



SWAZILAND GOVERNMENT GAZETTE EXTRAORDINARY

VOL. XLIII]

MBABANE, Thursday SEPTEMBER 1st, 2005

[No. 86

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PART B - ACTS

3. The Industrial Relations (Amendment) Act, 2005 S1

PUBLISHED BY AUTHORITY

INDUSTRIAL RELATIONS (AMENDMENT) ACT, 2005
(Act No. 3 of 2005)



I ASSENT

MSWATI III
King of Swaziland

16th March, 2005

AN ACT
Entitled

An act to amend, and incorporate into the Industrial Relations Act, 2000 certain international labour practices.

ENACTED by the King and Parliament of Swaziland.

Citation and Commencement

1. This Act may be cited as the Industrial Relations (Amendment) Act, 2005 and shall be read as one with the Industrial Relations Act, 2000 (hereinafter in this Act called the "principal Act"), and shall come into force on the date of publication.

Amendment of Section 2

2. Section 2 of the principal Act is amended by-

(a) replacing the definition of collective agreement with the following-

"collective agreement" means an agreement in writing concluded by a Joint Negotiating Council, or by an employer, a group of employers or employer's association on the one hand and a trade union or staff association on the other in respect of any matter of mutual interest between the employer and employee"; and

(b) deleting the words "trade dispute" in the definition of "dispute".

Amendment of Section 8

3. Section 8 of the principal Act is amended by adding a new subsection as follows-

"(8) notwithstanding the provisions of Section 85 (2), the President of the Court may direct that any dispute referred to it in terms of this or any other Act be determined by arbitration under the auspices of the Commission."

Amendment of Section 17

4. Section 17 of the principal Act is deleted and replaced with the following-

Arbitration

"17. (1) In hearing and determining any matter referred to arbitration whether by the President of the Court in terms of section 8(8) or of any other provisions of this Act, an arbitrator shall have all the remedial powers of the Court referred to in section 16.

(2) An arbitration award made under this Act shall be enforceable as if it was an order of the Court.

(3) Subject to any rules promulgated in terms of section 64, the arbitrator shall conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly.

(4) In any arbitration proceedings a party to a dispute may appear in person or be represented by a legal practitioner or person(s) authorized by the party.

(5) Unless a referral to arbitration provides otherwise, the arbitrator shall issue an award with concise reasons signed by the arbitrator within thirty (30) days after the conclusion of the arbitration proceedings.

(6) An arbitrator who has made an award may vary or rescind the award if -

- (a) it was erroneously sought or erroneously made in the absence of any party affected by the award;
- (b) it is ambiguous or contains an obvious error or omission, but only to the extent of that ambiguity, error, or omission; or
- (c) it was made as a result of a mistake common to the parties to the proceedings'.

Amendment of Section 19

5. Section 19 of the principal Act is amended by-

(a) deleting and replacing subsection (1) with a new subsection as follows -

"(1) There shall be a right of appeal against a decision of the Industrial Court, or of an arbitrator appointed by the President of the Industrial Court under section 8 (8) on a question of law to the Industrial Court of Appeal"; and

(b) adding a new subsection (6) as follows-

"(6) Any appeal from a decision or order of the Court made in terms of subsection (1) shall be heard by the Industrial Court of Appeal".

Amendment of section 25

6. Section 25 of the principal Act is amended-

- (a) in subsection (1) by deleting the phrase "only have a casting vote if that Chairperson is" and adding after the word "shall" at the opening of section 25 (1) (a) "be"; and

- (b) in subsection (2) by deleting the phrase "provided that in the case of the Government representatives, each one of them shall carry 2 votes." and replacing the same with the words or the phrase "provided that in the case of a tie the matter shall be referred back for reconsideration".

Amendment of Section 41

7. Section 41 (1) is amended by adding a new paragraph (d) after paragraph (c) as follows:

"(d) the employer affected by the amalgamation and the newly constituted organization shall be bound by any obligations in terms of the recognition agreement or collective agreement, if any, negotiated or entered into by and between such employer and the recognized organization which has amalgamated, as if such recognition or collective agreement had been negotiated or entered into by the employer and the newly constituted organization":

Provided that nothing in this Act or any other law shall prevent the employer and newly constituted organization from negotiating and agreeing to any changes and or amendments to any already existing agreement.

Amendment of Section 42

8. Section 42 is amended by -

- (a) deleting and replacing subsections (3) to (9) with the following-

"(3) The employer shall reply to the organization and the Commission in writing within 21 days of the receipt of the application stating that -

- (a) it recognizes the trade union or staff association; or
(b) it refuses to grant recognition and the reasons for such refusal.

(4) If the employer fails to reply under subsection (3) or it refuses to recognize the trade union or staff association, the organization may refer the dispute to the Commission.

(5) The employer shall recognize a trade union or staff association that has been issued with a certificate under Section 27 if -

- (a) fifty per cent of the employees in respect of which the trade union or staff association seeks recognition are fully paid up members of the organization;

- (6) by adding the new section-6

"for purposes of determining whether a trade union or staff association represents fifty percent of the employees in respect of which it seeks recognition, a stop-order form duly signed by the employee shall be sufficient proof that the employee is a full member of the union, and in the case of any disagreement a head count shall be conducted"

(7) If an employer fails or refuses to recognize a trade union or staff association the Commission shall appoint a commissioner to attempt to resolve the dispute through conciliation.

(8) The appointed commissioner shall attempt to resolve the dispute through conciliation within 21 days of the earlier of the following dates-

- (a) the date on which the employer replied in terms of subsection (3); or
 - (b) the date on which the 21 day period contemplated in subsection (3) expires.
- (9) If the commissioner fails to resolve the dispute within the period contemplated in subsection (8), the Commission shall appoint a commissioner to determine the dispute through arbitration.
- (10) The commissioner appointed in terms of subsection (8) may make any appropriate order.
- (11) An employer may make an application to the Industrial Court for the withdrawal of recognition if -
- (a) the organisation's representativeness falls below the representativeness contemplated in subsection (5)(a) for a continuous period of more than three months; or
 - (b) the organization has materially breached its obligation under a recognition agreement or an award of recognition under subsection (9).
- (12) The Court shall determine an application contemplated in sub-section 10 and shall:
- (a) make any appropriate order, including an order containing the terms of a withdrawal or recognition; and
 - (b) decide on the validity and duration of any collective agreement between the employer and the organization affected by the withdrawal of recognition.
- (13) If less than fifty per cent of the employees in respect of which the Trade Union or Staff Association, seeks recognition are fully paid up members of the organization concerned, recognition shall be at the discretion of the employer and the employer shall, within thirty (30) days of the receipt of the application, reply in writing to the organization.

Amendment to Section 43

9. Section 43 (1) is amended by deleting the phrase "and such authorisation shall be renewable annually from the date first granted"

Amendment to Section 44

10. Section 44 of the principal Act is amended by deleting subsection (4).

Amendment to Section 52

11. Section 52 of the principal Act is amended by deleting and replacing paragraph (h) of subsection (3) with the following-

"(h) the election, and the number, of employee representatives on the Works Council".

Amendment to Section 55

12. Section 55 of the principal Act is amended by deleting and replacing the word 'contain' in subsection (1) (b) with the words "provide for".

Amendment of Section 64

13. Section 64 of the principal Act is amended by -

(a) deleting and replacing subsection (1) (d) with the following-

“(d) annually compile and publish information and statistics about its activities and lodge that information with the Commissioner of Labour”; and

(b) adding a new paragraph (g) in subsection (2) as follows-

“(g) make rules regulating the practice and procedure of the Commission”.

Amendment to Section 76

14. Section 76 of the principal Act is deleted and replaced with a new section 76 as follows-

“76 (1) a dispute may only be reported to the Commission by” -

(a) an employer;

(b) an employee;

(c) an applicant for employment in respect of a dispute concerning unfair discrimination under the Employment Act;

(d) an organization which has been recognized in accordance with Section 42;

(e) a member of a works council

(f) a member of a joint negotiating council;

(g) any other organization concerned in the dispute and active in the undertaking where no organization has been recognized in terms of Section. 42.

(2) A dispute may not be reported to the Commission if more than eighteen (18) months has elapsed since the issue giving rise to the dispute arose.

(3) The Commission shall acknowledge receipt of the report and may-

(a) request further particulars of any of the matters referred to under Section 77 (1);

(b) in so far as suitable procedures for settling disputes exist between the parties have not been followed, refer the dispute back to the parties for those procedures to be followed; or

(c) reject the report if it is frivolous, vexatious or time wasting.

(4) If the Commission requests further particulars under subsection (3) (a) -

(a) the dispute shall be treated as reported only on the date on which the particulars are supplied;

(b) the particulars shall be read as one with the matters reported under Section 77 (1).

(5) If the Commission refers a dispute back to the parties under subsection (3) (b), the dispute shall only be treated as reported on the date that either of the parties reports that the dispute still exists provided that the Commission is satisfied that the party referring the dispute has taken all reasonable steps to comply with such suitable procedures as may exist.

(6) If the Commission rejects a report under subsection (3) ©, the party not satisfied with the decision of the Commission may appeal to the Court.

Amendment to Section 77

15. Section 77 of the principal Act is amended by -

(a) Inserting the words "on the prescribed form" between the words "in" and "writing" in the first line ; and

(b) adding a new subsection (3) and subsection (4) after subsection (2) as follows-

"(3) If the dispute is a complaint filed under the Employment Act and reported by an employee, the Commission shall assist the employee in the completion of the report and service of a copy of the report to the other party or parties to the dispute".

(4) The Commission shall retain the original report of dispute for purposes of conciliation, mediation, arbitration or for any process recognized under this Act or any other law in relation to the settlement of industrial disputes.

Amendment of Section 78

16. Section 78 of the principal Act is deleted.

Amendment of Section 79

17. Section 79 of the principal Act is amended by deleting and replacing the word "Commissioner of Labour" with the word "Commission".

Amendment of Section 80

18. Section 80 of the principal Act is amended by -

(a) deleting and replacing subsection (1) with a new subsection as follows-

"(1) On receipt of a dispute being reported in terms of Section 76, the Commission shall appoint a commissioner within (4) days who shall attempt to resolve the dispute through conciliation";

(b) deleting and replacing the full stop (.) at the end of paragraph (c) with (; or); and

(c) adding a new paragraph (d) as follows-

"(d) the President of the Court directs that the dispute be determined by arbitration under Section 8 (8)."

Amendment of Section 81

19. Section 81 of the principal Act is amended by-

(a) deleting subsection (1) and renumbering the subsections;

(b) deleting and replacing subsection (2) with a new subsection as follows-

“(1) A commissioner appointed in terms of Section 80 (1) shall conciliate within twenty- one (21) days of the date of appointment of a Commissioner provided that the parties may agree to extend that period”;

(c) inserting the words “in the prescribed form” between the words “certificate’ and ‘stating” in section 81 (6) (a) ;

(d) adding a new subsection as follows-

“(6) Notwithstanding the issue of a certificate that the dispute is not resolved, the commissioner appointed in terms of Section 80 (1) retains jurisdiction over the dispute until it is settled;

(7) If the dispute concerns the application to any employee of existing terms and conditions of employment or the denial of any right applicable to any employee in respect of his dismissal, employment, reinstatement or re-engagement, the commissioner appointed under Section 80 (1) may -

(a) reject the report if the party that reported the dispute fails to attend conciliation meeting; and

(b) refer the matter to arbitration and the arbitrator may grant default judgment against any other party that fails to attend a conciliation meeting.

(c) Before granting default judgement the arbitrator shall require the party in attendance to adduce evidence in support of his complaint or defense and the relief he seeks.

(d) a default judgement entered by an arbitrator shall have the same status in law as that of an arbitrator award.

(8) If the dispute concerns matters other than those referred to in subsection (7) and one of the parties to the dispute fails to attend a conciliation meeting, the commissioner appointed under Section 80 (1) may, at the request of the party that is in attendance -

(a) issue a certificate in terms of subsection (5) (a); or

(b) extend the period contemplated in subsection (1) for up to 21 days.

(9) Any party against whom a decision has been made under subsection (7) may, within fourteen (14) from the date on which he had knowledge of such decision, apply to the Executive Director of the Commission in the prescribed form and manner to have the decision rescinded.

(10) The Executive Director of the Commission may rescind a decision made in terms of Section (7) only on good cause.

Amendment of Section 81 (4)

20. Section 81(4) is amended by adding the letter(s) at the end of the following words:

“co-employee, member, office bearer, official, Director, employee”

Amendment of Section 82

21. Section 82 of the principal Act is deleted and replaced with the following-

"82 (1) For the purposes of subsections (2) and (4), 'dispute' includes a dispute -

- (a) that exists or a dispute that the Commissioner of Labour believes may arise between-
 - (i) employees and their employers;
 - (ii) trade unions and employers or their organizations;
 - (iii) trade unions themselves; and\
 - (iv) employer organizations themselves.

(2) The Commissioner of Labour may intervene at anytime before a dispute is reported under Section 76 if the Commissioner is satisfied that the dispute may have serious implications for employers, employees or the economy if not resolved quickly.

(3) If the Commissioner of Labour intervenes in terms of this section, the Commissioner-

- (a) shall advise the parties in writing of the intention to intervene; and
- (b) may-
 - (i) intervene personally and attempt to resolve or prevent the dispute through conciliation or;
 - (ii) appoint, after consultation with the Commission, a commissioner to attempt to resolve or prevent the dispute through conciliation;
 - (iii) appoint, after consultation with the parties, a representative from each party to assist in the settlement or prevention of the dispute through conciliation; or
 - (iv) appoint, after consultation with the Commission, a commissioner or, after consultation with the President of the Industrial Court, a judge of the Court, to conduct a fact finding exercise and make recommendations for the resolution or prevention of the dispute or future disputes.

(4) The Commissioner of Labour and any person appointed under subsection (3) shall have the powers referred to in Section 64 (5).

(5) If a party reports a dispute under Section 76 after the Commissioner of Labour has intervened but before that intervention has been completed, the Commission, after consultation with the Commissioner of Labour, may direct the Commissioner, or the persons appointed under subsection (3) (b), to conciliate the dispute as if they were commissioners appointed under Section 80 (1).

(6) If the Commission directs the Commissioner of Labour or a person appointed under subsection (3) (b) to conciliate the dispute, the provisions of sections 80 and 81 apply with changes required by context.

(7) If a party reports a dispute under Section 76 after the Commissioner of Labour has intervened and that intervention has been completed, the Commission may deem the dispute to have been

conciliated for the purposes of Sections 80 and 81 and issue, serve and file the certificate in terms of Section 81.

Amendment of Section 83

22. Section 83 of the principal Act is deleted.

Amendment of Section 84

23. Section 84 of the principal Act is amended by deleting and replacing subsection (1) with the following-

“(1) If a dispute has been determined or resolved, either before or after conciliation, the parties shall, with the assistant of the Commissioner-

(a) prepare a memorandum of agreement setting the terms upon which the agreement was reached; and

(b) lodge the memorandum with-

(i) the Commission and the Commission shall lodge it with the Court.

Amendment of Section 85

24. Section 85 of the principal Act is amended by -

(a) deletion and replacing subsection (1) with the following-

“(1) For the purposes of this section, an unresolved dispute means a dispute in respect of which a certificate has been issued under Section 81 (5)”.

(b) deleting and replacing subsection (2) with the following-

“(2) If an unresolved dispute concerns the application to any employee of existing terms and conditions of employment or the denial of any right applicable to any employee in respect of his dismissal, employment, reinstatement, or re-engagement, either part to such a dispute may refer the dispute to the court for determination or, if the parties agree, to refer the dispute to arbitration”;

(a) the President of the Industrial Court shall have the power upon receipt of an application, to decide whether such application should be heard by the Court or an Arbitrator appointed by the Commission;

provided that the Minister may by notice published in the Government Gazette revoke and or nullify this power.

(c) deleting and replacing subsection (3) with the following-

(3) If an unresolved dispute concerns a matter other than one referred to in subsection (2), the parties may agree to refer the dispute to arbitration”;

(d) deleting subsections (4) to (11); and

(e) adding a new subsection as follows-

“(4) If the matter is referred to arbitration -

(a) the arbitrator shall determine the dispute within 30 days of the end of the hearing;
and

(b) the arbitrator’s determination is final.

Amendment of Section 86

25. Section 86 of the principal Act is amended by deleting and replacing subsection (1) with the following-

(1) Subject to the provisions of this Act, any party to a dispute may take a lawful action by way of a lockout or a strike if -

(a) the dispute has been certified as an unresolved dispute under Section 81 (5);

(b) the dispute concerns a matter other than one referred to in Section 85 (2);

(c) the dispute has not been referred to arbitration under Section 85 (3);

(d) the parties to the dispute are not engaged in an essential service; and

(e) the provisions of this section have been complied with.

Amendment of Section 88

26. Section 88 (4) of the principal Act is amended by deleting and replacing the reference ‘subsection (4)’ with the reference ‘subsection (3)’

Amendment of Section 90

27. Section 90 of the principal Act is amended by adding the words “or an arbitrator” at the end of the sentence of subsection (1).

Amendment to Section 96

28. Section 96 of the principal Act is amended by deleting paragraph (a) in subsection (3) and deleting the word “ Mediation in subsection (4)”.

Amendment of Section 99

29. Section 99 of the principal Act is amended by inserting a new section between Sections 99 and 100 as follows-

“Rights of trade unions and employers’ organizations”

99A Every organization has the right-

(a) subject to the provisions of Part IV

(i) to determine its own constitution and rules; and

- (ii) to hold elections for its office bearers, officials and representatives;
- (b) to plan and organize its administration and lawful activities;
- (c) to participate in forming a federation of trade unions or a federation of employers' organizations;
- (d) to join a federation of trade unions or a federation of employers' organizations, subject to its constitution, and to participate in its lawful activities;
- (e) to affiliate with, and participate in the affairs of, any international workers' organization or international employers' organization or the International Labour Organisation.

Amendment of Section 100

30. Section 100 of the principal Act is amended by -

- (a) deleting and replacing the word "prices" in the heading with the word "practices";
- (b) inserting the words "and trade unions" after the words "person seeking employment" in the opening provisions of subsection (1);
- (c) adding a new paragraph in subsection (1) as follows-
- "(f) assist in the establishment of a trade union or interfere in its administration".

Amendment of Section 109

31. Section 109 of the principal Act is amended by-

- (a) deleting the term 'Code' where it appears in the section and replacing it with the phrase "codes and guidelines";
- (b) deleting and replacing the parenthetical phrase "(hereinafter called the Code)" with "(hereinafter called the Codes or the Guidelines, as the case may be)";
- (c) deleting and replacing the term 'may' in subsection (3) with the term shall'; and
- (d) deletion of the phrase "amend the Code"; in subsection (4) and its substitution with the phrase add to or amend the "Codes and Guidelines".