

GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF LABOUR

NO. 1401

19 DECEMBER 2018

REGULATIONS TO THE NATIONAL MINIMUM WAGE ACT, 2018

I, MILDRED NELISIWE OLIPHANT, Minister of Labour, in terms of section 16 of the National Minimum Wage Bill, 2018, hereby publish Regulations to the National Minimum Wage.

The Regulations in terms of section 16 of the National Minimum Wage Act, 2018 seek to provide for a form and manner in which exemptions must be made in terms of section 15(1) of the Act.

.....

M N OLIPHANT, MP
MINISTER OF LABOUR

DATE: 12/12/2018.....

NATIONAL MINIMUM WAGE REGULATIONS, 2018

The Minister of Labour has, under section 16 of the National Minimum Wage Act, No. 9 of 2018, and with effect from 1 January 2019, made the regulations set out in the Schedule.

SCHEDULE

ARRANGEMENT OF REGULATIONS

1. Definitions
2. Application for exemption from paying National Minimum Wage
3. Legal effect of exemption notice
4. Display and copies of exemption notice
5. Withdrawal of exemption notice
6. National Minimum Wage Exemption System

Schedule 1: Decision process

Schedule 2: Details to be included in the National Minimum Wage Exemption System

1. Definitions

In these Regulations any expression that is defined in the Act has that meaning and, unless the context indicates otherwise-

“**Act**” means the National Minimum Wage Act, No. 9 of 2018;

“**bargaining council**” means a bargaining council registered in terms of the Labour Relations Act, 1995, and, in relation to the public service, includes the bargaining councils referred to in section 35 of that Act;

“**delegated authority**” means the Director-General: Labour or an employee in the public service to whom the Minister has given the power

to grant exemptions in terms of section 15(3) of the Act read with section 85 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997);

“exemption notice” means the notice contemplated in regulation 2(8);

“National Minimum Wage Exemption System” means the online exemption process contemplated in regulation 6;

“registered employers’ organisation” means an employers’ organization registered in terms of section 96 of the Labour Relations Act, 1995 (Act 66 of 1995);

“representative trade union” means a registered trade union or two or more registered trade unions acting jointly, that are sufficiently representative of the employees employed by an employer in the work place.

2. Application for exemption from paying national minimum wage

- (1) An employer may apply to the delegated authority for an exemption, and a registered employers’ organisation may assist individual members to apply to the delegated authority for an exemption from paying the national minimum wage in terms of section 15 of the Act read with this regulation.
- (2) The application must be lodged on the National Minimum Wage Exemption System in the form required by that System.
- (3) 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.

-
- (4) The determination of whether an employer can afford to pay the minimum wage must be in accordance with the decision process in Schedule 1.
- (5) In consulting with the representative trade union or the affected workers contemplated in sub-regulation (3), the employer must provide the bargaining council, union or, if there is no such union, the affected workers with a copy of the application to be lodged in terms of sub-regulation (2) downloaded from the National Minimum Wage Exemption System for that purpose.
- (6) The delegated authority may grant an exemption from paying the national minimum wage-
- (a) only from the date of the application for the exemption and specifying the period for which it is granted, which may not be more than 12 months, unless the application is selected for audit in which case it will be the date of the decision which will not be more than 30 days from the date of application;
 - (b) specifying the wage that the employer is required to pay workers, which may not be less than the thresholds referred to in sub-regulation (7); and
 - (c) on any condition that advances the purposes of the Act.
- (7) The wage thresholds below which no exemption may be granted are:
- (a) Ninety percent (90%) of the national minimum wage in respect of workers other than those referred to in paragraphs (b) and (c);
 - (b) Ninety percent (90%) of the national minimum wage in respect of farm workers;
 - (c) Ninety percent (90%) of the national minimum wage in respect of domestic workers.
- (8) Any exemption granted in terms of this regulation must be by notice published on the National Minimum Wage Exemption System.

- (9) Any refusal of an exemption must be by notice published on the National Minimum Wage Exemption System together with reasons for the refusal.
- (10) An exemption will only be considered if the applicant confirmed compliance with applicable statutory payments, including but not limited to Unemployment Insurance Fund, Compensation Fund and any applicable Bargaining Council Agreement.

3. Legal effect of exemption notice

Sections 4 and 5 of the Act apply, with the necessary changes required by context, to a wage contained in an exemption notice issued in terms of regulation 2(8).

4. Display and copies of exemption notice

An employer in respect of whom an exemption has been granted must-

- (a) display a copy of the exemption notice conspicuously at the workplace where it can be read by the employees to whom the exemption applies;
- (b) give a copy of the exemption notice to-
 - (i) representative trade union representing one or more of those workers;
 - (ii) every worker who requests a copy; and
 - (iii) Applicable Bargaining Council.

5. Withdrawal of exemption notice

- (1) The delegated authority may withdraw an exemption notice if satisfied that-
 - (a) the employer has provided false or incorrect information that has led to the granting in its application for an exemption under regulation 2; or
 - (b) the employer is not complying with the exemption notice; or

- (c) the employer's financial position has improved to the extent that the employer is able to pay the national minimum wage; or
 - (d) there are other justifiable grounds for withdrawing the exemption notice.
- (2) Any affected person may apply to the delegated authority for the withdrawal of an exemption notice by lodging an application on the National Minimum Wage Exemption System in the form required by the System.
- (3) Before making a decision to withdraw an exemption notice in terms of sub regulation (2) the delegated authority must be satisfied, in addition to the grounds contemplated in sub regulation (1), that -
- (a) the employer has been consulted;
 - (b) the representative trade union or affected workers contemplated in regulation 2(3) have been given access to the application lodged in terms of sub regulation (2).
- (4) If an exemption notice is withdrawn-
- (a) the delegated authority must issue a notice of withdrawal on the National Minimum Wage Exemption System;
 - (b) on receipt of the notice the employer must-
 - (i) give a copy of the notice to the representative trade union and affected workers referred to in sub regulation (3)(b);
 - (ii) give a copy to the applicable Bargaining Council; and
 - (iii) as soon as is practically possible, remove any exemption notice displayed in terms regulation 4.
- (5) Any refusal of an application to withdraw an exemption notice must be by way of a notice issued on the National Minimum Wage Exemption System with the reasons for the refusal.

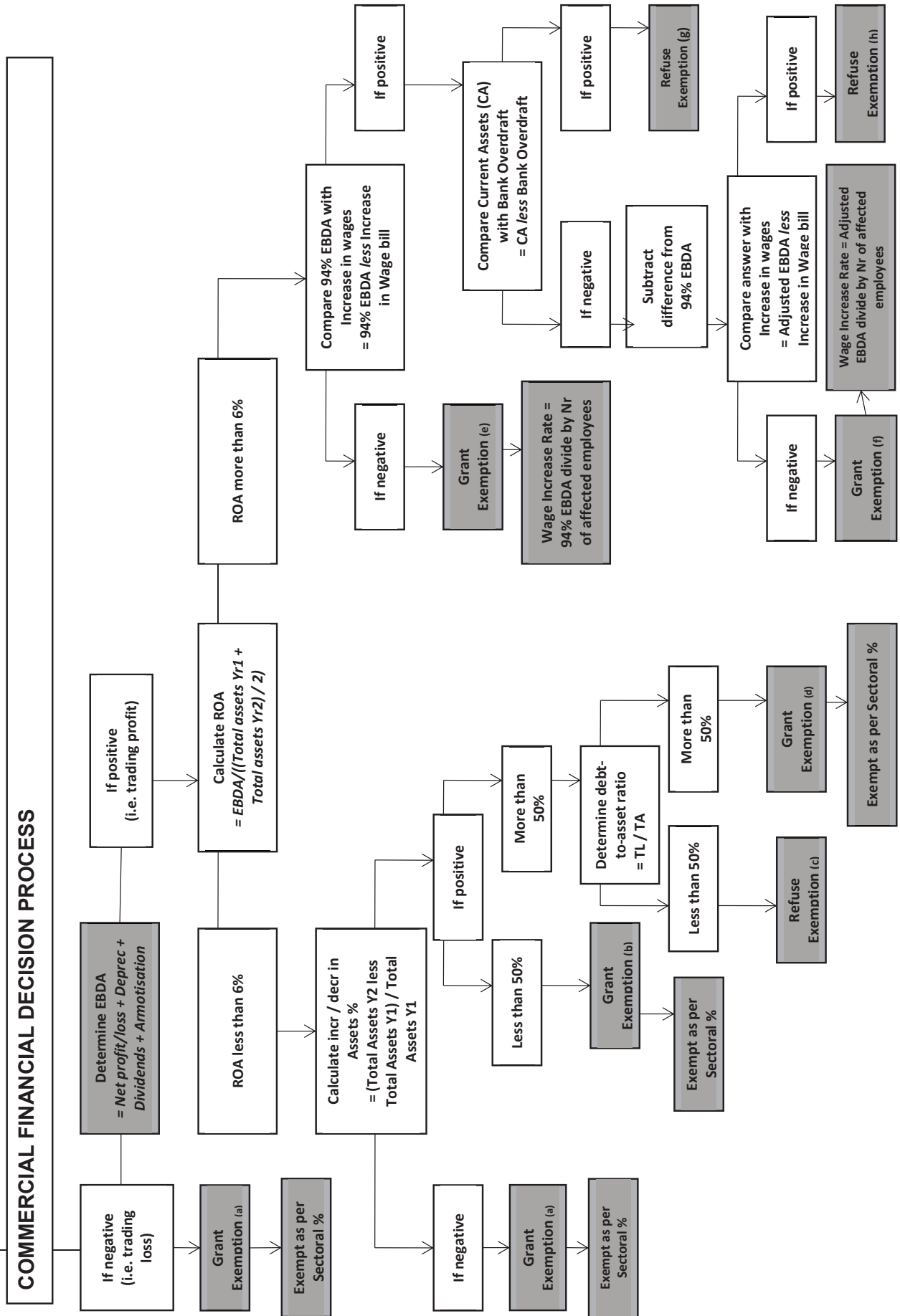
6. National Minimum Wage Exemption System

- (1) There is hereby established an online National Minimum Wage Exemption System managed by the Department of Labour.
- (2) The National Minimum Wage Exemption System is publicly accessible-
 - (a) online at <https://nmw.labour.gov.za>
 - (b) at any office of the Department of Labour or labour centre established under section 23(1)(a) of the Skills Development Act, 1998 (Act No. 97 of 1998), the addresses of which are to be found online at www.labour.gov.za
- (3) The delegated authority must establish, maintain and update a data base on the National Minimum Wage Exemption System in real time that-
 - (a) includes-
 - (i) all applications for an exemption and supporting documentation lodged;
 - (ii) all submissions made in respect of an application for an exemption;
 - (iii) all applications to withdraw an exemption notice;
 - (iv) all exemption notices; and
 - (v) all withdrawn exemption notices and the reasons for the withdrawal
 - (b) permits any affected person to make submissions in respect of any application in terms of these Regulations; and
 - (c) gives effect to the decision process in Schedule 1.
- (4) The delegated authority must ensure that the data referred to in sub-regulation (3)(a)(iv) and (v) is publicly accessible online on the National Minimum Wage Exemption System.

- (5) The delegated authority must publish an annual report on the Department of Labour's website including the following information:
- (a) the number of applications made, granted or refused;
 - (b) the number of employers and workers subject to exemptions; and
 - (c) the number of exemptions withdrawn and the generic reasons for the withdrawal of the exemptions; and
 - (d) the sectors affected.
- (6) The application form contemplated in regulation 2(1) must include the details listed in Schedule 2 to these Regulations that are to be completed by an applicant employer or employers' organisation.

SCHEDULE 1

COMMERCIAL FINANCIAL DECISION PROCESS



System notes:

- a) The applicant cannot afford due to insufficient profitability and assets. Thus exemption granted.
- b) The applicant cannot afford due to insufficient profitability and assets. Thus exemption granted.
- c) Profitability and assets based calculations indicates the applicant can afford. Thus exemption refused.
- d) Profitability and assets based calculations indicates the applicant cannot afford. Thus exemption granted.
- e) Profitability calculations indicate the applicant cannot afford. Thus exemption granted.
- f) Profitability and liquidity based calculations indicate the applicant cannot afford. Thus exemption granted.
- g) Profitability and liquidity based calculations indicate the applicant can afford. Thus exemption refused.
- h) Profitability and liquidity based calculations indicate the applicant can afford. Thus exemption refused.

Acronyms:

- EBDA – Earnings before Depreciation and Dividends Allowance
- TL – Total Liabilities
- TA – Total Assets
- ROA – Return on Assets
- CA – Current Assets
- CL – Current Liabilities.

Exemption will be granted if:

- a) The applicant cannot afford to pay the prescribed increase in minimum wages
- b) To test affordability [commercial] elements of Profitability, Liquidity and Solvency, are taken into account.

Exemption will be refused if:

- a) The applicant appears to be able to afford to pay the prescribed increase in minimum wages, taking the elements of Profitability, Liquidity and Solvency, into account.

Audit Triggers

- The required financial information above is captured on the system. The system will immediately perform tests to determine the presence of any of the following audit triggers based on determined percentages (Commercials) and discrepancies between financial years data:
 - Discrepancies in depreciation
 - Out of proportion net losses
 - Discrepancies in donations, entertainment, write-offs and loss on disposal of assets
 - Discrepancies in reported total expenditure
 - Discrepancies in reported revenue
- Discrepancies in non-current assets
- Discrepancies in total liabilities
- For individual household applicants, an audit is triggered if the amount captured by the user is more than the set cap [Stats SA: Living Conditions].

Affordability

- Affordability tests for businesses are based on the assessment of the elements of 1) Profitability, 2) Liquidity and 3) Solvency positions.
- 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 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.
- NB: Financial analysis is only conducted if the applicant's financial information does not trigger any audit keys mentioned above.

Profitability

- Profitability is the primary consideration in the entire financial analysis [commercial]. Depreciation expenditure and dividends are added back to the reported profit. The result of this process will be referred to as *Earnings before Depreciation Allowance* (EBDA).
- The calculated EBDA is used to determine employers' *Returns on Assets* (ROA).
- $ROA = EBDA / \text{Average Assets}$.
- If the calculated ROA is **less than 6%**, then Solvency tests are conducted in order to gain further insight into the financial asset structure of the business (*See "Solvency" below*)
- If the calculated ROA is **more than 6%**, then the required increase in wages is compared to 94% of the EBDA. If the required increase in wages can be accommodated, then further tests of Liquidity are conducted. However, if the required increase in wages cannot be accommodated within the 94% of EBDA, then the applicant qualifies for an exemption and no further tests are performed.

Liquidity

- Liquidity analysis is conducted only if the profitability analysis above indicates that the required increase in wages can be accommodated within the 94% of the EBDA.
- The total liquid assets such as debtors, inventory and other current assets are compared against the bank overdraft.
- If these liquid assets cannot cover the bank overdraft, the required shortfall is deducted from 94% of the EBDA to get the adjusted EBDA. Required increase in wages is then compared with this adjusted EBDA. If this required

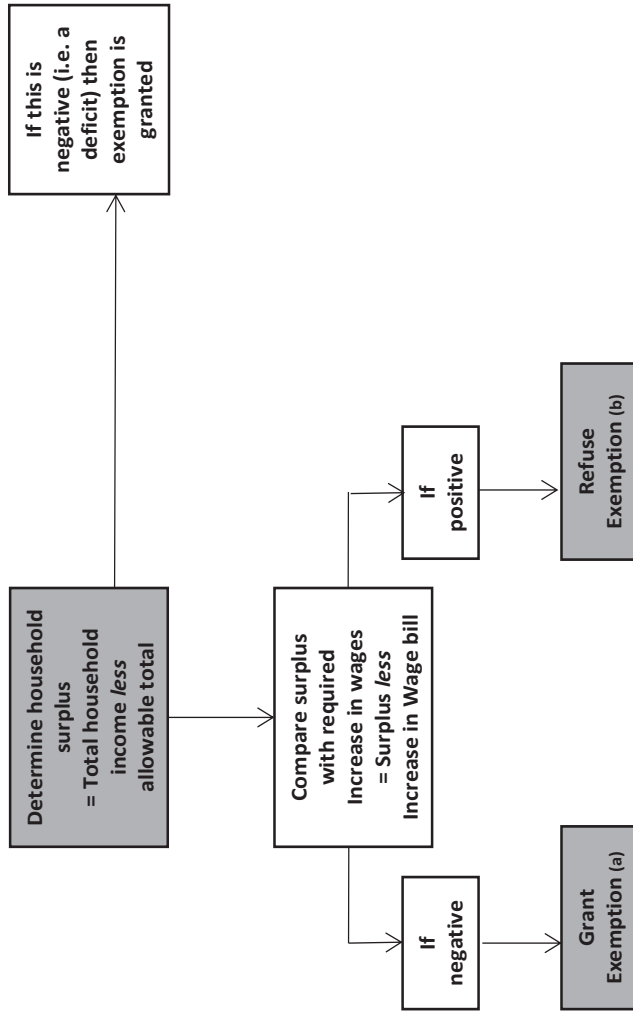
increase in wages cannot be covered from the adjusted EBDA, the employer's application for exemption will be granted. However, if the increase can be covered from the adjusted EBDA, the application will be refused.

- If the liquid assets can cover the bank overdraft the application will be refused.

Solvency

- Solvency analysis is conducted only if the profitability analysis above indicates that **ROA is less than 6%**.
- The analysis first determines if there was an increase or a decrease in the applicant's assets, and to what percentage.
- If there was an increase in the average assets of the applicant, of **more than 50%**, then a debt-to-asset ratio is determined. This ratio is used to ascertain how much of that increase was financed through debt.
- If the debt-to-asset ratio is **more than 50%** (i.e. more than 50% of assets are owned by creditors), the applicant will be granted an exemption. However, if the debt-to-asset ratio is **less than 50%**, the application will be refused.
- If there was a decrease in the average assets of the applicant, the application for exemption will be granted.

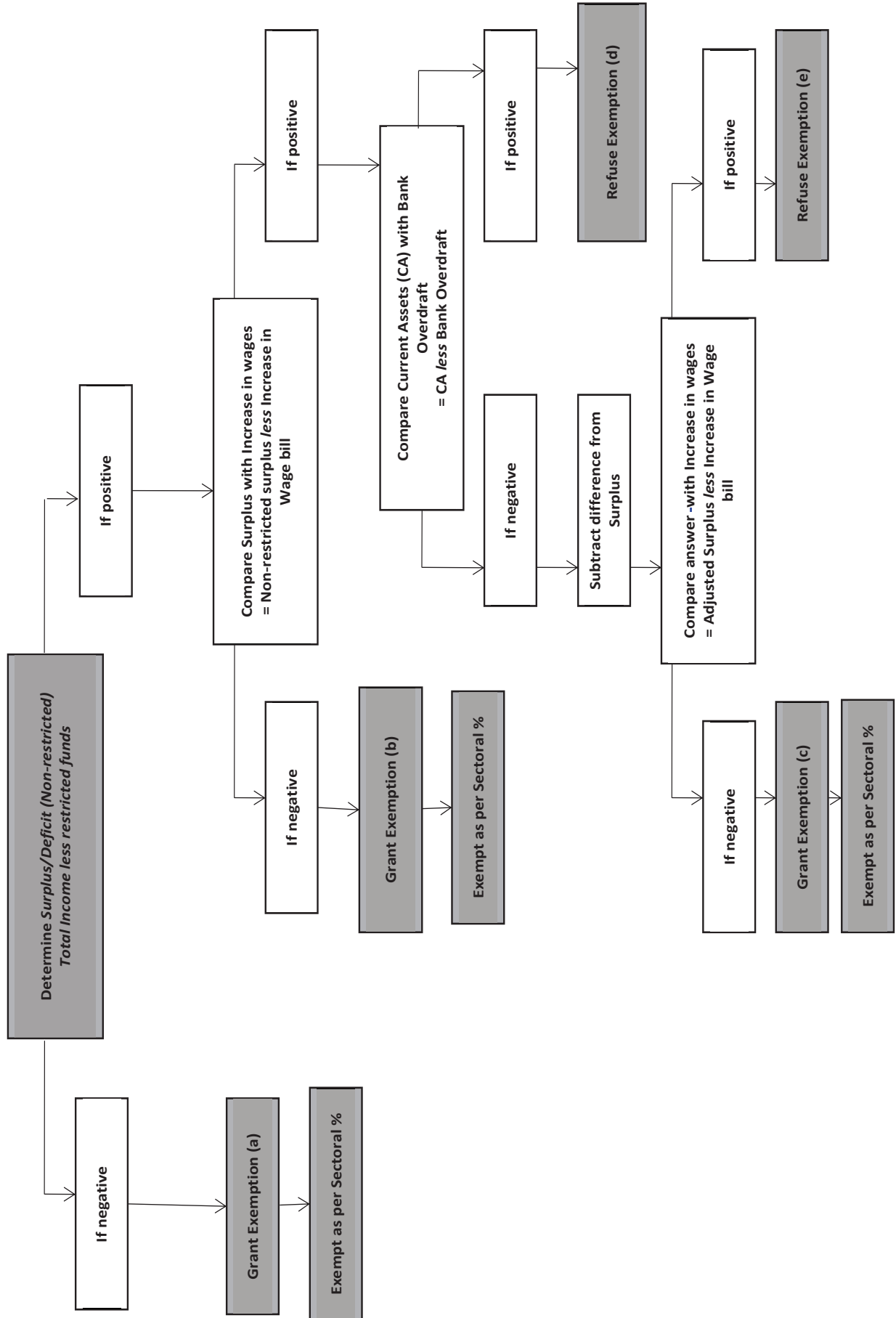
HOUSEHOLDS FINANCIAL DECISION PROCESS



System notes

- a) The exemption will be granted if from the income and expenditure analysis, the employer cannot afford required increases in wages,
- b) The exemption will be refused if from the income and expenditure analysis, the employer can afford required increases in wages.

NON-PROFIT ORGANISATIONS FINANCIAL DECISION PROCESS



NON-PROFIT ORGANISATIONS: SYSTEM NOTES

- a) The applicant cannot afford due to a deficit from income versus expenditure analysis. Thus exemption granted.
- b) The applicant cannot afford due to insufficient surplus from income versus expenditure analysis. Thus exemption granted.
- c) Surplus and liquidity based calculations indicate that the applicant cannot afford. Thus exemption granted.
- d) Surplus and liquidity based calculations indicate that the applicant can afford. Thus exemption refused.
- e) Surplus and liquidity based calculations indicate that the applicant can afford. Thus exemption refused.

SCHEDULE 2**DETAILS TO BE INCLUDED IN APPLICATION FOR EXEMPTION FORM****1. Application by registered employers' organisation on behalf of the employer**

If an application is made by a registered employers' organisation-

- (a) its full name, address and registration number;
- (b) the list of employers on behalf of whom the organisation is making the application; and
- (c) the Bargaining Council that it is affiliated to.

2. Employer particulars

- (a) Full name of employer including trade and brand names.
- (b) Unemployment Insurance Fund Registration number.
- (c) Compensation Fund Registration number.
- (d) SARS number.
- (e) Company registration number.
- (f) Physical address.
- (g) Postal address.
- (h) Contact person.
- (i) Contact details including telephone numbers, mobile phone numbers, fax numbers and email addresses.
- (j) Nature of business and sector.
- (k) Whether there is a bargaining council with jurisdiction.
- (l) Whether there is any sectoral determination binding on the employer.
- (m) Whether there is any collective agreement binding on the employer and the affected workers.

3. Employment details

- (a) The number of workers in the employer's workplace and their employment status e.g. permanent, fixed term, seasonal.
- (b) The number of workers to whom the application is to apply and their employment status e.g. permanent, fixed term, seasonal.
- (c) Details of current wages in respect of the workers contemplated in sub-item (b).
- (d) Details of the hours of work of the workers contemplated in sub-item (b).
- (e) Details of the number of months of work of the workers contemplated in sub-item (b)

4. Financial information

- (a) In respect of a business or organisation, full financial statements of the business for the 3 years (current year predictions and 2 previous years) and such other information that may be needed as prompted by the system including, depreciation, entertainment, write offs, finance cost, donations, profit/loss on disposal assets, operating expenses, tax, dividends, other expenses) to determine whether or not the employer can afford to pay the national minimum wage.
- (b) In respect of a household, details of the annual household income and expenditure and any other information that may be needed as prompted by the system (total household income less expenditure i.e. education, food and beverages, entertainment, loan repayments, cash donation, insurance premiums, travel cost (fuel, fares, etc.) other expenses.) to determine whether or not the employer can afford to pay the national minimum wage.