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EMPLOYMENT

Protest Code: Protest Action to Promote or Defend Socio-Economic Interests of Workers

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On 2 September 2022, the Executive Director of the National Economic Development and Labour Council ("**NEDLAC**") issued the 'Code of Good Practice: Protest Action to Promote or defend Socio-Economic Interests of Workers' ("**Protest Code**"), in terms of section 203(1) of the Labour Relations Act 66 of 1995 ("**LRA**").

The Purpose of the Protest Code

The purpose of the Protest Code is to, among others, provide practical guidance to those who engage in discussions concerning the promotion or defence of socio-economic interests of workers and the resolution of these matters through facilitation, conciliation, mediation or protest action as contemplated in section 77 of the LRA.

The Protest Code is, therefore, a useful practical guide when considering, among others, whether certain conduct constitutes 'protest action', the procedure which must be followed to ensure the protest action is protected, the protections afforded to those who engage in protected protest action and what happens in the events of disputes.

It is important, in applying the Protest Code, that the facts of any particular case be considered. To this end, the Protest Code is 'intentionally general'. Importantly, any person interpreting the LRA must take the Protest Code into account.

Protected Protest Action

In order for protest action to be protected –

- the protest action must be called by a registered trade union(s) or federation(s) of trade unions;
- they must have notified NEDLAC of the reasons for and the nature of the intended protest action;
- the issue giving rise to the intended protest action must concern a matter of socio-economic interest to workers;
- it must have 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
- at least 14 calendar days before the commencement of the protest action, the registered trade union or federation of trade unions must have served a notice on NEDLAC of its intention to proceed with the protest action.

Protected Protest Action: Procedural Requirements

In order to be afforded protection, the following steps must have been followed –

- the party making the referral must serve a notice in terms of section 77(1)(b) of the LRA concerning possible protest action on NEDLAC; (this is as per the LRA 4.4 form);
- thereafter, NEDLAC or an independent facilitator must consider it, as contemplated by section 77(1)(c) of the LRA; and

- the party making the referral must then serve a notice in terms of section 77(1)(d) of the LRA on NEDLAC which sets out its intention to proceed with the protest action (this is as per the LRA 4.5 form).

Protected Protest Action: Substantive Requirements

Protest action must relate to 'socio-economic' interests. Socio-economic interests has a wide meaning and will depend on the facts of each case. It excludes any conduct which would fall under the definition of strike action (i.e. matters of mutual interest) and matters of a purely political nature.

It includes –

- issues that are major social and economic policy trends which have a direct impact on the trade union's members and on workers in general, in particular as regards employment, social protection and standards of living; and
- matters which fall within the ambit of the social status and economic position of workers in general such as the imbalances in the education system as a result of past government policy.

What Protection is Afforded and to Whom

Where protest action is protected, all employees, regardless of whether they are members of the party who has referred the matter to NEDLAC or not, may participate in the protest action, except if they are employed in maintenance or essential services (as defined in the LRA).

Such employees have the same protections as employees engaged in protected strike action (i.e. protection against the allegation that they have committed a breach of contract or a delict and protection against dismissal for participating in the protest action).

Importance of the New Protest Code

The new Protest Code provides clarity and guidance on the issues mentioned above as well as on the various additional issues such as the establishment of a NEDLAC standing committee to deal with matters of protest action, a 'pre-consideration process', the appointing of a facilitator and the process involved in facilitation and dispute resolution.



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