IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA97/2019

In the matter between:

CONGRESS OF SOUTH AFRICAN TRADE UNIONS **First Appellant**

SOUTH AFRICAN SOCIETY OF BANK OFFICIALS, THE FINANCE UNION **Second Appellant**

and

BUSINESS UNITY SOUTH AFRICA **First Respondent**

NATIONAL ECONOMIC AND DEVELOPMENT LABOUR COUNCIL **Second Respondent**

Heard: **23 September 2020**

Delivered: **27 November 2020**

Summary: *Protest action—Section 77 of LRA 1995—Requirements—Compliance with—Notice to employer--- Section 77 envisages the issuing of a notice in terms of para (b)---When consideration of matter by employer failed union issuing a para (d) 14 days' notice of proposed protest action.*

Coram: Davis JA, Jappie JA and Kathree-Setiloane AJA

JUDGMENT

DAVIS JA

Introduction

[1] This appeal concerns the interpretation of s 77 of the Labour Relations Act 66 of 1995 (the LRA). Accordingly, this focusses the court's attention on the nature and scope of the right of employees who are not engaged in essential services or maintenance services to take part in protest action.

[2] On 25 September 2019, Rabkin-Naicker J sitting in the court a quo ordered that the appellant had failed to comply with the provisions of s 77(1) of the LRA. Accordingly, any person who took part in the intended protest action would not enjoy the protection afforded by s 77 of the LRA. Further, the learned judge ordered that the appellant was interdicted and restrained from proceeding with encouraging or enticing employees to engage in the intended protest action or any conduct contemplated or inference thereof until such time as they had complied fully with s 77 of the LRA.

[3] With the leave of the court a quo, the appellant has approached this court on appeal.

Factual matrix

[4] On 21 August 2017, the first appellant issued a notice to the second respondent in terms of s 77(1) of the LRA and notified the former about possible protest action. In an annexure to the notice, the first appellant set out the reasons for the intended protest action after describing what it considered to be adherence to economic policies which it described as 'neoliberal or trickle down' economic policies. The annexure then contained the following:

The current wave of retrenchments is of great concern to 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… 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%."

[5] The first appellant then issued a number of demands for policy interventions included the following:

> '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 create a certain number of jobs per year and this must be monitored by the CCMA.
>
> Government through Nedlac must convene an Economic and Jobs Summit within the next three months after submission of this notice.'

[6] The first appellant concluded with the following:

> '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 s 77 (1)(d) notice, if and when this notice is provided.'

[7] Following this notice, on 15 September 2017, third respondent's standing committee convened a consultative meeting which included representatives

of government, first respondent and the appellant. At this meeting, it appears that the parties agreed that a job summit should be convened and that third respondent should play a central role in the convening thereof. However, the parties could not agree on the demand for the prohibition of retrenchments which appellant alleged was motivated by profits maximisation. It appears that the government representatives undertook to consult and revert to third respondent within a month.

[8] On 15 January 2019, first appellant issued a further notice to the second respondent in terms of s 77 (1)*(d)* of the LRA. In it, the first appellant stated that it intended to proceed with protest action as set out in the notice which had been served on the second respondent on 21 August 2017. The annexure to the notice described the forms of protest action which were contemplated to take place on 13 February 2019.

[9] On 5 February 2019, the first appellant issued a further notice in terms of s 77 (1)*(d)* of the LRA in which it informed the second respondent of its intention to again proceed with protest action on 19 February 2019.

[10] On 28 August 2019, the first appellant issued yet another notice to the second respondent, again in terms of s 77 (1)*(d)* which disclosed an intention to proceed with protest action on 27 September 2019 which protest action would focus mainly on the financial sector. Appellant then informed the second respondent that "it will assess the program of action and decide on the way forward. It reserved the right to extend the program of action if it deemed it necessary."

[11] One day later, on 29 August 2019, the first appellant issued a further notice in terms of s 77(1)*(d)* of the LRA disclosing the intention to proceed with protest action in relation to the issues set out in the annexure to the notice of 21 August 2017. This time it described the protest action as follows:

> '4. The protest actions that will involve time away from work are:

4.1 Rallies, marches, demonstrations, pickets, placards demonstrations, lunchtime pickets, etc. In all major towns and cities on the weeks leading to 7 October 2019.

4.2 A National Stay-away or a Socio-Economic Strike on Monday 7 October 2019.

5. The specific activities in paragraph 4 above will take place during working hours. The socio-economic strike will commence at 00:00 and end at 23:59 on 7 October 2019, except that shift workers will be away for the duration of one whole shift and it will be the shift that has the majority of hours on the day in question.'

[12] Whereas no steps were taken to stop the protest action of which the respondents were informed in January and February 2019, and which subsequently took place in terms of the notices, a different approach was adopted to the last two notices issued by the first appellant. On 5 September 2019, the first respondent wrote a letter to the appellants requesting an undertaking in respect of the contemplated protests action which it claimed had been unlawful and unprotected. The approach of the appellants was a denial that there was a failure to comply with s 77(1)*(b)* and *(c)* of the LRA and that the protest action could be considered to be unlawful. Accordingly, it confirmed that it would not withdraw the notice and that it intended to proceed with the protest action on the indicated dates.

[13] It was as a result of this correspondence that first respondent approached the court a quo for relief.

[14] In granting the interdict so sought by first respondent, Rabkin-Naicker justified her order thus:

'I therefore find that s 77 must be read to mean that a s 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 s 77 (1) (b). The s 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).'

The appeal

[15] Central to this appeal is the meaning and scope of s 77(1) of the LRA which provides as follows:

'(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.'

[16] More than 20 years ago this court had occasion to examine this provision in *Business South Africa v Congress of SA Trade Union & another* (1997) 18 ILJ 474 (LAC); [1997] 5 BLLR 511 (LAC). Writing for the majority of the court, Myburgh JP said at 516:

> 'The first is that if the Act exacts the price of responsibility (in the form of adhering to the statutory requirements before embarking on a strike) in order to gain the benefit of protection of strikes, at least the same, if not greater, obligation or responsibility rests on a trade union, or federation of trade unions, that seeks protection for its members taking part in protest action.'

[17] The learned judge of appeal then went on to examine the specific meaning of s 77 (1)*(c)*. In this connection he said:

> 'The actual wording of s 77 (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 s 77 (1) (d) notice of an intention to proceed with the protest action at least fourteen 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 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 purpose of s 77, viz the regulated exercise of the right to protest action. This consistency is achieved if the requirement of "consider … in order to resolve" in s 77 (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 s 77(1) (d) notice, be proceeded with.'

[18] On the basis of these dicta, Mr Franklin who appeared with Mr Itzkin on behalf of the first respondent, submitted that s 77 when read holistically, envisaged a continuum of conduct, namely that protest action may only follow upon a series of steps that had been taken in sequence shortly after each

other. In other words, the initial notice which is required to be issued in terms of s 77(1)*(b)* is designed to enable the second respondent an opportunity to resolve the matters which had been raised in the notice. Pursuant to this notice, it was then open to the affected employer to meet with the relevant trade union at the premises of the second respondent in order to engage in a resolution of the grievances which had been raised in the notice. If the procedures envisaged in s 77(1)*(c)* to resolve the problems raised in the notice are unsuccessful, then on the basis of the principle that the LRA seeks timely and expeditious resolution of all labour disputes, Mr Franklin contended that this core principle militated against the construction of s77 which left the option of protest action "open ended" by allowing it to take place at the choice of the trade union, irrespective of how much time had passed since the initial referral of the matter in dispute to the second respondent in terms of s 77(1)*(c).*

[19] In order to determine the meaning of s 77(1) of the LRA, account must be taken of the context in which the right to protest action, as set out in the section, implicates three constitutional rights which are to be found in Chapter 2 of the Constitution of the Republic of South Africa, 1996. These rights are freedom of expression in s 16, the right of assembly, demonstration, picketing and petitions in s 17 and the various labour relations rights including the right to fair labour practice and the right that each worker has to participate in the activities and programs of a trade union in ss 23(1) and 23(2)*(b)* of the Constitution.

[20] A practice has been developed in recent times that, when interpretation of a statute is required, automatic and uncritical reference is made to dicta in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA). Suffice to say that one searches in vain in that judgment for any reference to the influence of s 39(2) of the Constitution which enjoins this Court, when interpreting any legislation, to promote the spirit, purport and object of the Bill of Rights. The interpretation of the legal text requires

recourse to publically accessible conventions and, in particular legal conventions, as opposed to a psychologically gleaned internal mental state of an individual speaker which conceit sits most uneasily with the idea of a multi membered legislature. When the interpretative task is viewed within the context of the Constitution, then it is possible to conclude that the latter has given rise to a legal convention sourced within the normative framework of the Constitution. Suffice in the present case to state that this approach to statutory interpretation means that s77 needs to be viewed, and thus understood, through the prism of the constitutional rights which are implicated by the section. Accordingly, the section requires an interpretation which gives a viable meaning to its purpose and content to these rights.

[21] But says the first respondent, a reading of the LRA is equally important and therefore content must be given to the principle of expeditious resolution of labour dispute. In this connection, Mr Redding, who appeared on behalf of the appellant, referred to the right to strike which in his view did not go stale.

[22] Thus the principle of expeditious resolution of a labour dispute did not apply in the case of strikes or protest action as contended for by first respondent. In this connection, Mr Redding cited dicta in the *Chamber of Mines SA v National Union of Mineworkers & another* (1986) (7) ILJ 304 (W) at 307 where Vermooten AJ said:

> 'I agree with Mr Trengove who appeared on behalf of NUM that the right to strike lawfully once acquired does not become stale. That is so appears from the following considerations. Firstly, the section itself does not lay down any time-limit, secondly the section creates a criminal offence. It is accordingly to be narrowly construed the construction less restrictive of the right to strike as to be preferred. Thirdly it also makes good sense once the parties in dispute have gone through described conciliation procedure not to require them to do so again from time to time whenever they wish to resort to a lawful strike or lock-out.'

[23] Significantly, this approach was not disturbed on appeal by the Appellate Division in *Chamber of Mines SA v National Union of Mineworkers and another* 1987 (1) SA 668 (A).

[24] Notwithstanding a contrary view which was expressed by the Labour Court in *Western Platinum Limited v National Union of Mineworkers & others* (2000) ILJ 2502 (LC), Landman J in *Public Service Association of SA v Minister of Justice and Constitutional Development & others* (2001) 22 ILJ 2302 (LC) at paras 38 ff, found that a time limit could not be read into the right to strike as guaranteed in the Constitution the operational details of which are set out in s 64 of the LRA.

[25] Turning to the right to conduct protest action, s 77 of the LRA does not expressly provide for time limits. While the first respondent argued for an implicit "reading in" of the principle of expedition of resolution in respect of protest action, the nature of protest action as envisaged in s77, may not be subject to the kind of expeditious resolution that would be the case with a labour dispute between employees and an employer in that as is the case in the present dispute, the gravamen of appellant's protests concerns a series of complaints about the government's economic policy. Manifestly the aim of the protest which is to press for policy changes falls within the scope of protest action as set out in s 77 of the LRA. Unlike a labour dispute between the parties to an employment relationship, the nature of this protest is not one that falls to be resolved as expeditiously as a defined labour dispute.

[26] The architecture of s 77 is also instructive. It requires an initial notice in which the reasons for the protest action and the nature of the protest action are set out. It is then incumbent, before embarking on protest action, for the matter to be considered by the second respondent or another appropriate forum. But once there has been compliance with these requirements, all that s 77, in terms of para (d) thereof provides, is at least 14 days before the commencement of the protest action foreshadowed in the initial notice, a

further notice must be served on the second respondent In *Business SA v COSATU, supra* at 524, Myburgh JP said of the requirements mandated in s 77 that: "To the extent that it is within the power of the employer to resolve the matter, the employer must know before it meets with the trade union or trade union federation at Nedlac, as a minimum whether the pressure is to be applied to it, when the pressure will be applied, the nature of the pressure and the duration of the pressure. BUSA knew when the pressure would be applied (12 May) the nature of the pressure (a strike), the duration of the pressure (1 day).

[27] That is precisely what any reader of the various notices to which I have made reference, and which were issued in terms of s 77 (1)*(b),* would have known in the present case; in short, when the pressure would be applied, the nature of the pressure and the duration of the pressure. Once an attempt at resolution failed, all that was required of the appellant was to issue the notice required in terms of para (d) which informed the respondents when the envisaged protest action would take place.

[28] Expressed differently, the interpretation for which the first respondent contends would involve the following: an initial notice would be issued by the party wishing to protest, it would set out the reasons for the protest action and the nature thereof. The matter would then be considered by the second respondent. An attempt at resolution would fail and accordingly, following a notice in terms of sub para *(d)* within the prescribed time period, the protest action would take place. Once that protest action which, as in this case would appear to last for a day, would have been completed, that would have been the end of the protest action as set out in s 77 (1) of the LRA. Where the union, in this case the appellant, wishes to engage in further protest action, it would have to issue a fresh notice in terms of s 77 (1)*(b)* specifying the reasons for, and the nature of the protest action, albeit that both of these may be the same as in the previous notice. The notice would then have to be

reconsidered by the second respondent. Once a further impasse has been reached, a para *(d)* notice could then be issued.

[29] There is simply no warrant for reading these requirements into the section, particularly as it is predicated on the vindication of three constitutional rights as enshrined in chapter 2 of the Constitution. In turn, this means that there was no justification for the reason upon which the order of the court *a quo* was based, namely that the (d) notice had to be issued within a reasonable time as contemplated by the court *a quo*. Regrettably, the reasoning of the court a quo, reveals a confusion between the two different notices, the first notice was issued in terms of para (b) and the second in terms of (d). If as the learned judge in the court a quo stated "I do not find that the section contemplated the issuing of more than one such notice in respect of a referral in terms of s 77 (1) (b)", there would appear to be no reason why a (d) notice would have to be issued within a prescribed time limit or even one which the court, in its discretion, considered to be a reasonable period.

[30] In the light of these findings, there is no need for this court to canvass the further arguments which were raised, in particular by the second respondent dealing with paragraph 7 of the so called "protocol document" which is annexed to the Code of Good Practice on Consideration of Notices of Possible Protest Action in terms of s 77 of the LRA.

[31] It follows that for the reasons set out in this judgment, the appeal should succeed with costs. The following order is therefore made:

1. The appeal is upheld with costs.
2. The order of the court *a quo* of 25 September 2019 is set aside and replaced with the following:

'*The application is dismissed. There is no order as to costs*.'

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Davis JA

Jappie JA and Kathree Setiloane AJA concur.

APPEARANCES:

FOR THE APPELLANT:	Adv Redding SC Instructed Cheadle Thompson & Haysom Inc
FOR THE SECOND APPELLANT:	Adv Corne Goosen Instructed by B J Erasmus Pieterse Attorneys
FOR THE FIRST RESPONDENT:	Adv Franklin And Adv Itzkin Instructed by Bowman Gilfillan Inc