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South Africa has recently enacted legislation to provide for a national minimum wage. Late in November 2018, the President assented to the National Minimum Wage Act, 2018 (Act 9 of 2018) or «the Act», which also provides for the composition and functions of the National Minimum Wage Commission and related matters.

The Act was motivated by the recognition that South Africa remains, many years after the onset of a democratic order, one of the most unequal societies in the world, beset by huge disparities in income in the national labour market. The purpose of the Act is to advance economic development and social justice.

The Act attempts to achieve this objective by:

- improving the wages of lowest paid workers;
- protecting workers from unreasonably low wages;
- preserving the value of the national minimum wage;
- promoting collective bargaining;
- and supporting economic policy.

The Act applies to all workers and their employers except members of the South African National Defence Force, the National Intelligence Agency and the South African Secret Service. It does not apply to a volunteer, who is defined to be a person who performs work for another person and who does not receive or is not entitled to receive, any remuneration for his or her services.

I - THE NATIONAL MINIMUM WAGE

The national minimum wage is an amount described in a schedule to the Act, which is adjusted annually. The Act provides that every worker is entitled to payment of a wage in an amount no less than the national minimum wage and every employer must pay wages to its workers that is no less than the national minimum wage. The payment of a national minimum wage cannot be waived and takes precedence over any contrary provision in any contract, collective agreement, sectoral determination or law. The national minimum wage effectively constitutes a term of the worker's contract, except to the extent that the contract, collective agreement or law provides a wage more favourable to the worker. It is an unfair labour practice for an employer to unilaterally alter wages, hours of work or other conditions of employment in connection with the implementation of the national minimum wage.

Despite any law to the contrary, the calculation of a wage for the purposes of the Act is the amount payable in money for ordinary hours of work. This excludes any payment made to enable a worker to work including any transport, equipment, tool, food or accommodation allowance, unless specified otherwise in a sectoral determination. Other exclusions include any payment in kind including board or accommodation, unless specified otherwise in a

sectoral determination, gratuities including bonuses, tips or gifts and any other prescribed category of payment.

At the moment, the national minimum wage has been set at R20 for each ordinary hour work. Despite this general minimum, different arrangements have been created for farm workers (R18 per hour), domestic workers (R15 per hour), workers employed on an expanded public works programme (R11 per hour) and workers who have concluded learnership agreements contemplated in terms of section 17 of the Skills Development Act, 1998 (Act no. 97 of 1998).

II - THE NATIONAL MINIMUM WAGE COMMISSION

The National Minimum Wage Commission (the Commission), which is established by the Act, must conduct a review of the national minimum wage within 18 months of the commencement of the Act. The Commission must make recommendations to the Minister of Labour on the adjustment of the national minimum wage. These recommendations are to be focused on the alleviation of poverty and the reduction of wage differentials and inequality.

The Commission comprises members nominated by organised business, organised community and organised labour, and also includes three independent experts knowledgeable about the labour market and conditions of employment and a chairperson appointed by the Minister.

In arriving at its recommendations, the Commission must consider the following factors:

- inflation, the cost of living and the need to retain the value of the minimum wage;
- wage levels and collective bargaining outcomes;
- gross domestic product;
- productivity;
- ability of employers to carry on their businesses successfully;
- The operation of small, medium or micro-enterprises and new enterprises;
- the likely impact of the recommended adjustment on employment or the creation of employment;
- and any other relevant factor.

The Commission's functions include investigating and report annually to the Minister on the impact of the national minimum wage on the economy, collective bargaining and the reduction in income differentials, and to make such information available to the public.

III - CONCLUDING REMARKS

The introduction of the national minimum wage has stimulated a great deal of debate in the country. One of the points of contention relates to the provisions of the Act that permit an employer or an employers' organisation to apply for an exemption from paying the national minimum wage. Regulations have come into operation to supplement the provisions of the Act in this regard, providing employers with an opportunity to demonstrate that they are unable to afford the new minimums, following meaningful consultation with workers and their representatives.

Employers who fail to comply with the provisions of the Act will be sanctioned by the Department of Labour, whose inspectors are also empowered to investigate whether workplaces are in compliance. Employees are also able to approach the country's Commission for Conciliation Mediation and Arbitration directly.

The Act continues the South African approach of seeking to link organised business with organised labour (as defined in the National Economic Development and Labour Council Act, 1994 (Act no. 35 of 1994 or the «NEDALC Act»).

Importantly, the Commission also includes members nominated by «organised community», which relate to non-governmental organisations contemplated in the NEDALC Act. The Act also introduces and utilises the concept of «worker», which is defined to mean «any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind». This is a different notion to that contained in most employment-related legislation in South Africa, which typically utilise definitions pertaining to the concept «employee» (and which specifically exclude independent contractors).

The broader approach advanced by the Act resonates with recent judgments such as *Pretorius and Another v Transnet Pension Fund and others*¹. In this case, dealing with a claim by pensioners, the Constitutional Court found it unnecessarily restrictive to require the applicants to plead that an employer-employee relationship had existed.

The Court noted that section 23 of the Constitution refers to «everyone» having the right to fair labour practices, and that its purpose is to protect persons from unfair labour practices that originated in an employer-employee relationship.

The Court acknowledged that labour law jurisprudence recognises that unfair labour practices under the LRA may extend beyond the termination of employment and that contemporary labour trends highlight the need to take a broad view of fair labour practice rights because fewer people are in formal employment. As the Court noted, «more and more people find themselves in the “twilight zone” of employment as supposed “independent

1 2018 ZACC 10.

contractors” in time-based employment subject to faceless multinational companies who may operate from a web presence».

For the Court, the facts of the case provided a compelling basis not to restrict the protection of section 23 of the Constitution to only those who have contracts of employment.