



# 3RD ANNUAL CCMA SHOP STEWARDS & UNION OFFICIALS CONFERENCE 2019

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GALLAGHER CONVENTION  
CENTRE MIDRAND, JOHANNESBURG



## The National Minimum Wage: The Post Implementation Conversation.

PLENARY 1:  
THE NATIONAL MINIMUM WAGE LEGISLATION POST ENACTMENT  
CONVERSATION:  
KEY INSIGHTS AND CHALLENGES AND THE JOURNEY AHEAD

Presenter: Prof Adriaan Van der Walt, Chairperson - NMW Commission



# PRESENTATION OUTLINE

1. Introduction

2. The purpose of the National Minimum Wage Act (NMWA)

3. Brief Overview of Key Provisions

3.1 The definition of a “*worker*”

3.2 The national minimum wage (NMW)

# PRESENTATION OUTLINE



**3.3 The calculation of the minimum wage**

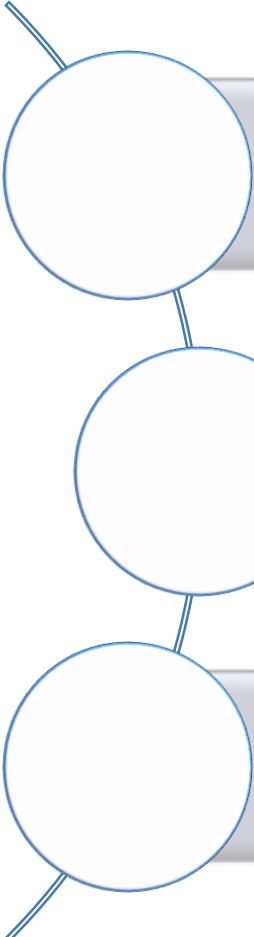
**3.4 Unfair Labour Practice/ Strike**

**3.5 The link to the BCEA**

**4. The NMW Commission**

**5. Exemptions**

# PRESENTATION OUTLINE



**6. Compliance and Enforcement**

**7. Insights and Challenges**

**8. The Journey Ahead**



# INTRODUCTION

- The NMWA was assented to 23 November 2018 and came into effect on **1 January 2019**
- On 19 December 2018, the Minister of Labour published the National Minimum Wage Regulations, 2018 in terms of section 16 of the NMWA which also came into operation on **1 January 2019**
- The preamble of the NMWA focuses on the fact that South Africa is mired by huge disparities in income in the labour market and recognises that RSA is one of the most unequal societies in the world



# INTRODUCTION (CONT...)

- The NMWA accordingly seeks to contribute towards the **eradication of poverty and inequality**, the **promotion of fair and effective competition** in the labour market, and the **promotion of labour market stability**
- The preamble also notes the constitutional obligation of the state and employers to promote and fulfil the right to fair labour practices
- The promulgation of the NMWA is part of the legislative drive to strengthen the **protection of the vulnerable workers** by ensuring that all employers in the country **comply with the minimum wage**



# INTRODUCTION (CONT...)

- Although it is early days, I intend to highlight the actions taken and plans agreed upon by the NMW Commission to fulfil its functions in this context
- I shall also touch on the exemption process so far and briefly refer to compliance and enforcement
- I shall conclude by reiterating the main challenges and consider the way ahead



# THE PURPOSE OF THE NMWA

Amongst other things, the purpose of the NMWA is to:

- Advance **economic development and social justice** by **improving wages and protecting the lowest paid workers in our labour market**
- To **promote collective bargaining**
- To **support economic policy**
- To protect the **value of the national minimum wage**





# BRIEF OVERVIEW OF KEY PROVISIONS

The NMWA applies to all **“workers”** and their employers except members of the:

- South African National Defence Force
- National Intelligence Agency
- South African Secret Service.



# THE DEFINITION OF A “*WORKER*”

**Section 1 of the NMW provides:**

“*Worker*” means any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind

- The definition has been worded in this way in order to **cover all forms of employment and to avoid disputes over whether or not the worker is an employee and to prevent the contractual circumvention of the national minimum wage through disguised employment**



# THE DEFINITION OF A “*WORKER*” (CONT...)

- The implication of this is that the national minimum wage applies to individuals who fall outside the definition of “employee” in the LRA and/or BCEA, such as independent contractors
- The intention is clear: it is meant to prevent employers from shifting to hire “contractors” to avoid meeting requirements of the NMWA
- The bottom line is that someone who is an independent contractor and not an “employee” under other laws, could be regarded as a “worker” for the purposes of the NMWA
- **It is not necessary for an individual to prove his or her status as an employee in order for the NMWA to be applicable to the individual**



# THE DEFINITION OF A “*WORKER*” (CONT...)

- These conclusions may still be contested in the courts
- I suggest that employers need to ensure that their individual contractors as well as part-timers not included in a formal employment contract earn at least a NMW for work they do



# THE NATIONAL MINIMUM WAGE

- The national minimum wage is **R20-00** for each ordinary hour worked
- The national minimum wage constitutes a term of the worker's contract except to the extent that the contract, collective agreement or any law provides a wage that is more favourable to the worker
- The minimum wage is different for certain categories of workers

# SECTION 6 (6)

Category or worker	Minimum wage payable
Farm workers	R18.00
Domestic workers	R15.00
Expanded public works programme workers	R11.00
Workers who have concluded learnership agreements	Allowance based on NQF level and credits earned by the learner



# THE CALCULATION OF WAGE SECTION 5

The calculation of wage for the purposes of the NMWA is the amount payable in money for ordinary hours of work **excluding** –

- (a) Any payment to enable a worker to work including any transport, equipment, tool, food or accommodation allowance
- (a) Any payment in kind including board or accommodation
- (b) Gratuities including bonus, tips or gifts
- (c) Any other prescribed category of payment



# UNFAIR LABOUR PRACTICE OR STRIKE [SECTION 4 (8)]

- It is unfair labour practice for an employer to unilaterally alter wages, hours of work or other conditions of employment in connection with implementing the national minimum wage and the provisions and sections 191, 193, 194(4) and 195 of the LRA apply unless the context indicates otherwise
- This provision ensures that there will not be a **proliferation of industrial action as a result of the employer's conduct**
- A registered trade union may elect to refer such dispute to the **CCMA for conciliation in terms of section 64(4) of the LRA**





# UNFAIR LABOUR PRACTICE OR STRIKE [SECTION 4 (8)] (CONT...)

- The act of altering the hours of work or other conditions of employment must be **unilateral**
- There must be a **clear link between the act and an intention to somehow avoid payment of the national minimum wage**
- Workers' representatives will need to provide sufficient evidence concerning the facts and context surrounding the alleged unilateral act by the employer

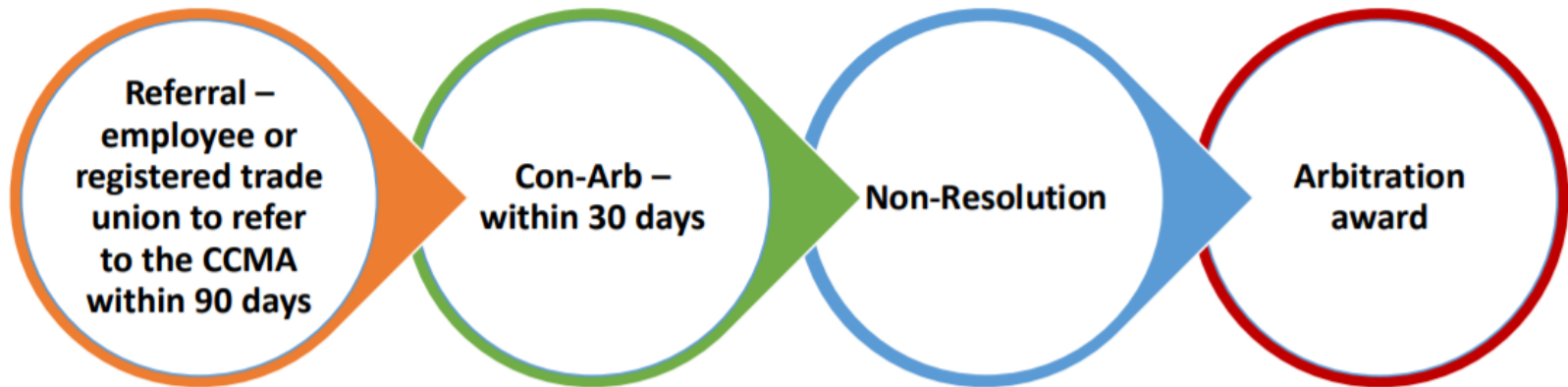


# UNFAIR LABOUR PRACTICE OR STRIKE [SECTION 4 (8)] (CONT...)

- Where the dispute has been referred as an unfair labour practice, the time period for referral is **90 days**
- Where a registered trade union elects to follow the route provided by section 64(4) of the LRA, the statutory provisions of **section 64(4) and (5) will apply**

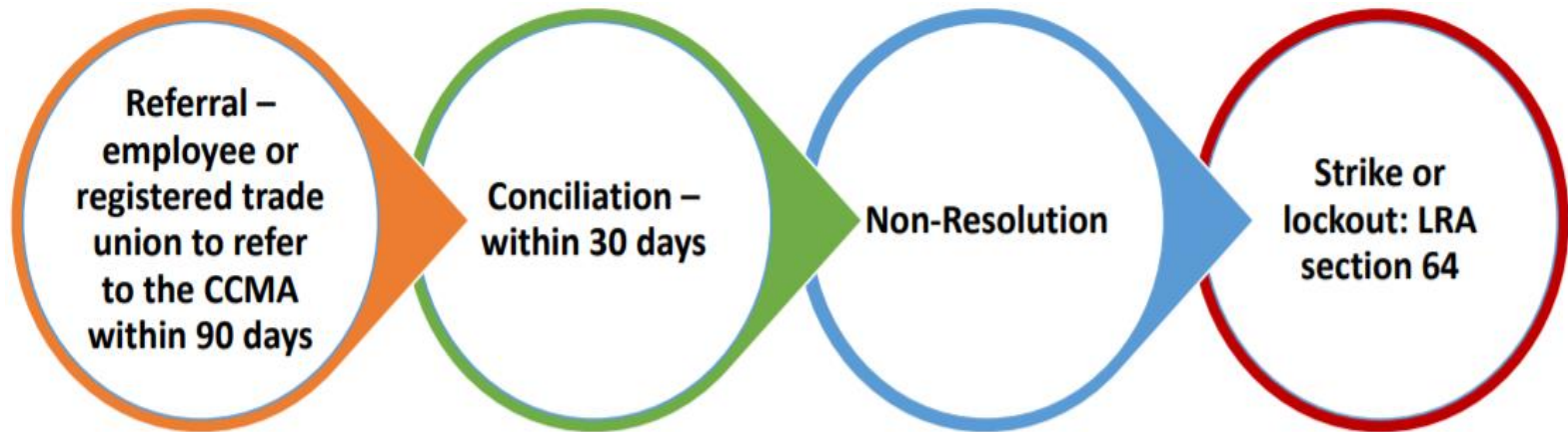


# SECTION 4 (6) VIA SECTION 191 OF THE LRA





# SECTION 4 (6) VIA SECTION 64 (4) OF THE LRA





# THE LINK TO THE BCEA

- Section 32, 33 and 34 of the BCEA apply to the payment of national minimum wage to workers
- In terms thereof, payment of remuneration must be made not **later than 7 (seven) days after the completion of the period for which the remuneration is payable or the termination of the contract of employment**
- The national minimum wage must also be reflected in the information about the worker's remuneration



# THE LINK TO THE BCEA (CONT...)

- All workers are entitled to receive the minimum wage for the **number of hours that the worker works on any day**
- If the worker is paid on a basis other than number of hours worked, the worker may not be paid **less than the minimum wage for the ordinary hours of work**
- Any deduction made from the remuneration of a worker must be in accordance with **section 34 of the BCEA**
- If the worker works less than 4 hours, the employer shall pay the worker as if he or she has worked for 4 hours in that particular day



# COMPOSITION OF THE NMW COMMISSION

- Chairperson appointed by the Minister
- Three (3) members nominated by organised labour
- Three (3) members nominated by organised business
- Three (3) members nominated by organised community
- Three (3) independent experts with knowledge of the labour market and conditions of employment appointed by the Minister



# LABOUR REPRESENTATIVES

- Mr Solly Phetoe – COSATU
- Mr Edward Thobejane – NACTU
- Mr Trenton Esley - FEDUSA





# THE NMW COMMISSION

The functions of the NMW Commission include to:

- (a) Review the national minimum wage and recommend adjustments
- (b) Investigate and report to the Minister on the impact of the national minimum wage on the economy, collective bargaining and the reduction in income differentials
- (c) Investigate income differentials and recommend benchmarks for proportionate income differentials
- (d) Advise the Minister on sectoral determinations



# THE NMW COMMISSION (CONT...)

- (e) Advise the Minister on measures to reduce income differentials or any other matter on which the Minister requests the Commission's advice
- (f) Advise the Minister on sectoral determinations
- (g) Advise the Minister on any matter concerning basic conditions of employment
- (h) Perform any such function as may be required of the Commission in terms of any other employment law



# THE NMW COMMISSION (CONT...)

- Section 12 of the NMWA provides for the NMW Commission to determine its own rules
- Consequently, soon after its inception, the NMW Commission adopted rules



# IN TERMS OF THE RULES:

- At least one representative from organised business, organised labour, the organised community and one independent commissioner must be present to constitute a quorum at a meeting
- The NMW Commission must endeavour to take decisions by consensus
- Should any matter be determined by means of voting, only members present are entitled to vote. The chairperson is required to act impartially and has no vote or casting vote
- Recommendations to the Minister will be based on decisions of the NMW Commission, in a consolidated report
- Any member who disagrees with a decision incorporated in a Report to the Minister may submit a minority report to be included in the consolidated report



# IN TERMS OF THE RULES (CONT...):

- Members are entitled to report to their respective matters before the NMW Commission, taking due care to maintain confidentiality, particularly in respect of details of discussions on views of the members during the discussions



# IN TERMS OF THE RULES (CONT...):

- In order to fulfil most of its functions the NMW Commission needs to be able to base its views and recommendations on reliable research results
- A rigorous study of the NMW impact in RSA is critical
- It is of utmost necessity to accurately determine the main effects of the introduction of the NMW relying on a quantitative analysis of reliable labour market data
- Both a reality as well as a challenge is the fact that a reasonable period is required to have elapsed from the inception of the NMW to accurately test the impact



# IN TERMS OF THE RULES (CONT...):

- The largest nationally representative labour force survey is the Quarterly Labour Force Surveys (QLFS) conducted by Statistics SA.
- The difficulty is that some information including the most important data on wages is only released in an annualised format
- However, the NMW Commission secured an agreement with Stats SA to release this information in a quarterly format and sooner for the benefit of the researchers



# IN TERMS OF THE RULES (CONT...):

- This means that interim results of the quantitative research will be available on 21 November 2019 in order for the NMW Commission to submit a Report and recommendations to the Minister





# IN TERMS OF THE RULES (CONT...):

- In addition to the quantitative research a qualitative study will be conducted by UJ in association with a DPRU
- This research aimed at an understanding of workers perspectives and experiences in relation to the NMW and at gauging possible impacts and implementation challenges from the perspective of multiple stakeholders
- Focus group discussions will be conducted with persons in low wage sectors (or people who are likely to work in lower wage positions in other sectors)



# IN TERMS OF THE RULES (CONT...):

The following sectors will be researched:

- Agriculture
- Domestic
- Construction
- Retail and Hospitality
- Community and Social Services (e.g. care- and health workers)
- Casual workers across all sectors



# IN TERMS OF THE RULES (CONT...):

- Interviews will also be conducted with trade union representatives and officials, employers and employers associations and relevant state officials
- Bargaining Council representatives maybe included
- Based on the data- and time constraints of the NMW Commission agreed with then researchers to adopt a 2-phase approach
- It is submitted that the research results will provide a reliable and detailed research analysis of the effects of the NMW



# THE EXEMPTION FROM PAYING THE NMW

- An employer or an employers' organisation registered in terms of section 96 of the LRA, or any other law may apply on behalf of its members for an exemption in the prescribed form and manner from paying the minimum wage
- The application must be lodged on the National Minimum Wage Exemption System in the form required by that System – online exemption process in regulation 6
- The National Minimum Wage Exemption System is publicly accessible online at <https://nmw.labour.gov.za>



# THE EXEMPTION FROM PAYING THE NMW (CONT...)

- An exemption may only be granted if the delegated authority is satisfied that-
  - (a) the employer **cannot afford to pay the minimum** wage; and
  - (b) every representative trade union representing one or more of the affected workers has been **meaningfully consulted** or, if there is no such trade union, **the affected workers have been meaningfully consulted**
- The determination of whether an employer can afford to pay the minimum wage must be in accordance with the decision process in **Schedule 1 of the regulations**



# THE EXEMPTION FROM PAYING THE NMW (CONT...)

- To assess **affordability, elements of profitability, liquidity** and solvency are taken into account
- The application will not be granted if the applicant appears to be able to afford to pay the prescribed increase in minimum wages
- The decision making process is rigorous and employers will need to ensure that they **submit comprehensive financial and organisational information when applying for exemption**
- Analysis begins by determining increases required on the employer's wage costs to comply with legislated minimum wage. This is the difference between the rate that the employer is currently paying and the rate required by the Department of Labour
- The steps to follow, in the financial analysis, are then aimed at determining whether the above difference can be afforded by the employer



# NO EXEMPTION UNDER THE FOLLOWING CIRCUMSTANCES

- No exemption may be granted where the wage is below the following threshold:
  - 90% of the national minimum wage in respect of workers other than farm workers and domestic workers
  - 90% of the national minimum wage in respect of farm workers
  - 90% of the national minimum wage of domestic workers.



# THE NATURE OF THE EXEMPTION IS LIMITED AS FOLLOWS

Category	All workers	Domestic workers	Farm workers
National minimum wage	R20.00	R15.00	R18.00
Minimum wage after exemption is granted	R18.00	R13.50	R16.20





# THE NATURE OF THE EXEMPTION IS LIMITED AS FOLLOWS (CONT...)

- An employer may not be exempted from the national minimum wage by a large amount
- It is only possible for an employer to **obtain 10% decrease (as maximum) through the exemption process**
- Once granted, the employer will receive an **exemption notice**
- If refused, the employer will be granted an **exemption notice with reasons for refusal**



# THE NATURE OF THE EXEMPTION IS LIMITED AS FOLLOWS (CONT...)

- An exemption granted in terms of **section 15** must:
  1. Specify the period for which it is granted which may not be longer **than 1 (one) year**
  2. Specify the **wage or the percentages of the national minimum wage that the employer is required to pay workers** and
  3. May contain any other relevant condition



# EXEMPTION APPLICATIONS RECEIVED 1 JANUARY 2019 – 19 AUGUST 2019

<b>TOTAL NUMBER OF APPLICATIONS RECEIVED</b>	<b>475</b>
<b>STATUS</b>	<b>NUMBER</b>
•Granted	289
•Withdrawn	2
•Refused	105
•Audit – in process	12
•Outstanding documents	67
•Mining and quarrying	149



# EXEMPTION APPLICATIONS RECEIVED 1 JANUARY 2019 – 19 AUGUST 2019 (CONT...)

SECTOR/SUB SECTOR	NO OF APPLICATIONS	AFFECTED EMPLOYEES
•Construction	16	2091
•Education	8	66
•Financial Intermediation Insurance, Real Estate	4	545
•Human Health & Social Work	5	145
•Information and Communication	1	1
•Manufacturing	105	16172
•Mining and Quarrying	1	149



# EXEMPTION APPLICATIONS RECEIVED 1 JANUARY 2019 – 19 AUGUST 2019 (CONT...)

SECTOR/SUB SECTOR	NO OF APPLICATIONS	AFFECTED EMPLOYEES
Other Service Activities	94	4109
Other Service Activities (NPO)	124	19967
Professional, Scientific & Technical Activities	2	8
Public Administration & Defence	7	428
Transport, Storage & Communication	1	250
Water Supply	8	512
Wholesale and Retail	44	2806



# COMPLIANCE AND ENFORCEMENT

- Enforcement by labour inspectors of the DoL
- Securing an undertaking
- Compliance Order may be made arbitration award
- A compliance order with the time period stated in the order unless employer refers a dispute concerning the compliance order to the CCMA
- Claims for failure to pay minimum wage to be referred to the CCMA for a con-arb process (section 73A)



# COMPLIANCE AND ENFORCEMENT (CONT...)

- Employers who are found not to be in compliance with the NMWA will face penalties – specifically, a fine
- Fines are calculated per employee as the greater amount of double the value of the underpayment or double the employee’s monthly wage



# COMPLIANCE AND ENFORCEMENT (CONT...)

- In October 2019 the DOL intends launching the Mpimpa System.
- This entails the option of anonymous reporting of non-compliance with the Minimum Wage Act which will trigger targeted and quick inspections





# PHASES IN AND ACTIONS FOR THE IMPLEMENTATION OF NMW

- Stakeholders communicate requirements around the minimum wage
- Exemptions are given to employers who would have to retrench if not given
- Non-Compliant employers identified and sanctioned
- Wages for low-income wages increase, preferably with limited job losses
- Wage and Income Inequality is reduced
- High demand for basic consumer products stimulates production
- High household incomes improve education and productivity
- Union density amongst lower-level workers increases



# PREREQUISITES FOR SUCCESSFUL IMPLEMENTATION

- Effective Communication
- Eligible employers know about the exemption process which is not costly or time consuming
- The exemption process is able to separate out genuine hardship cases from chancers
- Workers have clear routes to complain with the assurance of protection and anonymity
- Employers are not able to change employee to independent contractors to avoid paying more



# PREREQUISITES FOR SUCCESSFUL IMPLEMENTATION (CONT...)

- Employers do not substantially reduce working hours in-kind and other non-wage benefits
- Employers do not simply ignore the law on a mass scale
- Increases at the minimum leads to more compressed pay scales rather than ratcheting up pay for all workers
- Stakeholders do not treat minimum wage as norm for lower-level workers
- The minimum wage leads to a substantial increase in income for poor households
- Workers see the benefits of trade unions as a way to enforce the minimum wage



# POSSIBLE RISKS

- Work paid worker and employer are difficult to reach
- Many low-wage workers are not unionised and there is no obvious way for them to complain
- State agencies may lack capacity to investigate complaints
- Lack of capacity in inspectorate
- Shift in hourly work reduces workers monthly incomes
- Over time some employers may replace workers with machinery to hold down costs
- All workers get same percentage increase and inequality remains unchanged



# THANK YOU

**NGiyathokoza!**      **ro livhuwa!**  
**ke a leboga!**      **enKOSi!**  
*dankie!*      **thank you!**      **udo livhuwa!**  
**inkomu!**      **ngiyabonga!**  
**ke a leboha!**  
**siyabonqa!**