2026

Volume 47 ■ July

INDUSTRIAL LAW *Journal*

INDUSTRIAL LAW *Reports*

INDUSTRIAL LAW JOURNAL

Including the

INDUSTRIAL LAW REPORTS

The *Industrial Law Journal* is a peer reviewed journal.

Articles are published four times a year in January, April, July and October.

Published by JUTA

First Floor, Sunclare Building, 21 Dreyer Street, Claremont, Cape Town 7708

ISSN 0258-249X

Typesetting by Peter Howe

Printed and bound in the Republic of South Africa by DJE Flexible Print Solutions

Communication related to cases should be submitted to:
Christine Vosloo (legaled@netactive.co.za) — Judgments.
Michelle Posemann (michelle@posemann.com — Awards.

Manuscripts for articles and article-related queries should be submitted to:
Carole Cooper (carolcooperlaw.za@gmail.com).

2026 SUBSCRIPTIONS

Subscriptions enquiries and orders to:
JUTA Client Services, JUTA, PO Box 24299, Lansdowne 7779, South Africa
Telephone: (021) 659-2300. Fax: (021) 659-2360. Email: cserv@juta.co.za

South Africa
R7,601.00 plus postage R1,593.90 — Total R9,194.94

Southern Africa
R6,610.00 plus postage R2,493.35 — Total R9,102.95

Subscribers outside South and Southern Africa
R6,610.00 plus postage R5,217.32 — Total R11,826.92

The International Association of Labour Law Journals

The *Industrial Law Journal* is a member of the International Association of Labour Law Journals (IALLJ), which was established to facilitate the exchange of national and international labour law journals, promote closer relations among their editors, and advance labour law research. The other members of the IALLJ can be accessed at https://www.labourlawjournals.com/

Guide to Contributors to the Industrial Law Journal

The *Industrial Law Journal* — a peer-reviewed journal — welcomes submissions of relevance to labour law, broadly construed. Submissions with both a southern African and international focus are welcome.

Submissions to the Journal should comply with the following requirements:

- The submission must be in English.
- It must be an original, unpublished work and must not simultaneously be submitted for publication elsewhere.
- Article submissions should be approximately 12 000 words.
- Shorter submissions may be considered as notes or case notes. See the Journal's house style for further information concerning notes.
- The manuscript should be submitted by email in the form of a file attachment to the following address: chcooper@mweb.co.za.
- Contributors should refer to the Journal's house style which is available from the above email address. Cases, statutes, literature, and quotations should be cited accurately, in the correct format, and checked by the author.
- The Journal does not accept unsolicited book reviews.

INDUSTRIAL LAW JOURNAL

VOLUME 47 JULY 2026

CONTENTS

INDUSTRIAL LAW REPORTS

JUDGMENTS

The Implications of the Labour Relations and Employment Laws Amendment Bills

Jeremy Phillips*
Shamima Gaibie**

Abstract

On 26 February 2026, the Department of Employment and Labour published the Labour Relations Amendment Bill and the Employment Laws Amendment Bill for public consideration and comment. The Amendment Bills propose significant changes to the labour relations regime, as well as some smaller fixes to problems that have arisen in practice and through precedent. Although the period for comment has since closed, this article reviews the proposed amendments, attempts to anticipate how they may take shape in practice, and recommends some further changes for consideration before they are finalised.

Keywords: Labour law amendments — Employment Laws Amendment Bill, 2025 — Labour Relations Amendment Bill, 2025 — significant amendments.

1 Introduction

This year marks the 30-year anniversary of the Labour Relations Act (LRA),[1] the cornerstone legislation of South African labour law.[2] Reflecting on the past 30 years, and envisaging the next 30, Professor Mpedi proposed that 'the Legislature appropriately modernise labour laws and practices … [and] embrace the complexities of today's economy and anticipate the challenges of tomorrow'.[3] This is exactly what the

* BA, LLB University of Cape Town; LLM University of Fort Hare; Director, Cheadle Thompson & Haysom Inc (CTH). The authors are indebted to Paul Benjamin for the conversations with him about the topic, and to Carole Cooper for her sharp eye and comments.

** BA, LLB University of the Witwatersrand; LLM London School of Economics and Political Science; Senior Director, CTH; Research Associate, CENTROW (UWC). I would like personally to record Jeremy's significant contribution to this article.

[1] Act 66 of 1995 (LRA).

[2] The LRA came into operation on 11 November 1996 — see s 214 of the LRA and Proclamation R66 *GG* 17516 of 1 November 1996.

[3] L Mpedi 'The Labour Relations Act at 30: Navigating challenges and opportunities in the age of artificial intelligence' in R le Roux and E Kalula (eds) *Mission 2055: The Labour Relations Act 66 of 1995 – 30 years on and 30 years beyond* (2025 *Acta Juridica*) 358. Mpedi particularly proposed amendments to regulate the effect of technological advances on work, including the proliferation of artificial intelligence (AI). The proposed amendments do not extend as far as proposed by Mpedi. As Benjamin commented in 'Beyond the Boundaries: Prospects for Expanding Labour Market Regulation in South Africa', presented at *The Scope of Labour Law: Redrawing the Boundaries of Protection* in Belliagio, Italy (May 2005), 'Labour law is playing a perpetual game of catch-up.' Amendments to regulate AI and work may be inopportune at this stage.

https://doi.org/10.47348/ILJ/V47/i3a2

drafters of the Employment Laws Amendment Bill (ELAB) and Labour Relations Amendment Bill (LRAB) have sought to do.[4]

On 26 February 2026, the Amendment Bills were published for public comment.[5] On a reading of the proposed amendments and accompanying explanatory memoranda, it is apparent that the Bills are primarily aimed at expediting dispute resolution, extending protections to vulnerable workers, limiting obligations for certain employers, and addressing anomalies that have arisen through precedent and practice.[6]

These amendments herald the fifth phase of what Benjamin and Cheadle, in 2019, termed the 'phases of reform, contestation and adaptation of South African labour law'.[7] More so than any of the previous phases, which were similarly inaugurated by substantial legislative amendments, these fifth phase amendments simultaneously fine-tune, modify, and overhaul.[8]

The Amendment Bills were drafted over the course of 28 meetings between the social partners of the National Economic Development and Labour Council (NEDLAC) between April 2022 and November 2024.[9] The meetings were attended by representatives of organised labour,

[4] Referred to collectively as 'the Amendment Bills' or 'the Bills'.

[5] In GN 3801 *Government Gazette* 54220 of 26 February 2026 entitled the Labour Law Amendment Bill, 2025. The publication of the Amendment Bills coincides approximately with the 30-year anniversary of the LRA coming into operation. The opportunity for public comment closed on 27 March 2026. The notice provides that 'comments received after the closing date *may* not be considered'. Given the short time period provided for public comment, and the extent of the proposed amendments, it is submitted that comments received within a reasonable period after the closing date should also be considered.

[6] As set out in the Final Report on the Law Reform Process issued by the National Economic Development and Labour Council (NEDLAC Final Report) https://mediadon.co.za/wp-content/uploads/2025/08/Final-Nedlac-report-for-LLRTT-2024.pdf, accessed 7 April 2026 3, the social partners agreed that the Amendment Bills must 'respond to changes in the labour market and the nature of work; provide an enabling environment to support job creation and the sustainability of small and medium businesses; respond to identified bottlenecks in existing systems; broaden access to collective organisation and bargaining in response to an increasingly large group of unprotected workers; respond to rights and protection appropriate to the changing nature of work and an increasingly large group of unprotected workers; and improve efficiencies of labour market institutions such as the CCMA and bargaining councils'. The stated objects of the Amendment Bills are also explained, and grouped thematically, in the respective explanatory memoranda.

[7] P Benjamin and H Cheadle 'South African labour law mapping the changes — part 1: The history of labour law and its institutions' (2019) 40 *ILJ* 2189 at 2190. Also see Benjamin and Cheadle 'South African labour law mapping the changes — part 2: The history of labour law and its institutions (2020) 41 *ILJ* 1.

[8] The vast majority of the proposed amendments are targeted at resolving technical or procedural issues. Some of these issues arose shortly after the last round of amendments in 2018, but continued to fester until the Amendment Bills some eight years later. This situation should be obviated in the future by regularly convening meetings of technical advisors to address timeously issues arising from practice and precedent.

[9] NEDLAC Final Report n 6 above 35-36.

https://doi.org/10.47348/ILJ/V47/i3a2

business and government.[10] The outcome of this process is 47 proposed amendments — to the Basic Conditions of Employment Act (BCEA),[11] the Employment Equity Act (EEA),[12] the National Minimum Wage Act (NMWA),[13] the Unemployment Insurance Act (UIA),[14] and the LRA.

This article discusses some of the significant proposed amendments, following selected overarching themes interwoven through the amendments.[15] We also suggest and reiterate a few further amendments, which NEDLAC may consider before the final Amendment Bills are introduced in Parliament, which we believe will also advance the Bills' objectives and purposes.

2 Efficient Dispute Resolution

The average period of labour law dispute resolution and litigation has become progressively, and in some cases exponentially, prolonged and protracted. According to the most recent annual report of the Commission for Conciliation, Mediation and Arbitration (CCMA), it received 193 069 referrals in 2024/2025, an increase of approximately 40 000 cases since 2020/2021. On average, these disputes are arbitrated, and awards issued, after 125 days.[16] As of a recent survey, the average period between the date of the award and the Labour Court's judgment in an ensuing review application is 47 months (almost four years),[17] while the lead time for referrals to the Labour Court for adjudication is approximately three years.[18]

These delays are 'unacceptable'.[19] The proposed amendments are aimed at reducing the distended periods by relieving bottlenecks and

[10] Criticism has been levelled that the NEDLAC community constituency and organisations which represent workers who are not members of trade unions were not invited to participate. It is submitted that NEDLAC should closely consider their comments when considering all comments received.

[11] Act 75 of 1997 (BCEA).

[12] Act 55 of 1998 (EEA).

[13] Act 9 of 2018 (NMWA).

[14] Act 63 of 2001 (UIA).

[15] Some of the proposed amendments thematically overlap and seek to address more than one of the Amendment Bills' objectives and purposes.

[16] CCMA Annual Report 2024/2025 https://www.ccma.org.za/categories/annual-reports/, accessed 8 April 2026.

[17] A Myburgh 'Labour Court dispute resolution: Effective and expeditious?' (2025) 46 *ILJ* 706 at 715. Also see *Tokiso Dispute Resolution Digest* (2014) 65.

[18] On average, in our experience. This, however, differs between the different seats of the Labour Court. Also see Labour Court Practice Notice 1 of 2026 (3 February 2026).

[19] A van Niekerk 'The labour courts, fairness and the rule of law' (2015) 36 *ILJ* 2451 at 2454. The periods set out above also do not account for any subsequent appeals that add a further 2-5 years onto the litigation. In *Koko v Greater Tubatse Municipality & others* (2021) 42 *ILJ* 1019 (LAC) (*Koko*) para 31, Davis JA made the following scathing remark about delays in labour dispute resolution: 'This case, which is not an outlier, makes a mockery of one of the objectives of LRA being the expeditious resolution of labour disputes. The legislature must reconsider not only the narrow question of providing this court with a more expansive set of discretionary powers so as to prevent what is otherwise an excessive amount of money which is to be paid to the successful

https://doi.org/10.47348/ILJ/V47/i3a2

removing impediments. They do so in a number of ways. We discuss three.

2.1 *CCMA caseload*

First, the proposed amendments seek to alleviate the CCMA's caseload.[20] For example, clause 11 of the ELAB provides that claims for amounts owing, in terms of s 73A of the BCEA, may be referred to the applicable bargaining council for conciliation and arbitration. And clause 19 permits bargaining councils, under certain circumstances, to conciliate and arbitrate unfair discrimination disputes under chapter 2 of the EEA.[21]

According to the Memorandum of Objects, 'certain bargaining councils are refusing to exercise jurisdiction in respect of [BCEA s 73A] disputes',[22] notwithstanding the suggestion in *Nimfasha & others v Bokwe's Trading CC t/a Bokwe's Security Services* that bargaining councils are empowered, and enjoy jurisdiction, to determine BCEA s 73A claims.[23] Bargaining councils' refusal to assume jurisdiction in respect of EEA chapter 2 unfair discrimination claims follows on from *Motsomotso v Mogale City Local Municipality*.[24] In that matter, the Labour Appeal Court (LAC) stated that[25]

> 'only the CCMA may attempt to resolve an unfair discrimination dispute through conciliation. A bargaining council has no such power. The governing body of the CCMA also does not have the power to accredit a bargaining council to conciliate unfair discrimination disputes'.

In addition to reallocating some of the CCMA's caseload to bargaining councils,[26] the proposed amendments also eliminate some referrals which otherwise might burden the CCMA.

appellant in a case such as the present. Secondly, there is an urgent need to investigate the causes of the extraordinary length of time that it is now taking to dispose of all too many labour disputes. The legislature should consider this problem and develop legislative amendments accordingly.'

[20] NEDLAC Final Report n 6 above 24, under the heading 'Improving Efficiency of CCMA Functioning and Other Dispute Resolution Agencies'. Also see P Benjamin and D Collier 'Efficiency of labour market institutions: Towards effective dispute resolution and labour justice' NEDLAC Labour Law Series No 3 (CENTROW) (February 2024).

[21] The circumstances contemplated are where a collective agreement provides for bargaining council jurisdiction in unfair discrimination disputes or if the bargaining council is appropriately accredited in terms of s 127 of the LRA, which is correspondingly proposed for amendment under clause 20 of the LRAB.

[22] Memorandum of Objects on the Employment Laws Amendment Bill 11 (Memorandum of Objects ELAB).

[23] (2025) 46 *ILJ* 405 (LC).

[24] (2016) 37 *ILJ* 2803 (LAC). Curiously, the NEDLAC Final Report n 6 above 29 notes that some bargaining councils are also refusing to exercise jurisdiction over BCEA s 73A disputes even where their own collective agreements require that they determine such disputes.

[25] ibid para 21.

[26] There may be concern that, by reallocating cases away from the CCMA to the bargaining councils, those cases will suffer similar delays at the bargaining councils. This seems unlikely as the lead time in many of the bargaining councils is shorter than in the CCMA — see, for example, General Public Sector Services Bargaining Council (GPSSBC) Annual Report 2024/2025 https://gpssbc.org.za/home/annual-reports/accessed 8 April 2026; Bargaining Council for the Civil

https://doi.org/10.47348/ILJ/V47/i3a2

Clauses 6 and 35 of the LRAB confirm that unfair dismissal disputes arising from retrenchments may be referred directly to the Labour Court for adjudication after the retrenchment facilitation process has been concluded. This overturns the decision in *National Union of Metalworkers of SA obo Members v SA Airways Technical SOC Ltd*, in which Sutherland AJA held that, 'notwithstanding the facilitation process, a referral to conciliation is mandatory [in an unfair dismissal dispute]'.[27] His rationale was that, because of the 'functional distinction between facilitation and conciliation', a settlement may arise through conciliation that the parties did not consider during facilitation.[28] However, and as noted by the applicants in the Constitutional Court in *NUMSA v Industrial Oleo Chemical Products*,[29] if 'extensive facilitation … has not been able to resolve the impasse', it is unlikely that conciliation will.[30] The proposed amendments do away with what is often a futile exercise by the CCMA.

These proposed amendments will reduce the CCMA's caseload; though the extent of the reduction, and the effect on lead times, likely will not be considerable.[31] However, the proposed amendments certainly do address the anomaly that certain cases are reserved only for the CCMA to the exclusion of bargaining councils (which hold specialist industry knowledge).[32]

2.2 *Enforcement*

The enforcement of arbitration awards and court orders further protracts the finalisation of disputes, often interminably so. Mbiada notes that it is not uncommon for unscrupulous employers, after exhausting all avenues

Engineering Industry (BCCEI) Annual Report 2025 https://bccei.co.za/news/annual-reports/, accessed 8 April 2026; National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI) Annual Report 2020 https://www.nbcrfli.org.za/resources/annual-reports, accessed 8 April 2026.

[27] (2024) 45 *ILJ* 2524 (LAC) para 27.

[28] ibid para 24. Also see *Industrial Oleo Chemical Products v National Union of Metalworkers of SA* (2025) 46 *ILJ* 328 (LAC), [2025] 1 BLLR 1 (LAC); *Arcelormittal SA (Pty) Ltd v National Union of Metalworkers of SA* (2026) 47 *ILJ* 1300 (LAC), [2025] 2 BLLR 195 (LC); *Communication Workers Union & others v Mobile Telephone Networks (Pty) Ltd* (2024) 45 *ILJ* 1831 (LC) (*Mobile Telephone Networks*).

[29] Constitutional Court Case no CCT 367/24. The matter was argued in the Constitutional Court on 30 September 2025. As at the time of writing, judgment is still reserved.

[30] Applicants' written submissions para 44 https://collections.concourt.org.za/handle/20.500.12144/38623?show=fullaccessed 8 April 2026.

[31] As noted in the CCMA Annual Report 2024/2025, the vast majority of cases referred to the CCMA are unfair dismissal disputes. Reallocating some BCEA s 73A and EEA chapter 2 claims, and eliminating some largescale retrenchment referrals to conciliation, will not reduce the bulk of the CCMA's work. Whatever reductions there are will likely be counteracted by clause 36 of the LRAB which extends the CCMA's jurisdiction to determine certain automatically unfair dismissals.

[32] It is submitted that clause 36 of the LRAB should be amended accordingly in order that bargaining councils can also determine the selected automatically unfair dismissal disputes, so that the same anomaly does not persist. There are some inconsistencies in the memoranda of objects in this regard as well (see, for example, clauses 4 and 18 in the Memorandum of Objects on the Employment Laws Amendment Bill, and clauses 22, 39 and 40 of the Memorandum of Objects on the Labour Relations Amendment Bill).

https://doi.org/10.47348/ILJ/V47/i3a2

to overturn an unfavourable decision, to frustrate its implementation through a 'cat and mouse game' and 'Stalingrad tactics'.[33]

Clauses 16 and 22 of the LRAB seek to facilitate and expedite enforcement. Clause 16 requires that the CCMA assist low-earning employees with enforcement inter alia by briefing sheriffs, and paying sheriff fees.[34] And clause 22 provides that certified arbitration awards may be enforced in either the Magistrate's Court or the Labour Court.

These are undoubtedly positive developments that will serve to improve compliance with monetary awards. However, the proposed amendments do not account for compliance with reinstatement or reemployment orders, which are notoriously defied,[35] and difficult to enforce.[36]

Part of the difficulty arises in proving whether the employee tendered services, and whether the employer accepted the tender, in terms of the reinstatement or reemployment order.[37] In *SA Municipal Workers Union obo Koopman v City of Cape Town & others*,[38] Mlambo JA (as he then was) suggested an amendment to the LRA to address these difficulties:

'A simple suggestion might be a requirement that an employer be required to initiate communication with an employee after all review or appeal proceedings, if any. In the communication, the employer should be expected to inform the reinstated employee(s) by when they are expected to tender services, taking into account what the arbitration award or judgment has stated in relation to reinstatement or re-employment. This will provide both employers and employees with certainty and

[33] C Mbiada 'The cat and mouse game in the enforcement of arbitration awards: The interface between the Labour Relations Act amendments and Stalingrad litigation' (2025) 46 *ILJ* 2310. Also see, for example, *SACCAWU v Putini* [2025] ZALAC 11.

[34] Although the Supreme Court of Appeal (SCA) in *BG Bojosinyane and Associates v The Sheriff Vryburg and Another* [2023] ZASCA 174 para 28 held that sheriffs are 'not entitled to demand payment up front for fees and charges contemplated, but yet to be incurred, for the service and execution of court processes', many sheriffs still do so.

[35] The drafters of the LRA were alive to this concern. In the Explanatory Memorandum to the Draft Labour Relations Bill (1995) 16 *ILJ* 278 at 316, the drafters noted the 'reluctance to reinstate workers who have been unfairly dismissed because of the period of time that has passed between the date of dismissal and the date of the court order … [as] for the employer, who in the interim has engaged an alternative labour force in an endeavour to maintain production, the consequences of such an order, particularly in the case of mass dismissals, are self-evident'. Also see, for example, *Koko* n 19 above; *Coca Cola Sabco (Pty) Ltd v Van Wyk* (2015) 36 *ILJ* 2013 (LAC); *Cellucity (Pty) Ltd v Communication Workers Union obo Peters* (2014) 35 *ILJ* 1237 (LC).

[36] A reinstatement or reemployment order is an order ad factum praestandum, which is thus enforced through contempt of court proceedings that must be proved beyond a reasonable doubt (see *Kubeka & others v Ni-Da Transport (Pty) Ltd* (2021) 42 *ILJ* 499 (LAC) (*Kubeka*); *Techniflex CC & another v Maanaso & another* (2021) 42 *ILJ* 366 (LAC); *Compensation Solutions (Pty) Ltd v Compensation Commissioner & others* (2016) 37 *ILJ* 1625 (SCA); *Food & Allied Workers Union v In2Food (Pty) Ltd* (2014) 35 *ILJ* 2767 (LAC)).

[37] *Mavundla v Gotcha Security Services (Pty) Ltd* (2025) 46 *ILJ* 2073 (CC); *Kubeka* ibid; *City of Johannesburg & another v Independent Municipal & Allied Trade Union obo Erasmus & another* (2019) 40 *ILJ* 1191 (LAC).

[38] (2025) 46 *ILJ* 1132 (LAC).

https://doi.org/10.47348/ILJ/V47/i3a2

proof that a request for tender of services was made while keeping the onus on the employee to tender services.'[39]

We agree with the suggestion, which we submit should be tabled before NEDLAC when it considers comments and reconsiders the Amendment Bills.

2.3 *Efficiency through deterrence*

The third innovation is designed to discourage unnecessary postponements and 'hopeless cases'.[40]

Clause 21 proposes a postponement fee if a party's request to postpone an arbitration is 'frivolous or vexatious, or could reasonably have been avoided'. The proposed amendment is reminiscent of the costs ruling in *Communication Workers Union & others v Mobile Telephone Networks (Pty) Ltd & another*.[41] In that matter, the commissioner postponed the arbitration but ordered the applicants to pay the respondent's wasted costs and directed that the arbitration 'may only be rescheduled for hearing upon proof of payment'.[42] The LAC ostensibly accepted that such a ruling fell within the commissioner's powers under s 138(1) of the LRA.[43]

Respectfully, a reformulation of the proposed amendment that resembles the costs ruling in *Mobile Telephone Networks* may better serve the intended purpose.[44] The postponement fee, as contemplated in clause 21, may have the effect that parties treat postponements as purchasable (depending on the fee amount and the party's interest in postponement). It may also lead to commissioners granting postponements more readily — as it stands, rule 31(5) of the CCMA rules sets a high threshold for postponing an arbitration, providing that, 'there is no right to postponement'.[45]

The other approach to promote efficiency, particularly in the Labour Court, is to increase the odds of an adverse costs order against an

[39] ibid para 18.

[40] See O Rogers 'The ethics of the hopeless case' (December 2017) 30 (3) *Advocate* 46-51.

[41] (2020) 41 *ILJ* 2072 (LAC) (*Mobile Telephone Networks*).

[42] ibid para 7.

[43] ibid para 12. Section 138(1) provides: 'The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.'

[44] However, such an amendment would have to account for scenarios where frivolous postponements are occasioned by the employer, as the employer's interest is often against the continuation of a case. This may be obviated if, in situations where a frivolous postponement is occasioned by the employer, the arbitration is nevertheless rescheduled, but the employer is precluded from presenting a defence at the rescheduled hearing unless the postponement fee is paid beforehand.

[45] Commissioners generally seem to apply this high threshold. See, for example: *Anderson Transport (Pty) Ltd v Maqhina & others* (2003) 24 *ILJ* 522 (LC); *Seema and Fast Move Electrical* (2016) 37 *ILJ* 1778 (CCMA).

https://doi.org/10.47348/ILJ/V47/i3a2

unsuccessful party. In the NEDLAC meetings, the original proposal was to empower the Labour Court to order costs 'on the same basis as the High Court'. This proposal was moderated rather only to provide the Labour Court with a 'broader discretion' to determine costs.[46] Clause 28 of the LRAB, in turn, obliges the Labour Court to consider all relevant factors when deciding on costs.[47]

This proposed amendment sits uneasily with what the Constitutional Court has described as a 'constitutional imperative' not too readily to mulct a party with costs in labour disputes.[48] The court's aversion to cost orders is informed by its effect on the ongoing relationship between the parties,[49] the prospect of employees preferring unlawful industrial action over litigation,[50] and the chilling effect on efforts to vindicate employment rights.[51]

As it stands, clause 28 may be mistaken as pursuing the very same chilling effect that the Constitutional Court has decried.[52] We submit that the Memorandum of Objects clarifies that the amendment is not intended to depart from the established jurisprudence, but rather to reinforce the courts' power to censure parties who burden the courts with frivolous or vexatious, or otherwise ill-conceived, cases.[53]

However, even if all hopeless cases are rooted out under the threat of an adverse costs order, to match the inflow the Labour Court will still need to 'increase capacity and work smarter'.[54] That falls beyond the scope of the Amendment Bills.

[46] NEDLAC Final Report n 6 above 7.

[47] Clause 32 proposes a corresponding amendment in respect of the LAC.

[48] *UPSCO v SA Custodial Management (Pty) Ltd & others* (2021) 42 *ILJ* 2371 (CC) paras 24-37 (*UPSCO*).

[49] ibid. Also see *Association of Mineworkers & Construction Union v Minister of Mineral Resources & Energy & others* (2021) 42 *ILJ* 2158 (LAC); *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1991) 12 *ILJ* 1221 (A).

[50] ibid. At para 31, Khampepe J warned: 'When costs orders are too readily made against those who seek to vindicate their constitutionally entrenched labour rights in the specialist institutions created by the LRA, employers and employees alike may be left with no option but to resort to industrial action to remedy disputes that the LRA places beyond the purview of protected industrial action. That would cultivate unlawfulness and be inimical to the foundational value of the rule of law underpinning our democratic order.'

[51] *National Union of Mineworkers obo Masha & others v Samancor Ltd (Eastern Chrome Mines) & others* (2021) 42 *ILJ* 1881 (CC) para 31.

[52] In *UPSCO* n 48 above para 27, the court proclaimed that '[t]his laudable statutory goal [of providing a simple and accessible mechanism to vindicate labour rights] is eroded when the bearers of labour rights are faced with the threat of adverse costs orders'.

[53] See, for example, *UNISA v Socikwa & others* (2023) 44 *ILJ* 1785 (LC); *Mashishi v Mdladla & others* (2018) 39 *ILJ* 1607 (LC); *Kabe v Nedbank Ltd* (2018) 39 *ILJ* 1760 (LC).

[54] Myburgh n 17 above 719.

https://doi.org/10.47348/ILJ/V47/i3a2

3 Protecting Vulnerable Workers

The changing world of work has pushed many workers into precarity and vulnerability.[55] The extent of this was expressed by Froneman J in *Pretorius & another v Transport Pension Fund & another*:

> 'Fewer and fewer people are in formal employment; fewer of those in formal employment have union backing and protection. More and more people find themselves in the "twilight zone" of employment as supposed "independent contractors" in time-based employment subject to faceless multinational companies who may operate from a web presence.'[56]

The Amendment Bills propose measures to keep pace with these changes, enhancing protections for vulnerable employees, and extending recognition to workers on the periphery.[57] Three significant proposed amendments are the regulation and regularisation of 'zero hour' employment contracts, the increase of severance pay for retrenched employees, and the extension of limited rights to certain workers who fall outside the traditional definition of 'employees'.

3.1 *Zero hour contracts*

Zero hour employment contracts encompass a broad array of employment arrangements, common to all of which is that the employer does not guarantee a minimum number of hours of work.[58] Rather, the employee is scheduled for work — as work arises, or on the employer's whim. The employee is paid only for the hours worked, as determined solely by the employer. Because there is no guarantee of consistent work or payment, in one case of zero hour contracts, 'workers would go months without work [as the company] deemed necessary'.[59]

Business argued in favour of zero hour contracts as promoting job creation. The reality is less clear — employer efficiency gains are offset by employee insecurity, marked by volatile earnings and limited upwards mobility. Perhaps, most importantly, the arrangement entrenches

[55] Collier et al 'Workers who are (not) employees: Towards decent work, access to labour standards and social protection' NEDLAC Labour Law Series No 2 (June 2024) (CENTROW). Also see D du Toit 'Platform work and social justice' (2019) 40 *ILJ* 1; D du Toit and K Howson 'Protecting platform workers: Options and challenges' (2022) 43 *ILJ* 711; D Smit and G Stopforth 'An overview of categories of vulnerability among on-demand workers in the gig economy (part 1)' (2022) 26 *Law, Democracy and Development* 364; Smit and Stopforth 'An overview of categories of vulnerability among on-demand workers in the gig economy (part 2)' (2023) 27 *Law, Democracy and Development* 149; Benjamin 'Labour law beyond employment' (2012) *Acta Juridica* 21; J Theron 'Employment is not what it used to be' (2003) 24 *ILJ* 1256.

[56] (2018) 39 *ILJ* 1937 (CC) para 48.

[57] A Erwin 'Spotlight on the Labour Law Amendment Bill of 2025' *Industrial Relations Editorial — LexisNexis* (March 2026).

[58] Also referred to as 'on call contracts', 'min-max contracts', 'flexitime contracts' and 'if and when contracts'.

[59] D Webster 'Ruling deals crushing blow to zero-hours contracts' *Mail & Guardian* (3 December 2020) https://mg.co.za/news/2020-12-03-ruling-deals-crushing-blow-to-zero-hours-contracts/, accessed 9 April 2026.

https://doi.org/10.47348/ILJ/V47/i3a2

asymmetrical power relations, enabling employers to shift risk entirely onto employees.

Because of the inherent insecurity and uncertainty, zero hour contracts lend themselves to abuse and exploitation. This includes preventing an employee from coordinating their routine or expenses, and bypasses unfair dismissal protections in that employers can indefinitely not schedule the employee for work instead of formally dismissing the employee.[60] This constructive dismissal-esque conduct[61] has been aptly described as 'unemployment in the ironical guise of employment'.[62]

Zero hour contracts are not unique to South Africa, but have proliferated across numerous jurisdictions.[63] Because of their inherent simplicity, and employers' undeniable operational need for flexibility, Rideout notes that, 'the zero hours arrangement has defied even the skill of statutory draftsmen to devise some form of restriction'.[64]

Clause 2 of the ELAB negotiates these complexities by requiring employers to stipulate the maximum hours of work, the periods when the employee may be called on to work, and the period within which the employer must notify the employee of the work or that the work has been cancelled. Curiously, the Memorandum of Objects purports that clause 2 also requires the employer to stipulate 'the [employee's] guaranteed hours of work'.[65] Despite this, clause 2 does not contain such a provision. We submit that clause 2 should be rectified when NEDLAC considers comments.

The proposed amendments should alleviate the insecurity and abuse associated with zero hour contracts. If it does not, and zero hour contracts prove too elusive and resistant to regulation, NEDLAC may consider, among other things, additional protections such as: (a) specifically requiring a baseline number of hours per week or month; (b) a reasonable notice of shifts, and compensation that will be triggered by short-notice cancellations, alternatively a retainer payment for availability; or (c) banning zero hour contracts altogether, as some jurisdictions have done.[66] If banned, an employer's need for flexibility because of erratic

[60] D Damane and C Marumoagae 'Zero rated contracts in South Africa' (November 2021) *De Rebus* 11.

[61] In *Mkhutshulwa v Department of Health, Eastern Cape and Others* [2023] 8 BLLR 809 (LC), the Labour Court held that the employee had been constructively dismissed as she was left with no work to do for an extended period.

[62] A Adams, M Freedland, and J Prassl, 'The Zero-Hours Contract: Regulating Casual Work, or Legitimating Precarity?' https://www.europeanrights.eu/public/commenti/Commento_adams_e_altri.pdf accessed 9 April 2026.

[63] See, for example, in the United Kingdom: *Harpur Trust v Brazel* [2023] 2 All ER 113; *Flowers and Others v East of England Ambulance Service NHS Trust* [2020] 1 All ER 972.

[64] R Rideout, 'The lack of principles in labour law' (2000) 53 *Current Legal Problems* 409 at 424.

[65] Memorandum of Objects n 22 above at 2.

[66] See ss 67C-67H of New Zealand's Employment Relations Amendment Act 9 of 2016.

https://doi.org/10.47348/ILJ/V47/i3a2

work orders may be addressed in the same way many bargaining council main agreements regulate short time.[67]

These possible further regulations will address income volatility and unpredictability, while preserving flexibility. Given the proliferation of these types of arrangements across multiple jurisdictions though, a sensible regulatory approach, in current economic times, is a calibrated intervention ensuring both flexibility for employers and security and dignity for workers. As further protections are developed as required, these must, in time, include pro-rated access to leave, benefits, training and promotion opportunities.

3.2 *Severance pay*

Clause 4 of the ELAB proposes to increase the severance pay for a retrenched employee from one to two weeks' remuneration for each year of continuous service. In the NEDLAC meetings, labour representatives initially proposed increasing severance pay to four weeks, whereas business representatives opposed any increase. A compromise of two weeks was ultimately struck between labour and government.[68]

Clause 16 provides that the change will only apply prospectively. An employee's two week remuneration will only begin to accrue for each year of completed service after the amendment comes into effect.[69] In the final sentence of the corresponding explanation in the Memorandum of Objects, there is an erroneous reference to 'one' instead of 'two' weeks' severance pay. This should be corrected.

In addition to widening retrenched employees' safety net, the proposed amendment will almost certainly reduce the number of retrenchments.[70] It will not be as economical for employers to retrench, particularly where the rationale for retrenchment is increasing profit of already-profitable companies.[71] As a result, employers are more likely

[67] See for example the Metal and Engineering Industries Bargaining Council's Main Agreement 2020/2021 (as extended) 19.

[68] NEDLAC Final Report n 6 above 13-15.

[69] Memorandum of Objects.

[70] J Botha in 'Labour Law Amendment Bill 2026: Legislative Developments and Economic Implications' (2 March 2026) https://www.polity.org.za/article/labour-law-amendment-bill-2026-legislative-developments-and-economic-implications-2026-03-02, accessed 9 April 2026, advises that companies may not be able to engage in restructurings as periodically as before because of the amendment.

[71] Increasing profit, and related objectives, have been recognised as a legitimate operational requirement and a fair reason to retrench. See B Ramji, J Phillips, and I Bassier 'Exploring the idea that increasing profits is a legitimate operational requirement: Revisiting a twenty-year-old impulse' 140 *SALJ* 3 (2023) 521; *National Union of Metalworkers of SA & others v Fry's Metals (Pty) Ltd* (2005) 26 *ILJ* 689 (SCA); *General Food Industries Ltd v Food & Allied Workers Union* (2004) 25 *ILJ* 1260 (LAC).

https://doi.org/10.47348/ILJ/V47/i3a2

to regard retrenchment as a measure of last resort, as the jurisprudence prescribes.[72]

3.3 *Dependent contractors*[73]

There is growing recognition that, contrary to the traditional dichotomy, relationships of work 'exist on a continuum between pure employee and pure independent contractor'.[74] Clause 46 of the LRAB moves the needle along the employment continuum. It proposes the addition of a new schedule — schedule 11 — to the LRA which extends the definition of 'employee' and grants those employees certain rights.

The NEDLAC Report records that, after discussions about this proposal, 'the parties agreed that the issues raised … were more complex than anticipated',[75] and enlisted the assistance of the Centre for Transformative Regulation of Work (CENTROW), a research unit at the University of the Western Cape, to conceptualise the proposed amendments.[76]

Examples of vulnerable workers, identified by CENTROW, include supermarket grocery delivery drivers, e-hailing drivers and domestic services sector workers.[77] Attempts by these workers to gain recognition as employees under the statutory definition have thus far proved unsuccessful;[78] although there have only been a few attempts — perhaps in part because, as noted in one study, '[some] gig workers are

[72] See *Ndaba v SA Mint (RF) (Pty) Ltd* (2025) 46 *ILJ* 964 (LC), and the cases referred to therein, including *Chemical Workers Industrial Union & others v Algorax (Pty) Ltd* (2003) 24 *ILJ* 1917 (LAC), [2003] 11 BLLR 1081 (LAC); *Oosthuizen v Telkom SA Ltd* (2007) 28 *ILJ* 2531 (LAC) 2007, [2007] 11 BLLR 1013 (LAC); *Mbekela v Airvantage (Pty) Ltd* [2021] ZALAC 47.

[73] The 2018 Resolution of the International Conference of Labour Statisticians (4ICLS/20/2018/ Resolution 1) defines 'dependent contractors' as 'workers who have contractual arrangements of a commercial nature (but not a contract of employment) to provide goods and services for or through another economic unit. They are not employees of that economic unit, but are dependent on that unit for organization and execution of the work, income, or for access to the market. They are workers employed for profit, who are dependent on another entity that exercises control over their productive activities and directly benefits from the work performed by them.'

[74] See the judgment of the British Columbia Supreme Court in *Ursic v Country Lumber Ltd* 2025 BCSC 970 para 24. Also see *TCF Ventures Corp v The Cambie Malone's Corporation* 2017 BCCA 129; *Marbry Distributors Ltd v Avrecan Int Inc* 1999 BCCA 172. In a judgment of the District Court for the Northern District of California, *Cotter v Lyft Inc* 60 Supp 3d 1067 (ND Cal 2015) 1081, the court compared the categorisation of work either as one of employment or independent contracting as 'handing [the jury] a square peg and asking [them] to choose between two round holes'.

[75] NEDLAC Final Report n 6 above 18-19.

[76] See Collier et al 'Workers who are (not) employees: Towards decent work, access to labour standards and social protection' (June 2024) NEDLAC Labour Law Series No 2 (CENTROW); Collier and A Osiki 'Remote and hybrid work(ers): Considerations for regulating remote working arrangements and a code of good practice for remote work' (2024) NEDLAC Labour Law Series No 3 (CENTROW).

[77] Collier NEDLAC Labour Law Series No 2 ibid 13-14.

[78] *Uber SA Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers & others* (2018) 39 *ILJ* 903 (LC) (*Uber SA*); *Athur/RTT Group (Pty) Ltd* [2021] 6 BALR 610 (CCMA); *Mokhutswane v Uber SA (Pty) Ltd* [2019] ZANCT 64; *Mokhutswane v Uber SA (Pty) Ltd* [2019] ZANCT 137 (on appeal).

https://doi.org/10.47348/ILJ/V47/i3a2

ambivalent about becoming employees, particularly where employment conditions are poor or poorly enforced'.[79] Instructively though, the Casual Workers Advice Office, which represents many non-standard workers, has campaigned for the full complement of employment rights as enjoyed by standard employees.[80]

Clause 46 proposes a new category of employee, defined as 'any natural person who works for a person that is not a client or customer'. This is intended to target 'dependent contractors' — individuals who work independently, but are economically dependent on the party for whom they work. This may include, for example, a home-based textile worker whose only income is from freelance orders to sew garments for a local manufacturer.[81]

Respectfully, the proposed definition is vague and risks misinterpretation. Maloka and Okpaluba[82] suggest borrowing from the Ontario Labour Relations Amendment Act 1975 (OLRAA),[83] which defines a 'dependent contractor' as

> 'a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he or she is in a position of economic dependence upon, and under an obligation to perform duties for, that person more

[79] R Castel-Branco in 'Who counts as a worker? The politics of claim-making in Africa's gig economy' (December 2025) 'Future of Work(ers)' SCIS Working Paper 76 explains the often contradictory demands of gig workers: 'One of the main challenges of standard-setting processes is that gig workers often embody contradictory class locations. Their interests may be aligned with those of labour in one moment and with those of capital in the next. On the one hand, this reflects the broader social relations of production. In contexts where standard employment is the exception rather than the norm, workers often cobble together a livelihood from a multiplicity of activities, and flexibility is seen as essential in combining life roles. Consequently, gig workers are ambivalent about becoming employees, particularly where employment conditions are poor or poorly enforced. In the e-hailing sector for instance, some workers join the platform because they have no other option, while others are looking for an escape from the drudgery and discrimination of salaried employment. On the other hand, it reflects the contradictory nature of the labour process itself. Returning to e-hailing, some platform workers are aspiring fleet owners while others are carless drivers. As a result of contradictory class locations, workers' political strategies and demands are not always straightforward.'

[80] Casual Workers Advice Office (CWAO) 'Down with the Labour Amendments Bill (2025)' https://cwao.org.za/news-article.asp?ID=702, accessed 10 April 2026.

[81] C van der Westhuizen 'Trade and poverty: A case study of the SA clothing industry' (August 2007) 31 *Studies in Economics and Econometrics* 109.

[82] T Maloka and C Okpaluba 'The dependent contractor: A missing piece in the *SITA* test and the definition of employee in the LRA' (2021) 42 *ILJ* 709.

[83] The Ontario Labour Relations Amendment Act 1975 c 37 (OLRAA).

https://doi.org/10.47348/ILJ/V47/i3a2

closely resembling the relationship of an employee than that of an independent contractor'.[84]

However the definition is formulated, it differs substantively from the statutory definition of an employee in s 213 of the LRA, perhaps most significantly in that the schedule 11 definition does not presuppose an employment contract between the parties.[85]

An important distinction which CENTROW draws is between dependent contractors and disguised employment.[86] Clause 46 ostensibly contemplates dependent contractors who do not qualify under the LRA s 213 definition because of the degree of control and autonomy which they exercise. It does not include the situation where the true nature of the relationship is one of employment but is disguised to look otherwise. In *Uber SA*, Van Niekerk J (as he was then) left open the question whether e-hailing drivers, and similarly positioned workers, are actually disguised LRA s 213 employees.[87] Clause 46 should not be misinterpreted as answering this question.

Schedule 11 employees would be entitled to exercise collective labour rights,[88] including the right to freedom of association, engaging in collective bargaining and the right to strike. However, there are very few individual labour rights available to schedule 11 employees — only the right against automatically unfair dismissals for exercising the collective labour rights to which they are entitled.[89] This leaves open much unregulated terrain. For example, under schedule 11, an

[84] OLRAA s 1(1)*(ga)*. This definition is unwieldy but, importantly, articulates economic dependence as the central feature of dependent contracting, which clause 46 excludes. Benjamin, in 'An accident of history: Who is (and who should be) an employee under South African labour law' (2004) 25 *ILJ* 787 at 803, explains that economic dependence 'relates to the entrepreneurial position of the person in the marketplace. An important indicator that a person is not dependent economically is that he or she is entitled to offer skills or services to persons other than his or her employer. The fact that a person is required by contract to only provide services for a single "client" is a very strong indication of economic dependence. Likewise, depending upon an employer for the supply of work is a significant indicator of economic dependence. A concrete example which highlights the significance of economic dependence as a factor is the position of "homeworkers" who undertake work for manufacturers in the clothing industry'.

[85] *Universal Church of the Kingdom of God v Myeni & others* (2015) 36 *ILJ* 2832 (LAC). Also see *Fleet Africa (Pty) Ltd v Nijs* (2017) 38 *ILJ* 1059 (LAC); *Phera v ELRC & others* (2012) 33 *ILJ* 2839 (LAC).

[86] Collier n 55 above 22-23. The ILO Resolution (2006) states that a 'disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or true legal status as an employee'.

[87] *Uber SA* n 78 above para 98: 'Finally, it warrants mention (and emphasis) that this judgment does no more than conclude that on the facts, the drivers were not employees of Uber SA, and that they therefore have no right to refer an unfair dismissal dispute to the CCMA as against Uber SA. Whether the drivers are employees of Uber BV (either alone or in a co-employment relationship with another or other parties), or whether they are independent contractors of Uber BV, is a matter that remains for decision on another day. It was not the question before the commissioner, and it is not the question before this court.'

[88] See ILO: Freedom of Association and Protection of the Right to Organise Convention 87 of 1948; and ILO: Right to Organise and Collective Bargaining Convention 98 of 1949.

[89] LRA s 187(1)*(a)-(c)*.

https://doi.org/10.47348/ILJ/V47/i3a2

employee will not have any recourse if they are victimised or harassed (but not dismissed) for exercising the rights conferred on them; although incongruously, recourse would be available to LRA s 213 employees in the same scenario.

It bears noting though that there was much debate at NEDLAC about how, and to what extent, dependent contractors should be protected. Given the different approaches in other jurisdictions, and the circumstances and complexity of our own jurisdiction, an incremental approach was preferred, commencing with recognition and organisational and collective rights.[90] Although limited, this is a significant start.

4 Unfair Dismissal Amendments

The most controversial of the amendments is the proposed reform of the unfair dismissal regime.[91] Clause 33 of the LRAB proposes the exclusion of new employees from the right against unfair dismissal.[92] Clause 35 proposes that disputes about procedural unfairness in largescale retrenchments be processed in the same manner as substantive unfairness disputes. And clauses 37 and 38 propose to preclude reinstatement, and limit compensation, for unfairly dismissed high-earning employees, unless the dismissal was automatically unfair.

The proposals, particularly the introduction of qualifying periods for new employees and the restrictions on protections for high-earning employees, are intended to relieve labour market sclerosis and stagnation.[93] It is hoped that granting impunity for the dismissal of unsuitable new employees and the capping of consequences for dismissing high-earning employees will 'encourage hiring new employees, particularly young employees without a work history', and ultimately prompt economic growth.[94] Both of these measures will also immediately reduce the number of unfair dismissal disputes, and relieve fiscal burdens on the CCMA and bargaining councils.

Van Eck, Newaj and Mashele have already considered the proposed amendments to the unfair dismissal regime.[95] We agree in large part

[90] Final NEDLAC Report n 6 above.

[91] Some of the proposed amendments edge towards Martin Brassey's suggestion, in 'Fixing the laws that govern the labour market' (2012) 33 *ILJ* 1, to abolish the unfair dismissal regime entirely.

[92] An employee is regarded as new during their first three months of employment or during a longer period of probation. It is unclear from clause 33 whether protections against automatically unfair dismissals are still available to new employees. We submit that they should be, and that the clause should be accordingly amended to clarify this.

[93] P Benjamin and D Collier 'Efficiency of labour market institutions: towards effective dispute resolution and labour justice' (February 2024) NEDLAC Labour Law Series No 1 (CENTROW). Also see clause 2 of the LRAB which proposes an exemption for new employers from collective agreements concluded in a bargaining council.

[94] NEDLAC Final Report n 6 above 8-10.

[95] S van Eck, K Newaj and Z Mashele 'Reflections on proposed law reforms for unfair dismissal' (2025) 46 *ILJ* 2257.

https://doi.org/10.47348/ILJ/V47/i3a2

with their considered analysis,[96] which we do not intend to reproduce here. We particularly endorse their recommendation, which follows on from Halton Cheadle's,[97] that the term 'small business' be defined in s 213 of the LRA. The reference to small businesses in item 3 of the Code of Good Practice: Dismissal has stirred confusion, which many hoped would be clarified through the LRAB. Those authors propose that businesses with 10 or fewer employees be regarded as small. We fully agree.[98]

5 Anomalies in Precedent and Practice

As with the previous periodic amendments to labour legislation, the Amendment Bills take stock of, and seek to address, issues arising from recent judgments and patterns developing in practice. These include:

- providing for parental leave of four months, which may be shared between both parties to the parental relationship.[99] This amendment responds to paragraph 4 of the Constitutional Court's order in *Van Wyk & others v Minister of Employment & Labour (Centre for Human Rights, University of Pretoria & others as Amici Curiae); Commission for Gender Equality & another v Minister of Employment & Labour*;[100] amending s 10(6)(*a*A) of the EEA, which currently limits the CCMA's harassment jurisdiction to disputes about sexual harassment. Clause 18 of the ELAB proposes that the CCMA be empowered to arbitrate all harassment disputes based on any prohibited ground. This addresses the arbitrary distinction between types of harassment which, in practice, often intersect;[101]
- excluding deferred payments, such as contractual bonuses, in the calculation of wages for the purposes of the NMWA.[102] On the approach adopted in *Quantum Foods (Pty) Ltd v Jacobs NO*

[96] Save for a few differences of opinion regarding the Code of Good Practice: Dismissal which does not warrant discussion here.

[97] 'Regulated flexibility: Revisiting the LRA and the BCEA' (2006) 27 *ILJ* 663. At 699, he comments, 'Any adaptation of the law to meet the needs of small business raises the difficulty of the definition of "small business" … the simplest mechanism is to define "small" by reference to numbers.'

[98] With reference to s 191(12)*(c)* of the LRA.

[99] ELAB clause 3.

[100] (2025) 46 *ILJ* 2811 (CC). There has been some criticism of the judgment and the proposed amendment. Nthabiseng Nhlapho argues that shared parental leave may be abused by fathers, leaving birth mothers with less leave than required. To militate against this, parental leave (of 4 months) for birth mothers should be fixed (see 'Why birth moms lose in parental leave ruling' *News 24* (7 October 2025) www.news24.com/opinions/columnists/nthabi-nhlapo-why-birth-moms-lose-in-parental-leave-ruling-20251007-0573, accessed 27 April 2026.

[101] Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace GN 1890 *GG* 46056 of 18 March 2022.

[102] ELAB clauses 23 and 24.

https://doi.org/10.47348/ILJ/V47/i3a2

& others,[103] it is possible that an employee's daily take-home falls short of the prescribed minimum wage (in anticipation of a deferred payment). The proposed amendment negates this decision which, respectfully, appears at odds with the purpose of the NMWA;[104]

- obliging trade unions to conduct secret ballots every three years to confirm majority support for an existing closed shop agreement and its extension, failing which the agreement lapses. This will hopefully curb the growing number of violent strikes and protests in frustration against unrepresentative trade unions which dominate only by virtue of a historic closed shop agreement;[105]
- eliminating the possibility for socio-economic protest action on issues that were referred to NEDLAC for consideration more than two years prior.[106] In *Congress of SA Trade Unions v Business Unity SA*, the LAC held that the right to embark on protest action does not go stale.[107] Notwithstanding this, the Code of Good Practice: Protest Action to Promote or Defend Socio-Economic Interests of Workers provides that protest action should nevertheless 'not be unduly delayed and should be conducted within a reasonable time'.[108] The amendment proposes two years as the set expiration date;
- allowing for Labour Court judges to act in the LAC.[109] There

[103] (2024) 45 *ILJ* 71 (LAC) (*Quantum*).

[104] The Memorandum of Objects above explains the rationale for the proposed amendment and the issue with *Quantum*, as follows: 'Clauses 23 and 24 of the Bill proposes [sic] to amend sections 4 and 5 of Act No 9 of 2018 to clarify that when calculating whether there is compliance with the minimum wage, deferred payments made to employees are not taken into account. This is consistent with the purpose of the NMWA, which is to provide for the minimum take-home pay that employees are entitled to receive. This amendment achieves this purpose by clarifying the relationship between the NMWA and the provisions in the BCEA regulating the payment of remuneration and by specifying that deferred payments do not form part of the employee's wage for purposes of compliance with the national minimum wage. The necessity for this amendment emerges from a Labour Appeal Court decision that has raised the prospect of the purpose of the NMWA being undermined in this manner and employees receiving take-home pay below the national minimum wage.'

[105] *New Kleinfontein Goldmine (Pty) Ltd v Association of Mineworkers & Construction Union & others* (2024) 45 *ILJ* 159 (LC); *SA Transport & Allied Workers Union v Servest Security (Pty) Ltd & another* (2024) 45 *ILJ* 1308 (LC); N Simelane and N Maseko 'Gold One mine "hostage situation": South African miner feared for his life' *BBC News* (26 October 2023) https://www.bbc.com/news/world-africa-67215919, accessed 11 April 2026; E Stoddard 'NUM terminates closed-shop agreement at East Rand's Gold One as violence continues' *Daily Maverick* (15 November 2023) https://www.dailymaverick.co.za/article/2023-11-15, accessed 11 April 2026. These strikes and protests stand in stark contrast to CJ Albertyn's prediction in the 1989 article, 'Freedom of association and the morality of the closed shop' (1989) 10 *ILJ* 981, that the consequence of closed shop agreements is 'likely less violence and intimidation during strikes, more varied debate within union meetings, and possibly an earlier end to industrial action'.

[106] LRAB clause 11.

[107] (2021) 42 *ILJ* 490 (LAC). For a further discussion on the case, see ME Manamela 'Protest action within the ambit of the Labour Relations Act 66 of 1995: *COSATU v Business Unity of South Africa* (2021) 42 *ILJ* 490 (LAC)' (2022) *Obiter* 605.

[108] RN 2433 *GG* 46839 of 2 September 2022, item 11(2).

[109] LRAB clause 30.

https://doi.org/10.47348/ILJ/V47/i3a2

have been longstanding calls for this amendment because, although there are High Court judges with labour law expertise, 'it appears anomalous that specialist judges of the Labour Court could not be considered'.[110] Judges Matter also commented that Labour Court judges, who are 'undoubtedly specialists in the field', should be eligible to act in the LAC.[111] The proposed amendment's upshot will likely be a shortage of judges in the Labour Court, which is already one of the worst offending courts in respect of late judgments.[112] The inevitable shortfall should be anticipated by capacitating the Labour Court and through the appointment of competent practitioners to act in the court; and

- clarifying that interpretation and application disputes, as contemplated inter alia in s 24 of the LRA, include disputes about compliance.[113] Following *Hotel & Other Services Personnel Trade Union of SA obo Tshambi v Department of Health, KZN*,[114] parties were obliged to follow a two-stage process to ensure compliance with the proper interpretation of a collective agreement. The proposed amendment simplifies and streamlines this process.[115]

There is one further anomaly which was not identified for amendment by NEDLAC, but which may be worth consideration as an amendment in the LRAB.

Sections 198A, 198B and 198C of the LRA regulate low-earning employees engaged in atypical forms of employment — through temporary employment services, on a fixed term contract or on a part-time basis. Under certain circumstances, these atypical employees become deemed typical employees of the employer. However, although the deeming occurs ex lege,[116] the employees often are not treated as typical employees, and must refer a dispute to arbitration in terms of s 198D(1) of the LRA. In *Bata SA (Pty) Ltd v SA Clothing & Textile*

[110] S Gaibie 'Chapter 3: Dispute Resolution' in *Labour Relations Law — A Comprehensive Guide* 7 ed D du Toit (ed), S Godfrey and C Cooper et al (2023) 212. It is not insignificant that the proposal for the amendment was introduced by the Judge President (NEDLAC Final Report n 6 above).

[111] M Benjamin 'The role and importance of the Labour Court' 29 September 2023 https://www.judgesmatter.co.za/opinions/the-role-and-importance-of-the-labour-court/ accessed 11 April 2026.

[112] Reserved Judgment Report for the Office of the Chief Justice (20 March 2026).

[113] LRAB clause 43.

[114] (2016) 37 *ILJ* 1839 (LAC).

[115] The clarification is sorely needed in light of contradictory and confusing judgments about the extent of issues covered by interpretation and application disputes. In *Association of Mineworkers & Construction Union v UASA — the Union obo Members & others* (2021) 42 *ILJ* 1893 (LAC), the LAC held that a dispute about the validity of a collective agreement does not resort under an interpretation and application dispute. In *National Union of Construction Workers v Oranje Mynbou en Vervoer Maatskappy Bpk* [2000] 2 BLLR 196 (LC), the Labour Court held that a collective agreement can be enforced as part of an interpretation and application dispute.

[116] *Assign Services (Pty) Ltd v National Union of Metalworkers of SA & others* (2018) 39 *ILJ* 1911 (CC) para 69.

https://doi.org/10.47348/ILJ/V47/i3a2

Workers Union & others,[117] the LAC determined the scope of relief available under s 198D(1) in the face of conflicting Labour Court judgments and arbitration awards.[118]

Waglay JP held that s 198D(1) only empowers the appointed commissioner to issue a declarator, 'confirming the status of the employee and … that the employee has been subjected to differential treatment without justification'.[119] It does not empower the commissioner to order substantive relief to resolve the unjustifiable differential treatment.[120] Rather, a separate dispute must be referred for relief on this score. Bosch describes this as 'artificial' and 'antithetical to expeditious dispute resolution',[121] and criticises the interpretation adopted as giving rise to several anomalies.[122] We consider two below.

First, there are numerous forms of unjustifiable differential treatment that defy characterisation as a cognisable claim. While some may be pursued as unfair labour practices,[123] many may not. For example, in *Adcorp*, the deemed employees were prohibited from wearing the same uniforms as other employees. And in *Choenyane v SDV SA t/a Bollore Transport and Logistics (Pty) Ltd*, the deemed employees were

[117] (2024) 45 *ILJ* 1541 (LAC) (*Bata*).

[118] *SA Clothing and Textile Workers Union obo Members v Williams de Beer NO & others* (2021) 42 *ILJ* 2661 (LC); *Adcorp Workforce Solutions (Pty) Ltd v CCMA* (2021) 42 *ILJ* 2411 (LC) (*Adcorp*); *Unilever SA (Pty) Ltd v CCMA & others* (2021) 42 *ILJ* 411 (LC); *Passenger Rail Agency of SA v CCMA & others* (2020) 41 *ILJ* 961 (LC); *Nama Khoi Local Municipality v SA Local Government Bargaining Council & others* (2019) 40 *ILJ* 2092 (LC); *National Union of Metalworkers of SA obo Louw & others and Eskom Holdings SOC* (2019) 40 *ILJ* 668 (CCMA); *National Union of Metalworkers of SA obo Gugwana and RCG Engineering CC t/a Secant Engineering* (2018) 39 *ILJ* 953 (CCMA); *Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd & another* (2015) 36 *ILJ* 2408 (CCMA).

[119] *Bata* n 117 above para 38.

[120] This was informed, it appears, by Waglay JP's concern, at paras 24 and 36, that an employee may circumvent satisfying the requirements for substantive relief if they refer a s 198D(1) dispute.

[121] C Bosch 'The shoe doesn't fit: Bata and the rights in sections 198A, 198B and 198C of the Labour Relations Act' (2026) 47 *ILJ* 47. In *Victor & others v Chep SA (Pty) Ltd & others* (2020) 41 *ILJ* 2802 (LAC) employees referred a dispute to the CCMA in terms of s 198D(1), but only sought a declarator, and no substantive relief. The LAC ultimately confirmed their status as deemed employees. However, the employer did not give effect to the declaratory order. Instead, it restructured its operations ostensibly to frustrate employees' subsequent efforts to pursue equalisation — see *Chep SA (Pty) Ltd & others v Simphiwe Zungu & others* (LC) 6 May 2026 case no 2026-077398 unreported; CWAO 'Chep Strike Update — 29 March 2026', available at https://www.cwao.org.za/news-article.asp?ID=706, accessed 12 April 2026; K Mutandiro 'Strike at Australian-owned plant in Boksburg: Workers want to be recognised as permanent staff' 22 August 2025 https://groundup.org.za/article/workers-down-tools-at-australian-owned-plant-in-boksburg/, accessed 12 April 2026. This illustrates the shortcomings and inefficiencies of limiting s 198D(1) of the LRA to declaratory relief, which offers little protection, and protracted litigation, for vulnerable employees.

[122] The judgment has also been criticised by some as an instance of 'counter-purposive interpretation' as it seems to undermine the objectives and purpose of ss 198A, 198B and 198C.

[123] Bosch n 121 above at 56 states it is anomalous for employees to obtain substantive relief for one right by relying on another right.

https://doi.org/10.47348/ILJ/V47/i3a2

denied advantages granted to other employees.[124] Relief for these kinds of differential treatment are not readily available through the unfair labour practice regime. Employees are thus 'left to languish without a remedy',[125] contrary to the maxim ubi jus ibi remedium.

Second, the subsequent referral for substantive relief, following an earlier award that the deemed employee has been unjustifiably treated differently, is reduced to a mere formality. The second commissioner is only left to determine relief and/or quantum, as the first commissioner has already pronounced on the differential treatment and its unfairness. This strikes one as absurd.

To address these anomalies, we propose that s 198D(1) of the LRA be amended to accord with the objects and purpose of ss 198A, 198B and 198C, as set out in clauses 37–38 of the Memorandum of Objects on the Labour Relations Amendment Bill, 2012.[126] We have taken the (presumptuous) liberty to draft an initial formulation of the proposed amendment for possible consideration:

'198D General provisions applicable to sections 198A to 198C —
(1) Any dispute regarding sections 198A, 198B and 198C may be referred to the Commission or a bargaining council with jurisdiction for conciliation and, if not resolved, to arbitration, in terms of which a commissioner may make any appropriate arbitration award in terms of section 138(9), including:

(a) a declaratory order;

(b) an order that the deemed employer treat the deemed employee on the whole not less favourably than another employee who performs the same or similar work for the deemed employer, unless there is a justifiable reason for the disparity; and

(c) an order granting any appropriate relief in terms of section 193, section 73A of the Basic Conditions of Employment Act 75 of 1997, or section 48 of the Employment Equity Act 55 of 1998, provided that the requirements for obtaining such relief are satisfied, including that the dispute is referred within the stipulated timeframe as set out in the relevant corresponding provisions.'[127]

6 Conclusion

At the 1997 Labour Law Conference held in Durban, Karl Klare praised South Africa's labour legislation as an 'enormous achievement'. He opened his address by expressing his 'admiration for South Africa's

[124] GPRFBC38419 (3 October 2016) unreported award. The advantages that they were denied included the renewal of licences, to be provided with van assistants, to be paid during periods of suspension and to be allowed to leave work at 16h30 instead of 17h30. These advantages do not obviously constitute benefits as contemplated in *Apollo Tyres SA (Pty) Ltd v CCMA & others* (2013) 34 *ILJ* 1120 (LAC).

[125] Bosch n 121 above 56.

[126] Available at https://www.labour.gov.za/DocumentCenter/Bills/LRA%20bill16d-2012.pdf. Also see Bosch 'The proposed 2012 amendments relating to non-standard employment: What will the new regime be?' (2013) 34 *ILJ* 1631; T Cohen 'The effect of the Labour Relations Amendment Bill 2012 on non-standard employment relationships' (2014) 35 *ILJ* 2607.

[127] We also propose the deletion of s 198D(3) of the LRA.

https://doi.org/10.47348/ILJ/V47/i3a2

accomplishments in the labour field and with hope regarding your future'.[128] Of course, although an enormous achievement, regular reconsideration and development is required for the labour legislation to improve in achieving its objectives. We have noted some of the many ways the Amendment Bills seek to do this, and have noted some further changes that may more closely align with these objectives.

[128] K Klare 'The future of South African labour law: Some questions from the past and from afar' (1997) 18 *ILJ* 588.

https://doi.org/10.47348/ILJ/V47/i3a2

www.juta.co.za

ILJ0358

juta