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**Comment on the Draft Regulations**

**to the**

**National Minimum Wage (NMW) Bill**

## **Free Market Foundation**

### **The Free Market Foundation**

The Free Market Foundation (FMF) is an independent non-profit public benefit organisation founded in 1975 to promote and foster an open society, the rule of law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations and sponsorships.

Most of the work of the FMF is devoted to promoting economic freedom as the empirically best policy for bringing about economic growth, wealth creation, employment, poverty reduction and human welfare (including better healthcare, increased life expectancy, literacy and educational quality). The foremost question the FMF asks in addressing any policy question, including the contents of the Draft Regulations to the Minimum Wage Bill is, will this policy be to the long-term benefit of the people of South Africa and especially those who are the poorest and most vulnerable? Satisfaction of the fundamental needs and wants of the people are generally achieved by an absence of barriers to entry into the provision of goods and services, allowing the people a choice between the offerings of freely competing providers, including the providers of employment. The Draft Regulations will therefore be assessed to ascertain whether they are likely to result in the most beneficial conditions for the country's people.

### **2. The approach followed in commenting on the Draft Regulations**

This comment deals fundamentally with the nature of the Draft Regulations and the extent to which they are consistent or inconsistent with the requirements of South Africa's Constitution. It therefore does not contain a section by section comment on the detail of the Draft Regulations except to demonstrate the extent to which aspects of the Regulations do not comply with the Constitution.

An important Founding Provision of the Constitution, which is described in section 1(c) is "Supremacy of the constitution and the rule of law". Note that the constitution and the rule of law are coupled in describing the values upon which the Republic of South Africa is founded. Section 2 of the Constitution states that, "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled". Among those obligations is to ensure that laws that are adopted are not in conflict with the rule of law.

### **3. What is the rule of law?**

President Nelson Mandela described the rule of law as follows:

The rule of law, as I (admittedly a long retired old lawyer) understand it, refers to a structural exercise of rule as opposed to the idiosyncratic will of kings and princes. Even where the latter may express itself benevolently the former is morally and politically superior. Where the rule of law does not apply, rulers assume entitlement to rule; the rule of law, on the other hand, places the emphasis upon structured responsibility and obligation.

Important elements of the constitution and the rule of law that are applicable to this comment on the Draft Regulations and the legislation which the regulations seek to implement are:

**Non-discretion:** The most elementary aspect of the rule of law is that there should be little or no administrative discretion. People should be ruled by laws, not by men.

**Clear objectives:** Where, for whatever reason, there is discretion, there should be two distinct and easily confused qualifications. Firstly, the purpose for which the power is conferred must be articulated clearly – to what end is the power created? What outcome does the legislature want?

**Objective criteria:** There must be objective criteria according to which the power is to be exercised. Criteria such as the procedure to be followed should be clearly specified.

**Certainty:** Laws should prescribe clearly and unambiguously that with which citizens must comply, rather than leave them at the mercy of arbitrary or discretionary officialdom. It should be as easy as possible for everyone to know what the law is, and when they are complying with or transgressing it. Uncertainty in law creates real or suspected injustice.

**Division of powers:** For sound, tried and tested reasons a democratic order requires a genuine separation of powers: legislative, executive and judicial. The legislature alone should legislate, the executive alone execute, and the judiciary alone adjudicate.

### **Comment on Draft Regulations to the National Minimum Wage (NMW) Bill**

The invitation to comment on the draft regulations was sent out by the Department of Labour on 31 May 2018 and set 20 June 2018 as the final date for the receipt of submissions. The proposed regulations deal solely with the exemptions that are to be granted in terms of section 15. (1) of the NMW Bill according to the stipulations contained in section 16. of the Bill.

#### **Introduction**

It will be clear from the following comments on the Draft Regulations that there is a grave concern over the way in which so-called “exemptions” are to be dealt with. The concern commences with the incorporation of a contradiction in the NMW Bill, which states in section 15. (1) that employers and their registered organisations may apply for “*an exemption from paying the national minimum wage*” and then in section 15. (2)(b) that “*the exemption must specify the wage that the employer is required to pay workers*”. As described below, a proper interpretation of the word “exemption” should mean that the employer will be free from all strictures of the NMW but would be required to continue to comply with the requirements of the law that applied prior to the adoption of the NMW.

When informed that there were strong indications that the implementation of the NMW would result in increased unemployment, the response was that any employer who would not be able to pay the prescribed minimum would be entitled to an “exemption” – not a minimal reduction in the amount payable – but an “exemption” from the application of the NMW. This response lulled many employers into a false sense of security. The requirements of non-discretion, clear objectives, objective criteria, certainty, and division of powers are unfortunately clouded in both the NMW and these regulations. The legislation and regulations are consequently not consistent with the requirements of the rule of law and therefore of the constitution.

## Exemptions

15. (1) An employer or an employers' organisation registered in terms of section 96 of the Labour Relations Act, or any other law, acting on behalf of a member, may, in the prescribed form and manner, apply for an exemption from paying the national minimum wage.

### 1. Meaning of the words "exempt" and exemption

- (a) The dictionary meaning of the word **exempt** is "to free or grant immunity from". As an adjective it means "taken out; not liable to; released".
- (b) The dictionary meaning of the noun **exemption** is "act of exempting; state of being exempt; freedom from any service duty, &c.; immunity".

### 2. The drafters of legislation and regulations do not have the power to change the meaning of words

Regulations are intended to set out the practical procedures that are to be followed in implementing legislation. They cannot change the intentions of the legislature or grant the executive branch of government discretionary decision-making powers that do not follow the tenets of the legislation which is to be administered.

Section 15. (1) of the Act clearly states that **"an employer or an employers' organization...may... apply for an exemption from paying the national minimum wage"**. The Act speaks of exemption, and not a reduction in the amount payable. If the intention of the legislature was that affected employer parties could apply for reductions in the stipulated amounts payable in terms of Schedule 1 (2) of the Act, it would have said so.

Section 6.8 states that **"The Bill gives the Minister the power to make regulations regarding the procedure for exemptions ... It also states that "The Minister may also make regulations and any matter required or necessary to be prescribed."** According to this section the Minister has the power to make regulations regarding the procedure for exemptions, not the power to re-interpret the word "exemption" to mean something else, such as a minimal reduction in the wages payable. Exemption means exemption, and the Minister does not have the power to change the provision to mean something else. Such a power is certainly not contained in the Act.

### 3. Misleading small firms and individual employers by the misuse of the term "exemption"

It will possibly be contended that section 15. (2)(b) indicates that the word "exemption" has been misused but that it is possible to conclude, given the wording of this provision that "An exemption granted in terms of this section---- "(b) must specify the wage that the employer is required to pay workers." So, the average small employer, and it is mostly individuals and small employers that employ the low-wage workers, is to discover when the Act comes into operation that they have been deliberately misled into believing that they will be exempted from the application of the NMW. They will further discover that they will have to jump through endless bureaucratic hoops to obtain a one-year reduction of a maximum of 10% off the minimum payable by others.

### 4. Information to be required from employers applying for exemption

The information required to be provided by the applicants for a 10% reduction from the legislated minimum wage is not provided in the circulated draft regulations. It can be obtained by searching on the Department of Labour website. It is therefore unlikely that the average householder or micro business owner will be aware of what is in store for them. The little employers will be shocked to

know that the new system will require the employers' financial information, household income, commercial balance sheet, working hours and motivation which after thorough audit of the (company) will determine the granting or rejection of an exemption. Given this scenario it is understandable why the CCMA has estimated that it will require R20.8 million to cover "training activity, advocacy and increase in case load". The CCMA obviously expects desperate small businesses who cannot afford compulsory increased wages to reduce the number of their employees and that many of them will do so in a manner that will not comply with the requirements of the labour laws.

### **An alternative approach to the administration of the NMW**

A great deal of cost could be saved for the individuals and micro businesses that will be most affected by the NMW by devising a blanket and real exemption that can be applied to them to cut down substantially on the administration and the burden and stress on the small employers. For instance, all businesses that (say) employ less than 10 employees could be automatically given a blanket exemption to stay applicable unless it can be shown, perhaps according to turnover, that they no longer qualify for the exemption. Requiring all employers to jump through hoops to prove that they should be exempted is a heavy and unnecessary burden to impose on them. A great burden could be lifted from small employers if what is now described as an exemption were to be converted into a real exemption.

### **Conclusion**

There is a vast difference in views on the probable outcome of the implementation of the National Minimum Wage. The budgets allocated for its implementation are R10.3 million for 2017/18 and R11.1 million for 2018/19. The cost to individuals and small businesses will be a great deal more. The cost in human terms of the workers who will either lose their jobs or have their work hours reduced is likely to be much greater.

The notion that imposing higher wages on employers will stimulate the economy and not cause substantially reduced employment and economic growth is sadly scheduled to prove to be wrong.

Instead of providing some relief to low-income individual employers of domestic workers, and struggling micro firms being granted real relief in the regulations, they provide no worthwhile relief. Low-income employers and their employees are in for a torrid time.

Should the worst fears regarding the outcome of the implementation of the National Minimum Wage be realised, it is to be hoped that the regulations will be changed without delay to provide relief to the low-income employers and the unemployed.

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