NEW TRADE DISPUTES ACT OF 2016 - IMPLICATIONS OF WAGE NEGOTIATIONS - *(Moemedi Tafa, Partner)*

It is commonly accepted, and indeed a fundamental consideration of employment-relations, that (save where expressly agreed), that an employee is not entitled of right to a salary increment.

In order for an employee to enjoy such an increment and/or additional benefit, it is for the employee to engage with the employer and bargain/negotiate, with the aim of convincing the employer that they indeed are deserving of a particular salary increment. This bargaining is largely simplified, in instances where employees are represented by a union, as this burden is shifted from the employee to the mandated union, which then negotiates on behalf of all its members.

As a salary increment is not a right to which an employee can seek to bargain or engage through the Courts, it falls within the category of disputes categorised as "disputes of interest". In the Trade Disputes Act, a dispute of interest, is defined as: *"a dispute concerning the creation of new terms and conditions of employment or the variation of existing terms and conditions of employment".*

Besides salary increment disputes, other disputes of interest would include disputes such as disputes over desired bonuses, disputes over allowances, disputes over promotions etc.

Where parties are engaged in disputes of interest, it is accepted that the appropriate manner of convincing an employer to agree to the proposals and/or requests of the employees, would be to engage in a form of power-play with the employer. This usually takes the form of employees engaging in some form of industrial action, which in most instances result in employees engaging in strikes and/or go-slows. Employees would withdraw their labour with an intention of occasioning some degree of financial or economic discomfort on the employer.

With the coming into force of the Trade Disputes Act, on the 1st November 2016, this position has by and large remained the same with respect to employees represented by unions. However, with respect to employees not represented by unions, the new Act has somewhat (arguably) done away with their right to engage in industrial action over disputes of interest.

The new Act, at Section 8, provides that all disputes of interest, save for disputes where employees are represented by a union in a collective dispute of interest, shall be referred to arbitration. The Act further goes on to state that an arbitrator presiding over disputes shall make an award, which award shall have the same force and effect as a judgment of the Industrial Court.

Should either party be aggrieved by the decision of the said arbitrator, there are only two grounds upon which the said award may be appealed or challenged at the Industrial Court. The grounds are:

- where the decision complained of is about the decision to join or not to join a party to the proceedings; or
- where the decision complained of concerns the jurisdiction of the arbitrator to make the award.

This statutorily-mandated referral of disputes of interest to arbitration (for non-unionised employees), concerningly, brings about an undesirable consequence of non-unionised employees potentially being denied the opportunity to engage in industrial action over disputes of interest.

More concerningly, for employers, is that it brings about the great risk and likelihood of having wage increments being decided upon by a third party and thereafter, an employer being restricted, on the grounds upon which it may challenge such an award.

It therefore remains to be seen as to how, practically and legally, an arbitrator could dictate its preferences on issues that ordinarily and contractually do fall within the prerogative of an employer. As this is a new development of recently-passed legislation, there is no case law addressing this issue as yet.