



NATIONAL ECONOMIC DEVELOPMENT AND LABOUR COUNCIL

NEDLAC REPORT ON THE COSATU SECTION 77(1) (b) NOTICE FILED ON 21 OCTOBER 2004

1. Brief Background

- 1.1 On 21 October 2004, the Office of the Executive Director of Nedlac received a section 77(1)(b) Notice from Cosatu. The application cited a number of clothing retailers and finance companies as respondents. A copy of the notice is attached hereto marked annexure "A".
- 1.2 The Executive Director of Nedlac referred the application to the Section 77 Standing Committee to determine its compliance with the relevant requirements of the Act.
- 1.3 Government, Labour and Community representatives on the Standing Committee agreed that the notice was compliant with the Act, but the Business representative raised various concerns, including that the issues were the same or substantially similar to the section 77 notice tabled by SACTWU in August 2003. After the Committee could still not reach agreement at a special meeting held on 26 October 2004, the matter was referred to the Nedlac Management Committee for final determination.
- 1.4 The Nedlac Management Committee met on 27 October 2004, where it addressed the matter and resolved that the Notice was compliant with the Act and directed the Standing Committee to take the necessary steps to consider the matter.

2. First meeting to consider the Cosatu section 77 notice

- 2.1 Pursuant to the decision by the Management Committee, the first meeting to consider the Cosatu section 77 notice was convened on 2 November 2004.
- 2.2 Some of the Respondents raised a number of technical issues with respect to the notice, including the linkages with the previous section 77 notice by SACTWU, as well as a concern that retailers who had been cited but were unable to attend the meeting would be prejudiced if the meeting continued. After clarification that the Cosatu notice was distinct and separate from the SACTWU notice, it was agreed that the meeting would continue and that the Applicant was allowed to table its notice, whereafter the Respondents would be given an opportunity to reflect and obtain mandates prior to a next meeting.
- 2.3 The Applicant tabled its notice (annexure "A") and listed, inter alia, continuing large-scale job losses in the clothing, textile, footwear and leather manufacturing industry and high levels of imports by retailers of clothing, textile, footwear and leather products available locally as the reasons for the intended protest action. The Applicant submitted, inter alia, that
- 2.3.1 the effect of job losses is catastrophic in the context of an unemployment rate of approximately 40% and the fact that many workers who have or are at risk of losing their jobs are infected or affected by HIV/Aids;
- 2.3.2 more than 20 000 jobs were lost in the clothing and textile sectors during 2003 alone and more than 12 000 up to September 2004;
- 2.3.3 continuing job losses in the sector are the result in part of retailers' sourcing decisions, particularly the sourcing of imported articles (it pointed out that imports of clothing from China had increased by 110% from 2002 to 2003); and

2.3.4 the retailers' pricing policies exert downward pressure on wages and the shifting of sourcing to low-wage areas leads to the exploitation of workers, particularly in the informal sector.

2.4 The Applicant tabled the following as the solution to the problems in their notice:

2.4.1 For the retailers to enter into a Code of Conduct on local procurement with Cosatu. A copy of Cosatu's proposed Code is attached hereto, marked annexure "B".

2.4.2 For the finance sector to use their influence as providers of capital to the retail sector to bring to the attention of retailers that their sourcing decisions are not consistent with long-term economic and social development goals; and to require retailers to increase the total proportion of goods in their stores that are manufactured locally by entering into a code of conduct on local procurement with Cosatu.

2.5 The Respondents indicated a willingness to explore appropriate mechanisms and solutions to the problems raised by the Applicant and expressed their commitment to a process that will resolve these problems.

3. Further meetings to consider the Cosatu section 77 notice

3.1 Following the 2 November 2004 meeting, the Standing Committee convened a series of further meetings to assist the parties to the application in seeking an amicable resolution of the issues as tabled by the Applicant.

3.2 A second meeting to consider the notice was held on 19 November 2004.

3.2.1 At the meeting, the Respondents raised a number of points, including a contention that the Department of Trade and Industry was not cited as a party and a query about the legality of any protest action against retailers

who had signed the agreement with SACTWU following that section 77 process. The retailers also placed some concerns and technical issues on record, more specifically, the status of the s77 notice by COSATU in relation to previous s77 notice filed by SACTWU that was substantially similar.

- 3.2.2 The Respondents read out a statement in which they addressed a number of the issues raised in the section 77 notice. They contended that major retailers were not exploiting workers in the informal sector, causing jobs to shift to low-wage areas or allowing illegal imports to reach their stores; pointed to capacity constraints, long lead times and other problems in the local manufacturing industry and contested the Applicant's suggestion that their sourcing decisions are causing job losses, indicating that a large proportion of their sourcing is local.
- 3.2.3. The Applicant responded in detail to the statement by the retailers, making the points, inter alia, that sufficient capacity exists in the local industry to supply the retail sector, that trade figures clearly show a massive increase in imports that cannot be restricted to the informal trading sector and challenged the Respondents to publish the proportion of their stock procured and manufactured locally over the last three years. The Applicant noted that the Section 77 process only allowed for two parties, an applicant and a respondent therefore this it was not required, nor did it see value in, formally citing the Department of Trade and Industry in respect of a proposal that retailers sign a Code to procure locally.
- 3.2.4. After lengthy discussion, the Respondents proposed that a 5-a-side team be established to address the issues. It was agreed that the standing committee should secure the services of a professional facilitator to assist in the process. The Nedlac Standing Committee appointed one of the top facilitators in the country.

- 3.3 The 5-a-side team met on 29 November and 8 December 2004. At the latter meeting the parties discussed Cosatu's proposed code, considering particular clauses and raising objections and alternatives. The proposal of a "memorandum of understanding" was raised during the meeting. Eventually it was agreed that the retailers, using the proposed Cosatu code as a base document and incorporating points made during the discussions, would draft a proposal for consideration by the 5-a-side team. A draft Memorandum and Code was supplied by the retailers in January 2005. A copy is attached, marked "C".
- 3.4 The next 5-a-side team meeting, scheduled for 20 January 2005, was postponed to 11 February at the request of the retailers. The retailers subsequently requested in a letter dated 10 February 2005 that the meeting should again be deferred, and it was rescheduled for 22 February 2005. The retailers stated in their letter of 10 February 2005 that they had received legal opinion on the matter and requested more time to seek a further legal opinion due to the impact on the s77 process as a result of the advice given. Further they stated that their legal advisors have also given an opinion to the effect that the proposed Code would be in contravention of the Competition Act. The retailers refused a request by the Applicant that the full text of the legal opinion be made available to them. A copy of the letter of 10 February and subsequent correspondence between the parties are attached, marked "D".
- 3.5 At the meeting of the 5-a-side team held on 22 February 2005, Cosatu sought to engage the retailers on the points made in their letter of 10 February. However, the retailers, while committing themselves to further engagement on efforts to support the local industry, felt that the legal concerns contained in the opinion posed an insurmountable obstacle and that they were therefore unable to sign the Code or engage in further discussion of it and suggested that this was the end of this particular part of the section 77 process.
- 3.6 It was agreed that further engagement should take place between the facilitator and the Applicant provided that:

- 3.6.1 the full legal opinion is supplied to the facilitator;
 - 3.6.2 an edited version of the legal opinion that excludes issues irrelevant to the considerations being discussed by the parties is supplied to the Applicant and to the facilitator;
 - 3.6.3 the facilitator determines whether the edited version is a fair reflection of the full legal opinion, excluding issues irrelevant to the proceedings, and informs the Applicant of his decision;
 - 3.6.4 the decision of the facilitator is that the edited version is a true reflection of the full version of the legal opinion, minus matters irrelevant to the proceedings.
- 3.7 It was also agreed at that meeting that a meeting of all parties involved should be convened where the 5-a-side team would report back on progress.
- 3.8 The facilitator duly provided the Applicant with a copy of the edited version supplied by the retailers. The Applicant objected to the inadequacy of the document for purposes of further engagement and determined from the facilitator, after engagement, that there was in his opinion no scope for agreement between the parties on the proposed Code.

4. Finalisation of the section 77 process

- 4.1 At the plenary meeting of 8 March 2005, the Applicant tabled amendments to both the Applicant's and Respondents' drafts of the Code in a bid to accommodate the Respondents with a view to encouraging further engagement. The amended versions of both drafts are attached as annexure "E" and "F" respectively. The Applicant again offered to introduce a suspensive condition into the proposed

Code, which would suspend its coming into force until an appropriate authority had confirmed its compliance with the law.

4.2 The Applicant also delivered a detailed presentation dealing with the legal concerns raised by the retailers. They raised the following opinions:

4.2.1 The Code falls outside the operation of the Competition Act by virtue of being concerted action designed to achieve a non-commercial socio-economic objective or similar purpose (namely to address the crisis of job losses in the industry), as per section 3(1)(e) of the Act. It disputed the Respondents' interpretation that the Code would be subject to the Act because retailers are commercial entities and because it involves commercial activity.

4.2.2 The Code does not contravene section 4(1)(b) of the Act, because (1) the primary intention of the code is an agreement between Cosatu and each retailer and not is not in its essence an agreement between retailers themselves; and (2) the Code does not divide markets, nor does it seek to allocate suppliers among retailers – it merely limits the proportion of imported products that each retailer undertakes to stock.

4.2.3 Even if the Code did not fall outside the operation of the Act and contravened section 4, it would be capable of being exempted in terms of section 10(3)(b)(iii), which allows the Competition Commission to grant exemptions to agreements or practices designed to effect a "change in productive capacity necessary to stop decline in an industry".

4.2.4 It would not be illegal to engage on the terms of or enter into an agreement with a suitable suspensive condition such as one that requires the removal of all competition concerns before its implementation.

- 4.2.5 The Competition Act must be interpreted and applied in the context of the Constitution, which guarantees certain basic rights, including socio-economic rights the exercise of which is mediated through the market and that require employment in order to be exercised.
- 4.3 In addition, the Applicant pointed to the continuing increases in imports and job losses in the industry. It submitted figures showing a rise of 102% in clothing imports from China in the first ten months of 2004 as compared to the previous year and indicated that more than 37 000 jobs had been lost in the preceding 24 months. It also pointed out that Gauteng Clothing had recently closed and that Cosatu's affiliate had received notice that two other major factories, Prestige Clothing and Rex Trueform, would close.
- 4.4 Representatives of the South African Council of Churches and the Treatment Action Campaign, representing the Save Jobs Coalition, made an input into the meeting, requesting retailers to enter into a Code on local procurement with Cosatu.
- 4.5 Despite this, the Respondents who participated in the 5-a-side team (excluding Pick 'n Pay who was not present at the meeting) informed the meeting that:
- 4.5.1 their position remained that they would not sign Cosatu's proposed Code (in either its original or amended form) nor reintroduce their draft of the Code; nor do they believe a suspensive condition overcomes their legal concerns;
- 4.5.2 their decision would not bind the rest of the Respondents, who would have to relay to Nedlac their individual stances on the matter;
- 4.5.3 it was their opinion that this particular part of the s77 process had come to an end;

- 4.5.4 owing to the legal concerns they had raised, the Standing Committee could in their view not deem the matter to have been considered by Nedlac.
- 4.6 Respondents outside the 5-a-side team and Pick 'n Pay were given until 29 March 2005 to communicate their positions to Nedlac.
- 4.7 Responses were received from the following Respondents:
 - 4.7.1 Fashion World, in favour of signing the Code subject to competition concerns being allayed;
 - 4.7.2 Pick 'n Pay – against signing the Code;
 - 4.7.3 Queenspark, against signing the Code;
 - 4.7.4 Meltz, against signing the Code; and
 - 4.7.5 Pep Stores and Ackermans, in favour of engaging with Cosatu with a view to reaching agreement on terms to sign a code.

5. Consideration of the section 77 notice

- 5.1 The section 77 Standing Committee met on 1 April 2005. Government, Community and Labour deemed the matter to have been considered as required by the LRA, but Business objected on a number of grounds set out below. In line with the decision of the Nedlac Management Committee of 31 March 2005, it was agreed that the matter would be put to the Nedlac Overall Conveners for determination.
- 5.2 The Overall Conveners met on 6 April 2005 by teleconference to consider the matter.

5.3 The Business concerns regarding the legality of Nedlac deeming the matter to have been considered were raised in various forms at the Standing Committee and section 77 plenary meetings, and are set out below:

5.3.1 The issues are in violation of the Competition Act and are therefore not competent of being deemed to have been considered if the engagement on the Code and the Code itself are illegal, it would be improper for the Committee to deem the matter to have been considered.

Labour pointed out that no Court or other competent authority had found the Code to be in contravention of the law and that the Committee cannot be expected to play the role of a Court, but that the Committee's role is to determine whether adequate consideration were given to the matters raised in the section 77 application. It was clear that substantial discussions had taken place and that no agreement could be reached – the Respondents themselves had clearly stated that the end of the section 77 process had been reached. Government argued that the work of the Standing Committee should not be hamstrung on the basis of legal opinions by one or another party.

5.3.2 It would be premature to deem the matter considered while the Applicant itself is in the process of seeking an opinion on the legality thereof. It would be precipitate of Nedlac to make a declaration on the issue before the Competition Commission had pronounced on the legality of the matter.

Labour pointed out that neither the Applicant nor the Respondents had linked the issue of seeking a legal opinion to the section 77 process, and the processes should therefore be considered separately. It further noted that its application to the Competition Commission was not directed at compliance with a section 77 legal requirement.

- 5.4 Business noted that it took no view on the rights that the retail Respondents may believe they have in law in respect of the Code's alleged violation of the Competition Act, and that consideration by Nedlac of the section 77 notice would not alter such rights. Business agreed, however, that the section 77 notice and the matters set out therein had now been considered by Nedlac.
- 5.5 It was thereafter agreed by all four constituencies, Business, Labour, Government and Community, that the end of the road had been reached in the section 77 process and that the Cosatu section 77 notice must be deemed to have been considered by Nedlac.