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ALGEMENE KENNISGEWINGS

KENNISGEWING 538 VAN 1990

DEPARTEMENT VAN MANNEKRAG

AANBEVELINGS VAN DIE NASIONALE MANNEKRAGKOMMISSIE OOR DIE VOORGESTELDE WYSIGINGS VAN DIE WET OP ARBEIDSVERHOUDINGE

In opdrag van mnr. Eli Louw, Minister van Mannekrag, word die Aanbevelings van die Nasionale Mannekragkommissie oor die voorgestelde Wysigings van die Wet op Arbeidsverhoudinge, soos gepubliseer in Kennisgewing 420 wat in die *Staatskoerant* van 23 Mei 1990 verskyn het, in Bylae hieronder vir algemene inligting en kommentaar gepubliseer.

Kommentaar moet skriftelik en in tweevoud ingedien word en gestuur word aan die Direkteur-generaal: Mannekrag, Privaatsak X117, Pretoria, teen nie later nie as 31 Julie 1990.

BYLAE

NASIONALE MANNEKRAGKOMMISSIE

Aan: Mnr. Eli Louw, LP, Minister van Mannekrag.

Ek het die eer om die aanbevelings van die Nasionale Mannekragkommissie oor die SACCOLA/COSATU/NACTU-ooreenkoms aan u voor te lê.

F. S. BARKER,

Waarnemende Voorsitter.

PRETORIA.

8 Junie 1990.

AANBEVELINGS DEUR DIE NMK OOR DIE SACCOLA/COSATU/NACTU-OOREENKOMS

1. Belangrikheid van die ooreenkoms

Hierdie ooreenkoms verteenwoordig 'n besonder belangrike deurbraak in die verhoudinge tussen die Raadplegende Komitee van Suid-Afrikaanse Werkgewers insake Arbeidsaangeleenthede (SACCOLA) en die Congress of South African Trade Unions (COSATU)/

GENERAL NOTICES

NOTICE 538 OF 1990

DEPARTMENT OF MANPOWER

RECOMMENDATIONS OF THE NATIONAL MANPOWER COMMISSION ON THE PROPOSED AMENDMENTS TO THE LABOUR RELATIONS ACT

By direction of Mr Eli Louw, Minister of Manpower, the Recommendations of the National Manpower commission on the proposed Amendments of the Labour Relations Act, as published under Notice 420 appearing in the *Government Gazette* of 23 May 1990, are published in the Schedule hereto for general information and comment.

Comments should be submitted in writing and be in duplicate, and should be sent to the Director-General: Manpower, Private Bag X117, Pretoria by not later than 31 July 1990.

SCHEDULE

NATIONAL MANPOWER COMMISSION

To: Mr Eli Louw, MP, Minister of Manpower.

I have the honour to submit to you the recommendations of the National Manpower Commission on the SACCOLA/COSATU/NACTU agreement.

F. S. BARKER,

Acting Chairman.

PRETORIA.

8 June 1990.

RECOMMENDATIONS BY THE NMC ON THE SACCOLA/COSATU/NACTU AGREEMENT

1. Importance of the agreement

This agreement represents a particularly important breakthrough in the relations between the South African Employers' Consultative Committee on Labour Affairs (SACCOLA) and the Congress of South African Trade Unions (COSATU)/National Council of

National Council of Trade Unions (NACTU) vakbondbeweging. In breër verband beteken dit egter 'n nog groter deurbraak. Dit toon naamlik dat daar wel die moontlikheid bestaan van kompromieë oor besonder kontroversiële aangeleenthede. Verder was die COSATU/NACTU vakbondbeweging vantevore ook nie bereid om aan die NMK prosesse deel te neem nie. Hierdie houdings het drasties verander, soos blyk uit die feit dat verteenwoordigers van hierdie vakbondfederasies die NMK vergadering van 23 Mei bygewoon het om hul standpunt te stel, en die verskeie ontmoetings wat met u en die Direkteur-Generaal gehou is.

Die NMK het dus waardering daarvoor dat die regering die ooreenkoms dringend oorweeg. Dit beteken egter nie dat die ooreenkoms noodwendig net so gerubberstempel moet word nie. Uit die aard van die saak moet die NMK en uiteindelik die regering steeds die diskressie behou om aanpassings aan die ooreenkoms aan te bring of selfs as dit nie anders kan nie om die hele ooreenkoms af te keur.

Die partye betrokke by die ooreenkoms het ook besonder lank gewerk aan die bereiking van sodanige konsensus as wat bereik is. Die NMK het self ook drie besonder lang vergaderings gehou om die aanbevelings deeglik te oorweeg en ook om die besware teen die betrokke voorstelle te oorweeg. Daar is dus besonder deeglike aandag gegee aan die betrokke voorstelle, gegewe die kort tydsbestek wat beskikbaar was.

2. Aspekte gemeld in u tweede skrywe van 30 Mei 1990

2.1 U het versoek dat die NMK so wyd moontlik met nie-partye moet konsulteer en dat u voorsien word van die standpunte wat uit die konsultasies navore kom. Vanweë die Kennisgewing in die *Staatskoerant* en die publisiteit wat die Departement en die media daaraan verleen het, het baie persone en organisasies hierop gereageer. Die NMK het naamlik 70 insette oorweeg. Die NMK is wel van mening dat daar beter geleentheid vir konsultasie kon gewees het indien daar langer tyd beskikbaar was. Gegewe die kort tydsbestek, meen die NMK egter dat daar op besonder wye basis gekonsulteer is. Die NMK wil ook u aandag daarop vestig dat uit sekere vertoë dit geblyk het dat sekere werkgewers wel indirek partye tot SACCOLA is, maar dat hulle hul ten dele gedistansieer het van die ooreenkoms. Konsultasie met sowel partye as met nie-partye is dus baie belangrik.

2.2 Die NMK sal ook 'n volledige uiteensetting van die standpunte wat uit die vertoë blyk aan u voorlê. Hieronder word ook sekere indrukke aangaande die vertoë onder elkeen van die aspekte aangedui.

2.3 U het versoek dat die NMK die moontlikheid moet ondersoek of 'n magtigende bepaling in die Wet gevoeg kan word om 'n kode op die partye daartoe bindend te maak. Die NMK is nie baie duidelik oor wat presies bedoel word met die begrip kode of die wyse waarop dit in die wetgewing geïnkorporeer kan word nie. Gegewe hierdie onduidelikheid is die NMK egter steeds gekant teen 'n magtigende bepaling waarvolgens 'n kode op die partye bindend gemaak kan word. 'n Volledige standpunt hieroor verskyn in ons skrywe aan u rakende die 23 vrae. SACCOLA-lede van die NMK het daarop gewys dat die hele debat met die ander partye juis daarop gemik was om uitkontraktering te vermy, wat ten dele deur 'n kode geïmpliseer word. 'n Bin-

Trade Unions (NACTU) trade union movement. In the broad context it however denotes an even greater breakthrough. It indicates namely that the possibility indeed exists of compromise on particularly controversional matters. Furthermore the COSATU/NACTU trade union movement was previously also not prepared to participate in the NMC processes. These attitudes have changed drastically, as is apparent from the fact that representatives of these trade union federations attended the NMC meeting on 23 May 1990 to put their point of view, and the various meetings which took place with yourself and the Director-General.

The NMC therefor has appreciation thereof that the Government is considering the agreement urgently. This, however, does not mean that the agreement must necessarily be rubber stamped as it is. In the nature of things the NMC and eventually the Government must at all time retain the discretion to make adjustments to the agreement and even, if it cannot do otherwise, to dissaprove of the whole agreement.

The parties involved in the agreement also worked for a long time on achieving such consensus as was reached. The NMC itself also held three particularly long meetings to consider the recommendations thoroughly and moreover to consider the objections to the relevant proposals. There was therefore particularly thorough attention given to the relevant proposals, given the short time frame that was available.

2. Aspects mentioned in your second letter of 30 May 1990

2.1 You requested the NMC to consult as widely as possible with non-parties and that you be supplied with the viewpoint which were raised during such consultations. Owing to the Notice in the *Gazette* and the publicity given to it by the Department and the media, many persons and organisations reacted hereupon. The NMC considered namely 70 imputs. The NMC is indeed of the opinion that there could have been better opportunity for consultation if a longer time had been available. Given the short time frame, the NMC is, however, of the view that consultation took place on a particularly broad basis. The NMC would also like to draw your attention thereto that it appeared from certain representations that certain employers, although nominally parties to SACCOLA, partially distanced themselves from the agreement. Consultation with both parties as well as non-parties is therefore very important.

2.2 The NMC will also submit a complete exposition of the standpoints made in the representations. Hereunder certain impressions are also indicated as regards the representations under each of the aspects.

2.3 You requested the NMC to consider the possibility of inserting an enabling provision in the Act, whereby a code can be made binding on the parties thereto. The NMC is not to clear on what precisely is meant by the concept code or the manner in which it can be incorporated into the legislation. Given this lack of clarity, the NMC remains opposed to an enabling provision in accordance with which a code can be made binding on the parties. A comprehensive standpoint thereon appears in our letter to you touching on the 23 questions. SACCOLA members of the NMC pointed out that the whole debate with the other parties was precisely aimed at avoiding contracting out of the LRA, which is partly implied by a code. A binding code would according

dende kode sal volgens hulle vir werkgewers die slegste moontlike scenario wees en hulle sal verkies om die huidige wet eerder onveranderd te hê en die arbeidsonrus en beskuldigings van kwade trou wat daarmee gepaard sal gaan, te hanteer as om met sodanige kodes te werk. Die belangrikste rede hiervoor is die besondere tegniese probleme wat dit gaan meebring soos uitgespel in ons antwoorde op u 23 vrae en ook die regsonsekerheid en regsduplisering wat dit sal meebring. Die NMK is nie in staat om aan te dui hoe hierdie probleme aangespreek kan word nie. 'n Kode is verder ook aanwysend en ter toeligting van die wet en moet dus terug verwys na die hoofwet. Dit gaan besonder moeilik wees om 'n kode toe te pas waar die begrippe in die kode nie in die hoofwet vervat is nie.

2.4 Die NMK het na die beste van sy vermoë die voorstelle en die kommentare daarop oorweeg en het aanbevelings daaroor gemaak, welwetend dat dit nie alle alternatiewe dek nie. Die NMK is egter tevrede dat dit as interim maatreëls en binne die konteks van konsensus-soeking aanvaarbaar behoort te wees. Waar dit moontlik is, word bepaalde alternatiewe egter wel hieronder geïdentifiseer.

2.5 Die NMK waardeer ten seerste die aanbod om 'n gesprek met die Departement te voer. Die NMK beskou sodanige gesprekvoering en interaksie as besonder waardevol en is baie bereidwillig om hulp te verleen waar enigsins moontlik. Dit moet gemeld word dat die insette wat van die Streeksdirekteure ontvang is, baie waardevol was.

3. Wysiging van artikel 1: Onbillike arbeidspraktyk

Oorsig van vertoë: Heelwat probleme is in die vertoë geïdentifiseer indien die voorstelle aanvaar sou word. Daar is bv. verwys na die probleme wat sou ontstaan indien boikotte, simpatie-stakings, herhalende stakings, wettige en onwettige stakings, en die ses maande proeftydperk uitgesluit word van die definisie. Bepaalde probleme is ook geopper t.o.v. die voorgestelde definisie, bv. dat fisiese, ekonomiese, morele of sosiale welsyn as baie wyd geïnterpreteer kan word, dat daar bepaalde nuwe bewoordings gebruik word wat nie tot dusver gebruik is nie, en dat die voorstelle oor die afdanking van werkers heelwat verder gaan as bv. die IAO-konvensies. 'n Verdere probleem is dat indien die 1988-definisie geskrap word 'n vermoede sou ontstaan dat dit nie meer die bedoeling van die wetgewer is nie. Daar is egter ook heelwat teenargumente teen baie van hierdie besware, wat in die NMK se antwoord op u 23 vrae aangespreek word. Die NMK meen egter dat daar ook t.o.v. die 1988-definisie verskeie probleme bestaan, wat ook in ons dokument aangespreek word. Alle partye tot die ooreenkoms het egter beklemtoon dat die ooreenkoms juis in 'n groot mate draai daarom om die probleme met die 1988-definisie aan te spreek. 'n Deurvoering van die ooreenkoms sonder die aanvaarding van voorstelle oor die onbillike arbeidspraktyk definisie sou in 'n baie negatiewe lig gesien word deur die partye.

to them be the worst possible scenario for employers and they would prefer to have the present Act unchanged and to handle the labour unrest and accusations of bad faith which will accompany it, than to work with such codes. The most important reason for this is the particular technical problems which it will cause, as spelt out in our replies to your 23 questions and also the legal uncertainty and the legal duplication which it will bring about. The NMC is not in a position to indicate how this problem can be addressed. A code is further an indicator and explanatory of the Act and should consequently refer back to the principal Act. It will be particularly difficult to apply a code where the concepts in the code are not contained in the principal Act.

2.4 The NMC has to the best of its ability considered the proposals and the comments thereanent and has made recommendations thereon, well-knowing that they do not cover all alternatives. The NMC is, however, satisfied that as an interim measure and within the context of consensus-seeking it should be acceptable. Where it is possible, specific alternatives are, however, in fact identified hereunder.

2.5 The NMC very much appreciates the offer to hold discussions with the Department. The NMC regards such discussions and interaction as particularly valuable and is very willing to help wherever possible. It must be mentioned that the inputs received from Regional Directors were very valuable.

3. Amendment of section 1: Unfair Labour Practice

Overview of representations: A lot of problems were identified in the representations, should the proposals be accepted. Reference was for instance made to the problems which would arise if boycotts, sympathy strikes, repeated strikes, legal and illegal strikes and the six months probationary period are excluded from the definition. Specific problems were also raised in respect of the proposed definition, for example that physical, economic, moral and social welfare can be interpreted very widely, that specific new wordings are used which have thusfar not been used and that the proposals on the dismissal of workers go much further than for example the International Labour Organisation Conventions. A further problem is that if the 1988 definition is deleted the assumption would arise that it is no longer the intention of the legislator. There are, however, a lot of counter arguments against many of these arguments which are addressed in the NMC reply to your 23 questions. The NMC is, however, of the opinion that various problems also exist in respect of the 1988 definition, which are also addressed in our document. All of the parties to the agreement, however, emphasised that the agreement in fact to a large extent revolves around addressing the problems with the 1988 definition. Carrying through of the agreement without the acceptance of proposals on the unfair labour practice definition would be seen in a very negative light by the parties.

In die lig van die bg het die NMK die volgende moontlikhede oorweeg:

(a) Die behoud van die huidige definisie met die uitsluiting van stakings en uitsluitings asook die tweede gedeelte van par (j). Dit sou wel minder onsekerheid meebring maar sou ook versoekings laat onststaan om ook ander gedeeltes van die definisie te wysig. Dit sou ook die indruk laat ontstaan dat die Regering hom min steur aan die wese van die ooreenkoms.

(b) 'n Volledige terugkeer na die voor 1988-definisie. Dit impliseer dat die (b) gedeelte van die ooreenkoms nie aanvaar word nie, en dat 'n voorbehoud ingevoeg word waarvolgens die vermoede dat heeltemal weg beweeg word van die 1988-definisie, geneutraliseer word. 'n Moontlike bewoording wat in die verband gebruik kan word, is die volgende:

> "(b) Die vervanging van die woordbepaling van "onbillike arbeidspraktyk" deur artikel 1 (a) sluit nie 'n uitleg van die voormelde woordbepaling uit nie, indien van toepassing, van 'n praktyk waarna in die vervangde woordbepaling van 'n onbillike arbeidspraktyk verwys word.".

'n Besonder belangrike argument ten gunste van hierdie benadering is dat daar weer met 'n skoon lei begin word en die konsolidasie-proses hierop kan voortbou.

In die lig van die besondere belangrikheid wat die NMK heg aan die hele kwessie van konsensus-soeking, soos uitgespel in die NMK se skrywe van 25 Mei 1990 aan die Minister, beveel die NMK aan dat genoeg van die ooreenkoms in wetgewing geïnkorporeer word dat die proses van breëre konsensus-soeking en alles wat daarmee gepaard gaan, nie skipbreuk lei nie. Gevolglik is die NMK ten gunste van 'n terugkeer na die voor 1988-definisie dit wil sê (b) hierbo.

Die NMK het wel klem gelê op die belangrikheid om een of ander kodifikasie van 'n onbillike arbeidspraktyk te hê, maar die gevoel was dat dit moet oorstaan tot die konsolidasie-ondersoek van die NMK voltooi is. Hierby saam het die partye beklemtoon dat hulle die reg voorbehou om tydens die konsolidasie-oefening ander aanbevelings oor die definisie van 'n onbillike arbeidspraktyk te maak, selfs al sou dit in stryd wees met die huidige aanbeveling.

Die NMK het kennis geneem van die feit dat daar veral twee belangrike probleme rondom die huidige definisie is, naamlik eerstens die insluiting van wettige stakings en tweedens onduidelikhede rondom die kwessie van ontslag. Die NMK het ook kennis geneem van sekere moontlike ander knelpunte rondom die bewoording van die voor 1988-definisie, maar was van mening dat hierdie probleme nie van so 'n aard is dat dit die hele definisie onaanvaarbaar maak nie.

Die SACCOLA-lede van die NMK het aangedui dat hulle volstaan met die voorstelle in die ooreenkoms.

4. Artikel 2: Bestek van die Wet

4.1 Die NMK gaan akkoord met die voorstelle betreffende die insluiting van oliebore en daar was in die vertoë min besware hierteen. Daar moet egter beklemtoon word dat dit 'n aanpassing van die regulasies sal vereis, aangesien die jurisdiksie van versoeningsrade nie op hierdie stadium oliebore sal insluit nie.

In the light of the above-mentioned, the NMC considered the following possibilities:

(a) The retention of the present definition with the exclusion of strikes and lock-outs as well as the second part of paragraph (j). This would in fact bring about less uncertainty, but would also cause temptations to arise to also amend other parts of the definition. This would also leave the impression that the Government has not taken notice of the essence of the agreement.

(b) A complete return to the pre-1988 definition. This implies that the (b) part of the agreement is not accepted and that a proviso is inserted in accordance with which the presumption that there is being moved away completely from the 1988 definition would be neutralised. A possible wording that can be used in this regard is the following:

> "(b) The substitution of the definition of "unfair labour practice" by section 1 (a) shall not preclude a construction of the said definition to include, if applicable, a practice referred to in the substituted definition of an unfair labour practice.".

A particularly important argument in favour of this approach is that one would then start with a clean slate on which the consolidation process could build on.

In the light of the particular importance which the NMC attaches to the whole question of consensus-seeking, as spelt out in the NMC letter o0127003ing, as spelt out in the NMC letter of 25 May 1990 to the Minister, the NMC recommends that enough of the agreement be incorporated in legislation so that the process of broad consensus-seeking and everything that accompanies it does not get shipwrecked. Consequently the NMC is in favour of a return to the pre-1988 definition, that is to say (b) above.

The NMC has indeed laid emphasis on the importance to have some sort of codification of the unfair labour practice, but the feeling was that it should stand over until the consolidation inquiry of the NMC is completed. Together with this the parties emphasised that they retain the right to make other recommendations on the definition of an unfair labour practice during the consolidation exercise, even if they are contrary to the present recommendation.

The NMC took cognisance of the fact that there are particularly two problems with the present definition, namely firstly the inclusion of legal strikes and secondly a lack of clarity on the definition of dismissal. The NMC also noted certain possible other bottle-necks around the wording of the pre-1988 definition, but was of the opinion that these problems are not of such a nature that they would make the whole definition unacceptable.

The SACCOLA members of the NMC indicated that they stand by the proposals in the agreement.

4. Section 2: Scope of the Act

4.1 The NMC concurs with the proposals regarding the inclusion of oil drills and there was little objection against this in the representations. It must, however, be emphasised that it will require an adjustment of the regulations, as the jurisdiction of a conciliation board will not at this stage include oil drills.

4.2 Die NMK gaan akkoord met die beginsel vervat in die voorstel oor die registrasie van vakbonde met lede in sowel die openbare as private sektore. Uit die vertoë het egter geblyk dat indien Staatsdienspersoneelverenigings nie tyd gegun word om hierby aan te pas nie, dit hulle sal benadeel. Die NMK beveel dus aan dat die voorstel wel geïnkorporeer word, maar eers later gepromulgeer word. So 'n benadering sal vanuit die oogpunt van persepsies baie belangrik wees, veral aangesien die personeelverenigings nie beginselbesware teen so 'n benadering het nie.

5. Artikel 4: Registrasie van vakbonde

Die NMK beveel aan dat, soos voorgestel in die ooreenkoms, artikel 4 (4) (c) geskrap moet word. Enige ander wysiging t.o.v. hierdie artikel sal die persepsie laat bly bestaan dat die Suid-Afrikaanse regering nie bereid is om die rassekonnotasies verbonde aan hierdie artikel te skrap nie. Tegniese veranderings, byvoorbeeld in die vorm van 'n voorbehoud dat belang nie ras sal insluit nie, sal nie goed verstaan word nie en die positiewe impak daarvan sal baie minder wees as 'n summiere skrapping van die artikel.

Hoewel daar in die vertoës wel vanuit sekere oorde besware hierteen was, was 'n groot onverbonde vakbondfederasie ten gunste daarvan. 'n Ontleding van die vertoës met besware het egter groot onkundigheid oor die hele kwessie rondom registrasie en veral artikel 4 (4) (c) getoon.

Al die lede het ooreengekom dat die hele kwessie van registrasie as deel van die konsolidasie-ondersoek in diepte ondersoek en aangepas moet word. Die partye het hulle reg voorbehou om op daardie stadium vryelik aanbevelings te doen, wat nie noodwendig ooreen sal stem met die huidige aanbeveling nie.

6. Artikel 17: Funksies van die Nywerheidshof

6.1 Die NMK gaan akkoord met die voorstel insake regshulp teen onwettige stakings en uitsluitings, maar meen dat dit herbewoord moet word: "to give orders restraining strikes, work stoppages and lock-outs in contravention of section 65." Die moontlike probleem van konkurrente jurisdiksie is nie as ernstig beskou nie, aangesien dit reeds in ander opsigte bestaan, en die voorbeeld van die Marievale-saak is genoem. Die lede het dit nie as voldoende beskou dat onwettige stakings reeds in die Hooggeregshof aangespreek kan word nie en was hulle van mening dat daar ook in die Nywerheidshof remedies moet bestaan.

6.2 Die NMK was dit eens dat die bevoegdheid van kondonasie nie moet lê by 'n Nywerheidsraad nie omdat die Nywerheidsraad nie noodwendig onbevooroordeeld is nie. Die NMK was nie gekant daarteen dat die Direkteur-generaal die magte van kondonasie moet hê nie, maar indien die hof sodanige mag het, het dit die voordeel dat die hof reëls kan maak waarvolgens sodanige kondonasies op 'n konsekwente wyse gehanteer kan word. Die standpunte van die President van die Hof en die Reëlsraad sal ook in die verband van belang wees. Oor die algemeen was daar in die vertoës baie teenkanting teen die beginsel en wyse van hantering van kondonasies deur die Nywerheidsrade.

4.2 The NMC concurs with the principle contained in the proposal on the registration of trade unions with members in both the public and pri members in both the public and private sectors. From the representations it however appeared that if Public Service staff associations are not given time to adjust thereto, it will prejudice them. The NMC therefore recommends that the proposal be incorporated, but be promulgated only later. Such an approach will be very important from the viewpoint of perception, especially as staff associations have no objection in principle against such an approach.

5. Section 4: Registration of trade unions

The NMC recommends that, as proposed in the agreement, section 4 (4) (c) be deleted. Any other amendment in respect of thiser amendment in respect of this section will cause the perception to remain that the South African Goverment is not prepared to delete the racial connotation attached to this section. Technical changes, for example in the form of a proviso the interest shall not include race, will not be well understood and the positive impact thereof will be far less than a summary deletion of the section.

Although there were in the representations indeed objections from certain quarters against this, a large uncommitted trade union federation was in favour of it. An analysis of the representations with objections, however, indicated great ignorance on the whole question surrounding registration and especially section 4 (4) (c).

All the members agreed that the whole question of registration as a part of the consolidation investigation must be investigated in depth and adjustments be made. The parties reserved their right to freely make representations at that stage, which may not necessarily coincide with the present recommendation.

6. Section 17: Functions of the Industrial Court

6.1 The NMC concurs with the proposal on relief against illegal strikes and lock-outs, but is the opinion that it should be reworded: "to give orders restraining strikes, work stoppages and lock-outs in contravention of section 65". The possible problems of concurrent jurisdiction was not regarded as serious, as it already exists in other respects, and the example of the Marievale case was mentioned. The members did not regard it as sufficient that illegal strikes can already be addressed in the Supreme Court and they were of the opinion that remedies should also exist in the Industrial Court.

6.2 The NMC was in agreement that the competence to condone should not lie with an industrial council because an industrial council is not necessarily impartial. The NMC was not against the Director-General being vested with the powers of condonation, but if the court should have such powers, it would have the advantage that the court could make rules in accordance with which such condonations could be dealt with in a consistent way. The standpoints of the President of the Court and the Rules Board will also be important in this regard. In general there was a lot of resistance in the representations against the principle and ways of dealing with condonations by industrial councils.

Indien die hof egter wel die magte kry om laat aansoeke te kondoneer, was die NMK se gevoel dat subartikel (23) (b) eerder in die reëls van die hof gehanteer moet word as in die wet.

7. Artikel 17A: Arbeidsappèlhof

Soos uitgespel in die memorandum wat bepaalde antwoorde verskaf op die 23 vrae van die Minister, hou die voorstelle in verband met die Arbeidsappèlhof sekere moontlik nadelige implikasies in. In die vertoës is ook oor die algemeen baie teenkanting teen hierdie voorstelle geopper. Moontlike voorbehoude is die volgende:

(a) Die aanstelling van Regspraktisyns wat ook 'n beslissing oor regsvrae sal hê, beteken dat *ad hoc* regters aangestel word.

(b) Daar sal heelwat onenigheid wees om te besluit oor die definisie van "grootste nasionale federasies van werkgewerorganisasies en van vakverenigings".

(c) Dit mag moeilik indien nie onmoontlik wees nie, om konsensus te kry oor die aanstelling van minstens 20 assessore.

(d) Kleiner federasies van vakbonde of werkgewerorganisasies sal nie betrokke wees by die nominasie van assessore nie.

(e) Assessore sal in effek aangestel word op grond van populêre steun eerder as op grond van hulle kundigheid.

(f) Baie regspraktisyns sal uitgesluit word weens die vereiste van 'n ononderbroke 10-jaar-tydperk van praktisering as 'n prokureur of as 'n advokaat.

(g) As die paneel onder 20 daal a.g.v. onvermydelike faktore, byvoorbeeld dat assessore sterf, emigreer ens., kan dit wees dat die verhoor as ongeldig verklaar word.

(h) 'n Ander alternatief wat ook oorweeg behoort te word, is of die NMK nie ook betrokke moet wees by die proses van nominasie van assessore nie.

(i) Ten opsigte van subartikel 9 was daar onsekerheid of die Nywerheidshof of die Arbeidsappélhof die betrokke tydperk behoort te verleng.

(j) Ten opsigte van subartikel 10 was die NMK se standpunt dat daar nie hieroor 'n aanbeveling gemaak kan word sonder om met die Hoofregter/Regterpresidente te beraadslaag nie.

(k) Daar is gewys daarop dat die vereiste van ten minste 10 jaar se ervaring nie noodwendig beteken 10 jaar se ervaring t.o.v. arbeidsaangeleenthede nie. Dit is veral belangrik inaggenome die onvoldoende vergoeding wat aan assessore betaal word.

In die lig van al hierdie voorbehoude, was die NMK se standpunt dat daar eers 'n gesprek gevoer moet word met die Hoofregter. Die Regters-president van die Transvaal en Natal was egter skerp gekant teen die voorstelle. COSATU se regsadviseurs het aangedui dat hulle besig is om sodanige gesprek te reël, en die NMK sal versoek om teenwoordig te wees tydens sodanige gesprek. Die doel daarvan sal wees om die NMK in staat te stel om sy eie standpunt in hierdie verband te formuleer.

Die NMK se aanbeveling is dus dat die voorstelle vir eers moet oorstaan.

If the court should, however, get the power to condone late applications, it was the feeling of the NMC that subsection (23) (b) should rather be dealt with in the rules of the court than in the Act.

7. Section 17A: Labour Appeal Court

As spelt out in the memorandum giving specific answers to the 23 questions of the Minister, the proposals in connection with the Labour Appeal Court hold certain possible disadvantageous implications. In the representations there was in general much opposition against these proposals. Possible provisos are the following:

(a) The appointment of legal practitioners who will also decide on questions of law, means that *ad hoc* judges will be appointed.

(b) There will be quite a lot of disunity in deciding on the definition of "major national federations of employers' organisations and trade unions".

(c) It may be difficult, if not impossible, to get consensus on the appointment of at least 20 assessors.

(d) Smaller federations of trade unions or employer organisations will not be involved in the nomination of assessors.

(e) Assessors will in effect be appointed on the grounds of popular support rather than on the grounds of their expertise.

(f) Many legal practitioners will be excluded owing to the requirement of an uninterrupted period of 10 years practising as an attorney or advocate.

(g) If the panel should fall below 20 as a result of unavoidable factors, for example where assessors die, emigrate, etc., it can happen that a hearing is declared invalid.

(h) Another alternative which should also be considered is whether the NMC should not also be involved with the process of nomination of assessors.

(i) In respect of subsection 9 there was uncertainty whether the Industrial Court or the Labour Appeal Court should extend the period concerned.

(j) In respect of subsection 10 the NMC standpoint was that a recommendation should not be made without consultation with the Chief Justice and the Judge Presidents.

(k) It was pointed out that the requirement of at least 10 years experience does not necessarily mean 10 years experience in respect of labour matters. This is particularly important taking into account the inadequate remuneration paid to assessors.

In the light of these reservations, the standpoint of the NMC was that discussions would first have to be had with the Chief Justice. The Judge Presidents of Transvaal and Natal were however sharply opposed to the proposals. COSATU's legal advisors indicated that they were busy arranging such discussion and that the NMC would be requested to be present during the talks. The purpose thereof would be to enable the NMC to formulate its own standpoint in this connection.

The NMC recommendation is therefore that these proposals should for the time being stand over.

8. Artikel 27A: Nywerheidsrade

Die vertoës was baie uiteenlopend van aard, hoewel daar heelwat kritiek teen die voorstel oor 'n 180-dae tydlimiet was.

Die NMK gaan akkoord met die voorstelle aangaande subartikel (1) (a).

Die NMK gaan akkoord met die voorstelle aangaande subartikel (1) (b), maar meen dat daar steeds gesertifiseer moet word dat aan die bepalings van die konstitusie voldoen is.

Wat betref subartikel (1) (c) was die NMK se gevoel dat die bewoording soos voorgestel ietwat onnet is en dat dit aangepas moet word om meer in ooreenstemming met artikel 35 te wees. Betreffende subartikel (1) (c) (ii) het die NMK die voorstelle aanvaar, onderhewig aan die opmerkings oor registrasie wat hierbo genoem is. Hierdie meganisme is nie gesien as die regte manier om die registrasie/sertifisering van vakbonde te bewerkstellig nie.

Aanbeveling aangaande subartikel (1) (d): Die MNK beveel aan dat die bewoording in Engels soos volg gewysig word: ". . . unless the reference is made as expeditiously as possible but in any event not longer than within 180 days from the date on which the unfair labour practice was committed or such later date . . .". Die kwessie van kondonasie deur of die Nywerheidshof of die Direkteur-generaal kom ook hier ter sprake.

9. Artikel 35: Versoeningsrade

Dieselfde opmerkings as wat gemaak is t.o.v. artikel 27A geld ook t.o.v. artikel 35. Addissionele kommentaar is die volgende:

Subartikel 2B: Die eerste twee en 'n half reëls van hierdie subartikel moet behou word aangesien individue nie andersins toegang sal hê tot Versoeningsrade nie.

10. Artikel 46: Vasstelling van 'n onbillike arbeidspraktyk

Die volgende alternatiewe bewoording t.o.v. subartikel 9 (f) is deur die NMK aanvaar:

> "Die geskil wat deur die nywerheidshof vasgestel moet word, is die beweerder onbillike arbeidspraktyk wat na die nywerheidsraad kragtens artikel 27A verwys is of die beweerder onbillike arbeidspraktyk ten opsigte waarvan 'n versoeningsraad kragtens artikel 35 ingestel is en sluit in enige ander beweerder onbillike arbeidspraktyk wat wesenlik bedoel word deur die geskrewe verwysing van die geskil na die nywerheidsraad of die bepalings van die opdrag aan die versoeningsraad.".

In die "uitgelekte" wysigingswetsontwerp is voorsiening gemaak dat partye tot 'n geskil en nie die Sekretaris van 'n Nywerheidsraad of die Voorsitter van 'n Versoeningsraad nie, die geskil na die Nywerheidshof kan verwys. Die NMK se standpunt is dat dit 'n sinvolle benadering is en deurgevoer behoort te word.

11. Artikel 67: Publikasie van Nywerheidshofuitsprake

Die NMK beveel aan dat hierdie aangeleentheid nie dringend is nie en gevolglik kan oorstaan. Die betrokke partye tot die ooreenkoms het aangedui dat hulle nie beswaar daarteen sal hê as dit oorstaan nie.

8. Section 27A: Industrial Councils

The representations were very divergent in nature, although there was a lot of criticism against the proposal on a 180 day time limit.

The NMC concurs with the proposals on subsection (1) (a). The NMC concurs with the proposals on subsection (1) (b), but is of the view that it should still be certified that the provisions of the constitution have been complied with.

As regards subsection (1) (c) it was the feeling of the NMC that the wording as proposed was somewhat untidy and that it should be adjusted to be more in accordance with section 35. Regarding subsection (1) (c) (ii) the Commission accepted the proposals, subject to the remarks on registration made above. This mechanism was not seen as the right way to achieve the registration/certification of trade unions.

Recommendation in ragard to subsection (1) (d): The NMC recommends that the wording be amended as follows: ". . . unless the reference is made as expediatiously as possible but in any event not longer than within 180 days from the date on which the unfair labour practice was committed, or such later date . . .". The question of condonation by the Industrial Court or the Director-General is also in question here.

9. Section 35: Conciliation Boards

The same remarks as were made in respect of section 27A also apply in respect of section 35. Additional comment is the following:

Subsection 2B: The first two and a half lines of this subsection should be retained as individuals would not otherwise have access to conciliation boards.

10. Section 45: Determination of an unfair labour practice

The following alternative wording in respect of subsection 9 (f) was accepted by the NMC:

> "The dispute to be determined by the industrial court shall be the alleged unfair labour practice as referred to the industrial council in terms of section 27A or the alleged unfair labour practice in respect of which a conciliation board was established in terms of section 35 and shall include any other alleged unfair labour practice which is substantially contemplated by the written reference of the dispute to the industrial council or the terms of reference of the conciliation board.".

In the "leaked" amendment bill provision is made that the parties to a dispute and not the Secretary of an Industrial Council or the Chairman of a conciliation board, should refer the dispute to the Industrial Court. The NMC standpoint is that this is a meaningful approach and should be carried through.

11. Section 67: Publication of Industrial Court Judgments

The NMC recommends that this aspect is not urgent and can thus stand over. The relevant parties to the accord indicated that they would not object if it were to stand over.

12. Artikel 79: Deliktuele aanspreeklikheid en interdikte teen onwettige stakings

Die vertoës was baie uiteenlopend van aard. Sommige was gekant teen die skrapping van die huidige artikel 79 (2). Ander weer was gekant teen die 48 uur, maar het dit klaarblyklik ook misverstaan weens die swak stelwyse daarvan. Daar was ook in baie gevalle ondersteuning vir die voorstelle.

Die NMK het reeds by 'n vorige geleentheid aanbeveel dat die huidige artikel 79 (2) geskrap word.

Die NMK het aangedui dat hy akkoord gaan met die beginsels soos voorgestel, maar dat daar enkele probleme rondom die bewoording is, waaronder:

(a) Daar word net na interim interdikte verwys. Dit beteken dat 'n finale interdik nie aan hierdie reëls onderhewig sal wees nie.

(b) Die voorstelle maak nie voorsiening vir die geval wanneer 'n aansoek om 'n interdik om een of ander rede nie aan die party bedien kan word nie.

(c) Die bewoording van subartikel 2 (b) is baie onbevredigend. Die NMK lê hiermee in Aanhangsel A 'n verbeterde bewoording voor. Die NMK beveel ook aan dat die bepaling hernommer word tot artikel 17D of 79A.

13. Aanhangsel

Hierdie aanhangsel behoort nie in die Wet hanteer te word nie maar in die regulasies.

14. Kort titel

Die Afrikaanse bewoording is foutief en moet lees "Wysigingswet op Arbeidsverhoudinge".

15. Gees waarin die aanbevelings gemaak word

Vanweë die feit dat hierdie voorlegging binne 'n besondere kort tyd opgestel moes word, kom die bedoeling waarmee die NMK die aanbevelings maak en waarmee op u skrywes kommentaar gelewer word, moontlik nie duidelik na vore nie. Dit word hoegenaamd nie in 'n gees van konfrontasie gedoen nie, maar as konstruktiewe bydrae tot die optimale ontwikkeling van arbeidsbeleid in Suid-Afrika. Die besondere pogings van u as Minister en die Departement om wel die nodige dringende aandag aan die ooreenkomste te gee, ten spyte van die tekortkominge daarvan, word ook baie op prys gestel.

AANHANGSEL A

ARTIKEL 79 (2)

Geen hof insluitende die nywerheidshof mag 'n interdik of bevel uitreik om enige persoon daarvan te weerhou om 'n staking of uitsluiting of ander nywerheidsaksie aan te stig, aan te hits of aan deel te neem—

(a) as geen tydige kennisgewing op die voorgeskrewe vorm van die voorneme om 'n staking, uitsluiting of ander nywerheidsaksie uit te roep gegee is nie, tensy 48 uur kennis van die aansoek gegee is aan die party teen wie regs-hulp aangevra word: Met dien verstande dat die hof 'n versuim om aan hierdie paragraaf te voldoen, kan kondoneer op goeie gronde aangevoer en indien kennis in die voorgeskrewe vorm van die voorgeneme om om regshulp aansoek te doen gedien of gegee is aan die genoemde party of sy vakvereniging of werkgewersorganisasie op die vroegste moontlike geleentheid en indien 'n redelike geleentheid om aangehoor te word, gegee is aan die genoemde party; of

12. Section 79: Delictual liability and interdicts against illegal strikes

The representations were very diverse in nature. Some were opposed to the deletion of the present section 79 (2). Others again were opposed to the 48 hours, but apparently also misunderstood it because of the poor way in which it was put. There was also in many instances support for the proposals.

The NMC has already on a previous occassion recommended that the present section 79 (2) be deleted.

The NMC indicated that it concurs with the principles as proposed, but that there are a few problems with the wording, among which are:

(a) Reference is made only to interim interdicts. This means that a final interdict will not be subject to these rules.

(b) The proposals do not make provision for the case where an application for an interdict for some or other reason cannot be served on the party.

(c) The wording of subsection 2 (b) is very unsatisfactory. The NMC in Annexure A submits an improved wording. The NMC also recommends that the provision be renumbered to section 17D or 79A.

13. Annexure

This Annexure should not be dealt with in the Act, but in the regulations.

14. Short title

The Afrikaans wording is incorrect and should read "Wysigingswet op Arbeidsverhoudinge".

15. Spirit in which the recommendations are made

Because of the fact that this submission had to be drawn up within a particularly short time, the intentions with which the NMC makes the recommendations and in which comment is made on your letters, may not come through clearly. It is by no means made in a spirit of confrontation, but as a constructive contribution to the optimal development of labour policy in South Africa. The extraordinary efforts by you as Minister and the Department to indeed give the necessary urgent attention to the agreement, in spite of its shortcomings, is also very much appreciated.

ANNEXURE A

SECTION 79 (2)

No court including the industrial court shall grant an interdict or order restraining any person from instigating, inciting or participating in a strike or lock-out or other industrial action—

(a) if no timeous notification in the prescribed form of the intention to institute a strike, lock-out or other industrial action has been given unless 48 hours notice of the application has been given to the party against whom the relief is sought provided that the court may condone a failure to comply with this paragraph if good cause is shown and if a notice in prescribed form of the intention to apply for the relief has been served on or given to the said party or his trade union or employers' organisation at the earliest opportunity and if a reasonable opportunity to be heard has been afforded the said party; or

(b) waar 10 dae vooraf kennisgewing op die voorgeskrewe vorm van die voorneme om 'n staking uit te roep of na 'n uitsluiting of ander nywerheidsaksie oor te gaan gegee is, tensy vyf dae kennis om op die aansoek te antwoord aan die party teen wie die regshulp aangevra is, gegee is.

AANHANGSEL XX

KENNISGEWING VAN VOORNEME OM NA 'N STAKING, UITSLUITING OF ANDER NYWERHEIDSAKSIE OOR TE GAAN

Aan .....

van .....

(adres)

Neem asseblief kennis dat ..... (naam van vakvereniging of beskrywing van werknemers/naam van werkgewersorganisasie of werkgewer) van voorneme is om die volgende in te stel:

.....

.....

(gee uiteensetting van staking, uitsluiting of ander nywerheidsaksie beplan) op .....

(datum en/of tyd) aangaande die volgende geskil:

.....

(uiteensetting van die aard van die geskil)

Geteken en gedateer te .....op hierdie ..... dag van .....19.....

.....

(naam en hoedanigheid en adres van vakvereniging/werknemer verteenwoordiger/werkgewersorganisasie/werkgewer)

'n Afskrif hiervan ontvang deur die geadresseerde op die ..... dag van .....19.....

.....

namens geadresseerde

Neem kennis dat hierdie kennis 10 dae voor die aanvang van 'n staking, uitsluiting of ander nywerheidsaksie gedien moet word.

(b) if 10 days prior notification in the prescribed form of the intention to commence a strike, lock-out or other industrial action has been given unless five days notice to answer the application has been given to the party against whom the relief is sought.

ANNEXURE LR XX

NOTICE OF INTENTION TO INSTITUTE A STRIKE, LOCK-OUT OR OTHER INDUSTRIAL ACTION

To .....

of .....

(address)

Kindly take notice that ..... (name of union or description of employees/name of employers organisation or employer) intends to institute the following:

.....

.....

(set out strike, lock-out or other industrial action contemplated) on .....

(date and/or time) concerning the following dispute:

.....

(set out the nature of the dispute)

Signed and dated at .....this ..... day of .....19.....

.....

(name and capacity and address of trade union/employee representative/employers' organisation/employer)

A copy hereof received by the addressee on the ..... day.....of 19.....

.....

for addressee

Note this notice must be served 10 days before the institution of the strike, lock-out or other industrial action.

KENNISGEWING 539 VAN 1990

DEPARTEMENT VAN MANNEKRAG

VOORGESTELDE WYSIGING VAN DIE WET OP ARBEIDSVERHOUDINGE, 1956, SOOS GEPUBLISEER BY KENNISGEWING 420 VAN 1990

Aangesien baie van die respondente aangedui het dat die tyd wat vir kommentaar op die bovermelde kennisgewing toegelaat is te kort was, en uitstel gevra het en aangesien die voorstelle die regte van werkgewers en werknemers aansienlik verander en ekonomiese gevolge het wat nadere ondersoek verg, het die Regering besluit om die tydperk waarbinne kommentaar en vertoë op die Konsepwysigingswetsontwerp ingedien kan word, te verleng.

Enige verdere kommentaar of vertoë deur belanghebbende persone op die Konsepwysigingswetsontwerp wat in die Bylae tot Kennisgewing 420 van die *Staatskoerant* van 23 Mei 1990 gepubliseer is, moet skriftelik en in tweevoud ingedien en gestuur word aan die Direkteur-generaal: Mannekrag, Privaatsak X117, Pretoria, teen nie later nie as 31 Julie 1990.

NOTICE 539 OF 1990

DEPARTMENT OF MANPOWER

PROPOSED AMENDMENT OF THE LABOUR RELATIONS ACT, 1956, AS PUBLISHED BY NOTICE 420 OF 1990

As many of the respondents indicated that the time allowed for comment on the above notice was too short and requested an extension, and as the proposals considerably alter the rights of employers and employees and have economic implications which need closer investigation, the Government, in view of the gravity of the matters, decided to extend the period during which comments and representations on the Draft Amendment Bill can be submitted.

Any further comments or representations by interested persons on the Draft Amendment Bill published in the Schedule to Notice 420 of the *Government Gazette* of 23 May 1990, should be submitted in writing and be in duplicate and must be sent to the Director-General: Manpower, Private Bag X117, Pretoria by not later than 31 July 1990.

Werk mooi daarmee

Ons leef  daarvan

water is kosbaar

Use it

Don't abuse  it

water is for everybody

BELANGRIKE AANKONDIGING

Sluitingstye ***VOOR VAKANSIEDAE*** *vir*

WETLIKE KENNISGEWINGS
GOEWERMENTSKENNISGEWINGS 1990

Die sluitingstyd is stiptelik ***15:00*** *op die volgende dae:*

- **4 Oktober**, Donderdag, vir die uitgawe van Vrydag **12 Oktober**
- **18 Desember**, Dinsdag, vir die uitgawe van Vrydag **28 Desember**
- **21 Desember**, Vrydag, vir die uitgawe van Vrydag **4 Januarie**

Laat kennisgewings sal in die daaropvolgende uitgawe geplaas word. Indien 'n laat kennisgewing wel, onder spesiale omstandighede, aanvaar word, sal 'n dubbeltarief gehef word

Wanneer 'n APARTE *Staatskoerant* verlang word moet die kopie drie kalenderweke voor publikasie ingedien word

IMPORTANT ANNOUNCEMENT

Closing times ***PRIOR TO PUBLIC HOLIDAYS*** *for*

LEGAL NOTICES
GOVERNMENT NOTICES 1990

The closing time is ***15:00*** *sharp on the following days:*

- **4 October**, Thursday, for the issue of Friday **12 October**
- **18 December**, Tuesday, for the issue of Friday **28 December**
- **21 December**, Friday, for the issue of Friday **4 January**

Late notices will be published in the subsequent issue. If, under special circumstances, a late notice is being accepted, a double tariff will be charged

The copy for a SEPARATE *Government Gazette* must be handed in not later than three calendar weeks before date of publication

INHOUD

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