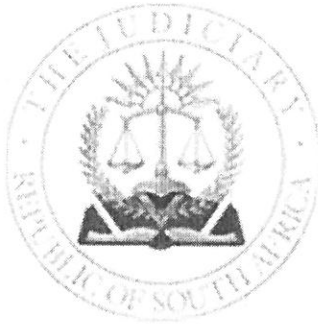




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED:

Date: **14th September 2017** Signature: _____

CASE NO: 2018/32607

In the matter between:

SOLIDARITY TRADE UNION

Applicant

and

**NATIONAL ECONOMIC DEVELOPMENT AND
DEVELOPMENT COUNCIL ('NEDLAC')**

First Respondent

THE PRESIDENCY OF THE RSA

Second Respondent

THE MINISTER OF TRADE & INDUSTRY

Third Respondent

JUDGMENT

ADAMS J

[1]. This is an urgent opposed application by the applicant for the review and setting aside of a decision of the first respondent not to consider the applicant's application in terms of section 77 of the Labour Relations Act no 66 of 1995 ('the LRA').

[2]. In its notice of motion, the applicant applies *inter alia* for an order in the following terms:

- '1. Reviewing and setting aside the decision made by NEDLAC, dated 21 August 2018; in terms of which the Standing Committee agreed on 17 August 2018, that Applicant's notice in terms of section 77(1)(b) of the LRA be deemed as not being considered in accordance with section 77(1)(c) of the LRA, and that protest action arising from the Applicant's notice, would not be protected under the LRA.
2. Ordering that Applicant's Notice and Application in terms of section 77 of the LRA; dated 25 July 2018; be remitted to NEDLAC for reconsideration in accordance with the Procedure for Considering Notices of Possible Protest Action ("the procedure guideline") in terms of section 77 of the LRA.'

[3]. The review application is based on procedural considerations and substantive considerations pursuant to the decision.

[4]. As regards procedural considerations, the applicant contends that the first respondent, as the custodian of national economic reform, is duty bound to follow procedures as outlined in its founding documents and its own guidelines and protocols, which deals with the manner in which it is required to consider notices in terms of section 77(1)(b) of the LRA. Importantly, so the applicants contends, in terms of the first respondent's procedural guidelines, it is required

to determine whether an issue referred to it is of a socio – economic nature. It is the case of the applicant that the process adopted by the first respondent in considering, in terms of section 77(1)(c) of the LRA, the section 77(1)(b) notice of the applicant, is contrary to the peremptory prescripts contained in section 4 of the Promotion of Administration of Justice Act, 3 of 2000 ('the PAJA'), and is therefore unlawful, unreasonable and irrational and stands to be reviewed.

[5]. As regards the substantive considerations, it is the applicant's case that the first respondent's decision that the applicant's section 77(1)(b) referral to it does not fall within its jurisdictional purview in that it does not have the powers to deal with the interpretation, application and implementation of BBBEE legislative provisions and any schemes based thereon, is unlawful, irrational and / or unreasonable. In particular, the applicant contends that the first respondent's failure to make a pronouncement on whether applicant's notice in terms of section 77(1)(b) constitutes a matter which is socio – economic in nature. Such failure, so the applicant alleges, was also unlawful, irrational and / or unreasonable.

[6]. The very crisp issue which I am required to adjudicate in this application for review is whether or not the first respondent had correctly decided that it does not have the necessary jurisdiction to consider the referral to it of the issue by the applicant.

[7]. Central to the issues in dispute in this review application is section 77(1) of the LRA, which provides as follows:

'77 Protest action to promote or defend socio-economic interests of workers

- (1) Every employee who is not engaged in an essential service or a maintenance service has the right to take part in protest action if-

- (a) the protest action has been called by a registered trade union or federation of trade unions;
 - (b) the registered trade union or federation of trade unions has served a notice on NEDLAC stating-
 - (i) the reasons for the protest action; and
 - (ii) the nature of the protest action;
 - (c) the matter giving rise to the intended protest action has been considered by NEDLAC or any other appropriate forum in which the parties concerned are able to participate in order to resolve the matter; and
 - (d) at least 14 days before the commencement of the protest action, the registered trade union or federation of trade unions has served a notice on NEDLAC of its intention to proceed with the protest action.
- (2)
- (3) A person who takes part in protest action or in any conduct in contemplation or in furtherance of protest action that complies with subsection (1), enjoys the protections conferred by section 67.
- (4) Despite the provisions of subsection (3), an employee forfeits the protection against dismissal conferred by that subsection, if the employee - ‘

[8]. On the 25th of July 2018 the applicant had served on the first respondent a notice in terms of the section 77(1)(b) of the LRA and the first respondent considered the notice and the issues raised therein, as contemplated in section 77(1)(c), and made a decision on the 17th of August 2018.

[9]. The reasons for and the purpose of the intended protest action, according to the applicant, was explained in the said notice and amplified in its oral submissions to the first respondent during a meeting of the 17th of August

2018, convened by the first respondent to 'clarify' the contents of the applicant's section 77(1)(b) notice. The applicant expressed the view that certain Employee Share Ownership Plans ('ESOP's'), including those proposed and adopted by companies in the Republic of South Africa, such as Sasol and Vodacom, and which were in the process of being implemented shortly, constitute unfair and unlawful conduct, prejudicial to the members of the applicant, whose socio – economic rights and interests, so the applicant claimed in their section 77(1)(b) notice, were violated. In addition, the applicant also contended that the ESOP's are prejudicial to the socio – economic and other rights of members of the public in general.

[10]. The intended respondents in the section 77(1)(c) process, and to whom the applicant, had addressed demands to be heard during the consideration of the issue, are the second and third respondents in this application. They played no part in the proceedings in this urgent application and also were not involved in the proceedings before the first respondent in view of the stance adopted by the Standing Committee of the first respondent.

[11]. The applicant had submitted to the first respondent that, in view of the above, it is imperative to protect and preserve the rights of its members and to prevent further harm and / or potential harm consequent upon the continued implementation of ESOP's.

[12]. This application was brought on an urgent because, so it was contended for on behalf of the applicant, if this matter is not disposed of expeditiously the applicant's rights to embark on protected / lawful protest action in terms of section 77 of the LRA, would effectively be placed on hold for a considerable period of time, whilst the impact of ESOP's would continue to prejudice the members of the applicant.

[13]. I find myself in agreement in agreement with these submissions, and therefore find that the application is urgent.

[14]. An important part of this application relates to the meaning of the 'socio – economic'. In that regards; Mlambo J (as he then was); in *Government of Western Province v Congress of South Africa Trade Unions and Another*, (Case no: C162/98) commented as follows that:

'It is not possible to provide an all – embracing definition of the phrase 'socio – economic interests of workers' [I]n my view each matter depends on its particular circumstances. It should generally be sufficient for a party to place the matter giving rise to the protest action squarely within the ambit of the social status and economic position of workers in general'; and;[i]t was stated that the LRA had correctly left the ambit of the scope of socio economic interests wide open and that to impose a strict and boxed type definition of socio economic interests would be "to go against the very grain of the Act"

[15]. Section 77 of the LRA is specifically headed 'Protest action to promote or defend socio – economic interests of workers'. Consequently, the purpose of entrenching the rights of employees to embark on protest action, within the confines of section 77; has as its aim the rights of employees to promote or defend their socio – economic interests. It is further submitted on behalf of the applicant that the issues raised in applicant's intended protest action; are issues in the public and national interest.

[16]. The first respondent opposes the application for review and persists in its stance that it lacks the necessary authority to consider the applicant's 'demands' as contained in its section 77(1)(b) notice / application addressed to the first respondent on the 18th of July 2018. This, the first respondent contends, results from a consideration of the enabling legislation and constitution of the first respondent, as well as its founding documents, consisting of a founding

declaration and its protocols. It is clear, so it was submitted by Mr Masipa, Counsel for the first respondent, that the first respondent lacks the power to determine the demands as contained in the applicant's section 77(1)(b) application / notice. There is no provision in the NEDLAC Act, its Constitution and its protocols which confer upon the first respondent the authority or power to facilitate on issues relating to duly implemented policies and/or Acts of Parliament, such as those relating BBBEE. This, so the argument is concluded on behalf of the first respondent, is the crux of the applicant's application herein.

[17]. The submission on behalf of the first respondent is furthermore that its powers and authority are confined to consideration of all significant changes to social and economic policies before it is implemented or introduced in Parliament. Clause 4.1 (d) of the constitution provides that its Council shall 'consider all significant changes to social and economic policy before it is implemented or, in the case of legislation, before it is introduced into Parliament'. This position, so Mr Masipa submitted, is reaffirmed in section 5(1)(d) of the NEDLAC Act. The share schemes, which form the basis of the applicant's grievance, are implemented in pursuance of the BBBEE and BEE legislation and policies developed around the legislative provisions. Therefore, so the first respondent contends, it does not have the authority to consider any application that has its effect on the aforementioned application and/or implementation.

[18]. In deciding whether or not the approach adopted by the first respondent is legally valid and sound, one needs look no further, in my view, than the provisions of the National Economic, Development and Labour Council Act, 35 of 1994, and in particular the provisions of section 5, which deals with the objects, powers and functions of the first respondent. Section 5 provides as follows:

'5 Objects, powers and functions of Council

(1) The Council shall-

- (a) strive to promote the goals of economic growth, participation in economic decision – making and social equity;
- (b) seek to reach consensus and conclude agreements on matters pertaining to social and economic policy;
- (c) consider all proposed labour legislation relating to labour market policy before it is introduced in Parliament;
- (d) consider all significant changes to social and economic policy before it is implemented or introduced in Parliament;
- (e) encourage and promote the formulation of co – ordinated policy on social and economic matters.

(2) For the purpose of subsection (1), the Council-

- (a) may make such investigations as it may consider necessary;
- (b) shall continually survey and analyse social and economic affairs;
- (c) shall keep abreast of international developments in social and economic policy;
- (d) shall continually evaluate the effectiveness of legislation and policy affecting social and economic policy;
- (e) may conduct research into social and economic policy;
- (f) shall work in close co-operation with departments of State, statutory bodies, programmes and other forums and non – governmental agencies engaged in the formulation and the implementation of social and economic policy.

(3) Nothing in this section shall preclude the Council from considering any matter pertaining to social and economic policy.'

[19]. In my judgment, any one of many of the foregoing provisions in the enabling Act of the first respondent empowers the first respondent to do what the applicant requires it to do in this application. Most notably is the provisions of section 5(2)(f), which empowers the first respondent to work in close co –

operation with departments of State, statutory bodies, programmes and other forums and non – governmental agencies engaged in the formulation and the implementation of social and economic policy. On any interpretation of this provision alone the first respondent is empowered to consider the request by the applicant as set out in its Section 7(7)(b) notice.

[20]. There is therefore no merit in the contention by the first respondent that it does not have the power to entertain the applicant's section 77(1)(b) application. That decision therefore stands to be reviewed.

[21]. The application therefore stands to be granted with costs.

Order

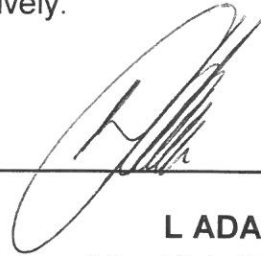
In the circumstances I make the following order:

1. The applicant's urgent review application be and is hereby granted.
2. The decision of the first respondent dated the 21st August 2018; in terms of which its Standing Committee agreed on the 17th August 2018 that the applicant's notice in terms of section 77(1)(b) of the Labour Relations Act, 66 of 1995 ('the LRA'), be deemed not to have been considered in accordance with the provisions of section 77(1)(c) of the LRA; and which resulted in the protest action contemplated in the applicant's notice, not being protected under the LRA; be and is hereby reviewed and set aside.
3. The applicant's notice and application in terms of section 77(1)(b) of the LRA dated the 25th July 2018, be and is hereby remitted to the first respondent for consideration in terms of the provisions of section of section 77(1)(c) of the



LRA in accordance with the first respondent's *Procedure for Considering Notices of Possible Protest Action* ('the Procedure Guideline').

4. The first respondent shall pay applicant's cost of this urgent application, including the cost relating to the hearing of the urgent application on the 11th September 2018 and on the 13th September 2018 respectively.



L ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	13 th September 2018
JUDGMENT DATE:	14 th September 2018
FOR THE APPLICANT:	Adv C Goosen
INSTRUCTED BY:	Serfontein Viljoen & Swart
FOR THE FIRST RESPONDENT:	Adv Relleng Masipa
INSTRUCTED BY:	T I Mathoa Attorneys