



REPUBLIC OF SOUTH AFRICA

Reportable

**THE LABOUR COURT OF SOUTH AFRICA,  
IN JOHANNESBURG  
JUDGMENT**

**CASE NO: J 1695/14**

In the matter between:

**PLASTICS CONVERTORS  
ASSOCIATION OF  
SOUTH AFRICA (PCASA)**

**Applicant**

**obo MEMBERS**

**and**

**NATIONAL UNION OF METAL  
WORKERS OF SOUTH AFRICA  
(NUMSA)**

**First Respondent**

**METAL & ELECTRICAL WORKERS  
UNION OF SOUTH AFRICA (MEWUSA)**

**Second Respondent**

**CHEMICAL ENERGY PAPER PRINTING**

**Third Respondent**

**WOOD & ALLIED WORKERS UNION  
(CEPPWAWU)**

**METAL AND ENGINEERING  
INDUSTRIES BARGAINING COUNCIL**

**Fourth Respondent**

Heard: 17 July 2014

Delivered: 30 July 2014

**Summary:** (Formation of bargaining forum under auspices of bargaining council – Strike action arising from dispute declared in main bargaining chamber – sectoral bargaining forum not constituted as exclusive bargaining forum for sector – application dismissed).

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**JUDGMENT**

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**LAGRANGE, J**

**Introduction**

***The Relief Sought and the Cause of Action***

[1] This matter was brought as an urgent application, the main objects of which were to declare the so-called Plastics Negotiating Forum ('PNF') a duly established and separate negotiation chamber within the Metal and Engineering Industries Bargaining Council ('MEIBC'), and to declare the strike embarked upon by the respondent unions in support of their demands for a new main agreement to be an unprotected strike in relation to the employer members of the applicant, the Plastics Convertors Association Of South Africa ('PCASA').

[2] The applicant claims that the strike is unprotected in so far as the plastics industry falling under the MEIBC is concerned because the wage dispute in the main metal and engineering industry strike which commenced on 1 July 2014 does not affect the plastics industry which now has its own negotiation forum ('the NPF') set up under the auspices of the MEIBC. More particularly, the applicant alleges that the *only* agreed bargaining

forum for the plastics industry mandated by the MEIBC is the NPF and the respondent unions are bound to negotiate terms and conditions for that sector in that forum. The applicant argues that until such time as negotiations for the plastics industry take place in the NPF and a deadlock is reached in that forum and until the matter had been conciliated in terms of section 64 of the Labour Relations Act, 66 of 1995 ('the LRA') there is no basis for conducting a protected strike over wages in the plastics sector.

- [3] Although the applicant did not refer in its founding papers to the specific sections of the LRA which it contended rendered the strike unprotected, *Mr Redding*, who appeared for the applicant, explained that the basis of the claim that the strike in the plastics sector was unprotected lay in sections 64 and 65 of the LRA and that the factual basis for this was laid in the founding affidavit. The relevant portions of Section 64 state:

*“64 Right to strike and recourse to lock-out*

*(1) Every employee has the right to strike and every employer has recourse to lock-out if-*

*(a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and-*

*(i) a certificate stating that the dispute remains unresolved has been issued; or*

*(ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that-*

*(b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless-*

*(i) the issue in dispute relates to a collective agreement to be concluded in a*

council, in which case, notice must have been given to that council; or

(ii) *the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or*

(c) *...*

[4] Section 65 provides:

*“65 Limitations on right to strike or recourse to lock-out*

*(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if-*

*(a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;*

*(b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;*

*(c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;*

*(d) that person is engaged in-*

*(i) an essential service; or*

*(ii) a maintenance service.*

*(2) (a) Despite section 65 (1) (c), a person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or lock-out if the issue in dispute is about any matter dealt with in sections 12 to 15.*

*(b) If the registered trade union has given notice of the proposed strike in terms of section 64 (1) in respect of an issue in dispute referred to in paragraph (a), it may not exercise the right to*

*refer the dispute to arbitration in terms of section 21 for a period of 12 months from the date of the notice.*

*(3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out-*

*(a) if that person is bound by-*

*(i) any arbitration award or collective agreement that regulates the issue in dispute; or*

*(ii) any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or*

*(b) any determination made in terms of the Wage Act and that regulates the issue in dispute, during the first year of that determination.”*

[5] As I understand the argument, the applicant bases it on the principle articulated in the case of **SACTWU v Yarrtex (Pty) Ltd t/a Bertrand Group (2013) 34 ILJ 2199 (LAC)**.<sup>1</sup> In essence, the point in that case PCASA wishes to rely on was that if a bargaining council constitution provides the forums in which collective bargaining would take place, because the Council constitution is itself a collective agreement the parties were bound by the bargaining arrangements set out in the constitution. The applicant expressed it thus in its heads of argument: the three unions are bound by the collective agreement concluded in 2008 to establish the PNF. They are also bound by a resolution made by the MEIBC (through Manco) to negotiate terms and conditions of employment for the plastics sector through a separate negotiating forum (the PNF). Consequently, in that matter no collective bargaining was permitted outside of the designated fora in the constitution and any strike action in support of demands not tabled in the correct forum was unprotected.

[6] The primary question to determine in this application therefore is whether the respondent unions were entitled to invoke strike action against the

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<sup>1</sup> 2013 (34) ILJ 2199 (LAC) at 2210, paras [68] and [69].

employer members of the applicant on the basis that the demands tabled for the new main agreement, if agreed to, would apply to them because collective bargaining for the plastics industry still took place under the ambit of the negotiations for the main agreement, or whether collective bargaining for the plastic industry had been relocated by agreement and in terms of the bargaining Council's Constitution to the NPF, which now constituted the agreed forum within which conditions in that sector would be negotiated. If the applicant is correct, then it follows that until such time as the respondent unions engage with the employers in that forum and follow the dispute resolution processes in section 64 of the LRA, they may not embark on protected strike action.

- [7] Before this question can be considered the issue of the applicant's *locus standi* to bring this application must be determined. One basis on which the respondents dispute the applicant's standing is related to its status as a member of the MEIBC. In this regard, there is a factual dispute about whether PCASA has been properly admitted as a party to the council.
- [8] Apart from opposing the application on the question of urgency, a point which was pursued more vigorously by the second respondent, MEWUSA, than by the first respondent, NUMSA, the unions challenged both the status of the applicant as a member of the council and the status of the NPF. In short, firstly it was argued that PCASA was still not a fully fledged party to the MEIBC because its admission as a member was still provisional and subject to certain membership details being verified. As such, NUMSA argues PCASA as a non-party to the MEIBC has no *locus standi* to bring the application. Secondly, it was contended that the NPF had not been properly established as a sectoral bargaining forum within the MEIBC and therefore negotiations for the plastics sector were still part and parcel of the negotiation of a new main agreement. Consequently, the union demands tabled in that forum and any agreement concluded there applied to the employers in the plastics sector. As far as NUMSA is concerned, any agreement concluded consequent to the strike will apply to PCASA members too, irrespective of what transpired in the NPF. The determination of these factual disputes is critical to the outcome of this matter.

- [9] In heads of argument filed at the request of the court after argument was presented, NUMSA raised issues of material non-joinder but these were not raised at the hearing when oral argument was presented nor in the answering affidavit.
- [10] At the hearing of the matter despite the complexity of the issues, no party filed heads of argument and accordingly were directed to do so by 21 July 2014, which they did.

**Chronology of events concerning PCASA's membership of the MEIBC and the formation of the NPF**

- [11] It is common cause that the scope of the MEIBC includes the plastics industry as defined therein. It should be mentioned at this point that only a portion of the greater plastics industry falls within the plastics industry as described by the registered scope of the Council. It also appears that PCASA has a wider membership in the general plastic industry beyond those manufacturers who fall within the registered scope of the bargaining Council.
- [12] In November 2011, the Registrar of Labour Relations announced his intention to vary the registered scope of the MEIBC by excluding the plastics industry subsection from the Council's registered scope. His motivation for this intended step was that only 22% of employees in the plastics industry falling within the Council's registered scope belonged to trade union parties to the Council and similarly only 9.6% of employers in the plastics industry were members of employer organisation parties to the Council. It appears this initiative sparked discussions between the applicant and other parties to the MEIBC. NEDLAC also debated the issue and recommended that the plastics industry as defined in the scope of the MEIBC should remain within the ambit of the MEIBC, but it supported and encouraged the establishment of a distinct chamber in the Council so that a separate wage schedule could be established for the plastics subsector in order to accommodate the economic conditions facing employers and employees working in it.

***Agreed recommendation on consideration of PCASA's membership and establishment of the PNF***

[13] Discussions ensued between the parties to the MEIBC and PCASA which culminated in a joint recommendation being tabled at a meeting of the MEIBC Manco on 10 September 2013. The recommendation was that:

13.1 PCASA should submit its application to become a member of the Council by 3 September 2013 to be considered by the MEIBC Manco on 10 September 2013.

13.2 The MEIBC should retain its current jurisdiction over the plastics industry.

13.3 The MEIBC Manco meeting scheduled for 10 September 2013 should establish a Plastics Negotiating Forum ('PNF') which "will be accountable to the Manco".

13.4 Manco should authorise the convening of the first PNF meeting within three weeks of the meeting on 10 September 2013.

13.5 The first meeting of the PNF should confine itself to establishing terms of reference, participants and housekeeping rules.

13.6 The first meeting would be convened under the auspices of the MEIBC and would be independently facilitated.

13.7 "Collective bargaining between the parties within the Plastics Negotiating Forum will take place within the constitutional requirements and structures of the MEIBC".

13.8 "Any amendments to terms and conditions of employment including matters relating to future bargaining arrangements will be a product of collective bargaining."

[14] On 2 September 2013, PCASA duly applied to become a party to the MEIBC. PCASA recorded in its membership application letter that it brought the application on the understanding set out in the recommendation summarised above which it characterised as "a dispensation for the Plastics Industry". Elaborating on its conception of the forum it envisaged that it would operate no differently from other special



arrangements under the umbrella of the MEIBC, such as companies with house agreements and the separate agreement for the Lift engineering industry, which meant that the terms and conditions of employers and employees under those arrangements were unique to that entity or sector. NUMSA's comment on the provisos in the membership application letter was that the applicant could not dictate the terms of its admission to the MEIBC.

### ***Manco meeting of 10 September 2013***

- [15] The Manco meeting scheduled for 10 September 2013 duly took place. NUMSA and MEWUSA delegates were among those present at the meeting. At the meeting the recommendation described above was adopted after being duly proposed and seconded. NUMSA points out that to the extent that the PNF was established it was established subject to the last two provisos of the recommendation set out in paragraphs 11.7 and 11.8 above
- [16] On the question of PCASA's application for membership, it was proposed and seconded that its membership should be accepted 'in principle' and its membership should be verified in terms of the current practice of the MEIBC.
- [17] The NUMSA representative at Manco stressed that the council Constitution had to be strictly adhered to and especially in terms of any proposed negotiations between the parties regarding all plastics matters, which I understand to have been a reference to the provisos of the adopted recommendation set out above in paragraphs 11.7 and 11.8.
- [18] On 18 September 2013 the General Secretary notified PCASA that its membership application had been tabled and approved at the Manco meeting on 10 September 2013, and invited it to participate in all the council activities. However the letter also pointed out that the employer parties at the Council were currently involved in arbitration proceedings concerning the allocation of seats to a party in the various meetings and therefore he could not advise PCASA of the seats they were entitled to so the parties had agreed they could attend as an observer until that was

resolved. NUMSA contends that the letter was inaccurate in suggesting that PCASA had been admitted unconditionally.

***PNF meeting of 4 October 2013 on formulating terms of reference for the forum***

[19] On 4 October 2013 the first facilitated meeting of the PNF took place. The meeting was attended by representatives from three unions and representatives from three employer organisations. The minutes record that NUMSA and MEWUSA tendered their apologies for not appearing. The minutes also reflect that the General Secretary satisfied himself that the requirements for a quorum in terms of the constitution had been met and the meeting proceeded. The outcome of the meeting was the conclusion of a document containing terms of reference for the PNF, which was signed by three union parties being SAEWA, UASA and Solidarity and three employer organisations being Border Industrial Employers Organisation, PCASA and NEASA respectively. Paragraph 2 of the Terms of Reference (“TOR”) reads:

*“2. The PNF will be the sole forum to:*

- ◆ *engage in respect of any matter related to the Plastic Sector;*
- ◆ *this will include but not be limited to*
  - a. Substantive negotiations within the sector*
  - b. Task team matters*
  - c. Scope of registration of MEIBC of the sector*
  - d. All other matters that require a position to be adopted in respect of the sector*
- ◆ *all agreements reached within the PNF will be submitted to Manco for ratification and extension purposes*
- ◆ *any other recommendations and or decisions in respect of other matters discussed within the PNF will be processed in terms of the Constitution of the MEIBC.”*

(emphasis added)

[20] NUMSA contends that the TOR were invalidly agreed on in its absence at this PNF meeting and they flouted the requirement in the recommendation adopted by Manco that “... *matters relating to future bargaining arrangements will be a product of collective bargaining.*”

***PCASA’s request to commence negotiations in the PNF***

[21] On 9 October 2013, PCASA formally requested that negotiation should be initiated in the PNF within 45 days of the date of the letter, in accordance with paragraph 2 of the TOR and Annexure E (2) (b) of the MEIBC. The General Secretary of the Council duly circulated the letter and mentioned that it would be included on the Manco agenda of 5 November 2013. Although the applicant refers to its letter as a draft agreement “regulating negotiation in the PNF” it amounts to nothing more than a request as described above. NUMSA contends that any proposal concerning the regulation of negotiations in the PNF would have to have been agreed to before substantive negotiations could commence.

[22] PCASA’s letter also refers to a proposal for a new agreement which was supposedly attached to it, but that was omitted from the papers. However, it appears that the reference could only have been to substantive proposals for a new agreement and not procedures for regulating negotiations in the PNF.

***The Manco meeting of 26 November 2013 and consideration of the TOR***

[23] On 26 November 2013, the applicant claims Manco adopted the TOR drawn up at the PNF meeting of 4 October 2013. NUMSA disputes that this was validly done for the following reasons:

23.1 the chairperson of the meeting, who was a signatory to the TOR, improperly invoked clause 8 (12) of the Constitution to prevent NUMSA from participating in the discussion on the terms of reference.

23.2 In terms of clause 8 (13) of the Constitution of the MEIBC the decision to adopt the terms of reference should have been voted upon by a show of hands and decided by a majority vote.

[24] Clauses 8 (12) and 8 (13) of the Constitution read:

*“(12) Any members or alternates representing any party on the Council which has refused to become a party to any agreement which has been arrived at between any or all of the parties shall not be entitled to vote at any meeting of the Council, or its committees on any matter in any way connected with or arising from any such agreement, or to speak on any such matter without the permission of the presiding officer, provided that where by reason of this provision any representative or alternate is disenfranchised, the value of the votes recorded for against any proposition shall be reduced to a common denominator in order to ascertain the result of the voting.*

*(13) No motion shall be considered unless seconded, and unless otherwise provided, all matters should be voted upon by show of hands and decided by a majority vote except in the case of elections, when the candidates up to the required number receiving the highest vote shall be declared elected.”*

(emphasis added)

[25] Reading the minutes of the Manco meeting, the discussion and purported adoption of the TOR took the following course. NUMSA’s representative confirmed that it had been unable to attend the PNF meeting owing to a strike but confirmed that it had written a letter expressing the union’s views concerning the meeting that had taken place. It was not in dispute that NUMSA had tendered its apologies for not attending the first PNF meeting. In passing, it should be mentioned this letter was not part of the documents placed before the court. Be that as it may, the representative appealed to the parties that were present at the meeting to allow NUMSA a chance to contribute to the terms of reference. The union’s request was supported by an employer’s organisation that sought the same opportunity for SEIFSA’s member associations to participate.

- [26] In opposition to NUMSA, the National Engineering Association of South Africa ('NEASA') representative argued that, in effect, the parties wishing to reopen the terms of reference process had no right to do so, but were welcome to enter into the "arrangement" and could address issues in the monthly meetings going forward. It seems the suggestion was that those who had not been party to the formulation of the TOR, could table further proposals by attending future PNF meetings. The NEASA representative supported the invocation of clause 8 (12) of the Constitution in relation to any matters dealt with at the first PNF meeting of 4 October 2013. NUMSA reiterated its request to be given an opportunity to participate in discussion of the terms of reference as it would be affected by the discussion going forward "especially the terms which impact on the main agreement." At this point in the discussion the chairman decided to invoke clause 8 (12) and ruled that any party who is not a signatory to an agreement is not allowed to participate in the discussion.
- [27] In what appears to have been an attempt to ameliorate the exclusion of parties from discussion of the terms of reference the SOLIDARITY representative proposed that a PNF meeting should be convened at which the parties could submit proposals on the terms of reference for discussion in that forum. NUMSA argued that the terms of reference concluded at the first PNF meeting did not amount to 'an agreement', which I assume was a reference to clause 8(12) of the constitution and that the very terms of reference themselves required any agreement to be ratified by Manco. This stance was supported by the Light Engineering Industries' Association ('LEIA') representative. The NEASA representative retorted that once a document was signed it bound a party as an agreement. Eventually the debate seemed to resolve itself with Manco agreeing that a PNF meeting would be convened and that parties were requested to submit proposals on the TOR to be discussed at the PNF meeting.
- [28] Matters did not end there however, because NUMSA argued that the matter could be rectified by Manco itself as long as the PNF remained with in "the auspices of Manco." This suggestion was resisted by the NEASA representative who argued that any submissions had to be dealt with in the PNF itself. NEASA further argued that "...on 24 October 2013 the

council had invited the entire Manco to a PNF meeting where it was decided that the terms of reference would be discussed at the Manco meeting for Manco to take a decision and in terms of the process that was stipulated in the document dated 16 August 2013<sup>2</sup> and finalised on 10 September 2013<sup>3</sup> the deadline dates cannot be extended”.

[29] The chairperson concluded the discussion on the basis that if there were amendments to the TOR it would be brought back to Manco “... to be adopted once again”.

[30] The discussion then proceeded to the formal agenda item dealing the adoption of the TOR of the NPF, even though much of the substantial discussion on this issue had already taken place. The previous discussion was then repeated to some extent, with NUMSA stressing that it was not in favour of adopting the TOR and claiming that the PCASA was not a fully fledged member of the bargaining Council and Manco could not adopt terms of reference established by parties that were not members of the Council. NEASA then proposed that NUMSA’s objection to the TOR be noted and the remaining PNF agenda items be adopted. This proposal was supported by SOLIDARITY and the minutes record it been agreed to. There was then some wrangling about how many representatives parties could send to the next PNF meeting, with NUMSA contending that it should comprise the Manco delegations because the PNF was still a Manco structure. Eventually it appears the parties accepted that MEWUSA and the employer organisations affiliated to SEIFSA would nominate their delegations and NUMSA would nominate their Manco delegation to attend the meeting.

#### ***Subsequent developments on the TOR and the PNF meeting of 21 January 2014***

[31] On 8 January 2014, the General Secretary of the Council issued a notice for the PNF meeting to be held on 21 January 2014 and reminded parties

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<sup>2</sup> This can only be a reference to the recommendation for the establishment of the PNF made on 16 August 2013.

<sup>3</sup> This refers to the MANCO meeting on that date which adopted the recommendation.

wishing to add more issues on the terms of reference to submit those to him seven days prior to the meeting.

[32] On 15 January 2014, the Registrar notified the General Secretary that in view of the PCASA joining the Council “as a full party” the employer party’s representativeness had improved to such an extent that it was no longer necessary for him to consider the variation of the registered scope of the Council. It is not clear what prompted this particular communication from the Registrar but presumably he must have received some kind of communication from the MEIBC in this regard. In the absence of further detail, the court is none the wiser which committee of the council might have decided this, though it seems most likely the communication to the Registrar was based on

[33] When the PNF next convened on 21 January 2014, neither NUMSA nor MEWUSA were present and according to the minutes neither tendered any apologies for their absence. Considerable discussion took place around the process for commencing negotiations under the auspices of the PNF and it was ultimately agreed that a special Manco meeting should be convened in order for Manco to fulfil its constitutional obligations of convening a meeting to discuss the plastics negotiations and to deal with the election of a President and Deputy President of the Council in light of the existing office bearers apparently no longer being able to serve in that capacity.

[34] Discussion then moved on to the variation of the TOR under which was noted that no submissions had been received although both NUMSA and MEWUSA had requested a postponement of the PNF meeting to give them further time to make their submissions.

[35] Clauses 2(a) and (b) of Annexure E to the Council Constitution dealing with negotiation procedures provide that:

*“(a) Where any party to the Council wishes to initiate negotiations for the amendment of any existing agreement or the introduction of a new agreement, that party shall submit its proposals in writing to the secretary of the Council.*

*(b) The Secretary shall immediately arrange for the proposals to be circulated to all interested parties and shall take steps to arrange a negotiating meeting within 45 days of receipt of the proposal. Where the secretary, in consultation with the President of the Council, decides that the proposal relates to the negotiation of an industry matter, the date of the first negotiating meeting shall be decided at the next meeting of the Council's Management Committee, and such negotiating meeting shall be held within 30 days of that Management Committee meeting.*

**Events subsequent to the PNF meeting of 21 January 2014 and PCASA's withdrawal and purported re-entry to the MEIBC**

[36] After the PNF meeting on 21 January 2014, it appears that NUMSA and LEIA objected to the convening of a special Manco meeting on 4 February 2014 as premature and called for it to be converted into a PNF meeting. In the upshot, it appears that a PNF meeting did take place on that day, and was attended by a much greater number of unions and employer organisations, including MEWUSA, NUMSA and LEIA. According to a subsequent letter from PCASA in which it gave notice of its intention to withdraw from the Council, the meeting on 4 February 2014 was largely taken up by an attack on its standing as a member of the Council, based on what it claimed was a misreading of the requirements of section 56 (2) of the LRA<sup>4</sup> relating to applications for admission as a party to a bargaining Council.

[37] The applicant claims that many requests were made to the Manco to confirm dates for negotiations in the PNF, but because nothing was forthcoming in this regard it indicated its intention to withdraw from the

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<sup>4</sup> Section 56 (2) states:

“(2) the application [for admission as a party to a council] must be accompanied by a certified copy of the applicants registered Constitution and certificate of registration and must include-

(a) details of the applicants membership with in the registered scope of the Council and, if the applicant is a registered employers organisation, the number of employees that is members employed with in that registered scope,

(b) the reasons why the applicant ought to be admitted as a party to the Council and

(c) any other information on which the applicant relies in support of the application.”



MEIBC and gave three months' notice to this effect on 19 February 2014. In the letter, it effectively accuses other parties to the MEIBC like SEIFSA, NUMSA and MEWUSA of reneging on the recommendation of 10 September 2013, and of luring it back into the Council in order to avoid the Registrar's intended limitation of the council scope by excluding the plastics industry as defined in the Constitution. It further complained that the parties who claimed they wanted to be included in the process of determining the terms of reference of the PNF were disingenuous because they never made themselves available when the opportunity was provided to do so.

- [38] The letter further attacked what it labelled the 'unconstitutional' decision to afford it only observer status and its exclusion from Council meetings with effect from 21 January 2014. PCASA reiterated its complaint about the failure to convene a negotiation meeting by 14 December 2013 as required by clause (2) (b) of Annexure E of the MEIBC Constitution. The letter ends off attacking the very constitutionality of the MEIBC itself, the details of which do not have any direct bearing on this application.
- [39] Following a letter dated 3 March 2014 from the General Secretary of the Council PCASA was subsequently persuaded to retract its notice of withdrawal from the Council which was due to take effect on 19 May 2014. The organisation confirmed that it anticipated participating in the Council's affairs and in the PNF in particular.
- [40] A Manco meeting took place on 16 May 2014 in which PCASA claims that it was agreed that negotiations in the PNF would start on 16 May and continue on 20 and 21 May 2014 and that NUMSA indicated it would not participate. One of the items for discussion at the meeting was the membership of various organisations including PCASA and the Border Industrial Employers Organisation. At the conclusion of the discussion the General Secretary explained that section 56 (2) of the LRA required the applicant employer organisation to provide the number of employers who are its members as well as the number of employees they employed. The council then verified this information and was required to do so in terms of clause 17(1) of the Constitution. He further stated that Manco had decided

that when these parties were accepted they were accepted subject to the membership verification exercise being done by the Council. On the question of negotiation in the PNF, NEASA, which appears not to have been a party to the PNF itself, proposed that dates for negotiation in that forum needed to be set as required by the Constitution.

- [41] Solidarity supported NEASA's stance, but NUMSA and MEWUSA reiterated what was apparently stated at another meeting on 20 March 2014 (oddly no party bothered to mention this meeting or include the minute in their pleadings) namely that if PCASA had a dispute about the failure to set a date for negotiations they could follow the dispute resolution process in the Constitution, but if they had demands they wanted to table at wage negotiations they should be tabled at the main negotiations to amend the main agreement. The discussion of the item ended with Solidarity stating that it supported the proposal of the NEASA representative about the dates for the PNF, and NUMSA and MEWUSA made it clear that they would not participate in that structure but would only negotiate in the main negotiations. From the minutes, it would appear that no decision was taken by Manco on the commencement of negotiations in the PNF, contrary to what the applicant alleges.

***The initiation of a negotiation process in the PNF***

- [42] Nevertheless, despite the impasse at the meeting of 16 May 2014, it appears that the Council did issue invitations to negotiate to all MEIBC parties and that meetings of the PNF were attended by the General Secretary of the Council and conducted under the auspices of a facilitator appointed by the MEIBC. The unions do not dispute this.

- [43] On 30 May 2014, the General Secretary issued the following circular:

***“RE: CIRCULAR TO THE INDUSTRY***

*We wish to confirm that as a result of the plastic negotiations between PCASA and some unions in our industry, the plastic sector remains covered by the registered scope of the MEIBC.*

*It is important to note that parties have agreed to engage through a process of negotiations in the PNF (Plastics Negotiating Forum)*

*on the PCASA proposed agreement, while the process is in progress there will be no vacuum meaning that the industry agreement still applies to plastic industry and are still covered by Metal and Engineering Bargaining Council Scope. The current negotiations of the industry when concluded its agreement will apply to all our industries including the plastics industry until and unless there is a separate agreement for the plastics sector. Once an agreement is concluded for the plastic sector, such agreement will still fall under the auspices of the MEIBC and will be administered by the MEIBC. Hence it is important to note that the current negotiation processes within the MEIBC does not impact on the registered scope of the MEIBC.”*

[44] The applicant saw this as an endorsement of its view on the status of talks in the PNF, whilst the respondents maintained that the General Secretary misrepresented the situation by suggesting that if an agreement was concluded in the PNF for the plastics industry it would then apply.

[45] On 5 June 2014, the General Secretary issued a further circular purporting to clarify the relationship between negotiations taking place in the PNF and those taking place for the conclusion of a new main agreement. He set it out thus:

*“The Plastics Sector as currently defined as covered by the scope and jurisdiction of the MEIBC and all its agreements.*

*Discussions that are currently taking place at the level of the PNF about a future possible dispensation for the Plastics Sector, the terms of which form the basis of on-going discussions.*

*In the interim and until such time that a new dispensation may be agreed-the MEIBC and main agreement retains jurisdiction over the Plastics Sector.*

*The Office has communicated its concerns over the fact that not all the trade unions had elected to participate in the process. This may at the end of the process pose a challenge particularly when the time comes for the implementation of any possible agreement.*

*Of concern to the office is the nonparticipation of CEPPAWAWU, MEWUSA and NUMSA in the PNF discussions who collectively may well represent the majority of unionised employees in the sector. Parties participating in the process of urged pay attention to this matter.*

*In closing, industry is reminded that the Main Agreement wage and conditions of employment negotiations of ongoing between the Parties. As matters stand the main agreement as to tell a tea is under review and renegotiation. Any agreement reached at the Main Agreement wage negotiations will also bind the plastics industry.*

*It is hoped that negotiations at this level will be speedily be resolved.*

[46] Of course, the correctness of the General Secretary's statements depends on the true status of the PNF as an exclusive sectoral bargaining forum and strictly speaking his say-so is simply an expression of his opinion. What these circulars do illustrate though is a degree of uncertainty in his mind as to the real status of the PFN negotiations in relation to the negotiations for the new main agreement.

[47] Ultimately, a substantive agreement was concluded between participating parties in the PNF on 30 June 2014, a day before the commencement of the National protected strike called by NUMSA. PCASA makes no claim that this agreement as such applies to the respondents or their members and consequently does not claim that strike action by the employees of its members is in breach of this agreement.

### **Urgency**

[48] On 30 May 2014, NUMSA served a copy of its declaration of the dispute on wages and other substantive issues on all the employer associations including the PCASA and the Border Industry Association. The strike commenced on 1 June 2007 preceded by a strike notice.

[49] It was only on 7 July 2014 that the applicant advised the respondent unions that the strike at its members premises was unprotected on the

grounds that the PNF was the exclusive negotiating Forum for the Plastics Industry and no strike could be called in respect of that sector unless the dispute resolution processes for a dispute in the plastics sector had been completed. In the letter it warned of the prospect of the dismissal of striking employees unless they return to work by the following day. NUMSA's response was to reiterate its belief that the strike was protected because their members were covered by the provisions of the MEIBC main agreement and not by any agreement reached in the PNF. It further invited the applicant, if it believed that the strike was unprotected, that it should launch an application a declaration to that effect. MEWUSA provided a similar response on 9 July 2014. The application was launched a few days later on 14 July 2014.

[50] The applicant complains that its members are suffering ongoing economic damage as a result of the strike and also complains of acts of violence and damage to property committed during the course of the strike. Other urgent applications to prevent unlawful conduct of strikers directed against individual members of the Association have already been before court by the time this application was launched, although the applicant also included prayers to interdict similar misconduct in this application. Obviously what distinguishes this application from those to interdict strike misconduct, is that this application raises the legal status of the strike itself which may have ramifications for any action taken in consequence thereof now or after the strike is over. This necessitates a finding on the status of the PNF as an exclusive bargaining forum.

[51] Whilst NUMSA conceded urgency in regard to the protected nature of the strike, it did not concede in relation to an application for an order declaring that the NPF constitutes a duly established and separate negotiating chamber within the MEIBC. The difficulty is that the determination of the protected nature of strikes is inextricably linked with this issue as this is the foundation of the applicant's claim. The urgency arose out of the strike which brought the status of the forum into critical focus.

[52] It is certainly questionable whether the applicant acted with sufficient urgency, but given the fact that it was invited by the respondents to obtain

clarity from the court about the status of the strike before embarking on any disciplinary action for engaging in unprotected strike action and given that, if the strike is unprotected then its members are suffering ongoing economic harm which they are unlikely to be able to recover by other means, I am inclined to treat the matter as sufficiently urgent to warrant a determination.

### **Evaluation of the merits**

[53] The crux of the applicant's claim concerns the establishment of the PNF as the exclusive forum for negotiating wages and conditions applicable to the Plastics Industry sector as defined in the registered scope of the MEIBC. A related but distinct issue is the applicant's *locus standi* as an admitted member of the MEIBC.

[54] Since the establishment of that forum as a structure of the MEIBC can only occur if mandated by a structure having the necessary power in terms of the MEIBC Constitution the answer to the question lies in the steps taken by Manco in this regard.

### ***Admission of PCASA as party to the MEIBC***

[55] It is useful to cite the relevant provisions of s 56 of the LRA more comprehensively than mentioned above, viz:

*“56 Admission of parties to council*

*(1) Any registered trade union or registered employers' organisation may apply in writing to a council for admission as a party to that council.*

*(2) The application must be accompanied by a certified copy of the applicant's registered constitution and certificate of registration and must include-*

*(a) details of the applicant's membership within the registered scope of the council and, if the applicant is a registered employers' organisation, the number of employees that its members employ within that registered scope;*

(b) *the reasons why the applicant ought to be admitted as a party to the council; and*

(c) *any other information on which the applicant relies in support of the application.*

*(3) A council, within 90 days of receiving an application for admission, must decide whether to grant or refuse an applicant admission, and must advise the applicant of its decision, failing which the council is deemed to have refused the applicant admission.*

*(4) If the council refuses to admit an applicant it must within 30 days of the date of the refusal, advise the applicant in writing of its decision and the reasons for that decision.*

*(5) The applicant may apply to the Labour Court for an order admitting it as a party to the council.*

*(6) The Labour Court may admit the applicant as a party to the council, adapt the constitution of the council and make any other appropriate order.”*

(emphasis added)

[56] PCASA applied for membership of the council on 2 September 2013. Assuming its application met the peremptory requirements of s 56(2) then the council had until 1 December 2013 to admit or refuse it membership of the council, failing which the deeming provision of s 56(3) would come into effect. At the Manco meeting of 10 September, PCASA was admitted but only ‘in principle’. Confirmation of its admission was dependent on the council conducting a verification exercise. The General Secretary’s letter of 18 September purported to confirm that PCASA’s membership application was approved without mentioning its provisional status. This seems to be a misrepresentation of what transpired at the meeting. The letter also paradoxically states that PCASA’s admission would only be as ‘observer’ until a dispute on seat allocations was determined.

[57] How PCASA could have been properly admitted as a party but relegated to observer status is difficult to reconcile. Indeed PCASA itself complained

about this in its withdrawal letter of 19 February 2014 contesting that its 'observer status' was unconstitutional. In that letter it noted that even more extreme step had been taken in a letter dated 21 January 2014 to advise it that it would not be invited to 'all Council Constitutional meetings' until the matter of employers' seating allocation had been finalised.

[58] Apart from correspondence from the General Secretary which is full of internal inconsistencies the applicant has not been able to point to a further decision of the council in which its admission to unencumbered membership was confirmed.

[59] In the circumstances, I believe the available evidence tends to suggest on a balance of probabilities that PCASA was not properly admitted as a member of the council, which its own complaints when it announced its 'withdrawal' seem to confirm. Even if it was not expressly refused membership the failure to admit it unconditionally by 2 December 2013 means its application was deemed to have been refused from that date, notwithstanding its participation in Manco and the PNF. It had a readily available remedy at hand to rectify the situation which was to approach the court in terms of s 56(5).

[60] As such, it could not participate in the deliberations of the PNF nor be a party to any agreement concluded in that forum, leaving aside for the moment the status of any agreement reached in that forum which had not been ratified by Manco. As a non-party to the council it has no *locus standi* to enforce any purported agreement of the parties to the council or a decision of the council about the designated forum for negotiations in the plastics industry.

[61] However, the applicant's status as a member of the council or as a party to any agreement reached on the establishment of the PNF as an exclusive negotiating forum is not dispositive of the issue of PCASA's *locus standi* to bring this application. If the strike by the respondent's members in the plastics industry is unprotected by virtue of a binding decision of the council or an agreement concluded in the council that negotiations for that sector will take place solely in the PNF and by implication cannot take place in the main negotiations, then the applicant



may still rely on that to obtain protection against unprotected strike action for its members. Plainly they have a material interest in the legal status of the strike which is independent of PCASA's membership of the council.

[62] Accordingly, it is still necessary to determine if an exclusive bargaining arrangement was concluded which took the plastics industry out of the scope of the main negotiations in which the dispute leading to the strike arose.

***The status of the PNF as properly constituted exclusive forum for collective bargaining in the Plastics Industry under the PNF.***

[63] There seems to be little doubt that in adopting the joint recommendation on 10 September 2013, Manco committed the MEIBC to the establishment of the PNF and to taking steps with the achievement of that object in mind. The issue is whether that objective was achieved.

[64] It is equally clear that in keeping with the adopted recommendation Manco authorised the convening of the first PNF meeting on 4 October 2014, within three weeks of the meeting on 10 September 2013. That meeting formulated terms of reference for the PNF, which were referred back to Manco for adoption, to which it was accountable in terms of the adopted recommendation.

[65] Neither NUMSA nor MEWUSA attended the meeting on 4 October 2014. NUMSA had previously asked for the meeting to be postponed and tendered its apology for being unable to attend owing to a strike. Nonetheless the parties who attended the meeting concluded an agreement on proposed terms of reference which was referred to Manco for adoption.

[66] Before considering what transpired at the next Manco meeting where the proposed terms of reference were tabled, it should be mentioned that of the three employer organisation signatories to the proposed terms of reference only NEASA was fully admitted as a party to the council, as the PCASA and the Border Industrial Employers Organisation had only been given observer status. MEWUSA contends that the PNF meeting was not quorate in terms of the council constitution.

[67] Clause 8 of the council constitution contains the following provisions dealing with quorums in meetings of council structures:

*(6) The quorum for a Meeting of the Council shall be a minimum of fifteen representatives each of the employers and employees.*

*(7) The quorum for meetings of committees of the Council shall be the following minimum number of representatives each of the employers and employees:*

*Management Committee - 5 per side*

*Administration Committee – 2 per side*

*Standing Committee - 2 per side*

*The quorum for the meeting of any other committees of the Council shall be the majority of the members thereof.”*

[68] As I understand MEWUSA's objection to the composition of the NPF meeting, it is that the parties present did not represent the majority employer and employer interests in the council and only one employer party was a legitimate participant in the meeting. If for the sake of argument, I assume that the PNF constituted a 'standing committee' then it was not quorate because only one fully admitted employer party was present. However, if the PNF is not one of the named types of committee then its quorum would be comprised of a majority of members of the committee. This leads to the following conundrum: when the PNF convened on 4 October 2014, it was still in a nascent form, because it was still deliberating on its own proposed terms of reference including its very composition. It is evident from the minute of the meeting and the proposed composition of the committee that the NPF did not have any defined membership criteria at that point in terms of which a quorum could be determined. Accordingly, the agreement concluded by the parties present could not be construed as a decision of a duly constituted meeting of the MEIBC.

[69] In the terms of reference agreed by those present it was proposed that any union party or employer party whose registered constitution allowed

for representation of members in the plastics sector discussion could be a party to the forum.

[70] What this discussion highlights is the importance of Manco's deliberation on the terms of reference emanating from the 4 October 2014 meeting of NPF in its inchoate form, in confirming constitution of NPF as a forum in conformity with the composition of MEIBC committees and capable of arriving at decisions in accordance with the rules governing quorums and decision making processes, as dictated by the council constitution.

[71] As set out above, we know that at the next Manco meeting on 26 November 2014, where the terms of reference developed in the meeting of 4 October 2013 were tabled for consideration, NUMSA sought to intervene and rectify its failure to contribute to the formulation of the proposed terms of reference. However, the upshot of what was clearly a hotly contested debate that followed, was that the chairperson invoked clause 8(12) of the Constitution, to prevent NUMSA opening debate of the proposed terms of reference in Manco.

[72] NUMSA attacks the chairperson's recourse to this measure as improper. Indeed, it seems to have been invoked by the chairperson in circumstances not contemplated by clause 8(12). The wording of that provision clearly envisages that power may only be invoked, where a party *refuses* to become a party to *an agreement* arrived at *between any of the parties*. This presupposes the existence of an agreement between admitted parties and a refusal by the intervening party to become bound to it.

[73] NUMSA contends that the terms of reference could not be construed as an agreement. In any event, even if it was an agreement, the terms of reference themselves required ratification by Manco. The effect of the chairperson's action was to preclude NUMSA from participating in the determination of the terms of reference before those very terms were ratified by Manco, and this was on the basis that it had not made itself a party to them even though it was an agreement which was still unratified and therefore invalid at that point. The process of ratification is a procedure for validating the instrument or decision ratified. In the absence

of ratification that instrument or decision remains invalid. The factual prerequisites for the chairperson to exercise the power in clause 8(12) had not been met, and his purported exercise of that power was improper and *ultra vires* the constitution.

[74] It is important to note in this regard that it was not only NUMSA who was precluded from debating the terms of reference in consequence of this ruling but also the other parties at the Manco meeting which supported NUMSA's request, but which had not been signatories to the terms discussed at the PNF meeting. In the circumstances, it cannot be said that the terms of reference could have been properly adopted when certain parties were improperly excluded from debate of those terms, assuming that a decision to ratify them actually was purportedly taken.

[75] The applicant sought to address any defects in the procedure for establishing the NPF in part by relying on s 206 of the LRA, but when considered in its totality I do not think that assists it. S 206 states:

*"206 Effect of certain defects and irregularities*

*(1) Despite any provision in this Act or any other law, a defect does not invalidate-*

*(a) the constitution or the registration of any registered trade union, registered employers' organisation or council;*

*(b) any collective agreement or arbitration award that would otherwise be binding in terms of this Act;*

*(c) any act of a council; or*

*(d) any act of the director or a commissioner.*

*(2) A defect referred to in subsection (1) means-*

*(a) a defect in, or omission from, the constitution of any registered trade union, registered employers' organisation or council;*

*(b) a vacancy in the membership of any council;  
or*

- (c) *any irregularity in the appointment or election of-*
- (i) *a representative to a council;*
  - (ii) *an alternate to any representative to a council;*
  - (iii) *a chairperson or any other person presiding over any meeting of a council or a committee of a council; or*
  - (iv) *the director or a commissioner.*

[76] At first glance s 206(1)(c), might appear to be capable of remedying the serious procedural defect in the chairperson's improper reliance of clause 8(12) but its clear from the provisions of s 206(2) that it only applies in a limited set of circumstances which are not relevant here and s 206 cannot overcome the chairperson's improper curtailment of the debate on the terms of reference and the effective denial of rights of participation on the issue to voting members of Manco.

[77] Quite apart from the fact that the improper use of Clause 8(12) had the effect of preventing Manco from properly considering the terms of reference, the minutes of the meeting do not even disclose an unequivocal decision to adopt those terms of reference, but merely reveal a decision that NUMSA's objection to them be noted. The solution to the further amendment of the terms of reference was to defer this to the NPF itself to entertain further submissions on the matter.

[78] NUMSA also contends that in terms of clause 8 (13) of the Constitution of the MEIBC a decision to adopt the terms of reference should have been voted upon by a show of hands and decided by a majority vote and this was not done. The applicant cannot dispute this and s 206 does not assist it because this is not one of the defects which can be overlooked in terms of s 206(2) of the LRA.

[79] What happened thereafter in the PNF does not alter the fact that the PNF's terms of reference cannot said to have been finalised by the Manco meeting on 26 November 2013 nor in any Manco meeting thereafter. Until

such time as they were ratified by Manco, it is difficult to see how the PNF could have been properly constituted as a forum under the MEIBC and accordingly could not function as a bargaining forum for the plastics industry, even if that had been the original intention.

[80] Lastly, although the last provision in the recommendation of 10 September is awkwardly drafted, the reference to 'matters relating to future bargaining arrangements' being 'the product of collective bargaining' cannot simply be treated as superfluous verbiage. The adopted recommendation did not go so far as to state that the PNF would be an exclusive forum for collective bargaining in the plastics sector and it cannot be said that the adoption of the recommendation at the meeting of 10 September 2014 bound the MEIBC to establish the PNF as an exclusive forum.

[81] In the circumstances, I am not satisfied that the applicant has demonstrated with sufficient certainty on the facts that:

81.1 the PNF was properly constituted as an exclusive bargaining forum for the plastics industry falling within the registered scope of the MEIBC, or that

81.2 the MEIBC and the parties to the MEIBC had agreed to establish an exclusive bargaining forum for the plastics industry as envisaged by the applicant.

[82] Consequently, it cannot be said that there exists a properly constituted forum in terms of the MEIBC constitution in which the parties and their members are obliged to negotiate on wages and conditions in the plastics industry falling under the council and in no other forum. Accordingly, nothing precluded the main negotiations from covering the plastics industry within the MEIBC scope and the strike by members of the respondent unions employed by the applicant's members was not unprotected.

### **Order**

[83] The application is heard as a matter of urgency and the applicant's non-compliance with time periods and service in the Rules of the court is condoned.

[84] The application is dismissed with costs.

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**R LAGRANGE, J**

**Judge of the Labour Court of South Africa**

**APPEARANCES**

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LABOUR COURT