



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: J1908/19

In the matter between:

BUSINESS UNITY SOUTH AFRICA

Applicant

and

CONGRESS OF SOUTH AFRICAN TRADE UNIONS

First Respondent

SOUTH AFRICAN SOCIETY OF BANK OFFICIALS

Second Respondent

NATIONAL ECONOMIC AND DEVELOPMENT

LABOUR COUNCIL

Third Respondent

Date heard: 25 September 2019

Order Delivered: 26 September 2019

Reasons Delivered: 1 October 2019

Summary: Urgent application in terms of section 77(2) of the LRA. The process set out in Section 77 (1) must be read to be constrained by a reasonable time period. A section 77(1)(d) Notice must be issued within a reasonable time after the completion of the requirements of section 77(1) (c).

JUDGMENT-REASONS FOR ORDER

RABKIN-NAICKER, J

[1] On the 25 September 2019, I handed down the following order:

- “1. The matter is treated as urgent.
2. It is declared that:
 - 2.1 The Congress of South African Trade Unions (COSATU) and the South African Society of Bank Officials (SASBO) have failed to comply with the provisions of section 77(1) of the Labour Relations Act 66 of 1995 (LRA); and
 - 2.2 Any person who takes part in the intended protest action does not enjoy the protections afforded by section 67 of the LRA.
3. COSATU and SASBO are interdicted and restrained from proceeding with, encouraging or enticing employees to engage in the intended protest action or any conduct in contemplation or in furtherance thereof unless and until such time as they have complied with section 77 of the LRA.
4. COSATU is directed to advise its affiliates, including SASBO and their members that its proposed protest action is unlawful and in breach of section 77 of the LRA.
5. There is no order as to costs.”

[2] I set out the reasons for the above order below.

The Factual Matrix

[3] The papers reflect certain material facts that are undisputed. These include the following:

- 3.1 On the 21st August 2017, COSATU issued a notice to NEDLAC in terms of section 77(1)(b) of the Labour Relations Act¹ (LRA) on LRA Form 4.4, setting out the reasons for the intended protest action and demanding certain policy interventions.

¹ Act 66 of 1995 as amended.

3.2 The reasons set out for the intended protest contained, among others, the following:

“4. The main cause of the economic crisis is the post 1994 neo liberal or trickle down economic policies which are based on the view that benefits derived from the liberalization of the economy, deregulation of companies, tax and direct cash subsidies will trickle down to the poor through living wages, secured decent jobs, free education and free transport. Where these policies have succeeded they have made a few individuals richer and the majority poor.

5. The current wave of retrenchments is of great concern to the society and not only trade unions. One of the consequences of trickle down economic policies in the labor market is that employers must be allowed to hire and fire workers any time and for any reason including for increasing their profits and it is this labour flexibility that has played a major contribution in the dismissal of workers and increase in poverty. This philosophy is not consistent with ubuntu, SA's socio-economic challenges and the need to rectify the legacy of apartheid and colonialism.....

9. The maintenance of high levels of profits and bonuses to executives cannot be a fair reason for retrenchments. SA is facing a jobs bloodbath. In terms of the broad definition of unemployment 37% of people are unemployed as at 2017. The rate for black Africans is 40.9%, Coloureds 28.9%, Indians 15.8% and Whites is 8.5%. The youth unemployment between 15 and 24 years is about 66%. It is unacceptable that BRICS countries unemployment is below 10%.”

3.3 The following policy interventions were demanded by COSATU to arrest the continuing economic crisis:

“19.1 As a *quid pro quo* for government's generous tax benefits and other subsidies to private sector companies, companies must be prohibited from retrenching employees for the sake of profits and must be required to recreate a certain number of jobs per year and this must be monitored by the CCMA.

19.2 Government through Nedlac must convene an Economic and Jobs Summit within the next three months after submission of this notice.

19.3 Issues for discussion in the summit must include the following:

- a. The review of the National Development Plan in particular the Chapters on the Economy and Employment.
- b. The abandonment of the neo liberal trickle down economic policies.
- c. Imposition of legally enforceable obligations and targets on the private sector to create jobs, eliminate poverty and income and asset inequality.
- d. Amendments to existing laws that shall restrict layoffs to insolvent companies. A company must not be allowed to retrench workers simply to make profits. Government must bail out companies that are insolvent by injecting equity capital instead of allowing these companies to fail in the same way as government has bailed out insolvent banks."

3.4 Under the heading "The nature of the protest Action" the section 77(1)(b) Notice read as follows:

"20. If the above demands are not accepted, and/or if no acceptable settlement can be reached, all employees eligible to engage in protest action in terms of section 77 of the Labour Relations Act, will be called to involve themselves in:

20.1 Rallies, demonstrations, pickets (including, lunchtime picket), placard demonstrations, marches and stay aways and a total shut down of the economy.

20.2 calls for solidarity campaigns that are aimed at shareholders, employers, suppliers; and

20.3 Other forms of protest activity.

21. NEDLAC will be advised of the precise nature of the protest action and the date or dates upon which they will take place in the section 77(1)(d) notice, if and when this notice is provided."

3.5 The Section 77 Standing Committee of NEDLAC convened a plenary meeting with COSATU and the respondents cited in COSATU's 77(1) (b) Notice on the 15th September 2017. The following is recorded in a document issued by NEDLAC entitled "NEDLAC Certificate on the section 77(1) (B) Notice filed by the Congress of South African Trade Unions in respect of the economic crisis in South Africa".

3.6 The said 'Certificate' was dated the 7th November 2017. It records the submissions made on behalf of COSATU and further records:

"2.2.2 The Respondent stated the following:

2.2.2.1 It agreed that the Job Summit should be convened and that NEDLAC should play a central role in the convening of the Job Summit. This process would to [sic] ensure participation by all social partners.

2.2.2.2 The demand on the prohibition of retrenchments that are motivated by profit maximization could not be agreed upon at the meeting. Government therefore requested an opportunity to seek a mandate with its principals on this matter. It would then engage with Business where necessary.

2.2.2.3 The Respondent undertook to revert to NEDLAC within one month.

2.2.3 The Standing Committee agreed that the Respondents be allowed time to consult with their principals and revert to the Committee within one month.

2.2.4 A response has not been received from the Respondents within the stipulated timeframe."

3.7 The said Certificate, signed by the executive Director of NEDLAC ends with the following statement:

"DECLARATION

Given these circumstances, the Standing Committee resolved that the Respondents appeared to be no longer committed to engage on this notice.

The Standing Committee subsequently deemed this Section 77(1)(b) notice filed by COSATU as having been considered in terms of Section 77(1) (c) of the LRA.”

- 3.8 On the 15th January 2019, COSATU issued a notice to NEDLAC in terms of section 77(1)(d) of the LRA which disclosed an intention to proceed with the protest action relying on the section 77(1)(b) Notice served on NEDLAC on the 21st August 2017. The 15th January 2019 notice (“the First section 77(1)(d) Notice”) gave notice of COSATU’s intention to proceed with protest action on the 13th February 2019.
- 3.9 On the 5th February 2019, COSATU issued another notice to NEDLAC (“the Second section 77(1)(d) Notice”) relying on the section 77(1)(b) Notice served on NEDLAC in August 2017 in relation to various forms of protests to take place on Wednesday 19th February 2019.
- 3.10 No steps were taken to stop the protest action that took place in terms of the First and Second section 77(1)(d) Notices.
- 3.11 On the 28th August 2019, COSATU issued a further Notice to NEDLAC in terms of section 77(1)(d) (“the Third section 77(1)(d) Notice”) relying again on the section 77(1) (b) Notice served on NEDLAC in August 2017. The third Notice *inter alia*, gave Notice of protest action by employees in the finance sector to take place on the 27th September 2019.
- 3.12 On the 29th August 2019, COSATU issued another Notice to NEDLAC in terms of section 77(1) (d) (“the fourth section 77(1) (d) Notice”) in reliance on the August 2017 section 77(1)(b) Notice. The fourth section 77(1)(d) Notice stated the intention to have protest action across all sectors of the economy on the 7th October 2019.
- 3.13 It was on receipt of the Third and Fourth Notices that BUSA brought the urgent proceedings heard on the 24th September 2019.

The Legal issues

[4] Section 77 of the LRA 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) The Labour Court has exclusive jurisdiction-

(a) to grant any order to restrain any person from taking part in protest action or in any conduct in contemplation or in furtherance of protest action that does not comply with subsection (1);

(b) in respect of protest action that complies with subsection (1), to grant a declaratory order contemplated by subsection (4), after having considered-

(i) the nature and duration of the protest action;

(ii) the steps taken by the registered trade union or federation of trade unions to minimise the harm caused by the protest action; and

(iii) the conduct of the participants in the protest action.

(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-

(a) takes part in protest action or any conduct in contemplation or in furtherance of protest action in breach of an order of the Labour Court; or

(b) otherwise acts in contempt of an order of the Labour Court made in terms of this section.”

[5] The section 77 provisions have been considered by the Labour Appeal Court but once, in the matter of *Business South Africa v Congress of SA Trade Unions and Another*². The parties before me did not take issue with the principles set out in that case. These include that:

“In order to determine the proper nature and scope of the right to take part in protest action in terms of the Act it is of course necessary (1) to have regard to the definition of protest action in the Act and the further provisions regulating its exercise in s77 of the Act; (2) the purpose of the Act; and (3) the provisions in the Act itself which determines its proper interpretation.”³

“...support for the clear distinction between a right to strike and a right to protest action is, of course, the fact that the Act explicitly makes that distinction and defines the two as mutually exclusive, a fact already referred to. This distinction is one which finds support in comparative international law where a differentiation is made between industrial action underpinning the collective bargaining process and a work stoppage for more 'political' purposes (such as the broad socio-economic interests of the workers)..”⁴

“The findings and recommendations of the Freedom of Association Committee of the Governing Body of the ILO, and its Committee of Experts, are to the effect that the right to withhold labour in order to promote economic

² (1997) 18 ILJ 474 (LAC).

³ Ibid at pg 477 C-D.

⁴ Ibid at pg 480 C-D

and social interests legitimately falls within the scope of the right to freedom of association as expressed in Convention 87, a convention which South Africa has ratified. Where the final Constitution recognizes both the right to freedom of association and an independent right to strike their conclusions do not necessarily support the argument that the right to protest action in s77 of the Act forms part of the constitutional right to strike.

If the argument that the right to protest action in s77 of the Act is part of the statutory expression of the constitutional right to strike, it is fallacious to argue further that the limitation of that right should be interpreted restrictively because of other features of protest action which bear on the democratic process in a wider sense, viz the right to mobilize, demonstrate, influence and inform and which do not form part of the right to strike. Those features find expression in other constitutional rights such as freedom of association, the right to assemble, to demonstrate, to picket, to present petitions and freedom of expression. The right to protest action, therefore, appears to give expression to only one form of those rights, viz a work stoppage to influence, in broad terms, the democratic process. It limits the right by providing procedural requirements for its exercise but it also provides protection benefits which might not be the case in the ordinary exercise of the right.

This does not necessarily make the right itself less important than the other labour rights but merely emphasizes its different character.”⁵

“Because of the different nature and character of the right to take part in protest action in terms of the Act, the interpretation and application of that right needs to be assessed in a broader context than the fundamental 'labour rights' which form part of the primary objects of the Act in terms of s1. The application and interpretation of the latter takes place in the context of their contribution, in general, to collective bargaining. Collective bargaining itself is constitutionally guaranteed. The parties to collective bargaining are primarily restricted to employers and employees, not the general public. Not so in the case of protest action. Collective bargaining is not at stake. The extent of the right to protest action involves the weighing up of that right, taking not only the rights of employees and employers into consideration, but also, importantly,

⁵ Ibid at pg 480 E-J.

the interests of the public at large and, in a case such as this, the effect on the national economy...”⁶

“...the nature of the right to take part in protest action is such that it necessitates a consideration of the rights of the public at large and not only those of labour and business.

The purpose for enacting s77 was therefore, to regulate the manner in which protest action should take place. That purpose would be forfeited if the process did not involve that sequence.

...The legislature has chosen a particular sequence, and not another, which indicates the order in which the process should occur.⁷

“....Protest action, as defined in the Act, potentially causes harm. The notice in terms of s77(1)(b) implicitly contains a threat to apply pressure, unless the dispute is resolved at NEDLAC. If the dispute is not resolved, the s77(1)(d) notice is then given. The threat adds a new dimension to any consideration of the matter giving rise to the dispute. Even if the matter had been considered earlier, before the s77(1)(b) notice, the threat of action necessitates further consideration.

If the purpose of s77 is to regulate the exercise of the right to protest action and that entails a number of steps to be taken in sequence, the further question which arises is what meaning is to be given to the requirement that the intended protest action must have been 'considered . . . in order to resolve the matter in dispute'. The actual wording of s77(1)(c) is, once again, not particularly helpful in determining this. It is possible to argue that the matter in dispute can be 'considered . . . in order to resolve the matter' on more than one occasion, and that therefore it is open to take the next step in the sequence, viz to serve the s77(1)(d) notice of an intention to proceed with the protest action at least 14 days in advance of that protest action, at any time after one of these occasions where the matter was so considered. But such an interpretation would defeat the purpose of a regulated exercise of the right to protest action. If protest action may be proceeded with whilst all the parties at NEDLAC are still committed to consider the matter giving rise to the dispute in order to resolve it, the purported regulation of that exercise of the

⁶ Ibid at pg 481 D-F.

⁷ Ibid at pg 486 A-B.

right to protest action becomes meaningless. Why refer the matter giving rise to the dispute to NEDLAC in order to resolve it if protest action may take place regardless of whether the issue has been resolved or not at NEDLAC? The answer must be consistent with the purpose of s77, viz the regulated exercise of the right to protest action. This consistency is achieved if the requirement of 'consider . . . in order to resolve' in s77(1)(c) is interpreted so that it is only met once it becomes clear that any one or more of the parties at NEDLAC is not committed to resolve the matter in dispute any more. Only when that is clear, may the next step, the s77(1)(d) notice, be proceeded with."⁸

- [6] On the facts in the LAC case, the majority found that section 77(1)(c) had not been complied with, i.e. consideration of the matter in order to resolve the dispute, before the issuing of the section 77(1)(d) notice.

Evaluation

- [7] I now turn to evaluate the various propositions pleaded and submitted by the parties in the matter before me.
- [8] BUSA sought to establish that section 77(1) (c) had not been complied with in this matter (as in the matter before the LAC). It did so principally on the basis that only one plenary had taken place, and that it was the Government and not BUSA who had not returned to a further meeting with proposals. However, this is disputed in the answering papers. The denial is supported by the contemporaneous minutes of the Plenary Meeting and the content of the "certificate" issued by NEDLAC which, on a proper reading, reflects that the respondents to the section 77(1)(b) notice did not revert to NEDLAC within the month agreed at the plenary, and not just the Government respondent.
- [9] In my view, therefore, given the above and the trite principles in applications for final relief, BUSA failed to establish that section 77(1)(c) was not complied with. What remained of BUSA's case was the issue of the delay of 14 months in the issuing of the first section 77(1)(d) notice and the fact that three further such notices were issued based on the referral in August 2017.

⁸ Ibid at p486 A-H..

[10] It was argued on behalf of COSATU that, given the circumstances of the economic crisis listed in the section 77(1)(b) referral of August 2017 had not changed, it was open for COSATU to rely on that notice. Further, that it would be ‘absurd’ for this Court to read any time limitation into the steps set out in section 77, other than that specifically spelt out i.e. that 14 days’ notice should be given of the intended protest action in terms of section 77(1) (d). In my view, this approach cannot be correct.

[11] The indications that the section 77 process is constrained by a reasonable time period include the following:

11.1 The Annexure to the section 77(1)(b) notice (LRA Form 4.4) issued by COSATU in August 2017 specifies that the Job Summit it demands must be held within a period of three months;

11.2 The social partners pursuant to the provisions of the National Economic Development and Labour Council Act⁹ (NEDLAC Act) have developed certain rules and protocols. One of these is the Section 77 Protocol entitled “Procedure for Considering Notices of possible Protest Action (“the Procedure”) in terms of Section 77 of the LRA. The Procedure is attached to the Code of Good Practice on Consideration of Notices of Possible Protest Act in terms of Section 77 of the LRA.

11.3 The Procedure contains a number of time limits. For example, the Executive Director must convene a Plenary Meeting within 10 calendar days of receiving the 77(1)(b) Notice.¹⁰ The Committee must produce a Report within five days of the conclusion of the process listed in clause 3 of the Code of Good Practice.¹¹ Where a panelist is requested to assist in the resolution of the referral by the respondent to the referral, they must so indicate within three days of receipt of the Notice of the first meeting.¹²

11.4 Section 77 includes terms that the “resolution of the matter” is an objective of the provision. Section 77(1)(c) is one of the jurisdictional

⁹ Act 35 of 1994.

¹⁰ Clause 3.1.

¹¹ Clause 3.7.

¹² Clause 4.3.

facts to be met before protest action may ensue and reads that “*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; ..*”

11.5 As referred to above, the Protocol issued in terms of the NEDLAC Act dealing with the section 77 Procedure refers to the right of the parties to request a ‘panelist to assist in resolving the matter.’ If such a panelist is appointed she is subject to certain time periods set out in the Procedure.¹³

[12] It is apposite to revisit Section 1 of the LRA, which provides that:

“The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are-

(a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996;

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can-

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy; and

(d) to promote-

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the workplace; and

(iv) the effective resolution of labour disputes.”

¹³ Clause 4.5.

- [13] The above objectives which must guide the interpretation of section 77 of the LRA, include the advancement of social justice, labour peace, effective resolution of disputes and the provision of a framework for the formulation of industrial policy. The formulation of industrial policy speaks directly to the social partners comprising NEDLAC and the subject matter of referrals under section 77. There was much made in submission before me of the distinction between strike action and “protest action” in terms of section 77. There is such a distinction. However, the work stoppages contemplated by section 77 are the result of a labour dispute of a special type. Given my observations in paragraph 11 above, this special type of labour dispute cannot be immune from the principle of the speedy resolution of disputes. Indeed, one would expect that trade union organisations would be the first to complain when referrals under section 77 are not dealt with expeditiously.
- [14] I therefore find that section 77 must be read to mean that a section 77(1)(d) Notice is issued within a reasonable period. This was not the case in this matter. Further, and in consequence of the same reading of the section, I do not find that the section contemplated the issuing of more than one such Notice in respect of a referral in terms of section 77(1)(b). The section 77(1)(d) Notice must be issued within a reasonable period dependent on the particular facts and circumstances of the process undertaken in terms of section 77(1)(c).
- [15] A further issue pleaded and submitted on behalf of SASBO was the following: given that BUSA took no steps to object to the issuing of the First and Second Section 77(1)(d) Notices, the Court should consider that they had waived their rights, and were now perempted from launching this application. This argument is misplaced. We are concerned with objective jurisdictional facts which must be met to clothe Section 77 protest action with lawfulness. In the same way, the LRA contains provisions¹⁴ which are applied by this Court to determine whether a strike is protected by the statute. If an employer does not move to interdict a strike relying on the provisions of the LRA, but the jurisdictional facts for the protection of that strike have not been met, the strike remains unprotected in law.

¹⁴ Contained in Chapter IV of the LRA.

[16] Having found that the jurisdictional facts required by the section have not been met as set out above, and the intended protests are unlawful, the interdictory relief sought stands to be granted. I wish, however, to make certain general observations below.

[17] The facts before me in this application do not simply reflect that COSATU was dilatory in pressing its right to organize its protests. The other social partners could be described as supine in reaction to the issues raised in the section 77(1)(b) referral. Indeed, BUSA, it seems, was only roused from its slumber on receipt of the Third and Fourth section 77(1)(d) Notices, when major disruption of the financial sector was imminent. It would seem to me that a positive outcome of this dispute would be a return to the recognition of the importance of the role of NEDLAC in the labour and industrial sectors. The message of this judgment to the social partners and their NEDLAC structure is therefore "VUKANI! WAKE UP!"

[18] Application for leave to appeal my order, and to oppose such application, have already been made by the parties despite the fact that reasons for my order were still pending. Given the importance of the matter, I take the unusual step of granting such leave by means of an order that follows:

Order

1. Leave to appeal the order and judgment in this matter is granted.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Alistair Franklin SC with Advocate Riaz Itzkin

Instructed by: Bowman Gilfillan Inc

For the First Respondent: Advocate DI Berger SC with Advocate Z Ngwenya

Instructed by: Cheadle Thompson & Haysom Inc

For the Second Respondent: Advocate C Goosen

Instructed by: BJ Erasmus Pieterse Attorneys