



# GOVERNMENT GAZETTE

## OF THE

# REPUBLIC OF NAMIBIA

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No. 266 Promulgation of Labour Act, 2004 (Act No. 15 of 2004), of the Parliament ..... 1

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## Government Notice

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### OFFICE OF THE PRIME MINISTER

No. 266 2004

#### PROMULGATION OF ACT OF PARLIAMENT

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 15 of 2004: Labour Act, 2004.

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## ACT

**To consolidate and amend the labour law; to establish a comprehensive Labour Law for all employers and employees; to entrench fundamental labour rights and protections; to regulate basic terms and conditions of employment; to ensure the health, safety and welfare of employees; to protect employees from unfair labour practices; to regulate the registration of trade unions and employers' organisations; to regulate collective labour relations; to provide for the systematic prevention and resolution of labour disputes; to establish the Labour Advisory Council, the Labour Court, the Wages Commission and the labour inspectorate; to provide for the appointment of the Labour Commissioner and the Deputy Labour Commissioner; and to provide for incidental matters.**

*(Signed by the President on 22 November 2004)*

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**PREAMBLE**

**To give effect to the constitutional commitment to promote and maintain the welfare of the people of Namibia in Chapter 11 of the Constitution; and**

**To further a policy of labour relations conducive to economic growth, stability and productivity by -**

**promoting an orderly system of free collective bargaining;**

**improving wages and conditions of employment;**

**advancing individuals who have been disadvantaged by past discriminatory laws and practices; and**

**regulating the conditions of employment of all employees in Namibia without discrimination on grounds of sex, race, colour, ethnic origin, religion, creed, or social or economic status, in particular -**

**ensuring equality of opportunity and terms of employment, maternity leave and job security for women;**

**promoting sound labour relations and fair employment practices by encouraging freedom of association, in particular, the formation of trade unions to protect workers' rights and interests and the formation of employers' organisations;**

**setting minimum basic conditions of service for all employees;**

**ensuring the health, safety and welfare of employees at work;**

**prohibiting, preventing and eliminating the abuse of child labour;**

**prohibiting, preventing and eliminating forced labour;**

**giving effect, if possible, to the conventions and recommendations of the International Labour Organisation.**



**NOW THEREFORE BE IT ENACTED** by the Parliament of the Republic of Namibia, as follows:

## **CHAPTER 1 INTRODUCTORY PROVISIONS**

### **Definitions and interpretation**

1. (1) In this Act, unless the context indicates otherwise -

“arbitrator” means one or more persons appointed, in terms of this Act, to determine a dispute or any other matter arising from the interpretation, implementation or application of this Act;

“basic wage” means that part of an employee’s remuneration, as calculated in terms of section 10, paid in respect of work done during the hours ordinarily worked but does not include -

- (a) allowances, whether or not based on the employee’s basic wage;
- (b) pay for overtime, as defined in section 8(1);
- (c) additional pay for work on a Sunday or a public holiday; or
- (d) additional pay for night work, as required in terms of section 19(1);

“competent court” means the Labour Court or any magistrates’ court established in terms of the Magistrates’ Courts Act, 1944, (Act No. 32 of 1944);

“conciliation” includes -

- (a) mediating a dispute;
- (b) conducting a fact finding exercise; and
- (c) making an advisory award if -
  - (i) it will enhance the prospects of settlement; or
  - (ii) the parties to the dispute agree.

“collective agreement” means a written agreement concerning the terms and conditions of employment or any other matter of mutual interest, concluded by -

- (a) one or more registered trade unions, on the one hand, and
- (b) on the other hand -
  - (i) one or more employers;
  - (ii) one or more registered employers’ organisations; or
  - (iii) one or more employers and one or more registered employers’ organisations;

“Committee for Dispute Prevention and Resolution” means the Committee established in terms of section 94(1)(a);

“dispute” means any disagreement over a question of law or fact between an employer or an employers’ organisation on the one hand, and an employee or a trade union on the other hand, which disagreement relates to a labour matter;

“dispute of interest” means any dispute, other than a dispute of right, that relates to a labour matter, but does not include a dispute that this Act or any other Act requires to be resolved by -

- (a) adjudication in the Labour Court or other court of law; or
- (b) arbitration;

“employee” means an individual, other than an independent contractor, who -

- (a) works for another person and who receives, or is entitled to receive, remuneration for that work; or
- (b) in any manner and for remuneration assists in carrying on or conducting the business of an employer;

“employer” means any person, including the State who -

- (a) employs, provides work for, an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual;
- (b) permits an individual to assist that person in any manner in the carrying on, conducting that person’s business;

“employers’ organisation” means any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between those employers and their employees or the employees’ trade unions;

“Essential Services Committee” means the Committee established in terms of section 94(1)(b);

“exclusive bargaining agent” means a trade union that has been recognised as such in terms of section 62;

“individual” means a natural person;

“Labour Commissioner” means the individual who holds the office of that name described in section 118;

“Labour Court” means the court referred to in section 112;

“labour inspector” means an individual appointed as a labour inspector in terms of section 122;

“legal practitioner” means an individual admitted to practice as a legal practitioner in terms of the Legal Practitioners Act, 1995 (Act No. 15 of 1995);

“lockout” means a total or partial refusal by one or more employers to allow their employees to work, if the refusal is to compel those employees or employees of any other employer to accept, modify or abandon any demand that may form the subject matter of a dispute;

“medical practitioner” means an individual who is registered as such in terms of the Medical and Dental Professions Act, 2004 (Act No. 10 of 2004) and includes an individual who is registered as a nurse or midwife in terms of the Nursing Act, 2004 (Act No. 8 of 2004);

“Minister” means the Minister responsible for Labour;

“Ministry” means the Ministry responsible for Labour;

“office-bearer” in relation to a trade union or employers’ organisation, means an individual, other than an official, who holds any office in that trade union or employers’ organisation and includes a member of a committee of that trade union or employers’ organisation;

“official” in relation to trade union or employers’ organisation, means an employee of the trade union or employers’ organisation whether or not that employee is employed in a full-time capacity;

“Permanent Secretary” means the Permanent Secretary of the Ministry responsible for Labour;

“public holiday” means any public holiday referred to in or declared under the Public Holidays Act, 1990 (Act No. 26 of 1990);

“picket” has the meaning set out in the Code on Picketing issued by the Minister;

“premises” includes any building or structure, or part of it, whether above or below the surface of the land or water, or any vehicle, truck, vessel or aircraft;

“prescribed” means prescribed by regulation in terms of this Act;

“registered” in relation to a trade union or employers’ organisation, means a trade union or employers’ organisation registered in terms of Chapter 6;

“remuneration” means the total value of all payments in money or in kind made or owing to an employee arising from the employment of that employee;

“State” includes a regional council, local authority or any body created by law in which the State or Government of Namibia has some control over because of shares purchased in or funds made available to that body by the State or Government of Namibia;

“strike” means a total or partial stoppage, disruption or retardation of work by employees if the stoppage, disruption or retardation is to compel their employer, any other employer or an employers’ organisation to which the employer belongs, to accept, modify or abandon any demand that may form the subject matter of a dispute;

“this Act” includes any regulation made under it;

“trade union” means an association of employees whose principal purpose is to regulate relations between employees and their employers;

“Wages Commission” means the Commission referred to in section 102;

“wage order” means a wage order made in terms of section 13;

(2) If a word or expression is defined in this section, other parts of speech or grammatical forms of that word or expression have corresponding meanings to the word or expression that is defined.

### **Application of Act**

2. (1) Section 5 of this Act applies to all employers and employees.

(2) Subject to subsections (3) to (5), all other sections of this Act apply to all employers and employees except -

- (a) subject to the Defence Act, 2002, (Act No. 1 of 2002), the Namibian Defence Force;
  - (b) subject to the Police Act 1990, (Act No. 19 of 1990), the Namibian Police Force and a municipal police service referred to in that Act;
  - (c) subject to the Namibia Central Intelligence Service Act, 1997, (Act No. 10 of 1997), the Namibian Central Intelligence Service; and
  - (d) subject to the Prisons Service Act, 1998, (Act No. 17 of 1998), the Prison Service.
- (3) The Minister may, by notice in the *Gazette*, declare that any provision of a law listed in subsection (5) does not apply to an employee if -
- (a) it relates to the employee's remuneration, or other conditions of service; and
  - (b) it conflicts with this Act.
- (4) If there is a conflict between a provision of this Act and a provision of a law listed in subsection (5), in respect of which the Minister has not made a declaration contemplated in subsection (3) -
- (a) the provision of that other law prevails to the extent of the conflict, if it is more favourable to the employee; or
  - (b) the provision of this Act prevails to the extent of the conflict, in any other case.
- (5) The laws referred to in subsections (3) and (4) are -
- (a) the Apprenticeship Ordinance, 1938 (Ordinance No. 12 of 1938);
  - (b) the Merchant Shipping Act, 1951 (Act No. 57 of 1951); or
  - (c) any law on the employment of persons in the service of the State.

## CHAPTER 2 FUNDAMENTAL RIGHTS AND PROTECTIONS

### Prohibition and restriction of child labour

3. (1) A person must not employ, or require or permit, a child to work in any circumstances prohibited in terms of this section.

(2) A person must not employ a child under the age of 14 years.

(3) In respect of a child who is at least aged 14, but under the age of 16 years, a person -

(a) must not employ that child in any circumstances contemplated in Article 15 (2) of the Namibian Constitution;

(b) must not employ that child in any circumstances in respect of which the Minister, in terms of subsection (5)(a), has prohibited the employment of such children;

(c) must not employ that child in respect of any work between the hours of 20h00 and 07h00; or

(d) except to the extent that the Minister by regulation in terms of subsection (5)(b) permits, must not employ that child, on any premises where -

(i) work is done underground or in a mine;

(ii) construction or demolition takes place;

(iii) goods are manufactured;

(iv) electricity is generated, transformed or distributed;

(v) machinery is installed or dismantled; or

(vi) any work-related activities take place that may place the child's health, safety, or physical, mental, spiritual, moral or social development at risk.

(4) In respect of a child who is at least aged 16 but under the age of 18 years, a person must not employ that child -

(a) in any circumstances set out in subsection (3)(c); or

(b) except to the extent that the Minister by regulation in terms of subsection (5)(b) permits, in any circumstances set out in subsection (3)(d).

(5) The Minister may make regulations to -

(a) prohibit the employment of children between the ages of 14 and 16 at any place or in respect of any work; or

(b) permit the employment of children between the ages of 14 and 18 in circumstances contemplated in subsection (3)(d) and (4)(b), subject to any conditions or restrictions that may be contained in those regulations, but such regulations must not permit the employment of a child -

- (i) under the age of 16 years in circumstances contemplated in subsection (3)(a) to (c); or
- (ii) at least age 16, but under the age of 18 years, in circumstances contemplated in subsection (3)(c).

(6) It is an offence for any person to employ, or require or permit, a child to work in any circumstances prohibited under this section and a person who is convicted of the offence is liable to a fine not exceeding N\$4 000 or to imprisonment for a period not exceeding 12 months or to both such fine and imprisonment.

#### **Prohibition of forced labour**

4. (1) A person must not directly or indirectly cause, permit or require any individual to perform forced labour.

(2) Forced labour does not include any labour described in Article 9(3)(a) to (e) of the Namibian Constitution but, for the purposes of this Act, "forced labour" includes -

- (a) any work or service performed or rendered involuntarily by an individual under threat of any penalty, punishment or other harm to be imposed or inflicted on or caused to that individual by any other individual, if the first-mentioned individual does not perform the work or render the service;
- (b) any work, performed by an employee's child who is under the age of 18 years, if the work is performed in terms of an arrangement or scheme in any undertaking between the employer and the employee;
- (c) any work performed by any individual because that individual is for any reason subject to the control, supervision or jurisdiction of a traditional chief or headman in that chief's or headman's capacity as chief or headman.

(3) It is an offence for any person to directly or indirectly, cause, permit or require an individual to perform forced labour prohibited under this section and a person who is convicted of the offence is liable to a fine not exceeding N\$4 000 or to imprisonment for a period not exceeding 12 months or to both such fine and imprisonment.

#### **Prohibition of discrimination and sexual harassment in employment**

5. (1) For the purposes of this section -

- (a) "AIDS" means Acquired Immune Deficiency Syndrom, a human disease which is caused by the HIV and which is characterised by the progressive destruction of the body's immune system;
- (b) "employment practice" includes -
  - (i) access to vocational guidance, training and placement services;
  - (ii) access to employment and to a particular occupation or job, including -
    - (aa) advertising;
    - (bb) recruitment procedures;
    - (cc) selection procedures;
    - (dd) appointments and the appointment process;

- (ee) promotion, demotion, and transfer;
  - (ff) remuneration and other terms and conditions of employment;
  - (iii) access to and the provision of benefits, facilities and services;
  - (iv) security of tenure; or
  - (v) discipline, suspension or termination of employment;
  - (c) “family responsibility” means the responsibility of an employee to an individual -
    - (i) who is a parent, spouse, son, daughter or dependant of the employee; and
    - (ii) who, regardless of age, needs the care and support of that employee;
  - (d) “HIV” means Human Immunodeficiency Virus, a virus that weakens the body's immune system, ultimately causing AIDS;
  - (e) “person with disability” means an individual who suffers from any persistent physical or mental limitation that restricts that individual's preparation for, entry into or participation or advancement in, employment or an occupation;
  - (f) “racially disadvantaged persons” means individuals who belong to a racial or ethnic group that was or is, directly or indirectly, disadvantaged in the labour field as a consequence of social, economic, or educational imbalances arising out of racially discriminatory laws or practices before the independence of Namibia;
  - (g) “work of equal value” means work that -
    - (i) is broadly similar in nature having due regard to the frequency and nature of the differences; and
    - (ii) requires comparable skills, abilities, and responsibilities within a comparable working environment.
- (2) A person must not discriminate in any employment practice, directly or indirectly, against any individual on one or more of the following grounds -
- (a) race, colour, or ethnic origin;
  - (b) sex, marital status or family responsibilities;
  - (c) religion, creed or political opinion;
  - (d) social or economic status;
  - (e) degree of physical or mental disability;
  - (f) AIDS or HIV status; or
  - (g) previous, current or future pregnancy.
- (3) For the purpose of subsection (2) -

- (a) it is discrimination to differentiate without justification in any employment practice between employees who do work of equal value, or between applicants for employment who seek work of equal value; but
  - (b) it is not discrimination -
    - (i) to take any affirmative action measure to ensure that racially disadvantaged persons, women or persons with disabilities -
      - (aa) enjoy employment opportunities at all levels of employment that are at least equal to those enjoyed by other employees of the same employer; and
      - (bb) are equitably represented in the workforce of an employer; or
    - (ii) to distinguish, exclude or prefer any individual on the basis of an inherent requirement of a job;
    - (iii) to take any measure that has been approved by the Employment Equity Commission in terms of the Affirmative Action (Employment) Act, 1998 (Act No. 29 of 1998); or
    - (iv) in the case of a female employee who is pregnant, to temporarily reassign that employee duties or functions, other than that employee's normal duties or functions, which are suitable to that employee's pregnant condition, provided that the reassignment does not lead to a reduction in remuneration or any other benefits in respect of the employee's employment.
- (4) A person must not, in any employment practice or in the course of an employee's employment, directly or indirectly sexually harass an employee.
- (5) Where sexual harassment is perpetrated by an employer against an employee, that conduct does, for the purposes of section 32, constitute unfair dismissal which entitles the employee to remedies available to an employee who has been unfairly dismissed.
- (6) For the purposes of subsections (4) and (5) -
- (a) "employee" includes a prospective employee;
  - (b) "sexual harassment" means any unwarranted conduct of a sexual nature which violates the dignity of an employee and constitutes a barrier to equality in employment where -
    - (i) the victim has made it known to the perpetrator that he or she finds the conduct offensive; or
    - (ii) the perpetrator should have reasonably realised that the conduct is regarded as unacceptable, taking into account the respective positions of the parties in the place of employment, the nature of their employment relationships and the nature of the place of employment;
- (7) In a dispute alleging discrimination without justification, it is a complete defence to the allegation if -
- (a) the decision taken by the employer was in compliance with -



- (i) an affirmative action plan approved by the Employment Equity Commission in terms of the Affirmative Action (Employment) Act, 1998 (Act No. 29 of 1998); and
- (ii) section 19(1) and (2) of that Act; and
- (b) the dispute arises from a choice by an employer between or among individuals, each of whom is -
  - (i) a woman;
  - (ii) a person with a disability; or
  - (iii) a racially disadvantaged person.

### **Freedom of association**

6. (1) A person must not prejudice an employee or an individual seeking employment because of past, present or anticipated -

- (a) exercise of any right conferred by this Act;
- (b) disclosure of information that the employee or individual seeking employment is entitled or required to give in terms of this Act;
- (c) failure or refusal to do something that an employer must not lawfully permit or require an employee to do;
- (d) membership of a trade union; or
- (e) participation in the lawful activities of a trade union -
  - (i) outside of ordinary working hours; or
  - (ii) with the consent of the employer, during working hours.

(2) A trade union or employers' organisation must not discriminate against any individual on any of the grounds listed in section 5(2) in respect of -

- (a) admission to, suspension or termination of membership;
- (b) election to or removal from office;
- (c) the union's or organisation's activities.

### **Disputes concerning fundamental rights and protections**

7. (1) Any party to a dispute may refer the dispute in writing to the Labour Commissioner if the dispute concerns -

- (a) a matter within the scope of this Act and Chapter 3 of the Namibian Constitution; or
- (b) the application or interpretation of section 5 or 6.

(2) The person who refers a dispute must satisfy the Labour Commissioner that a copy of the notice of a dispute has been served on all the other parties to the dispute.

(3) Subject to subsection (4), the Labour Commissioner may, subject to section 83(4), appoint an arbitrator to resolve the dispute through arbitration, in accordance with Part C of Chapter 8 of this Act.

- (4) If a dispute alleges discrimination, the Labour Commissioner may -
- (a) first appoint a conciliator to attempt to resolve the dispute through conciliation; and
  - (b) appoint an arbitrator in terms of subsection (3) only if the dispute remains unresolved after conciliation.

(5) Nothing in this section, prevents a person who feels that that person's fundamental right or freedom under this Chapter has been infringed or is threatened, from approaching a competent court for enforcement or protection or from approaching the Ombudsman for legal assistance or advise as contemplated in the Namibian Constitution.

### CHAPTER 3 BASIC CONDITIONS OF EMPLOYMENT

#### PART A APPLICATION OF THIS CHAPTER

##### Definitions relating to basic conditions of employment

8. In this Chapter -
- (a) "annual leave cycle" means the period of 12 consecutive month's employment with the same employer immediately following -
    - (i) an employee's commencement of employment; or
    - (ii) the completion of the last annual leave cycle;
  - (b) "continuous shift" means a shift in a continuous operation, as permitted by the Minister in terms of section 15(1);
  - (c) "guard" means an employee who -
    - (i) controls, checks and reports on the movement of individuals, vehicles and goods through a checkpoint or at any other place; or
    - (ii) protects persons or property;
  - (d) "incapacity" means an inability to work owing to any sickness or injury;
  - (e) "monetary remuneration" refers to that part of the remuneration that is paid in money;
  - (f) "overtime" means time worked in excess of the hours an employee ordinarily works in any ordinary working day but does not include any work done on -
    - (i) a Sunday, if it is not an ordinary working day for that employee; or
    - (ii) a public holiday;

- (g) “sick leave” means any period during which the employee is unable to work due to incapacity;
- (h) “sick leave cycle” -
  - (i) means the period of 36 consecutive months’ employment with the same employer immediately following -
    - (aa) an employee’s commencement of employment; or
    - (bb) the completion of the last sick leave cycle; and
  - (ii) includes any period, or combination of periods, not exceeding a total of 36 weeks, during which an employee is on annual leave, sick leave or any other absence from work on the instructions, or with the permission, of the employer.
- (i) “spread-over” means the period from the time an employee first starts work in any one 24 hour cycle to the time the employee finally stops work in that cycle;
- (j) “urgent work” means -
  - (i) work connected with an essential service, as determined in terms of section 75; or
  - (ii) work connected with the arrival, departure, loading, unloading, provisioning, fuelling or essential maintenance of -
    - (aa) a ship;
    - (bb) an aircraft; or
    - (cc) a truck or other heavy vehicle used to transport passengers, livestock or perishable goods;
- (k) “week” in relation to an employee, means a period of seven days within which the working week of that employee falls;
- (l) “weekly interval” means the interval between the end of one ordinary working week and the start of the next.

### **Basic conditions**

9. (1) Each provision set out in Parts B through to F of this Chapter is a basic condition of employment.

(2) A basic condition of employment constitutes a term of any contract of employment except to the extent that -

- (a) any law regulating the employment of individuals provides a term that is more favourable to the employee;
- (b) a term of the contract of employment or a provision of a collective agreement is more favourable to the employee; or
- (c) the basic condition of employment has been altered as a result of an exemption granted in terms of section 137.

(3) Subject to section 2(3) to (5), if there is a conflict between the provisions of this Chapter, and the provisions of any other law, the law that provides the more favourable terms and conditions for the employee prevails to the extent of the conflict.

## PART B REMUNERATION

### Calculation of various wage rates

**10.** (1) This section applies when, for any purpose of this Act, it is necessary to determine the applicable hourly, daily, weekly or monthly rate of pay of an employee -

- (a) whose remuneration is based on a different time interval; or
- (b) who is remunerated on a basis other than time worked.

(2) If an employee is remunerated on a basis other than time worked, that employee must be considered, for the purpose of this section, to be remunerated on a weekly basis, and that employee's basic weekly wage must be calculated as follows:

- (a) total the amount of monetary remuneration earned by the employee during -
  - (i) the immediately preceding 13 weeks of work; or
  - (ii) if the employee has been in employment for a shorter period, that shorter period of work; and
- (b) divide that total by the number of weeks the employee worked to determine the employee's average weekly wage.

(3) To determine the comparable hourly, daily, weekly or monthly wage rate of an employee who is paid on an hourly, daily, weekly, fortnightly or monthly basis -

- (a) in the first column of Table 1 below, locate the line for that employee's applicable pay period;
- (b) read across on that line to the column for the desired comparable wage rate, as indicated in the first line of the table; and
- (c) apply the formula set out in the cell of the table thus located.

Table 1 – Calculation of comparable wage rates

|   | To calculate hourly rates   | To calculate daily rates   | To calculate weekly rates   | To calculate monthly rates  |
|---|---|--|---|---|
| Employees whose remuneration is set by the hour |   | Multiply the hourly rate by the number of ordinary hours of work each day. | Multiply the hourly rate by the number of ordinary hours of work each week. | Calculate the weekly rate, then multiply the calculated weekly rate by 4,333. |
| Employees whose remuneration is set by the day  | Divide the daily rate by the number of ordinary hours of work each day. |  | Multiply the daily rate by the number of ordinary days of work each week.   | Calculate the weekly rate, then multiply the calculated weekly rate by 4,333. |

|  | To calculate hourly rates   | To calculate daily rates   | To calculate weekly rates           | To calculate monthly rates  |
|--|---|--|-------------------------------------|---|
| Employees whose remuneration is set by the week      | Divide the weekly rate (or calculated weekly rate) by the number of ordinary hours of work each week. | Divide the weekly rate (or calculated weekly rate) by the number of ordinary days of work each week. |                                     | Multiply the weekly rate (or calculated weekly rate) by 4,333.                |
| Employees whose remuneration is set by the fortnight | Divide the fortnightly rate by two times the number of ordinary hours of work each week.              | Divide the fortnightly rate by two times the number of ordinary days of work each week.              | Divide the fortnightly rate by two. | Calculate the weekly rate, then multiply the calculated weekly rate by 4,333. |
| Employees whose remuneration is set by the month     | Divide the monthly rate by (4,33 times the number of hours ordinarily worked each week).              | Divide the monthly rate by (4,33 times the number of days ordinarily worked each week).              | Divide the monthly rate by 4,333.   |   |

(4) For the purposes of Table 1 in subsection (3) -

(a) 'ordinary hours' -

(i) must not exceed the maximum number of ordinary hours referred to in section 16;

(ii) do not include overtime.

(b) 'ordinary days' means -

(i) five days, if the employee works a five day week;

(ii) six days, if the employee works a six day week; or

(iii) the number of agreed days, if the employee works less than five days a week.

### Payment of remuneration

**11.** (1) An employer must pay to an employee any monetary remuneration to which the employee is entitled -

(a) not later than one hour after completion of the ordinary hours of work on the agreed pay day, which may be daily, weekly, fortnightly or monthly;

(b) in cash or by cheque in which case the payment must be either -

(i) to the employee; or

(ii) by direct deposit into an account designated in writing by that employee;

- (c) in a sealed envelope, if payment is in cash or by cheque.
- (2) Each payment contemplated in subsection (1) -
  - (a) must be supported by a written statement of particulars in the prescribed form, which -
    - (i) must accompany the payment, if payment is in cash or by cheque; or
    - (ii) must be in a sealed envelope given to the employee, if payment is by direct deposit;
  - (b) must not be made at a shop, bottle store or other place where intoxicating liquor is sold or stored or any place of amusement in that shop, bottle store or place, unless the employee is employed in that shop, bottle store or place.

### **Deductions and other acts concerning remuneration**

**12.** (1) An employer must not make any deduction from an employee's remuneration unless -

- (a) the deduction is required or permitted in terms of a court order, or any law; or
- (b) subject to subsection (2), the deduction is -
  - (i) required or permitted under any collective agreement or in terms of any arbitration award; or
  - (ii) agreed in writing and concerns a payment contemplated in subsection (3).

(2) The deductions made in terms of subsection (1)(b) must not in aggregate exceed one third of the employee's remuneration.

(3) A deduction referred to in subsection (1)(b)(ii) may be made only in respect of the payment of -

- (a) rent in respect of accommodation supplied by the employer;
- (b) goods sold by the employer;
- (c) a loan advanced by the employer;
- (d) contributions to employee benefit funds; or
- (e) subscriptions or levies to a registered trade union.

(4) An employer who deducts an amount from an employee's remuneration in terms of subsection (1) for payment to another person must pay the amount to that person in accordance with the time period and other requirements specified in the law, court order, arbitration award or agreement.

- (5) An employer must not -
  - (a) levy a fine on an employee unless it is authorised by statute or a collective agreement;

- (b) require an employee to -
    - (i) buy goods from a shop owned by the employer or run on its behalf;
    - (ii) use the services rendered by the employer for reward;
    - (iii) pay for any goods supplied by the employer at a price exceeding an amount equal to the price paid by the employer for the goods plus any reasonable costs incurred by the employer in acquiring the goods;
  - (c) require or permit an employee to -
    - (i) repay any remuneration duly paid to an employee; or
    - (ii) acknowledge receipt of an amount greater than the remuneration actually received;
- (6) Despite any provision in a contract of employment to the contrary, an employer may, by written notice to the employee -
- (a) reduce an employee's agreed number of working hours on a temporary basis; and
  - (c) correspondingly reduce that employee's remuneration, but by no more than one third of that employee's basic wage.

### Wage order

**13.** (1) After considering a report and recommendations of the Wages Commission, the Minister may make a wage order determining remuneration and other conditions of employment for employees in any industry and area -

- (a) in accordance with the recommendations;
  - (b) by notice in the *Gazette*; and
  - (c) with effect from a date specified in that *Gazette*.
- (2) A wage order is binding on all employers and employees described in the notice.
- (3) A wage order remains binding until it is -
- (a) suspended or cancelled by the Minister in accordance with subsection (4);
  - (b) amended or superseded by a new or amended wage order; or
  - (c) superseded by a collective agreement.
- (4) The Minister, after consulting the parties bound by a wage order, may suspend or cancel all or part of that order by publishing a notice in the *Gazette*, setting out -
- (a) the provisions affected by the suspension or cancellation;
  - (b) the industry and areas affected by the suspension or cancellation; and
  - (c) the period of the suspension, or date the cancellation takes effect.

(5) In addition to publication of any information in the *Gazette* as contemplated in this section, the Minister must, where appropriate, publish the information through other available means, with a view to ensuring that the intended recipients of the information receive the information.

(6) If the Minister decides not to make a wage order that has been recommended by the Wages Commission, any person who is aggrieved by the Minister's decision may apply to the Labour Court for a review of the decision.

#### **Exemptions from a wage order**

**14.** (1) Any person may apply to the Minister in the prescribed manner and form for an exemption from the provisions of a wage order.

(2) The Minister may exempt any person or category of persons from any provision of a wage order if the Minister is satisfied that -

- (a) the terms and conditions of employment of the employees affected by the exemption are not substantially less favourable than those contained in the wage order; or
  - (b) special circumstances exist that justify the exemption in the interests of the affected employees.
- (3) An exemption granted in terms of subsection (2) -
- (a) must be set out in the prescribed form, which must -
    - (i) state the period of the exemption as determined by the Minister; and
    - (ii) be signed by the Minister;
  - (b) may commence on -
    - (i) the date it is signed, or a later date; or
    - (ii) a date before the date it is signed, but not earlier than the date of the application for exemption; and
  - (c) may include any conditions under which the exemption is granted.
- (4) The Permanent Secretary must -
- (a) forward the exemption to any person exempted and the employees affected by the exemption; and
  - (b) furnish a copy of the exemption to any person on the payment of the prescribed fee.
- (5) The Minister may, in writing, amend or withdraw an exemption.

(6) Any person who is aggrieved by the grant, amendment or withdrawal of an exemption or the terms or period of the exemption may apply to the Labour Court for a review of the Minister's decision.



## PART C HOURS OF WORK

### Declaration of continuous shifts

15. (1) The Minister may, by notice in the *Gazette*, declare any operation to be a continuous operation and to permit the working of continuous shifts in respect of those operations.

(2) In a notice referred to in subsection (1), the Minister may prescribe any condition in respect of the shift, provided that no one shift may be longer than eight hours.

(3) In addition to publication of any information in the *Gazette* as contemplated in this section, the Minister must, where appropriate, publish the information through other available means, with a view to ensuring that the intended recipients of the information receive the information.

### Ordinary hours of work

16. (1) Subject to any provision of this Chapter to the contrary, an employer must not require or permit an employee, other than an employee contemplated in subsection (3), to work more than -

- (a) 45 hours in any week; or
- (b) if the employee works in a continuous operation, the maximum number of hours prescribed by the Minister in terms of section 15(2) for that employee's continuous shift.

(2) The ordinary hours of work of an employee described in subsection (1) whose duties include serving members of the public may be extended up to 15 minutes in a day, but not more than a total of 60 minutes in a week, to enable that employee to continue performing those duties after the completion of ordinary hours of work.

(3) Subject to any provision of this Chapter to the contrary, an employer must not require or permit a guard, an employee working in emergency services or an employee of a class designated by the Minister in terms of subsection (4) to work more than -

- (a) 60 hours in any week; or
- (b) if the employee works in a continuous operation, the maximum number of hours prescribed by the Minister in terms of section 15(2) for that employee's continuous shift.

(4) The Minister may designate a class of employees for the purpose of subsection (3) by notice in the *Gazette* if satisfied that the affected employees or their registered trade unions have been consulted.

### Overtime

17. (1) Subject to any provision of this Chapter to the contrary, an employer must not require or permit an employee to work overtime except in accordance with an agreement, but, such an agreement must not require an employee to work more than 10 hours overtime a week, and in any case, not more than 3 hours' overtime a day.

(2) An employer must pay an employee for overtime worked at a rate at least one and one-half times the employee's basic wage but in case the employee works on a Sunday or public holiday, the employer must pay at a rate of at least double the employee's basic wage.

(3) An employer may apply in writing to the Permanent Secretary to increase the limits on overtime work referred to in subsection (1) if the employees affected by the application agree.

(4) If the Permanent Secretary grants the application, the Permanent Secretary must issue a notice stipulating -

- (a) the class of employees to whom the notice applies;
- (b) the new limits on overtime work;
- (c) any conditions concerning the working of that overtime; and
- (d) its period of application.

(5) This section, except subsection (2), does not apply to an employee who is performing urgent work.

#### **Meal intervals**

**18.** (1) An employer must give an employee who works continuously for more than five hours a meal interval of at least one hour.

(2) An employer may shorten the meal interval to not less than 30 minutes if -

- (a) the employee agrees; and
- (b) the employer has given written notice to the Permanent Secretary of that agreement.

(3) An employer must not require or permit an employee to work during a meal interval.

(4) For the purposes of this section -

- (a) work is continuous unless it is interrupted by an interval that is not less than 60 minutes, or such shorter period as agreed in terms of subsection (2);
- (b) a driver of a motor vehicle who does no work other than remain in charge of the vehicle or its load during a meal interval is deemed not to be working during the interval; and

(c) an employee must be remunerated for any portion of a meal interval that is longer than 60 minutes.

(5) This section does not apply to -

- (a) an employee who is engaged in urgent work;
- (b) a guard; or
- (c) an employee who works on a continuous shift.

**Night work**

**19.** (1) An employee is entitled to additional remuneration of at least six percent of that employee's hourly rate for each hour of work, excluding overtime work, performed by that employee, between the hours of 20h00 and 07h00.

(2) An employer must not require or permit an employee, who the employer knows, or reasonably ought to know, is pregnant, to perform any work, including overtime work, between the hours of 20h00 and 07h00, during the period -

- (a) eight weeks before her expected date of confinement; or
- (b) eight weeks after her confinement.

(2) The periods referred to in subsection (2) may be extended if a medical practitioner certifies that it is necessary for the health of the employee or her child.

**Daily spread-over and weekly rest period**

**20.** (1) No employer may require or permit an employee, other than an employee who is performing urgent work, to work a spread-over of more than 12 hours.

(2) An employer must not require or permit an employee, other than an employee who is performing urgent work, to work without a weekly interval of at least 36 consecutive hours of rest.

**Work on Sundays**

**21.** (1) An employer must not require or permit an employee to perform work on a Sunday, except as provided in this section.

(2) Subsection (1) does not apply to an employer who employs an employee for the purposes of -

- (a) urgent work;
- (b) carrying on the business of a shop, hotel, boarding house or hostel that lawfully operates on a public holiday or Sunday;
- (c) performing domestic service in a private household;
- (d) health and social welfare care and residential facilities, including hospitals, hospices, orphanages and old age homes;
- (e) essential work on a farm required to be done on that day;
- (f) work in which continuous shifts are worked; or
- (g) any activity approved by the Permanent Secretary in terms of subsection (4).

(3) An employer may apply in writing to the Permanent Secretary to approve work on Sundays if the employees affected by the application agree.

(4) If the Permanent Secretary grants the application, the Permanent Secretary must issue a notice in writing stipulating -

- (a) the nature of the work to which the notice applies; and

(b) any conditions that may apply.

(5) Subject to subsection (6), an employee who works on Sunday is entitled to double that employee's basic hourly wage for each hour worked on Sunday.

(6) Despite subsection (5), an employer may pay an employee who works on Sunday one and one half of that employee's basic hourly wage for each hour worked on Sunday if -

(a) the employer grants that employee an equal period of time away from work during the next working week; and

(b) that employee agrees.

(7) For the purpose of this section, if the majority of the hours worked on a shift, that extends into or begins on a Sunday, falls on -

(a) the Sunday, all the hours on that shift are deemed to be work on Sunday; or

(b) the Saturday or Monday, all the hours on that shift are deemed to be work on that Saturday or Monday.

### **Public holidays**

**22.** (1) An employer must not require or permit an employee to perform any work on a public holiday, except as provided in this section.

(2) Subsection (1) does not apply to an employer who employs an employee for the purposes of -

(a) urgent work;

(b) carrying on the business of a shop, hotel, boarding house or hostel that lawfully operates on a public holiday or Sunday;

(c) performing domestic service in a private household;

(d) health and social welfare care and residential facilities, including hospitals, hospices, orphanages and old age homes;

(e) essential work on a farm required to be done on that day;

(f) work in which continuous shifts are worked; or

(g) any activity approved by the Permanent Secretary in terms of subsections (4).

(3) An employer may apply in writing to the Permanent Secretary to approve work on public holidays if the employees affected by the application agree.

(4) If the Permanent Secretary grants the application, the Permanent Secretary must issue a notice in writing stipulating -

(a) the nature of the work to which the notice applies; and

(b) any conditions that may apply.

(5) If a public holiday falls on a day on which an employee would ordinarily work, the employer must either -

- (a) pay -
  - (i) an employee who does not work on the public holiday, no less than that employee's basic daily wage subject to subsection (6); or
  - (ii) an employee who works on the public holiday, no less than double that employee's basic hourly wage for each hour worked on that day; or
- (b) if the employee referred to in paragraph (a)(ii) requests and the employer agrees -
  - (i) pay an employee who works on the public holiday one and one half of that employee's basic hourly wage for each hour worked on that day; and
  - (ii) grant that employee an equal period of time from work during the next working week.

(6) If an employee who does not work on a public holiday fails, without a valid reason contemplated in this Act, to work on either the day immediately before, or the day immediately following, that public holiday, the employer is not required to pay that employee the amount otherwise required in terms of subsection (5)(a)(i).

(7) For the purpose of subsections (1) to (6), if the majority of the hours worked on a shift, that extends into or begins on a public holiday, falls on -

- (a) the public holiday, all the hours on that shift are deemed to be worked on the public holiday; or
- (b) the other day, all the hours on that shift are deemed to be worked on that day.

#### **PART D LEAVE**

##### **Annual leave**

**23.** (1) An employee is entitled to at least 24 consecutive working days' annual leave on full basic wage in respect of each annual leave cycle.

(2) The number of days referred to in subsection (1) may be reduced by the number of days during the annual leave cycle which, on request by the employee, the employer granted that employee occasional leave on full basic wage.

(3) An employer may determine when the annual leave is to be taken provided that it is taken no later than -

- (a) four months after the end of the annual leave cycle; or
- (b) six months after the end of the annual leave cycle, if, before the end of the four month period contemplated in paragraph (a), the employee agreed in writing to such an extension.

(4) An employer must pay the remuneration due to an employee in respect of annual leave -

- (a) according to that employee's regular pay schedule, if the employee is paid by direct deposit as contemplated in section 11(1)(b)(ii); or
- (b) in any other case, not later than -
  - (i) the last working day before the commencement of the annual leave; or
  - (ii) not later than the first pay day after the end of the leave period, if the employee requests such an extension in writing.

(5) An employer must not require or permit an employee to take annual leave during any other period of leave to which the employee is entitled in terms of this Part.

(6) An employer must grant an employee an additional day of paid leave if a public holiday falls on a day -

- (a) during an employee's annual leave; and
- (b) on which the employee would ordinarily have worked.

(7) An employer must not require or permit an employee to work for the employer during any period of annual leave.

(8) Except on termination of employment, an employer must not pay an employee an amount of money in substitution for the annual leave to which that employee is entitled, whether or not the employee requests, or agrees in writing to, such a payment.

#### **Sick and compassionate leave**

**24.** (1) During any sick leave cycle, an employee is entitled to sick leave as follows:

- (a) during the employee's first 12 months of employment, one day's sick leave for every 26 days worked; and
- (b) thereafter -
  - (i) not less than 30 working days, if the employee works not more than five days during a week;
  - (ii) not less than 36 working days, in the case of any other employee.

(2) Subject to subsection (3), on the employee's agreed pay day, the employer must pay that employee an amount equal to that employee's basic wage rate for each day's sick leave.

(3) Despite subsection (2), an employer is not required to pay an employee for sick leave in any of the following circumstances:

- (a) if the employee -
  - (i) has been absent from work for more than two consecutive days; and
  - (ii) fails to produce a medical certificate by a medical practitioner;

- (b) to the extent that the employee is entitled to payment in terms of the Employees' Compensation Act, 1941 (Act No. 30 of 1941), if the employee is absent from work during any period of incapacity arising from an accident or a scheduled disease;
  - (c) to the extent that the employee is entitled to payment in respect of that sick leave from a fund or organisation -
    - (i) designated by the employee, and in respect of which the employer makes contributions at least equal to that made by the employee;
    - (ii) that guarantees the payment of sick leave; or
  - (d) to the extent that the employee is entitled to payment in respect of that sick leave under any other legislation.
- (4) An employee is, during each period of 12 months that the employee is employed, entitled to five working days compassionate leave with fully paid remuneration.
- (5) An employee is entitled to compassionate leave if there is a death or serious illness in the family.
- (6) The Minister must prescribe the form and manner in which compassionate leave may be applied for by an employee and any other information which may be required to support the application.
- (7) Compassionate leave -
- (a) does not form part of annual, sick or maternity leave;
  - (b) does not entitle the employee to any additional remuneration on termination of employment; and
  - (c) if not used during the period referred to in subsection (4), lapses at the end of that period.
- (8) For the purposes of this section "family" means a -
- (a) child, including a child adopted in terms of any law, custom or tradition;
  - (b) spouse, including a partner to a customary law union or other union recognised as a marriage in terms of any religion or custom; or
  - (c) parent, grandparent, brother or sister,

of the employee.

### **Maternity leave**

**25.** (1) Subject to subsection (3), an employee is entitled to not less than 12 weeks maternity leave, calculated as follows:

- (a) before her actual date of confinement -
  - (i) she is entitled to commence maternity leave 4 weeks before her expected date of confinement, as certified by her medical practitioner; and

- (ii) she is entitled to maternity leave for the entire time from the commencement of her maternity leave as contemplated in paragraph (i), until her actual date of confinement.
- (b) after her date of confinement, she is entitled to -
  - (i) eight weeks maternity leave in every case; and
  - (ii) in the case of an employee whose date of confinement occurred less than four weeks after the commencement of her maternity leave, the amount of additional time required to bring her total maternity leave to 12 weeks.
- (2) The employee must provide the employer with a certificate signed by a medical practitioner confirming -
  - (a) the expected date of confinement before taking maternity leave; and
  - (b) the actual date of confinement on her return from leave.
- (3) During any period of maternity leave, the provisions of the contract of employment remain in force, and the employer must, during the period of maternity leave, pay to the employee the remuneration payable to that employee.
- (4) The employer may recover from the Social Security Commission established by the Social Security Act, 1994 (Act No. 34 of 1994), that part of the remuneration, paid under subsection (3), which constitutes the basic wage of the employee.
- (5) An employer must not dismiss an employee during her maternity leave or at the expiry of that leave on -
  - (a) any grounds contemplated in section 33; or
  - (b) any grounds arising from her pregnancy, delivery, or her resulting family status or responsibility.
- (6) Subsection (5) does not apply if -
  - (a) the employer has offered the employee appropriate alternative employment; and
  - (b) she has unreasonably refused to accept that offer.

#### **Extended maternity leave**

- 26.** (1) If a medical practitioner certifies that -
- (a) due to complications arising from pregnancy or delivery, it is necessary for the health of an employee, an employer must grant that employee extended maternity leave in excess of the periods referred to in section 25(1)(a) or (b), up to a maximum equal to the greater of -
    - (i) one month; or
    - (ii) the amount of accrued sick leave that the employee has at that time; or



- (b) due to complications arising from birth or congenital conditions, it is necessary for the health of the employee's child, an employer must grant that employee extended maternity leave in excess of the periods referred to in section 25(1)(b), up to a maximum equal to the greater of -
- (i) one month; or
  - (ii) the amount of accrued sick leave that the employee has at that time.
- (2) If a medical practitioner issues a certificate in terms of both subsection (1) (a) and (b), the periods of extended maternity leave must run concurrently.
- (3) A period of extended maternity leave must run immediately before or immediately following an employee's maternity leave in terms of section 25.
- (4) Section 25(3) to (6) apply in respect of an employee who takes extended maternity leave under this section.

## PART E ACCOMMODATION

### Provision of accommodation

27. (1) For the purposes of this section, a "dependant" means the spouse and the dependant children of the employee.
- (2) If an employee is required to live at the place of employment or to reside on any premises owned or leased by the employer, that employer must provide the employee with adequate housing including sanitary and water facilities.
- (3) If an employee contemplated in subsection (2) lives on agricultural land, the employer must provide sufficient facilities referred to in that subsection to meet the reasonable needs of the employee and the employee's dependants, and must either -
- (a) permit the employee to keep livestock and to cultivate land to meet the reasonable needs of that employee and that employee's dependants; or
  - (b) in terms of an agreement with the employee -
    - (i) provide the employee with sufficient food to meet the reasonable needs of the employee and the employee's dependants; or
    - (ii) pay the employee an additional allowance to do so.

## PART F TERMINATION OF EMPLOYMENT

### Period of employment

28. For the purposes of this part the period of employment includes -
- (a) the time that the employee worked for the employer;
  - (b) the period of any leave granted in terms of this Act;
  - (c) any leave of absence granted in terms of this Act or granted by the employer for any other reason;

- (d) any period of suspension;
- (e) if the employee has been reinstated, the period from the date of dismissal to the date of reinstatement; and
- (f) the period of any lawful strike or lockout.

#### **Termination of employment on notice**

**29.** (1) Subject to any provisions of this Part to the contrary, if a contract of employment may be terminated on notice, the period of notice must be not less than -

- (a) one day, if the employee has been employed for four weeks or less;
- (b) one week, if the employee has been employed for more than four weeks but not more than one year;
- (c) one month, if the employee has been employed for more than one year.

(2) An employer and an employee may agree to a notice period that is longer than that provided for in subsection (1) provided that it is of equal duration for both parties.

(3) Subject to subsection (4), notice of termination must be given in writing, stating the reasons for termination and the date on which the notice is given, which may be -

- (a) on any working day in respect of an employee contemplated in subsection (1)(a);
- (b) on or before the last working day of the week in respect of an employee contemplated in subsection (1)(b); or
- (c) on the first or the 15<sup>th</sup> of the month in respect of an employee contemplated in subsection (1)(c).

(4) Despite subsection (3), an illiterate employee may give notice orally.

(5) An employer must not give notice of termination -

- (a) during any period of leave to which the employee is entitled in terms of Part D of this Chapter; or
- (b) to run concurrently with any such period of leave.

(6) Nothing in this section affects the right -

- (a) of a dismissed employee to dispute the lawfulness or fairness of the dismissal in terms of this Act or any other law; or
- (b) of an employer or an employee to terminate the contract of employment without notice, or payment in lieu of notice, for any cause recognised by law.

(7) Nothing in this section prevents an employer from waiving any right to notice conferred by this section.

**Payment instead of notice**

**30.** (1) Instead of giving an employee notice in terms of section 29, an employer may pay the employee the remuneration the employee would have received, if the employee had worked during the period of notice.

- (2) If an employee gives notice of termination of employment, the employer -
  - (a) may waive the notice, but
  - (b) in that case, must pay the employee the remuneration contemplated in subsection (1).

(3) Instead of giving an employer notice in terms of section 29, an employee may pay the employer the remuneration the employer would have paid, if the employee had worked during the period of notice.

**Automatic termination of contracts of employment**

**31.** (1) Subject to a notice in terms of subsection (2), a contract of employment terminates automatically -

- (a) one month after -
  - (i) the death or sequestration of the employer, if the employer is an individual;
  - (ii) the date on which the employer is wound up, if the employer is a juristic person; or
  - (iii) the date on which the partnership is dissolved, if the employer is a partnership; or
- (b) at the end of a longer period -
  - (i) provided for in the contract of employment or a collective agreement; or
  - (ii) during which the employer continues to carry on business.

(2) At any time during the period contemplated in subsection (1), an executor, administrator, liquidator or a partner may give notice to terminate an employee's contract of employment in accordance with this Part, or of a collective agreement.

(3) Despite the provisions of any law to the contrary, an employee whose contract is terminated in the circumstances referred to in subsection (1) is a preferent creditor in respect of any remuneration due or monies payable to the employee in terms of this Act.

**Unfair dismissal**

**32.** (1) An employer must not, whether notice is given or not, dismiss an employee -

- (a) without a valid and fair reason; and
- (b) without following -
  - (i) the procedures set out in section 33, if the dismissal arises from a reason set out in section 33(1); or

- (ii) subject to any code of good practice issued under section 135, a fair procedure, in any other case.
- (2) It is unfair to dismiss an employee because that employee -
  - (a) discloses information that the employee is entitled or required under any law to disclose to another person;
  - (b) fails or refuses to do anything that an employer must not lawfully permit or require an employee to do;
  - (c) exercises any right conferred by -
    - (i) this Act; or
    - (ii) the terms of the contract of employment;
  - (d) belongs, or has belonged, to a trade union;
  - (e) takes part in the formation of a trade union; or
  - (f) participates in the lawful activities of a trade union -
    - (i) outside of working hours; or
    - (ii) with the consent of the employer, within working hours.
- (3) In any proceedings concerning a dismissal -
  - (a) the employee must establish the existence of the dismissal; and
  - (b) if the existence of the dismissal is established, the employer must prove that the dismissal is fair.

#### **Dismissal arising from redundancy**

**33.** (1) If the reason for an intended dismissal is the reduction of the workforce arising from the reorganisation or transfer of the business or the discontinuance or reduction of the business for economic or technological reasons, an employer must -

- (a) at least four weeks before the intended dismissals are to take place, inform the Labour Commissioner and any trade union which the employer has recognised as the exclusive bargaining agent in respect of the employees, of -
  - (i) the intended dismissals;
  - (ii) the reasons for the reduction in the workforce;
  - (iii) the number and categories of employees affected; and
  - (iv) the date of the dismissals;
- (b) if there is no trade union recognised as the exclusive bargaining agent in respect of the employees, give the information contemplated in paragraph (a) to the workplace representatives elected in terms of section 65 and the employees at least four weeks before the intended dismissals;

- (c) subject to subsection (3), disclose all relevant information necessary for the trade union or workplace representatives to engage effectively in the negotiations over the intended dismissals;
- (d) negotiate in good faith with the trade union or workplace representatives on -
  - (i) alternatives to dismissals;
  - (ii) the criteria for selecting the employees for dismissal;
  - (iii) how to minimise the dismissals;
  - (iv) the conditions on which the dismissals are to take place; and
  - (v) how to avert the adverse effects of the dismissals; and
- (e) select the employees according to selection criteria that are either agreed or fair and objective.

(2) Despite subsections (1)(a) and (b), an employer may inform the trade union or workplace representative of the intended dismissals in less than four weeks if it is not practicable to do so within the period of four weeks.

(3) When disclosing information in terms of subsection (1)(c), an employer is not required to disclose information if -

- (a) it is legally privileged;
- (b) any law or court order prohibits the employer from disclosing it; or
- (c) it is confidential and, if disclosed, might cause substantial harm to the employer.

(4) If, after the negotiations and selections contemplated in subsection (1) there is no agreement between the parties, either party may refer the matter to the Labour Commissioner who may -

- (a) approve the dismissals subject to any reasonable conditions which the Labour Commissioner may impose; or
- (b) refuse to approve the dismissals and give reasons for the refusal.

(5) A party or person who is aggrieved by the decision of the Labour Commissioner made in terms of subsection (4) may apply to the Labour Court for a review of that decision.

(6) An employer who contravenes or fails to comply with this section commits an offence and is liable on conviction to be imprisoned for a period not exceeding 12 months or to a fine not exceeding N\$10 000 or to both the fine and imprisonment.

### **Severance pay**

**34.** (1) Subject to subsection (2), an employer must pay severance pay to an employee who has completed 12 months of continuous service, if the employee

- (a) is dismissed;
- (b) dies while employed; or

- (c) resigns after reaching the age of 65 years.
- (2) Subsection (1) does not apply -
  - (a) to a fair dismissal on grounds of misconduct or incapability;
  - (b) if the employee unreasonably refuses to be reinstated; or
  - (c) if the employee unreasonably refuses to accept employment on terms no less favourable than those applicable immediately before the termination of employment with -
    - (i) the surviving spouse, heir or dependant of a deceased employer within one month of the death of the employer; or
    - (ii) one or more of the former partners within one month of the dissolution of the partnership, if the employer was a partnership.
- (3) Severance pay in terms of subsection (1) must be in an amount equal to at least one week's remuneration for each year of continuous service with the employer.
- (4) When calculating the length of an employee's service for the purposes of subsections (1) and (3), the following rules apply:
  - (a) if the employer is an individual, and dies and the employee is employed subsequently by the surviving spouse, heir or dependant of the deceased employer, the employee retains any service acquired before the employer's death;
  - (b) if the employer was a partnership that was dissolved, and the employee is employed subsequently by one or more of the former partners of that partnership, the employee retains any service acquired before the dissolution of the partnership;
  - (c) if the employer's business has been transferred to another person and the employee continues in the service of that business after the transfer, the employee retains any service acquired before the transfer of that business;
  - (d) the service of an employee who works for the same employer on a seasonal basis for two or more successive years is regarded as continuous provided that the period of service is made up of the periods actually worked; and
  - (e) continuous service includes any period of employment contemplated in section 28.
- (5) The payment of severance pay in terms of this section does not affect an employee's right to any other amount that the employer is obliged to pay the employee.
- (6) If the contract of employment is terminated as a result of the death of the employee and in the absence of a will, the employer must pay the severance pay to -
  - (a) the employee's surviving spouse; or
  - (b) if there is no spouse, to the employee's children;
  - (c) if there are no children, to the employee's estate.

**Transportation on termination of employment**

**35.** (1) If the employee is dismissed during the first 12 months of employment, and at any place other than the place where the employee was recruited, the employer must either -

- (a) transport the employee to the place that the employee was recruited; or
  - (b) pay the employee an amount equal to the costs of that transport.
- (2) Subsection (1) does not apply -
- (a) to a fair dismissal of an employee on grounds of misconduct or incapability; or
  - (b) if an employee unreasonably refuses to be reinstated.

**Payment on termination and certificates of employment**

**36.** (1) On termination of employment, an employer must pay the employee all the remuneration due to the employee for -

- (a) work done before the termination;
- (b) any paid time off that the employee is entitled to in terms of sections 21(5) or (6) or 22(5) that the employee has not taken;
- (c) any period of annual leave due for any completed annual leave cycle in terms of section 23;
- (d) any annual leave pay to which the employee is entitled for any incomplete annual leave cycle in terms of subsection (2);
- (e) any severance pay due in terms of section 34;
- (f) any notice pay contemplated in section 30 if the employee is paid instead of being given notice; and
- (g) any transport allowance due in terms of section 35.

(2) Subject to subsection (3), an employee whose contract is terminated is entitled to additional annual leave pay equal to one-quarter of the employee's basic wage for every month worked during an incomplete annual leave cycle as defined in section 23.

(3) An employee is not entitled to the additional annual leave pay contemplated in subsection (2) if that employee, without good cause, fails -

- (a) to give notice of termination in terms of section 29, and to work the full period of the notice; or
- (b) to pay the employer the remuneration contemplated in section 30(3) instead of working the period of notice.

(4) An employer must pay the remuneration contemplated in subsection (1) to the employee -

- (a) on or before the next pay day after the termination; and

(b) in accordance with section 11.

(5) On termination of employment an employer must give an employee a certificate of service stating -

- (a) the employee's full name;
- (b) the name and address of the employer;
- (c) a description of the industry in which the employer is engaged;
- (d) the date of commencement and date of termination of employment;
- (e) the employee's job description;
- (f) the remuneration at date of termination; and
- (g) if the employee requests, the reason for termination of employment.

(6) Nothing in this section prevents an employer from furnishing, an employee whose employment has been terminated, with a testimonial or other certificate of good character.

## **PART G DISPUTES CONCERNING THIS CHAPTER**

### **Disputes concerning this Chapter**

**37.** (1) If there is a dispute about the non-compliance with, contravention, application or interpretation of this Chapter, any party to the dispute may refer the dispute in writing to the Labour Commissioner.

(2) The person who refers the dispute must satisfy the Labour Commissioner that a copy of the notice of a dispute has been served on all the other parties to the dispute.

(3) The Labour Commissioner must, subject to section 83(4), appoint an arbitrator to resolve the dispute through arbitration in accordance with Part C of Chapter 8 of this Act.

(4) Nothing in this section prevents a party to a dispute making an application to any competent court for resolution of the dispute.

## **CHAPTER 4 HEALTH, SAFETY AND WELFARE OF EMPLOYEES**

### **PART A RIGHTS AND DUTIES OF EMPLOYERS AND EMPLOYEES**

#### **Employer duties to employees**

**38.** (1) Every employer or person in charge of premises or place where employees are employed must, without charge to the employees -

- (a) provide a working environment that -
  - (i) is safe;
  - (ii) is without risk to the health of employees; and



- (iii) has adequate facilities and arrangements for the welfare of employees;
  - (b) provide and maintain plant, machinery and systems of work, and work processes, that are safe and without risk to the health of employees;
  - (c) provide and maintain safe entry and exit from places of work;
  - (d) provide employees with adequate personal protective clothing and equipment if reasonably necessary;
  - (e) provide employees with the necessary information and training to work safely and without a risk to their health;
  - (f) ensure that use, handling, storage or transport of articles or substances is safe and without risk to the health of employees;
  - (g) ensure that employees are given the necessary instructions and supervision to work safely and without a risk to their health;
  - (h) ensure that the organisation of work, including hours of work and mealtimes, do not adversely affect the safety or health of employees; and
  - (i) take any other prescribed steps to ensure the safety, health and welfare of employees at work.
- (2) Every employer must report to a labour inspector in the prescribed manner, whenever -
- (a) there is an accident at any place where the employer's employees work; or
  - (b) a prescribed disease is contracted at any such place.

### **Employer's duties to persons other than employees**

**39.** (1) Every employer must conduct its business operations on its premises in a manner that, as far as is reasonably practicable, persons who are not employees of that employer are not exposed to the risk of their safety or health.

(2) The Minister may, by regulation, require an employer to inform persons who are not employees of that employer of any risk to their safety or health that might arise from the conduct of that employer's business.

### **Employee duties**

- 40.** (1) Every employee has a duty to -
- (a) take reasonable care to ensure -
    - (i) the employee's own safety and health in the workplace; and
    - (ii) the safety and health of any individual who may be affected by the employee's activities at work; and
  - (b) co-operate with the employer to enable the employer to perform any duty imposed under this Chapter or the regulations.

**Employee's right to leave dangerous place of work**

41. (1) If an employee has reasonable cause to believe that, until effective measures have been taken, it is neither safe nor healthy to continue work in a place of work, that employee may leave that place.

(2) If an employee leaves a place of work in terms of subsection (1), the employee must immediately inform the employer of the basis for believing that it is not safe or healthy to continue working there.

(3) An employee who leaves a place of work in terms of this section is entitled to the same conditions of service applicable to that employee and to receive the same remuneration unless a labour inspector determines that the employee left the place of work without reasonable cause.

**PART B****HEALTH AND SAFETY REPRESENTATIVES AND COMMITTEES****Election of health and safety representatives**

42. (1) The employees in a workplace -

(a) with more than 10 but fewer than 101 employees, may elect from among themselves one health and safety representative; or

(b) with 101 or more employees, may elect from among themselves one health and safety representative for the first 100 employees in the workplace, and one additional representative for each additional 100 employees, or part thereof.

(2) Whenever it is necessary to conduct an election for health and safety representative -

(a) the election must be conducted in the prescribed manner; and

(b) the employer must provide any facilities that are reasonably necessary for the purposes of conducting the election.

(3) A health and safety representative holds office for two years and may stand for re-election.

(4) The employer must grant each health and safety representative -

(a) time off during working hours without loss of pay in order to perform the functions of that office; and

(b) reasonable leave of absence to attend health and safety meetings or training courses provided that payment for the leave of absence lies in the employer's discretion.

(5) The rights conferred by subsection (4) are subject to -

(a) the provisions of any collective agreement; or

(b) any conditions that are reasonable and necessary to ensure the effective performance of the employer's operations.

**Rights and powers of a health and safety representative**

- 43.** (1) A health and safety representative is empowered to -
- (a) collect information on safety, health and welfare of employees;
  - (b) inspect, at any reasonable time, the work places of the employees who that representative represents;
  - (c) investigate -
    - (i) the causes of accidents and diseases at work;
    - (ii) complaints about safety, health or welfare of employees;
    - (iii) potential hazards and risks to health and safety;
  - (d) make representations on the safety, health or welfare of employees to -
    - (i) the employer; and
    - (ii) a labour inspector;
  - (e) perform any other functions -
    - (i) provided for in a collective agreement;
    - (ii) agreed to by the health and safety committee.

**Duties to provide information**

- 44.** (1) Subject to subsection (2), an employer must -
- (a) provide every health and safety representative with sufficient information to enable the representative to -
    - (i) perform the functions of that office;
    - (ii) improve or maintain conditions of safety, health and welfare in the workplace;
  - (b) consult with a health and safety representative -
    - (i) on any policy on health, safety or welfare that may apply to the employees represented by that representative;
    - (ii) in planning any change to the content, process or organisation of work that may affect health, safety or welfare of the employees represented by that representative;
  - (c) at any reasonable time, allow a health and safety representative to inspect -
    - (i) the work places of the employees represented by that representative;
    - (ii) any place where an accident has occurred; or
    - (iii) any place where a disease has been contracted; and

- (d) permit a health and safety representative access to a labour inspector.
- (2) Subsection (1) does not require an employer to disclose information that -
  - (a) is not related to the employees who are represented by the health and safety representative;
  - (b) the employer is prohibited by law from disclosing;
  - (c) is private and personal, unless the person affected by the disclosure consents;
  - (d) may be detrimental to the business for reasons other than the effect of the disclosure on the employer's obligations under this Chapter; or
  - (e) is legally privileged.

### **Health and safety committees**

**45.** (1) In any workplace with more than 100 employees, at the request of a health and safety representative, the employer must establish a health and safety committee consisting of -

- (a) every health and safety representative elected under section 42;
- (b) an equal number of representatives appointed by the employer; and
- (c) any additional individuals agreed to by the committee.

(2) Subject to a collective agreement, a health and safety committee may make rules in respect of the procedure of meetings of the committee.

- (3) The functions of a health and safety committee include -
  - (a) monitoring the application of health and safety regulations and rules in the workplace;
  - (b) advising the employer on any matter concerning health and safety in the workplace; and
  - (c) any other function agreed by the committee and the employer.

### **Disputes concerning this Chapter**

**46.** (1) If there is a dispute about the non-compliance with, contravention, application or interpretation of this Chapter, any party to the dispute may refer the dispute in writing to the Labour Commissioner.

(2) The person who refers the dispute must satisfy the Labour Commissioner that a copy of the notice of a dispute has been served on all the other parties to the dispute.

(3) The Labour Commissioner must, subject to section 83(4), appoint an arbitrator to resolve the dispute through arbitration in accordance with Part C of Chapter 8 of this Act.

(4) Nothing in this section prevents a party to a dispute making an application to any competent court for resolution of the dispute.

## CHAPTER 5 UNFAIR LABOUR PRACTICES

### Unfair disciplinary action

47. (1) Section 32 in so far as it applies to the dismissal of an employee, does, read with the necessary changes, apply to the discipline of an employee by an employer.

(2) Disciplinary action taken against an employee in contravention of section 32 constitutes an unfair labour practice.

### Employee and trade union unfair labour practices

48. (1) It is an unfair labour practice for a registered trade union -

- (a) to refuse to bargain collectively, when the provisions of this Act or a collective agreement require the union to bargain collectively;
- (b) to bargain in bad faith; or
- (c) to engage in conduct that -
  - (i) subverts orderly collective bargaining;
  - (ii) intimidates any person;
- (d) not to fairly represent an employee in any bargaining unit in respect of which the trade union is recognised as the exclusive bargaining agent.

(2) It is an unfair labour practice for an employee to engage in any conduct contemplated in subsection (1)(c).

(3) This section does not prohibit any person from participating in a strike, picket or lockout that is in compliance with this Act.

### Employer and employers' organisation unfair labour practices

49. (1) It is an unfair labour practice for an employer or an employers' organisation -

- (a) to refuse to bargain collectively when the provisions of this Act or a collective agreement require the employer or the organisation to bargain collectively;
- (b) to bargain in bad faith;
- (c) subject to subsections (2) to (7), to fail to disclose to a workplace union representative appointed in terms of this Act any relevant information that is reasonably required to allow the workplace union representative to perform the functions of that office under this Act;
- (d) subject to subsections (2) to (7), to fail to disclose to a recognised trade union any relevant information that is reasonably required to allow the trade union to consult or bargain collectively in respect of any labour matter;
- (e) to unilaterally alter any term or condition of employment;
- (f) to seek to control any trade union or federation of trade unions;

- (g) to engage in conduct that -
  - (i) subverts orderly collective bargaining; or
  - (ii) intimidates any person.
- (2) When disclosing information in terms of subsection (1) -
  - (a) the employer must notify the trade union representative or recognised trade union in writing if any of the disclosed information is confidential; and
  - (b) the employer is not required to disclose information if -
    - (i) it is legally privileged;
    - (ii) any law or court order prohibits the employer from disclosing it;
    - (iii) it is confidential and, if disclosed, might cause substantial harm to an employee or the employer; or
    - (iv) it is private personal information relating to an employee, unless that employee consents to the disclosure of that information.

(3) In any dispute about the disclosure of information, the arbitrator or the court must first decide whether or not the information is relevant.

(4) If the arbitrator or the court decides that information is relevant and if it is information referred to in subsection (2)(b)(iii) or (iv), the arbitrator or the court must balance -

- (a) the harm that the disclosure is likely to cause; against
- (b) the harm that the failure to disclose is likely to cause to the ability of the trade union representative to perform its functions, or the ability of the recognised trade union to engage effectively in consultations or collective bargaining.

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

(6) When making an order, the arbitrator or court must take into account any breach of confidentiality in respect of information disclosed to the workplace union representative or the recognised trade union in terms of this section and may refuse to order the disclosure of the information for a period specified in the award.

(7) In any dispute about an alleged breach of confidentiality, the arbitrator or court may order that the right of disclosure of information in that workplace be withdrawn for a period specified in the award.

### **Disputes concerning this Chapter**

**50.** (1) If there is a dispute about the non-compliance with, contravention, application or interpretation of this Chapter, any party to the dispute may refer the dispute in writing to the Labour Commissioner.

(2) The person who refers the dispute must satisfy the Labour Commissioner that a copy of the notice of a dispute has been served on all the other parties to the dispute.

(3) The Labour Commissioner must, subject to section 83(4), appoint an arbitrator to resolve the dispute through arbitration in accordance with Part C of Chapter 8 of this Act.

(4) Nothing in this section prevents a party to a dispute making an application to any competent court for resolution of the dispute.

## **CHAPTER 6 TRADE UNIONS AND EMPLOYERS' ORGANISATIONS**

### **PART A TRADE UNIONS AND EMPLOYERS' ORGANISATIONS**

#### **Definitions relating to this Chapter**

- 51.** (1) In this Chapter -
- (a) "authorised representative" means any person authorised to represent a registered trade union or any office-bearer or official;
  - (b) "employer's premises" means any premises under the control of the employer where work is done or the employees are accommodated;
  - (c) "fee" means an entry fee, a periodic membership fee, a levy, or any other monetary amount owed by a member of a trade union to that union in terms of its constitution; and
  - (d) "workplace" 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, each of those operations constitutes a separate workplace.

(2) In Parts A and B of this Chapter, "registered trade union" includes one or more trade unions acting jointly, or a federation of trade unions.

#### **Constitutions of trade union or employers' organisation**

**52.** (1) A trade union or employers' organisation that intends to register under this Act must adopt a constitution that meets the requirements set out in this section.

(2) The constitution of a trade union or employers' organisation that intends to register under this Act must -

- (a) state the name of that trade union or employers' organisation;
- (b) declare its objects;
- (c) describe the industry or industries in its scope;
- (d) prescribe the qualifications for the admission to membership;
- (e) provide for membership fees and the method for determining membership fees and other payments by members;
- (f) establish the circumstances and prescribe the procedure for the termination of membership, which must include -
  - (i) an opportunity for the member to be heard; and

- (ii) a right of appeal;
- (g) prescribe that -
  - (i) a member in good standing is a member who is not more than 3 months in arrears with the payment of any fees due in terms of the constitution;
  - (ii) only a member in good standing may nominate candidates for any office or vote or be voted for in an election of an office bearer or official; and
  - (iii) no person who has been convicted of an offence of which dishonesty is an element and for which that person has been sentenced to imprisonment without an option of a fine may stand for election as an office-bearer;
- (h) prescribe -
  - (i) the functions of its officials and office bearers;
  - (ii) the procedure for the appointment or election of officials and office - bearers;
  - (iii) the terms of appointment of its officials and office-bearers; and
  - (iv) the circumstances and manner in which officials and office-bearers may be removed from office;
- (i) prescribe the procedure for nomination and election of -
  - (i) workplace representatives; and
  - (ii) health and safety representatives;
- (j) prescribe -
  - (i) that there must be at least one general meeting of members every three years;
  - (ii) that general meetings of members must be open to all members; and
  - (iii) the procedure for convening and conducting meetings of members and meetings of office bearers, including the quorum for meetings and the manner in which minutes are to be kept;
- (k) establish the manner in which ballots are to be conducted;
- (l) provide for the banking and investing of funds;
- (m) establish the purposes for which funds may be used;
- (n) provide that no payment may be made to an official or employee without the prior approval of its governing body granted under the hand of its chairperson except for their salaries and the expenses incurred by them in the course of their duties;
- (o) provide for the acquisition and control of property;



- (p) determine the date for the end of its financial year;
- (q) prescribe a procedure for affiliation, or amalgamation, with other trade unions or employers' organisation, as the case may be;
- (r) prescribe a procedure for changing the constitution; and
- (s) prescribe a procedure by which it may be wound up.
- (3) A constitution of a trade union or employers' organisation must not -
  - (a) conflict with -
    - (i) the fundamental human rights and freedoms set out in Chapter 3 of the Namibian Constitution;
    - (ii) any other law; or
  - (b) hinder the attainment of the objects of any law; or
  - (c) evade any obligation imposed by any law.
- (4) The Labour Commissioner may -
  - (a) notify any trade union or employers' organisation in writing that the Labour Commissioner has reason to believe that its constitution does not comply with subsection (2) or (3); and
  - (b) in that notice, invite the trade union or employers' organisation to make representations to the Labour Commissioner.
- (5) After considering any representations submitted in terms of subsection (4)(b), the Labour Commissioner may change any provision in the constitution by issuing a notice in writing to the union or organisation.
- (6) If a trade union or employers organisation refuses or fails to comply with a change to its constitution that the Labour Commissioner has made in terms of subsection (5), the Labour Commissioner may -
  - (a) cancel its registration; or
  - (b) apply to the Labour Court for an order to -
    - (i) compel the union or organisation to comply with the changes to the constitution; or
    - (ii) wind it up.

### **Changing constitution of registered trade union or registered employers' organisation**

**53.** (1) Any change to the constitution of a registered trade union or registered employers' organisation takes effect only when the Labour Commissioner approves the change in terms of this section.

(2) A trade union or employers' organisation may apply for the approval of a change to its constitution by submitting to the Labour Commissioner -

- (a) the prescribed form duly completed;

- (b) three copies of the resolution containing the wording of the change; and
  - (c) a certificate signed by the chairperson stating that the resolution was passed in accordance with the constitution.
- (3) The Labour Commissioner may require further information in support of the application.
- (4) The Labour Commissioner must -
- (a) consider the application and any further information supplied by the applicant; and
  - (b) if satisfied that the amendments meet the requirements contemplated in section 52, approve the change by issuing -
    - (i) the prescribed certificate approving the change; or
    - (ii) if it is a change of name, a new certificate of registration reflecting the new name.
- (5) If the Labour Commissioner refuses to approve a change, the Labour Commissioner must give written notice of that decision and the reasons for the refusal.

#### **Winding up of trade union or employers' organisation**

- 54.** (1) The Labour Court may order a trade union or employers' organisation to be wound up if -
- (a) the union or organisation has resolved to wind up its affairs and has applied to the court for an order giving effect to that resolution;
  - (b) the Labour Commissioner or any member of the union or organisation has applied to the court for its winding up and the court is satisfied that, for some reason that cannot be remedied, it is unable to continue functioning;
  - (c) the Labour Commissioner has applied to the court for its winding up in terms of section 52(6)(b)(ii); or
  - (d) a person has applied for its winding up because it is insolvent.
- (2) If the reason for the winding up is insolvency -
- (a) the Insolvency Act, 1943 (Act No. 16 of 1943) applies; but
  - (b) any reference in that Act to the court must be interpreted as referring to the Labour Court.

#### **Appeals from decision of Labour Commissioner**

- 55.** (1) Any person aggrieved by a decision of the Labour Commissioner made under this Part may appeal to the Labour Court against that decision.

**PART B**  
**REGISTRATION OF TRADE UNIONS AND EMPLOYERS'**  
**ORGANISATIONS**

**Requirements for registration**

**56.** (1) Any trade union or employers' organisation that has adopted a constitution that complies with section 52 may apply to the Labour Commissioner for registration, by submitting to the Labour Commissioner -

- (a) the prescribed form duly completed; and
- (b) three copies of its constitution, each duly certified by its chairperson and secretary as a true and correct copy of the constitution.

(2) The Labour Commissioner may require further information in support of an application.

(3) The Labour Commissioner must -

- (a) consider the application and any further information supplied by the applicant; and
- (b) if the constitution of the applicant meets the requirements for registration set out in section 52(1) to (3), register the applicant by issuing the prescribed certificate of registration.

(4) If the Labour Commissioner refuses to register the applicant, the Labour Commissioner must give written notice of that decision and the reasons for the refusal.

(5) The Minister may, by regulation, prescribe further requirements or conditions to be satisfied before registration under this Chapter.

**Effect of registration of trade union or employers' organisation**

**57.** (1) A registered trade union or employers' organisation is a juristic person.

(2) A member, office bearer or official of a registered trade union or employers' organisation is not personally liable for any liability or obligation incurred in good faith by that union or organisation only because of being a member, office bearer or official.

**Rights of registered trade unions and registered employers' organisations**

**58.** (1) Subject to any provision of this Act to the contrary, a registered trade union has the right -

- (a) to bring up a case on behalf of its members and to represent its members in any proceedings brought in terms of this Act;
- (b) of access to an employer's premises in terms of section 63;
- (c) to have union fees deducted on its behalf in terms of section 64;
- (d) to form federations with other registered trade unions;
- (e) to affiliate to, and participate in the activities of, federations formed with other trade unions;
- (f) to affiliate to, and participate in the activities of, any international workers organisation and, subject to any laws governing exchange control -

- (i) to make contributions to such an organisation; and
  - (ii) to receive financial assistance from such an organisation;
  - (g) in the case of trade union which is an exclusive bargaining agent, to negotiate the terms of, and enter into, a collective agreement with an employer or a registered employers' organisation; and
  - (h) to report to the Labour Commissioner any dispute which has arisen between any employer and that employer's employees who are members of the trade union.
- (2) Subject to any provision of this Act to the contrary, a registered employers' organisation has the right -
- (a) to bring up a case on behalf of its members and to represent its members in any proceedings brought in terms of this Act;
  - (b) to form federations with other registered employers' organisations;
  - (c) to affiliate to, and participate in the activities of, federations formed with other employers' organisations; and
  - (d) to affiliate to, and participate in the activities of, any international employers' organisation and, subject to any laws governing exchange control -
    - (i) to make contributions to such an organisation; and
    - (ii) to receive financial assistance from such an organisation.

#### **Obligations of registered trade unions and registered employers' organisations**

- 59.** (1) Every registered trade union and every registered employers' organisation must -
- (a) maintain a register of members in the prescribed form;
  - (b) keep proper books of account;
  - (c) prepare at the end of each financial year -
    - (i) a statement of income and expenditure for that year; and
    - (ii) a balance sheet showing its financial position as at the end of that year;
  - (d) cause its books of account to be audited and a report to be prepared at least once a year by a public accountant and auditor registered in terms of the Public Accountants' and Auditors Act, 1951 (Act No. 51 of 1951) or an auditor approved by the Labour Commissioner;
  - (e) within six months after the end of its financial year -
    - (i) make the statement of income and expenditure and the balance sheet referred to in paragraph (c) and the audit report referred to in paragraph (d) available to members; and
    - (ii) submit an annual return in the prescribed form to the Labour Commissioner; and

- (f) submit the statement of income and expenditure and balance sheet referred to in paragraph (c) and the audit report referred to in paragraph (d) to a meeting or meetings of members or their representatives in terms of its constitution.

#### **Failure to comply with constitution or obligations under this Part**

**60.** (1) The Labour Commissioner must notify any registered trade union or employers' organisation in writing that the Labour Commissioner has reason to believe that the trade union or employers' organisation is not complying with its constitution or its obligations under this Part.

(2) A notice referred to in subsection (1) must give the trade union or employers' organisation an opportunity to make representations.

(3) After considering any representations made in terms of subsection (2), the Labour Commissioner may issue a compliance order, which may include required steps to rectify the failure to comply.

(4) If a trade union or employers' organisation fails to comply with a compliance order issued in terms of subsection (3), the Labour Commissioner may -

- (a) cancel its registration; or
- (b) apply to the Labour Court for an order to compel the union or organisation to comply with the order, which may include an order suspending its registration pending compliance.

#### **Appeals from decision of Labour Commissioner**

**61.** Any person aggrieved by a decision of the Labour Commissioner made under this Part may appeal to the Labour Court against that decision.

### **PART C RECOGNITION AND ORGANISATIONAL RIGHTS OF REGISTERED TRADE UNIONS**

#### **Recognition as exclusive bargaining agent of employees**

**62.** (1) A registered trade union that represents the majority of the employees in an appropriate bargaining unit, as defined by the trade union, is entitled to recognition, for the purpose of negotiating a collective agreement or any matter of mutual interest, as the exclusive bargaining agent of the employees in that bargaining unit.

(2) An employer or employers' organisation must not recognise a trade union as an exclusive bargaining agent in terms of this Act unless -

- (a) the trade union -
  - (i) is registered in terms of this Act; and
  - (ii) represents the majority of the employees in the bargaining unit; or
- (b) an arbitrator, in terms of subsection (9), declares the trade union to be so recognised.

(3) A registered trade union may seek recognition as an exclusive bargaining agent of an appropriate bargaining unit by delivering a request, in the prescribed form, to -

- (a) an employer to recognise it as the exclusive bargaining agent of its employees or some of its employees; or
  - (b) an employers' organisation to recognise it as the exclusive bargaining agent of the employees of its members.
- (4) The trade union concerned must submit to the Labour Commissioner -
- (a) a copy of its request in terms of subsection (3);
  - (b) proof that the request has been served on the employer; and
  - (c) if requested by the Labour Commissioner, proof that the trade union represents the majority of the employees within the bargaining unit which proof might be obtained by -
    - (i) a ballot amongst the employees held under the supervision of the Labour Commissioner; or
    - (ii) any other manner mutually agreed between the trade union and the employer or employers' organisation.
- (5) Within 30 days after the receipt of the request, the employer or the employers organisation must notify the trade union in the prescribed form either -
- (a) that it recognises the trade union as the exclusive bargaining agent of the employees in the bargaining unit -
    - (i) proposed by the trade union; or
    - (ii) agreed to by the trade union and the employer; or
  - (b) that it refuses to recognise the trade union because it disputes -
    - (i) the appropriateness of the proposed bargaining unit; or
    - (ii) whether the trade union represents the majority of the employees in the proposed bargaining unit.
- (6) If the employer or the employers' organisation -
- (a) fails within 30 days to respond to a request, as required under subsection (5); or
  - (b) responded in terms of subsection (5)(b),

the trade union may refer its request in the prescribed form to the Labour Commissioner as a dispute.

(7) When referring a dispute in terms of subsection (6), the registered trade union must satisfy the Labour Commissioner that a copy of the notice of a dispute has been served on all the other parties to the dispute.

(8) If a dispute has been referred to the Labour Commissioner, the Labour Commissioner must, subject to section 83(4), appoint an arbitrator to attempt to resolve the dispute through arbitration.

(9) If an arbitrator appointed in terms of subsection (8) is satisfied that the trade union represents the majority of the employees in the agreed bargaining unit, or a bargaining unit that the arbitrator considers to be appropriate, the arbitrator may make an order declaring the union to be recognised as the exclusive bargaining agent of the employees in the agreed or appropriate bargaining unit.

(10) In determining the appropriateness of a bargaining unit for the purposes of subsection (9), the arbitrator must -

- (a) take the organisational structure of the employer into account; and
- (b) promote orderly and effective collective bargaining with a minimum of fragmentation of an employer's organisational structure.

(11) If an employer or employers' organisation has recognised a registered trade union as an exclusive bargaining agent and the trade union no longer represents the majority of the employees in the bargaining unit, the employer or employers organisation must -

- (a) give the trade union notice in the prescribed form to acquire a majority within three months; and
- (b) withdraw recognition from that trade union if it fails to acquire that majority at the expiry of the three month period.

(12) If there is a dispute concerning the withdrawal of recognition under subsection (11), any party to the dispute may refer the dispute in writing to the Labour Commissioner.

(13) In any dispute contemplated in subsection (12), subsections (7) through to (10) apply with the necessary changes, and the arbitrator has the power to make any appropriate order including -

- (a) declaring that the trade union represents a majority of the employees in the bargaining unit;
- (b) giving the trade union a further opportunity to acquire a majority;
- (c) altering the bargaining unit; or
- (d) withdrawing recognition of the trade union as the exclusive bargaining agent of the employees in the bargaining unit.

(14) A registered trade union which has been recognised as an exclusive bargaining agent in respect of the bargaining unit in question has a duty to represent, for the purposes stated in subsection (1), the interests of every employee falling in that bargaining unit, whether or not the employees are members of that trade union.

### **Trade union access to the premises of the employer**

**63.** (1) An employer must not unreasonably refuse access to the employer's premises to an authorised representative of a trade union that is recognised as an exclusive bargaining agent under section 62 -

- (a) during working hours -
  - (i) to recruit members; or

- (ii) to perform any function in terms of a collective agreement, the union's constitution or this Act; and
- (b) outside of working hours, to hold meetings with members.
- (2) An employer must not unreasonably refuse an authorised representative of a registered trade union access to the employer's premises, outside of working hours -
  - (a) to recruit members;
  - (b) to hold a meeting with members; or
  - (c) to perform any union functions in terms of a collective agreement, the union's constitution or this Act.
- (3) An employer may require proof that an individual claiming to be the authorised representative of a trade union is -
  - (a) an official or office-bearer of that trade union; or
  - (b) duly authorised to represent the union.
- (4) The rights conferred by subsection (1) are subject to any conditions that are reasonable, taking into account the effective performance of the employer's operations.

#### **Deduction of trade union dues**

- 64.** (1) An employer must not deduct from an employee's remuneration any fee due to a trade union that is not registered under this Act.
- (2) An employer must deduct a fee due to a registered trade union from an employee's remuneration if the trade union is recognised as an exclusive bargaining agent by the employer, and if -
  - (a) the employee has authorised the deduction in writing; or
  - (b) subject to subsection (4) and (5), a provision in a collective agreement has authorised the deduction.
- (3) A provision in a collective agreement contemplated in subsection (2)(b) is valid until the earlier of -
  - (a) the date three years after the provision takes effect; or
  - (b) the date on which the majority of the employees subject to the agreement vote in favour of invalidating the provision in a ballot conducted by the Labour Commissioner in terms of subsection (4).
- (4) The Labour Commissioner must conduct a ballot contemplated in subsection (3)(b) if 25% of the employees subject to the agreement request the Labour Commissioner to conduct a ballot to determine whether the majority of the employees are in favour of invalidating the provision.
- (5) In a ballot conducted in terms of subsection (4), if -
  - (a) the majority do not vote in favour of invalidating the provision, no further ballot may be conducted before the expiry of the provision in terms of subsection (3)(a); or



- (b) the majority vote in favour of invalidating the provision, no new collective agreement containing such a provision is valid for a period of a year after the ballot unless -
  - (i) another ballot has been conducted by the Labour Commissioner; and
  - (ii) a majority of the employees to be covered by the agreement vote in favour of such a provision.
- (6) An employer must stop deducting a fee due to a registered trade union within one calendar month of being notified in writing that the employee concerned has withdrawn the authorisation referred to in subsection (2)(a).
- (7) An employer who has deducted fees in terms of this section -
  - (a) may retain as a collection fee an amount not exceeding 5% of the total amount deducted; and
  - (b) must pay the remaining money deducted to the trade union within seven days of the end of the month in which the deductions were made, together with a statement reflecting the names of the employees, the amounts deducted and the date of the deduction.

#### **Workplace union representatives**

- 65.** (1) In any workplace, any 10 or more employees who are members of a registered trade union are entitled to elect from among themselves -
- (a) one workplace union representative, if there are 10 members; or
  - (b) two representatives, if there are more than 25 members; or
  - (c) three representatives, if there are more than 50 members; or
  - (d) if there are more than 100 members -
    - (i) four representatives for the first 100 members; and
    - (ii) an additional representative for every additional 100 members.
- (2) An employer must provide any facilities that are reasonably necessary for the purposes of conducting an election contemplated in subsection (1).
- (3) A workplace representative holds office for two years, and may stand for re-election.
- (4) The functions of a workplace representative are -
- (a) to make representations to the employer of the employees who elected the representative concerning -
    - (i) any matter relating to terms and conditions of those employee's employment; and
    - (ii) any dismissal of employees arising from the reduction of the workforce as a result of the reorganisation or transfer of the business or the discontinuance or reduction of the business for economic or technological reasons;

- (b) to represent any employee in respect of whom the representative was elected in any disciplinary or dismissal proceedings against that employee; and
  - (c) perform any other function that may be provided for in a collective agreement.
- (5) The employer must grant each workplace representative -
- (a) reasonable time off during working hours without loss of pay in order to perform the functions of that office; and
  - (b) reasonable leave of absence to attend meetings or training courses of a registered trade union provided that payment for the leave of absence lies in the employer's discretion.

### **Organisational rights in collective agreements**

**66.** (1) Nothing in this Part precludes the conclusion of a collective agreement to regulate the rights of a recognised trade union.

### **Disputes concerning certain provisions of this Chapter**

**67.** (1) If there is a dispute, about the non-compliance with, contravention, application or interpretation of Part A, B or C, other than a dispute concerning the recognition of a registered trade union, any party to the dispute may refer the dispute in writing to the Labour Commissioner.

(2) The person who refers the dispute must satisfy the Labour Commissioner that a copy of the notice of a dispute has been served on all the other parties to the dispute.

(3) The Labour Commissioner must appoint a conciliator to attempt to resolve the dispute through conciliation in accordance with Part B of Chapter 8 of this Act.

(4) If the dispute remains unresolved, the Labour Commissioner must, subject to section 83(4), appoint an arbitrator to resolve the dispute through arbitration in accordance with Part C of Chapter 8 of this Act.

(5) Nothing in this section prevents a party to a dispute making an application to any competent court for resolution of the dispute.

## **PART D COLLECTIVE AGREEMENTS**

### **Legal effect of collective agreements**

- 68.** (1) A collective agreement binds -
- (a) the parties to the agreement;
  - (b) the members of any registered trade union that is a party to the agreement;
  - (c) the members of any registered employers' organisation that is a party to the agreement;
  - (d) the employees in the recognised bargaining unit, if a trade union that is a party to the agreement has been recognised as an exclusive bargaining agent in terms of section 62; and

- (e) any other employees, employers, registered trade unions or registered employers' organisations to whom the agreement has been extended in terms of section 69.

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

(3) The provisions of a collective agreement relating to the terms and conditions of employment vary every contract of employment between an employee and an employer who are both bound by the agreement.

(4) Unless the agreement expressly states otherwise, a collective agreement does not preclude the conclusion of a contract of employment that contains terms and conditions more favourable than those contained in the agreement.

### **Extension of collective agreements to non-parties**

**69.** (1) Despite section 1, for the purposes of this section, "collective agreement" means an agreement between an employer or a registered employers' organisation and a registered trade union that is recognised by that employer or employers' organisation in terms of section 62.

(2) The parties to a collective agreement may ask the Minister, in the prescribed form, to extend that agreement to employers and employees -

- (a) who are not members of the parties to the agreement; and
- (b) who fall within the scope of the agreement.

(3) The Minister must -

- (a) publish a request made in terms of subsection (2) in the *Gazette*; and
- (b) invite objections to the request within a period specified in the *Gazette*, which period must not exceed 30 days as from the date of publication of request in the *Gazette*;
- (c) serve copies of any objection received in terms of paragraph (b) on the parties to the agreement; and
- (d) in the prescribed form, invite responses to those objections within a period, which must not extend more than 14 days as from the date of invitation.

(4) The Minister -

- (a) must not extend a collective agreement unless -
  - (i) the Minister has considered any objection or response received in terms of subsection (3); and
  - (ii) the Minister is satisfied that -
    - (aa) the agreement is not in conflict with the Constitution or any law;

- (bb) the agreement is not, on the whole, less favourable than the terms and conditions of employment that applied to employees immediately before the conclusion of the agreement;
  - (cc) the agreement provides for an arbitration procedure to resolve disputes about its interpretation, application and enforcement; and
  - (dd) the request to extend the agreement complies with this section; but,
- (b) if that agreement meets all the requirements set out in paragraph (a), the Minister must extend that collective agreement for a fixed period to the parties contemplated in subsection (2), by publishing a notice to that effect in the *Gazette*.
- (5) After a notice contemplated in subsection (4)(b) has been published, the Minister may, at the request of the parties to the collective agreement, publish a further notice in the *Gazette* -
- (a) extending the period specified in the earlier notice by a further period determined by the Minister;
  - (b) 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; or
  - (c) cancelling all or part of the notice published in terms of subsection (4).
- (6) Subsections (2) through to (4), read with the necessary changes, apply in respect of the publication of any notice in terms of subsection (5)(a) or (b).
- (7) In addition to publication of any information in the *Gazette* as contemplated in this section, the Minister must, where appropriate, publish the information through other available means, with a view to ensuring that the intended recipients of the information receive the information.

### **Exemptions from an extended collective agreement**

**70.** (1) Any person bound by the extension of a collective agreement under section 69 may apply in the prescribed form to the Minister for an exemption from the extension of the agreement.

(2) If the Minister is satisfied that special circumstances exist justifying an exemption applied for, the Minister may -

- (a) exempt the person who has applied in terms of subsection (1) by notice in writing; and
- (b) may subject the exemption to any condition.

(3) The Minister must serve a copy of any exemption granted in terms of this section on the parties to the collective agreement.

(4) The parties to the collective agreement, or the person who applied for an exemption in terms of subsection (1), may appeal to the Labour Court against any decision made by the Minister under this section.

**Disputes arising from application, interpretation or enforcement of a collective agreement**

71. (1) Every collective agreement must provide for an arbitration procedure to resolve any dispute about the interpretation, application or enforcement of the agreement unless provision is made in another collective agreement for the resolution of that dispute.

(2) If there is a dispute contemplated in subsection (1), any party to the dispute may refer the dispute to the Labour Commissioner if -

- (a) the collective agreement does not provide for a procedure as required by subsection (1);
- (b) the procedure is not operative; or
- (c) any party to the collective agreement frustrates the resolution of the dispute in terms of the collective agreement.

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

(4) The Labour Commissioner may appoint an arbitrator to arbitrate the dispute in terms of the collective agreement or refer the matter for arbitration in terms of Part C of Chapter 8.

**CHAPTER 7  
STRIKES AND LOCKOUTS****Right to strike or lockout**

72. (1) Subject to section 73, every party to a dispute of interest has the right to strike or lockout if -

- (a) the dispute has been referred in the prescribed form to the Labour Commissioner for conciliation in accordance with section 80;
- (b) the dispute remains unresolved at the end of -
  - (i) a period of 30 days from the date of the referral; or
  - (ii) the longer period determined in terms of subsection (3)(a), if it is applicable; or
  - (iii) the shorter period determined in terms of subsection (3)(b), if it is applicable; and
- (c) after the end of the applicable period contemplated in paragraph (b), a party has given 48 hours notice, in the prescribed form, of the commencement of the strike or lockout to the Labour Commissioner and the other parties to the dispute; and
- (d) the strike or lockout conforms to -
  - (i) any agreed rules regulating the conduct of the strike or lockout; or
  - (ii) any rules determined by the conciliator in terms of subsection (2).

(2) If a dispute referred in terms of subsection (1) cannot be resolved, a conciliator appointed in terms of section 80(3)(a) to conciliate the dispute must -

- (a) attempt to reach agreement on rules to regulate the conduct of the strike or lockout; and
- (b) if the parties do not reach such an agreement, determine rules in accordance with any guidelines or Code of Good Practice published by the Minister in terms of section 135.

(3) If the Labour Commissioner refers a dispute for conciliation, and -

- (a) the party who referred the dispute in terms of subsection (1) fails to attend that hearing, the period contemplated in subsection (1)(b)(i) is extended to the date that is 30 days after the conciliation; or
- (b) the other parties to the dispute do not attend that conciliation, the period contemplated in subsection (1)(b)(i) is shortened, and ends on the date of the conciliation.

#### **Prohibition of certain strikes and lockouts**

73. (1) A person must not take part in a strike or a lockout if -

- (a) section 72 has not been complied with;
- (b) the dispute is one that a party has the right to refer to arbitration or to adjudication in terms of this Act;
- (c) the parties to the dispute have agreed to refer the dispute to arbitration;
- (d) the issue in dispute is governed by an arbitration award or a court order; or
- (e) the dispute is between parties engaged in an essential service designated in terms of section 75.

#### **Strikes and lockouts in compliance with this Chapter**

74. (1) By taking part in a strike or a lockout in compliance with this Chapter, a person does not commit a delict or a breach of contract, but an employer is not obliged to remunerate an employee for services that the employee does not render during a strike or lockout in compliance with this Chapter.

(2) Despite any other law, an employee or member or official of a registered trade union may, in furtherance of a strike in compliance with this Chapter, hold a picket at or near the place of employment for the purpose of peacefully -

- (a) communicating information; and
- (b) persuading any individual not to work.

(3) Despite the provisions of any contract of employment or collective agreement, an employer must not require an employee who is not participating in a strike that is in compliance with this Chapter to do the work of a striking employee, unless the work is necessary to prevent any danger to the life, personal safety or health of any individual.

(4) An employee is entitled to resume employment within three days of the date -

- (a) that the strike or lockout ended; or
- (b) that the employee became aware or could reasonably have become aware of the end of the strike or lockout;

unless the employee has been dismissed for a valid and fair reason.

(5) A employer must not institute civil legal proceedings against any other person for participating in a strike or a lockout in compliance with this Chapter, unless those proceedings concern an act that constitutes defamation or a criminal offence.

### Designation of essential services

**75.** (1) For the purposes of this section, “essential service” means any service that has been designated as such by the Essential Services Committee.

(2) The Essential Services Committee may designate all or part of a service to be an essential service if, in the opinion of the Committee, the interruption of that service would endanger the life, personal safety or health of the whole or any part of the population of Namibia.

(3) When considering whether to designate a service to be an essential service, the Essential Services Committee must comply with the following requirements:

- (a) the Essential Services Committee must give notice in the *Gazette* of any investigation that it intends to conduct as to whether all or part of a service should be designated as an essential service, which notice must -
  - (i) indicate the service or part of a service that is to be the subject of the investigation;
  - (ii) invite interested parties to make written submissions within a period stated in the notice; and
  - (iii) state the date, time and place of the hearing referred to in paragraph (b);
- (b) the Essential Services Committee may hold a public hearing at which persons who made written submissions may make oral representations;
- (c) after having considered the written submissions and oral representations, the Essential Services Committee -
  - (i) may decide whether or not to designate the whole or the part of a service that was the subject of the investigation as an essential service; and
  - (ii) if it does designate any part of the service to be an essential service, must publish a notice of that designation in the *Gazette*.

(4) In addition to publishing a notice in the *Gazette* as contemplated in subsection (3)(a) and (c), the Minister must, through any other available means, publish the information contained in the notice, in order to ensure that the individuals whose interests are affected by the notices receive the information.

(5) The Essential Service Committee may vary or cancel the designation of any essential service by following subsections (3) and (4), read with the necessary changes.

(6) When the Essential Services Committee publishes a notice in terms of subsections (3)(a) and (4), any interested party may inspect any written representations made pursuant to that notice at the Labour Commissioner's office.

(7) A person may, in writing, refer a dispute about whether or not an employee or employer is engaged in an essential service to the Essential Service Committee.

(8) The party who refers a dispute to the Essential Services Committee must satisfy the Committee that a copy of the referral has been served on all the parties to the dispute.

(9) The Essential Services Committee must determine the dispute referred to in subsection (7) as soon as possible.

(10) A person may apply to the Labour Court to review any decision of the Essential Service Committee.

#### **Disputes in a designated essential service**

**76.** (1) Any party to a dispute of interest, who is prohibited in terms of section 73(e) from participating in a strike or a lockout because that party is engaged in an essential service designated in terms of section 75, may refer the dispute to the Labour Commissioner.

(2) The person who refers the dispute must satisfy the Labour Commissioner that a copy of the notice of a dispute has been served on all the other parties to the dispute.

(3) The Labour Commissioner must, subject to section 83(4), appoint an arbitrator to resolve the dispute through arbitration.

#### **Urgent interdicts**

**77.** (1) The Labour Court must not grant an urgent order interdicting a strike, picket or lockout that is not in compliance with this Chapter, unless -

- (a) the applicant has given written notice of its intention to apply for an interdict, and copies of all relevant documents, to the respondent; and
- (b) the applicant has served a copy of the notice and the application on the Labour Commissioner; and
- (c) the respondent has been given a reasonable opportunity to be heard before a decision is made.

(2) The Labour Court may request a police report contemplated in section 115(2)(b) before making an order.

(3) Nothing in this section prevents a person from referring to a competent court any dispute arising from the application or interpretation of this Chapter.



**CHAPTER 8  
PREVENTION AND RESOLUTION OF DISPUTES**

**PART A  
DISPUTES AFFECTING THE NATIONAL INTEREST**

**Disputes affecting the national interest**

- 78.** (1) If the Minister considers it in the national interest, the Minister may -
- (a) request the Labour Commissioner to appoint a conciliator to conciliate any dispute, or potential dispute, between employers and their organisations on the one hand and employees and their unions on the other hand; or
  - (b) in consultation with the Labour Advisory Council, appoint a panel of persons representing the interests of employers, employees and the State to investigate any industrial conflict or potential conflict for the purpose of reporting and making recommendations to the Minister.
- (2) Any panel appointed in terms of subsection (1)(b) has all the powers of a conciliator set out in section 80(10), read with the necessary changes.

**PART B  
CONCILIATION OF DISPUTES**

**Definitions**

- 79.** For the purposes of this Part, “a dispute” means any of the following:
- (a) a dispute of interest;
  - (b) a complaint relating to affirmative action contemplated in the Affirmative Action (Employment) Act, 1998 (Act No. 29 of 1998).
  - (c) a dispute referred for conciliation by -
    - (i) the Minister in terms of section 78(1)(a); or
    - (ii) the Labour Court in terms of section 115(2)(a).

**Resolution of disputes through conciliation**

- 80.** (1) Any party to a dispute may refer the dispute in the prescribed form to -
- (a) the Labour Commissioner; or
  - (b) any labour office.
- (2) The party who refers the dispute must satisfy the Labour Commissioner that a copy of the referral has been served on all the other parties to the dispute.
- (3) The Labour Commissioner must -
- (a) appoint a conciliator to attempt to resolve the dispute through conciliation;
  - (b) determine the place, date and time of the first conciliation meeting; and
  - (c) advise the parties to the dispute of the details contemplated in paragraphs (a) and (b).

(4) Subject to the provisions of section 72(1)(b) and 72(3), the appointed conciliator must attempt to resolve the dispute through conciliation within -

- (a) 30 days of the date the Labour Commissioner or labour office received the referral of the dispute; or
- (b) any longer period agreed in writing by the parties to the dispute.

(5) Subject to the rules determined in terms of section 97(a), the conciliator -

- (a) must determine how the conciliation is to be conducted; and
- (b) may require that further meetings be held within the period contemplated in subsection (4).

(6) In any conciliation proceedings, a party to a dispute may appear in person or be represented by -

- (a) a member, office bearer, or official of that party's registered trade union or registered employer's organisation;
- (b) if the party is an employee, a co-employee; or
- (c) if the party is a juristic person, a director, member or employee of that juristic person.

(7) Subject to section 81, a conciliator must issue a certificate that a dispute is unresolved if -

- (a) the conciliator believes that there is no prospect of settlement at that stage of the dispute; or
- (b) the period contemplated in subsection (4) has expired.

(8) When issuing a certificate under subsection (7) the conciliator must, if the parties have agreed, refer the unresolved dispute for arbitration in terms of Part C of this Chapter.

(9) A conciliator appointed in terms of subsection (3)(a) -

- (a) remains seized of the dispute until it is settled; and
- (b) must continue to endeavour to settle the dispute through conciliation in accordance with the guidelines and Codes of Good Practice published in terms of section 135.

(10) A conciliator appointed in terms of this Part may -

- (a) subpoena any person to attend a conciliation hearing if the conciliator considers that that person's attendance will assist in the resolution of the dispute;
- (b) administer an oath or accept an affirmation from any individual called to give evidence; and
- (c) question any individual about any matter relevant to the dispute.

(11) A person who, without lawful excuse, fails to comply with a subpoena issued in terms of subsection (10)(a) or refuses to answer any question put to that person by a conciliator in terms of subsection (10)(c) commits an offence and is liable on conviction to a fine not exceeding N\$5 000 or to imprisonment for a period not exceeding 12 months or to both the fine and imprisonment.

### **Consequences of failing to attend conciliation meetings**

**81.** (1) If a dispute is referred in terms of section 72, subsection (3) of that section applies to any failure to attend a conciliation meeting.

(2) In respect of any other dispute referred in terms of this Act, the conciliator of the dispute may -

- (a) dismiss the matter if the party who referred the dispute fails to attend a conciliation meeting; or
- (b) determine the matter if the other party to the dispute fails to attend a conciliation meeting.

(3) The Labour Commissioner may reverse a decision made by a conciliator in terms of subsection (2) if -

- (a) application is made in the prescribed manner; and
- (b) the Labour Commissioner is satisfied that there were good grounds for failing to attend the conciliation meeting.

## **PART C ARBITRATION OF DISPUTES**

### **Definitions and application of the Arbitration Act 1965**

**82.** (1) For the purposes of this Part, “dispute” means -

- (a) a complaint relating to the breach of a contract of employment or a collective agreement;
- (b) a dispute contemplated in section 45 of the Affirmative Action (Employment) Act, 1998 (Act No. 29 of 1998);
- (c) any dispute referred in terms of section 80(8); or
- (d) any dispute that is required to be referred to arbitration in terms of this Act.

(2) Except for any matter otherwise provided for in this Act, the Arbitration Act, 1965 (Act No. 42 of 1965) applies to any arbitration conducted under this Part and for the purposes of that Act, this Act must be regarded as an “arbitration agreement” as defined in that Act.

### **Resolving disputes by arbitration**

**83.** (1) Any party to a dispute may refer the dispute in writing to -

- (a) the Labour Commissioner; or
- (b) any labour office.

- (2) A party may refer a dispute in terms of subsection (1) only -
- (a) within six months after the date of dismissal, if the dispute concerns a dismissal, or
  - (b) within one year after the dispute arising, in any other case.
- (3) The party who refers the dispute in terms of subsection (1) must satisfy the Labour Commissioner that a copy of the referral has been served on all the other parties to the dispute.
- (4) The Labour Commissioner must make available to the parties the names of arbitrators who, in terms of section 98, are qualified to determine the dispute and the parties may, by agreement, nominate one or more persons for appointment as arbitrator.
- (5) If the parties agree on the nomination of an arbitrator as contemplated in subsection (4) or fail to agree on a nomination, the Labour Commissioner must -
- (a) appoint the person agreed on as the arbitrator or where there is no agreement, appoint an arbitrator to attempt to resolve the dispute through arbitration;
  - (b) determine the place, date and time of the arbitration hearing; and
  - (c) advise the parties to the dispute of the details contemplated in paragraphs (a) and (b).
- (6) Unless the dispute has already been conciliated, the arbitrator must attempt to resolve the dispute through conciliation before beginning the arbitration.
- (7) If the conciliation attempt is unsuccessful, the arbitrator must begin the arbitration.
- (8) Subject to any rules promulgated in terms of section 97(a), the arbitrator -
- (a) may conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly; but
  - (b) must deal with the substantial merits of the dispute with the minimum of legal formalities.
- (9) An arbitrator appointed in terms of this Part may -
- (a) subpoena any person to attend an arbitration hearing if the arbitrator considers that that person's attendance will assist in the resolution of the dispute;
  - (b) administer an oath or accept an affirmation from any individual called to give evidence; and
  - (c) question any individual about any matter relevant to the dispute.
- (10) A person who, without lawful excuse, fails to comply with a subpoena issued in terms of subsection (9)(a) or refuses to answer any question put to that person by an arbitrator in terms of subsection (9)(c) commits an offence and is liable on conviction to a fine not exceeding N\$5 000 or to imprisonment for a period not exceeding 12 months or to both the fine and imprisonment.

(11) Subject to the discretion of the arbitrator as to the appropriate form of proceedings, a party to the dispute may give evidence, call witnesses, question witnesses of any other party, and address concluding arguments.

(12) If the parties to the dispute consent, the arbitrator may suspend the proceedings and attempt to resolve the dispute through conciliation.

(13) In any arbitration proceedings a party to a dispute may appear in person or be represented by -

- (a) a member, office bearer, or official of that party's registered trade union or registered employer's organisation; or
- (b) if the party is an employee, a co-employee; or
- (c) if the party is a juristic person, a director, member or employee of that person.

(14) Despite subsection (13), an arbitrator may permit a legal practitioner to represent a party to a dispute in arbitration proceedings if -

- (a) the parties to the dispute agree; or
- (b) at the request of a party to a dispute, the arbitrator is satisfied that -
  - (i) the dispute is of such complexity that it is appropriate for a party to be represented by a legal practitioner; and
  - (ii) the other party to the dispute will not be prejudiced.

(15) The arbitrator may make any appropriate arbitration award including -

- (a) an interdict;
- (b) an order directing the performance of any act that will remedy a wrong;
- (c) a declaratory order;
- (d) an order of reinstatement of an employee;
- (e) an award of compensation or damages; and
- (f) subject to subsection (16), an order for costs.

(16) The arbitrator may include an order for costs in the arbitration award only if a party, or the person who represented that party in the arbitration proceedings, acted in a frivolous or vexatious manner -

- (a) by proceeding with or defending the dispute in the proceedings; or
- (b) during the proceedings.

(17) In making an award, the arbitrator must take into account -

- (a) any code of good practice that has been published by the Minister in terms of section 135; and
- (b) any guidelines issued by the Committee for Dispute Prevention and Resolution.

(18) Within 30 days of the conclusion of the arbitration proceedings, the arbitrator must issue an award with concise reasons signed by the arbitrator.

#### **Effect of arbitration awards**

- 84.** (1) An arbitration award made in terms of this Act -
- (a) is binding unless the award is advisory;
  - (b) becomes an order of the Labour Court on filing the award in the Court by -
    - (i) any party affected by the award; or
    - (ii) the Labour Commissioner.

(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 judgement debt in terms of the Prescribed Rates of Interest Act, 1975 (Act No. 55 of 1975) unless the award provides otherwise.

#### **Variation and rescission of awards**

**85.** An arbitrator who has made an award in terms of section 83(15) may vary or rescind the award if -

- (a) it was erroneously sought or erroneously made in the absence of any party affected by that award;
- (b) it is ambiguous or contains an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
- (c) it was made as a result of a mistake common to the parties to the proceedings.

#### **Appeals or reviews of arbitration awards**

**86.** (1) A party to a dispute may appeal to the Labour Court against an arbitrator's award made in terms of section 83 -

- (a) on any question of law alone; or
- (b) in the case of an award in a dispute initially referred to the Labour Commissioner in terms of section 7(1)(a), on a question of fact, law or mixed fact and law.

(2) A party to a dispute who wishes to appeal against an arbitrator's award in terms of subsection (1) must note an appeal in accordance with the rules of the Labour Court, and within 30 days after the award being served on the party.

(3) The Labour Court may condone the late noting of an appeal on good cause shown.

(4) A party to a dispute who alleges a defect in any arbitration proceedings in terms of this Act may apply to the Labour Court for an order setting aside the award -

- (a) within 30 days after the award was served on the party, unless the alleged defect involves corruption; or
- (b) if the alleged defect involves corruption, within six weeks after the date that the applicant discovers corruption.

- (5) A defect referred to in subsection (4) means -
- (a) that the arbitrator -
    - (i) committed misconduct in relation to the duties of an arbitrator;
    - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
    - (iii) exceeded the arbitrator's power; or
  - (b) that an award has been improperly obtained.
- (6) When an appeal is noted in terms of subsection (1), or an application for review is made in terms of subsection (4) the appeal or application -
- (a) operates to suspend any part of the award that is adverse to the interest of an employee; but
  - (b) does not operate to suspend any part of the award that is adverse to the interest of an employer.
- (7) An employer against whom an adverse award has been made may apply to the Labour Court for an order varying the effect of subsection (6), and the court may make an appropriate order.
- (8) When considering an application in terms of subsection (7), the Labour Court must -
- (a) consider any irreparable harm that would result to the employee and employer respectively if the award, or any part of it, were suspended, or were not suspended;
  - (b) if the balance of irreparable harm favours neither the employer nor employee conclusively, determine the matter in favour of the employee.
- (9) The Labour Court may -
- (a) order that all or any part of the award be suspended; and
  - (b) attach conditions to its order, including but not limited to -
    - (i) conditions requiring the payment of a monetary award into court; or
    - (ii) the continuation of the employer's obligation to pay remuneration to the employee pending the determination of the appeal or review, even if the employee is not working during that time.
- (10) If the award is set aside, the Labour Court may -
- (a) determine the dispute in the manner it considers appropriate; or
  - (b) make any award it considers appropriate about the procedures to be followed to determine the dispute; or
  - (c) refer it back to the arbitrator.

**Enforcement of awards**

**87.** A party to an arbitration award may apply to a labour inspector in the prescribed form requesting the inspector to enforce the award by taking such steps as are necessary to do so, including the institution of execution proceedings on behalf of that person.

**PART D  
PRIVATE ARBITRATION****Private arbitration**

**88.** (1) For the purposes of this section “arbitration agreement” means any agreement contemplated in subsection (2) and includes the arbitration procedure contemplated in section 71;

(2) Parties to a dispute contemplated under this Act may agree in writing to refer that dispute to arbitration under this section.

(3) If an appointed arbitrator is not able to act for any reason or the arbitrator’s appointment is set aside, the parties to the arbitration agreement may appoint another arbitrator in accordance with that agreement.

(4) If the parties to an arbitration agreement are not able to reach agreement on the appointment of an arbitrator, the Labour Court, on application, may appoint an arbitrator on behalf of the parties.

(5) Unless an arbitration agreement provides otherwise, the appointment of an arbitrator may be terminated only by consent of the parties to the agreement.

(6) The appointment of an arbitrator may be set aside, on good cause shown, by order of the Labour Court.

(7) An arbitrator appointed in terms of an arbitration agreement may -

- (a) subpoena any person to attend an arbitration hearing if the arbitrator considers that that person’s attendance will assist in the resolution of the dispute;
- (b) administer an oath or accept an affirmation from any individual called to give evidence; and
- (c) question any individual about any matter relevant to the dispute.

(8) Section 83(8) through to (12), read with the necessary changes, applies to an arbitration in terms of this section.

(9) Subject to the provisions in the arbitration agreement, the arbitrator may make any appropriate arbitration award, including;

- (a) any award listed in section 83(15)(a) to (e); and
- (b) an order for costs.

(10) Section 83(17), read with the necessary changes, applies to the making of an arbitration award in terms of this section.

(11) Unless the arbitration agreement provides otherwise, the arbitrator must issue an award with concise reasons signed by the arbitrator within 30 days after the conclusion of the arbitration proceedings.



(12) Sections 84 to 87, each read with the necessary changes, apply to an arbitration award made in terms of this section.

(13) If any party to an arbitration agreement refers a dispute to the Labour Commissioner that should be referred to private arbitration, the Labour Commissioner must refer the dispute to arbitration in terms of the agreement.

(14) Unless an arbitration agreement provides otherwise, the agreement -

- (a) may be terminated only by consent of the parties to the agreement, or by order of the Labour Court;
- (b) is not terminated by the death, sequestration or winding up of any party, but in such a case, any arbitration that has commenced must be stayed until an executor, administrator, curator, trustee, liquidator or judicial manager has been appointed.

## CHAPTER 9 LABOUR INSTITUTIONS

### PART A LABOUR ADVISORY COUNCIL

#### **Continuation of Labour Advisory Council**

**89.** The Labour Advisory Council established by section 7 of the Labour Act, 1992 (Act No. 6 of 1992) is continued, subject to this Part.

#### **Functions of Labour Advisory Council**

**90.** (1) The Labour Advisory Council must investigate and advise the Minister in respect of the following matters:

- (a) collective bargaining;
- (b) national policy in respect of -
  - (i) basic conditions of employment; and
  - (ii) health, safety and welfare at work;
- (c) the prevention and reduction of unemployment;
- (d) issues arising from the International Labour Organisation;
- (e) issues raised by any international or regional association of states of which Namibia is a member;
- (f) legislation concerning labour matters including -
  - (i) amendments to this Act or any other relevant law;
  - (ii) laws aimed to achieve the objects of Article 95 of the Constitution; and
  - (iii) laws to give effect to Namibia's international law obligations;
- (g) codes of good practice;

- (h) collection and compilation of information and statistics relating to the administration of the Act;
- (i) any other labour matter that -
  - (i) the Council considers useful to achieve the objects of this Act; or
  - (ii) is referred to the Council by the Minister.
- (2) The Labour Advisory Council may -
  - (a) make recommendations to the Judge-President on the designation of judges to the Labour Court; and
  - (b) nominate the members of the panels appointed by the Minister to prevent or resolve disputes in the national interest in terms of section 78.
- (3) The Labour Advisory Council must report to the Minister once a year on its investigations in respect of the matters referred to in subsection (1)(a), (b), (d), (e) and (f).

#### **Composition of Labour Advisory Council**

**91.** (1) The Labour Advisory Council consists of the following individuals appointed by the Minister in accordance with this section:

- (a) a chairperson, who must be a Namibian citizen; and
- (b) and 12 other members, comprising -
  - (i) four individuals to represent the interests of the State;
  - (ii) four individuals to represent the interests of registered trade unions; and
  - (iii) four individuals to represent the interests of registered employers' organisations.
- (2) Before appointing a member of the Labour Advisory Council, the Minister must, by notice in writing, invite nominations from -
  - (i) registered trade unions, if the member is to represent them; or
  - (ii) registered employers' organisations, if the member is to represent them.
- (3) With the approval of the Minister, the Labour Advisory Council may co-opt other individuals to assist it in the performance of its functions, but those individuals must not vote at meetings of the Council.

#### **Terms of office and conditions of membership**

- 92.** (1) A member of Labour Advisory Council -
- (a) is appointed for three years; and
  - (b) may be re-appointed at the end of the term of office.

(2) A member of the Labour Advisory Council who is not in full time employment of the State may be paid allowances for attending meetings, travel and subsistence at a rate determined by the Minister with the consent of the Minister responsible for Finance.

(3) The allowances determined under subsection (2) may differ according to the office held, or the functions performed, by a member.

#### **Removal of members and filling of vacancies**

- 93.** (1) The Minister must remove a member from office if the member -
- (a) has resigned in writing and delivered the resignation to the Permanent Secretary;
  - (b) no longer represents the interest contemplated in section 91(1)(b) and in respect of which the member was appointed;
  - (c) is absent from three meetings of the Council without permission or good cause;
  - (d) is declared insolvent; or
  - (e) is convicted of an offence and sentenced to imprisonment without an option of a fine.

(2) Despite subsection (1), the Minister may, after affording a member an opportunity to make representations on the matter, remove a member from office if the Minister has reasonable cause to believe that the member is no longer fit or able to discharge the functions of that member's office

(3) Whenever a vacancy occurs on the Labour Advisory Council, the Minister must -

- (a) appoint a member to fill that vacancy for the unexpired term of office; and
- (b) comply with section 91 when doing so.

#### **Committees**

**94.** (1) The following committees are established as Committees of the Labour Advisory Council -

- (a) Committee for Dispute Prevention and Resolution; and
- (b) Essential Services Committee.

(2) Despite subsection (1), the Labour Advisory Council -

- (a) may establish other committees to advise the Council on the performance of its functions; and
- (b) subject to the approval of the Minister, may assign any of its functions to a committee on conditions it may decide to impose.

(3) A committee appointed by the Labour Advisory Council in terms of subsection (2) -

- (a) must comprise at least two members of the Labour Advisory Council; and
- (b) may include any number of other individuals, but such committee members must not vote in meetings of the committee.

(4) Any function performed by a committee in terms of this section is deemed to be performed by the Labour Advisory Council.

### Meetings

- 95.** (1) The chairperson of the Labour Advisory Council -
- (a) may decide the date, time and place of meetings of the Labour Advisory Council; but
  - (b) must call a special meeting of the Labour Advisory Council -
    - (i) on the written and motivated request of four members; or
    - (ii) on the request of the Minister.

(2) The chairperson must preside over all meetings of the Labour Advisory Council at which the chairperson is present.

(3) If the chairperson is not present, the members may elect a chairperson from among their number to chair the meeting.

(4) The majority of the members of the Labour Advisory Council constitute a quorum.

(5) A decision of the majority of the members of the Labour Advisory Council present at the meeting is the decision of the Labour Advisory Council.

(6) In the case of a tied vote, the individual presiding at the meeting has the casting vote in addition to that individual's deliberative vote.

- (7) A decision made by the Labour Advisory Council is valid despite -
- (a) that there was a vacancy on the Council at the time the decision was made; or
  - (b) the presence at the meeting when the decision was made of an individual who was not entitled to sit as a member, sat as a member, if a majority of the members present and entitled to sit, voted in favour of the decision.

- (8) The Labour Advisory Council -
- (a) may make rules for the conduct of its meetings; and
  - (b) must keep a written record of those meetings.

### Administration of Labour Advisory Council

- 96.** (1) The Permanent Secretary -
- (a) must make staff members in the Ministry available to perform administrative and clerical work for the Labour Advisory Council in the performance of its functions; and

- (b) may designate a staff member in the Ministry to serve as a secretary to the Council.

(2) The Labour Advisory Council may engage other persons to assist it in the performance of its functions -

- (a) after consultation with the Permanent Secretary; and
- (b) with the approval of the Permanent Secretary as to the conditions of the employment.

**PART B**  
**COMMITTEE FOR DISPUTE PREVENTION AND RESOLUTION AND**  
**ESSENTIAL SERVICES COMMITTEE**

**Functions of Committee for Dispute Prevention and Resolution**

97. The functions of the Committee are to -
- (a) determine rules for the conduct of conciliation and arbitration in terms of this Act;
  - (b) determine policies and guidelines on dispute prevention and resolution for application by the Labour Commissioner and the users of the Labour Commissioner's services;
  - (c) determine the code of ethics for conciliators and arbitrators appointed in terms of this Act;
  - (e) make recommendations to the Permanent Secretary on -
    - (i) the qualifications for the appointment of conciliators and arbitrators;
    - (ii) the appointment of the conciliators and arbitrators;
  - (f) review the performance of dispute prevention and resolution by the Labour Commissioner on a regular basis;
  - (g) report to the Labour Advisory Council on the activities of the Labour Commissioner as and when required to do so by the Council; and
  - (h) perform any other function assigned to it by this Act or by the Labour Advisory Council.

**Composition of Committee for Dispute Prevention and Resolution**

98. (1) The Committee for Dispute Prevention and Resolution consists of the following individuals who are either, designated, in the case of individuals who are members of the Labour Advisory Council, or in any other case, appointed by the Labour Advisory Council -

- (a) the chairperson who must be designated or appointed in consultation with the Minister;
- (b) two individuals, one of whom must be a member of the Labour Advisory Council, who represent the interests of registered employers organisations;

- (c) two individuals, one of whom must be a member of the Labour Advisory Council, who represent the interests of registered trade unions; and
- (d) two individuals, one of whom must be a member of the Labour Advisory Council, who represent the interests of the State.

#### **Terms of office and conditions of membership**

**99.** (1) A member of the Committee for Dispute Prevention and Resolution who is also a member of the Labour Advisory Council holds office for as long as that member is a member of the Labour Advisory Council.

(2) A member of the Committee for Dispute Prevention and Resolution who is not a member of the Labour Advisory Council holds office for a period of three years and may be re-appointed at the end of that period.

(3) The Labour Advisory Council must remove from office, a member referred to on subsection (2), if that member becomes subject to a disqualification mentioned in section 93.

(4) Whenever a vacancy occurs on the Committee for Dispute Prevention and Resolution, the Labour Advisory Council must -

- (a) designate or appoint a member to fill that vacancy for the unexpired term of office; and
- (b) comply with section 98 when doing so.

(5) A member of the Committee who is not in full time employment of the State may be paid allowances for attending meetings, travel and subsistence at a rate determined by the Minister with the consent of the Minister responsible for Finance.

(6) The allowances determined under subsection (5) may differ according to the office held, or the functions performed, by a member.

#### **Procedures of Committee for Dispute Prevention and Resolution**

**100.** The Committee for Dispute Prevention and Resolution may make rules for the conduct of its meetings.

#### **Essential Services Committee**

**101.** (1) The functions of the Essential Services Committee are -

- (a) to designate essential services in terms of section 75; and
- (b) to determine disputes about whether or not an employee or employer is engaged in a designated essential service in terms of section 75(7).

(2) The Essential Services Committee consists of the following individuals -

- (a) the chairperson who must be a member of the Labour Advisory Council designated by the Council;
- (b) four individuals with knowledge and experience of labour law and labour relations of whom, in the case of individuals who are members of the Labour Advisory Council, are designated by the Council or, in the case of other individuals, are appointed by the Labour Advisory Council.

(3) A member of the Committee who is also a member of the Labour Advisory Council holds office for as long as that member is a member of the Labour Advisory Council.

(4) A member of the Committee who is not a member of the Labour Advisory Council holds office for a period of three years and may be re-appointed at the end of that period.

(5) The Labour Advisory Council must remove from office, a member referred to in subsection (4), if that member becomes subject to a disqualification mentioned in section 93.

(6) Whenever a vacancy occurs on the Essential Services Committee, the Labour Advisory Council must -

- (a) designate or appoint a member to fill that vacancy for the unexpired term of office; and
- (b) comply with the provisions of subsection (2) when doing so.

(7) A member of the Committee who is not in full time employment of the State may be paid allowances for attending meetings, travel and subsistence at a rate determined by the Minister with the consent of the Minister responsible for Finance.

(8) The allowances determined under subsection (7) may differ according to the office held, or the functions performed, by a member.

(9) The Essential Services Committee may make rules for the conduct of its meetings.

## PART C WAGES COMMISSION

### Continuation of Wages Commission

**102.** (1) The Wages Commission established by section 84 of the Labour Act, 1992 (Act 6 of 1992) is continued, subject to this Part.

(2) The Commission may be constituted by the Minister from time to time for any period the Minister determines -

- (a) whenever the Minister may decide to do so; or
- (b) at the request of any registered trade union or registered employers' organisation.

### Functions of Commission

**103.** The functions of the Commission are to investigate terms and conditions of employment, including remuneration, and report to the Minister in accordance with section 111, for the purposes of making a wage order in terms of section 13.

### Composition of Commission

**104.** The Commission consists of the following members appointed by the Minister -

- (a) a chairperson; and

- (b) a member nominated by members of the Labour Advisory Council who represents the interests of registered trade unions; and
- (c) a member nominated by members of the Labour Advisory Council who represents the interests of the registered employers' organisations.

#### **Terms of office of members of Commission**

**105.** (1) A member of the Commission holds office until that member's office is vacated in terms of subsection (2) or (3).

- (2) The Minister must remove a member from office if the member -
  - (a) has resigned and delivered the resignation to the Permanent Secretary;
  - (b) is incapable of acting as a member because of illness;
  - (c) is convicted of an offence and sentenced to imprisonment without an option of a fine; or
  - (d) has not attended three consecutive meetings of the Commission without the leave of the chairperson.

(3) Despite subsection (2), the Minister may, after affording a member an opportunity to make representations on the matter, remove a member from office if the Minister has reasonable cause to believe that the member is no longer fit or able to discharge the functions of that member's office

- (4) Whenever a vacancy occurs on the Wages Commission, the Minister must -
  - (a) appoint a member to fill that vacancy for the unexpired term of office; and
  - (b) comply with section 104 when doing so.

(5) A member of the Commission, who is not in full time employment of the State, may be paid allowances for attending meetings, travel and subsistence at a rate determined by the Minister with the consent of the Minister responsible for Finance.

(6) The allowances determined under subsection (5) may differ according to the office held, or the functions performed, by a member.

#### **Meetings of Commission**

**106.** (1) The chairperson must decide the date, time and place of meetings of the Commission.

- (2) A majority of members of the Commission constitute a quorum.

(3) The chairperson of the Commission must preside over all meetings of the Commission at which the chairperson is present and in the absence of the Chairperson the members present must elect one of their number to be the chairperson.

(4) The decision of a majority of the members of the Commission present at a meeting of the Commission is a decision of the Commission.

#### **Administration of Commission**

- 107.** (1) The Permanent Secretary -



- (a) must make staff members in the Ministry of Labour available to perform administrative and clerical work for the Commission in the performance of its functions; and
  - (b) may designate a staff member in the Ministry to serve as a secretary to the Commission.
- (2) The Commission may engage persons to assist it in the performance of its functions -
- (a) after consultation with the Permanent Secretary; and
  - (b) with the approval of the Permanent Secretary as to the conditions of employment.

### Terms of reference of Commission

**108.** (1) When convening the Wages Commission, the Minister must determine the terms of reference of the Commission, which must include -

- (a) the industry or area to be investigated;
- (b) the categories of employees to be included in the investigation;
- (c) subject to subsection (2), any matter to be investigated that relates to terms and conditions of employment, including remuneration.

(2) The terms of reference must not require the Commission to investigate a matter regulated by any wage order or a collective agreement made within a period of 12 months of its commencement.

(3) The Minister must publish a notice in the *Gazette* setting out the terms of reference of an investigation, and inviting written representations.

- (4) A notice in terms of subsection (3) must contain -
- (a) any particulars of the members of the Commission appointed for purposes of the enquiry; and
  - (b) the period, if any, within which -
    - (i) the written representations have to be submitted to the Commission;
    - (ii) the enquiry is required to be completed; and
    - (iii) the report is required to be submitted.

(5) In addition to publishing a notice in the *Gazette* as contemplated in subsection (3), the Minister must, through other available means, publish the information contained in the notice, in order to ensure that the individuals whose interests are affected by the notice receive the information.

### Powers of Commission

**109.** (1) The Commissions Act, 1947 (Act No. 8 of 1947), read with any changes required by the context, applies to the Commission in the performance of its functions.

(2) The chairperson, any member of the Commission or any other individual with written authorisation from the Commission and signed by the chairperson may exercise the powers conferred on a labour inspector by section 123 in the performance of the Commission's functions.

#### **Matters to be considered in investigation**

- 110.** (1) The Commission must consider, in its investigation -
- (a) the aims of Article 95 of the Namibian Constitution in so far as it relates to labour matters;
  - (b) all representations and other information submitted to it; and
  - (c) all relevant matters including -
    - (i) the ability of the employer or employers or category of employers to carry on their businesses on a profitable basis if any recommendation is made a wage order;
    - (ii) the cost of living in Namibia or in any part of it;
    - (iii) the minimum subsistence level in any area;
    - (iv) the value of any board, lodging or other benefits provided by any employer or employers or category of employers to any employee or employees or category of employees; and
    - (v) any other matter determined by the Minister.

#### **Reports of Commission**

**111.** (1) On the completion of an investigation and after considering any representations submitted, the Commission must prepare and submit a report to the Minister, which must consist of -

- (a) the Commission's findings; and
- (b) its recommendations, subject to the terms of reference, on -
  - (i) minimum remuneration;
  - (ii) the amount of any increase or reduction in remuneration;
  - (iii) the basis upon which remuneration is to be determined;
  - (iv) the prohibition of payment of remuneration in kind;
  - (v) the deductions to be made, permitted or prohibited from remuneration;
  - (vi) where, when and how remuneration is paid;
  - (vii) what employment records an employer is required to keep, for how long and in what form;
  - (viii) the prohibition of, or regulation and remuneration of, certain kinds of work, whether on the employer's premises or off it, including outwork, taskwork, contractwork or piecework; and

- (ix) any matter connected or incidental to any matter contemplated in this paragraph.
- (2) If a member does not agree with the Commission's report, or any part of it, -
  - (a) that fact must be recorded in the report; and
  - (b) the member may submit a minority report to the Minister together with the Commission's report.
- (3) The Minister -
  - (a) may publish any report contemplated in this section in any manner or form or any information contained in a report; but
  - (b) must not include in such a publication, any information relating to the financial statements or trade practices of any employer

#### **PART D LABOUR COURT**

##### **Continuation and powers of Labour Court**

**112.** (1) The Labour Court established by section 15 of the Labour Act, 1992 (Act 6 of 1992) is continued, subject to this Part.

(2) In the performance of its functions, the Labour Court has all the powers of the High Court of Namibia under Articles 78(4) and 80 of the Namibian Constitution, and under the High Court Act, 1990 (Act No. 16 of 1990).

##### **Composition of Labour Court**

- 113.** The Labour Court consists of -
- (a) the senior labour judge; and
  - (b) as many judges as the Judge-President considers necessary.

##### **Assignment of judges of Labour Court**

**114.** (1) The Judge-President must, on the recommendation of the Labour Advisory Council, assign judges to the Labour Court, each of whom must be a judge or an acting judge of the High Court.

(2) The Judge-President must designate one of the judges of the Labour Court as the senior labour judge.

##### **Jurisdiction of the Labour Court**

- 115.** (1) The Labour Court has exclusive jurisdiction to -
- (a) determine appeals from -
    - (i) decisions of the Labour Commissioner made in terms of this Act; and
    - (ii) arbitrators' awards, in terms of section 86;
  - (b) review -

- (i) arbitrators' awards in terms of this Act;
  - (ii) decisions of the Essential Services Committee in terms of section 75; and
  - (iii) decisions of the Minister, the Permanent Secretary, the Labour Commissioner or any other body or official in terms of -
    - (aa) this Act; or
    - (bb) any other Act for which the Minister is responsible;
  - (c) review, despite any other provision of any Act, any decision of any body or official provided for in terms of any other Act, if the decision concerns a matter within the scope of this Act;
  - (d) grant a declaratory order in respect of any provision of this Act or a collective agreement provided that the declaratory order is the only relief sought; and
  - (e) determine any other matter which it is empowered to hear and determine in terms of this Act.
- (2) The Labour Court may -
- (a) refer any dispute contemplated in subsection (1)(c) or (d) to the Labour Commissioner for conciliation or arbitration in terms of Part C of Chapter 8; or
  - (b) request the Inspector General of the Police to give a situation report on any danger to life, health or safety of persons arising from any strike or lockout.

### Costs

**116.** In any proceeding before it, the Labour Court must not make an order for costs against a party unless that party has acted in a frivolous or vexatious manner by instituting, proceeding with or defending those proceedings.

### Rules of Labour Court

**117.** (1) The Labour Courts' Rules Board established by section 22 of the Labour Act, 1992 (Act No. 6 of 1992) is continued under the name "Labour Court Rules Board", subject to this Part.

- (2) The Board consists of -
- (a) the senior labour judge who is the chairperson;
  - (b) two legal practitioners with expertise and experience in labour law appointed by the senior labour judge;
  - (c) an individual appointed by the Minister responsible for justice to represent the Ministry responsible for justice;
  - (d) an individual appointed by the Minister to represent the Ministry; and
  - (e) two individuals nominated by the Labour Advisory Council.

(3) The Board may make rules to regulate the conduct of proceedings in the Labour Court with a view to effecting a speedy and fair disposal of the proceedings.

(4) To the extent that the rules contemplated in subsection (3) do not deal with a matter contained in the Rules of the High Court of Namibia, those Rules of the High Court apply.

## PART E THE LABOUR COMMISSIONER

### Appointment of Labour Commissioner and Deputy

**118.** (1) The Minister must, subject to the laws governing the public service, appoint a Labour Commissioner and a Deputy Labour Commissioner, each of whom must be a person who is competent to perform the functions of a conciliator and arbitrator.

(2) The Labour Commissioner and the Deputy Labour Commissioner are, by virtue of their office, a conciliator and an arbitrator for the purposes of this Act.

(3) The Minister may -

- (a) with the concurrence of the Minister of Finance, determine the remuneration and allowances to be paid to the Labour Commissioner and the Deputy Labour Commissioner; and
- (b) determine the other terms and conditions of their service.

(4) If the Labour Commissioner, for any reason, is unable to perform the functions of that office, the Deputy Labour Commissioner must perform those functions.

(5) If both the Labour Commissioner and the Deputy Labour Commissioner are unable to perform their functions, the Minister may appoint any suitably qualified person in the public service to perform those functions.

### Powers and functions of the Labour Commissioner

**119.** (1) The functions of the Labour Commissioner are -

- (a) to receive complaints from employees and employers over contraventions, the application, interpretation or enforcement of this Act and to take appropriate action;
- (b) to attempt, through conciliation or by giving advice, to prevent disputes from arising;
- (c) to attempt, through conciliation, to resolve disputes referred to the Labour Commissioner in terms of this Act or any other law;
- (d) to arbitrate a dispute that has been referred to the Labour Commissioner if the dispute remains unresolved after conciliation, and
  - (i) this Act requires arbitration; or
  - (ii) the parties to the dispute have agreed to have the dispute resolved through arbitration; and
- (e) to compile and publish information and statistics of the Labour Commissioner's activities and report to the Minister.

(2) The Labour Commissioner may -

- (a) if asked, advise any party to a dispute about the procedure to follow;

- (b) offer to resolve a dispute that has not been referred to the Labour Commissioner through conciliation;
- (c) intervene in any application made to the Labour Court in terms of section 77; or
- (d) apply on the Labour Commissioner's own initiative, to the Labour Court for a declaratory order in respect of any question concerning the interpretation or application of any provision of this Act.

(3) The Labour Commissioner may, where possible, provide registered employers' organisations and registered trade unions with advice and training relating to the objects of this Act including -

- (a) designing and establishing procedures for the prevention and resolution of disputes;
- (b) the registration of trade unions;
- (c) the design and content of collective agreements;
- (d) dismissal procedures; and
- (e) employment equity in the workplace.

#### **Labour Commissioner may delegate certain powers and functions**

**120.** (1) The Labour Commissioner may delegate any of the Labour Commissioner's functions to any individual employed in the Ministry.

(2) The Labour Commissioner may attach conditions to a delegation and may amend or revoke that delegation at any time.

### **PART F LABOUR INSPECTORATE**

#### **Interpretation**

**121.** For the purposes of this Part -

- (a) 'employer' includes any person -
  - (i) the employer has contracted to perform work on its behalf; and
  - (ii) who is in charge of any premises where employees work;
- (b) 'object' includes any article or substance.

#### **Appointment of inspectors**

**122.** (1) Subject to the laws governing the public service, the Minister may appoint labour inspectors to enforce this Act or any decision, award or order made in terms of it.

(2) The Permanent Secretary must issue each appointed labour inspector with a certificate confirming the appointment.

(3) The Permanent Secretary may suspend or withdraw an appointment made in terms of subsection (1).

### **Powers of inspector**

**123.** (1) In so far as this section authorises the interference with a person's right to privacy and the privacy of that person's home as guaranteed by Article 13 of the Constitution, this section is enacted on the authority of subarticle (2) of that Article.

(2) For the purposes of the administration of this Act, a labour inspector may, subject to subsection (3) -

- (a) at any reasonable time enter any premises and -
  - (i) direct that the premises or any part of it must not be disturbed as long as it is reasonably necessary to search the premises;
  - (ii) search for and examine any book, document or object relevant to the administration of this Act;
  - (iii) seize, make a copy of any such book, document or object;
  - (iv) take a sample of the atmosphere or of any object found;
  - (v) take measurements, readings, recordings or photographs; and
  - (vi) question any individual on the premises;
- (b) order, in the prescribed form, any individual to appear at a specified date, time and place and to question that individual;
- (c) require any person who has control over any book, document or object to produce the book, document or object and explain any entry in the book or document or on the object;
- (d) examine, make a copy or seize any book, document or object produced in terms of paragraph (c);
- (e) take a sample of any object produced in terms of paragraph (c);
- (f) require an employer to pay an employee any remuneration owed;
- (g) enforce arbitration awards made under this Act;
- (h) give directions on where notices required in terms of this Act are to be posted;
- (i) assist any person in -
  - (i) any application, referral or complaint under this Act;
  - (ii) settling any application, referral or complaint under this Act;
- (j) require a member of the Namibian Police Force to assist in the exercise of the powers referred to in this subsection; and
- (k) request any individual to assist as an interpreter or otherwise in the exercise of the powers referred to in this subsection.

(3) A labour inspector may enter premises and conduct a search in terms of subsection (1)(a) only if it is done in accordance with Chapter 2 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) and as if -

- (a) a labour inspector is a police official; and
- (b) any book, document or object is concerned with the commission of an offence.

(4) A labour inspector must issue a receipt for any book, document or object seized in terms of this section.

(5) If asked, a labour inspector must produce the certificate referred to in section 122(2).

(6) Any member of the Namibian Police Force required to assist in terms of subsection (2), or any individual requested to assist in terms of subsection (2), may accompany the labour inspector as if that member or individual were a labour inspector.

(7) Any individual in charge of any premises on which individuals are employed must provide facilities as may be reasonably required in order for a labour inspector to exercise the powers referred to in subsection (2).

#### **Power to issue compliance order**

**124.** (1) An inspector who has reasonable grounds to believe that an employer has not complied with a provision of this Act may issue a compliance order in the prescribed form.

(2) An employer must comply with an order issued in terms of subsection (1) unless the employer appeals to the Labour Court in terms of subsection (3).

(3) An employer may appeal against a compliance order to the Labour Court within 30 days after receiving it.

#### **Offences in relation to inspectors**

**125.** (1) Any person who does any of the following acts commits an offence:

- (a) hindering or obstructing a labour inspector in the performance of the inspector's functions or the exercise of the inspector's powers;
- (b) refusing or failing to answer to the best of that individual's ability any question put by a labour inspector in terms of section 123(2)(a)(vi) or 123(2)(b);
- (c) intentionally furnishing false and misleading information to a labour inspector;
- (d) refusing or failing to comply to the best of that individual's ability with any compliance order issued in terms of section 124;
- (e) falsely claiming to be a labour inspector.

(2) A person convicted of an offence contemplated in subsection (1) is liable to a fine not exceeding N\$4 000 or to imprisonment for a period not exceeding 12 months or to both a fine and imprisonment.



## CHAPTER 10 GENERAL PROVISIONS

### Employment Hire Services

**126.** (1) In this section, “employment hire service” means any person who, for reward, procures for or provides to a client, individuals who, -

- (a) render services to, or perform work for, the client; and
- (b) are remunerated either by the employment hire service, or the client.

(2) For all purposes of this Act, an individual whose services have been procured for, or provided to, a client by an employment hire service is the employee of that employment hire service, and the employment hire service is that individual’s employer.

(3) The employment hire service and the client are jointly and severally liable if the employment hire service, in respect of any of its employees, contravenes -

- (a) a collective agreement;
- (b) a binding arbitration award that regulates terms and conditions of employment; or
- (c) Chapter 2 or 3 of this Act.

(4) An employment hire service must not offer to its employees, conditions of employment which are less favourable than those provided for in this Act.

(5) For the purposes of this section an individual must be regarded as an employee even if that individual works for periods which are interrupted by periods when work is not done or work is not made available to the employee.

(6) An employment hire service which contravenes or fails to comply with this section commits an offence and is liable on conviction to a fine not exceeding N\$50 000 or to imprisonment for a period not exceeding two years or to both such fine and imprisonment.

### Service of documents

**127.** (1) For the purpose of this section -

- (a) a document includes any notice, referral or application required to be served in terms of this Act;
- (b) an address includes a person’s residential or office address, post office box number, private bag number or, in the case of an employee, the address of that employee’s employer.

(2) A document is served on a person if it is -

- (a) delivered personally;
- (b) sent by registered post to the person’s last known address;
- (c) left with an adult individual apparently residing at or occupying or employed at the person’s last known address; or

- (d) in the case of a company -
  - (i) delivered to the public officer of the company;
  - (ii) left with some adult individual apparently residing at or occupying or employed at its registered address;
  - (iii) sent by registered post addressed to the company or its public officer at their last known addresses; or
  - (iv) transmitted by means of a facsimile transmission to the person concerned at the registered office of the company.

(3) Unless the contrary is proved, a document delivered in the manner contemplated in subsection (2)(b) or (d)(iii), must be considered to have been received by the person to whom it was addressed at the time when it would, in the ordinary course of post, have arrived at the place to which it was addressed.

### Records and returns

**128.** (1) Every employer must keep a record, current for the most recent five years, in the prescribed manner, containing the following information -

- (a) the name, sex, age and occupation of each employee;
- (b) the date on which each employee commenced employment;
- (c) the date on which any contract of employment was terminated and the reasons for the termination;
- (d) the remuneration payable to each employee;
- (e) the remuneration paid to each employee;
- (f) any period of absence, including annual leave, sick leave or maternity leave, taken by an employee; and
- (g) any other information that is prescribed or required by the Permanent Secretary in writing.

(2) Every employer must -

- (a) retain a record kept in terms of subsection (1) for a period of five years after the termination of the employee concerned; and
- (b) submit to the Permanent Secretary any information contained in the records kept in terms of subsection (1) as may be prescribed.

(3) Subject to section 129, the Permanent Secretary may -

- (a) at any time, compile, analyse and tabulate statistics collected from the information submitted in terms of this section; and
- (b) subject to the directions of the Minister, publish those statistics.

(4) It is an offence for an employer to -

- (a) fail to comply with subsection (1) or (2); or

- (b) intentionally make a false entry in a record or submission made in terms of this section.

(5) An employer found guilty of an offence contemplated in this section is liable to a fine not exceeding N\$4 000 or to imprisonment for a period not exceeding 12 months or to both such a fine and imprisonment.

#### **Preservation of secrecy**

**129.** (1) Any person performing a function in terms of this Act, whether or not that person is employed in the Ministry, must not disclose any confidential information acquired in the course of performing that function unless the disclosure -

- (a) is permitted or required in terms of this Act, any other law or order of court;
- (b) is made with the consent of -
  - (i) any person concerned; or
  - (ii) the Minister, if the Minister is satisfied that the information is of a general nature and the disclosure is in the public interest.

(2) Any person who contravenes this section commits an offence and is liable on conviction to a fine not exceeding N\$4 000 or to imprisonment for a period not exceeding 12 months or to both such a fine and imprisonment.

#### **Liability for contravention of this Act by manager, agent or employee**

**130.** (1) If a manager, agent or employee of an employer contravenes this Act, the employer is liable, unless it is established on the balance of probabilities that-

- (a) the commission of the contravention was not within the scope of the authority or in the course of the employment of the manager, agent or employee;
- (b) the manager, agent or employee contravened this Act without the permission of the employer; and
- (c) the employer took all reasonable steps to prevent the contravention.

(2) The fact that an employer issued instructions forbidding a contravention does not, of itself, constitute sufficient proof that the employer took all reasonable steps to prevent the contravention.

(3) Any manager, agent or employee of any employer who contravenes this Act is liable for any contravention, whether or not the employer is also held liable in terms of subsection (1).

#### **Evidence**

**131.** (1) In any legal proceedings in terms of this Act, a labour inspector's opinion of the probable age of an individual is presumed to be that individual's age if -

- (a) the age of that individual is in dispute; and
- (b) there is no satisfactory proof of that individual's age.

(2) Any interested party to the legal proceedings who does not accept an inspector's opinion of an individual's age may at their expense require that individual to appear before and be examined by a medical practitioner, and a statement of the individual's age contained in a certificate signed by that medical practitioner is conclusive proof of the age of that individual, for the purposes of those proceedings.

(3) In any legal proceedings in terms of this Act, a statement or entry contained in a book or document kept by an employer, or found upon or in any premises occupied by an employer, and any copy or reproduction (whether obtained by microfilming or any other process or by the use of a computer) of that statement or entry, is admissible in evidence against that employer as an admission of the facts stated in that statement or entry, unless it is proved that that statement or entry was not made by that employer, or any manager, agent or employee of that employer in the course and scope of their work.

(4) In any dispute about the failure to pay an employee at a rate of pay prescribed in terms of this Act, it is presumed, unless the contrary is proved, that the employer failed to do so if it is proved that -

- (a) the employee was in the employ of the employer; and
- (b) the provision prescribing the rate of pay binds the employer.

#### **Limitation of liability**

**132.** The following individuals do not incur any personal civil liability if, acting in terms of any provision of this Act, they did something, or failed to do something, in good faith in the performance of their functions in terms of this Act -

- (a) the Permanent Secretary;
- (b) the Labour Commissioner and Deputy Labour Commissioner;
- (c) a conciliator, arbitrator or labour inspector appointed in terms of this Act; and
- (d) any staff member in the employ of the Ministry.

#### **Regulations**

**133.** (1) The Minister may, after consulting the Labour Advisory Council, make regulations in relation to any matter -

- (a) required or permitted to be prescribed by this Act;
- (b) that may be necessary or expedient in order to achieve the objects of this Act.

(2) Without derogating from the generality of subsection (1) any regulation made under subsection (1) may include any matter relating to -

- (a) the measures to be taken to secure the safety and the preservation of the health and welfare of employees at work, including sanitation, ventilation and lighting in, on or about premises where machinery is used or building, excavation or any other work is performed by employees;
- (b) the duties of occupiers of such premises, users of such machinery, builders, excavators and employers and employees in connection therewith;
- (c) the accommodation facilities and conveniences to be provided on such premises by occupiers for employees while they are working, resting or eating therein;

- (d) the clothing, safety devices and protective articles to be provided by employers, builders, excavators, occupiers of premises and users of machinery for employees who handle specified articles in the course of their work or who are employed in specified activities under specified conditions;
- (e) the first-aid equipment to be provided by occupiers of premises, users of machinery, builders and excavators, and the employment of persons who hold specified qualifications in first-aid, and the provision of ambulances and other health care facilities;
- (f) the steps to be taken by the owners of premises used or intended for use as factories or places where machinery is used, or by occupiers of such premises or by users of machinery in connection with the structure of such buildings or otherwise in order to prevent or extinguish fires, and to ensure the safety, in the event of fire, of persons in such buildings;
- (g) the medical examination of persons in relation to occupational health;
- (h) the conditions of work of employees in, on or about any premises where in the opinion of the Minister concerned special provision is necessary to safeguard the physical, moral or social welfare of such employees;
- (i) the returns, statistics, information and reports which must be furnished in relation to premises, machinery, building work, excavation work, and employees, and the times at which, the manner in which, and the persons by whom such returns, statistics, information and reports are to be furnished, and the records which must be kept;
- (j) the conditions governing the erection, installation, working and use of any machinery and the duties, responsibilities and qualifications of the user or person in charge of or erecting, such machinery;
- (k) the reporting of accidents, the submission of notices of dangerous occurrences and occupational diseases, the manner of holding inquiries in connection therewith and the procedure to be followed at such inquiries;
- (l) the conditions governing the construction, erection, alteration or taking down of scaffolding or cranes;
- (m) the conditions governing building work and excavation work, including the steps to be taken in connection with timbering, underpinning and shoring up;
- (n) the precautions to be taken by builders or employees to prevent persons being injured by falling articles;
- (o) the lighting of building work and the safeguards to be used in connection with electrical equipment;
- (p) the stacking of material on or near the site;
- (q) the necessary qualifications of a crane driver or hoisting appliance operator;
- (r) the provision of equipment and the precautions necessary where persons employed on building or excavation work are in risk of drowning;

- (s) safety, health, hygiene, sanitation and welfare of persons employed in or about mines, including sea-bed operations, and generally of persons, property and public traffic;
- (t) the grant, cancellation and suspension of certificates of competency to employees in certain industries in respect of operations to be performed by them;
- (u) the submission of notices of commencement and cessation of any operations;
- (v) the submission of notices of appointment of employees in industries to which the provisions of paragraph (t) applies;
- (w) the functions of officers acting in the administration of this Act;
- (x) the making and keeping of plans of any premises relating to health and safety measures in, on or about such premise and the depositing of copies thereof in such office as may be specified in such regulations;
- (y) the protection and preservation of the surface of land and of buildings, roads, railways and other structures and enclosures on or above the surface of the land, and the conditions under which any such buildings, roads, railways, structures and enclosures may be undermined or excavated;
- (z) the prohibition or restrictions in relation to the making or use of roads or railways or other travelling ways over, or the erection or use of buildings or other structures over areas which have been undermined or excavated;
- (aa) the making safe of undermined ground and of dangerous slimes and tailing dams, dams, waste dumps, ash dumps, shafts, holes, trenches or excavations of whatever nature made in the course of prospecting or mining operations, posing a risk to safety and health, the imposition of monetary and other obligations in connection with such safe-making on persons who are or were responsible for the undermining of such ground or the making of such slimes and tailing dams, dams, waste dumps, ash dumps, shafts, holes, trenches or excavations or for the dangerous condition thereof, who will benefit from such safe-making;
- (ab) the assumption by the State of responsibility or co-responsibility for such safe-making as mentioned in paragraph (aa) in particular cases;
- (ac) the conditions upon which machinery may be erected or used;
- (ad) the generation, transformation, transmission, distribution and use of electricity;
- (ae) the prevention of outbreak of fire and precautions to be taken against heat, dust, noise and vibration in, on or about any premises or in connection with any operations;
- (af) the precautions to be taken against irruption or inrush of water or other liquid matter into workings;
- (ag) the transport, handling, storage and application of explosives in connection with any operations and the mixing of substances to make explosives in any working place which are not contrary to the provisions of any other law;
- (ah) the conveyance of persons and materials;

- (ai) the movement of vehicles;
  - (aj) the fees payable by persons applying for any other certificates mentioned in paragraph (t) or on their admission to an examination for any such certificate;
  - (ak) the particulars of workers in safety and health management;
  - (al) the provision of disaster management and rescue services;
  - (am) the prevention and combating of pollution of the air, water, land or sea which arises or may possibly arise in the course of any operations involved in any works or after such operations have ceased, and the imposition of monetary and other obligations;
  - (an) the conservation, rehabilitation and safe-making of land disturbed by any operations;
  - (ao) the disposal of waste rock, its stabilization, prevention of run off any reclamation;
  - (ap) the fees which are payable for any inspection under these regulations;
  - (aq) the regulation or prohibition of noise and vibration generated in the workplace;
  - (ar) the manufacturing, storage, transport and labelling of chemicals and other hazardous substances;
  - (as) the registration or licensing of industries specified in such regulations for purposes of securing the health and safety of employees employed in such industries.
- (3) Different regulations may be made in respect of different industries or different employees employed in such industries.
- (4) The regulations may prescribe penalties for the contravention of a regulation, but such a penalty -
- (a) must not exceed a fine of N\$4 000 or imprisonment for more than six months; but
  - (b) may permit the imposition of both such a fine and imprisonment.

#### **Administration of regulations**

**134.** (1) The President may, by proclamation in the *Gazette*, assign the administration of the provisions of any regulation to -

- (a) the Minister;
  - (a) any other member of the Cabinet;
  - (b) partly to one member of the Cabinet and partly to another; or
  - (c) different members of the Cabinet in so far as the regulations relate to different specified functions.
- (2) The President may, in a proclamation contemplated in subsection (1) -

- (a) prescribe the powers and functions to be exercised or performed by any member of the Cabinet, and
- (b) require the exercise or a power or the performance of a function after consultation or with the concurrence of a member of the Cabinet.
- (3) The President may vary or amend any proclamation made in terms of this section.

#### **Guidelines and codes of good practice**

- 135.** (1) The Minister may, after consulting the Labour Advisory Council -
- (a) issue codes of good practice;
  - (b) issue guidelines for the proper administration of this Act;
  - (c) change or replace any code of good practice or guideline.
- (2) Any code of good practice or guideline or any change to or replacement of a code or a guideline must be published in the *Gazette*.
- (3) Any person interpreting or applying this Act must take into account any code of good practice or guideline published in terms of this section.

#### **Contracts entered into by State for provision of goods and services**

- 136.** (1) For the purposes of this section, "licence" includes a permit, grant or concession in terms of any law on mining and minerals, or fisheries.
- (2) The State must not issue a licence to an employer, or enter into a contract with an employer for the provision of goods or services to the State, unless that employer has given a written undertaking as described in subsection (3).
- (3) In an undertaking contemplated in subsection (2), the employer must undertake to ensure that every individual directly or indirectly employed for the purpose of exercising rights under the licence, or for the purpose of providing goods or services under the contract, is employed on terms and conditions not less favourable than -
- (a) those provided for in a collective agreement in that industry or those prevailing for similar work in the industry and the region in which the employees are employed; or
  - (b) those prevailing in the nearest appropriate region, if similar work is not performed in the region.
- (4) In any dispute about whether an employer is complying with an undertaking given in terms of this section, any person, including the Minister, may make application to the Labour Court to compel compliance, and the Labour Court may make any appropriate order in order to secure compliance.

#### **Exemptions**

- 137.** (1) The Minister may exempt any employer or class of employers from any provision of Chapter 3 of this Act except the provisions in sections 34 and 37.



(2) The Minister may grant an exemption in terms of subsection (1) only if the employer or employers' organisation representing the employers satisfies the Minister that they have consulted with the employees affected by the exemption or their trade unions.

(3) An exemption granted in terms of subsection (1) must -

- (a) be in the prescribed form signed by the Minister, which form must include a statement of the employees, or category of employees affected by the exemption;
- (b) include any conditions under which the exemption is granted;
- (c) state the period of the exemption, which may be made retrospective to a date no earlier than the date of the application for exemption; and
- (d) if the exemption is granted to a class of employers, be published in the *Gazette*.

(4) An exemption may be amended or withdrawn by the Minister.

(5) If the exemption was published in the *Gazette* in terms of subsection (3)(d), the Minister may amend or withdraw the exemption only by notice in the *Gazette* from a date stated in the notice.

(6) In addition to publishing a notice in the *Gazette* as contemplated in subsection (3) and (5), the Minister must, through other available means, publish the information contained in the notice, in order to ensure that the individuals whose interests are affected by the notice receive the information.

(7) Any person who is aggrieved by the grant, amendment or withdrawal of an exemption or the terms or period of the exemption may appeal to the Labour Court.

### **Delegation of powers**

**138.** (1) The Minister, the Permanent Secretary or the Labour Commissioner may delegate to any staff member employed in the Ministry any power conferred upon them other than the powers referred to in this section and sections 133 and 135.

(2) A delegation under subsection (1) does not prevent the exercise of that power by the Minister, the Permanent Secretary or the Labour Commissioner.

### **Repeal of laws, transition and consequential amendments**

**139.** (1) The Labour Act, 1992 (Act No. 6 of 1992) is hereby repealed, subject to the transitional provisions set out in the Schedule.

(2) The Schedule to this Act governs the transition from the administration of the Labour Act, 1992 (Act No. 6 of 1992) to the administration of those matters under this Act.

(3) Section 45 of the Affirmative Action (Employment) Act, 1998 (Act No. 29 of 1998) is amended by the substitution for subsection (2) of the following amended subsection (2):

“(2) The Commission may refer a complaint referred to in subsection (1) to the Labour Commissioner appointed in terms of the Labour Act, 2004 (Act No. 15 of 2004) as a complaint in terms of section 7(1) of that Act.”.

**Short title and commencement**

**140.** (1) This Act is called the Labour Act, 2004, and comes into operation on a date to be determined by the Minister by notice in the *Gazette*.

(2) Different dates may be determined under subsection (1) in respect of different provisions of this Act.

(3) Any reference in any provision of this Act to the commencement of this Act must be construed as a reference to the date determined under subsection (2) in relation to that particular provision.

## SCHEDULE 1 TRANSITIONAL PROVISIONS

### Definitions

1. (1) In this Schedule -

“effective date” means the date on which this Act, or any relevant provision of it, came into operation in terms of section 140.

“previous Act” means the Labour Act, 1992 (Act No. 6 of 1992).

(2) A reference in this Schedule -

(a) to a section by number, is a reference to the corresponding section of -

(i) the previous Act, if the number is followed by the words “of the previous Act”; or

(ii) this Act, in any other case.

(b) to an item or a sub-item by number is a reference to the corresponding item or sub-item of this Schedule.

### General preservation of rights, duties, regulations, notices and other instruments

2. (1) Any right or entitlement enjoyed by, or obligation imposed on, any person in terms of any provision of the previous Act, that had not been fulfilled immediately before the effective date must be considered to be a right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of this Act, as from the date that the right, entitlement or obligation first arose.

(2) Any regulation promulgated in terms of the previous Act remains in force as if it had been promulgated under this Act as from the effective date.

(3) A form determined by the Permanent Secretary for use in terms of the previous Act and in use immediately before the effective date, is an acceptable form for a comparable purpose contemplated in this Act, as if it had been prescribed in terms of this Act as from the effective date until a new form is determined.

(4) A notice given by any person to another person in terms of any provision of the previous Act must be considered as notice given in terms of any comparable provision of this Act, as from the date that the notice was given under the previous Act.

(5) An agreement between an employee and employer, a request or an authorisation given by an employee to an employer, in terms of or as contemplated in any provision of the previous Act, and in effect immediately before the effective date, continues in effect, as if it had been made in terms of this Act, or as contemplated by a provision of this Act, subject to -

(a) any condition of the agreement, request or authorisation at the time it was given, whether expressed by the employee, or imposed by a provision of the previous Act; and

(b) this Act.

(6) Permission given by a person to another person in terms of, or as contemplated in, any provision of the previous Act, and in effect immediately before the effective date, continues in effect, as if it had been made in terms of this Act, or as contemplated by a provision of this Act, subject to -

- (a) any condition imposed at the time it was given, whether expressed, or imposed by a provision of the previous Act; and
- (b) this Act.
- (7) An assignment by the President in terms of section 102(1) of the previous Act, and in effect immediately before the effective date, continues in effect, subject to the provisions of this Act.
- (8) A document that, before the effective date, had been served in accordance with section 113 of the previous Act must be regarded as having been satisfactorily served for the purposes of this Act.
- (9) An order of the Labour Court, a District Labour Court, or a labour inspector, issued in terms of any provision of the previous Act, and in effect immediately before the effective date, continues in effect, subject to the provisions of this Act.
- (10) An exemption granted by the Minister in terms of section 114 of the previous Act is deemed to have been granted in terms of the corresponding provision of this Act, and continues in effect on and after the effective date, subject to this Act.
- (11) A delegation of authority made in terms of section 115 of the previous Act, and in effect immediately before the effective date, continues in effect on and after the effective date, until it is rescinded.
- (12) Despite the repeal of the previous Act, the effect section 116 of the previous Act survives as if that section were a section of this Act.

### **Continuation of time**

3. Whenever, for the purposes of this Act it is necessary to have reference to a period of time, or compute a period of time, that computation must extend to a date before the effective date, to the extent required by the circumstances.

### **Applications and notices concerning continuous work and overtime hours**

4. (1) A declaration by the Minister concerning continuous work and given by notice in terms of section 33(2)(f) of the previous Act and in effect immediately before the effective date, remains in effect as if it had been issued in terms of section 15, subject to the expiry date and any conditions set out in that notice at the time it was issued.

(2) An application made to the Permanent Secretary in terms of section 32(4)(a) of the previous Act, and pending at the effective date, must be proceeded with as if it were an application in terms of section 17(3).

(3) A notice increasing maximum overtime issued by the Permanent Secretary in terms of section 32(4)(b) of the previous Act and in effect immediately before the effective date, remains in effect as if it had been issued in terms of section 17, subject to the expiry date and any conditions set out in that notice at the time it was issued.

### **Applications and notices concerning Sunday or public holiday work**

5. (1) An application made to the Permanent Secretary in terms of section 33(2)(d) of the previous Act, and pending at the effective date, must be proceeded with as if it were an application in terms of section 21(3).

(2) A notice concerning work on Sundays or public holidays issued by the Permanent Secretary in terms of section 33(2)(d) of the previous Act and in effect immediately before the effective date, remains in effect as if it had been issued in terms of section 21 or 22, as the case may be, subject to the expiry date and any conditions set out in that notice at the time it was issued.

### Maternity Leave

6. (1) Despite the coming into operation of this Act, -
- (a) section 25(3) and (4) and 26 are suspended until a date to be determined by the Minister by notice in the *Gazette*, which date must not be before the coming into operation of legislation of the type contemplated in section 25(4); and
  - (b) for the period that section 25(3) and (4) and 26 are suspended as provided in paragraph (a), section 25(3) must be regarded as if it read as follows:  
“(3) During a period of maternity leave, -
    - (a) all provisions of the contract of employment remain in force; but
    - (b) the employer is not obliged to pay the employee her basic wage for that period unless an agreement or law provides otherwise.”
- (2) An employee who is on maternity leave immediately before the date on which the suspension of sections 25(3) and (4) and 26 ends, despite the provisions of those sections, -
- (a) remains subject to the provision of section 25(3) as set out in sub-item (1)(b) above, until the end of her maternity leave; but
  - (b) from the date on which the suspension of section 26 ends, is entitled to the benefit of section 26(1), if it is applicable in her circumstances.

### Remuneration deposited with Permanent Secretary

7. Despite the repeal of the previous Act -
- (a) section 44(2)(b) of the previous Act remains in effect for six months after the effective date, and applies in respect of amount being held by the Permanent Secretary on the effective date, as contemplated in that section; and
  - (b) section 44(2)(c) of the previous Act remains in effect for three years after the effective date, and applies in respect of amounts paid by the Permanent Secretary into the State Revenue Fund in terms of section 44(2)(b) of the previous Act.

### Health and safety representatives

8. (1) A health and safety representative elected in terms of section 99(1)(a) of the previous Act, and who held that office immediately before the effective date, continues to hold that office, as if the representative had been elected in terms of section 42, and the term of that representative ends at the expiry of the period set out in section 42, measured as from the date on which that representative was most recently elected to that office.

(2) A health and safety committee established in terms of section 99(1)(b) of the previous Act and in operation immediately before the effective date, continues to be the health and safety committee in that workplace, as contemplated in section 45.

(3) Any rules made by a health and safety committee in terms of section 99(3) of the previous Act, that were in effect immediately before the effective date, continue to have effect as rules of that health and safety committee, as if they had been made under section 45(2).

### **Registration of trade unions and employers' organisations**

**9.** (1) An application by a trade union or employers' organisation for registration, in terms of section 54(1) of the previous Act, or for the substitution or alteration of its constitution in terms of section 61(2) of the previous Act, that was pending before the Labour Commissioner immediately before the effective date, must be proceeded with in terms of this Act.

(2) A trade union or employers' organisation that was registered in terms of the previous Act immediately before the effective date, continues to be registered in terms of this Act, subject to Part A of Chapter 6.

(3) A certificate of registration issued to a trade union or employers' organisation in terms of the previous Act, and valid immediately before the effective date, continues to be a valid certificate of registration, as if it had been issued in terms of this Act, subject to -

- (a) any conditions attached to it at the time it was issued, and
- (b) this Act.

(4) An application to be recognised as an exclusive bargaining agent, made in terms of section 58(1) of the previous Act, and pending immediately before the effective date must be proceeded with under the provisions of this Act as if it had been made in terms of section 62, and the Labour Commissioner may make any directions necessary to facilitate the transition between the requirements for dealing with that application under the previous Act, and those for dealing with it under this Act.

(5) A registered trade union, or group of registered trade unions, that was recognised as an exclusive bargaining agent in respect of a bargaining unit immediately before the effective date continues to be the exclusive bargaining agent in respect of that bargaining unit after the effective date, subject to this Act.

(6) A workplace union representative holding office in terms of section 6(1) of the previous Act immediately before the effective date continues to hold that office, as if the representative had been elected in terms of section 65, and the term of that representative ends at the expiry of the period set out in section 65(3), measured as from the date on which that representative was most recently elected to that office.

### **Collective bargaining**

**10.** (1) Part D of Chapter 6 applies equally to a collective agreement whether entered into before or after the effective date.

(2) An exemption from a collective agreement granted by the Minister in terms of section 69 of the previous Act, that was in effect immediately before the effective date, continues in effect for a period of 12 months after the effective date.

(3) The extension of a collective agreement by the Minister in terms of section 70 of the previous Act, that was in effect immediately before the effective date, continues in effect as if it had been made in terms of section 69, subject to -

- (a) any conditions to which it was subject when the extension was ordered; and
- (b) section 69.

(4) An exemption from an extension of a collective agreement granted by the Minister in terms of section 70(5) of the previous Act, that was in effect immediately before the effective date, continues in effect as if it had been made in terms of section 70, subject to -

- (a) any conditions to which it was subject when the extension was ordered; and
- (b) section 70.

(5) A request to the Minister for -

- (a) an exemption from the provisions of a collective agreement, in terms of section 69(3) of the previous Act, that had not been determined immediately before the effective date, lapses on the effective date and is a nullity in terms of this Act;
- (b) an extension of the effect of a collective agreement, in terms of section 70 (1) of the previous Act, that had not been determined immediately before the effective date, must be proceeded with as if it had been made in terms of section 69; or
- (c) an exemption from the extension of a collective agreement, in terms of section 70(5) of the previous Act, that had not been determined immediately before the effective date, must be proceeded with as if it had been made in terms of section 70.

(6) A dispute that, immediately before the effective date, was pending before the Labour Commissioner in terms of section 74 of the previous Act, or before a conciliation board constituted in terms of section 75 of the previous Act, must be proceeded with in terms of the provisions of this Act, subject to any directions given by the Labour Commissioner as to the fair and reasonable transition from the previous Act to this Act.

### **Strikes, lock-outs and essential services**

**11.** (1) Subject to sub-item (2), a strike or lockout that was underway, or for which notice had been given in terms of the previous Act, immediately before the effective date continues to be governed by the relevant provisions of the previous Act, despite their repeal by this Act.

(2) If, on or before the effective date, the parties to a strike or lockout described in sub-item (1) agreed by notice in writing to the Labour Commissioner, that strike or lockout must be governed by the provisions of this Act, subject to any directions given by the Labour Commissioner as to the fair and reasonable transition from the previous Act to this Act.

(3) An essential service designated as such in terms of section 80 of the previous Act is an essential service in terms of section 75 as if it had been so designated in terms of that section, subject to the authority of the Essential Services Committee to vary or cancel that designation in terms of section 75(5).

**Wages Commission, Wage orders and exemptions**

**12.** (1) The individual who, at the effective date, holds an appointment by the Minister -

- (a) in terms of section 86(1)(a) of the previous Act, is the Chairperson of the Wages Commission, as if that person had been appointed in terms of section 104(a); or
- (b) in terms of section 86(1)(b) of the previous Act, is a member of the Wages Commission, as if that person had been appointed in terms of section 104(b) or (c).

(2) Section 105(4) applies in respect of any vacancy in the composition of the Wages Commission that exists on the effective date.

(3) Any meetings of the Wages Commission before the effective date from which a member of the Commission was absent, as contemplated in section 88(1)(d) of the previous Act, must be included when considering the number of meetings that member has been absent for the purposes of applying section 105(2)(d).

(4) An individual who, on the effective date, holds a designation by the Permanent Secretary in terms of section 86(3)(b) of the previous Act, as Secretary of the Wages Commission, continues to be the Secretary of the Commission, as if that designation had been made in terms of section 107(1)(b).

(5) A wage order issued in terms of Part XI of the previous Act, that was in effect immediately before the effective date, remains in effect as if it had been made under Section 13, subject to the authority of the Minister to suspend or cancel it in terms of section 13(4).

(6) An exemption from a wage order granted, or a license of exemption signed by, the Minister in terms of section 95 of the previous Act, that was in effect immediately before the effective date, remains in effect as if it had been granted under Section 14, subject to -

- (a) the expiry date of that exemption as granted under the previous Act;
- (b) the authority of the Minister to amend or withdraw it in terms of section 14(5); and
- (c) the authority of the Labour Court to hear an appeal from the granting, amendment or withdrawal of that exemption in terms of section 14(6).

(7) An appeal to the Labour Court from the granting of an exemption, brought in terms of section 95(4)(a) of the previous Act, and pending before the court at the effective date, must be concluded as if the previous Act had not been repealed.

**Labour Commissioner and Labour Inspectors**

**13.** (1) An individual who, immediately before the effective date, held a valid appointment by the Minister as Labour Commissioner in terms of section 3(1)(a) of the previous Act, continues to be the Labour Commissioner in terms of this Act from the effective date, as if that person had been appointed by the Minister in terms of section 118(1), subject to -

- (a) any conditions attached to that individual's appointment in terms of the previous Act; and
- (b) this Act.



(2) An individual who, immediately before the effective date, held a valid appointment by the Minister as a labour inspector in terms of section 3(1)(b) of the previous Act, continues to be a labour inspector in terms of this Act from the effective date, as if that person had been appointed by the Minister in terms of section 122, subject to -

- (a) any conditions attached to that individual's appointment in terms of the previous Act; and
- (b) this Act.

(3) A labour inspector's certificate that was issued by the Permanent Secretary and remained valid immediately before the effective date, continues to be a valid labour inspector's certificate after the effective date, as if it had been issued in terms of section 122(2), and despite any differences between the form of that certificate and the form prescribed for such certificates in terms of this Act.

(4) An appointment of a person in terms of section 3(1)(c) of the previous Act to examine or investigate any matter, that was in effect immediately before the effective date, continues to have effect after the effective date, subject to the direction of the Permanent Secretary.

#### **Labour Advisory Council**

14. (1) The individual who, at the effective date, holds a designation by the Minister in terms of section 9(1)(a) of the previous Act, is the chairperson of the Labour Advisory Council, as if that person had been appointed in terms of section 91(1)(a), and the term of that individual's appointment ends at the expiry of the period set out in section 92(1)(a), measured as from the date on which that individual was most recently designated by the Minister to hold that office.

(2) An individual who, at the effective date, holds a designation by the Minister in terms of section 9(1)(b) or (c) of the previous Act, is a member of the Labour Advisory Council, as if that person had been appointed in terms of section 91(1)(b), and the term of that individual's appointment ends at the expiry of the period set out in section 92(1)(a), measured as from the date on which that individual was most recently appointed to that office.

(3) Section 93(3) applies in respect of any vacancy in the composition of the Labour Advisory Council that exists on the effective date.

(4) An individual who, in terms of section 9(3) of the previous Act, had been co-opted by the Labour Advisory Council to assist the Council or any of its committees, and whose assistance was still required immediately before the effective date, must be regarded as having been co-opted by the Council in terms of section 91(3), as from the effective date, subject to -

- (a) any conditions determined by the Minister in terms of section 9(3) of the previous Act at the time that individual was co-opted;
- (b) the period of the co-option, as so determined by the Minister; and
- (c) this Act.

(5) Any meetings of the Labour Advisory Council before the effective date from which a member of the Council was absent, as contemplated in section 12(1)(e) of the previous Act, must be included when considering the number of meetings that member has been absent for the purposes of applying section 93(1)(c).

(6) Any rules made by the Labour Advisory Council in terms of section 13(9) of the previous Act, and in effect immediately before the effective date, continue in effect as Rules of the Council, as if they had been made in terms of section 95(8)(a).

(7) A committee established by the Labour Advisory Council in terms of section 10(1) of the previous Act, and in operation immediately before the effective date, is a committee of the Council under this Act, as if it had been established in terms of section 94(2), subject to -

- (a) any assignment of functions to that committee in terms of section 10(1)(b) of the previous Act;
- (b) any conditions attached to its assignment of functions in terms of that section of the previous Act; and
- (c) this Act.

(8) If, on the effective date, the composition of a committee referred to in sub-item (7) does not meet the requirements of section 94(3), -

- (a) the Labour Advisory Council must re-constitute the committee to satisfy those requirements within three months after the effective date; or
- (b) if the Council fails to do so, the committee ceases to be a committee of the Labour Advisory Council.

(9) An individual who, on the effective date, holds a designation by the Permanent Secretary in terms of section 14(2) of the previous Act, as Secretary of the Labour Advisory Council, continues to be the Secretary of the Council, as if that designation had been made in terms of section 96(1)(b).

### **Labour Court**

**15.** (1) Despite section 113, a judge of the High Court who, at the effective date, is seized of a matter arising under the previous Act, remains seized of that matter until it is concluded, as if that judge had been assigned as a judge of the Labour Court in terms of section 114.

(2) Despite the repeal of the previous Act, Section 16 of that Act continues to apply in respect of any matter coming before the Labour Court in terms of this Act, until such time as the Judge-President first assigns members of the Labour Court in terms of section 114.

(3) A person who was a member of the Labour Courts' Rules Board immediately before the effective date ceases to be a member of that Board on the effective date.

(4) Any rules made by the Labour Courts' Rules Board in terms of section 22(4) of the previous Act, and in effect immediately before the effective date, continue in effect as Rules of the Labour Court, as if they had been made in terms of section 117(3) -

- (a) in so far as they are applicable to proceedings in terms of this Act; and
- (b) subject to the authority of the Labour Court Rules Board as constituted in section 117 to amend, repeal or replace those rules.

**Pending disputes**

16. (1) In this item, “pending” means that a matter has been filed with the registrar of a district Labour Court, or the Labour Court, as the case may be, and has been issued a case number in terms of the laws governing the operation of that court.

- (2) A dispute that -
  - (a) arose in terms of circumstances that occurred before the effective date; and
  - (b) could have been brought before a district Labour Court, or before the Labour Court, in terms of any provision of the previous Act; but
  - (c) was not pending before a district Labour Court, or the Labour Court, as the case may be, on the effective date,

must be proceeded with in terms of this Act.

(3) Despite sub-item (2), section 83(2)(a), in respect of a dispute that, as at the effective date, was not yet been barred due to the passage of time in terms section 24 of the previous Act, that section applies to determine when the dispute is barred due to the passage of time, as if it had not been repealed.

(4) A matter that, immediately before the effective date, was pending before a district Labour Court, or the Labour Court, in terms of any section of the previous Act, must be concluded by that court as if the previous Act had not been repealed.

(5) Any appeal or review allowed from a matter described in sub-item (4), must be proceeded with in terms of the provisions of the previous Act, as if it had not been repealed.

**References in other laws**

- 17. (1) As from the effective date, any reference in any law -
  - (a) to a provision of the previous Act must be read as if it were a reference to the corresponding provision of this Act, in so far as possible;
  - (b) to a district Labour Court, must be read as if it were a reference to -
    - (i) the Labour Commissioner, if it concerns a matter in respect of which this Act provides for or requires a referral to the Labour Commissioner; or
    - (ii) the Labour Court, in any other case;
    - (iii) to the Labour Court, Labour Advisory Council, Wages Commission must be read as a reference to each such body respectively, as constituted under this Act.

**Resolution of other transitional matters**

18. (1) If a matter arises in which, because of the repeal of the previous Act, and the coming into operation of this Act, a question of interpretation of any law is uncertain, a status of any person, action or thing is uncertain, or it is uncertain how to proceed in any matter, and that uncertainty is not addressed in this Schedule, a party may apply to the Labour Court for a declaratory order, and the Court may make any order that is just and reasonable, including an order applying a provision of the previous Act, despite its repeal.

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Act No. 15, 2004

**LABOUR ACT, 2004**

(2) A party applying to the Labour Court in terms of sub-item (1) must serve notice of that application on the Permanent Secretary, the Labour Commissioner, and any other person with an interest in the order sought, and the Permanent Secretary, the Labour Commissioner and each other such person has the rights of a party in that matter before the court.

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