Labour Portfolio Committee
5 March 2013
Basic Conditions of Employment Amendment Bill & Labour Relations Amendment Bill: deliberations

Chairperson: Mr M Nchabaleng (ANC)

Documents handed out:
Portfolio Committee Amendments to Labour Relations Amendment Bill
Labour Relations Amendment Bill
Labour Relations Bill: Documents submitted by Parliamentary Legal Advisors dated 6/11/12
Committee Minutes dated 13, 19, 26 February

Relevant documents
Basic Conditions of Employment Amendment Bill B15
A-list of amendments (circulated to Members earlier not made available at meeting)

Summary
The Parliamentary Legal Advisors took Members through the A list for the Basic Conditions of Employment Bill, which had been circulated earlier. There was nothing contentious, as the changes had been largely stylistic. What had formerly appeared as subclause (c) of clause 2 had been moved into the main part of the clause. Most of the changes were stylistic, and the rewording was done to emphasise points. There was an insertion into clause 2. There was a cross-referencing inserted between sections 43 and section 50(2) to ensure that there would be no inconsistency when the Minister made provision for children to be employed in certain instances (such as the entertainment industry). The majority of Members agreed to adopt the Bill, but the two DA Members noted their objections to clauses 8 and 10, and said that they would address the House on these.

The Working Document and A-list of the Labour Relations Amendment Act were tabled and the State Law Advisors took the Members through the changes. These had been effected following the instructions of the Committee at the last meeting on the Bill in November 2012. There were also some clauses that were flagged for further debate. A new clause was inserted, before clause 1, which essentially corrected the reference to the relevant section of the current Constitution, since the principal Labour Relations Act had referred to the Interim Constitution. Several instances were cited where the word “engaged” was substituted with “employed”. The new subsection 21(8D) had been inserted in the Bill in error, and because it was repeating what was included in the new subsections 21(8A), (8B), and (8C), Members agreed that it could be removed from the next draft. Section 32 would contain a reference to “60 days” as agreed upon by the Committee. Under clause 17, dealing with the insertion of a new clause 103A, the word “administrator” was substituted with the phrase “trade union, employer’s organisation or registrar”. Another amendment of subsection (4)(c) had been proposed, to provide that if the administration process did not result in the winding up of the union or employers organisation the administrator's fee would be paid as an expense of the trade union or employer’s organisation. This would also be reflected in the A-list. Although clause 20 was initially flagged, the Committee decided that no amendments were necessary. Drafting corrections were noted in clause 23 and 35. Clauses 27, 28 and 34 were removed, because the principles were incorporated into the Superior Courts Bill. The legal drafters noted that a new version of clause 38 still needed to be presented to the Committee. There was fairly substantial discussion on clause 40 (amending section 190), as there had originally been a proposal to change the word “salary” to “remuneration”. However, the Department of Labour representatives submitted that because “remuneration” had a much wider meaning and could include payments such as pension payouts, this could result in uncertainty around the effective date of termination of employment, and asked that the original use of “salary” be retained. Members agreed to this, and therefore did not effect any amendments to the original clause 40. A number of technical amendments were noted for clauses 43 and 44. In relation to the new sections 198A(2) and (3), there were seemingly contradictions, and the drafters agreed to work on a new draft. The definition of “serve” in clause 48 was amplified to add a reference to “electronic mail”. The Long Title was changed to reflect the correct section of the current Constitution. Clause 50 was to be split into two subsections. The majority of the Act would come into operation on a date fixed by the President, by proclamation in the Government Gazette. However, the coming into operation of the new section 198(4F) would be suspended until the new legislation named in that section was in force.

Members then debated whether clauses 31 and 33 presented any constitutional problems, since both

referred to the functioning of courts. Clause 31 stated that the Judge President must ensure that the Rules Board for Labour Courts met at least once every two years to review the rules of the Labour Court. Clause 33 sought to amend section 169 of the Labour Relations Act to state that judges of either the High Court or the Labour Court could be appointed as judges to the Labour Appeal Court (LAC). Some Members had doubts that this impinged upon the mandates of, respectively, the Judge President and Minister of Justice, and noted that neither of these issues was covered in the Superior Courts Bill. It was agreed, after debate, that the Chairperson and Parliamentary legal advisors would consider how best to discuss this with the Portfolio Committee on Justice and Constitutional Development and would report back.

The Committee formally adopted the reports on five international labour conventions that were presented in the previous week, recommending ratification of each by the House. Minutes of 13, 19 and 26 February were adopted.

Minutes
Basic Conditions of Employment Amendment Bill: A list of amendments: Parliamentary Law Advisors briefing
The Chairperson noted that the Committee would go through the A list and should have completed the Bill by the following week.

Adv Anthea Gordon noted that the Committee had, in November, decided that the A-list could be prepared and Creda Printers would be asked to print the Bill. The A-list and Bill were circulated in the previous week.

She noted that there was nothing contentious in this. There were only three clauses. She also referred Members to the B version of the Bill. She took Members briefly through the changes.

When the Committee last discussed the Bill in the previous year, clause 2 had been changed but these were mostly stylistic changes. This clause prohibited an employer forcing the employees to purchase certain goods. The (c) had been shifted into the main part of the clause and had resulted in the emphasis that the Committee wanted.

She noted that the wording still needed to be underlined but the legal advisors would correct that.

There was now an insertion into clause 2, at line 16, in relation to prohibited conduct.

On page 3, at line 19, paragraph (c) was being omitted. She reminded Members that the content had been moved up to the main part of (2)

In terms of the Bill, the Minister was allowed to regulate employment of children in various industries, such as advertising or films. In order to prevent any inconsistency, there was a cross-reference being inserted into section 43, reading “Subject to section 50(2)(b)(a)".

Clause 18 would amend the way in which the Bill came into effect. It would generally come into effect on a date fixed by the President, by proclamation in the Gazette.

Discussion
Mr Nchabaleng noted that legislation was written differently from everyday speech, but he did not see that there were substantial matters that had changed.

Mr A Williams (ANC) agreed that the Committee had basically finished with this Bill, as no substantive issues were now raised.

Members then went through the Bill, clause by clause, referring to the changes on the A-list, but voting on the Bill as introduced.

Adv Anthea Gordon noted the procedure to be followed. If a clause had not been amended, Members could vote on the clause without it being necessary to read it out. However, where there were amendments to clauses, the amended version would be read out. She followed that when taking Members through each clause.

The Long Title and clause 1 were accepted without amendments.

Clause 2 was accepted with amendments.

Mr A van der Westhuizen (DA) raised a question on the punctuation of clause 3, which did not seem to be consistent with the previous clause. The matter was clarified in discussion. Clause 3 was adopted with amendments.

Clauses 4, 5, 6, and 7 were adopted without amendments.

The two DA Members recorded their objection to clause 8, which they believed gave the Minister too many powers. Other Members were in favour of the clause.

Clause 9 was adopted without amendments.

The two DA Members recorded their objection to clause 10, which was amending the employer's position in relation to compliance orders.

Clauses 11, 12, 13, 14, 15, 16, 17, were approved without amendments.

Clause 18 was adopted with amendments.

Mr A van der Westhuizen (DA) asked if the Bill's date would change to reflect "2013".

Ms Suraya Williams, State Law Advisor, Office of the Chief State Law Advisor, noted that the Bill would keep the same year number during all discussions, but when it was assented to, the relevant number and year would be inserted as it became the Amendment Act.

Adv Gordon noted that it would come into operation on a date determined by the President.

The Chairperson read out the Committee Report, which was adopted by Members.

Mr D Kganare (COPE) noted that the objects of the Bill included "avoid exploitation of workers". However, this was not possible in a capitalist society; it would only ever be possible to alleviate it.

The Chairperson said he had noted that comment and Mr Kganare was free to raise this in the House.

Labour Relations Amendment Bill
Ms Suraya Williams noted that an A list had been forwarded to Members but also said that this version was missing clauses 35 to 44A.

A short recess was taken to allow copies to be circulated. Members were provided with the A-list (titled "Portfolio Committee Amendments to the Labour Relations Amendment Bill) and the Working Draft, which was titled "Docs submitted by Parliamentary Law Advisors", dated 6 November 2012.

Ms Williams took Members through the latest changes.

New Clause before clause 1
A new clause had been inserted before clause 1 of the Bill, to amend section 3 of the Act. This was a consequential amendment that corrected the references to the current Constitution. She noted that the bold and brackets indicated deletions, and new wording was underlined.

Mr van der Westhuizen pointed out a spelling error, and she noted that this would be changed.

Clause 1: Amendment of section 21
The word "engaged" was being substituted with "employed" . This was being done throughout the Bill.

She noted that the content of the new subsections 21(8A), (8B) and (8C) were similar to (8D)

Mr Thembinkosi Mkalipi, Chief Director, Department of Labour, noted that these had first been drafted as

alternative proposals, but, due to an error, all were incorporated into the Bill. He suggested that the new section 21(8D) should be deleted.

Ms Williams said that this was one of the outstanding issues. She asked if the Committee wanted section 21(8D) to be omitted.

The Chairperson said that he would prefer the Committee simply to be taken through the A list.

Ms Williams explained that if the Committee could confirm now that it wanted this change made, it would be deleted from the next draft. When there was no objection, she confirmed that the new section 21(8D) would be deleted from the next draft.

Clause 3: Amendment of section 32
Ms Williams pointed out a similar substitution of "employed" for "engaged".

She then noted that the Committee had discussed a proposal whether 60 or 90 days was appropriate for the Minister's response.

Dr Barbara Loots, Parliamentary Researcher, clarified that this was not in fact a proposals from her office; this was a policy decision that was for the Committee.

Ms Williams said that the Committee had agreed on 13 November that they preferred 60 days.

Clause 17: Insertion of new section 103A
Ms Williams said that the reference to "administrator" would be substituted with "by the trade union, employer's organisation or registrar".

She also indicated that the word "engaged" had been substituted for "employed" at line 47 of page, which the Parliamentary Law Advisors felt was a better term.

In line 28 on page 12, the words "of the administrator.." would be substituted with " by the Trade union, employees or registrar"

Adv Gordon said that her office had proposed changes to page 5 of the working document. The Committee had agreed in principle to amend the new subsection (4)(c) to provide that if the administration process did not result in the winding up of the union or employers organisation the administrator's fee would be paid as an expense of the trade union or employer's organisation.

Members agreed and said that this change should also be noted on the A-list.

Clause 20
Ms Williams noted that although this had initially been flagged the Committee decided that no amendments were necessary.

Clause 23
Ms Williams noted a drafting correction where a full stop had been underlined mistakenly. This was being corrected.

Clause 25
Ms Williams noted that the words "four times" would be omitted from line 55 of page 13.

Clauses 27, 28, 34
Ms Williams noted that these clauses had been rejected. They were covered in the Superior Courts Bill, which had been passed in the National Assembly (NA) and referred to the National Council of Provinces (NCOP).

Clause 35
There were technical amendments, which Ms Williams outlined.

Clause 38

Ms Williams said it was included because the Committee wanted to speak to it.

Mr Mkalipi noted that it was agreed that a small sub-committee would be formed to come up with a new draft. The final version still needed to be submitted for consideration by the whole Committee.

Members flagged the clause for further consideration.

Clause 40: amendment of section 190
Ms Williams noted that there was initially a proposal at the Committee to substitute the word “salary” that currently appeared in the Bill, with “remuneration”. However, the Department of Labour (DoL) had some problems with that.

Mr Mkalipi explained that this clause was attempting to clarify the date of dismissal, when an employee received notice. The date of termination would be either the date on which the notice period expired, or, if an earlier date, the date on which the employee would be paid the outstanding salary. If the word “remuneration” was used, this was a wider interpretation that could include pension and other payments, which meant that the date of dismissal could be put back several months, and the dismissal would then only take effect when, for instance, the pension contributions were paid out. If “salary” was retained, this would be the final cash payment to the employee.

The Chairperson agreed that there should be certainty on this matter.

Mr E Nyekembe (ANC) asked for more clarity. Pension funds may not be administered by the same company, so he wondered how those funds would then be included under the definition of “remuneration”, which surely included what was under the control of the employer. The argument might then also be extended to payments such as unemployment benefits. He asked that Mr Mkalipi remind him of the rationale put forward during earlier debates.

Mr Mkalipi referred Members to the definition of "remuneration" which included "any payment in money, or in kind, or both in money and in kind, owing to an employee". Any money, whether in shares, housing benefit, pension benefit or other allowances was part of "remuneration". If the date of dismissal was the date on which the “remuneration” was paid, the dismissal might not take effect until the pension was paid over. It made no difference who administered it as it was a benefit that the employer awarded.

Adv Gordon said that during last year there was concern about maintaining consistency of terms across the four Bills, although she understood the DoL’s concern about the wider and narrower interpretations of the words. She questioned what would happen to someone who received wages, but not a salary. A salary was generally perceived as monthly remuneration, but this might not cover other circumstances.

Mr Paul Benjamin, Consultant to Department of Labour, said that the terms “wage”, “salary” and “remuneration” were all used in labour law. “Salary” had a well-established legal meaning of “all cash wages”, and “wage” meant earnings. Although there was a general understanding in the sector that wages were paid weekly and salaries monthly, there was actually no legal ruling on this point. “Remuneration” included all benefits. He reiterated that “salary” was “cash earnings”.

Mr Mkalipi clarified that the DoL was attempting to make this as clear as possible and to avoid the period of dismissal being extended. Whilst he noted Adv Gordon’s comment about achieving consistency, he said that this should not take precedence over achieving more certainty in the clause. The DoL suggested that dismissal become effective when the worker received the last cash payment due to him or her, not any other benefits.

The Chairperson also noted that there was a common understanding that “wages” were paid to non-professional workers, such as labourers, whereas a “salary” was paid through the banks.

Mr Nyekembe said that the use of "salary" would seem to make sense.

Mr Williams questioned if there was anything else that could be considered as payment for work that was not included in "salary", for instance, a payment in kind, and when that would be due.

Mr Mkalipi gave the example of a farm worker paid a set amount, as well as getting payment in kind in

terms of accommodation. When dismissed, that person would get a final salary. However, there could still be problems around the accommodation benefit; he might claim that he had nowhere else to go and therefore challenge an eviction from the accommodation. If “salary” was used, the fact that there might be other outstanding issues around the accommodation would not prevent the dismissal taking effect. If the employee could not show that another cash payment was owing to him, he was regarded as dismissed.

Ms Williams said that when legislation was drafted, it had to be clear and able to be easily interpreted. If the objective of this clause was to provide a specific outcome, it should be worded in a way that would not allow for disputed interpretation. Dismissal would put a person in a vulnerable position, and she would support wording that created more certainty.

Ms Williams then noted the Chairperson's comment that the Committee seemed in agreement with the word "salary". In that case, there was no necessity to amend clause 40, as the Committee was happy with the original wording of the bill.

Clause 43: Amendment of section 198
Ms Williams said that in line 2 of page 21 there was a substitution of the singular for the plural, referring to “service”.

Clause 44: Insertion of section 198A
Ms Williams noted that there was a technical amendment, inserting the word “a” because “services” was being changed to “service”.

Consequential amendments were also noted in line 41. The new (a) was inserted because of the change of the grammatical construction.

Several other grammatical or wording changes were set out on the “Portfolio Committee Amendments” document (see page 4). The word “assignment” was being substituted with "service". As mentioned earlier, the word “engaged” was consistently being substituted with “employed”. The word “purpose” in line 10, and elsewhere, was substituted with “purposes”. "On" was being substituted with "in terms of" in several places.

Ms Williams also noted the substitution of the proposed new section 198D(1)(d). The new clause referred to criteria of a similar nature, “and such reason is not prohibited by section 6(1) of the Employment Equity Act. The reference to that Act had been moved to this location because the condition applied to subclauses (a) through to (d).

Mr Benjamin said that this was a key clause. There had been many comments on it, and the Committee and DoL had had further discussions on how to make this clause more clear.

Mr Benjamin suggested that perhaps still further amendments were needed. Many people had commented on the apparent disconnect between the new sections 198A(2) and (3). Subsection (2) stated that the section did not apply to employees earning in excess of the basic threshold. However, subsection (3) started by referring to “an employee referred to in subsection (2)…” He suggested that one way to clarify this might be to make it clear that the person referred to in (2) was an “excluded employee”, and to delete, from line 42 and 43, the reference to “subsection (2)”.

Mr Mkalipi added that the new subsection (3) was meant to refer to all employees other than those earning above the threshold. However, this was not stated in terms.

Mr Williams asked why the proposed new subsection(3) should not be removed completely. He asked what (3) applied to. If it referred to those earning less than the threshold, this should be stated clearly.

The Chairperson had to leave the meeting at this point, and Mr K Manamela (ANC) acted as Chair until the end of the debate on this Bill.

The Acting Chairperson suggested that this point should be flagged for further consideration and asked that the drafters come up with new wording.

Adv Gordon said that this point had been raised in November 2012. The Committee had been unsure

what the DoL was trying to say, and she seemed to recall that an explanation was given that the reference in (3) should be to subsection (1), not (2).

Mr Benjamin said that this was a misunderstanding. The only category of employee covered in the new subsection (1) was the person for whom there was a substitute. Subclauses (2) and (3) were linked, and this was the intention, but the drafting was not clear.

He also noted that the new section 198A(3)(a) was dealing with “services”, and the cross reference to that should be reflected in line 44. He suggested that this might be amended to read “(a) performing temporary services as contemplated in subsection (1) …" .

Mr Williams made the point that this was not the right time for the legal advisors to be discussing possible options. The Members were not interested in these discussions but wanted to see the end product. He suggested that the issue be flagged, that new wording be produced in the next meeting, and that the Committee move on.

Ms Williams confirmed that the advisors would come up with a redraft.

Clause 48: amendment of section 213
Ms Williams indicated the minor amendment to amplify the definition of “serve” with the addition of “electronic mail”, in line 17.

New clause: Amendment of Long Title
Ms Williams noted that the Long Title would be amended by changing the reference to the correct section of the current Constitution, as she had stated earlier. This was for consistency.

Clause 50: Short title
Ms Williams reminded Members that clause 50 was to be split into two subsections. The Act would come into operation on a date fixed by the President, by proclamation in the Government Gazette. However, notwithstanding this general provision, the coming into operation of the new section 198(4F) would be suspended until the new legislation named in that section was in force.

The Chairperson resumed the Chair.

Clauses 31 and 33: Links to Superior Court Bill
Dr Loots noted that the Committee had also asked that two other issues that were linked with the Superior Courts Bill (SCB) should be flagged for further discussion. They were clauses 31 and 33.

Clause 31 had added a new subsection to section 159 of the Labour Relations Act, saying that the Judge President must ensure that the Rules Board for Labour Courts met at least once every two years to review the rules of the Labour Court. Clause 33 was seeking to amend section 169 of the Labour Relations Act to state that judges of either the High Court or the Labour Court could be appointed as judges to the Labour Appeal Court (LAC).

During the November 2012 meetings, it was highlighted that the Minister of Justice, in terms of Schedule 6 of the Constitution, had the constitutional mandate to organize the functioning of courts. There were some constitutional concerns. Clause 31 essentially dealt with matters around the administration of courts. Clause 33 dealt with the composition of the LAC. Both of these fell within the competency of another official – respectively, the Judge President and the Minister of Justice. The SCB had taken certain labour court issues into consideration, but not these matters.

Mr Manamela said that the concern was whether these aspects should be kept in the current Bill, or whether they should be covered in the SCB.

Mr Mkalipi said that what was covered in clause 31 was not dealt with in the SCB. Nedlac had felt very strongly about the Rules Board. If the Labour Courts did not operate to the satisfaction of their constituents, this would create problems. If the SCBill were to deal with the issues, then he agreed that they should be removed from this Bill. However, it had not done so, as the SCB said nothing about when the Rules Board should meet. He would not go into the constitutionality of the provision at this point.

Mr Mkalipi added that clause 33 was largely a technical amendment. At the moment, only judges of the High Court could be appointed to act in the Labour Appeal Court, but the DoL wanted to ensure that judges of the Labour Court also be eligible for appointment. If there was any suggestion of a constitutional problem, then it would apply not to this amendment, but to the whole section. The intention was merely to expand the pool of judges eligible for appointment.

He added that this Bill had gone to the Cluster and to Cabinet, and the Minister of Justice and Constitutional Development, as part of Cabinet, had agreed, and there was also agreement on some of the clauses that would be removed from the LR Amendment Bill as they were covered by the SCB.

Dr Loots clarified that she was not suggesting that there was anything unconstitutional about the clause as it stood. However, whatever was done subsequently might be a challenge. The Minister of Justice and the Judicial Service Commission regulated appointment of judges, and she was concerned that this was not the correct way to deal with the matter. She suggested that perhaps the Department of Labour needed to discuss the point with the Department of Justice and Constitutional Development.

Mr Mkalipi noted again that this was an important consideration for the constituents at Nedlac. Clause 33 had nothing to do with initial appointment of judges to the Labour Court, but was seeking to ensure that they could be appointed to act at the LAC.

Mr Williams noted that Labour Court judges would be permitted to act in a certain way, and he wondered if this point should have been taken up with the Portfolio Committee on Justice and Constitutional Development. Although it may not be strictly incorrect, it may also not be in line with Parliamentary procedures.

Mr Kganare noted that it had been suggested at some point that the issues would be addressed by the Portfolio Committee on Justice, when it dealt with the SCB, and asked why this had not happened.

Mr S Motau (DA) asked that the legal advisors should clarify the points.

The Chairperson suggested that he, Dr Loots and Adv Gordon should meet after this meeting to discuss how the matter could be brought to the attention of the Portfolio Committee on Justice.

Mr Nyekembe had no problem with that, but stressed that this Committee would have to take a final decision on the matter, and asked that Members be kept advised of the discussions.

Mr Manamela added that the Committee needed to be told if there were any other provisions of any other legislation that covered these points. This Committee needed to ensure that the Bill was constitutionally correct.

The Chairperson confirmed that he would report back fully to the Committee, to allow Members to engage with the points from a more informed standpoint.

Mr Benjamin noted that the provision about the Rules Board was very limited, as it dealt with the appointees submitted by Nedlac. The Minister of Labour dealt with the labour partners. The Board operated properly under the Act, and its constitutional status was not in question. He was not sure that clause 31 raised any constitutional issues. For practical purposes, he also noted that this Rules Board had not sat since 2003. He agreed that clause 33 did need to be considered carefully.

Mr Mkalipi said again that the fact that the Rules Board for the Labour Court had failed to sit was unfortunate; it affected constituents' confidence in the process.

The Chairperson reiterated that more research and discussion would be done before reporting back to Members on these clauses.

still thought that research was needed and wanted it to be discussed again when more information was available.

Ms Williams said that she would send the revised A-List to the Committee Secretary by close of business today.

Other business: Formal adoption of Committee reports recommending ratification of labour conventions
The Chairperson reminded Members that in the previous week they had received briefings on the five international labour conventions. He now read out the draft Committee reports, recommending that each of the Conventions (listed below) be ratified:

- International Labour Organisation Recommendations on HIV and Aids and the World of Work
- Decent Work for Domestic Workers Convention
- Labour Inspection Convention
- Maritime Labour Convention
- Work in the Fishing Sector Convention

Members resolved unanimously to recommend ratification to the House.

Adoption of Minutes
The Chairperson tabled the minutes of 13 February, 19 February and 26 February 2013.

The minutes were adopted, with no amendments.

The meeting was adjourned.