

gekweek om minder nougeset met hulle eise om te gaan, skuldenaars word met ou skulde lastig geval, bewyse moet langer gehou word, ensovoorts. Wat, sou 'n mens kon vra, is die maksimum toelaatbare termyn dan waarop partye kan ooreenkom voordat 'n hof dit aanstootlik sou vind? Sou 'n ooreengekome ses jaar termyn in plaas van die gebruikelike algemene termyn van drie jaar byvoorbeeld in orde wees, of sal dit nie wees nie, en wat is die afsnypunt?

Die feit dat die Verjaringswet self vir langer termynse voorsiening maak in sekere gevalle, behoort nie as argument te dien nie. Die opskorting van voltooide verjaring deur die Verjaringswet is beperk tot besondere gevalle, soos waar 'n skuldeiser nog minderjarig is, of waar die partye met mekaar getroud is. Daar bestaan goeie beleidsoorwegings vir hierdie uitsonderings, maar dit is nie nodig om op die basis van kontrakteervryheid die aantal gevalle van verlengde verjaringstermyne uit te brei nie. Kort voor lank sal standaardkontrakte dan weer vir ooreengekome verlengings voorsiening maak waartoe die skuldenaar geen werklike inspraak gehad het nie, en dan is ons terug by blokkie een.

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## Some thoughts on the Application of the New Basic Conditions of Employment Act 75 of 1997

### 1 Introduction

The common law views the contract of employment as the basis of each and every employment relationship. The contract of employment, which is entered into by the employer and employee voluntarily after negotiating the terms and conditions of said agreement, regulates the rights and obligations of the parties during the duration of the contract (Wallis *Labour and Employment Law* (1995) par 8; Grogan *Workplace Law* (1997) 3).

Large numbers of employers and employees in the private sector are subject to collective agreements in terms of the Labour Relations Act 66 of 1995. These agreements regulate aspects such as minimum wages for specific job categories, hours of work, overtime and leave. Collective agreements have the effect of limiting the contractual capacity of the parties to the contract of employment. The Labour Relations Act 66 of 1995 (s 23(3)) provides that "a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement".

There are, however, certain industries and undertakings where no collective agreements exist. The common law affords no protection to employees in relation to aspects such as minimum wages, maximum hours of work or minimum holiday leave. It would therefore be possible for a job applicant to commit himself or herself to a very unfavourable contract of employment. Such a contract could for example provide that the employee has to work 365 days per year without any provision for holiday

leave (see Du Plessis, Fouché, Jordaan and Van Wyk *A Practical Guide to Labour Law* (1996) 25).

The main purpose of legislation regulating basic conditions of employment is to protect employees by prescribing minimum standards of employment. The effect of this type of legislation is to limit the contractual freedom of the parties to the contract in that the individual contracts of employment must comply with the basic conditions of employment provided for in the legislation (Grogan 54).

The new Basic Conditions of Employment Act 75 of 1997 (hereinafter the "new Act" or the "1997 Act") was published on 1997-12-05 after a lengthy period of acrimonious negotiations between organised business, labour unions and the Government. (See GG 18491 of 1997-12-05. For an overview of the struggle to achieve consensus on the new Act, see Editorial "Business and Government square up to Labour as South Africa faces major Economy Disruption over BCE Bill" *South African Labour-Business Monitor* 1997-06-13 1; Shilowa "Cosatu Retreat would betray Workers" *Business Day* 1997-06-25 15; Mittner "'n Buigsame wet, maar wat van Cosatu?" *Finansies & Tegniek* 1997-04-25 40.)

Although the new Act has been passed by parliament, it will only come into force at a date yet to be determined by the President. The 1997 Act will consolidate and replace the Basic Conditions of Employment Act 3 of 1985 (hereinafter the "old Act" or the "1983 Act") and the Wage Act 5 of 1957. In consolidating these two acts, the new Act will not only prescribe minimum standards of employment as is the case with the 1983 Act, but it will also make provision for the establishment of basic conditions of employment through sectoral determinations in sectors where collective agreements do not exist (s 51-58).

It is not the objective of this contribution to give a summary of the basic conditions of employment embodied in the new Act. The focus is rather placed on the differences between the 1983 Act and the 1997 Act, as far as the scope of application and the variation of minimum conditions of employment are concerned.

## 2 Purpose and Application of the 1997 Act

The purpose of the new Act is to advance economic development and social justice by fulfilling the primary objectives of the Act, namely: to give effect to and regulate the right to fair labour practices conferred by the Constitution of the Republic of South Africa, Act 108 of 1996, by establishing and enforcing basic conditions of employment and by regulating the variation of basic conditions of employment; and to give effect to obligations incurred by South Africa as a member of the International Labour Organisation (s 2).

In comparison with the 1983 Act, the scope of application of the 1997 Act has been widened significantly. The old Act excluded persons who work *inter alia* for the State, Parliament, Atomic Energy Corporation of South Africa, the South African Reserve Bank, the South African Broadcasting Corporation, the South African Bureau of Standards, the South African Council for Scientific and Industrial Research, the South African Medical

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of termination of employment (s 14(5)) and the provision of a certificate of service after the termination of the contract of employment (s 15(2)(a)).

The 1997 Act also provides that certain sections will not be applicable to persons working less than 24 hours a month. These persons are excluded from the provisions relating to the regulation of working time (s 6(c)), leave (s 19(1)), particulars of employment and remuneration (s 28(1)), and termination of employment (s 36).

The 1983 Act contains no definition of the concept "basic condition of employment". The 1997 Act defines this as "a provision of this Act or sectoral determination that stipulates a minimum term or condition of employment". The new Act furthermore provides that a basic condition of employment constitutes a term of any contract of employment except if any other law provides a term that is more favourable to the employee, if the basic condition of employment has been varied in accordance with the Act, or if a term of the contract of employment is more favourable to the employee than the basic condition of employment (s 4).

### 3 Variation of Basic Conditions of Employment through Agreement

#### 3.1 Introduction

In terms of both the 1983 and the 1997 Acts employers and employees are permitted to agree upon more favourable conditions of employment than those prescribed in the respective Acts. Generally speaking, the conditions contained in a contract of employment may not be less favourable to an employee than those conditions provided for in the 1983 Act or the 1997 Act (see s 3 of the 1983 Act and s 4 of the 1997 Act).

Under certain circumstances, however, the basic conditions of employment contained in the Acts under discussion may be varied in accordance with the relevant provisions of the respective statutes. There are substantial differences in the manner in which it is regulated, and also in the degree to which it is permitted to vary the basic conditions of employment provided for in these Acts.

#### 3.2 Variation by agreement in terms of the 1983 Act

Section 55 of the 1983 Act stipulates that the provisions of the Act, "shall not be affected by any term or condition of any agreement, whether such agreement was entered into before or after the commencement of this Act". It has been inferred from this section that it is not permissible for an employer or an employee to conclude any form of agreement which contains conditions of employment that are less favourable than those provided for in the Act. This implies that the provisions of the 1983 Act not only override individual contracts of employment but also collective agreements concluded at bargaining councils. (See Grogan 11 who seems to agree with this interpretation.)

However, it is submitted that although this inference is correct in relation to the individual contract of employment, it is not the case with collective agreements concluded under the auspices of the Labour Relations Act 66 of 1995. Section 1(3) of the old Act provides that the Labour

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- (d) reduce the protection afforded to employees who perform night work (s 17(3)-(4));
- (e) reduce an employee's annual leave to less than the prescribed 21 days per year (s 20);
- (f) reduce an employee's entitlement to sick leave (s 22-24) or maternity leave (s 25);
- (g) be in conflict with the chapter prohibiting employment of children and forced labour (ch 6); and
- (h) must have due regard to the family responsibilities of employees (s 7(d)).

Collective agreements, other than those concluded by bargaining councils (s 49(2)) and contracts of employment (s 49(3)) may also replace or exclude certain of the new Act's basic conditions of employment. However, this is also subject to the condition that such variations will only be allowed to the extent permitted by the new Act.

Collective agreements, including those not concluded by bargaining councils, may provide for:

- (a) ordinary hours of work and overtime to be averaged over a period of four months or less (s 12(1));
- (b) shorter notice periods for the termination of contracts of employment than those prescribed by the new Act (s 37(1)-(2));
- (c) the resolution of certain disputes through arbitration which has the effect that a labour inspector may not issue a compliance order in respect of an employee who is covered by such a collective agreement (s 70(a)); and
- (d) vary the number of days and the circumstances under which leave is to be granted for family responsibilities (s 27(7)).

Any employer must reach an agreement with employees to work overtime (s 10(1)(a)), night work (s 17(2)(a)) and work on public holidays (s 18(1)). Apart from this, employers and employees may also replace or exclude certain basic conditions of employment by way of an individual contract, to the extent permitted by the new Act (s 49(3)). As is the case with collective agreements, the basic conditions of employment which may also be varied through individual agreements are limited. An individual agreement may for instance:

- (a) extend an employee's ordinary hours of work by up to 15 minutes a day, but not more than 60 minutes in a week, where these employees need to continue serving members of the public after the completion of ordinary hours of work (s 9(2));
- (b) grant paid time off as compensation for overtime work; (s 10(4));
- (c) permit employees to work up to twelve hours in a day without receiving overtime pay as long as it is not required to work longer than 45 ordinary hours during a week (s 11(1));
- (d) reduce daily meal intervals from 60 minutes to no less than 30 minutes (s 14(5)(a));

- (c) provide employees with a rest period of 60 consecutive hours every two weeks instead of a weekly rest period (s 15(3)(a));
- (f) compensate employees for Sunday work by granting paid time off (s 16(3)); and
- (g) vary the provisions regarding payment during sick leave within certain limits (s 22(6)).

#### 4 Variation by the Minister

The old Act, which, at the time of writing was still in force, provides that the Minister of Labour may exempt any employer, on such conditions as may be determined by the minister, from one or more of the provisions of the Act (s 34(1)). The effect of such an exemption by the minister would be that the Act does not place any restriction on the parties to the contract of employment in relation to the specific basic conditions of employment provided for in the exemption. From this it is clear that the minister has very wide discretionary powers in this regard. The 1983 Act places no restriction on the minister in relation to aspects on which exemptions may not be granted. Excepting that an employer would have to submit convincing arguments, nothing precludes an employer from applying for an exemption from the old Act as a whole.

The new Act stipulates that the minister may on his or her own accord, or on application by an employer or employee, make a determination to replace or exclude any basic condition of employment provided for in the Act (s 50(1)(a)-(b)). Whereas the old Act only gives the minister the authority to exempt employers from the provisions of the Act, the new Act in addition gives the minister the prerogative to replace any basic condition of employment with other minimum standards. Although it may be argued that this introduces more flexibility in terms of the new Act, it must be kept in mind that it would be possible for the minister to introduce more onerous and stricter basic conditions of employment through such determinations.

In contrast with the old Act, the minister does not enjoy an unfettered discretion in the making of such determinations in terms of the new Act. The minister's power to make such determinations are restricted in that it:

- (a) must be consistent with the purpose of the new Act (s 50(1)); and
- (b) may not be made in respect of certain core rights, such as the regulation of working time (s 7), ordinary hours of work (s 9) night work (s 17(3)-(4)), prohibition of employment of children (s 43(2) and 44) and the prohibition of forced labour (s 48).

In addition, if such a determination is requested by an employer or an employers' organisation, it may not be issued unless a registered trade union representing the employees in respect of whom the determination is to apply, has consented to the variation or has had the opportunity to make representations to the minister in this regard (s 50(7)).

#### 5 Variation by Sectoral Determination

At the date of its inception, the 1997 Act will repeal the Wage Act 5 of 1957. The Wage Board is one of the central institutions established by the

latter Act. It is the main purpose of the Wage Board to establish minimum conditions of employment in sectors of industry where organised labour and organised business have not reached agreements through the process of collective bargaining (Grogan 8).

The old Act did not provide for mechanisms which could establish minimum conditions of employment in sectors and areas of industry. The new Act, however, will take over the functions of Act 5 of 1957 through the publication of sectoral determinations (s 51-58).

The minister may make a sectoral determination establishing basic conditions of employment for employees in a sector and an area after the prescribed procedure has been followed (s 51-54). Such a sectoral determination has the legal effect of replacing any corresponding basic condition of employment which is provided for in the new Act (s 57).

The minister may not publish a sectoral determination covering employees and employers who are bound by a collective agreement concluded at a bargaining council or by a statutory council (s 55(7)). The minister's power to make sectoral determinations are restricted in the same manner as is the case with the making of ministerial determinations in terms of section 50 of the new Act (see discussion par 4 above). Sectoral determinations must be consistent with the purpose of the new Act (s 50(1)). Also, these determinations may not be made in respect of certain core rights, such as the regulation of working time (s 7), ordinary hours of work (s 9), night work (s 17(3)-(4)), prohibition of employment of children (s 43(2) and 44) and the prohibition of forced labour (s 48).

A sectoral determination may amongst others, regulate minimum rates of remuneration, regulate the payment of remuneration in kind, provide for training and education schemes and regulate pension schemes and medical aid (s 55(4)).

## 6 Status of Contracts of Employment and Collective Agreements

### 6.1 Introduction

The basic conditions of employment pertaining to a specific employment relationship can be found in various sources, for example an individual contract, a collective agreement and legislation regulating basic conditions of employment. This may cause certain problems, which can be illustrated by the following example: A contract of employment between A and B contains a provision which requires B to work 50 hours per week. The old and new Acts provide that an employee may not work more than a specified number of hours per week (46 hours 1983 Act; 45 hours 1997 Act). A collective agreement concluded at a bargaining council which covers the relationship between A and B in terms of the Labour Relations Act 66 of 1995 provides for a maximum of 48 hours per week for A and B's industry and area. The question is which one of these instruments will determine the maximum hours B is permitted to work per week? The answer depends upon the question as to which source of rules regulating basic conditions of employment enjoys preference over the other.



## 6.2 Position under the 1983 Act

It is clear that in terms of the old Act employers and employees may not through a contract of employment agree upon less favourable conditions of employment than those provided for in the Act (s 35). The provisions of the old Act enjoy preference over any clause of an individual contract of employment and it is not permissible to contract out of the old Act by way of a contract of employment. The basic conditions of employment of the old Act are enforced through criminal sanctions (see *National Union of Mineworkers v Gold Fields of SA* 1989 ILJ 86 (T) 84H).

However, in relation to collective agreements, the old Act is not all that clear. There is an apparent contradiction between section 35 and 1(5) of the old Act (see the discussion in par 3.2). Nevertheless, it is our submission that the basic conditions of employment contained in a collective agreement will enjoy preference over the basic conditions of employment embodied in the old Act.

Returning to the above example of A and B, the following conclusions may be drawn: the collective agreement (which provides for a maximum of 48 hours per week) will take precedence over the old Act (which provides for a maximum of 46 hours) as well as the contract of employment (which provides for 50 hours per week).

## 6.3 Position under the 1997 Act

The new Act specifies to what extent its basic conditions of employment may be varied by agreement. Generally speaking, if a contract of employment is covered by a collective agreement, such contract has to conform to the corresponding provisions of the collective agreement (s 23(5) of Act 66 of 1995). Similarly, if the new Act covers an individual contract of employment, the provisions of the contract of employment must comply with the basic conditions provided for in the Act (s 4).

The new Act, however, does permit a limited number of basic conditions of employment contained in the Act, to be altered by different forms of agreement. Individual contracts of employment, collective agreements other than those concluded at bargaining councils and collective agreements by bargaining councils may each vary a limited number of aspects in accordance with the provisions of the Act (see the discussion in par 3.3). A substantial number of core rights of employees may not be varied by agreement. In other words, the provisions of the Act override any form of agreement in respect of the employees' list of protected core rights.

Returning to A and B's employment relationship mentioned above, it may be concluded that: the new Act (which provides for a maximum of 45 hours per week) will take precedence over the collective agreement (which provides for a maximum of 48 hours) as well as the contract of employment (which provides for 50 hours). This is due to the fact that employees have a right not to work more than 45 hours per week in terms of the Act's protection of certain core rights (s 49(1)(a) read with s 9).

It is important to keep in mind that extensive powers have been granted to the minister in terms of section 50 of the 1997 Act, whereby the minister may replace or exclude certain basic conditions of employment embodied in this Act. Such a ministerial determination will enjoy

preference over the new Act, as long as a number of core rights of employees are not infringed upon (see par 4 above). An employee's right not to work more than 45 hours per week, may for instance not be varied through a ministerial determination (s 50(2)(a)).

## 7 Conclusion

There are significant differences between the 1983 Act and the 1997 Act regarding their scope of application. Whereas the old Act did not cover the employment relationships of a number of categories of employees, the exclusions to the new Act are limited. This has the effect that the number of employees who are covered by the new Act has been extended dramatically.

There are also a number of important differences between the Acts under discussion in respect of the variation of basic conditions of employment by way of agreement.

In the first instance, the apparent contradiction in the 1983 Act between s 1(3) and s 35 has been eliminated in the 1997 Act. The new Act contains specific provisions regarding the variation of basic conditions and the extent of such variations.

Secondly, collective agreements which are regulated under the Labour Relations Act 66 of 1995 do not necessarily override the basic conditions of employment contained in the 1997 Act, as was the case under the old Act. The new Act places major restrictions on the aspects on which it is permitted to vary the Act's basic conditions of employment through collective agreements.

Thirdly, contrary to the position under the old Act, it is permissible to vary a limited number of aspects through an individual contract of employment. However, employers and employees do not have the right to exercise their contractual freedom in an unfettered way. The variations must take place within the strict boundaries laid down by the new Act.

In the fourth place, additional powers are conferred on the minister by the 1997 Act in relation to the making of ministerial determinations. The 1997 Act provides that the basic conditions of employment embodied therein cannot only be excluded, but may also be replaced by the minister. It is doubtful whether this is a change for the better, as such wide powers conferred on the minister will not necessarily promote legal certainty (Barker 1997 *CLL* vol 7 no 5 41-47). It is debatable whether it is feasible to endow the minister with these semi-legislative powers which would enable him to change the basic conditions of employment contained in the new Act. However, in accordance with the protection of a number of core rights (s 50(2)), certain basic conditions of employment may not be varied by the minister. It seems strange that there was so little debate on the wide powers given to the minister in terms of the new Act. Although the minister's discretion is tempered to a certain extent by the core rights, one would think that endowing a member of the executive with this type of legislative powers would have proved to be more controversial.

Although the new Act has been passed by parliament, it is believed that the last word on the 1997 Act has not yet been spoken. The new Act did

not enjoy the support of organised business before its implementation. It has also been stated that the new Act "does not meet the needs of economic liberalisation that is transforming workplaces across the world" (Barker 1997 *CLL* vol 7 no 5 50). Only time will tell if the minimum standards which are set by the 1997 Act will have a positive influence on the regulation of basic conditions of employment at the South African workplace.

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## Some Basic Principles on the Application of the Bill of Rights to the Law of Delict

### 1 General

Much has been written recently on the exact relationship between the Bill of Rights and private law in general (see eg De Wet 1996 *THRHR* 577; De Waal and Erasmus 1996 *Stell LR* 190; Du Plessis 1996 *Stell LR* 10; Visser 1997 *De Jure* 135; 1997 *Obiter* 99; 1997 *THRHR* 296; 1997 *THRHR* 495; 1996 *THRHR* 176; 1995 *THRHR* 745; 1996 *THRHR* 510; 1996 *THRHR* 695; Gravet *Die Konstitusionalisering van die Privaatreg met Laster as Fokuspunt* (LLB diss UP 1996); Van der Vyver 1995 *SALJ* 572; Neethling and Potgieter 1996 *THRHR* 706; Woolman 1996 *SALJ* 428; Van der Walt 1996 *TSAR* 732; Wolhuter 1996 *SAPL* 512; Cheadle and Davis 1997 *SAJHR* 44).

It is unnecessary for the purposes of this contribution to consider and discuss all the issues covered by the general concept of "horizontal" in too much detail (see the analysis of Cockrell in *Bill of Rights Compendium* par 3A5 which reveals at least three different ways in which "horizontal" may be looked at). It is equally unnecessary to examine whether it is appropriate to use the concept of "horizontal" to describe the various phenomena and processes involved (see on terminology also *Gardener v Whitaker* 1995 2 SA 672 (E) 684H; *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) 597F-G; *Du Plessis v De Klerk* 1996 3 SA 850 (CC) 871D-E; *Bill of Rights Compendium* par 3A5 *supra*).

Only the basic principles commonly associated with "horizontal" and their relevance in the field of delict are considered here. The same delictual principles are applied in regard to the liability of the state and to that of non-state organs (see also *Du Plessis v De Klerk supra* par 146). In regard to the delictual liability of the state it is any event inappropriate to use the term "horizontal" (Cheadle and Davis 1997 *SAJHR* 52).

### 2 The Interim Constitution and the New Constitution

It is important for a proper understanding of the current constitutional principles regarding horizontal to carefully compare the provisions of the interim Constitution and the new Constitution (Cheadle and Davis 45-54). The issue of direct "horizontal" was not expressly addressed by the interim Constitution and this provided a battleground for one of the most