

REPUBLIC OF SOUTH AFRICA

**BASIC CONDITIONS OF
EMPLOYMENT
AMENDMENT BILL**

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 41257 of 17 November 2017)
(The English text is the official text of the Bill.)*

(MINISTER OF LABOUR)

[B 30—2017]

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- (b) the [Skills Development Act, 1998 (Act No. 97 of 1998)]
Employment Services Act, 2014 (Act No. 14 of 2014);
 - (c) the Employment Equity Act, 1998 (Act No. 55 of 1998);
 - (d) the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993);
 - (e) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993); or
 - (f) the National Minimum Wage Act, 2017;”;
- (c) by the insertion after the definition of “month” of the following definition:
“**‘national minimum wage’** means the national minimum wage envisaged in section 4 of the National Minimum Wage Act, 2017;”;
- (d) by the insertion after the definition of “trade union representative” of the following definitions:
“**‘Unemployment Insurance Act’** means the Unemployment Insurance Act, 2001 (Act No. 63 of 2001);
‘Unemployment Insurance Contributions Act’ means the Unemployment Insurance Contributions Act, 2002 (Act No. 4 of 2002);”.

Amendment of section 3 of Act 75 of 1997

2. Section 3 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

- “(3) This Act, except section 41, does not apply to persons employed on vessels at sea in respect of which the Merchant Shipping Act, 1951 (Act No. 57 of 1951), applies, except to the extent provided for in [a sectoral determination] the National Minimum Wage Act, 2017, read with section 62A.”.

Insertion of section 9A in Act 75 of 1997

3. The following section is hereby inserted in the principal Act after section 9:

“Daily wage payment

9A. (1) An employee who works for less than four hours on any day must be paid for four hours work on that day.

(2) This section applies to employees who earn less than the earnings threshold set by the Minister in terms of section 6(3).”.

Repeal of Chapters 8 and 9 of Act 75 of 1997

4. Chapters 8 and 9 of the principal Act are hereby repealed.

Insertion of section 62A in Act 75 of 1997

5. The following section is hereby inserted in the principal Act before section 63 under Part A of Chapter 10:

“Definitions

62A. For the purpose of Chapter 10, an employee includes a worker as defined in section 1 of the National Minimum Wage Act, 2017.”.

Amendment of section 64 of Act 75 of 1997

6. Section 64 of the principal Act is hereby amended by the deletion in subsection (1) of the word “and” at the end of paragraph (d) and the insertion in that subsection of the following paragraphs after paragraph (d):

- “(dA) referring disputes to the CCMA concerning failure to comply with this Act, the National Minimum Wage Act, 2017, the Unemployment Insurance Act and the Unemployment Insurance Contributions Act;

- (dB) appearing on behalf of the Director-General in any proceedings in the CCMA or Labour Court concerning a failure to comply with the legislation referred to in paragraph (dA); and”.

Amendment of section 65 of Act 75 of 1997, as amended by section 17 of Act 37 of 2008

7. Section 65 of the principal Act is hereby amended—
- (a) by the deletion of paragraph (b) of subsection (1); and
 - (b) by the substitution in subsection (1) for paragraph (c) of the following paragraph: 5
 - “(c) any place at which any person provides or purports to provide any employment services as defined in terms of the [**Skills Development Act, 1998 (Act No. 97 of 1998)**] Employment Services Act, 2014 (Act No. 4 of 2014).”; 10

Amendment of section 68 of Act 75 of 1997, as amended by section 13 of Act 11 of 2002 and section 9 of Act 20 of 2013

8. Section 68 of the principal Act is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection: 15
 - “(1) A labour inspector who has reasonable grounds to believe that an employer has not complied with any provision of this Act, the National Minimum Wage Act, 2017, the Unemployment Insurance Act or the Unemployment Insurance Contributions Act may endeavour to secure a written undertaking by the employer to comply with the provision.”;
 - (b) by the substitution in subsection (2) for paragraph (a) of the following paragraph: 20
 - “(a) may seek to obtain agreement between the employer and employee as to any amount owed to the employee in terms of this Act or the National Minimum Wage Act, 2017.”; and
 - (c) by the substitution for subsection (3) of the following subsection: 25
 - “(3) If an employer fails to comply with a written undertaking given by the employer in terms of this section, the Director-General may apply to the [**Labour Court for an order in terms of section 73 directing the employer to comply with the undertaking**] CCMA to make the undertaking an arbitration award.” 30

Amendment of section 69 of Act 75 of 1997, as amended by section 14 of Act 11 of 2002 and section 10 of Act 20 of 2013

9. Section 69 of the principal Act is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection: 35
 - “(1) A labour inspector who has reasonable grounds to believe that an employer has not complied with a provision of this Act, the National Minimum Wage Act, 2017, the Unemployment Insurance Act or the Unemployment Insurance Contributions Act may issue a compliance order.”;
 - (b) by the substitution in subsection (2) for paragraphs (b) and (c) of the following paragraphs, respectively: 40
 - “(b) **[any]** the provision of this Act and any other Act referred to in subsection (1) that the employer has not complied with, and details of the conduct constituting non-compliance;
 - (c) any amount that the employer is required to pay to an employee, or in the case of a failure to pay the national minimum wage, the amount that the employer is required to pay to an employee in terms of section 76A;” 45
 - (c) by the deletion of subsection (2A);
 - (d) by the substitution for subsection (5) of the following subsection: 50
 - “(5) An employer must comply with the compliance order within the time period stated in the order, unless the employer refers a dispute concerning the compliance order to the CCMA within that period.”; and
 - (e) by the addition of the following subsection: 55
 - “(6) A dispute referred to the CCMA by the employer in terms of subsection (5) must be dealt with in terms of section 73.”

Substitution of section 70 of Act 75 of 1997, as amended by section 15 of Act 11 of 2002 and section 11 of Act 20 of 2013

10. The following section is hereby substituted for section 70 of the principal Act:

“Limitations

70. A labour inspector may not issue a compliance order in respect of any amount payable to an employee as a result of a failure to comply with a provision of this Act or the National Minimum Wage Act, 2017, if—
- 5 [(a) **the employee is covered by a collective agreement that provides for resolution by arbitration of disputes concerning amounts owing in terms of this Act;**]
 - 10 (b) the employee [is employed in a category of employees mentioned in section 6(1)(a) or in respect of which a notice has been issued] earns in excess of the threshold prescribed by the Minister in terms of section 6(3); or
 - 15 (c) any proceedings have been instituted for the recovery of that amount in the CCMA or a court, unless those proceedings have been withdrawn; **or**
 - 20 (d) **that amount has been payable by the employer to the employee for longer than 12 months before the date on which a complaint was made to a labour inspector by or on behalf of the employee or, if no complaint was made, the date on which a labour inspector first endeavoured to secure a written undertaking by the employer in terms of section 68 or issued a compliance order in terms of section 69].”.**

Substitution of section 73 of Act 75 of 1997, as amended by section 16 of Act 11 of 2002, and substituted by section 13 of Act 20 of 2013

11. The following section is hereby substituted for section 73 of the principal Act:

“Order may be made [order of Labour Court] an arbitration award

73. (1) The Director-General may apply to the [Labour Court on the date specified in the compliance order in terms of section 69 (2A) (b) or, with further notice to the employer, on a subsequent date] CCMA for a compliance order to be made an [order of the Labour Court] arbitration award if the employer has not complied with the order.
- (2) After considering any representations made to it, the [Labour Court] CCMA may issue an [order] arbitration award in terms of subsection (1) requiring—
- 30 (a) the employer to comply with the provisions of [this Act] an employment law;
 - 35 (b) subject to section [70(d)] 76A, the payment of any amount owing to an employee; **[or]**
 - 40 (c) the payment of a fine calculated in terms of Schedule 2 to this Act; or
 - 45 (d) the payment of the amount that the employer is required to pay in terms of the Unemployment Insurance Contributions Act, including interest and penalties calculated in terms of section 12 and 13 of that Act.”.

Insertion of section 73A in Act 75 of 1997

12. The following section is hereby inserted in the principal Act after section 73:

“Claims for failure to pay any amount

- 73A. (1) Despite section 77, any person may refer a dispute to the CCMA concerning the failure to pay any amount owing to that person in terms of this Act, the National Minimum Wage Act, 2017, a contract of employment, a sectoral determination or a collective agreement.

(2) Subsection (1) does not apply to employees earning in excess of the threshold prescribed by the Minister in terms of section 6(3).

(3) An employee, other than the person referred to in subsection (1), may institute a claim concerning the failure to pay any amount contemplated in subsection (1) in either the Labour Court, the High Court or, subject to their jurisdiction, the Magistrates' Court or the small claims court.” 5

Amendment of section 74 of Act 75 of 1997, as amended by section 17 of Act 11 of 2002 and section 14 of Act 20 of 2013

13. Section 74 of the principal Act is hereby amended by the substitution for subsections (1), (2) and (3) of the following subsections, respectively: 10

“(1) A dispute concerning a contravention of this Act or the National Minimum Wage Act, 2017, may be instituted jointly with proceedings instituted by an employee under Part C of this Chapter.

(2) If an employee institutes proceedings for unfair dismissal, the Labour Court or the arbitrator hearing the matter may also determine any claim for an amount that is owing to that employee in terms of this Act [**if the claim has not prescribed**] or the National Minimum Wage Act, 2017. 15

(3) A dispute concerning any amount that is owing to an employee as a result of a contravention of this Act or the National Minimum Wage Act, 2017, may be initiated jointly with a dispute instituted by that employee over the entitlement to severance pay in terms of section 41(6).” 20

Substitution of section 75 of Act 75 of 1997, as substituted by section 18 of Act 11 of 2002

14. The following section is hereby substituted for section 75 of the principal Act:

“Payment of interest 25

75. An employer must pay interest on any amount due and payable in terms of this Act or the National Minimum Wage Act, 2017, at the rate of interest prescribed in terms of section 1 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), to any person to whom a payment should have been made.” 30

Substitution of section 76 of Act 75 of 1997

15. The following section is hereby substituted for section 76 of the principal Act:

“Proof of compliance

76. [(1)] In any proceedings concerning a contravention of this Act, the National Minimum Wage Act, 2017, or any sectoral determination, it is for an employer— 35

- (a) to prove that a record maintained by or for that employer is valid and accurate; or
- (b) who has failed to keep any record required by this Act or the National Minimum Wage Act, 2017, that is relevant to those proceedings, to prove compliance with any provision of this Act.” 40

Insertion of section 76A in Act 75 of 1997

16. The following section is hereby inserted in the principal Act after section 76:

“Fine for not complying with national minimum wage

76A. Subject to section 76, a fine that may be imposed on an employer who paid an employee less than the national minimum wage, is an amount that is the greater of— 45

- (a) twice the value of the underpayment; or
- (b) twice the employee's monthly wage.”

Amendment of section 77A of Act 75 of 1997, as inserted by section 19 of Act 11 of 2002

17. Section 77A of the principal Act is hereby amended by the deletion of paragraphs (a) and (c).

Amendment of section 78 of Act 75 of 1997

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18. The following section is hereby substituted for section 78 of the principal Act:

“Rights of Employees

78. (1) Every employee has the right to—

- (a) make a complaint to a trade union representative, a trade union official or a labour inspector concerning any alleged failure or refusal by an employer to comply with this Act or the National Minimum Wage Act, 2017; 10
- (b) discuss his or her conditions of employment with his or her fellow employees, his or her employer or any other person;
- (c) refuse to comply with an instruction that is contrary to this Act, the National Minimum Wage Act, 2017, or any sectoral determination; 15
- (d) refuse to agree to any term or condition of employment that is contrary to this Act, the National Minimum Wage Act, 2017, or any sectoral determination;
- (e) inspect any record kept in terms of this Act or the National Minimum Wage Act, 2017, that relates to the employment of that employee; 20
- (f) participate in proceedings in terms of this Act;
- (g) request a trade union representative or a labour inspector to inspect any record kept in terms of this Act and that relates to the employment of that employee. 25

(2) Every trade union representative has the right, at the request of an employee, to inspect any record kept in terms of this Act or the National Minimum Wage Act, 2017, that relates to the employment of that employee.”.

Substitution of section 80 of Act 75 of 1997

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19. The following section is hereby substituted for section 80 of the principal Act:

“Procedure for disputes

80. (1) If there is a dispute about the interpretation or application of this Part, any party to the dispute may refer the dispute in writing to [—

- (a) **a council, if the parties to the dispute fall within the registered scope of that council; or** 35
- (b) **the CCMA[, if no council has jurisdiction].**

(2) The party who refers a dispute must satisfy **[the council or]** the CCMA that a copy of the referral has been served on all the other parties to the dispute. 40

(3) The **[council or the]** CCMA must attempt to resolve a dispute through conciliation.

(4) If a dispute remains unresolved, any party to the dispute may refer it to the **[Labour Court for adjudication]** CCMA for arbitration.

(5) In respect of a dispute in terms of this Part, the relevant provisions of Part C of Chapter VII of the Labour Relations Act, 1995, apply with the changes required by the context. 45

(6) For the purposes of this section, a party to a dispute includes a labour inspector.”.

Transitional provisions

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20. (1) Despite the repeal of Chapter 8 of the principal Act, any sectoral determination in effect at the commencement of the National Minimum Wage Act, 2017, remains in

force except to the extent that it prescribes a wage that is less than the national minimum wage set by the National Minimum Wage Act, 2017.

(2) Sections 56, 57 and 58 of the principal Act remain in force in respect of the sectoral determination contemplated in subsection (1) for as long as the sectoral determination has not been cancelled or suspended by the Minister as contemplated in section 56. 5

(3) If any sectoral determination already prescribes wages that are higher than the national minimum wage, the wages in that sectoral determination and the remuneration and associated benefits based on those wages must be increased proportionally to any adjustment of the national minimum wage in terms of the National Minimum Wage Act, 2017, for a period of three years from the commencement of the National Minimum Wage Act, 2017. 10

(4) Notwithstanding the provisions of any sectoral determination, an employer must pay a learner an allowance as prescribed in Schedule 2 of the National Minimum Wage Act, 2017, as is adjusted from time to time, from the date that the National Minimum Wage Act, 2017, comes into force. 15

(5) For the purpose of subsection (4)—

- (a) **'learner'** means a learner as defined in Schedule 2 of the National Minimum Wage Act, 2017; and
- (b) **'allowance'** means an allowance as defined in Schedule 2 of the National Minimum Wage Act, 2017. 20

Short title and commencement

21. This Act is called the Basic Conditions of Employment Amendment Act, 2017, and takes effect on a date immediately after the National Minimum Wage Act, 2017, has taken effect. 25

**MEMORANDUM ON THE OBJECTS OF THE BASIC CONDITIONS
OF EMPLOYMENT AMENDMENT BILL, 2017**

1. BACKGROUND

- 1.1 The Basic Conditions of Employment Amendment Bill, 2017 (“the Bill”), introduces amendments to the Basic Conditions of Employment Act, 1997 (BCEA), consequent to the proposed National Minimum Wage Act, 2017.
- 1.2 The primary amendments introduced by the Bill seek to—
- (a) repeal the provisions dealing with the making of Sectoral Determinations and the powers and functions of the Employment Conditions Commission;
 - (b) extend the provisions for monitoring and enforcement by the labour inspectorate to apply to the national minimum wage and unemployment insurance; and
 - (c) extend the jurisdiction of the Commission for Conciliation, Mediation and Arbitration (CCMA) to include enforcement procedures and claims for underpayment in terms of the BCEA, the national minimum wage, unemployment insurance legislation and claims arising from contracts or collective agreements.

2. CLAUSE BY CLAUSE ANALYSIS

Clause 1

- 2.1 Clause 1 of the Bill amends section 1 of the BCEA—
- (a) by substituting the definition of “employment law” so as to include the Unemployment Insurance Act, 2001 (Act No. 63 of 2001), the Employment Services Act, 2014 (Act No. 14 of 2014), and the proposed National Minimum Wage Act, 2017; and
 - (b) by inserting the definition of “national minimum wage”, “Unemployment Insurance Act” and “Unemployment Insurance Contributions Act”.

Clause 2

- 2.2 Clause 2 of the Bill amends section 3 of the BCEA by the substitution for subsection (3), which refers to a sectoral determination, with a new subsection (3) that makes reference to the proposed National Minimum Wage Act, 2017.

Clause 3

- 2.3 Clause 3 inserts section 9A that deals with daily wage payment. Section 9A requires that an employee who works for less than four hours on any day is entitled to be paid for four hours’ work. This only applies to employees earning less than the threshold set by the Minister of Labour in terms of section 6(3) of the BCEA. The provisions to this effect are currently found in several sectoral determinations.

Clause 4

- 2.4 Clause 4 of the Bill repeals Chapters 8 and 9 of the BCEA. Chapter 8 deals with the making of sectoral determinations and Chapter 9 deals with the powers and functions of the Employment Conditions Commission.

Clause 5

- 2.5 Clause 5 of the Bill inserts section 62A that deals with definitions. It states that for the purpose of Chapter 10 of the BCEA, an employee includes a worker as defined in section 1 of the proposed National Minimum Wage Act, 2017.

Clause 6

- 2.6 Clause 6 of the Bill amends section 64 of the BCEA which deals with the functions of labour inspectors. The amendment seeks to insert new paragraphs (*dA*) and (*dB*) in subsection (1). The effect of paragraphs (*dA*) and (*dB*) is that the functions of a labour inspector will now include the referral of disputes to the CCMA, concerning non-compliance with the BCEA, the proposed National Minimum Wage Act, 2017, the Unemployment Insurance Act, 2001, and the Unemployment Insurance Contributions Act, 2002. The labour inspector will also be able to appear on behalf of the Director-General in any proceedings in the CCMA or Labour Court concerning a failure to comply with the legislation referred to in paragraph (*dA*).

Clause 7

- 2.7 Clause 7 of the Bill amends section 65 of the BCEA which deals with powers of entry. The amendment substitutes a reference to Skills Development Act, 1998 (Act No. 97 of 1998), in subsection (1)(c) with the Employment Services Act, 2014.

Clause 8

- 2.8 Clause 8 of the Bill amends section 68 of the BCEA so as to permit labour inspectors to obtain a written undertaking from an employer to comply with the proposed National Minimum Wage Act, 2017, the Unemployment Insurance Act, 2001, and the Unemployment Insurance Contributions Act, 2002, where the employer has not complied with the provisions of these Acts. Furthermore, the amendments authorise the Director-General to apply to the CCMA to make the undertaking made by the employer an arbitration award, where such an employer fails to comply with the undertaking.

Clause 9

- 2.9 Clause 9 of the Bill amends section 69 of the BCEA so as to—
- (a) extend the powers of a labour inspector to issue compliance orders to cover breaches of the proposed National Minimum Wage Act, 2017, the Unemployment Insurance Act, 2001, and the Unemployment Insurance Contributions Act, 2002; and
 - (b) permit employers who dispute the terms of a compliance order served on them to refer the matter to the CCMA for determination through arbitration. It should be noted that amendments have been proposed to the Labour Relations Act, 1995 (Act No. 66 of 1995), to regulate these proceedings.

Clause 10

- 2.10 Clause 10 of the Bill amends section 70 of the BCEA which imposes limitations on the labour inspector's powers. The effect of the amendment is that it limits a labour inspector's powers to issue a compliance order against an employer in respect of any amount payable to an employee due to a failure to comply with a provision of the BCEA or the proposed National Minimum Wage Act, 2017, if—
- (a) the employee earns more than the threshold prescribed by the Minister; or
 - (b) any proceedings have been instituted for the recovery of that amount in the CCMA or a Court.

Clause 11

- 2.11 Clause 11 of the Bill amends section 73 of the BCEA to authorise the Director-General to refer a compliance order that has not been complied with to the CCMA so as to be made an arbitration award.

Clause 12

2.12 Clause 12 of the Bill inserts section 73A which deals with claims for failure to pay any amount. The proposed new section 73A provides that employees earning below the threshold prescribed by the Minister in terms of section 6(3) of the BCEA may refer disputes to the CCMA concerning a failure to pay wages or any amount owing to them in terms of the BCEA, the proposed National Minimum Wage Act, 2017, collective agreement, contract or sectoral determination. It is envisaged that this will provide a cheaper and more expeditious method of resolving these disputes and will avoid these claims being split into proceedings before different forums. This right does not prevent employees from instituting a claim in the civil court. Employees earning above the BCEA earnings threshold retain their right to bring claims in the Labour Court or a civil court with jurisdiction (the High Court, the Magistrates Court or the Small Claims Court, depending on the amount of the claim).

Clause 13

2.13 Clause 13 of the Bill amends section 74 of the BCEA to permit a claim for payment of the national minimum wage to be instituted jointly with proceedings in terms of Part C of Chapter 10 of the BCEA.

Clause 14

2.14 Clause 14 of the Bill amends section 75 of the BCEA so as to provide that an employer who fails to pay the national minimum wage must pay interest on any late payment calculated at the rate prescribed in the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975).

Clause 15

2.15 Clause 15 of the Bill amends section 76 of the BCEA to extend the provisions concerning proof of compliance currently applicable to the BCEA, to the proposed National Minimum Wage Act, 2017. In terms of this section employers are required to prove the accuracy of wage records and to prove compliance if they have failed to keep the requisite records.

Clause 16

2.16 Clause 16 of the Bill inserts section 76A to provide for a fine for non-compliance with the national minimum wage. An employer who fails to pay the national minimum wage will be required to pay the employee an amount that is twice the value of the underpayment or twice the employee's monthly wage, whichever is the greater.

Clause 17

2.17 Clause 17 of the Bill amends section 77A of the BCEA so as to remove the powers of the Labour Court to make a compliance order issued by a labour inspector an order of Court. This function will now be performed by the CCMA which will have the power to make an arbitration award in order to enforce a compliance order.

Clause 18

2.18 Clause 18 of the Bill amends section 78 of the BCEA which deals with rights of employees. The amendment seeks to substitute the current section 78 with a similar section that makes reference to the proposed National Minimum Wage Act, 2017.

Clause 19

2.19 Clause 19 of the Bill amends section 80 of the BCEA to provide that disputes concerning the protection of employees against discrimination for enforcing their rights should be referred to the CCMA for both conciliation and arbitration. Currently, bargaining councils conciliate these disputes within their sectors.

Clause 20

2.20 Clause 20 of the Bill provides for the transitional provisions to regulate the operation of sectoral determinations once the proposed National Minimum Wage Act, 2017, comes into force. The effect of the transitional provisions is that—

- (a) sectoral determinations remain in force, except to the extent that they prescribe wages below the level of the national minimum wage;
- (b) the Minister may withdraw or amend sectoral determinations;
- (c) an employer must pay a learner an allowance as prescribed in Schedule 2 to the proposed National Minimum Wage Act, 2017, from the date the proposed National Minimum Wage Act, 2017, comes into force.

Clause 21

2.21 This clause provides for the short title and the commencement. The commencement is aligned with the commencement of the National Minimum Wage Act, 2017.

3. PARTIES CONSULTED

All affected stakeholders were consulted individually.

4. FINANCIAL IMPLICATIONS FOR STATE

There will be no cost implications to the State in relation to the implementation of the Act. The proposed amendments are purely of an administrative or technical nature.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers and the Department are of the opinion that the Bill should be dealt with in terms of the procedure established by section 75 of the Constitution, since it does not contain provisions to which the procedure set out in section 76 of the Constitution applies. In *Tongoane and Others v Minister of Agriculture and Land Affairs and Others*¹, the Constitutional Court (“the CC”) dealt with the question of tagging. The CC determined the proper test for tagging of the Communal Land Rights Act, 2004² (“the CLARA”), by analysing the provisions of the CLARA and found that CLARA, in substantial measure, affects indigenous law, customary law and traditional leadership which are areas of concurrent national and provincial legislative competence, and are functional areas listed in Schedule 4 to the Constitution. The CC held in paragraph 58 of the judgment that:

“ . . . What matters for the purpose of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill ‘in substantial measure fall within a functional area listed in schedule 4’. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this court to characterise a Bill in order to determine legislative competence. This involves the determination of the subject matter or the substance of the legislation, its essence, or

¹2010 (8) BCLR 741 (CC).

²[Act No. 11 of 2004].

true purpose and effect, that is, what the **[legislation]** is about.”.
(Footnote omitted)

- 5.2 The CC held that the test for tagging must be informed by its purpose. Tagging is neither concerned with determining the sphere of government that has the competence to legislate on a matter, nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how a Bill must be considered by the provinces and in the National Council of Provinces, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interest, concerns and capacities of the provinces, the more say the provinces should have on its content.³ The CC further held as follows:

“**[64]** The purpose of tagging is therefore to determine the nature and extent of the input of provinces on the contents of legislation affecting them. Indeed, all the legislation mentioned in section 76(3) is legislation that substantially affects the interests of provinces.

[69] The tagging of Bills before Parliament must be informed by the need to ensure that the provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them. The subject-matter of a Bill may lie in one area, yet its provisions may have a substantial impact on the interests of provinces. And different provisions of the legislation may be so closely intertwined that blind adherence to the subject-matter of the legislation without regard to the impact of its provisions on functional areas in Schedule 4 may frustrate the very purpose of classification.

[71] . . .; the ‘substantial measure’ test permits a consideration of the provisions of the Bill and their impact on matters that substantially affect the provinces. This test ensures that legislation that affects the provinces will be enacted in accordance with a procedure that allows the provinces to fully and effectively play their role in the law-making process. This test must therefore be endorsed.

[72] To summarise: any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in section 76. Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a)-(f), and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence.”.

- 5.3 To determine whether the provisions of the Bill in substantial measure fall within a functional area listed in Schedule 4, the Bill ought to be considered against the provisions of the Constitution relating to the tagging of Bills as well as against the functional areas listed in Schedule 4 and Schedule 5 to the Constitution. It is apparent from the provisions of the Bill that the Bill seeks, amongst others, to repeal the provisions dealing with the making of Sectoral Determinations and the powers and functions of the Employment Conditions Commission, extend the provisions for monitoring and enforcement by the

³See fn 1 above at para [60].

labour inspectorate to apply to the National minimum wage and unemployment insurance and extend the jurisdiction of the Commission for Conciliation, Mediation and Arbitration (CCMA) to include enforcement procedures and claims for underpayment in terms of the BCEA, the National minimum wage, unemployment insurance legislation and claims arising from contracts or collective agreements. The aforesaid are matters that are not listed in either Schedule 4 or 5 to the Constitution. The Bill is thus an ordinary Bill not affecting provinces and should be tagged as a section 75 Bill.

- 5.4 The State Law Advisers are also of the opinion that it is not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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