REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

J2616/14 & J2339/14

In the matter between:

NATIONAL EMPLOYERS' ASSOCIATION	
OF SOUTH AFRICA (NEASA)	Applicant
and	
METAL AND ENGINEERING INDUSTRIES	
BARGAINING COUNCIL (MEIBC)	First Respondent
GENERAL SECTRETARY OF THE MEIBC	Second Respondent
MINISTER OF LABOUR	Third Respondent
THE PRESIDENT OF THE MEIBC	Fourth Respondent
FURTHER RESPONDENTS	
(Set out in Annexure A)	Fifth and further respondents

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Date heard: 25 September and 14 November 2014

Delivered: 1 December 2014

Summary: Urgent applications to interdict request to the Minister to extend a collective agreement to non-parties in terms of section 32(1) of the LRA; whether section 32(1)(b) of the LRA requires that employers' organisations voting in favour of request must have representatives with voting rights on requisite committee of a bargaining council in terms of its constitution; whether an employers' federation is an employers' organization for the purposes of the LRA, and in terms of section 206 in particular.

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RABKIN-NAICKER J

[1] On the 25 September 2014, under case number J2339, I issued a *rule nisi* calling upon the respondents to show cause why an order in the following terms should not be made final:

"2.1 Interdicting and restraining the first and second respondents from requesting the third respondent to extend the first respondent's Main Collective Agreement to non-parties in terms of section 32 of the Labour Relations Act 66 of 1995 (the LRA), insofar as the request is based on any decision purportedly taken by the first respondent at its management committee meeting on 17 September 2014; and/or the ballot vote of the first respondent's representatives concluded on 24 September 2014;

2.2 Insofar as may be necessary, reviewing and setting aside:

2.2.1 any decision which the first respondent purportedly made, at its Annual General Meeting on 25 March 2014, to appoint a Management Committee;

2.2.2 any decision which the first respondent purported to take at its Management Committee meeting on 15 August 2014 to:

2.2.2.1 ratify and/or adopt the MEIBC Settlement Agreement: 1 July 2014 to 30 June 2017. "as a collective agreement of the Council of the MEIBC" (resolution 1);

2.2.2.2 direct the second respondent to arrange for a vote of the council's representatives by way of ballot (resolution 3);

2.2.3 any decision which the first respondent purported to take at its management committee meeting on 17 September 2014 to:

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2.2.3.1 ask the third respondent to extend the collective main agreement, incorporating provisions of the 29 July 2014 MEIBC settlement Agreement and its annexes to nonparties (Resolution 1);

2.2.3.2 direct the second respondent to take all steps necessary to request the Minister to extend that agreement. (Resolutions 2 and 5)*;"*

[2] The above application for interim relief was argued on NEASA's papers, the Council opposing the issue of urgency alone. Full papers were subsequently filed. On the 24 October 2014, NEASA brought a second urgent application under case number J2616/14 seeking the issuing of a *rule nisi* in the following terms:

"2.1 Interdicting and restraining the first and second respondents from requesting the third respondent to extend the first respondent's Main Collective Agreement to non-parties in terms of section 32 of the Labour Relations Act 66 of 1995 (the LRA), insofar as the request is based on any decision purportedly taken by the first respondent's special management committee meeting on 8 October 2014 and/or the balloted vote of the first respondent's representatives concluded on 14 October 2014;

2.2 insofar as may be necessary, reviewing and setting aside any and all decisions which the first respondent purported to take at that special management committee on 8 October 2014, pertaining to a request to the third respondent to extend the first respondent's Main Collective Agreement to non-parties in terms of section 32 of the LRA;"

[3] NEASA sought the consolidation of the two applications which consolidation was granted by my brother Molahlehi J. Both matters served before me in proceedings on the 14 November 2014, in which NEASA sought a final interdict and/or an order reviewing and setting aside the extension request decision taken at the MANCO meeting on 8 October 2014 and the balloted vote. As far as the first application is concerned, only the issue of costs remain to be decided. This is because before my *ex tempore* judgment was handed down at 16.00h on the 25 September 2014, and without the

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knowledge of the court, the first respondent (MEIBC) delivered the request for extension that was the object of the relief sought in the application, to the Minister. The request was subsequently withdrawn. The Minister has indicated that she abides the decision of the court in both applications.

[4] Matters emanating from the contestation among parties to the MEIBC are by no means new to this court.[1] However, previous matters have focused on the validity of Minister's decision to extend a collective agreement in terms of section 32 (2) of the LRA. What is in issue in this case are the requirements relating to requesting that such a decision be made as provided for in section 32(1) of the LRA.

[5] These applications come in the wake of negotiations regarding changes to conditions of employment within the metal industry, a month-long strike from 1 July 2014 to the 29 July 2014 by NUMSA, and a settlement agreement concluded between the union and 23 employer organisations belonging to the Steel and Engineering Industries Federation of South Africa (SEIFSA). It is this settlement agreement, the Main Collective Agreement, that is sought to be referred to the Minister in terms of section 32(1).

[6] It is necessary to understand the context in which these matters come to court. In **National Employers' Association of SA & others v Minister of Labour & others**[2], NEASA approached this court for a declarator on the validity of the decision of the Minister to extend the Main Collective Agreement to non-parties. My brother Van Niekerk J recorded that:

> "[12] To the extent that the applicants in these proceedings rely on various contraventions of the bargaining council's constitution, a dispute about the interpretation and application of the bargaining council's constitution has been referred to arbitration before an independent arbitrator. These proceedings are scheduled to commence on 10 November 2011. In the statement of case before the arbitrator, the applicant contends that the management committee, the regional councils and the council are all constituted in contravention of

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[1] Van Niekerk J dealt with two such matters in recent years i.e. in National Employers Association of SA & others v Minister of Labour & others (2013) 34 ILJ 1556 (LC) and National Employers' Association of SA & others v Minister of Labour & others (2012) 33 ILJ 929 (LC).

[2] (2012) 33 ILJ 929 (LC)

the applicable provisions of the bargaining council's constitution. Inter alia, the applicant contends that the management committee was not appointed at the last annual general meeting of the council as required, that the persons held out by the council to be members of the management committee have never been validly appointed as such, that the council itself has never been validly constituted, that there is no parity as required in relation to membership by employer and trade union representatives respectively on the management committee. The applicants contend further that the regional councils are improperly constituted and that as a consequence, the council itself is not validly constituted."

[7] The said arbitration proceedings are still ongoing in 2014, and submissions made by NEASA in the first application before me reflect that it remains committed to the allegations in its statement of case as referred to above. In other words, the court is called upon to consider the way in which decisions have just been taken to refer the Main Collective Agreement to the Minister for extension, in a context in which NEASA is contesting the validity of the way in which the MEIBC is constituted, including its regional councils. What needs to be emphasized is that pending the outcome of arbitration and/or mediation proceedings between members of MEIBC, it remains registered under section 29 of the LRA. The effect of such registration is provided for in Section 50(1) and (2) of the LRA *inter alia* as follows:

"50 Effect of registration of council

(1) A certificate of registration is sufficient proof that a registered council is a body corporate.

(2) A council has all the powers, functions and duties that are conferred or imposed on it by or in terms of this Act, and it has jurisdiction to exercise and perform those powers, functions and duties within its registered scope."

[8] In addition, to the protection of a council's jurisdiction while it is registered, a second key provision in the LRA allows a council like MEIBC to continue to function and carry out its duties in a context in which its largest employer party

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is challenging the lawfulness of its structures, i.e. section 206 of the LRA. This provides that:

"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."

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[9] I am in agreement with my brother Van Niekerk J in **National Employers' Association of SA & others v Minister of Labour & others**[3] as to the purpose of this section, when he stated that:

"It seems to me that s 206 was enacted specifically to protect processes against technical shortcomings and deficiencies in the

[3] National Employers' Association of SA & others v Minister of Labour & others (2012) 33 ILJ 929 (LC) at paragraph 20

functioning of bargaining councils. The ordinary grammatical meaning of s 206(1)(b) read with subsection (2)(c) immunizes collective agreements and acts of bargaining councils from attacks on their validity on account of any irregularity in the appointment or election of any representative to a council, or any of its structures. The applicants' attack on the validity of an act of the bargaining council, at least that part of it premised on the failure by the bargaining council to comply with its constitution insofar as appointments to the management committee are concerned, is precisely the kind of attack envisaged by s206. What s 206 means is that even if the council or its management committee were not constituted in accordance with its constitution when it requested the minister to extend the agreement, that defect does not invalidate the request, nor does it affect the validity of the agreement."

[10] I would add that the provision is reflective of the ILO's Convention on Collective Bargaining[4], particularly its Article 5 which provides *inter alia* that collective bargaining should not be hampered by the absence of rules governing agreed procedures between workers and employers' organisations or by the inadequacy or inappropriateness of such rules.[5] Taking all of the above into account, NEASA'S submission that the collective agreement sought to be extended was not one envisaged by section 32(1) of the LRA, in the sense that it was not "concluded in the bargaining council" (i.e. in accordance with the constitution of the bargaining council), is without merit. In fact, on NEASA'S approach, every function that MEIBC continues to carry out could be subject to a similar challenge, with the springboard for this proposition being the position it is taking at arbitration proceedings on the interpretation and application of the MEIBC Constitution, as set out above.

[11] It was submitted on behalf of NEASA that the most fundamental issue raised in the second application was whether at a meeting of the MANCO on the 8 October 2014, it was legally permissible for employers' organisations who do not have representatives on the MANCO (or on the council) to vote in favour

[4] No 154 of 1981

[5] Article 5 (c) and (d)

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of the request for an extension of the collective agreement. It argued that it is a fundamental safeguard contained in the constitution of MEIBC that not all parties to the council are accorded representatives' seats on the council or MANCO. Further, that there is no requirement in section 32, or the LRA as a whole, that all parties to a bargaining council must be afforded the right to vote on a council decision to request the Minister to extend a collective agreement in terms of section 32(1).

[12] Section 32(1) of the LRA reads as follows:

"32 Extension of collective agreement concluded in bargaining council

(1) A bargaining council may ask the Minister in writing to extend a collective agreement concluded in the bargaining council to any non-parties to the collective agreement that are within its registered scope and are identified in the request, if at a meeting of the bargaining council-

(a) one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favour of the extension; and

(b) one or more registered employers' organisations, whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension."

[13] We are asked therefore to read section 32(1) (b) as qualifying the words 'registered employers organisations' to mean "registered employers' organisations *with a voting right on the council in terms of that council's constitution"* . Reliance was placed on the approach to interpretation of statutes pronounced upon by Wallis JA in **Natal Joint Municipal Pension Fund v Endumeni Municipality.**[6] In that judgment, he stated that:

"[18] The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the

[6] 2012 (4) SA 593 (SCA)

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particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document" (emphasis mine).

[14] It was submitted by Mr. Freund on behalf of NEASA that there is nothing in section 32(1) that expressly (or by necessary implication): (a) overrides the decision-making processes that have been agreed upon by the parties to the council; or (b) provides that a council's constitution governs how certain decisions are made, but not others (i.e. that in the case of a section 32 request decision, the constitution can be completely ignored). This reading was premised on the principle of 'voluntarism' in collective bargaining, which is a foundational principle of the LRA. In my view, there is nothing ambiguous in the provision, where more than one meaning is possible. It sets out the jurisdictional facts that must be met before a request for an extension is submitted to the Minister. As Mr. Cassim for MEIBC argued, these are the following:

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14.1 There must be a collective agreement concluded in the bargaining council;

14.2 A meeting of the bargaining council must be held (at which):

14.3 one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favour of the extension; and one or more registered employers' organisations, whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension.

[15] I have found that NEASA's contentions that the Main Collective Agreement was not 'concluded in a bargaining council' to be without merit based on my reading of section 206, and the effect of registration of a bargaining council as set out above. On the same basis, the contention that the meeting of the 8 October 2014 did not amount to a meeting of the bargaining council cannot be sustained. In as far as the requirements of section 32(1) (b) are concerned, NEASA's approach to its interpretation would in effect mean that an agreement between parties to a bargaining council would only have the status of a collective agreement that can be extended, if those parties had representatives with the right to vote on the requisite committees established by the bargaining council's constitution. This would mean that the LRA envisages a hierarchy of collective agreements, only some of which may be extended to non-parties. I find no indication that the LRA intends such a distinction. It defines a collective agreement as follows:

"'collective agreement' means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-

(a) one or more employers;

(b) one or more registered employers' organisations; or

(c) one or more employers and one or more registered employers' organisations;"

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[16] The sensible meaning to be accorded to section 32(1) is that a collective agreement as defined in the LRA may be extended to non-parties subject to the jurisdictional pre-requisites set out in that section. In contrast, NEASA's approach to the interpretation of section 32(1)(b) would lead to 'insensible' results i.e. that while parties to a bargaining council are in dispute as to the interpretation and application of its constitution, the right of parties to the council to refer a request to the Minister in terms of section 32(1) may not be enforced, on the basis of a particular party's interpretation of the constitution. The effect of this would be to de-rail the functions of the council, albeit that it is registered, with the status that such registration endows. The impact of this on orderly collective bargaining, with a bias towards bargaining at sectoral level[7], which is one of the objectives of the LRA, would be detrimental to say the least.

[17] I have thus found that it is legally permissible for employers' organisations to vote at a meeting of the bargaining council for a referral in terms of section 32(1) even if they do not have representatives with a vote on a MANCO or similar structure. It has been conceded on behalf of NEASA that if the votes purportedly cast by the CEO of SEIFSA on behalf its affiliates who were not present at the meeting were valid, NEASA would <u>not</u> have succeeded in showing that the required majority was not obtained.

[18] A further submission on behalf of NEASA in the second application was the argument that the method by which SEIFSA represented its affiliates at the meeting on 8 October 2014 was irregular, including the use of voting by proxy in the ballot vote. Fuelling this assertion was the notion that under the 1995 LRA, SEISFA *qua* federation could not be considered to be an employers' organization *inter alia* in the sense that section 206 would not be applicable to its procedures. The LRA protects employers' rights *inter alia* "to participate in

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[7] As the Constitutional Court held in NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA AND OTHERS v BADER BOP (PTY) LTD AND ANOTHER 2003 (3) SA 513 (CC) per O'REGAN J: "The first purpose of the Act is thus to give effect to constitutional rights. Secondly, the Act also makes clear that it is intended to give legislative effect to international treaty obligations arising from the ratification of International Labour Organisation (ILO) conventions. South Africa's international obligations are thus of great importance to the interpretation of the Act. Thirdly, the Act seeks to provide a framework whereby both employers and employees and their organisations can participate in collective bargaining and the formulation of industrial policy. Finally, the Act seeks to promote orderly collective bargaining with an emphasis on bargaining at sectoral level, employee participation in decisions in the workplace, and the effective resolution of labour disputes.

forming an employers' organisation or a federation of employers' organisations;"[8] and defines an 'employers' organisation' as meaning "any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and employees or trade unions;" (emphasis mine).[9] The fact that certain groups of employers' organisations elect to associate together by means of registering a federation does not affect the essential nature of such a federation as a group of employers' organisations. Although decided under the 1956 LRA, the judgment in **Steel and Engineering and Engineering Industries Federation and Others v NUMSA**[10] by a full bench per Myburgh J, should still act as an important guide in this respect. The court in deciding as to whether SEIFSA had legal standing had this to say:

> "SEIFSA is an employers' organisation which represents its members in collective bargaining with NUMSA. When that collective bargaining has failed to resolve a dispute between the parties, in this case a wage dispute, and the trade union resorts to industrial action to compel the employers, members of the associations which are members of SEIFSA, to accede to their demands, SEIFSA has a direct, actual or present interest in the legality of that industrial action. SEIFSA is not 'a mere busybody who is interfering with things which do not concern him' (Attorney-General of the Gambia v N'Jie [1961] 2 All ER 504 (PC) at 511). Central to the relief sought by SEIFSA and the associations, whether of an interim or final nature, is the issue whether the strike is illegal. They have an interest in the resolution of that issue. SEIFSA has a right to approach the Court to declare that a strike called by NUMSA is illegal. NUMSA would have locus standi to approach the Court to declare that a lock-out instituted by SEIFSA's members was illegal. Similarly, the associations which are employers' organisations, members of SEIFSA, who are parties to the main agreement, have a

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[8] Section 6 of the LRA

[9] Section 213 of the LRA

[10] (1) 1993 (4) SA 190 (T)

legal interest, which is not hypothetical or academic, in the question whether the strike is legal.

SEIFSA, the associations and, I may add, NUMSA, all have a direct and substantial interest in the process of collective bargaining and dispute resolution. It is a collective interest which vests in them independently of their members' interests." (emphasis mine)

[19] Indeed SEIFSA signed the Main Collective Agreement sought to be extended on behalf of its affiliates. In my judgment SEIFSA must be a bearer of the protection afforded by section 206 of the LRA, read with the relevant ILO Conventions. The attack on its role in the October 8 meeting and the ballots garnered from its members must fail.

[20] In all the circumstances, the interdictory relief sought by the applicant stands to be dismissed as well as the alternative claim for review. Both the applicant and the MEIBC sought costs against each other. In the sincere hope that the parties to the MEIBC find each other for the good of all those involved in the sector, I am not going to make a cost order in respect of either application.

[21] In respect of the application under case number J2339/14 only costs stood to be decided. I make the following order:

Order:

1. There is no order as to costs.

[22] In respect of the application under case number J2616/14 I make the following order:

1. The application is dismissed.
2. There is no order as to costs.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

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Appearances:

Applicant: A.J Freund SC with G.A Leslie instructed by Anton Bakker Inc

First Respondent: N. Cassim SC with F. Boda SC and R. Itzkin instructed by Patelia-Kachalia Inc

Thirty Seventh Respondent (NUMSA): Xolisa Ngako of Ruth Edmonds Attorneys

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