CASES / VONNISSE

PROTEST ACTION WITHIN THE AMBIT OF THE LABOUR RELATIONS ACT 66 OF 1995

COSATU v Business Unity of South Africa (2021) 42 *ILJ* 490 (LAC)

1 Introduction

Protest action is not a new phenomenon in democratic South Africa. In the 1980s and 1990s, many stay-aways were used by workers to demonstrate opposition to government policy (Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide* (2015) 380; Manamela *The Social Responsibility of Trade Unions: A Labour Law Perspective* (unpublished LLD thesis, University of South Africa) 2015 130; Le Roux and Van Niekerk "Protest Action in Support of Socio-Economic Demands: The First Encounter" 1997 6(10) *CLL* 81). However, the Industrial Court was disinclined to grant such actions protection and, as a result, they were deemed unlawful under the Labour Relations Act 28 of 1956 (1956 LRA) (see *Amalgamated Clothing & Textile Workers Union of SA v African Hide Trading Corporation (Pty) Ltd* (1989) 10 *ILJ* 475 (IC)). Unlike protest action, strike action was regulated and defined under the 1956 LRA. Nonetheless, the International Labour Organisation (ILO)'s Fact-Finding and Conciliation Commission on Freedom of Association criticised the narrow definition of "strike" in the 1956 LRA, stating that employees should be permitted to strike in protest against the government's economic and social policies (see ILO Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa (May–June 1992) https://www.ilo.org/global/standards/information (accessed 2021-05-03)).

Under the democratic dispensation, the Constitution of the Republic of South Africa, 1996 (the Constitution) clearly provides that everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions (s 17) and that employees have the right to strike (s 23(2)(*c*)). The term "assemble" in section 17 of the Constitution has been interpreted to cover meetings, pickets, protest marches and demonstrations that are aimed at expressing a common opinion (see De Waal, Currie and Erasmus *The Bill of Rights Handbook* (2001) 334). Based on these constitutional provisions, employees can therefore use economic power to support their various demands. In terms of section 1 of the Labour Relations Act 66 of 1995 (LRA), one of the aims of this Act is "to advance economic

development, social justice, labour peace and the democratization of the workplace". Among other measures, this is done through allowing employees and their organisations the right to engage in protest action. While a strike is focused on "matters of mutual interest" between employees and their employer, protest action is focused on the "socio-economic interests" of employees (s 213 of the LRA). Strike action is the most common and better understood of the two actions, while protest action is often misconstrued. Protest action assists employees, their trade unions and federations to play an important wider role in society (see Garbers, Le Roux, Strydom, Basson, Christianson and Germishuys-Burchell *The Essential Labour Law Handbook* (2019) 495; Manamela *The Social Responsibility of Trade Unions* 13–14). Through protest action, employees can influence policy decisions in society. Section 77 of the LRA gives effect to and regulates the right to engage in protest action.

South Africa has experienced many protests and as a result, the country has been referred to as "the protest capital of the world" (Rodrigues "'Black Boers' and other Revolutionary Songs" (2010-04-05) *Mail & Guardian* https://thoughtleader.co.za/on-revolutionary-songs (accessed 2021-05-06)). Federations of trade unions such as the Congress of South African Trade Unions (COSATU) have over the years organised a number of protests, including those against labour broking and high tolls (see Buhlungu *A Paradox of Victory: COSATU and the Democratic Transformation in South* Africa (2010) 2–3). Protests are used for various reasons, including those related to service delivery. However, the focus in this discussion is on protests regulated by the LRA. Given the number of protests that take place in South Africa, it is important that the concept of protest action, and the nature and scope of the right to engage in protest action as regulated by section 77 of the LRA, be properly understood. The discussion focuses on *COSATU v Business Unity of South Africa* ((2021) 42 *ILJ* 490 (LAC)), which deals with the interpretation of section 77 of the LRA.

2 Facts of the case

The first appellant (COSATU) issued a notice to the second respondent, the National Economic Development and Labour Council (NEDLAC)) on 21 August 2017 in terms of section 77(1) of the LRA, notifying it of possible protest action. The notice outlined the reasons for the intended protest action in an annexure, including what it described as "neoliberal or trickle-down" economic policies. It further raised concerns regarding retrenchments taking place in the country, which it alleged were caused by employers dismissing employees based on the employer's intention to increase profits. It was further argued that retrenchments increased levels of poverty and that this was not consistent with *ubuntu*, addressing socio-economic challenges in the country and the need to rectify the legacy of apartheid and colonialism (par 4). COSATU demanded that companies be prohibited from retrenching employees based on profit-seeking; that they be required to create a certain number of jobs per year and that through NEDLAC, government should convene an Economic and Jobs Summit within three months after the issuing of the notice. COSATU stated that NEDLAC would be advised, of the precise nature of the protest action and the date/s on which it would take

place, in a notice in terms of section 77(1)(*d*) of the LRA. On 15 September 2017, NEDLAC's standing committee convened a consultative meeting with representatives of government, the first respondent (Business Unity South Africa (BUSA)), COSATU and the South African Society of Bank Officials (SASBO) at which it was agreed that a job summit would be convened. However, there was no agreement on the demand concerning a prohibition on retrenchments (par 7 of the judgment). On 15 January 2019, 17 months later, COSATU issued another notice in terms of section 77(1)(*d*) of the LRA, describing forms of protest action in the annexure. Further notices were issued by COSATU, including one on 28 August 2019 stating that protest action with a focus on the financial sector would take place on 27 September 2019, and one on 29 August 2019 stating its intention to proceed with protest action in relation to issues outlined in the annexure to the notice of 21 August 2017 (par 10 of the judgment). It described the protest actions in paragraph 4 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.
> 4.3 A National Stay-away or a Socio-Economic Strike on Monday 7 October 2019. 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." (par 11 of the judgment)

On 5 September 2019, BUSA wrote a letter to the appellants requesting an undertaking in respect of intended protest action that it regarded as unlawful and unprotected owing to a failure to comply with section 77(1)(*b*) and (*c*) of the LRA. The appellants denied such failure and stated that the protest action would continue. As a result, BUSA approached the court *a quo* for relief (par 13 of the LAC judgment).

3 The finding of the court *a quo*

The court *a quo* found that the appellants failed to meet the requirements of section 77 of the LRA and therefore that the protest action was unprotected. The court as a result interdicted and restrained the appellants from engaging in the protest or any related conduct until they had complied with the provisions of section 77 of the LRA. The court stated that the section 77(1)(*d)* notice should be issued within a reasonable period and that the section did not contemplate the issuing of more than one such notice in respect of a referral in terms of section 77(1)(*b)* of the LRA. The court *a quo* granted the appellants leave to appeal (par 14 of the LAC judgment).

4 The finding and reasoning of the Labour Appeal Court

The appeal is based on the meaning and scope of section 77(1) of the LRA. The Labour Appeal Court (LAC) (par 16) referred to *Business South Africa v*

Congress of SA Trade Union ((1997) 18 *ILJ* 474 (LAC) 516), wherein Myburgh JP (for the majority) stated:

> "[I]f 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."

The judge further examined the specific meaning of section 77(1)(*c*) of the LRA and stated as follows:

> "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 the 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." (par 17)

It was argued on behalf of BUSA that, when holistically read, section 77 of the LRA envisaged a continuum of conduct, including that protest action may only follow upon a series of steps taken in sequence after each other. BUSA argued further that the initial notice as per section 77(1)*(b)* of the LRA is to allow NEDLAC an opportunity to resolve the matters raised in the notice; thereafter, it was upon the affected employer to meet with the relevant union at NEDLAC to engage in the resolution of the grievances raised in the notice. It was also argued that the fact that the LRA seeks timely and expeditious resolution of disputes militates against a construction of section 77 of the LRA that leaves the option of protest action "open ended" by allowing it to take place at a time chosen by the trade union, irrespective of how much time has passed since the initial referral of the matter in dispute to NEDLAC in terms of section 77(1)(*c*) of the LRA (par 18). It was noted that there are three constitutional rights implicated in the determination of the meaning of section 77(1) of the LRA; these include the right to freedom of expression (s 16), the right of assembly, demonstration, picketing and petitions (s 17), and a number of other labour rights, including the right to fair labour practices and the right of each worker to participate in the activities and programmes of a trade union in terms of section 23(1) and (2)(*b*) of the Constitution (par 19).

The LAC further noted that when interpretation of a statute is required, automatic and uncritical reference is usually made to *dicta* in *Natal Joint Municipal Pension Fund v Endumeni Municipality* ((2012) (4) SA 593 (SCA)),

which unfortunately does not make reference to section 39(2) of the Constitution, which enjoins the court to promote the spirit, purport and object of the Bill of Rights when interpreting legislation. The court stated that section 77 of the LRA should be viewed and understood through the prism of the constitutional rights implicated in the section. BUSA argued that the reading of the LRA is equally important, and content should be given to the principle of expeditious resolution of labour disputes. It was, however, argued on behalf of COSATU that the right to strike does not go stale (citing *Chamber of Mines SA v National Union of Mineworkers* (1986) (7) *ILJ* 304 (W) 307), and therefore the principle of expeditious resolution of a labour dispute did not apply in the case of strikes or protest actions. In this regard, in *Public Service Association of SA v Minister of Justice and Constitutional Development* ((2001) 22 *ILJ* 2302 (LC) par 38), Landman J found that a time limit could not be read into the right to strike as guaranteed in the Constitution.

The LAC found that section 77 of the LRA does not expressly provide for time limits. It also stated that the nature of protest action may not be subject to the kind of expeditious resolution that would be the case with a labour dispute between employees and an employer, as in the present protest that concerned a series of complaints about the government's economic policy. According to the LAC, unlike a labour dispute, the nature of the protest is not the one that falls to be resolved as expeditiously as a defined labour dispute (par 25). It was stated that the construction of section 77 of the LRA requires an initial notice in which reasons for the protest action and the nature of the protest action are set out and thereafter NEDLAC or another appropriate forum must consider the matter before a protest is embarked upon. If these requirements are met, section 77(1)(*d*) of the LRA only requires that, at least 14 days' notice before the commencement of the protest action, a further notice must be served on NEDLAC (par 26). The LAC stated that there was no need to read further requirements into the section based on the three constitutional rights mentioned above and that there was therefore no reason upon which the order of the court *a quo* was based. The finding by the court *a quo* was therefore set aside.

5 Protest action

5 1 Definition

Section 213 of the LRA defines "protest action" as "the partial or concerted refusal to work, or retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of a strike". It must be noted from this definition that the type of actions that may amount to protest action are the same as those found in the definition of strike. However, strike action and protest action differ insofar as their purposes are concerned. While the purpose of a strike is "to remedy a grievance or resolve a dispute in respect of any matter of mutual interest between the employer and employees", the purpose of protest action is "to promote or defend the socio-economic interests of the workers".

Unfortunately, the LRA does not define the concepts of "matters of mutual interest" and "socio-economic interests". The correct interpretation of these concepts is important as the dividing line between "matters of mutual interest" and "socio-economic interests" may at times be a thin one (*Greater Johannesburg Transitional Metro Council v IMATU* [2001] 9 BLLR 1063 (LC)). The concept of "matters of mutual interest" refers to matters that are "work related" or "concern the employment relationship" (see Manamela "'Matters of Mutual Interest' for Purposes of a Strike: *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of South Africa* [2014] 9 BLLR 923 (LC)" 2015 36(3) *Obiter* 791 796; *Rand Tyre and Accessories (Pty) Ltd & Appel v Industrial Council for the Motor Industry (Transvaal), Minister for Labour, & Minister for Justice* (1941) TPD 108 115).

With regard to the concept of "socio-economic interests" of workers, it was stated in *Government of the Western Cape Province v Congress of SA Trade Unions* ((1999) 20 *ILJ* 151 (LC)) that, in failing to define the phrase "socio-economic interests", the legislature left the determination of its meaning to the courts. The court accepted that the definition is capable of a range of interpretations, ranging from a restrictive one to a liberal one. In this case, the determination by the court was on whether educational reform was a socio-economic matter relating to or relevant to workers. The court found that indeed educational issues were relevant to workers and were the direct result of past government policy and that workers have a general interest in educational issues and in ensuring that their children do not suffer the same ills that afflicted them as a result of the policies of apartheid. "Socio-economic interests" of workers go beyond the workplace (see Grogan *Collective Labour Law* (2019) 309). Things that may be of concern to workers, or advance the interests of the community from which workers come, may fall within the definition of socio-economic matters. Matters such as the imposition of taxes, employment creation, the provision of housing and privatisation (see Bendix *Industrial Relations in South Africa* (2010) 685) may also be regarded as socio-economic matters. Some of the socio-economic rights provided for in the Constitution include the right to health care services (s 27) and the right to basic education (s 29). Socio-economic rights are positive rights that impose obligations on government (see De Waal *et al The Bill of Rights Handbook* 432). However, for purposes of protest action, it is important that the matter must relate to socio-economic interests of workers. "Socio-economic interests" of workers must be distinguished from purely "political issues" as the latter will not be covered under section 77 of the LRA (see Garbers *et al The New Essential Labour Law* 496; Grogan *Collective Labour Law* 309; ILO Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (5ed revised 2006) par 528).

It must further be noted that the word "worker" used in the definition of protest action is different from the word "employee". The word "worker", which is also used in section 23(2) of the Constitution, is wider in meaning than the word "employee", which is defined in section 213 of the LRA. Protest action may therefore be called in support of the interests of people who are not necessarily employees and against organisations that are not employers. Unfortunately, the word "worker" is also not defined in the LRA. Although in terms of the definition of protest action, the right is for "workers",

the right to participate in protest action is limited to employees in section 77 of the LRA. Independent contractors may therefore not participate in protest action regulated by section 77 of the LRA (see Grogan *Collective Labour Law* 310).

5 2 Requirements for protected protest action

Given its nature, protest action may have devastating effects on the economy and society at large (see Garbers *et al The New Essential Labour Law* 496; *ACTWUSA v African Hide Trading Corporation* (1989) 10 *ILJ* 475 (IC) 478–479A; *NUM v Free State Consolidated Gold Mines (Operations) Ltd* (1992) 13 *ILJ* 366 (IC) regarding what the court said about stay-aways and the economy). For these reasons, section 77 of the LRA requires compliance with procedural requirements before protest action may take place (Explanatory Memorandum to the Draft Labour Relations Bill B 85B–95, published in 1995 16 *ILJ* 278 307). Section 77(1) of the LRA provides as follows:

> "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;
> (iii) 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
> (iv) 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."

It is evident from this section that the right to engage in protest action in the context of the LRA is for employees. However, employees in essential services or maintenance services may not engage in protest action. Unfortunately, unlike with strikes, there is no provision for the arbitration of disputes in essential services relating to socio-economic interests. Only a registered trade union or federation of trade unions can call for protest action. However, all employees will acquire the right to join the protest action (mass stay-away) once notice has been given, whether or not they are members of the union that called for the protest (see Grogan *Collective Labour Law* 311). As a first phase, section 77(1)(*b*) of the LRA requires a registered trade union or federation of trade unions to serve on NEDLAC a notice that states the reasons for and nature of the protest action. The second phase, in terms of section 77(1)(*c*) of the LRA, is that NEDLAC or any other appropriate forum in which parties are able to participate in order to resolve the matter must consider the matter. Unfortunately, the LRA does not provide more details regarding the other appropriate forum. However, Grogan states that this could include debates in Parliament or even bargaining councils in which parties have a voice (see Grogan *Collective Labour Law* 313). This has also been interpreted to mean "a forum that has

jurisdiction over the matter and is in a position to influence the outcome of the issue in dispute" (see Du Toit *et al Labour Relations Law* 381, fn 335).

Furthermore, the word "consider" used in section 77(1)(*c*) of the LRA, shows that NEDLAC, or the other forum, do not have prescriptive powers, as the process largely involves facilitating a debate between the parties and taking necessary steps, such as mediation, to address the matter (see Grogan *Collective Labour Law* 313). The LRA does not provide a period within which NEDLAC, or the appropriate forum, should consider the matter and it can only be assumed that it should be for a reasonable period, taking into consideration the nature of the matter. The third phase is that the registered trade union or federation of trade unions must, in terms of section 77(1)(*d*) of the LRA, after the matter has been considered, serve another notice on NEDLAC, 14 days before commencement of the intended protest action, of its intention to proceed with the protest action. As stated in *Business South Africa v COSATU* (*supra*), the steps or phases envisaged in section 77 of the LRA should therefore be taken in the order in which they are stated. The notice in section 77(1)(*b*) of the LRA contains caution to apply pressure through protest action, unless the matter is resolved at NEDLAC or by another appropriate forum. If the dispute is not resolved, the section 77(1)(*d*) notice may be given.

It must be noted that courts have a different approach to interpreting the limitations of section 77 of the LRA from the one used for other labour rights, such as the right to strike. The LAC in *Business South Africa v COSATU* (481D–G) stated as follows:

> "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 includes the right to strike] which form part of the primary objects of the Act in terms of section 1. 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, the interests of the public at large and, in a case such as this, the effect on the national economy … in a nutshell: the purpose of the Act does not necessarily require an expansive or liberal interpretation of section 77, in the sense that the exercise of the right to protest action must be restricted as little as possible."

The rights and interests of employees, employers and the public should therefore be taken into consideration before protest action can take place, given the nature of its possible national economic effects and consequences. In terms of section 77(3) of the LRA, as with strikes, if the above procedural requirements are met, the protest action will be protected. There is protection against civil claims and employees may not be dismissed for participating in protest action as that will amount to automatically unfair dismissal (s 187(1)(*a*) of the LRA). However, in terms of section 77(2)(*a*) of the LRA, if the protest action is not protected, it may be prohibited through an order of the Labour Court. Furthermore, even if the above requirements are met, the Labour Court may grant a declaratory order restraining a person

from participating in protest action or prohibiting the continuation of protest action (s 77(2)(*b*) of the LRA).

6 Analysis and discussion

The finding of the LAC in *COSATU v BUSA* is now evaluated against the above discussion and in light of the facts of the case. First, it must be determined whether the proposed protest action by COSATU complied with the definition of protest action. It was stated in the annexure to the notice of 21 August 2017 given by COSATU in terms of section 77(1)(*b*) of the LRA that the purpose of the protest related to "neoliberal or trickle-down" economic policies (among other issues); and concerns regarding the retrenchments taking place in the country, which increase the levels of poverty. Furthermore, COSATU demanded that companies must be prohibited from retrenching employees based on profit-seeking, must create a certain number of jobs per year and also that through NEDLAC, government must convene an Economic and Jobs Summit. It is submitted that the reasons given by COSATU for the protest action were in line with the definition of protest action provided by the LRA, which requires that the purpose of the protest action must be "to promote or defend the socio-economic interests of the workers". The reasons related to economic policies and employment creation (see Bendix *Industrial Relations* 685; Grogan *Collective Labour Law* 309) and therefore the action qualified as protest action. It must be mentioned that the LRA does not protect all forms of protest action. The motive or purpose of the protest should fall under the purpose of protest action as defined by section 213 of the LRA in order for the action to be protected. Protests in general are regulated by the Regulation of Gatherings Act 205 of 1993, which is the primary statute regarding the regulation of public assemblies in South Africa. However, this Act has been criticised for over-restricting the rights of those who intend to engage in protest action, especially in section 12(1) of the Act, which criminalises non-compliance with provisions of the Act. Furthermore, it has been stated that this discourages and inhibits freedom of assembly as it limits the right to assemble freely, peacefully and unarmed (see Omar "The Regulation of Gatherings Act: A Hindrance to the Right to Protest?" 2017 62 *SA Crime Quarterly* 26).

Secondly, it must be determined whether the appellants complied with the provisions of section 77 of the LRA before engaging in protest action. In the present case, there was no dispute regarding the employees who were to take part in the protest action, as they were not engaged in either essential services or maintenance services. In addition, as required by the section, the protest action was called by COSATU, which is a federation of trade unions. It is also evident from the facts that COSATU gave notice of the protest action to NEDLAC as required by section 77(1)(*b*) of the LRA, also stating the reasons and nature of the protest action. NEDLAC was therefore given an appropriate notice stating the reasons for the protest action and the nature of the protest action. This would then enable NEDLAC or another appropriate forum to consider the matter giving rise to the intended protest action in terms of section 77(1)(*c*) of the LRA. As stated above, the consideration by NEDLAC or another appropriate forum mainly involves

facilitating debate between the parties and not necessarily resolving the dispute. Once this was done, COSATU in the present case gave several notices (on 15 January 2019, 5 February 2019, 28 August 2019 and 29 August 2019) in terms of section 77(1)(*d*) of the LRA, stating its intention to proceed with the protest action. Some of the notices were given two years after the section 77(1)(*b*) notice. It is nonetheless submitted that COSATU complied with the procedural requirements set out by section 77 of the LRA.

According to the LAC in *Business South Africa v COSATU*, just as it is important for trade unions to comply with the LRA requirements for strikes to be protected, trade unions and federations of trade unions should likewise comply with set requirements for a protest action to be protected. A registered trade union or federation of trade unions should give notice to NEDLAC in terms of section 77(1)(*b*) of the LRA and then allow time for NEDLAC or another appropriate forum to consider the matter. It is submitted that of necessity, the trade union or federation of trade unions should allow NEDLAC or another appropriate body time to consider the matter in order to resolve it. If this is not done, the process prescribed by the LRA will become purposeless. The trade union or federation of trade unions cannot therefore simply give notice and proceed with protest action while the matter is still being considered. The trade union or federation of trade unions can only proceed to issue the section 77(1)(*d*) notice if it is evident that there is no commitment from parties to consider the matter in order to resolve it. All the procedural steps and their sequence are therefore pivotal in meeting the requirements of section 77 of the LRA. Of concern is that although the 14 days' notice required by section 77(1)(*d*) was given by COSATU informing NEDLAC of the commencement of the intended protest action, the notices were several and given in 2019. This took an unreasonably long period, and the several notices were excessive. It must, however, be noted that, while the LRA encourages timely and expeditious resolution of disputes, the drafters of the Act did not make provision for the time period within which the matter should be considered by NEDLAC or another appropriate forum.

As it stands, different approaches are adopted for protest action and strike action respectively; in the latter case, in terms of section 64(1)(*a*)(i) and (ii) of the LRA, the trade union and employees may give the employer just 48 hours' notice of strike action if a certificate stating that the dispute remains unresolved has been issued, or if 30 days have elapsed since the referral of the dispute to the CCMA or to a bargaining council. According to Grogan, these steps serve to ensure that employees do not engage in strikes reflexively and to compel parties to subject themselves to conciliation with the help of a neutral party (Grogan *Collective Labour Law* 228). It is submitted that leaving "open ended" the period within which a matter leading to protest action is considered raises challenges; on the one hand, the trade union or federation of trade unions could become impatient, which might not allow NEDLAC or another appropriate forum enough time to consider the matter; on the other hand, NEDLAC or another appropriate forum may not know how much time is available for them to consider the matter at hand. It is therefore proposed that a period be set taking into consideration all constitutional rights (freedom of expression; freedom of assembly, demonstration, picketing and petitions; right to fair labour practices; and the right to participate in the activities of a trade union) that are implicated in

section 77 of the LRA, as well as the economy and the interests of the public. This period should be reasonable and realistic in order to ensure that the right to engage in protest action is restricted as little as possible. This will provide guidance to trade unions and federations of trade unions on how much time they have before they can issue a section 77(1)(*d*) notice and NEDLAC or another appropriate forum would know how much time is available to deal with the matter. Although, as stated by Landman J in *Public Service Association of SA v Minister of Justice* (*supra*), a time limit cannot be read into the right to strike or the right to engage in protest action, as with strikes, guidance with regard to the time period before a section 77(1)(*d*) notice can be issued could make a difference.

Section 17 of the Constitution gives effect to South Africa's international obligations by providing for the right to peaceful assembly as provided for in article 21 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) and article 11 of the African Charter on Human and Peoples' Rights, 1981 (ACHPR). Among other provisions, article 21 of the ICCPR states that restrictions should not be placed on this right unless the restriction is in conformity with the law and is necessary in a democratic society in the interests of national security or public safety, public order, or the protection of the rights and freedoms of others. Article 11 of the ACHPR echoes article 21 of the ICCPR regarding the rights and freedoms of others. The Constitution allows for the limitation of rights in terms of section 36, but only if reasonable and justifiable in a democratic society based on human dignity, equality and freedom. It is imperative to strike a balance between the rights of those who want to protest and those of others. Therefore, the inclusion of a reasonable, but sufficient time for NEDLAC or an appropriate forum to consider the matter in terms of section 77(1)(*c*) of the LRA could be introduced to the extent that it is in line with the Constitution, the ICCPR and the ACHPR.

7 Conclusion

Protest action is an important tool in the hands of employees beyond the workplace in order to promote and defend their socio-economic interests. It assists them to participate directly or indirectly in matters that cannot be pursued through strike action, and which are of national importance. The LRA covers and regulates only protest action that falls under the definition in section 213. It is therefore important for employees, trade unions and federations of trade unions to understand how the right to engage in protest action can be exercised in the labour law context. The LRA further sets out the procedural requirements that are necessary for protest action to be protected and not attract certain consequences. Although the right to protest action should not be unnecessarily limited, it is important that in giving effect to this constitutional right, the LRA should provide more information and be clear on certain aspects, including the period that NEDLAC or another appropriate forum should have in order to consider the matter, and the time trade unions and federations of trade unions have before they can issue a section 77(1)(*d*) notice stating their intention to commence with protest

action. As previously stated, a balance between the right to engage in protest action and the rights of others is necessary.

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