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BETTER UNDERSTANDING THE CURRENT LABOUR CLIMATE

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INTRODUCTION

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27 November 2018

The President of the Republic of South Africa signed the following amendments to Labour Legislation into law:

- 1 Basic Conditions of Employment Act 7 of 2018
Effective 01 January 2019
- 2 Labour Relations Amendment Act 8 of 2018
Effective 01 January 2019
- 3 National Minimum Wage Act 9 of 2018
Effective 01 January 2019
- 4 Labour Laws Amendment Act 10 of 2018
Awaiting Proclamation

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THE CURRENT
LABOUR CLIMATE

NATIONAL MINIMUM WAGE ACT 9 OF 2018 (NMWA)

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Introduction

- Focus on low earning employees
- Attempts to address the income disparities within South Africa
- A first of its kind within South Africa

What is the basic minimum wage?

- R20 per hour for every ordinary hour worked
- R18 per hour for agricultural / farm workers
- R15 per hour for domestic workers

National Minimum Wage Commission

- Established by the NMWA
- Essentially acts as a watchdog and reports to the Minister of Labour
- Responsible for renewing the national minimum wage on an annual basis on , *inter alia*, the following factors:
 - Cost of living
 - Minimum living levels
 - Alleviation of poverty
 - Wage differentials and inequality
 - Conditions of employment

Exemptions

- Employers who are unable to pay the minimum wage are able to apply for exemptions under the NMWA
- The inability to pay must be due to business and / or financial constraints

BASIC CONDITIONS OF EMPLOYMENT ACT 7 OF 2018 (BCEAA)

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Impact

- Due to the introduction of the NMWA the BCEAA has been amended in order to align with the new national minimum wage

Failure to adhere

- Failure to pay employees in line with the NMWA could result in an employer being fined which is calculated per employee as the:
 - greater amount of twice the value of the underpayment or,
 - twice the employee's monthly wage

BETTER
UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

Employment Conditions Commission

- The Employment Conditions Commissions is disestablished due to the introduction of the National Minimum Wage Commission in terms of the NMWA

Claim by employee for outstanding payments

- Employees who are owed an amount by an employer can now institute such a claim at the Commission for Conciliation, Mediation and Arbitration

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UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

LABOUR RELATIONS AMENDMENT ACT ACT 8 OF 2018 (LRAA)

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Introduction

- The LRAA changes various provisions of the Labour Relations Act 66 of 1995
- The main changes can be seen in how the LRAA deals with collective bargaining
- The LRAA provides for the following:
 - Extension of bargaining council agreements to non-parties by the Minister of Labour
 - Extension of funding agreements of bargaining councils
 - Picketing through collective agreement or through prescribed picketing rules
 - Extension of the meaning of ballot for a strike or lock-out to include a secret vote
 - Creation of an advisory arbitration panel

BETTER
UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

Advisory Arbitration Panel (AAP)

- The AAP has been established in order to resolve strikes or lock-outs that are violent or obstinate
- The AAP may also intervene where a strike or lock-out has the potential to cause a national crisis
- The AAP has the power to investigate the cause and circumstances of the strike or lock-out and release an advisory arbitration award
- The AAP may only be established by the Minister of Labour or the Labour Court
- The appointment of the AAP does not interrupt or suspend the right to strike or recourse to a lock-out in accordance with the provisions of the LRA

BETTER
UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

Picketing Regulations

- The Minister of labour released proposed picketing regulations in September 2018
- In its current form it states that unions may not engage in a picket unless there is an agreement on the picketing rules
 - This agreement can take the form of a collective agreement or the parties can engage in conciliation proceedings before the CCMA
 - Alternatively the CCMA can determine the picketing rules
- These default picketing rules will only apply in the absence of a collective agreement or if the parties fail to reach an agreement on the picketing rules

BETTER
UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

Has anything changed around how trade unions refer disputes?

- No, a dispute referral must still be made to the CCMA or relevant Bargaining Council and there is still a compulsory 30-day conciliation period

What happens during the compulsory 30-day conciliation period?

- The commissioner will not only attempt to conciliate the dispute, but will under the proposed amendments, also have to consider whether the parties have any binding collective agreement between them, which contains picketing rules. If no such picketing rules exist, the commissioner will attempt to secure an agreement between the parties

BETTER
UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

What if no agreement is secured?

- The commissioner will then be obliged to determine picketing rules in accordance with any such picketing rules published by the CCMA and any code of good practice

Can the 30-day conciliation period be extended?

- Yes, but only if:
 - its extension will lead to a meaningful conciliation process;
 - an agreement appears likely; and
 - that any such request to extend the 30day period is not unreasonably withheld

BETTER
UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

When determining the rules, is the commissioner obliged to consider any other factors?

- Yes, the commissioner must consider:
 - the nature of the premises / workplace and where the employees intend to picket;
 - the Code of Good Practice: Picketing; and
 - the representations made by either party

What happens if your staff deployed at third party sites want to picket at those third parties' sites?

- This is possible however, the party who owns or controls that third party site must now be given an opportunity to make prior representations on the picketing rules and importantly, on where the designated area may be

BETTER
UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

Can the commissioner issue picketing rules that permit employees to picket on the employer's premises?

- Yes, but only if the employer unreasonably withholds its consent and in such cases, regard must still be had to the nature and circumstances of the premises
- Health and safety factors will also be relevant factors to take into account

When will the commissioner issue the picketing rules?

- Currently, the absence of picketing rules is not a bar to the commencement of strike action, however, the commissioner will have to issue the picketing rules before issuing a certificate of non-resolution

BETTER
UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

Under what other circumstances will a commissioner issue picketing rules?

- A commissioner will be called upon to urgently issue picketing rules in cases of:
 - strike action that is carried out as a result of a unilateral change to terms and conditions of employment by the employer; or
 - where a strike is carried out in response to an unprotected lock-out by the employer

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UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

What happens if there are no picketing rules in place when the strike starts?

- No picketing will be permitted unless:
 - there is a collective agreement in place regulating picketing ie picketing rules;
 - an agreement has been reached on picketing rules between the parties; or
 - the commissioner has issued picketing rules

What recourse is available in the event that the picketing rules are breached?

- The Labour Court may through an interdict:
 - compel compliance with the picketing rules;
 - vary the terms of the picketing rules; and
 - suspend the picket

BETTER
UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

What facts would give rise to the appointment of an advisory panel?

- Where the strike or lock-out:
 - is no longer conducive to collective bargaining, ie it has continued for a protracted period of time with no end in sight;
 - brings about an imminent threat that constitutional rights may or are being violated or there is a threat of damage to property and/or violence;
 - has the imminent potential to cause or exacerbate an acute national or local crisis affecting the conditions for normal social and economic functioning of the community or society

Can any party interdict, stay or review the proceedings of the advisory arbitration panel?

- This will not be possible until such time as an advisory award has been issued

BETTER
UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

Who makes up the advisory award panel?

- A senior commissioner who will be the chairperson, together with one assessor appointed by the employer and one assessor appointed by the trade union

What happens if one of the parties fails or refuses to participate in the advisory arbitration?

- The director of the CCMA will then appoint a person with the requisite experience to represent the interests of that party during the proceedings

What are the powers of the advisory arbitration panel?

- The panel will have the same powers as a commissioner but must deal with the substantial merits of the dispute and can order the disclosure of relevant information, provided that information is necessary in order to make a factual finding

BETTER
UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

How long does the panel take to issue the advisory arbitration award?

- This should be issued within 7 days

If an advisory arbitration panel is appointed, does this suspend the right to strike or lock-out?

- No, the strike and lock-out can continue during this period

What would the advisory arbitration award seek to address?

- It would include a report on the findings, recommendations for the resolution of the dispute and a motivation as to why the recommendations ought to be accepted

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UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

Is the advisory arbitration award binding?

- An award is only binding on a party to the dispute if the parties have accepted or are deemed to have accepted the award. In certain circumstances, the advisory arbitration award can be extended as if it were a collective agreement, but subject to the requirements thereof

Under what circumstances will a party be deemed to have accepted the advisory arbitration award?

- The parties have to make such an election within 7 days. If a party to the dispute fails to indicate either its acceptance or rejection of the award within the aforesaid period, the party is deemed to have accepted the award

BETTER
UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

Are there any additional requirements if a party rejects the advisory arbitration award?

- Yes, the party must provide a motivation for its rejection in the prescribed manner

Can a party strike or lock-out once it becomes bound by the advisory arbitration award?

- No, the advisory award then binds the parties

BETTER
UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

Strike ballot required?

- In terms of s95(5)(p) of the Labour Relations Act, No 66 of 1995 (LRA) trade unions and employers' organisations are required to provide in their Constitution provisions to conduct a secret ballot amongst its members before calling a strike or lock-out in respect of such members
- Trade unions and employer organisations who apply for registration must have adopted a Constitution meeting the requirements in LRA
- Transitional provision – Section 19
- The LRA has been amended to clarify that a ballot means any system of voting by members that is recorded and secret
- The LRA now also requires every registered trade union and employer's organisation to keep the ballot papers or any documentary or electronic record of the ballot for a period of three years from the date of every ballot – Section 99(c)

Strike ballot required?

- Although trade unions and employer's organisations must comply with their Constitutions, the failure to hold a ballot will not result in a strike being unprotected – Section 67(7)
- Section 67(7) only applies to trade unions that have ballot provisions in their Constitution
- This judgement clarifies (sic) the position that a strike by a registered trade union, that does not have in their Constitution the requirements of a ballot, can be interdicted as a result of the failure to conduct a recorded and secret ballot*

* *Mahle Behr SA (Pty) Ltd v NUMSA and Foskor (Pty) Ltd v NUMSA* (D448/19 & D439/19)

Sympathy strikes new test

- Section 66(2) of the LRA requires that the following requirements be satisfied before a secondary strike is protected:
 - The primary strike must comply with sections 64 and 65 of the LRA. It must therefore enjoy protection under the LRA.
 - The secondary employer must be given at least seven (7)/(14) days' notice before the strike commences.
 - The requirements for the notice of secondary strike is the same as that applicable to a primary strike, i.e. the notice must record the issue in dispute / reason for the strike and the date and time of commencement of the strike.

BETTER
UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

- Lastly, the 'nature and extent of the secondary strike must be reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer'
- In determining this nexus, such has been the subject of litigation, academic assessment and judicial debate. It is therefore prudent to consider this final requirement in more detail
- The court held that a secondary strike may be called with the object of giving emotional support and applying socio-economic pressure, but that does not take away from the fact that the secondary strike must possibly have some impact on the bargaining process, of which potential impact or effect is sufficient*
- And: The secondary strike would be disproportionate to the goal of the strike and is thus unreasonable and unprotected

* *Anglo Gold Ashanti Limited t/a Anglo Gold Ashanti and Others v AMCU* [2019]

BETTER
UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

Bonus to non-striking employees?

- The courts have found the payment of bonuses to non-striking employees does not constitute a form of unfair discrimination on arbitrary grounds *
- Section 5 of LRA
- Section 6 of Employment Equity Act
- Section 187(1)(b) – Refusal to do work of a striker

* *National Union of Mineworkers obo Members v Cullinan Diamond Mine A Division of Petra Diamond (Pty) Ltd* (JS102/14) [2019]
ZALCJHB 43 (1 March 2019)

BETTER
UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

- The Court held that it does not mean that because a right to strike is constitutionally guaranteed, once it is exercised, that certain rights like the right to continue in business, should be adversely affected (par 41)
- In this case the court held that in considering s6 of the EEA which prohibits unfair discrimination, there was no contravention
- The court further held that not being paid a bonus does not impair an employee's dignity which is the type of discrimination the EEA seeks to protect
- The case serves to prove that whilst employees exercise their fundamental right to strike, this does not mean that an employer cannot reward those employees who voluntarily contribute to production in order to keep the business afloat during the strike period

BETTER
UNDERSTANDING
THE CURRENT
LABOUR CLIMATE

EFF involvement

- “Where it comes to the EFF and its functionaries, it should simply not stick in its nose where it does not belong”
- These were some of the Labour Court’s words in the judgment of *Calgan Lounge v EFF & Others* (J2648/18) handed down on 9 October 2018
- The Labour Court ruled that a political party has no *locus standi* in the workplace
- Damages

Extension of a collective agreement

- Section 23(1)(d) of the LRA provides that:
A collective agreement binds employees who are not members of the registered trade union or trade unions party to the agreement if:

The employees are identified in the agreement

The agreement expressly binds the employees; and

That trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

- The issue of extension of a collective agreement was argued and the court held that in considering all necessary authority and with proper interpretation of the Act, that the ex post facto extension of the collective agreement is not unlawful or *ultra vires* and it takes effect by the operation of law if the formal requirements of section 23(1)(d) have been met *

* *AMCU v Sibanye Gold Limited and others* [2019]

Planning for a strike

- Violence
- Picketing Rules
- SAPS
- Strike Committee
- Derivative Misconduct
- Interdicts
- Collecting Evidence
- Formulation of Charges
- Damages
- Contempt of Court
- Regulation of Gatherings Act

BETTER
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THE CURRENT
LABOUR CLIMATE

LABOUR LAWS AMENDMENT ACT ACT 10 OF 2018 (LLAA)

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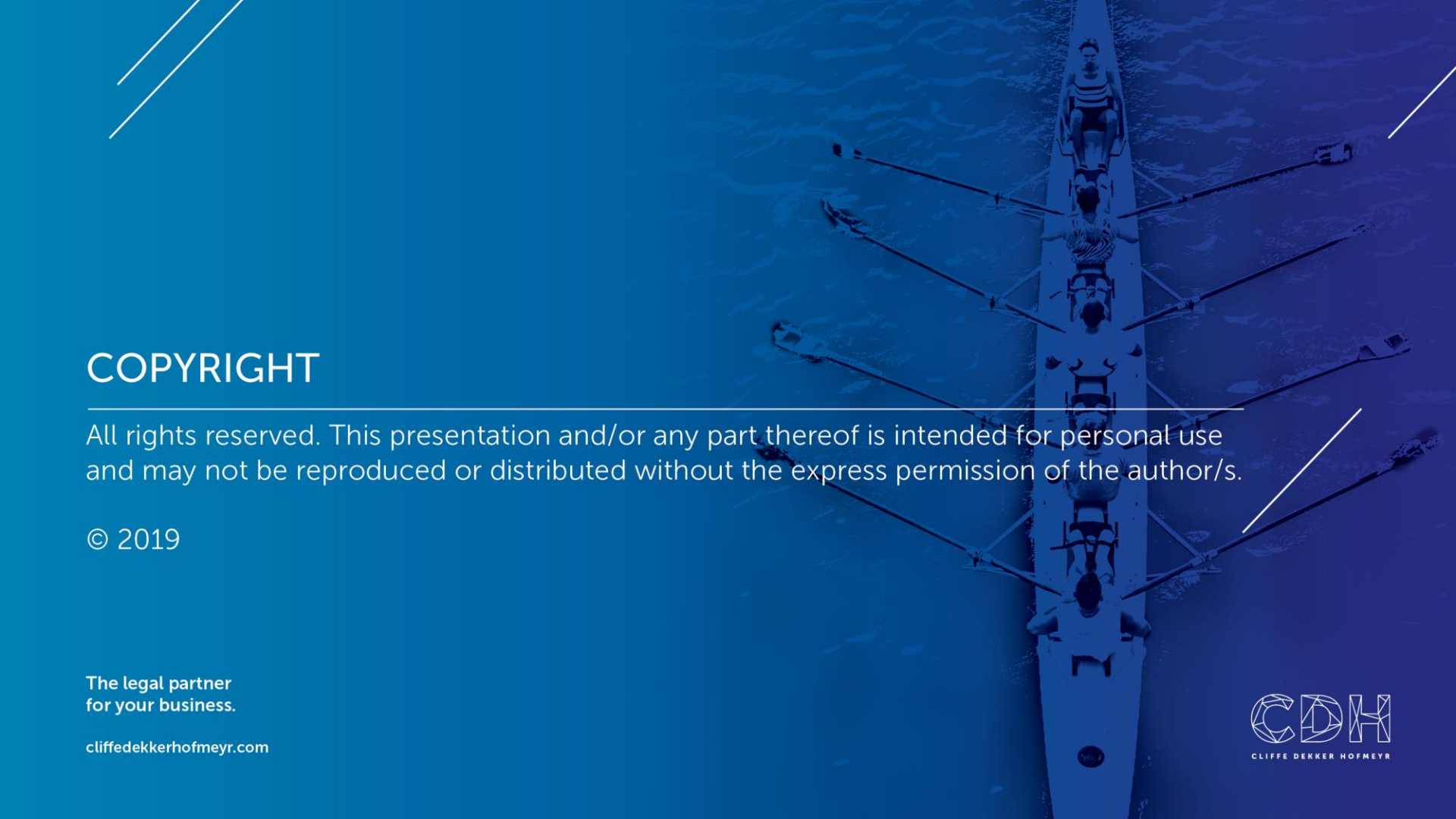
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Introduction

- The LLAA amends the BCEA by introducing new forms of leave for employees
- The LLAA introduces:
 - parental leave,
 - adoption leave, and
 - commissioning parental leave
- The LLAA provides that a collective agreement may not reduce an employee's entitlement to parental, adoption or commissioning parental leave
- Amends the Unemployment Insurance Act, 2001, to provide for the right to claim parental and commissioning parental benefits from the Unemployment Insurance Fund

When is the leave available to an employee?

- An employee, who is a parent of a child, is entitled to 10 consecutive days of parental leave
- An employee, who is commissioning parent in a surrogate motherhood agreement is entitled to:
 - Commissioning parental leave of 10 consecutive weeks, or
 - At least 10 consecutive days of parental leave
- An employee, who is an adoptive parent of a child below the age of two is entitled to:
 - Adoption leave of at least 10 consecutive weeks, or
 - At least 10 consecutive days of parental leave.



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