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## LEGAL SUB COMMITTEE MEETING – 21 OCTOBER 2020

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### PROPOSED AMENDMENTS TO ELRC CONSTITUTION (PART C)

The following recommendations are based on difficulties encountered by ELRC Commissioners during arbitration proceedings.

#### 1. Right of Appearance of Candidate Attorneys

As the current rules read, only admitted attorneys and admitted advocates (legal practitioners) may appear and not candidate attorneys. This is highly problematic as the Legal Practice Act permits candidates to appear in all tribunals, councils and courts other than the High Court and Regional Court. For a long time the CCMA rules and most rules of councils provided that only legal practitioners may appear (thus by implication excluding candidate attorneys). The CCMA has now amended its rules to expressly permit candidate attorneys to appear.

Certain councils such as the Metal and Engineering Industries Bargaining Council (MEIBC) also permit candidate attorneys to appear. However, since the ELRC rules do not refer to candidate attorneys, and because a council is entitled to regulate its own procedures, candidate attorneys still cannot, despite the express permission in the Legal Practice Act and CCMA rules, appear before Commissioners in the ELRC.

This becomes very confusing for employees and candidate attorneys since they assume that since they can appear at the CCMA and because the Legal Practice Act allows them right of appearance, they can appear before all councils.

#### 2. Referral period for matters other than ULP and Dismissal

The rules and the Labour Relations Act (LRA) do not provide for the referral period in the case of disputes other than ULP and dismissal. Now the courts have provided that in such cases, the dispute must be referred within a reasonable time, which is generally 90 days. However, this silence in the rules and Act creates uncertainty and confusion amongst parties and Commissioners. Many of them do not know that even in such cases the referral must be made within a

reasonable period which is generally 90 days. To remove this uncertainty, the ELRC rules need to provide for this.

### **3. Discovery/Production of Documents**

There is no rule in the ELRC constitution that expressly permits Commissioners to direct a party to produce certain documents to the other side. The CCMA rules and rules of most councils contain such an express provision. Commissioners have always made such orders in terms of the doctrine of implied jurisdiction, however, it would be better if the rules expressly provide for that. Attorneys who read the ELRC rules see that there is no such provision and then assume that no Commissioner will make such an order. Due to this lack of definitive regulation, attorneys subpoena all and sundry (such as the provincial HOD) to bring these documents to the arbitration. This happened in a recent case in the Northern Cape that one of the ELRC Commissioners is currently dealing with. It is unreasonable to expect prominent figures such as provincial HODs to avail themselves to attend hearings and produce documents, when the same objective can be achieved through an order made by the Commissioner. It is therefore recommended that an amendment is made in this regard.

### **4. Wasted costs of the ELRC**

There is no rule in the constitution that permits the Council to direct a party to pay wasted costs of the ELRC. Such a provision was contained in the previous set of rules. It is understood that the ELRC has never truly enforced such costs orders, but most parties did not know this and that rule at least gave Commissioners some leverage, as parties were scared that if they fail to comply with orders or waste time, Commissioners could order them to pay costs of the ELRC. Hence, in order to serve as a deterrent, it is suggested that this rule is brought back again.

### **5. Results of failure to file statements of case/produce documents/etc.**

The rules provide that a Commissioner can direct parties to file a statement of claim or defence. However, if a party does not comply, there is practically nothing a Commissioner can do.

In some zoom hearings, Commissioners initially directed parties to provide written statements, but since they ignore this directive and Commissioners 3 with a default award if he/she is the defendant.

These powers are seldom, if ever used in private arbitrations, but because these provisions are there, the parties comply with the Commissioner's orders as they never know when these powers will be exercised. Usually a threat that these powers will be enforced unless a party complies within seven days, is sufficient to persuade parties to comply. In the ELRC this rule does not exist. A provision of this nature could be handy to force parties to comply with directives to produce documents/files (pdf bundles of documents) and provide written statements, etc.

## 6. Zoom Hearings

As the Council's intention is to eventually move over to zoom hearings in most cases in line with technological advancements, this has to be regulated in the rules. It needs to be provided that such hearings are accepted in the ELRC and in which cases such hearings will be appropriate and when not.

More importantly, the procedure that needs to be followed leading up to such hearings must be outlined. For example, in each and every case heard thus far through videoconferencing, there is always one person (sometimes more than one) who has problems in connecting and often it becomes clear that nobody has done a dry run with them before the hearing to test that the microphone works and that the Wi-Fi connection from the venue where he/she sits is suitable for zoom. This then results in delays as the person has to be guided through the process, often with hand signals and at times by involving the case management. More problematic is the fact that in each case most of the documents required in the arbitration are not supplied to case management, as a result the Commissioner does not have the documents when the matter commences.

Often, documents must still be scanned on the day of the hearing. Once that is done it must be emailed to case management who must then email it to the Commissioner. Sometimes these bundles are so long it takes ages to be delivered by email and when received, some pages are not paginated or pages are scanned upside down and often so many different pdf's are provided (instead of one or two) that it becomes a nightmare to navigate between all these bundles during the hearing on a laptop.

Another challenge is that sometimes representatives, witnesses or parties are unable to access the documents as they did not print or save the information received from the other side.

The ELRC informs parties in the notice of set down that they must provide the bundles by a given date, however, this directive is mostly ignored. Furthermore, there is no way in which the ELRC case management will know whether the pdf bundle which is provided is complete. Neither will case management know whether all the pdf bundles were also provided to all witnesses and to all the other parties in the case.

In face-to-face hearings this is not a major concern as the case stands down for a few minutes and photocopies are made for everyone. In zoom hearings this is no longer possible and it then takes ages to scan documents and get them to the other parties, witnesses and the Commissioner by email or drop box in the middle of an arbitration.

The recommendation in this regard is in line with 5 above, to compel parties to comply with directives to produce documents.

## 7. Quality Control

It would be prudent to expressly provide for the quality control of awards in the rules. In one of the cases of the GPSSBC, the court expressed that this was necessary. It therefore needs to be introduced in the ELRC rules as well. are not permitted to do anything if they fail to provide it, they stopped issuing such directives.

In private commercial arbitrations the rules provide that if a party fails to comply with the orders of a Commissioner, he/she is then sent a letter to comply within seven days, failing which the following can happen: (1) the Commissioner can direct him/her to pay wasted costs and/or, (2) the Commissioner can exclude him/her from further participation in the proceedings and dismiss the claim if he/she is the applicant and proceed.

## 8. Enforcement of Collective Agreements and of *BCEA* provision

In response to the ELRC's memorandum requesting submissions to amend the ELRC Constitution (Part C) the only submission I wish to make relates to enforcement dispute and that is to amend clause 69 to include similar wordings as contained in section 73 A of the Basic Conditions of Employment Act. Section 73A (1) of the BCEA provides "*Despite section 77, any employee or worker as defined in section 1 of the National Minimum Wage Act, 2018, may refer a dispute to the CCMA concerning the failure to pay any amount owing to that employee or worker in terms of this Act, the National Minimum Wage Act, 2018, a contract of employment, a sectoral determination or a collective agreement.*"

My recommendation is to insert the following wordings in clause 69. "*Despite clause 69.5 an educator may refer a dispute to the ELRC concerning the failure to pay an amount owing to that employee in terms of the Basic Condition of Employment Act, the Employment of Educators Act, the Personnel Administration Measures (PAM), any regulations or subordinate legislation promulgated by the Minister of Basic Education or MEC for Education in a respective Provinces where an educator is employed as it relates to conditions of service, a collective agreement and a contract of employment.*"

To be in line with the BCEA, I further suggest that we also insert similar wordings as contained in Section 73(4) and (5). I suggest that the following also be inserted "*The ELRC must appoint a panellist in terms of section 135 of the Labour Relations Act to attempt to resolve by conciliation any dispute that is referred to the ELRC in terms of clause 69. The ELRC must commence the arbitration of a dispute referred in terms of this sub-clause immediately after certifying that the dispute remains unresolved in terms of section 135 (5).*"

The reason for this suggestion is remove any technicalities or jurisdictional challenges where an educator or an employee falling under the jurisdiction of the ELRC seeks to claim monies that is owing to him, be it salary or any other amount that is due and payable.

9. Should an arbitrating commissioner not be able to conclude an arbitration allocated to him/her, the General Secretary has a discretion to appoint a new commissioner to arbitrate the pending case.