

03 OCTOBER 2011

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SOCPOL CIRCULAR NO. 97 / 11

TO: ALL MEMBERS OF THE BUSA TASK TEAM ON SOCIAL POLICY

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COSATU PROTEST ACTION : 5 OCTOBER 2011

BUSA members have expressed concern following communication from COSATU affiliated unions in the various sectors that there would be planned protest action scheduled for 05 October 2011. The purpose of this circular is to brief BUSA members with the background and legal position, and to suggest to BUSA members how they deal with the challenge presented by the proposed COSATU action.

Background

1. Since the promulgation of four draft bills in December 2010 proposing wide ranging amendments to employment legislation, the social partners have been engaged in NEDLAC for a period of several months. They have dealt with the issues arising from the draft bills under a series of themes.
2. The first of these themes concerns atypical employment relationships. Under this theme the parties have engaged on, among other things, the question of what would be the appropriate regulatory regime for labour brokers.
3. Those engagements have proceeded on the basis that the government, through a drafting team appointed by NEDLAC, has produced draft formulations of proposed amendments to section 198 of the LRA. Organised business and labour have indicated their respective positions on the various clauses of the draft, have indicated areas of agreement and have identified areas of disagreement. In the course of engagement at NEDLAC, the parties have made significant progress in narrowing the areas of disagreement.
4. An area of disagreement has been COSATU's formal demand that no employees earning below a specified threshold should be employed through labour brokers. It has referred to this as a "ban" on labour brokers below that threshold.
5. Business have, by contrast, agreed in principle with the initial Government proposal that the employment by labour brokers of employees earning below a certain threshold may be regulated by reference to the duration of the arrangement or the reason for using a labour broking arrangement.
6. No formal deadlock has been declared or has resulted from these engagements and the engagements are ongoing. Both business and labour have approached the engagement in the separate themes on the basis that they will not ultimately "sign off" an agreement on amendments to employment legislation without taking into account the full extent of



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the “package” of amendments to be introduced. Trade-offs in some areas may be compensated for in other areas.

7. On 8 September 2011 COSATU served a notice on NEDLAC in terms of section 77(1)(b) of the LRA. That notice attached a lengthy statement of “the reasons for the intended protest action”. The statement concluded that COSATU was concerned only with the abusive practices of labour brokers in relation to its own members and “for blue-collar and vulnerable workers in general”. It stated that its call for a “ban” was specifically directed at these workers.
8. On 9 September 2011, a meeting took place of a Section 77 Standing Committee. This committee is established in terms of a NEDLAC procedure for considering notices of possible protest action, which is in turn Annexure A to a Code of Good Practice issued by NEDLAC (in terms of section 203 of the LRA) to deal with the consideration of notices of possible protest action in terms of section 77 of the LRA.
9. We believe that, while different views were expressed in the committee about whether the first notice satisfied the requirements of section 77, the majority of the members of the committee (all excluding a COSATU representative) agreed that the application was premature in light of the ongoing NEDLAC process on labour market policy review. It was therefore resolved that this view of the standing committee be communicated to COSATU, with the dissenting view of the COSATU representative being recorded.
10. We do not know whether NEDLAC addressed a formal communication to COSATU following the meeting of the committee.
11. Twelve days later, on 20 September 2011, COSATU issued a second notice, this time in terms of section 77(1)(d). This was the notice of the protest action planned for 5 October 2011.
12. The notice records that “*there was a deadlock between the social partners at NEDLAC on the question of labour brokers, in particular for blue-collar workers before COSATU submitted its section 77(1)(b) notice*”. It then refers to NEDLAC having convened “the section 77 committee” to deal with the first notice, and records that this committee “refused / failed to resolve the matter”.
13. No engagement had taken place on the subject matter of the section 77(1)(b) notice, either in the section 77 standing committee, in the NEDLAC labour market chamber, or in any other formally constituted NEDLAC body, in the period between 9 September and 20 September 2011.
14. NEDLAC’s section 77 standing committee met again by teleconference on 27 September 2011 to record its formal response to the first notice.
15. The record of the committee meeting of 27 September 2011 noted that the issue raised by COSATU in its section 77(1)(b) notice was “part of the current NEDLAC processes under the auspices of the NEDLAC labour market policy review task team”. It further noted that while there are “fundamental issues” between the parties, including labour’s

demand for a ban on labour broking, “the NEDLAC process is proceeding nevertheless”. The record acknowledges that concerns had been raised about the relatively slow progress of engagements in NEDLAC. It further notes that where the parties had already indicated their disagreements “*it was not inconceivable that parties could still find convergence on them*”.

16. For these reasons the committee resolved that the current NEDLAC process “under the auspices of the labour market policy review task team” should “proceed with its work” and that the standing committee would “monitor” the current NEDLAC processes on these issues.

BUSA’s view: the protest action is unprotected

17. We have given the detailed background set out above so that members may appreciate the complexity of the situation that BUSA is dealing with in the NEDLAC processes.
18. In summary, BUSA believes that the protest action is not protected, because the matter raised by COSATU in its first section 77 notice has not been considered by NEDLAC with a view to resolving it. It does not necessarily follow, however, that individual members of BUSA are free to discipline workers who participate in the action. This is a strategic decision that individual member will have to make, if necessary after taking their own professional advice. BUSA recommends to employers that at this stage they reserve the right to take disciplinary action against employees who participate, and take their own independent advice, before they take such action.
19. In the interim, BUSA has addressed a letter to COSATU registering its strong objection to the proposed action and seeking the intervention of COSATU at the highest level to call off the proposed action. A meeting has been scheduled with the COSATU leadership this afternoon, and BUSA will communicate further with its members as soon as possible after that.

Way Forward

1. Employers should communicate clearly to all employees that:
 - a. They have been advised by BUSA that the proposed action is unprotected because the provisions of section 77 of the LRA have not been complied with;
 - b. They will be applying the “no work no pay” rule for all employees that participate in the action; and
 - c. They reserve the right to take strong disciplinary action against workers who participate in the action.



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2. BUSA will communicate further following the meeting with the COSATU leadership this afternoon, and will inform members of all further developments should the protest action be called off.