

The Department of Labour

Attention: Ms Sellinah Mahlangu

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Dear Ms Mahlangu

WRITTEN SUBMISSIONS ON DRAFT PICKETING REGULATIONS IN TERMS OF SECTION 208 OF THE LABOUR RELATIONS ACT, 1995

This submission is made by BUSA in response to the Minister of Labour's call for comments on the Draft Picketing Regulations published in terms of section 208 of the Labour Relations Act, 1995 ("LRA").¹

At the outset, BUSA wishes to note its serious concern with the deviations in the draft text from the agreements reached in Nedlac under the Labour Relations Stability Accord and the related documents.

1. BACKGROUND TO BUSA

Business Unity South Africa (BUSA) is a confederation of business organisations, including chambers of commerce and industry, professional associations, corporate associations, and unisectoral organisations.

BUSA represents a cross-section of business, large and small, on macro-economic and cross-cutting policies and issues which affect business in all three spheres of government and at the international level. BUSA's function is to ensure business plays a constructive role in economic growth, development and transformation, and to ensure an environment in which business can thrive, expand and be competitive. As the principal representative of business in NEDLAC, BUSA conveys the views of its members in various national structures and bodies, both statutory and non-statutory.

2. GENERAL

In 2017, Nedlac parties agreed to a Labour Relations Accord, amendments to the Labour Relations Act and a Code of Good Practice on Collective Bargaining, Industrial Action and Picketing. The package of agreements reached at Nedlac is foundational towards the achievement of labour relations stability based on the principles of trust, mutual respect, accountability and respect for the right to strike, alongside other Constitutional rights.

¹ Published in the Government Gazette on 10 September 2018, GN41898.

In general, the amendments to the LRA are designed to strengthen collective bargaining, enhance labour market stability and promote proactive and speedy dispute resolution. One of the amendments to the LRA provides for a conciliating commissioner to impose compulsory default picketing rules (“Default Rules”) in the absence of an agreement or collective agreement in this regard. This amendment aims to ensure that no strike should proceed in the absence of picketing rules being established.

The Default Rules are significantly important in that they will be imposed by a conciliating commissioner in circumstances in which parties to a dispute, although having had the opportunity to make representations thereon, have not been able to reach agreement on picketing rules. It is critically important that conciliating commissioners who will be required to determine Default Rules are well equipped and capacitated, through training, to deal with the matters prescribed by the Picketing Regulations. Conciliating commissioners will need to approach the determination of the Default Rules carefully, balancing the rights of picketers as well as the rights of employers and members of the public who might be affected by the picket in terms of the law.

The comments made by BUSA in this submission are based on the principles that:

- Default Rules, if imposed, will only apply if a picket is protected.
- Any Default Rules imposed on parties to a dispute should be clear, precise and practical.
- If a union intends to picket on or inside an employer’s premises, it can only do so if the employer agrees thereto. In the absence of an agreement, a conciliating commissioner may only determine that a picket may be held within in or on the premises of an employer if the union has failed to prove that the employer’s refusal is unreasonable.
- Pickets must, at all times, remain peaceful.
- The provisions of the regulations should be consistent with the agreements reached in Nedlac, referred to above.

SUBMISSION ON THE DRAFT REGULATIONS:

3. DEFINITIONS

The Picketing Regulations define “*default picketing rules*” to mean “*the rules contained in Annexure A.*” Annexure A to the Picketing Regulations consists of the description of the place/s where a picket may be held. Annexure A does not contain the Default Rules and therefore the cross-reference contained in the definition should be corrected.

The reference to section 64(1)(a) of the LRA is not correct and should be corrected to refer to section 64(1)(a)(i) of the LRA.

The term “parties to a dispute” should be deleted and replaced with the word “dispute” which is what has been defined therein.

4. REGULATION 2 – AGREEMENT ON PICKETING RULES

Regulation 2 (1) requires the CCMA or a Bargaining Council to notify parties to a dispute that if the dispute is not resolved, a trade union may not engage in a picket unless:

- (a) there is a collective agreement regulating picketing;*
- (b) an agreement on picketing rules is reached in the conciliation proceedings; or*
- (c) picketing rules determined by the Commission in terms of section 69 (5) of the Act. [sic]*

While Regulation 2 (1) imposes an obligation on the CCMA or Bargaining Council to notify the parties to the dispute as to the circumstances under which a picket may not be held, it does not indicate when such notification must be given. Given what is stated in Regulation 2 (2), it appears that the notice in 2 (1) must be given before the conciliation hearing. It would be helpful if this was indicated.

Regulation 2 (2) states that “*The Commission or bargaining council must in that notice request that the trade union submit a copy of any collective agreement regulating picketing to the conciliator.*” Regulation 2 (2) is silent as to when a collective agreement must be submitted to the conciliator. BUSA proposes that it would, in the interests of time (given that matters of this nature are urgent), be helpful if Regulation 2 (2) requires the trade union to submit a copy of the collective agreement regulating picketing to the CCMA or Bargaining Council prior to the start of the conciliation hearing. It is also proposed that in addition to submitting a copy of any collective agreement regulating picketing to the conciliator, that the union should also submit a copy to the employer party/ies to the dispute. The reason for this proposed addition is to allow the employer party/ies the opportunity, prior to the start of conciliation, to verify that the agreement submitted by the union is in fact valid, and to inform the CCMA or Bargaining Council, in advance, should this not be the case.

There is a drafting error in Regulation 2 (1) (c), the word “are” should be inserted immediately before the word “determined”.

5. REGULATION 3 – DETERMINING PICKETING RULES

In terms of Regulation 3, a conciliating commissioner must, if parties to the dispute do not agree on picketing rules, determine the rules of a picket in accordance with the Default Rules and in doing so must take account of:

- (a) the particular circumstances of the workplace or other premises where it is intended that the right to picket is to be exercised;*
- (b) any relevant code of good practice; and*
- (c) any representations made by the parties during the course of the conciliation proceedings.*

Given that the above factors must be taken into account by a conciliating commissioner in determining the Default Rules and will largely influence the extent of Rules to be imposed, and the agreement reached by

Nedlac partners on the matters that should be considered in picketing rules, BUSA proposes that the above listed factors under (a) should be elaborated on to ensure that the commissioner takes into account all relevant factors and applies his or her mind rationally when determining the Default Rules. It is therefore proposed that Regulation 3 (a) should be amended to read as follows:

“the particular circumstances of the workplace or other premises where it is intended that the right to picket is to be exercised including but not limited to the following:

- *the nature of the workplace or premises at which the Picket is intended to be held (i.e.: in a shopping centre, shared office block or stand-alone building)*
- *the location of the workplace or premises at which the Picket is intended to be held;*
- *the nature and type of work performed by employees at the workplace or at the premises where the Picket is intended to be held;*
- *the nature of the conduct in the picket*
- *the nature and number of locations at which the Picket is intended to be held;*
- *the number of employees employed by the employer at the workplace;*
- *the number of employees working at the premises at which the Picket is intended to be held;*
- *the number of picketers;*
- *modes of communication between marshals and employers and other relevant parties;*
- *health and safety considerations; and*
- *the trading hours and season of the employer at the time the Picket is intended to take place.”*

Regulation 3 (c) should also be amended to expressly include any representations made by any interested party. The right of representations should not be limited only to the parties to the dispute. For example, if the employer party to the dispute is a tenant in a shopping centre or shared office park, representations submitted by the landlord, as an interested party, should be taken into account by the conciliating commissioner before determining the rules for that Picket.

The current wording in Regulation 3(2)(b) seems to suggest that if the trade union has not provided the conciliator with the details of the convenor and marshal, the conciliator will not be able to proceed with imposing the Default Rules. In order to ensure that this is not case, we propose the provision is amended as follows

“in the case of the trade union, the General Secretary of the trade union shall be regarded as the designated convenor and marshal until the information required in respect of the union convenor and marshals has been submitted to the conciliator”.

There is a drafting error in Regulation 3(1), in that ‘to’ should be inserted before ‘picketing rules’.

6. REGULATION 4 – BINDING NATURE OF THE PICKETING RULES

Regulation 4 provides for the binding nature of Picketing Rules and states that:

“A collective agreement is an agreement contemplated in section 69 (4) and regulation 2 (3), and picketing rules determined in terms of section 69 (5) and regulation 3.”

BUSA is of the view that the Department of Labour should give careful consideration to re-drafting regulation 4. In its current form, the Regulation does not clearly articulate the binding nature of the Default Rules (if imposed by a conciliating commissioner). It is proposed that Regulation 4 should clearly state that the Default Rules are binding on “*the parties to the dispute, their officers, officials, members and supporters.*”

7. PROPOSED NEW REGULATION DEALING WITH AN EMPLOYER’S REFUSAL TO PERMIT A PICKET ON OR INSIDE ITS PREMISES

BUSA is of the view that the Regulations should, for the reasons that follow, include a section dealing with how a conciliating commissioner should approach the determination of Default Rules in circumstances in which an employer refuses to permit a picket to be held on or inside its premises.

The agreed Code of Good Practice on Collective Bargaining, Industrial Action and Picketing, makes provision for the factors that should be taken into account. These should be included in the regulations:

- The nature of the workplace;
- The particular situation of the workplace;
- The number of employees taking part in the picket inside the employer’s premises;
- The potential for violence and other unlawful acts;
- The areas designated for the picket;
- The time and duration of the picket;
- The proposed movement of persons participating in the picket;
- The proposals by the trade union to exercise control over the picket; and
- The conduct of the picketers.

In addition, the judgment of *Shoprite Checkers (Pty) Ltd v CCMA & Others (2006) 27 ILJ 2681 (LC)*, the Labour Court highlighted the following principles in so far as an employer’s refusal to permit a picket inside its premises:

- The general rule is that no picketing may take place on the premises of the employer except with the permission of that employer.
- An employer has the right to its property and a union must obtain permission from the employer to be able to picket on the premises.
- If an employer refuses to grant permission for a picket to be convened in/on its premises, the Union then bears the *onus* of proving that the employer’s refusal was unreasonable.

Taking the above principles into account, the Regulations should expressly state that the onus is on the union to prove that the employer’s refusal to permit a picket on its premises is unreasonable. This will ensure that when a conciliating commissioner applies his/her mind to the determination of the Default Rules, that he/she consciously takes into account whether the union has discharged its onus in this regard.

8. PROPOSED NEW REGULATION DEALING WITH CONDUCT IN THE PICKET AND PEACE OBLIGATION, WITH THE ROLE OF POLICE AND PRIVATE SECURITY

The agreed Nedlac Code of Good practice sets out clear requirements for the conduct in the picket including that a trade union must appoint convenors and marshals to monitor and control the picket; provide convenors and marshals with the rules; and take measures to ensure that they understand the rules. Further the manner in which picketers may conduct themselves is specified. These provisions should be contained in the body of the regulations.

Similarly, the provisions pertaining to the peace obligation and the role of the police and private security should form part of the body of the regulations as they specify the forms of conduct that are acceptable and unacceptable as part of lawful strike action.

SUBMISSION ON THE NOTES ON DEFAULT PICKETING RULES

As a general point, BUSA is most concerned about the imposition of new default picketing rules that deviate significantly from those agreed in Nedlac as part of the Labour Relations Stability Accord and agreements.

9. NOTES – PAGE 9 OF THE PICKETING REGULATIONS

On page 9 of the Picketing Regulations is a section with the heading “Notes” in terms of which five (5) notes are listed. BUSA is concerned that Note 1 and 4 may cause confusion, uncertainty and unnecessary interpretation disputes over the extent to which a conciliating commissioner may impose Default Rules.

Note 1 states that:

“These Rules are default rules applicable if the employer and trade union parties to the dispute fail to conclude an agreement on picketing rules in terms of section 69 (4) of the LRA. These Rules are made in terms of section 69 (5) of the LRA and the Commissioner must impose these Rules, in the absence of an agreement, unless there are good grounds for not doing so.”

Clarity is required on two matters in so far as Note 1 is concerned:

- The intention of Note 1 is not clear and raises concerns in so far as how the Note may be interpreted by conciliating commissioners who are required to determine Default Rules. Clarity is required on Note 1 to understand whether it means that if “*good grounds*” exist, a commissioner may then decide not to impose the Default Rules at all or, in the alternative, does Note 1 mean that a commissioner may, if “*good grounds*” exist, still issue Picketing Rules but that depart from what is prescribed in the Default Rules? The amendments to the LRA do not appear to give a conciliating commissioner the option to not impose the Default Rules (where no collective agreement exists and where the parties to the dispute fail to agree on the Rules) and it is therefore not clear what is precisely intended by Note 1.
- It is also necessary for the Department of Labour to provide clarity on what would be considered to be “*good grounds*”? The word “*good*” is fairly non-descriptive and not onerous in nature. BUSA is of the view, depending on what precise intention of Note 1 is, that any departure from the determination of Default Rules should only be permitted in “*exceptional*” circumstances.

In so far as Note 4 is concerned, it states that “*These Rules include substantive and procedural rights of the parties deriving from the Act, which the Commissioner or the parties do not have the power to amend. These will as far as possible be identified*”. It does not appear that any such Rules have been identified in the Default Rules. Furthermore, it appears that Note 4 may (depending on the precise intention of Note 1), be in conflict with Note 1.

It is critical that before these Draft Regulations and Default Rules are finalised and published for implementation, that the Department of Labour elaborates and provides clarity on the Notes as captured on page 9 of the Picketing Regulations. The current wording of the Notes may result in unnecessary disputes concerning matters of interpretation. It is in the interest of all parties concerned, including the conciliating commissioner that the Notes provided for on page 9 of the Picketing Regulations are clearly articulated to limit any uncertainty.

10. LEGAL CONTEXT

Note 1.1.3 and 1.1.4 are confusing as the new Code of Good Practice combines these Codes. Furthermore, the Code is differently reference in the proposed Regulations where it deals with ‘any Code dealing with Picketing’.

11. DEFAULT RULE 2 – PURPOSE OF THE PICKET

BUSA is of the view that a general statement, in order to enforce and remind parties of what the purpose of a picket is should be included, at the start of paragraph 2 to state that:

“A picket is a form of public demonstration for the purpose of demonstrating peacefully in support of any protected strike or in opposition to a lock-out.”

12. DEFAULT RULE 3 – CIRCUMSTANCES OF WORKPLACE

Default Rule 3 makes provision for the conciliating commissioner to itemise and list the circumstances of the workplace/premises that have been taken into account in determining the specifics of a picket in relation to the Default Rules.

It is proposed, in order to ensure that a commissioner takes into account the circumstances that have been identified in the Code of Good Practice on Collective Bargaining, Industrial Action and Picketing, and that may have a bearing on the extent to which the Default Rules will be prepared, that Default Rule 3 be amended to specifically list the factors that should be taken into account (and to provide for a space for the commissioner to insert what those particular circumstances are). In the event that certain factors are irrelevant or not applicable to the circumstances of the workplace, those factors should be marked by the conciliating commissioner as “*not applicable*”.

In the interests of all parties concerned, including the conciliating commissioner, Default Rule 3 should read and be set out as follows (in table format so that the commissioner may insert the necessary information):

“In establishing these Rules, the commissioner has taken into account the following circumstances of the workplace or other premises where pickets are intended to be held:

NO	FACTORS TAKEN INTO ACCOUNT IN FORMULATING THESE RULES	INFORMATION RELEVANT TO THE LISTED FACTOR - IF NOT APPLICABLE, INDICATE SO
1.	<i>the nature of the workplace or premises at which the Picket is intended to be held (i.e.: in a shopping centre, shared office block or stand-alone building)</i>	
2.	<i>the location of the workplace or premises at which the Picket is intended to be held;</i>	
3.	<i>the nature and type of work performed by employees at the workplace or at the premises where the Picket is intended to be held;</i>	
4.	<i>the nature of the conduct in the picket</i>	
5.	<i>the nature and number of locations at which the Picket is intended to be held;</i>	
6.	<i>the number of employees employed by the employer at the workplace;</i>	
7.	<i>the number of employees working at the premises at which the Picket is intended to be held;</i>	
8.	<i>the number of picketers;</i>	
9.	<i>modes of communication between marshals and employers and other relevant parties;</i>	
10.	<i>health and safety considerations; and</i>	
11.	<i>the trading hours and season of the employer at the time the Picket is intended to take place.”</i>	
12.	<i>the number of employees employed by the employer at the workplace;</i>	

13. DEFAULT RULE 4 – LOCATION OF THE PICKET

Paragraph 4.3 of the Default Rules states that *“If the employer has not agreed to the picket being held within its premises, the Commissioner may determine that the picket be held within the following places in*

the premises if the Commissioner considers the employer's refusal to permit a picket inside its premises to be unreasonable."

As mentioned earlier on in this submission, the onus is on the union to prove that the employer's refusal is unreasonable. Based on that, Default Rule 4.3 should be amended to read as follows:

"If the employer has not agreed to the picket being held within its premises, the Commissioner may only determine that the picket be held within the following places in the premises if the Commissioner determines that the union has discharged its onus in proving that the employer's refusal to permit a picket inside its premises to be unreasonable."

If a union fails to discharge its onus in proving that an employer's refusal is unreasonable, the conciliating commissioner should then (regardless of the commissioner's own considered views) not be permitted to impose a rule that will allow picketing inside or on an employer's premises.

It is proposed that the words "any other third party's premises to which the public has access" be inserted in Rule 4.4. This amendment is aimed at situations where service provider's employees decide to picket outside the premises of a client. The client should be given an opportunity to make representations before a decision is taken by the CCMA. The amended provisions will read as follows:

"If picketing is to take place within a shopping mall, business complex or business park or at any other third party's premises where the public has access, the Commissioner may, but only after consultation with all interested parties, and provided the Commissioner has determined that the employer's refusal is unreasonable, may determine that the picket be held within the following places and subject to such terms as the Commissioner considers reasonable:"

14. **DEFAULT RULE 6- NATURE AND CONDUCT OF THE PICKET**

The word "Pickets" as it appears in Default Rules 6.1, 6.2, and 6.4 should read "picketers".

The rules in 6.4 irregularly exclude some of the agreed wording in the Code of Good Practice on Collective Bargaining, Industrial Action and Picketing. In this regard, there is a requirement to explicitly include the provisions underlined below:

Picketers may not:

- Incite violence;

Furthermore the following provisions should be added to 6.4:

- picketers must not obstruct vehicles entering or exiting the premises at which the picket is held.
- display placards, hand out pamphlets which reflect insulting language or defamatory remarks about the employer, its employees or any third parties.
- interfere, threaten, obstruct and/or prevent any person from entering or making use of employer provided residential accommodation.

15. **DEFAULT RULE 7 – CONTROL OF PICKETS**

Convenors appointed by the trade union should not only be responsible for overseeing a picket but should also be responsible for ensuring that the picket complies with the Default Rules. On that basis, it is proposed that the following amendments be made to Default Rule 7:

- Rule 7.1 should be amended to read as follows: “*The trade union must appoint a member or official as convenor of the Picket as well as appoint a second person to discharge the responsibilities of the convenor in the absence of such convenor at the Picket. The convenors will be responsible for:*
 - *Overseeing and controlling the picket;*
 - *overseeing the marshals appointed in terms of Rule 7.4;*
 - *ensuring, in so far as it is reasonably practicable, that the union, its members and supporters comply with the Default Rules at all times.*
 - *immediately notifying the employer representative appointed in terms of Rule 8.1.1 of any breaches of the Default Rules.*
- Rule 7.2 should be amended to read as follows: “*The convenor must at all times during the picket have a copy of these Rules in his possession for purposes of reference to ensure that the picket complies with the Rules.*”
- It is proposed that a new sub-paragraph be inserted as paragraph 7.8 which states that “*The trade union must ensure, before a picket starts, that its appointed convenors and marshals are fully aware of and understand the Code and the Rules so that they may discharge their responsibilities to ensure a lawful and peaceful picket.*”

16. PARAGRAPH 8 – EMPLOYER CONDUCT

The words “*this agreement*” as they appear in Rule 8.1.1 should be replaced with the words “*these Rules*”. Default Rules are imposed by a conciliating commissioner, they are therefore not agreed to by the parties to a dispute.

Rule 8.2.2 provides that “*The employer or any person in authority at the workplace or acting on the employer’s behalf may not undermine any employee’s right to participate in the picket or discipline or threaten to discipline any employee for doing so.*” It is proposed that this sub-paragraph should be amended to expressly state that the prohibition against disciplining or threatening to discipline employees applies only in so far as the picket remains protected and the conduct of the employees remains lawful.

The word “*employed*” as it appears in Rule 8.3 should be replaced with the word “*contracted*”.

17. PARAGRAPH 9 – PICKETING ON EMPLOYER’S PREMISES

The words “*access*” should be inserted before the word “*telephone*” in Rule 9.2.4. The employer will provide “*access to a telephone*” and not necessarily the telephone to the convenor, marshals, shop stewards or other responsible union officials for purposes of ensuring the proper conduct of the picket.

18. **ANNEXURE A – DESCRIPTION OF PLACE OR PLACES FOR THE PICKET**

The word “*pickets*” as it appears used under items 3 and 4 should be replaced with the words “*picketers*”.

19. **CONCLUSION**

It is unclear why the default picketing rules agreed to in Nedlac have been departed from. Given the Nedlac agreement to the default picketing rules, BUSA is concerned that it is required to comment on a new draft that deviates substantially from what has been agreed.

Given the importance of these regulations in giving effect to the Labour Relations Stability agreements in Nedlac, it is proposed that the regulations are urgently considered by a Nedlac task team

Yours sincerely



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