

(19 December 2018 – to date)

## **LABOUR RELATIONS ACT 66 of 1995**

*(Gazette No. 16861, Notice No. 1877, dated 13 December 1995 – Commencement date: 11 November 1996  
– unless otherwise indicated)*

### **CODE OF GOOD PRACTICE: COLLECTIVE BARGAINING, INDUSTRIAL ACTION AND PICKETING**

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19 December 2018*

Notice is hereby given in terms of section 203(2) of the Labour Relations Act, 1995 (Act 66 of 1995), that the National Economic Development and Labour Council (NEDLAC) has issued under section 203(1) of that Act a code of good practice: collective bargaining, industrial action and picketing as set out in the Schedule.

(Signed)

**M N OLIPHANT, MP**  
**MINISTER OF LABOUR**  
**12/12/2018**

### **CODE OF GOOD PRACTICE: COLLECTIVE BARGAINING, INDUSTRIAL ACTION AND PICKETING**

#### **CONTENTS**

#### **PART A: INTRODUCTION**

1. Intention and interpretation
2. Context
3. Purpose

#### **PART B: COLLECTIVE BARGAINING**

4. Collective bargaining and disputes of mutual interest
5. Fundamental commitments
6. Principles of good faith bargaining
7. Development and support for negotiators
8. Preparing for negotiations
9. Submission of demands and responses
10. Commencement of negotiations
11. Use of facilitators

Prepared by:

12. Disclosure of information

### **PART C: WORKPLACE DEMOCRACY AND DIALOGUE**

13. Object
14. Measures to promote employee participation and dialogue in the workplace

### **PART D: INDUSTRIAL ACTION: STRIKES AND LOCKOUTS**

15. Constitutional context
16. Disputes in respect of which industrial action may be exercised  
Disputes of right, mutual interest and those involving socio-economic interests  
What disputes may form the subject matter of a strike or lockout
17. Conciliation of mutual interest disputes
18. Ballot of members
19. Notice of the commencement of the strike or lockout
20. Who may strike
21. Strikes or lockouts in respect of employees residing on employer premises
22. Peace and stability and communication during a strike or a lockout

### **PART E: PICKETING**

23. Introduction
24. Authorisation
25. Purpose of the picket
26. No picketing unless rules agreed or determined
27. Agreed picketing rules
28. Default picketing rules
29. Pickets on employer premises or in other designated areas
30. Conduct in the picket
31. Peace obligation and the role of police
32. Peace obligation and role of private security officers
33. General rights, obligations and immunity

ANNEXURE A - GOOD FAITH DECLARATION

ANNEXURE G[sic] - DEFAULT PICKETING RULES

ANNEXURE A[sic] - DESCRIPTION OF PLACE OR PLACES FOR THE PICKET

ANNEXURE B[sic] - NAMES AND DETAILS OF PARTICIPANTS

## **PART A: INTRODUCTION**

### **1. Intention and interpretation**

- (1) This Code of good practice is intended to provide practical guidance on collective bargaining, the resolution of disputes of mutual interest and the resort to industrial action. It is intended to be a guide to those who engage or want to engage in collective bargaining or who seek to resolve disputes of mutual interest by mediation, conciliation, arbitration or as a means of last resort, industrial action.
- (2) Any person interpreting the Labour Relations Act, 66 of 1995 (Act) must take this Code into account. This includes employees, trade unions, employers, employers' organisations, the registrar of labour relations, conciliators, arbitrators and judges.
- (3) The legal context within which this Code should operate is explained in the text. While every effort is made to ensure that the explanations in the Code are accurate, any interpretation of the law advanced in this Code is always subject to what the courts ultimately determine.
- (4) This Code must not be interpreted as imposing any unconstitutional limitation on the right to strike or the recourse to lockout as provided for in the Act or applied in a way that undermines the right to strike or the employers' recourse to lockout.
- (5) This Code is intentionally general as circumstances may differ and a departure from its norms (subject to the requirements of the Act) may be justified under circumstances such as: the size and nature of the workplace; the nature and form of the collective bargaining relationship; and the nature of the sector.

### **2. Context**

- (1) Violence during strikes and lockouts requires serious measures to prevent violence and to induce a behaviour change in the way employees, employers and the police and private security, engage with each other during a strike or a lockout.
- (2) The role and conduct of the South African Police Services and the private security services in strikes and lockouts needs to be addressed and clarified and brought to the attention of all role players.
- (3) Prolonged and violent strikes have a serious detrimental effect on the strikers, the families of the strikers, the small businesses that provide services in the community to those strikers, the employer, the economy and community. Serious measures are needed to induce a behaviour change in the way that trade unions and employers and employers' organisations engage with each other in the pre-negotiation, negotiation and industrial action phases of collective bargaining.

- (4) The measures must promote orderly and effective collective bargaining and include measures to proactively and constructively resolve disputes prior to industrial action and to explore all genuine options to resolve a dispute as speedily as possible.

### **3. Purpose**

- (1) In line with the Ekurhuleni Declaration<sup>1</sup> and the purpose of the Act, the purpose of this code is to –
- (a) strengthen and promote orderly collective bargaining by –
    - (i) promoting trust and mutual understanding and constructive engagement;
    - (ii) promoting the maximum involvement of workers and worker representatives in negotiations;
  - (b) recognise the importance of workplace democracy and dialogue and promoting employee participation in decision-making in the workplace;
  - (c) promote the proactive, effective, constructive and speedy resolution of labour disputes;
  - (d) promote the peaceful resort to a strike or a lockout free of intimidation and violence; and
  - (e) proactively promote steps to avoid or prevent prolonged or violent strikes and lockouts.

## **PART B: COLLECTIVE BARGAINING**

### **4. Collective bargaining and disputes of mutual interest**

- (1) Collective bargaining is a voluntary process in which organised labour in the form of trade unions and employers or employers' organisations negotiate collective agreements with each other to determine wages, terms and conditions of employment or other matters of mutual interest. The collective bargaining process may be established institutionally, by agreement or in practice.
- (2) The Act provides an institutional form for sectoral bargaining in the form of bargaining councils by providing machinery for the voluntary establishment of a bargaining council by trade unions and employer organisations in a sector and their registration as such by the Registrar of Labour Relations if their constitution provides for the scope, membership, governance, the negotiation of collective agreements and dispute procedures in accordance with the Act.
- (3) The Act provides for collective bargaining by agreement in a number of ways:

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<sup>1</sup> The Declaration signed by the NEDLAC constituencies on 4 November 2014 at Ekurhuleni, Gauteng Province

- (a) It specifically empowers bargaining councils to determine by way of a collective agreement what matters for collective bargaining may be devolved to the level of the workplace.
  - (b) It permits multi-employer bargaining arrangements and provides for the enforceability of collective agreements entered into in such arrangements.
  - (c) It permits collective bargaining at the level of the workplace and the enforceability of collective agreements at this level. The typical form is the recognition agreement which includes a negotiation and dispute procedure to regulate the collective bargaining relationship between the employer and the trade union or unions that may affect one or more workplaces of the employer.
  - (d) In circumstances where there is no bargaining council or agreement to bargain, a group of workers or a trade union may bargain collectively as a matter of practice by making a demand on an employer under threat of a strike. Similarly, an employer or employers' organisation may make demands and threaten to unilaterally introduce them under a threat of a lockout. In each case, before any industrial action may be engaged in, the dispute must be referred for conciliation to the Commission for Conciliation Mediation and Arbitration (the CCMA) or to a bargaining council with jurisdiction. The conciliation of such a dispute is in effect a facilitated exercise in collective bargaining, the object of which, is a settlement agreement (in the case of demands made by or against a group of workers) or a collective agreement (in the case of demands made by or against a trade union).
- (4) There is no constitutional or statutory duty to bargain. Collective bargaining under the Act is voluntary and employers (other than the State) and trade unions are permitted to determine their collective bargaining relationships in the institutional form of bargaining councils at sectoral level (the form promoted by the Act) or by way of a recognition agreement at multi-employer or workplace level. However, once having established a collective bargaining relationship in the form of a bargaining council constitution or a recognition agreement, the parties have thus by agreement implicitly committed themselves to a duty to bargain and the duty to bargain under such circumstances does not arise statutorily but contractually.
- (5) In so far as the State is concerned, although the establishment of a structure of collective bargaining is statutorily determined, its constitution is determined by the State as employer and the trade unions. The duty to bargain, too, does not arise statutorily but contractually from the agreed bargaining council constitution.

## **5. Fundamental commitments**

- (1) The following constitute fundamental commitments on the part of trade unions and their members, trade union federations, employers and employers' organisations for orderly and constructive collective bargaining and peaceful industrial and protest action –

- (a) to promote trust and develop mutual understanding and constructive engagement in their engagements with each other;
  - (b) to promote the importance of democracy and dialogue at the level of the workplace;
  - (c) to promote maximum participation and accountability in the preparation for, the conduct and the conclusion of negotiations by –
    - (i) members and worker representatives of the trade union party to the negotiations in terms of the Act;
    - (ii) if represented by an employers' organisation, the members of that organisation;
  - (d) to take all the necessary measures to ensure the competence of negotiators appointed to represent the parties to the negotiations;
  - (e) to adhere to the principles of good faith bargaining; and
  - (f) that violence, intimidation, damage to property and the use of dangerous weapons in the pursuit of collective bargaining, industrial action or protest action is condemned in the strongest terms and should not be tolerated in the workplace, on picket lines or in any conduct related or incidental to such industrial and protest action;
  - (g) that dangerous weapons have no place in industrial action and cultural instruments should not be used to intimidate or cause harm;
  - (h) that the parties commit to prioritising and dealing with violence related conduct in industrial and protest action in an expeditious manner.
- (2) In the context of the constitutional right to picket peacefully and unarmed and applying the relevant factors listed in section 3(2) of the Dangerous Weapons Act, 15 of 2013 to determine whether a person intends to use the object as a dangerous weapon, a dangerous weapon is any object that could be used to injure or threaten a person or damage property. In the context of a picket there is no other justifiable use for the possession or display of such an object.
- (3) The relevant factors in the context of a picket listed in section 3(2) of the Dangerous Weapons Act are as follows:
- (a) The place and time where the person is found;

- (b) The behaviour of the person, including the making of any threat or the display of intimidatory behaviour;
- (c) The manner in which the object is carried or displayed;
- (d) Any other relevant factors, including any explanation the person may wish to provide for his or her possession of the object provided that this does not impose an obligation on the person to explain the possession of the object.

## **6. Promotion of collective bargaining**

- (1) ILO Convention 98 on Collective Bargaining requires governments to take measures appropriate to national conditions to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.
- (2) The Act promotes collective bargaining in a number of ways by –
  - (a) encouraging collective bargaining at sectoral level by providing a statutory framework for collective bargaining in the form of bargaining councils;
  - (b) permitting collective bargaining in single and multi-employer workplaces;
  - (c) providing for organisational rights at the level of the workplace.
- (3) Nothing in the Act prevents collective bargaining at a national level to set thresholds for collective bargaining at sectoral and workplace levels provided that it is by agreement.
- (4) The Government and the federations of trade unions and employer organisations in NEDLAC undertake to engage on a periodic basis to develop legislative and other measures to promote collective bargaining at centralised, sectoral and workplace levels and to deepen the representativeness of trade unions and employer organisations.

## **7. Principles of good faith bargaining**

- (1) Every trade union, employer, employers' organisation and the negotiators appointed to represent them commit themselves to adhere to the principles of good faith bargaining and mutual respect set out below.
- (2) Disclosure of information is essential for a trade union to effectively engage in collective bargaining. All relevant information should be disclosed to the trade union on request and subject to confidentiality and clause 12 of the Act.

- (3) All demands and responses to those demands from a party should be in writing.
- (4) A party may only add a new demand during the course of negotiations if the new demand is introduced for the purpose of finding a settlement and only with the agreement of the other party.
- (5) An employer should not unilaterally alter terms and conditions of employment during the course of negotiations prior to deadlock being reached in terms of any collectively agreed dispute procedure, failing which, when a period of 30 (thirty) days has lapsed after the referral of the dispute to the CCMA or Bargaining Council, or a certificate of non-resolution has been issued.
- (6) Negotiations should be conducted in a rational and courteous manner and disruptive or abusive behaviour must be avoided.
- (7) Parties should attend agreed negotiation meetings unless there is a good reason for not attending, in which case the party that cannot attend should give reasonable notice of its non-attendance to avoid wasteful expenditure and inconvenience to the other party or parties to such negotiations.
- (8) A party should engage each other in a constructive manner and not unreasonably conduct itself prior to or during negotiations in a manner that has the effect of unreasonably delaying negotiations by failing to agree dates and times for negotiation meetings, failing to attend agreed meetings, changing negotiators, failing to secure a mandate or refusing to modify demands.
- (9) Parties should be prepared to modify demands and responses during the course of negotiations.
- (10) Parties should endeavour, as far as possible, to ensure that their negotiators remain the same throughout the course of negotiations and that they are properly mandated to modify their demands and responses.
- (11) Mandating processes should be conducted in facilities that are conducive to collective bargaining. Employers should assist this mandating process by providing facilities where possible and time off as per the Act or any collective agreement for trade union officials or worker representatives to meet and if need be ballot members as provided for in the Act. If provided, the trade union should not unreasonably refuse to use the facilities and time off.
- (12) Without interfering with a trade union or employers' organisation's right to communicate with its members as they consider best, the negotiators should endeavour to present the demands or responses provided by the other side as accurately as possible.
- (13) Without interfering with the right of the trade union to communicate with the members of an employers' organisation and an employer with its employees, the trade union or employer should not undermine the bargaining status of union or organisation as the case may be.

- (14) An employer should not bypass a recognised trade union and deal directly with employees before deadlock or a reasonable period after deadlock in respect of the matters that are subject of the negotiations in order to allow the trade union to communicate with employees.
- (15) The parties should consider escalating the negotiations to a higher level of management or union office bearer within their respective organisations to avoid a deadlock and the resort to industrial action through seeking to settle the differences or exploring the possibility of voluntarily referring the dispute to binding or advisory arbitration.
- (16) The parties should remain open to continue negotiations after a dispute has been declared.

## **8. Development and support for negotiators**

- (1) Parties to collective bargaining under the Act commit themselves and their members to develop competent negotiators to engage in collective bargaining by –
  - (a) supporting the establishing of training courses on this Code by recognised training institutions to train negotiators in collective bargaining; and
  - (b) requiring negotiators to undergo such training;
- (2) Each trade union, employer or employers' organisation should identify specific individuals for training and appointment as negotiators.
- (3) Each employer should grant reasonable paid time off for an employee identified as a negotiator in terms of (2) above, unless training for collective bargaining, industrial action and picketing is sufficiently provided for in terms of an existing agreement.
- (4) Negotiators of parties should on a regular basis, either jointly or separately, attend training courses using the same training materials and conducted by recognised training institutions, trade unions or employers' organisations.

## **9. Preparing for negotiations**

- (1) Subject to the democratic procedures contained in the collective agreement or the constitutions of trade unions and employers' organisations, their respective leaderships should in preparation for the union's or employer or employers' organisations' demands or responses to the extent that it is necessary –
  - (a) to conduct proper research into the state of the economy, sector, and ability of individual employers, particularly small, medium and micro-enterprises and new enterprises, the cost of

living, the alleviation of poverty and reduction of wage differentials and inequality, and the likely impact of any proposal or response on employment and health, safety or welfare of employees;

- (b) to determine whether there is a need for disclosure of information in order to prepare a demand or response;
  - (c) to take advice from labour market experts on employment effects of a proposed demand or response;
  - (d) to take advice on settlement rates generally and specific to the sector;
  - (e) to consider whether any demand or response reduces inequality of treatment; and
  - (f) to consider whether the demand or response or the extent of the demand or response cannot be obtained differently through a reconfiguration of the demand or response by linking increases to productivity or eliminating vertical inequality by agreeing to longer term agreements.
- (2) If a trade union considers it necessary for an employer to disclose information for the purpose of formulating its demands, it should request the employer in writing to disclose the information at the earliest opportunity and in accordance with guidelines set out in clause 12 of this Code.
- (3) In order deal with expectations and introduce a sense of realism on the part of members, the information acquired in the preparation of the demands or responses must be conveyed to members in order that in securing a mandate for negotiations members are fully informed.
- (4) The parties should formally appoint negotiators for specific negotiations and ensure that they participate in the preparation for negotiations including the formulation of demands or responses and the mandating process.
- (5) A party should in writing advise other parties to the negotiations of the names of their appointed negotiators.
- (6) Each party should in preparation for negotiations consider the manner in which the negotiations are to be conducted, including whether to appoint and use a facilitator given the history of prior negotiations or the nature of the demands or responses and a timetable for the negotiations.

## **10. Submission of demands and responses**

- (1) A party should submit its demands in writing or in accordance with any agreed negotiation procedure or practice and in good time and well in advance of any established implementation date.
- (2) The submission should include –

- (a) the demand or demands in a clear and concise form;
  - (b) an outline of its demands;
  - (c) any request for or response to a request for the disclosure of relevant information made in terms of this Code;
  - (d) a proposed timetable for the negotiations which should include alternative dates and times for a pre-negotiation meeting; and
  - (e) the names and details of its appointed negotiators.
- (3) The party in receipt of a written demand from a trade union should –
- (a) acknowledge the receipt in writing;
  - (b) inform the other party of when it should in accordance with any agreed negotiation procedure or practice respond to the demands or make demands itself; and
  - (c) agree or propose alternative dates and times for the pre-negotiation meeting.
- (4) A party responding to a demand should submit in writing its response or any demand of its own to the other party and include in its response –
- (a) its response in clear and concise form;
  - (b) any demand it may have of its own;
  - (c) an outline of its response and demands;
  - (d) any response or request for disclosure of information made in terms of this Code;
  - (e) a response to the proposed timetable for the negotiations; and
  - (f) the names and details of its appointed negotiators.

## **11. Commencement of negotiations**

- (1) Subject to any agreed procedures and the nature and size of the bargaining unit, the negotiators should consider holding pre-negotiation meeting/s to –

- (a) agree to a timetable for the negotiations;
  - (b) decide whether or not to appoint and use a facilitator and if so, agree on a facilitator or request the CCMA or a bargaining council with jurisdiction to appoint a facilitator;
  - (c) consider any request for disclosure of information made in terms of the Act and this Code; and
  - (d) commit themselves to a good faith declaration by signing the model declaration in Schedule A to this Code.
- (2) At the first negotiation meeting, each party should present a full motivation for its demands and responses.

## **12. Use of facilitators**

- (1) Parties to collective bargaining should consider the appointment of a facilitator/s by mutual agreement to facilitate negotiations by –
- (a) including the appointment and use of facilitators in negotiation procedures contained in bargaining council constitutions and recognition agreements;
  - (b) considering the appointment and use of a facilitator in the preparation for negotiations; and
  - (c) raising the appointment and use of a facilitator with the other party before negotiations commence.
- (2) Although it is advisable for parties to a course of negotiations to appoint a facilitator from the beginning of the negotiations, negotiators should be free to raise the appointment of a facilitator at any time during the course of negotiations if it could assist the successful conclusion of the negotiations, particularly in order to break a deadlock.
- (3) Facilitators should be appointed to continue facilitation even after a dispute is declared and particularly if one or both the parties to the negotiations engage in industrial action.
- (4) Trade unions, employers and employers' organisations that engage in collective bargaining on a regular basis should consider the appointment of a facilitator or a panel of facilitators to facilitate their negotiations and their relationship from one course of negotiations to the next.

## **13. Disclosure of information**

- (1) Disclosure of information of relevant and credible information is essential for rational collective bargaining and effective consultation at the level of the workplace. It is an essential ingredient for winning cooperation of employees and building a culture of trust.
- (2) Section 16(2) of the Act gives a trade union with majority of employees in the workplace as members the right to require the disclosure of relevant information that should allow the trade union to engage effectively in collective bargaining or consultation. The information has to be relevant to the issues being negotiated or consulted on. So for example the financial information of an employer become relevant if the employer motivates its demand or its refusal to accept a trade union demand on the grounds of its inability to pay or the employer motivates its need to retrench on the grounds of financial difficulties. But not all relevant information needs to be disclosed. Section 16(5) lists four exceptions:
  - (a) Legally privileged information<sup>2</sup>.
  - (b) Information the disclosure of which would entail a contravention of a law or a court order.
  - (c) Personal information concerning an employee without that employee's consent.
  - (d) Confidential information that if disclosed might cause substantial harm to the employer or an employee such as information that may constitute a threat to the employer's security or affect its competitiveness. There are alternatives to the disclosure of such information such as agreeing to an auditor or arbitrator to assess whether the standpoint relied on in the negotiations or the consultations is supported by the information which the employer does not wish to disclose.
- (3) Although the statutory right to disclosure in section 16 is limited to registered trade unions with a majority of the employees in the workplace as members, employers should disclose information in accordance with section 16 to any trade union with which it negotiates at the level of the workplace subject to the ability of the employer party to access the information, and the requisite agreement by the trade union not to disclose confidential information to third parties or to agree to a trusted auditor or arbitrator to have access to the information to determine whether the standpoint that may be relied on in the negotiations or consultations is supported by the information.
- (4) Just as this Code urges the disclosure of credible and relevant information by employers in order to promote rational negotiations, so does it urge trade unions to use the information received responsibly and to take that information into account when formulating demands or responses or when deciding to declare a dispute.

## **PART C: WORKPLACE DEMOCRACY AND DIALOGUE**

### **14. Object**

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<sup>2</sup> Such as the communications between an employer and its lawyers in respect of any anticipated or pending litigation.

The object of promoting workplace democracy and dialogue is to develop a culture of mutual respect and trust between those who manage the enterprise and those who work for it. Dialogue, with a view to consulting employees in the decision-making process on issues other than those pertaining to collective bargaining<sup>3</sup> should be encouraged.

**15. Measures to promote employee participation and dialogue in the workplace**

- (1) Trade unions, employers and employers' organisations must take the necessary measures to promote workplace democracy and dialogue in the workplace. These measures may, in terms of the Act, include –
- (a) recognising employee representatives elected or appointed by a trade union that the employer recognises or one that represents a significant interest or a substantial number of employees in the workplace;
  - (b) granting reasonable access and facilities to trade union officials of such trade unions;
  - (c) promoting employee and trade union participation in consultative forums such as –
    - (i) health and safety committees under section 19 of the Occupational Health and Safety Act, 85 of 1993 and section 25 of the Mines, Health and Safety Act, 29 of 1996;
    - (ii) employment equity structures contemplated in section 16 of the Employment Equity Act, 55 of 1998;
    - (iii) Skills development forums or related workplace committees, where such structures exist or are established;
    - (iv) workplace forums as contemplated in sections 80 and 81 of the Act;
  - (d) in the absence of a workplace forum contemplated in sections 80 or 81 of the Act –
    - (i) establishing consultative forums in the workplace by collective agreement including a bargaining council agreement;
    - (ii) extending the terms of reference of the health and safety and employment equity structures to include certain of the consultation matters listed in sections 84 and 85 of the Act.

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<sup>3</sup> Such as those listed in section 84(1) and 86(1) of the LRA Including the restructuring of the workplace, the Introduction of new technology and new work methods, changes to the organisation of work, plant closures, mergers and transfers of ownership, retrenchments, exemptions, production development, disciplinary codes, workplace rules, changes to employer controlled social benefit schemes etc.

- (2) The promotion of employee and trade union involvement in consultative forums should not undermine collective bargaining or existing workplace arrangements. In order to ensure that these forums are not used to by-pass collective bargaining structures and processes, the forums should where appropriate be designed as follows:
- (a) There should be a clear distinction between the structures of collective bargaining (bargaining councils, negotiation procedures in recognition agreements) and the structures of consultative forums which may be elected and inclusive of the different occupational categories irrespective of union membership.
  - (b) There should be a clear distinction between the matters that form the subject of collective bargaining (such as terms and conditions of employment) and the subject matter of consultation such as employment equity plans, health and safety plans, plans to restructure or introduce new technology or work methods, and plans to change the organisation of work. The list of matters set out in sections 84 and 85 of the Act constitute a useful basis for any agreement on what the trade union and the employers wish to include as matters for consultation.
  - (c) There should be a clear understanding that the processes and outcomes of collective bargaining and consultation are different. In collective bargaining, the process is negotiation with the outcome being a collective agreement. In consultation, the process is one of informed discussion with the outcome of ensuring that workers' interests and representations are taken into account in the making of managerial decisions. Although there may be consensus at the end of a consultation process, it is not a collective agreement and a trade union not happy with the outcome remains free to declare a dispute and, after conciliation, call a strike.
- (3) In the absence of a recognised trade union or a trade union representing a substantial number of employees in a workplace, a workers' committee may be established subject to the following:
- (a) It may not be established in order to pre-empt or compete with a trade union representing the employees in the workplace.
  - (b) It should include any trade union representatives elected by union members.
  - (c) It should be dissolved if a trade union acquires the right to trade union representatives under section 14 of the Act.

## **PART D: INDUSTRIAL ACTION: STRIKES AND LOCKOUTS**

### **16. Constitutional context**

- (1) The right to engage in collective bargaining and the right of workers and employers to take industrial action is constitutionally protected. The right to engage in collective bargaining is a right that trade

unions, employers and employers' organisations share. Workers have the right to strike and the Constitutional Court has held that the right to engage in collective bargaining implicitly recognises the employer's right to exercise some economic power, which may include the right to lockout.

- (2) Like all rights, the right to engage in collective bargaining (including the recourse by employers to exercise economic power) and the right to strike may be limited by legislation provided that the limitation is reasonable and justifiable. The limitations imposed on the right to strike and lockout seek to make a strike or lockout the last resort or unnecessary because of other judicial or arbitral remedies or to protect society from strikes in essential services, the interruption of which may affect the health and safety of the population.
- (3) It is in this context that the right to strike and the recourse to lockout must be understood. Unlike most other rights in the Bill of Rights, the right to strike and the right to lockout is a right to cause economic harm.
- (4) However, prolonged and violent strikes have a serious detrimental effect on the strikers, the families of the strikers, the small businesses that provide services in the community to those strikers, the employer, the economy and community.
- (5) Workers exercising the right to strike or the right to protest action and employers exercising the recourse to a lockout must therefore recognise the constitutional rights of others<sup>4</sup>.

## **17. Disputes in respect of which industrial action may be exercised**

Disputes of right, mutual interest and those involving socio-economic interests

- (1) The Act distinguishes between three kinds of dispute: disputes of right; disputes of mutual interest; and disputes involving the socio-economic interests of workers:
  - (a) A dispute of right is a dispute that the Act or other employment laws require to be settled by arbitration or adjudication. An example of a dispute of right is a dispute arising from a contravention of a collective agreement or an employment law such as unfair dismissal, unfair discrimination, and underpayment of wages. It can be described as a dispute concerning existing rights.

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<sup>4</sup> Constitutional rights include:

- i. Section 12(1) 'Everyone has the right to freedom and security of the person, which includes the right- ... (c) to be free from all forms of violence from either public or private sources.' This refers to the right of people not to be threatened with or subjected to violence.
- ii. Section 16 'Everyone has the right to freedom of expression ... (that) does not extend to (b) incitement of imminent violence; or (c) advocacy of hatred ...' Refers to the right to express oneself during industrial action, but not in a manner that incites violence or constitutes hate speech.
- iii. Section 17 'Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.' This refers to the right of workers to demonstrate and picket in a peaceful and unarmed manner.
- iv. Section 18 'Everyone has the right to freedom of association.' This refers to the right of a worker to participate or not to participate in the strike or lockout.
- v. Section 25 'No one may be deprived of property except in terms of a law of general application'. This refers to the right not to be threatened with or subjected to damage of property.
- vi. Section 23(1) 'Everyone has the right to fair labour practices.' Refers to the right not to be penalised for engaging in a protected strike or lockout.

- (b) A dispute of mutual interest on the other hand is a dispute concerning employment or labour relations that cannot be resolved through enforcing existing rights. It can be described as a dispute to create new rights. A dispute of mutual interest is the legitimate scope of a collective bargaining agreement and the matters which may legitimately form the subject of a protected strike or lockout.
  - (c) A dispute involving the socio-economic interests of workers, permits protest action in matters that extend beyond matters that form the subject matter of collective agreements. These disputes though must be distinguished from purely political strikes which the Act does not afford any protection.
- (2) The distinction between a rights and a mutual interest dispute can be demonstrated by a few examples:
- (a) If an employer pays an employee less than the rate of pay stipulated in a collective agreement or the amount stipulated in an employment law, a dispute over the underpayment is a dispute of right that may be referred to the CCMA, a bargaining council or the Labour Court for adjudication.
  - (b) A dispute of interest on the other hand is a dispute over a demand that the employees or employer has no legal right to, such as a demand for an increase in wages or a change in hours of work. These kinds of dispute can only be resolved by agreement, which may be induced by a threat or the exercise of a strike or lockout. There are two exceptions - disputes of interest in essential services must be referred to arbitration; and the parties to a dispute of interest may by agreement refer the dispute to arbitration. The following are examples of a dispute of interest:
    - (i) A dispute over what next year's wages are going to be;
    - (ii) A dispute over a new collective agreement or the renewal of an expired agreement;
    - (iii) A dispute over shorter working hours or higher overtime rates of pay;
    - (iv) A dispute over the introduction of a new shift system.
- (3) The distinction between a dispute of mutual interest and a dispute of interest is important because as a rule, the Act limits the right to strike to matters of mutual interest. There are two exceptions. A dispute over organisational rights or a proposed retrenchment in some circumstances may either be determined, on the one hand by the CCMA (organisational rights) or the Labour Court (retrenchment disputes) or, on the other hand, by the exercise of the right to strike. For example, if a registered trade union does not have sufficient or majority representativeness (depending on the nature of the organisational right), it has no statutory right to those organisational rights but the Act specifically

permits a trade union to strike– i.e. the creation of a new right, in this case granting a minority trade union an organisational right by collective agreement rather than by operation of statute.

What disputes may form the subject matter of a strike or lockout

- (4) Apart from the two exceptions relating to organisational rights and retrenchment in certain circumstances, the dispute must be one of mutual interest. Accordingly, rights disputes (other than the two exceptions) do not constitute matter that can form the subject matter of a protected strike or lockout.
- (5) Not all mutual interest disputes however may form the subject matter of a protected strike or lockout. The Act limits the right to strike and recourse to lockout in respect of the following:
  - (a) In breach of a peace clause in a collective agreement;
  - (b) If the trade union and employer or employers' organisation have agreed to refer the dispute to arbitration;
  - (c) If the employees, trade union, employer or employers organisation make an unlawful demand. An unlawful demand for example is a demand by workers that an employer dismiss a fellow employee. That would be unlawful because it would require the employer to contravene the fair dismissal provisions in the Act. Another example is the demand by an employer that employees work longer overtime hours than permitted in the BCEA.

## **18. Conciliation of mutual interest disputes**

- (1) Section 64(1) of the Act requires all disputes of mutual interest that may result in a strike or a lockout to be referred to conciliation. There is one exception – the unilateral change to terms and conditions of employment if an employee or a trade union gives notice not to introduce the alteration or, if introduced, to restore the original terms and conditions.
- (2) The trade union and employer parties to a mutual interest dispute must attend the conciliation meetings convened by the CCMA or the bargaining council with jurisdiction.
- (3) The primary object of the conciliation is to try to resolve the dispute without resort to industrial action. The parties must in good faith endeavour to settle the dispute, failing which, the commissioner or conciliator must propose alternative means to do so, such as arbitration, including advisory arbitration.
- (4) If the parties fail to settle the dispute or agree on an alternative method to resolve it, a secondary object of conciliation is to –

- (a) to record the demands in respect of which the workers, trade union, employer or employers' organisation intend to take industrial action;
- (b) to agree on the following:
  - (i) the need for maintenance or minimum services, if necessary;
  - (ii) the lines of communication between the conciliator (or facilitator if there is one), the union, the employer and the police; and
  - (iii) Strike and picketing rules.

## **19. Ballot of members**

- (1) The Act does not require the conduct of a ballot as requirement for a protected strike or lockout. Section 67(7) of the Act states quite explicitly that the failure by a registered trade union or registered employer organisation to conduct a ballot may not give rise to any litigation that will affect the legality and the protected status of a strike.
- (2) The obligation to ballot flows instead from the constitution of a registered trade union or employers' organisation. The constitutional obligation flows from the requirement in section 95(5)(p) of the Act that a trade union or employers' organisation that seeks registration must provide in its constitution for the conduct of a ballot before the calling of a strike or lockout. That ballot must be a secret ballot.
- (3) Registered trade unions and employers' organisations are obliged to comply with their constitutions even though the failure to do so does not have the consequence of invalidating the protected status of the strike or lockout..*[sic]*

## **20. Notice of the commencement of the strike or lockout**

- (1) The notice of the commencement of a strike or lockout must be in writing and given at least 48 hours after the issue of a certificate of outcome or the expiry of thirty days in the case of private employers and seven days in case of the state as employer.
- (2) Since the object of notice is to allow the other party to put its house in order and limit the negative consequences of industrial action to loss of production on the part of employers and the loss of income on the part of employees, the parties should agree to a notice period, notwithstanding the minimum periods set out in the Act, that is of sufficient duration to allow the employer to shut down its plant or services without damage to property and to allow the employees to make the necessary arrangements to face a period of no income..*[sic]*
- (3) The notice must include –

- (a) the date and time when the strike or lockout is to commence;
  - (b) the demands which the other party is being required to meet, which demands may not be different to those on which the parties deadlocked.
- (4) The notice does not have to include the following information:
- (a) Which employees are to go on strike;
  - (b) In which division of the employer's workplace the strike is going to be called.
- (5) If a strike or lockout does not commence on the date stated in the notice, the trade union or employers' organisation should issue a further notice stating the date and time of commencement if it intends to strike or lockout unless there is an agreement, that should not be unreasonably withheld, to extend or shorten the notice to allow for further negotiations.
- (6) The failure to issue a further notice, or strike or lockout after a notice is issued in terms of 19(5) herein, may lead to an inference that the trade union or employers' organisation has waived or abandoned its right to strike or lockout.

## **21. Who may strike**

- (1) Any employee, including employees who are not members of the union calling the strike, may join a protected strike. There are only two exceptions:
- (a) Essential service workers or any agreed minimum services within an essential service;
  - (b) Maintenance service workers
- (2) If a service has been declared an essential service by the Essential Service Committee in terms of section 71 of the Act, the trade unions in that service and the employers can conclude a minimum services agreement on the particular categories within that service and number of employees to perform that service during the strike. If a minimum services agreement is not concluded, the Essential Services Committee may determine such minimum services under section 72(2) of the Act. Employees within agreed or determined minimum services are not permitted to strike.
- (3) A trade union and employer may enter into a maintenance service agreement in order to avoid material physical damage to the working area, plant or machinery arising from a strike. If there is no agreement, the employer may apply to the Essential Services Committee for a determination. Employees falling within such a determination are not permitted to strike. Depending on whether the

all or a substantial number of employees are prohibited from striking as a result, the committee may refer the dispute to arbitration.

## **22. Strikes or lockouts in respect of employees residing on employer premises**

- (1) Employees residing in accommodation provided by their employer are entitled to exercise their fundamental rights including their freedom of association not only at the workplace but also in their living quarters<sup>5</sup>.
- (2) During a protected and peaceful strike or lockout, the employer, at the request of the employee, should not discontinue payment in kind in respect of accommodation, the provision of food and other basic amenities of life such as the provision of water and heating. The parties may regulate this by way of a collective agreement as provided for in section 34(1)(b) of the Basic Conditions of Employment Act (BCEA) and which may include provisions for the employer to recover such payment in kind by way of deductions from an employee's wages after the industrial action.
- (3) The employer may recover the monetary value of the payment in kind made at the request of the employee during the strike or lockout from the employee in terms of the BCEA and Act.
- (4) Freedom of association in the context of employees residing at their place of work, means –
  - (a) the right of an employee to choose either –
    - (i) to strike or not to strike; or
    - (ii) to participate or not to participate in a collective decision to resist a lockout;
  - (b) that every employee must respect the right of other employees –
    - (i) to strike or not to strike;
    - (ii) to participate or not to participate in a collective decision to resist a lockout;
  - (c) to work or not to work during the strike or lockout;
  - (d) the right of every employee not to be interfered with, threatened with or intimidated when entering or exiting the workplace, commuting to and from the workplace, in their living quarters (if provided by the employer) or their homes or within their communities.
- (5) Every employee must respect the right to freedom of movement in particular –

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<sup>5</sup> The ILO Workers' Housing Recommendation 115 of 1961.

- (a) the right of management to enter and exit its premises;
  - (b) the right of non-striking workers to enter and exit the workplace and their living quarters and to use public transport;
  - (c) the right of third parties to enter and exit the employer's premises and do business with the employer;
  - (d) an employer's right to continue and maintain production, subject to the restrictions on replacement labour contained in section 76 of the Act; *[sic]*
- (6) All parties must take all reasonable steps to ensure that their employees and members comply with (4) and (5) above.
- (7) Nothing in this clause restricts a lawful and peaceful picket on the employer's premises in accordance with section 69 of the Act and Part E: Picketing.

### **23. Peace and stability and communication during a strike or a lockout**

- (1) In accordance with the guideline that the parties should develop rules regulating peaceful and protected industrial action, which includes picketing, those rules, depending on the circumstances, may include the establishment of a peace and stability committee made up of union officials, shop stewards, employer representatives, the conciliator or facilitator, a person representing the private security company and a person appointed by the South African Police Services in accordance with the Accord.
- (2) At the very least, the rules should include the following:
- (a) The trade union, employer or employers' organisation should identify persons and alternates with whom the parties can communicate during a strike or lockout and provide each other with contact details.
  - (b) The contact details of the trade union and employer representatives should be forwarded to the conciliator or facilitator in order that the conciliator or facilitator is able to re-institute negotiations during the course of the strike or lockout.
  - (c) The employer should then request the South African Police Services to appoint a police officer in accordance with the Accord with whom the trade union and employer representatives can liaise during the currency of the strike and to provide that person with the contact details of the employer and trade union representatives and those of the conciliator or facilitator.

- (d) If there is a significant private security presence, the employer should ensure that a person with authority in the private security company is identified as a representative and that that person's contact details are forwarded to the trade union, the conciliator or facilitator and the South African Police Services.

## **PART E: PICKETING**

### **24. Introduction**

- (1) This Part of the Code is intended to provide practical guidance on picketing in support of any protected strike or in opposition to any lockout. It is intended to be a guide to those who may be contemplating, organising or taking part in a picket and for those who as employers or employees or members of the general public that may be affected by it.
- (2) Section 17 of the Constitution recognises the right to assemble, to demonstrate, to picket and to present petitions. This constitutional right can only be exercised peacefully and unarmed. Section 69 of the Act seeks to give effect to this right in respect of a picket in support of a protected strike or a lockout.
- (3) Any person interpreting or applying the Act in respect of any picket must take this Part of the Code into account. This is the effect of section 203 of the Act. This applies to employers and their employer organisations, employees and their trade unions, the Commission, Labour Court, the Labour Appeal Court, private security services and the South African Police Services. (include supporters and landlord)
- (4) This Part of the Code does not apply to all pickets and demonstrations in which employees and trade unions may engage. It applies only to pickets held in terms of section 69 of this Act. That section has four elements:
  - (a) The picket must be authorised by a registered trade union;
  - (b) Only members and supporters of the trade union may participate in the picket;
  - (c) The purpose of the picket must be to peacefully demonstrate in support of any protected strike or in opposition to any lockout;
  - (d) The picket may only be held in a public place outside the premises of the employer or, with the permission of the employer, inside its premises. The permission of the employer may be overruled by the CCMA, if the permission is unreasonably denied. The factors to be taken into account to determine whether permission is unreasonably denied are set out in clause 29 of this Code.

- (5) If the picket complies with these four elements then the ordinary laws regulating the right of assembly do not apply. These laws include the common law, municipal by-laws and the Regulation of Gatherings Act, 205 of 1993.
- (6) A picket conducted by an unregistered trade union or for purposes other than to demonstrate in support of a protected strike or a lockout is not protected by section 69 of the Act. The lawfulness of that picket or demonstration will depend on compliance with the ordinary laws regulating public gatherings referred to in sub-clause (5).

## **25. Authorisation**

- (1) A picket contemplated in section 69 of the Act must be authorised by a registered trade union.
- (2) The authorisation must be made in accordance with the trade union's constitution. That means that there must either be a resolution authorising the picket or a resolution permitting a trade union official to authorise a picket in terms of section 69(1). It should be formal and in writing.
- (3) A copy of the resolution authorising the picket ought to be served on the employer before the commencement of the picket.
- (4) The authorisation applies only to its members and its supporters.

## **26. Purpose of the picket**

- (1) The purpose of the picket is to peacefully encourage non-striking employees and members of the public to oppose a lockout or to support strikers involved in a protected strike. The nature of that support can vary. It may be to peacefully encourage employees not to work during the strike or lockout. It may be to peacefully dissuade replacement labour from working. It may also be to persuade members of the public or other employers and their employees not to do business with the employer.
- (2) The strike must be a protected strike. In normal cases, employees picket at their own place of work or other designated areas as agreed by the parties, or provided for by the CCMA in support of their strike against their own employer. Cases do arise, however, where employees picket at their own place of work in support of a strike between another employer and its employees. This is what is contemplated in section 66 of the Act as a "secondary strike". In this case, in order to be protected, the picket must further satisfy the requirements of a lawful secondary strike in terms of section 66. This is because the definition of "secondary strike" in the section includes "conduct in contemplation or furtherance of a strike". A picket is "conduct in contemplation or furtherance of a strike."
- (3) The requirements for a protected secondary strike are –
  - (a) the strike that is to be supported by the secondary strike must itself be a protected strike;

- (b) the employer of the employees taking part in the secondary strike must have received written notice of the proposed picket at least 7 days prior to its commencement; and
  - (c) the nature and extent of the secondary strike must be reasonable in relation to the possible direct or indirect affect that the secondary strike may have on the business of the primary employer.
- (4) If a picket is in support of an unprotected strike, the picket is not protected by section 69 of the Act.
  - (5) Pickets may be held in opposition to a lockout. Section 69(1) does not distinguish between protected and unprotected lockouts. This means that a picket may be held in opposition to both a protected and an unprotected lockout.

## **27. No picketing unless rules agreed or determined**

No picket in support of a protected strike or in opposition to a lockout may take place unless rules have been agreed or determined by the CCMA in terms of section 65(9) of the Act.

## **28. Agreed picketing rules**

- (1) A registered trade union and employer or employer organisation should seek to conclude a collective agreement on standing picketing rules to regulate pickets in support of a protected strike or in opposition to a lockout.
- (2) The following matters should be considered in such a collective agreement –
  - (a) the nature of the authorisation and its service upon the employer;
  - (b) the notice of the commencement of the picket including the place, time and the extent of the picket;
  - (c) the nature of the conduct in the picket;
  - (d) the number of picketers and their location;
  - (e) the modes of communication between marshals and employers and any other relevant parties;
  - (f) the conduct of the pickets on the employer's premises; and
  - (g) this code of good practice and the Default Picketing Rules annexed to this Code.

- (3) If the parties to a dispute giving rise to a protected strike or lockout have not concluded a collective agreement regulating pickets, the parties must endeavor to agree picketing rules before the commencement of the protected strike or lockout taking into account the factors referred to in sub-item (2). The trade union or employer may request the Commission to facilitate such an agreement in terms of section 69(4) of the Act.

## **29. Default picketing rules**

- (1) If there is no collective agreement on picketing rules or no picketing rules agreed during the conciliation process, the Commission must determine picketing rules in accordance with the Default Picketing Rules determined in terms of section 69(9) of the Act.
- (2) In terms of section 69(9)(b) of the Act, rules determined under clause (1) are binding on the trade union, its members and supporters, and the employer.

## **30. Pickets on employer premises or in other designated areas**

- (1) A picket may take place on the employer's premises or other designated area with the permission of the employer. The permission may not be unreasonably withheld. In order to determine whether the decision of the employer to withhold the permission is reasonable, the factors, which should be taken into account, include –
- (a) the nature of the workplace e.g. a shop, a factory, a mine etc;
  - (b) the particular situation of the workplace e.g. distance from place to which public has access, living accommodation situated on employer premises, etc;
  - (c) the number of employees taking part in the picket inside the employer's premises;
  - (d) the potential for violence and other unlawful acts;
  - (e) the areas designated for the picket;
  - (f) time and duration of the picket;
  - (g) the proposed movement of persons participating in the picket;
  - (h) the proposals by the trade union to exercise control over the picket; and
  - (i) the conduct of the picketers.

## **31. Dissemination of picketing rules**

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Employers, employer organisations and trade unions must take measures to disseminate the picketing rules which may include measures –

- (a) placing the rules on notice boards; and
- (b) distributing copies of the rules to employees and private security officers.

### **32. Conduct in the picket**

- (1) Although the picket may be held in any place to which the public has access, the picket may not interfere with the constitutional rights of other persons.
- (2) The trade union must –
  - (a) appoint convenors and marshals to monitor and control the picket as set out in the picketing rules;
  - (b) provide the convenors, marshals with the agreed or determined picketing rules; and
  - (c) take measures to ensure that the convenors, marshals and picketers understand those rules.
- (3) The picketers must conduct themselves in a peaceful, unarmed and lawful manner. They may –
  - (a) carry placards;
  - (b) chant slogans; and
  - (c) sing and dance.
- (4) Picketers may not –
  - (a) forcefully prevent or Intimidate suppliers, clients and customers of the employer, members of the public, employees who are not on strike and replacement workers from entering or leaving the premises of the employer;
  - (b) commit any unlawful action, such as intimidating, coercing, threatening or assaulting any person or causing or threatening to cause any damage to any property whether belonging to the employer or not;
  - (c) incite violence;

- (d) wear masks; or
- (e) have any dangerous weapons or objects in their possession.

### **33. Peace obligation and the role of police**

(1) It is not the function of the police to take a view of the merits of a particular strike or lockout. Their role is to uphold the law and keep the peace. The law does, however, give the police the power to take measures that may be reasonably necessary to ensure that a strike and picket remains peaceful, unarmed and orderly. In exercising these measures –

- (a) the police may only intervene with any person/s who –
  - (i) the police reasonably believe is in possession of a firearm or dangerous weapon;
  - (ii) displays a firearm or dangerous weapon;
  - (iii) has committed or threatens to commit an assault or damage to property;
  - (iv) intimidates or threatens any person entering or leaving the employer's property;
  - (v) unlawfully prevents the employer or another person from conducting their business or from working or not working;
  - (vi) blocks any vehicle or person from entering or leaving the employer's premises;
  - (vii) breaks into or enters the employer's property without the employer's permission;
  - (viii) threatens or commits an act of public violence; or
  - (ix) commits any action prohibited by a court order.
- (b) the police may only disperse a picket or gathering if –
  - (i) there is reasonable cause to believe that persons involved in the picket or gathering may engage in any of the crimes referred to in (a) above; or
  - (ii) the picket or gathering has been interdicted under a court order and the court orders the police to enforce court order;
  - (iii) persons involved in the picket or gathering commits or threatens to commit an act of public violence;

- (2) In the context of the constitutional right to picket peacefully and unarmed and applying the factors listed in section 3(2) of the Dangerous Weapons Act, 15 of 2013 to determine whether a person intends to use the object as a dangerous weapon, a dangerous weapon is any object that could be used to injure or threaten a person or damage property. In the context of a picket there is no other justifiable use for the possession or display of such an object. Cultural implements carried by picketers must clearly not be carried or used in a manner intended to intimidate or cause harm.
- (3) Fundamental to promoting peaceful industrial action and peaceful lockouts, is implementing the principle of seeking to resolve disputes as to the conduct of participants through negotiations.
- (4) The police have no responsibility to enforce the Act or any picketing rules. They have no responsibility to enforce the terms of a court order interdicting a strike or a picket unless ordered to do so by a court. The police may, however, assist the sheriff in serving a court order if the police think that there may be a breach of the peace.
- (5) Members of the police assigned to monitor strikes, lockouts and pickets should where necessary conduct a threat analysis –
  - (a) should adopt a non-threatening presence;
  - (b) be sensitive to the potential presence of persons with disabilities and to consider their safety and security when acting to disperse any picket or gathering;
  - (c) should use minimum force and non-lethal equipment such as shields, rubber bullets, water cannons, stun grenades and tear gas<sup>6</sup>;
  - (d) should take into account that the use of that equipment can result in serious injury and even death;
  - (e) may only use that equipment –
    - (i) after non-violent means have failed;
    - (ii) to the extent necessary, subject to prevailing circumstances and in compliance with the law and all police regulations; and
    - (iii) in a proportional and lawful manner.

#### **34. Peace obligation and role of private security**

- (1) The role of private security is to protect the property of the employer and client and ensure the safety of persons on the property. Private security officers have no right to intervene in a strike or a picket or to enforce the Act or any picketing rules made under them.
- (2) A private security officer does not have the powers of the police but may arrest in terms of section 42 of the Criminal Procedure Act, 51 of 1977 just as any other private person may do, a person participating in the picket or gathering –
  - (a) who commits a Schedule 1 offence in the officer's presence or the officer reasonably suspects the person of doing so such as public violence, malicious injury to property and assault when a dangerous wound is inflicted;
  - (b) who the officer reasonably believes to have committed an offence and is escaping from or being freshly pursued by a person who the officer reasonably believes has the authority to arrest;
  - (c) who the officer sees engaged in a fight;
  - (d) if authorised by the employer, any person committing an offence on the employer's property.
- (3) A private security officer may pursue a person referred to in (a) above.
- (4) Any person arrested by a security officer in these circumstances must be brought as soon as possible to a police station.
- (5) Every employer that contracts with a private security company must ensure that –
  - (a) the company is registered as a security service provider in terms of the Private Security Industry Regulation Act, 56 of 2001;
  - (b) it complies with the legislation and codes of conduct relating to the private security industry and the requirements of the Private Security Regulatory Authority;
  - (c) its security officers tasked with protecting property of the employer during the course of industrial action are adequately trained in crowd management and the provisions of this Code in order to ensure that they act appropriately if conflict escalates during the course of industrial action.

### **35. General rights, obligations and immunity**

- (1) A person who takes part in a picket protected in terms of the Act does not commit a delict or a breach of contract. This means that the employer may not sue a person or a union for damages caused by a picket held in compliance with section 69 of the Act and the applicable picketing rules.

- (2) The employer may not take disciplinary action against an employee for participating in a picket in compliance with section 69 of the Act and the applicable picketing rules. If an employee's conduct during a picket constitutes misconduct the employer may take disciplinary action in accordance with the Act.

## **ANNEXURE A**

### **GOOD FAITH DECLARATION**

**In the negotiations between:**

**[Name of union or unions]**

**and**

**[Name of employer, employers or employers' organisation]**

**on**

**[Short description of the matters for negotiation<sup>7</sup>]**

I, ...[name], [capacity] of the [name of entity] declare that –

- 1 I will engage in the negotiations with [name of entity on the other side] in good faith with the sincere intention of concluding a collective agreement if possible.
- 2 I will adhere to the principles of good faith bargaining contained in the Code on Collective Bargaining and Industrial Action.
- 3 I will treat the negotiators representing the [name of the other entity on the other side] with respect and conduct the negotiations in a rational, constructive and courteous manner.
- 4 I will not deliberately delay negotiations by failing to respond quickly to communications, to agree dates and times for negotiation meetings, to attend negotiating meetings, and to attending meetings without a mandate.
- 5 I will, accordingly, ensure to the best of my ability that I and the other members of our negotiating team –

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<sup>7</sup> Such as: 'Wage Agreement for 2016/17' or 'Employer's restructuring proposal dated ....'.

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5.1 will attend agreed negotiating and conciliation meetings and, if for good reason we are unable to do so, I will ensure that reasonable notice of our non-attendance is given to avoid wasteful expenditure and inconvenience.;

5.2 are properly mandated when we attend negotiation and conciliations meetings.

6 I will faithfully communicate any proposals or counterproposals arising from negotiations to our [members/mandating structures/board/executive committee]

7 I will not conduct myself in any way that may constitute conduct that undermines the negotiations.

Signed on [date] at [place]

\_\_\_\_\_  
[Name and contact details]

## **ANNEXURE B**

### **DEFAULT PICKETING RULES<sup>8</sup>**

#### **1 PARTIES TO THE dispute**

1.1 The parties to the dispute giving rise to the strike/lockout<sup>9</sup> are:<sup>10</sup>

..... [name]

..... [name]

#### **2 BINDING NATURE**

2.1 These Rules are binding on the parties to the dispute and their officers, officials, members and supporters.

2.2 Nothing in these Rules prevents the parties to the dispute agreeing to their own rules to replace or amend these Rules.

2.3 These Rules must be interpreted in accordance with –

<sup>8</sup> Picketing may only take place in terms of s69. Gatherings related to unprotected strikes are subject to the provisions of the Regulation of Gatherings Act.

<sup>9</sup> Delete, whichever is not applicable unless both a strike and a lockout are in place.

<sup>10</sup> Commissioner to fill in the names of the parties to the dispute giving rise to the strike.

2.3.1 sections 17, 18 and 23 of the Constitution;

2.3.2 section 69 of the Labour Relations Act, 66 of 1995 (Act);

2.3.3 The Code of Good Practice: Picketing (Code)

2.4 Where these Rules are silent, the relevant provisions of the Act and the Code apply.

### **3 PURPOSE OF THE PICKET**

3.1 The only purpose of the picket is to approach and peacefully seek to persuade the following persons to support the strike or oppose the lockout by temporarily withholding their services from, supplying goods and materials to, or working for the employer/s:

3.1.1 service providers, clients and customers of the employer;

3.1.2 members of the public; and

3.1.3 employees who are not on strike (other than essential or minimum service employees) and replacement workers.

### **4 LOCATION OF PICKET AND NUMBER OF PICKETERS<sup>11</sup>**

4.1 A picket may only be held at the places designated in Annexure A.

4.2 Only members and supporters of the strike may take part in the picket.

4.3 A picket at any designated location may not exceed the maximum number of members or supporters determined by the Commissioner in that Annexure.

### **5. DURATION AND TIME OF PICKET**

5.1 The picket may only commence at or after the commencement of the strike or lockout.

5.2 The picket may only take place during daylight hours.<sup>12</sup>

### **6. NATURE AND CONDUCT OF PICKET**

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<sup>11</sup> The Commissioner must determine the location of the pickets and the number of picketers in each designated location in accordance with section 69(5) and (6) of the LRA, clauses XX of the Code and any relevant court decision.

<sup>12</sup> The Commissioner may amend this rule if the employer works night shift or the picket is rendered ineffective because the employer has arranged for its suppliers, customers and clients to enter the premises at night.

- 6.1 Picketers must at all times conduct themselves in a peaceful, unarmed and lawful manner and not interfere with the constitutional rights of other persons
- 6.2 Subject to clause 6.3, picketers may for the purposes of the picket –
  - 6.2.1 carry placards;
  - 6.2.2 hand out pamphlets;
  - 6.2.3 chant slogans, sing and dance;
  - 6.2.4 be addressed by union officials and supporters; and
  - 6.2.5 wear trade union t-shirts, hats, caps, badges and other paraphernalia.
  - 6.2.6 approach and peacefully engage suppliers, clients, customers, employees (other than essential or minimum service employees) and replacement workers not to enter the premises and support the strike or oppose the lockout.
- 6.3 Any limitations on the activities listed in clause 6.2 in respect of specific locations are detailed in Annexure A.<sup>13</sup>
- 6.4 Picketers may not –
  - 6.4.1 In performing the activities contemplated in clause 6.3 use hate or defamatory speech or incite violence;
  - 6.4.2 forcefully prevent or appear to prevent suppliers, clients and customers of the employer, members of the public, employees who are not on strike and replacement workers from entering or leaving the premises or any part of the premises of the employer;
  - 6.4.3 commit any unlawful action, such as intimidating, coercing, threatening or assaulting any person or causing or threatening to cause any damage to any property whether belonging to the employer or not;
  - 6.4.4 wear masks; or
  - 6.4.5 have any dangerous weapons or objects in their possession.

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<sup>13</sup> The Commissioner may, for example, limit the activity of a picket in a shopping mall or business complex to carrying placards and handing out pamphlets.

6.5 For the purposes of these Rules, dangerous objects or weapons includes any object that could be used to injure or threaten a person or damage property. In the context of a picket there is no other justifiable use for the possession or display of such an object, in particular any of the following objects:

6.5.1 Knives, spears, pangas, bush knives or any similar object;

6.5.2 Sticks and knobkieries<sup>14</sup> whether made of metal or wood;

6.5.3 Whips and sjamboks;

6.5.4 Bricks, stones or any similar object that can be thrown or propelled in a manner that can cause injury or damage to property;

6.5.5 Any inflammable substance;

6.5.6 Any liquid, foam or similar substance that can be sprayed or extruded to cause injury or damage to property.

## **7. CONTROL OF PICKETS**

7.1 Union officials and managers are accountable and should be available to resolve problems may the need arise.

7.2 The name and contact details of the Commissioner responsible for the conciliation of the dispute giving rise to the strike or lockout and these Rules is set out in Annexure B.

7.3 The names and contact details of the trade union convenor/s of the picket and the employer representative/s are listed in Annexure B<sup>15</sup>.

7.4 The convenor/s of the picket is responsible for overseeing the picket and ensuring that the picket complies with the rules.

7.5 The trade union must appoint one marshal for every ten picketers to monitor and control the picket at each designated location. The full names and contact details of the marshals are listed in Annexure B.

7.6 The convenors, marshals and employer representatives must be present from the start to the end of the picket each day.

7.7 The convenor, the marshals and the employer representative must –

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<sup>14</sup> To be discussed further.

<sup>15</sup> The Commissioner must list the names and contact details of the convenor/s and employer representative/s In Annexure B.

7.7.1 at all times during the picket have a copy of these Rules in their possession;

7.7.2 wear the armbands or vests described in Annexure B to identify themselves as convenors or marshals<sup>16</sup>; and

7.7.3 be present from the start to the end of each day of the picket.

7.8 The names and telephone numbers of the convenor and marshals must be set out in Annexure B.

7.9 Any change to a convenor, employer representative and marshal must be sent by a text message to the persons listed in Annexure B.

7.10 The trade union must ensure that its members and supporters who participate in a picket wear the identification described in Annexure B.<sup>17</sup>

7.11 The trade union must train its convenors and marshals on the Code and the Rules and their responsibilities to ensure a lawful and peaceful picket.

## **8. EMPLOYER CONDUCT**

8.1 The employer or any person in authority at the workplace or acting on the employer's behalf may not –

8.1.1 in any way hinder or obstruct the lawful and peaceful conduct of the picket;

8.1.2 undermine any employee's right to lawfully and peacefully participate in the picket or discipline or threaten to discipline any employee for peacefully and lawfully doing so;

8.1.3 engage in or permit conduct which is provocative or may incite conflict; or

8.1.4 carry a dangerous weapon of any kind while in contact with the picketers.

8.1.5 use hate or defamatory speech or incite violence

8.2 The employer must ensure that any private security company employed by the employer complies with the requirements relating to such companies under the Code of Good Practice on Collective Bargaining and Industrial Action.

8.3 The employer must ensure reasonable access to toilet facilities and drinking water to persons participating in a picket

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<sup>16</sup> The Commissioner to describe the armbands or vests identifying the members or officials as convenors and marshals.

<sup>17</sup> The Commissioner to describe the T shirts, hats, badges or other forms of identification of participants in the picket in Annexure B.

## **9. PICKETING ON EMPLOYER'S PREMISES OR IN OTHER DESIGNATED AREAS**

- 9.1 If picketing is to take place on the employer's premises or other designated areas, the employer must, where applicable provide the trade union with written confirmation of the health and safety rules to be observed before, during and after the picket.
- 9.2 Participants in a picket on the employer's premises or in any other designated area must, in addition to the requirements set out in clauses 6 and 7 above –
- 9.2.1 remain within the designated picketing area(s);
  - 9.2.2 observe the health and safety rules and regulations applicable in the workplace;
  - 9.2.3 refrain from causing any damage to property or allowing any damage to be caused; and
  - 9.2.4 leave the premises and the facilities in the condition in which they found it.

## **10. FAILURE TO COMPLY WITH THESE RULES**

- 10.1 Any person may refer a dispute concerning the interpretation or application of these Rules to the Commissioner responsible for the conciliation of the dispute giving rise to the strike or lockout and these Rules.
- 10.2 The Labour Court may suspend a picket at one or more designated locations if these Rules have not been complied with in terms of section 69(12)(c) of the Act.

## **11. DISPUTE RESOLUTION**

- 11.1 Any dispute about the interpretation or application of these Rules or any alleged breach thereof shall be dealt with in accordance with section 69(8), (9), (10) and (11) of the Act or section 158(1)(g) of the Act. This does not affect any other right that any person may have in terms of the Act or any other law.
- 11.2 It is recorded that the employer, the union and persons taking part in the picket are subject to the protections and provisions set out in section 67 of the Act.

## **12. POLICE INVOLVEMENT**

- 12.1 These Rules do not affect the right of any person to ask the South African Police Service or any security organisation responsible for maintaining safety and security at or near the workplace to investigate or deal with any unlawful conduct or alleged unlawful conduct.

- 12.2 If this happens, the employer and the union undertake to cooperate with the police or security organisation in the performance of their duties and the union undertakes to do everything possible to ensure that its members and supporters will do the same.

### 13. TERMINATION

These Rules will remain in effect until the settlement of the dispute, the termination of the strike, termination of the picket by the union or until it is terminated or reviewed by mutual agreement, whichever may come first.

## ANNEXURE 1

### DESCRIPTION OF PLACE OR PLACES FOR THE PICKET

#### Addresses and location/s of pickets and number of picketers

##### Address/es or location of the picket

1. ....
2. ....

##### Physical location of pickets at each address <sup>18</sup>

.....	[number of pickets]	[limitation of activity]
.....	[number of pickets]	[limitation of activity]

#### Duration and times of pickets – Date/s and times that pickets may be held at each address and physical location

Address /physical location	times of pickets (hours during which pickets may be held at each address and physical location)
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- 1.
- 2.

<sup>18</sup> The physical location may be described in words or drawn or both. So for example the location may be described as 5 metres from the entrance to the employers premises on XX road and extend no more than 2 metres onto the pavement - accompanied with a drawing to that effect.

## ANNEXURE 2

### NAMES AND DETAILS OF PARTICIPANTS

#### Commissioner

1. [Name, email address and mobile telephone number]

#### Convenor

[Name, designation of status<sup>19</sup>, email address and mobile telephone number]

#### Employer representative

[Name of person appointed in terms of clause 8.1, designation of status, email address and mobile telephone number]

#### Marshalls

[Name, work number and mobile telephone number]

[Name, work number and mobile telephone number]

[Name, work number and mobile telephone number]

[Name, work number and mobile telephone number]

### ACCORD

#### ON

### COLLECTIVE BARGAINING AND INDUSTRIAL ACTION

#### Preamble

Recognising the constitutional rights –

- the freedom and security of individuals
- the freedom to assemble peacefully and unarmed.
- the freedom of association
- to strike and
- to engage in collective bargaining,

Recognising the constitutional obligations on the State to respect, protect, promote and fulfill those rights

Recognising the principles stated in the Ekurhuleni Declaration on 4 November 2014, the parties to this Accord affirm –

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<sup>19</sup> Whether a trade union official, shop steward or member. If a shop steward or member, then the employee's work number must be included]

- that the constitutional right to strike and the statutory right to lockout must be peaceful, free of intimidation and violence, including violence and intimidation that may be associated with police action
- strike action by workers and trade unions is a legitimate exercise of power to pursue demands
- prolonged strike action has the potential to cause serious harm not only to strikers and their employers but also to others inside and outside the workplace

The Parties and signatories to this Accord commit themselves and their members to this Accord.

### **Parties to the Accord**

1. NEDLAC constituencies
2. The trade union parties to the Accord are:
  - 2.1. The trade union federations that are represented on the National Economic Development Labour Advisory Council (NEDLAC);
  - 2.2. The trade unions and the members of such trade unions that are members of those federations;
  - 2.3. The trade unions and their members that do not belong to any of those federations that have signed this Accord.
3. The employer parties to the Accord are:
  - 3.1. The federations of employer associations that are represented on NEDLAC;
  - 3.2. The employer associations of those federations;
  - 3.3. The employer associations and members of those associations that are not members of those federations that have signed this Accord; and
  - 3.4. Any employers that are not members of those associations, that have signed this Accord
4. The Government
  - 4.1. The Government in so far as it is directly or through its agencies and institutions required to implement this Accord.

4.2. The State, in its capacity as employer at national, provincial and local level, and as employer in State Owned Enterprises.

5. Agencies

5.1 Commissioner for Conciliation Mediation and Arbitration;

5.2 Bargaining Councils;

5.3 Sector Education and Training Authorities;

5.4 The National Skills Authority;

5.5 The Private Security Industry Regulatory Authority.

6. Other Private Sector Organisations and Institutions;

6.1. The federations of private security companies;

6.2. Private security companies that have signed the Accord; and

6.3 Trade unions in the private security industry.

7. All parties to this Accord commit:

In the case of violence, intimidation, and the threat of harm to person or property associated with industrial action, to build capacity; expedite processes and assign sufficient and senior staff to the resolution of issues.

8. Employer and trade union undertakings

The employer and trade union parties to the Accord and their members undertake –

8.1. to abide by and implement the Code of Good Practice: Collective Bargaining, Industrial Action and Picketing;

8.2. to abide by the terms of collective agreements;

8.3. to mutually respect all parties and to uphold the principles of good faith bargaining and the law;

- 8.4. that during the course of negotiations, dispute resolution processes and strike or lockout action make public statements calling on all members that they must always act in compliance with this Code and in a law abiding and peaceful manner.
  - 8.5. to secure that their negotiators undergo the training contemplated in the Code of Collective Bargaining and Industrial Action including refresher training at regular intervals;
  - 8.6. to secure that any bargaining council to which they belong signs the Accord;
  - 8.7. encourage parties to only contract with security companies that abide by the Accord and Code of Good Practice on Collective Bargaining, Industrial Action and Picketing;
  - 8.8. to only make lawful requests of employees of private security companies;
  - 8.9. to refrain from acting in a manner that makes any conflict worse, and;
  - 8.10. to monitor and evaluate, together with government and under the auspices of NEDLAC, whether the commitments made here are effective in promoting the principles contained in the Preamble.
9. Employer and trade union declaration against violence, loss of life or harm to persons and property

The trade union and employer parties to the Accord and their members hereby –

- 9.1. declare that the resort to violence, intimidation, loss of life or threat of harm to persons and property under all circumstances and more particularly during strikes, lockouts, pickets and protest action is intolerable;
- 9.2. undertake to take all necessary measures to prevent violence, intimidation and damage to property and, if it does occur, to take all the steps necessary to discourage such conduct and to comply with a court order interdicting the violence, intimidation or damage to property;
- 9.3. declare that they are committed to adhering to the provisions of the Code of Good Practice Collective Bargaining and Industrial Action and the related declaration on good faith bargaining.

## **10. Role of Public Order Policing in strikes, lockouts, pickets and protest action**

SAPS, in relation to Public Order Policing undertakes –

- 10.1. to comply with the Code of Collective Bargaining and Industrial Action and the Code of Good Practice on Picketing in so far as those Codes apply to it and to take the necessary steps to ensure that its members do so;

- 10.2. to ensure sufficient capacity and that its members assigned to monitor strikes, lockouts, pickets and protest action are trained in public order policing and those Codes;
- 10.3. that its presence at strikes, lockouts, pickets and protest action is minimal and unobtrusive unless there is good cause for it to be otherwise;
- 10.4. that its members will refrain from acting in a manner that escalates the conflict and will only use minimum force and make use of non-lethal weapons to prevent or respond to breaches of the Codes;
- 10.5. to ensure monitoring and engagement with employees and employers participating in a strike, lockout, picket or protest action.
- 10.6. to investigate and submit for prosecution any perpetrators of violence, intimidation or damage to property on an expedited basis.

## **11. Role of private security companies**

The private security companies that are bound by the Accord undertake –

- 11.1. to comply with the Code of Collective Bargaining, Industrial Action and Picketing in so far as those Codes apply to them and to take the necessary steps to ensure that their employees do so;
- 11.2. to ensure that its security officers tasked with protecting property during industrial action are adequately trained in crowd management and the Code of Collective Bargaining and Industrial Action in order to ensure that they act appropriately if conflict escalates during the course of industrial action;
- 11.3. that the presence of its security officers at strikes, lockouts, pickets and protest action does not escalate conflict and is minimal and unobtrusive unless there is good cause for it to be otherwise; and
- 11.4. that its security officers are only armed with non-lethal weapons to prevent or respond to breaches of the Code.

## **12. Role of the CCMA and Bargaining Councils**

The CCMA and bargaining councils undertake to provide –

- 12.1. dispute resolution and prevention services contemplated in giving effect to the Code of Collective Bargaining and Industrial Action and the Code of Good Practice on Picketing;
- 12.2. training of negotiators in accordance with that Code based on the materials provided by the CCMA and adapted for the sector by that Council;
- 12.3. workplace capacity building programs and services to trade union and employer representatives as may be provided for in terms of its existing policies and procedures;
- 12.4. services to support the establishment of workplace participatory structures where parties have agreed to the establishment of such structures.

**13. Role of Department of Higher Education and Training (DHET) National Skills Fund (NSF) and Sector Education and Training Authorities (SETAs)**

- 13. The DHET, NSF, SETAs undertake to facilitate and make funding available for the training of negotiators in their respective sectors. This training should be developed by the CCMA and appropriately adapted for a sector by that SETA.

Signed by: .....

Date: .....