para. (g) substituted by s. 36 (b) of Act 12 of 2002.]
- (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 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).

[Sub-s. (1A) inserted by s. 36 (c) of Act 12 of 2002.]

(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) Pending 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 107 of 1985).

[Para. (e) amended by s. 45 (a) of Act 42 of 1996.]

(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.

[Sub-s. (7) added by s. 45 (b) of Act 42 of 1996 and amended by s. 15 of Act 127 of 1998.]

(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).

[Sub-s. (8) added by s. 45 (b) of Act 42 of 1996 and amended by s. 15 Act 127 of 1998.]

(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 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.

[Sub-s. (9) added by s. 45 (b) of Act 42 of 1996.]

(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.

[Sub-s. (10) added by s. 45 (b) of Act 42 of 1996.]

[Date of commencement of s. 159: 1 January 1996.]

## **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 Supreme 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.

[Para. (d) substituted by s. 37 of Act 12 of 2002.]

[S. 161 substituted by s. 16 of Act 127 of 1998.]

## **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.

[S. 163 amended by s. 17 of Act 127 of 1998.]

## **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 (ss 167-183)***

## **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 jurisdiction, equal to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction.

[Sub-s. (3) amended by s. 18 of Act 127 of 1998.]

(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.

[Para. (c) substituted by s. 46 of Act 42 of 1996 and amended by s. 19 of Act 127 of 1998.]

(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 other judges of Labour Appeal Court**

(1) The President, acting on the advice of *NEDLAC* and the Judicial Service Commission, after consultation with the Minister of Justice and the Judge President of the Labour Appeal Court, must appoint the judges of the Labour Appeal Court referred to in section 168 (1) (c).

[Sub-s. (1) amended by s. 20 (a) of Act 127 of 1998.]

(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.

[Sub-s. (2) amended by s. 20 (b) of Act 127 of 1998.]

[S. 169 substituted by s. 47 of Act 42 of 1996.]

[Date of commencement of s. 169: 1 January 1996.]

### **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.

[Sub-s. (3) amended by s. 21 of Act 127 of 1998.]

(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 88 of 1989), is affected by that judge's appointment and concurrent tenure of office as a judge of the Labour Appeal Court.

[Sub-s. (4) amended by s. 21 of Act 127 of 1998.]

(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
- (b) upon having been removed as judge of the High Court must be removed from office as a judge of the Labour Appeal Court.

[Sub-s. (5) amended by s. 21 of Act 127 of 1998.]

(6) Despite the expiry of the 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.

[Sub-s. (6) added by s. 48 of Act 42 of 1996.]

(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).

[Sub-s. (7) added by s. 48 of Act 42 of 1996.]

[Date of commencement of s. 170: 1 January 1996.]

### **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.

[Date of commencement of s. 171: 1 January 1996.]

### **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*.

[Date of commencement of s. 172: 1 January 1996.]

### **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).

(2) .....

[Sub-s. (2) deleted by s. 22 (a) of Act 127 of 1998.]

(3) .....

[Sub-s. (3) amended by s. 22 (b) of Act 127 of 1998 and deleted by s. 38 of Act 12 of 2002.]

(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.  
[Date of commencement of s. 176: 1 January 1996.]

#### **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.

[Sub-s. (2) amended by s. 23 of Act 127 of 1998.]

#### **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.

[S. 180 amended by s. 24 of Act 127 of 1998.]

### **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 (1) (a);
- (b) its decision on any question of law in terms of section 173 (1) (b); or
- (c) any judgment or order made in terms of section 175.

#### **Part F**

#### **General provisions applicable to courts established by this Act (s 184)**

### **184 General provisions applicable to courts established by this Act**

Sections 5,<sup>xliii\*</sup> 18,<sup>xliv\*\*</sup> 25,<sup>xlv\*\*\*</sup> 30,<sup>xlvi\*\*\*\*</sup> 31,<sup>xlvii#</sup> 39<sup>xlviii##</sup>, 40<sup>xlix###</sup> and 42<sup>l####</sup> of the Supreme Court Act, 1959 (Act 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*.

## **CHAPTER VIII**

### **UNFAIR DISMISSAL AND UNFAIR LABOUR PRACTICE (ss 185-197B)**

[Heading substituted by s. 39 of Act 12 of 2002.]

### **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.

[S. 185 substituted by s. 40 of Act 12 of 2002.]

### **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) .....

[Sub-para. (ii) deleted by s. 95 (4) of Act 75 of 1997.]

- (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.



[Para. (f) added by s. 41 (b) of Act 12 of 2002.]

(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) the unfair suspension of an *employee* or any other unfair disciplinary action short of dismissal in respect of an *employee*;
- (c) a failure or refusal by an employer to re-instate 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 26 of 2000), on account of the *employee* having made a protected disclosure defined in that Act.

[Sub-s. (2) added by s. 41 (c) of Act 12 of 2002.]

[S. 186 amended by s. 41 (a) of Act 12 of 2002.]

### 187 Automatically unfair dismissals

(1) A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to section 5<sup>li\*</sup> 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;<sup>lii#</sup>
- (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*;
- (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  
[Para. (g) added by s. 42 of Act 12 of 2002.]
- (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.  
[Para. (h) added by s. 42 of Act 12 of 2002.]

(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*.<sup>liii\*</sup>

### **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-

- (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, office bearer or official of that party's registered *trade union* or registered *employers' organisation*; or
- (d) a legal practitioner, on 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*, if 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 provisions 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.

[S. 188A inserted by s. 43 of Act 12 of 2002.]

### **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;
- (f) 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 *operational 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 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.

[S. 189 substituted by s. 44 of Act 12 of 2002.]

### **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 in 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 in 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 103 of 1994).

[S. 189A inserted by s. 45 of Act 12 of 2002.]

## 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 (1)-

- (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<sup>liv\*</sup>

(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 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.

[Sub-s. (1) substituted by s. 46 (b) of Act 12 of 2002.]

(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.

[Sub-s. (2) substituted by s. 46 (c) of Act 12 of 2002.]

(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.

[Sub-s. (2A) inserted by s. 46 (d) of Act 12 of 2002.]

(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* is 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;

[Sub-para. (ii) substituted by s. 46 (e) of Act 12 of 2002.]

(iii) the *employee* does not know the reason for *dismissal*; or

(iv) the *dispute* concerns an unfair labour practice; or

[Sub-para. (iv) added by s. 46 (f) of Act 12 of 2002.]

(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.

[Sub-s. (5A) inserted by s. 46 (g) of Act 12 of 2002.]

(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.

[Sub-s. (6) substituted by s. 46 (h) of Act 12 of 2002.]

(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.

[Sub-s. (11) added by s. 25 of Act 127 of 1998.]

(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.

[Sub-s. (12) added by s. 46 (i) of Act 12 of 2002.]

(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).

[Sub-s. (13) added by s. 46 (i) of Act 12 of 2002.]

[S. 191 amended by s. 46 (a) of Act 12 of 2002.]

## 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.<sup>lv\*</sup>

(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.

[Sub-s. (4) added by s. 47 (b) of Act 12 of 2002.]

[S. 193 amended by s. 47 (a) of Act 12 of 2002.]

## 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*.

[Sub-s. (1) substituted by s. 48 (a) of Act 12 of 2002.]

(2) .....

[Sub-s. (2) deleted by s. 48 (b) of Act 12 of 2002.]

(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.

[Sub-s. (4) added by s. 48 (c) of Act 12 of 2002.]

## 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 .....

[S. 196 repealed by s. 95 (5) of Act 75 of 1997.]

### 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 24 of 1956), are satisfied.<sup>lv1\*</sup>

(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-

(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), must disclose to the person or body contemplated in subparagraph (ii), 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 that 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.

[S. 197 substituted by s. 49 of Act 12 of 2002.]

### **197A Transfer of contract of employment in circumstances of insolvency**

(1) This section applies to a 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 or sequestration for reasons of insolvency.

(2) Despite the Insolvency Act, 1936 (Act 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 and 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. <sup>lvii\*</sup>

(5) Section 197 (7), (8) and (9) does not apply to a transfer in accordance with this section.

[S. 197A inserted by s. 50 of Act 12 of 2002.]

### **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.

[S. 197B inserted by s. 50 of Act 12 of 2002.]

## **CHAPTER IX**

### **GENERAL PROVISIONS (ss 198-214)**

#### **198 Temporary employment service**

(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 of 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) a temporary employment service;

(b) a person employed by a temporary employment service; and

(c) a temporary employment services 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) 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*.

[S. 200A inserted by s. 51 of Act 12 of 2002.]

## **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).

[Sub-s. (3) substituted by s. 49 of Act 42 of 1996.]

## **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.

[Sub-s. (4) added by s. 52 of Act 12 of 2002.]

[Date of commencement of s. 203: 1 January 1996.]

## **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*.

[S. 204 amended by s. 53 of Act 12 of 2002.]

## 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.

[Date of commencement of s. 206: 1 January 1996.]

## 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).

[Sub-s. (1) substituted by s. 50 (a) of Act 42 of 1996 and by s. 26 (a) of Act 127 of 1998.]

(2) .....

[Sub-s. (2) deleted by s. 26 (b) of Act 127 of 1998.]

(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.

[Sub-s. (5) substituted by s. 50 (b) of Act 42 of 1996.]

(6) .....

[Sub-s. (6) substituted by s. 50 (b) of Act 42 of 1996 and deleted by s. 26 (b) of Act 127 of 1998.]

[Date of commencement of s. 207: 1 January 1996.]

## 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*.

[Date of commencement of s. 208: 1 January 1996.]

## 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).

[S. 208A inserted by s. 51 of Act 42 of 1996.]

## 209 This Act binds the State

*This Act* binds the State.

## 210 Application of Act when in conflict with other laws

(1) 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 1 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 Employment Act, 1997 (Act 75 of 1997);

[Definition of 'Basic Conditions of Employment Act' substituted by s. 54 (a) of Act 12 of 2002.]

'**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 118 (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**<sup>lviii\*</sup> 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

(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 any of the following Acts:

(a) the Unemployment Insurance Act, 1966 (Act 30 of 1966);

(b) the Skills Development Act, 1998 (Act 97 of 1998);

(c) the Employment Equity Act, 1998 (Act 55 of 1998);

(d) the Occupational Health and Safety Act, 1993 (Act 85 of 1993); and

(e) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993);

[Definition of 'employment law' inserted by s. 54 (b) of Act 12 of 2002.]

'**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 Service;

'**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 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 government components contemplated in section 7 (2) of the Public Service Act, 1994 (promulgated by Proclamation 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.

[Definition of 'public service' substituted by s. 54 (c) of Act 12 of 2002 and amended by s. 42 of Act 30 of 2007.]

**'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);

[Para. (b) substituted by s. 54 (d) of Act 12 of 2002.]

- (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 1 of the Constitution<sup>ix\*</sup>; and
- (b) when used in the territorial sense, means the national territory of the Republic as defined in section 1 of the Constitution<sup>ix\*</sup>;

'**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 III;

'**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 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 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;

[Para. (a) substituted by s. 54 (e) of Act 12 of 2002.]

- (b) .....

[Para. (b) deleted by s. 54 (f) of Act 12 of 2002.]

- (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*.

[Sub-s. (2) substituted by s. 53 of Act 42 of 1996.]

## Schedule 1

## ESTABLISHMENT OF BARGAINING COUNCILS FOR PUBLIC SERVICE

### 1 Definitions for this Schedule

In this Schedule, unless the context otherwise indicates-

'**Education Labour Relations Act**' means the Education Labour Relations Act, 1993 (Act 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 (1) of the Public Service Labour Relations Act;

'**Public Service Labour Relations Act**' means the Public Service Labour Relations Act, 1994 (promulgated by Proclamation 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

[Para. (a) substituted by s. 54 of Act 42 of 1996.]

- (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 (1) 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 a *sector* to attend a 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, 10 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 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 follows-

4 seats for members to be elected from candidates nominated from among the manual *employees*

1 seat for members to be elected from candidates nominated from among the administrative and clerical *employees*

1 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 *workplace*;
  - (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.
- (f) 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 per cent 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.
- (f) 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*.
- (f) 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 co-ordinating 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 co-ordinating *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 co-ordinating *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 co-ordinating *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

[Date of commencement of Schedule 3: 1 January 1996.]

### 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 20 (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 sub-item (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 118 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

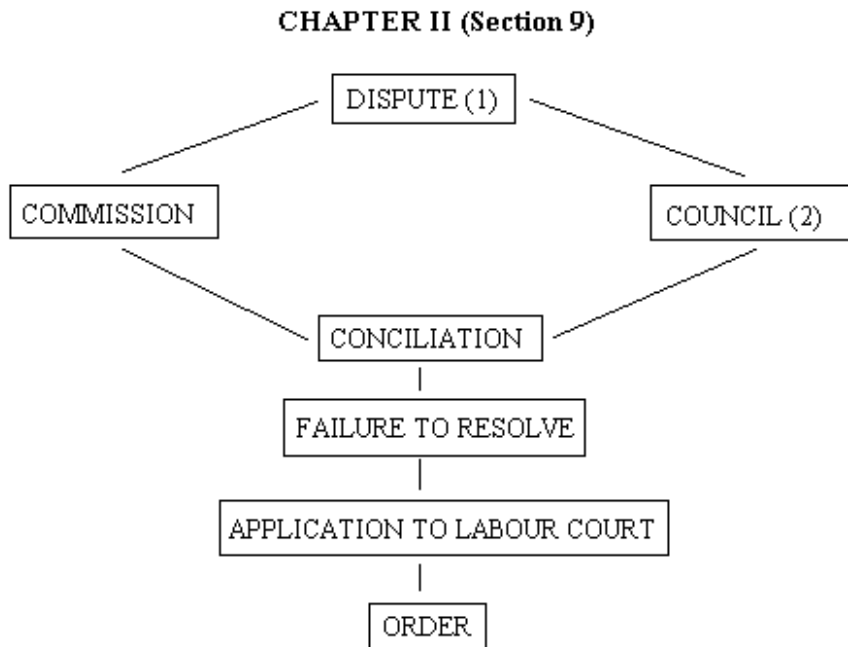
### DISPUTE RESOLUTION: FLOW DIAGRAMS

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 DIAGRAM 1 FREEDOM OF ASSOCIATION



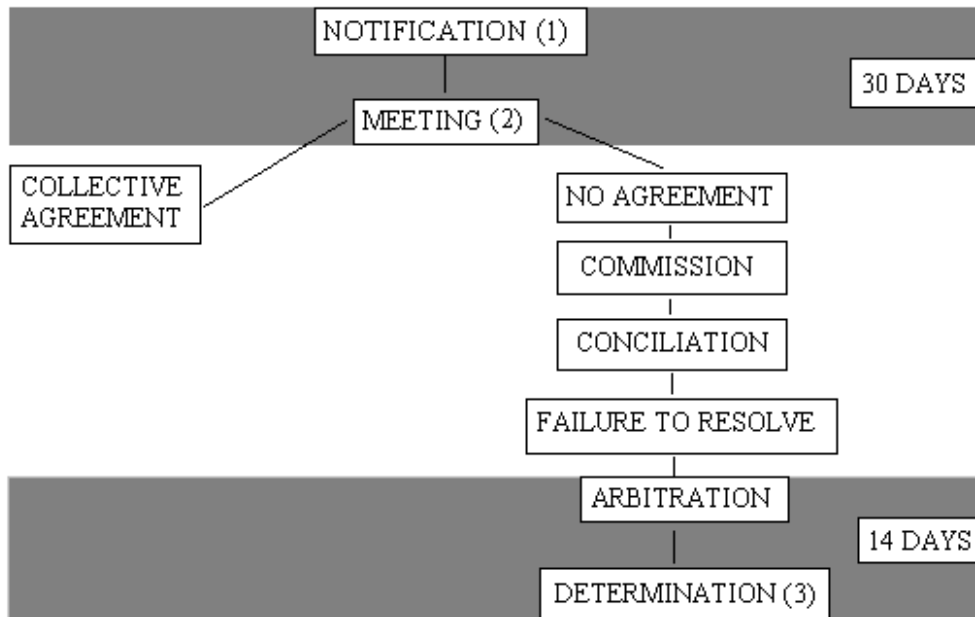
#### FOOTNOTES:

1. This procedure is relevant to the interpretation or application of Chapter II. For example, if an employer threatens to dismiss an employee unless the employee resigns from a trade union, that employee can enforce the rights conferred by this chapter in terms of this procedure. If a trade union threatens to boycott an employer, for example, because the employer institutes proceedings against the union, the employer can enforce its rights in the same way.
2. The dispute must be referred to a council if the parties to the dispute fall within the council's registered scope.

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#### FLOW DIAGRAM 2 ORGANISATIONAL RIGHTS

**CHAPTER III (Section 21)**



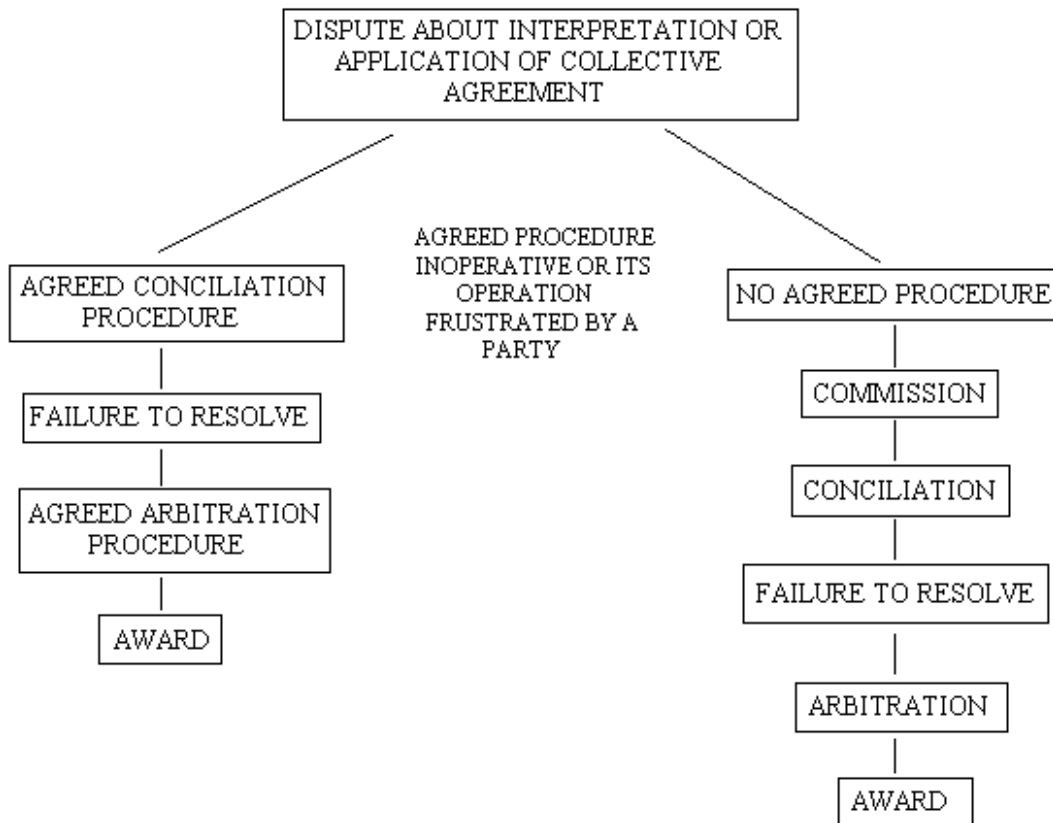
**FOOTNOTES:**

1. A registered trade union may notify an employer that it intends to exercise organisational rights. The content of the notice is described in s. 21 (2). For example, if a registered trade union is sufficiently representative, it may notify the employer that it seeks to exercise the rights of access.
2. The object of the meeting is to conclude a collective agreement on the exercise of the organisational right. If there is no agreement, the trade union can elect to exercise a right to strike, or it can refer the dispute to the commission. If the trade union elects not to strike, it cannot refer a dispute over the organisational rights to the Commission for a period of 12 months.
3. The Act contemplates disputes and therefore determinations about the definition of a workplace, the representativeness of a union and the manner in which organisational rights are exercised.

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**FLOW DIAGRAM 3**  
**COLLECTIVE AGREEMENTS**

**CHAPTER III (Section 24)**



<sup>i</sup>Italicised words and phrases bear the same meaning as accorded to them by section 213 of the Labour Relations Act, 1995

<sup>ii</sup>The Constitution referred to is the Constitution of the Republic of South Africa, 1993, which was repealed by the Constitution of the Republic of South Africa, 1996. The reference in this Act will remain until such time as the legislature shall amend it.  
The Constitution of the Republic of South Africa, 1996 deals with labour relations in section 23.

<sup>iii</sup>The Constitution referred to is the Constitution of the Republic of South Africa, 1993, which was repealed by the Constitution of the Republic of South Africa, 1996. The reference in this Act will remain until such time as the legislature shall amend it.

<sup>iv</sup>An italicised word or phrase indicates that the word or phrase is defined in section 213 of this Act.

<sup>v</sup>Section 27, which is in the Chapter on Fundamental Rights in the Constitution. The Constitution referred to is the Constitution of the Republic of South Africa, 1993, which was repealed by the Constitution of the Republic of South Africa, 1996. The reference in this Act will remain until such time as the legislature shall amend it.

The Constitution of the Republic of South Africa, 1996 deals with labour relations in section 23.\*  
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.

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(5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33 (1)'.<sup>vi</sup>

<sup>vii</sup>**See flow diagram 1 in Schedule 4.**

<sup>viii</sup>**See flow diagram 2 in Schedule 4.**

<sup>ix</sup>See flow diagram 3 in Schedule 4.

<sup>x</sup>See flow diagram 4 in Schedule 4.

<sup>xi</sup>Section 56 provides for a procedure for the admission of parties to a council.

<sup>xii</sup>Schedule 1 deals with the procedure for the establishment of the Public Service Co-ordinating Bargaining Council.

<sup>xiii</sup>The provisions of section 29 deal with the procedure for the registration of a bargaining council.

<sup>xiiii</sup>Section 29 deals with the procedure for the registration of bargaining councils.

<sup>xv</sup>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 statutory council 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). [Footnote amended by Act 12 of 2002.]

<sup>xvi</sup>**See flow diagram 5 in Schedule 4.**

<sup>xvii</sup>Essential services, agreed minimum services and maintenance services are regulated in sections 71 to 75.

<sup>xviii</sup>These sections deal with organisational rights.

<sup>xix</sup>See flow diagram 6 in Schedule 4.

<sup>xx</sup>**See flow diagram 7 in Schedule 4.**

<sup>xxi</sup>A maintenance service is defined in section 75.

<sup>xxii</sup>**See flow diagram 8 in Schedule 4.**

<sup>xxiii</sup>See flow diagram 9 in Schedule 4.

<sup>xxiiii</sup>These are the requirements relating to the name of a trade union or employers' organisation to be



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registered.

<sup>xxiv</sup> See section 148

<sup>xxv</sup> See section 149

<sup>xxvi</sup> See section 150

<sup>xxvii</sup> See item 4 of Schedule 3 for the governing body's rules of procedure.

<sup>xxviii</sup> See items 1 to 3 of Schedule 3 for the terms of appointment of members of the governing body.

<sup>xxix</sup> These sections deal with disputes about organisational rights.

<sup>xxx</sup> 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.

<sup>xxxi</sup> These sections deal with disputes about agency shops and closed shops.

<sup>xxxii</sup> This section deals with disputes about determinations made by the Minister in respect of proposals made by a statutory council.

<sup>xxxiii</sup> These subsections deal with disputes about the interpretation or application of collective agreements of a council whose registration has been cancelled.

<sup>xxxiv</sup> This section deals with disputes about the demarcation of sectors and areas of councils.

<sup>xxxv</sup> This section deals with disputes about the interpretation or application of Parts C to F of Chapter III. Part C deals with bargaining councils, Part D with bargaining councils in the public service, Part E with statutory councils and Part F with general provisions concerning councils.

<sup>xxxvi</sup> This section concerns disputes about pickets during strikes and lock-outs.

<sup>xxxvii</sup> This section deals with disputes about proposals that are the subject of joint decision-making.

<sup>xxxviii</sup> This section deals with disputes about the disclosure of information to workplace forums.

<sup>xxxix</sup> This section deals with disputes about the interpretation or application of Chapter V which deals with workplace forums.

<sup>xl</sup> The Constitution referred to is the Constitution of the Republic of South Africa, 1993, which was repealed by the Constitution of the Republic of South Africa, 1996. The reference in this Act will remain until such time as the legislature shall amend it.

The Constitution of the Republic of South Africa, 1996 deals with privacy in section 14.

<sup>xli</sup> Section 24 (1) states that every collective agreement must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement.

<sup>xlii</sup> The Legal Aid Board established in terms of section 2 of the Legal Aid Act, 1969 (Act 22 of 1969).

<sup>xliii</sup> Scope and execution of process.

<sup>xliv</sup> Certified copies of court records admissible as evidence.

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<sup>xlv</sup>No process to be issued against judge except with consent of court.

<sup>xlvi</sup>Manner of securing attendance of witnesses or the production of any document.

<sup>xlvii</sup>Manner in which witness may be dealt with on refusal to give evidence or produce document.

<sup>xlviii</sup>Property not liable to be seized in execution.

<sup>xlix</sup>Offences relating to execution.

<sup>l</sup>Witness fees.

<sup>li</sup>Section 5 confers protections relating to the right to freedom of association and on members of workplace forums.

<sup>lii</sup>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 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.'

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.'

<sup>liii</sup>See Schedule 8, the Code of Good Practice: Dismissal.

<sup>liv</sup>**See flow diagrams 10, 11, 12 and 13 in Schedule 4.**

<sup>lv</sup>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.

<sup>lvi</sup>Section 14 (1) (c) of the Pension 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.

<sup>lvii</sup>Section (14) (1) (c) of the Pension 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.

<sup>lviii</sup>'Employee' is given a different and specific meaning in section 78 in Chapter V.

<sup>lix</sup>The Constitution referred to is the Constitution of the Republic of South Africa, 1993, which was repealed by the Constitution of the Republic of South Africa, 1996. The reference in this Act will remain until such time as the legislature shall amend it.

<sup>lx</sup>The Constitution referred to is the Constitution of the Republic of South Africa, 1993, which was

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repealed by the Constitution of the Republic of South Africa, 1996. The reference in this Act will remain until such time as the legislature shall amend it.