LAW SOCIETY
OF SOUTH AFRICA

17 February 2011

Via email Thembinkosi.Mkalipi@labour.gov.za

Mr T Mkalipi
Department of Labour
P/Bag X 117
PRETORIA
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Dear Mr Mkalipi

The Department of Labour published four draft Bills relating to proposed amendments to Employment Legislation, these Bills included: -

1. Labour Relations Act amendment Bill;
2. Basic Conditions of Employment Act Amendment Bill;
3. Employment Equity Act Amendment Bill; and
4. Employment Services Bill.

The Department of Labour has called for submissions in respect of the proposed Bills by 17 February 2011.

This submission is made by the Law Society of South Africa (LSSA) and Kwazulu-Natal Law Society (KZNLS) and deals only with issues affecting attorneys and an attorney's client's rights of access to justice.

A number of the proposed amendments are to be commended.

There are also a number of instances where the drafting of the proposed amendments simply do not make sense or are in conflict with current legislation. These and other concerns will no doubt be addressed by other interested parties.

This submission is intended to be brief and to the point. Should any elaboration or explanation be required in respect of any of the submissions such elaboration or explanation will be provided either orally or in writing.

The three (3) areas where this submission will be focused are: -

1. Representation of parties by attorneys in the CCMA;
2. The "con-arb" process in the CCMA; and
3. The exclusion of employees earning in excess of a threshold amount (still to be determined by the Minister) from the Dispute Resolution processes provided for by the CCMA.

1. Representation by Attorneys in the CCMA

Section 115 (2)(k) of the LRA is proposed to be amended to read: -

"The Commissioner may make Rules relating to the representation of parties and any conciliation or arbitration proceedings, including the limitation or prohibition of representation in those proceedings." (our emphasis)

This section at present reads: -

"The Commission may make Rules regulating –

(k) the right of any person or category of persons to represent any party in any conciliation or arbitration proceedings." (our emphasis)

The CCMA has a Rule, namely Rule 25 of the CCMA Rules, dealing with "representation of parties", before the CCMA.

The Law Society submits that Rule 25(1)(c) of the current Rules of the CCMA, which refuses automatic legal representation to a party to a dispute involving a dismissal for misconduct or incapacity is *ulta vires* or unconstitutional for reasons that it unfairly discriminates against members of the legal profession. Furthermore, it denies parties at the CCMA the right to be represented and advised by a representative of their choice. A right to "regulate" does not include the right to "prohibit". The proposed amendment to Section 115(2)(k) removes any reference to "regulate" and simply empowers the Commission to make Rules "limiting or prohibiting" representation in the CCMA.

This will give the CCMA wide-ranging powers to prohibit legal representation by making Rules to this effect. Any such Rule promulgated under the amended Section 115(2)(k) will be unconstitutional in that it unfairly discriminates against attorneys, in the circumstances were attorneys are being given limited rights of appearance in the CCMA or being prohibited from representing clients in the CCMA. The refusal to allow parties the right to be legally represented at arbitration proceedings relating to misconduct and incapacity, while allowing representation by trade union representatives, employer organization and "in-house legal advisors", unfairly discriminates against members of the Attorney's profession. It also seriously limits a party's right of access to justice.

It is submitted that the prohibiting of representation by attorneys in the CCMA is irrational, unreasonable, arbitrary and discriminates against members of the profession.

Further in terms of Section 22 of the Constitution:

"Every citizen has a right to choose their trade, occupation or profession freely."

Implicit in this respect is the right to freely engage in the economic activity, with the presumption that such engagement could be regulated by laws having a rational basis for the type of regulation imposed.

It is submitted that any legislation providing for the "limitation or prohibition" of an attorney's ability to represent parties in the CCMA, would be unconstitutional.

It is further submitted that the limitation or prohibition of legal representation in the CCMA would deprive their clients of their right of access to justice.

Commissioners in the CCMA currently have the necessary powers to deal with unprofessional and unethical behaviour by attorneys in the CCMA. The CCMA has "contempt proceedings" available to it and the Law Society would deal with any report of unethical or unprofessional conduct.

Further the Bill of Rights provides that:

"Everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a Court or where appropriate, another independent and impartial tribunal or forum."

Depriving individuals of the right to legal representation deprives them of the right to a fair hearing.

2. Amendment to Section 191 (5)(A) – "con-arb" process

The proposed amendment to Section 191 (5)(A) of the Labour Relations Act would have the effect that in the event of any conciliation before the CCMA not resolving the dispute an arbitration must commence immediately after a Commissioner has certified that the dispute remains unresolved with only certain exclusions. An amendment of this nature will in effect impact on parties' rights of access to justice. It could also limit the prospects of successfully mediating and resolving a dispute by way of mediation/conciliation.

The amendment to Section 191 (5)(A) of the Labour Relations Act makes the "con-arb" process obligatory with no prior opportunity to object to a matter being conciliated and immediately thereafter arbitrated (as it presently is). Therefore parties will have to argue the "exception" cases at each and every con-arb. This will lead to immense waste of time and resources and create further delays.

Parties to litigation will be prejudiced by having disclosed the strengths and weaknesses of their dispute before a conciliating Commissioner where, in the event of the dispute not being

settled, the matter is arbitrated immediately by the same Commissioner. This process will simply undermine the interests of justice.

In addition, parties will have to prepare for Arbitration, with the impact on business, even where the matter is ultimately postponed or settled.

3. Inclusion of Section 187A – exclusion of certain employees from CCMA

The inclusion of the proposed Section 187A to the Labour Relations Act proposes the exclusion of employees earning in excess of a threshold amount still to be determined by the Minister from the jurisdiction of the CCMA to deal with disputes relating to unfair dismissals, unfair labour practices, operational requirements' terminations, automatically unfair dismissals and the consequences of transfers of businesses (as defined).

As the proposed amendments currently read, an employee earning above whatever the threshold is determined to be, will be "non-suited". In other words employees earning above the threshold, still to be determined, will have no forum available to them to refer a dispute relating to unfair dismissals, unfair labour practices, operational requirements terminations, automatically unfair dismissals and the effects to employees in instances of the transfer of businesses. The reason for this is that no concurrent amendment to Section 191(5)(a) or (b) has been made.

Employees earning above the threshold would simply be entitled to contest the lawfulness of the termination of their contracts of employment on a contractual basis and without reference to fairness and the *jurisprudence* that has developed in this regard over many years.

Such an amendment is unconstitutional as it discriminates arbitrarily against employees earning above the threshold. Further any threshold set would no doubt be arbitrary.

The Bill of Rights provides that "everyone has the right to fair labour practices".

Employees earning over the threshold in terms of the Constitution are also entitled to "fair labour practices". The Bill of Rights provides "everyone is equal before the law and has the

right to equal protection and benefit of the law." The threshold is simply an infringement on these rights.

These are the three (3) key areas where the Department of Labour should give further consideration, in the view of the KZNLS and LSSA.

Yours faithfully

Lizette Burger
Professional Affairs Manager
Tel: +27 (0)12 366 8800
Fax: +27 (0) 86 674 6533
E-mail: lizette@lssa.org.za