REPUBLIC OF SOUTH AFRICA

Reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2282/16

In the matter between:

PLASTICS CONVERTERS ASSOCIATION OF SOUTH AFRICA	First applicant
NATIONAL EMPLOYERS' ASSOCIATION OF SOUTH AFRICA (NEASA)	Second applicant
and	
MEIBC	First respondent
GENERAL SECRETARY OF THE MEIBC N.O.	Second respondent
MINISTER OF LABOUR	Third respondent
NUMSA	Fourth respondent

Heard: 7 March 2017

Delivered: 10 March 2017

LABOUR COURT

SUMMARY: Application to review and set aside decision by Bargaining Council to request Minister to extend collective agreement to non-parties. LRA ss 32 and 158(1)(g).

JUDGMENT

STEENKAMP J

Introduction

[1] This dispute – one of many to seek the attention of this Court involving the same parties – has its genesis in a hostile history between the second applicant, NEASA, and the employers' federation, SEIFSA[1], even though SEIFSA is not a party to this round of litigation.

[2] NEASA (the National Employers' Association of South Africa) is an employers' organisation that represents a number of smaller employers in the metal and engineering industry. It says it is the largest single employers' organisation in the Metal and Engineering Industries Bargaining (MEIBC), the first respondent. (NUMSA disputes this, but has no evidence to the contrary). Most of the big employers are affiliated to regional employers' organisations that are, in turn, members of a federation known as SEIFSA. (SEIFSA is not, on its own an employers' organisation and is not eligible to vote at Council meetings). The first applicant, PCASA, is also an employers' organisation. It is aligned with NEASA.

[3] Employers and representative trade unions in the metal and engineering industry bargain collectively and strike agreements in the MEIBC. Trade unions and employers' organisations have equal voting rights in the Council. The Council concludes and enforces collective agreements in terms of s 28 of the LRA.

[4] The Council took a decision, purportedly in terms of s 32(1) of the LRA, to request the Minister of Labour (the third respondent) to extend a

[1] The Steel and Engineering Industries Federation of South Africa.

LABOUR COURT

Registration and Administration Expenses Collective Agreement (known as "the admin agreement") to non-parties. The applicants say that decision is reviewable, either in terms of s 158(1)(g) of the LRA[2], or under PAJA[3], or on the grounds of legality. It wants the Court to set the decision aside. The Bargaining Council and the National Union of Metalworkers of South Africa (NUMSA, the fourth respondent) oppose the application.

Background facts

[5] In December 2015 the parties to the MEIBC – including NEASA – signed the admin agreement. A number of parties to the Council want to have the agreement extended to non-parties. That is something that only the Minister can do, after a request by the Council. NEASA and some other parties to the Council, such as PCASA, do not want it to be extended. PCASA is a party to the Council, but not to the admin agreement. Non-parties benefit from some of the outcomes of collective bargaining, but many of them don't want agreements extended to them and they do not pay Council levies.

[6] On 29 June 2016 the Management Committee (Mancom) of the Council resolved, in principle, to request the Minister to extend the admin agreement to non-parties. The decision to so could only be done in a general meeting. A number of parties to the Council who do not have seats on Council meetings adopted resolutions before the Mancom meeting in the following terms:

> "SEIFSA is duly authorised and mandated to vote at the Special MEIBC Management Committee Meeting and at any subsequent Meeting [*sic*] that may be scheduled by the MEIBC, on behalf of the Association, in favour of the extension to non-parties of the Registration and Administrative Expenses Collective Agreement."

[7] It should be noted that SEIFSA cannot vote at any Council meeting. Only its constituent members who are parties to the Council can. In any event, a General Meeting was called on 26 July 2016. It was not quorate. It was

[2] Labour Relations Act 66 of 1995.

[3] Promotion of Administrative Justice Act 3 of 2000.

LABOUR COURT

postponed. Despite short notice, a Special General Meeting was held on 28 July 2016. That is the contentious meeting giving rise to this application.

[8] Those present at the meeting were asked to vote in favour of the extension of the admin agreement. The applicants were not present. Section 32(1) of the LRA reads:

> "**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.
>
> (2) Within 60 days of receiving the request, the Minister must extend the collective agreement, as requested, by publishing a notice in the Government Gazette declaring that, from a specified date and for a specified period, the collective agreement will be binding on the non-parties specified in the notice."

[9] The trade unions party to the Council voted in favour of the extension. That is uncontentious. But only two employers' organisations[4] voted through their representatives at the meeting, and another two[5] exercised their votes by proxy. Between them, the employees employed by those four employer organisations represent, at best, 36% of the employees

[4] The South African Engineers and Founders Association (SAEFA) and the Light Engineering Industries Association of South Africa (LEIA).

[5] Cape Engineers and Founders (CEFA) and KwaZulu-Natal Engineering Industries Association (KZNEIA).

LABOUR COURT

employed by the members of the employers' organisations that are party to the bargaining council as envisaged by s 32(1)(b).

[10] The Bargaining Council and NUMSA say that the matter does not end there. They say that Mr Lucio Trentini, the LEIA representative, presented or submitted a further 19 resolutions in favour of extension – apparently in the form quoted above. According to NUMSA, he "left them on the table" in the meeting. There is no record in either the minute of the meeting or the verbatim transcript of the proceedings of those resolutions being discussed. Whether such resolutions, if they were submitted, constitute a "vote" or votes in terms of s 32(1)(b) remains to be considered.

[11] On 30 August 2016 the Council requested the Minister to extend the admin agreement to non-parties for a period of 12 months. The Minister published a notice in the Government Gazette on 7 October 2016, inviting representations from interested parties in terms of s 32(5)(c) of the LRA. On 28 October the applicants launched this review application.

[12] The applicants launched an urgent application on 5 January 2017. They asked that the hearing of the review application be brought forward; and that the Minister be interdicted from extending the agreement, pending this review application. At that stage NUMSA had not delivered an answering affidavit in this review application. The urgent application served before Rabkin-Naicker J on 9 January 2017. She postponed it until 24 January and issued an order in terms of which the Minister would not, in the interim, extend the agreement. NUMSA subsequently delivered its answering affidavit. The urgent application then served before Prinsloo J on 24 January. After meeting the legal representatives of the parties in chambers, she issued a further order that the review application would be heard on 10 February; setting out dates for the filing of further affidavits; and ordering the Minister not to take any decision on extension pending the finalisation of the review application. NUMSA applied for leave to appeal that order, and brought an application for Prinsloo J to recuse herself. She dismissed both applications. NUMSA petitioned the LAC. That petition is still pending.

LABOUR COURT

[13] The review application came before me on 7 March 2017. All parties – the applicants, the Bargaining Council, the Minister and NUMSA – had filed answering and replying affidavits in the review application, as well as heads of argument. But before dealing with the merits of the review application, one issue remains. NUMSA delivered its answering affidavit in the review application out of time. It seeks condonation. The applicants oppose it.

Condonation for late filing of NUMSA's answering affidavit

[14] I shall, firstly, consider the application for condonation at the hand of the well-known principles in *Melane v Santam Insurance Co Ltd.*[6]

Degree of lateness

[15] NUMSA only filed its answering affidavit on 31 January 2017, after the urgent application had been heard and about two and a half months late. It is an excessive delay.

Reason for delay

[16] NUMSA says that "initially it was difficult to establish all the facts relating to this matter", despite the fact that it was present and voting at the 28 July meeting. Also, Solidarity had applied to appoint a curator for the Council and this application "raises related issues".

Importance of the matter

[17] NUMSA simply states that "this is an important matter" because it is a key component of the MEIBC.

Prejudice

[18] NUMSA correctly states that there will be no prejudice to allow its answering affidavit as all the parties are before Court, the pleadings have closed and the applicants have replied.

[6] 1962 (4) SA 531 (A).

LABOUR COURT

Prospects of success

[19] I deal with the merits – i.e. the prospects of success – below.

Conclusion : condonation

[20] The answering affidavit was filed excessively late. The explanation is a poor one. Yet I think it is in the interests of justice that NUMSA be heard. It is the only party that has attempted to put a full picture of its version of events, and the counter arguments to the application, before court. There is no prejudice to the applicants. They have considered the answering affidavit and replied thereto. All the parties have filed heads of argument and were given the opportunity to address the Court fully in legal argument. Having said that, the union's lackadaisical approach and this Court's condonation in this case should not be seen as *carte blanche* to behave with the same disregard for the Court's rules in future or as a precedent for being granted condonation.

The impugned decision

[21] The decision to be reviewed is not the Minister's decision to extend the collective agreement. That has not happened. The applicants seek to review the decision of the MEIBC taken at the special general meeting on 28 July 2016 to *request* the Minister to extend the admin agreement. The distinction is important, not least in addressing the questions of ripeness and the nature and method of the decision itself.

Review grounds and evaluation

[22] The applicants say, in short, that the jurisdictional facts required by s 32(1)(b) were not present. The employer organisations that voted in favour of the request for extension did not employ the majority of the employees employed by members of employer parties to the Council.

[23] NUMSA – and to some extent, the Council – raises the following defences:

23.1 The application is premature ("ripeness");

LABOUR COURT

23.2 The decision of the Bargaining Council does not constitute administrative action;

23.3 The application must in any event fail on the merits; and

23.4 If the Court should find that the decision is reviewable, it should in any event not exercise its discretion to set it aside.

Ripeness

[24] Both the Minister and NUMSA argue that the application is premature. The premise of that argument appears to be that the Minister has not yet extended the agreement. But the impugned decision is that of the Bargaining Council, not the Minister. And the Council's decision is complete. Should that decision be reviewable, now is the time to review it. It would lead to far greater costs and uncertainty to wait for the Minister to extend the agreement, and then to seek to review the Minister's decision once it has already taken effect and fees are already levied from non-parties.

[25] Prof Cora Hoexter describes the doctrine of ripeness as follows:

> "The idea behind the requirement of ripeness is that a complainant should not go to court before the offending action or decision is final, or at least ripe for adjudication. The doctrine of ripeness holds that there is no point in wasting the court's time with half-formed decisions whose shape may yet change, or indeed decisions that have not yet been made."

[26] In this case, the Council's decision has been made. That is the decision that the applicants seek to review. It is ripe for hearing.

Administrative action?

[27] Both NUMSA and the Council concede that this application can be brought in terms of s 158(1)(g) of the LRA. That subsection empowers this Court to review the performance of any function provided for in the LRA on any grounds that are permissible in law. It is therefore of lesser importance to decide whether the Council's decision to request the Minister to extend the admin agreement to non-parties constitutes administrative action that is reviewable under PAJA or on the principle of legality.

LABOUR COURT

[28] As Watt-Pringle AJ stated in *NEASA v Minister of Labour:*[7]

> "An interesting debate as to whether PAJA applies to the Minister's decision need not be resolved. A decision which is not competent in terms of the empowering statute is clearly reviewable under 158 (1) (g) of the LRA, which empowers this Court to review the performance or purported performance of any function provided for in the LRA on any grounds that are permissible in law."

[29] In any event, though, the decision is almost certainly reviewable for reasonableness or rationality under PAJA; and overall, it is constrained by the Constitutional principle of legality. As Murphy J reasoned in *Free Market Foundation:*[8]

> 'As regards the possibly deliberative or quasi-legislative nature of a bargaining council resolution, there is no textual basis supporting a finding that such is not a decision as defined, or is excluded from the definition of administrative action. There is, though, perhaps an argument that it is not one of "an administrative nature". Laws made by administrative functionaries exercising delegated powers might possibly be classified as administrative, but laws made by original legislative bodies can seldom be so described. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* the Constitutional Court held that legislative bodies exercising original, deliberative law making powers are not engaged in administrative action. The negotiation of a collective agreement coupled with a request to the Minister to promulgate it, however, might be regarded, like the making of regulations, not as original legislation but as delegated rulemaking. Under section 32 of the LRA it is ultimately the Minister who legislates by the act of promulgation; and the preceding request to the Minister by the bargaining council is strictly speaking not legislative in nature because that action does not result in law-making. The bargaining council request might thus better be seen as an antecedent administrative part of a delegated law-making process. In *Minister of Health v New Clicks SA (Pty) Ltd and others* Chaskalson CJ held that the making of regulations fell within the scope of administrative action. This was not however the view of the majority of the court and there remains uncertainty

[7] [2014] ZALCJHB 524 (12 December 2014) par [4].

[8] *Free Market Foundation v Minister of Labour* (2016) 37 *ILJ* 1638 (GP); 2016 (4) SA 496 (GP); [2016] 8 BLLR 805 (LC) par [80] – [81].

LABOUR COURT

about whether the making of regulations by a functionary will always be administrative action.

From the foregoing discussion it is evident that any determination of whether a bargaining council resolution is administrative action in terms of PAJA will depend in the final analysis on the peculiar facts. I incline to agree with COSATU, NUMSA, the Minister and the bargaining councils that PAJA ordinarily will apply and thus that the decision of the bargaining council will be subject to PAJA review. … If the decision is administrative action then it will be reviewable on grounds of reasonableness (at least rationality), legality and due process. If, on the other hand, the bargaining council resolution is not administrative action under PAJA, it still will be subject to rationality and legality review under the rule of law provision in section 1 of the Constitution."

[30] This view is bolstered by that of the SCA in *Motor Industry Staff Association v Macun N.O.*[9]:

'In adjudicating any matter properly within its province the Labour Court would, in any event, be astute to ensure that its decision was one that complied with the principle of legality, which is all-embracing and which permeates our entire constitutional scheme.

…

Section 32 of the LRA is located in Part C of Chapter 3, which deals with collective bargaining. It sets certain preconditions for the extension of a collective agreement concluded in a bargaining council. The question whether there has been compliance with the provisions of s 32 of the LRA is one that pre-eminently arises out of the LRA.

…

The provisions of s 158(1)(g) on their own are not decisive. In the present case the question that should rightly be asked is whether the basis of the challenge to the decision to extend the collective agreement is one that arises out of the LRA. The obvious answer is that it does."

[9] (2016) 37 *ILJ* 625 (SCA); [2016] 3 BLLR 284 (SCA); 2016 (5) 76 (SCA) par [21] – [23].

LABOUR COURT

The legal framework : s 32(1)(b)

[31] Section 32 stipulates a number of jurisdictional facts before the Council may ask the Minister to extend a collective agreement to non-parties. In this case, the one in s 32(1)(a) – that, at a meeting of the Council, one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the Council voted in favour of the extension – is met. But the applicants contend that the Council did not comply with s 32(1)(b).

[32] Section 32(1)(b) requires that, at a meeting of the Council, 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.

[33] Although the section itself is quite clear, insofar as it needs any further authority, Mr *Redding* referred to the following description of the prescribed process by a full bench of the High Court:[10]

> "Section 32(1) of the LRA stipulates a number of legal prerequisites to the bargaining council's action. The collective agreement in question must be concluded in the bargaining council. The decision to ask the Minister to extend it to non-parties must be by way of a resolution taken at a bargaining council meeting. The resolution must be supported by one or more trade unions whose members constitute the majority of members of all the trade union parties to the council. Likewise, the resolution must be supported by one or more employer's organisations which employ the majority of employees employed by the employer organisation members who are party to the council. The request to the Minister must be in writing. The non-parties sought to be bound must be identified in the written request to the Minister and they must fall within the registered scope of the council."

[34] If these jurisdictional facts are not present, the Council cannot validly ask the Minister to extend a collective agreement. As Watt-Pringle AJ held in a matter involving the same applicants in this Court:[11]

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[10] *Free Market Foundation v Minister of Labour* (2016) 37 *ILJ* 1638 (GP); 2016 (4) SA 496 (GP); [2016] 8 BLLR 805 (LC) par [19] [per Murphy, Matojane and Basson JJ].

LABOUR COURT

> "Without a valid collective agreement … and without a valid decision to request the extension, the Minister is simply in no position to consider the merits of the submission purportedly made in terms of section 32."

[35] Similarly, Van Niekerk J has held[12]:

> "Section 32 (1) of the LRA provides that a bargaining council may ask the minister, in writing, to extend a collective agreement concluded in the council to any non-parties to the agreement that are in the council's registered scope and are identified in the request. The request must be preceded by a meeting of the bargaining council at which one or more registered trade unions whose members constitute the majority of the members of the members of the trade unions that are party to the council vote in favour of the extension, and one or more employers' associations, whose members employ the majority of the employees employed by members of the employers' organisations that are party to the council, vote in favour of the extension."

[36] And the LAC[13] has confirmed that:

> "It is clear from section 32 that the Minister does not have a wide discretion concerning the extension of collective agreements concluded in bargaining councils. If the requirements stipulated in that section have been complied with, the Minister, effectively, has to act upon the request for the extension of the agreement. Section 32(2) of the LRA provides that within 60 days of receiving the request, the Minister "must" extend the collective agreement if the requirements stipulated in sub-section (3) have been met."

[37] The Council can only validly request an extension of a collective agreement if the legal requirements of s 32 are met. Did this happen in this case? It appears not.

The Council's constitution

[38] The Council's constitution specifies that its members are registered employers' organisations and registered trade unions. Those members are listed. SEIFSA is not a member. One half of the representatives to the

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[11] *NEASA v Minister of Labour* [2014} ZALCJHB 524 (12 December 2014) par [3].

[12] *NEASA v Minister of Labour* [2012] 2 BLLR 198 (LC); (2012) 33 *ILJ* 929 (LC) par [14].

[13] *AMCU v Chamber of Mines of South Africa* (2016) 37 *ILJ* 1333 (LAC); [2016] 9 BLLR 872 (LAC) par [121] (my underlining).

LABOUR COURT

Council are elected by employers' organisations and the other half by trade unions. If any representative is absent from any meeting and is not represented by its alternate, the voting power of employers or employees, as the case may be, must be reduced as necessary to preserve equality of voting power. And, as the Council points out in its heads of argument, it may not perform any act other than in accordance with its constitution.[14] A decision of a bargaining council that does not comply with its constitution is a nullity.[15]

Events of 28 July 2016

[39] At the meeting of 28 July 2016, only two employers' organisations voted in favour of extension at the meeting, and a further two by proxy. Together, they represented no more than 36% of the employees employed by members of the employers' organisations that are party to the council. They did not meet the majoritarian requirement stipulated by s 32(1)(b).

[40] Even if the 19 resolutions purportedly left on the table were to be taken into account – dubious as it is, since it is clear from the verbatim of the transcript that these resolutions were never discussed – that does not constitute a "vote" "at a meeting" of the Council. The organisations who adopted resolutions did not, on the evidence before me, and especially not having regard to the transcript or the minute of the special general meeting, either vote at the meeting or provide any of those present with a proxy to do so. At best, they had resolved in June 2016 to authorise SEIFSA to vote at the Mancom meeting "and at any subsequent meeting"; but SEIFSA is neither a party to the Council, nor does it have a seat or carry a vote at Council meetings. And Mr Trentini attended the meeting as a representative of LEIA, not of SEIFSA – an entity that cannot confer proxies in any event, as it is not entitled to vote. (That much is admitted by the MEIBC in its answering affidavit).

LABOUR COURT

[14] *University of the North v Franks* [2002] 8 BLLR 701 (LAC) par [35].

[15] *SALGA v IMATU* [2014] 6 BLLR 569 (LAC) paras [30]-[31].

[41] This Court found in *NEASA v MEIBC*[16] that an employer's organisation may exercise a vote by proxy at a Council meeting. Mr *Redding* invited the Court to hold that that judgment is clearly wrong; but I need express no such opinion. Even if the two proxy votes exercised by CEFA and KNEIA at the 28 July 2016 meeting are taken into account, the jurisdictional prerequisite of a majority as stipulated in s 32(1)(b) is not met. That judgment does not hold that submitting "resolutions" in the way that the Council and NUMSA allege Mr Trentini did, would constitute a valid vote or votes.

Conclusion: the award is reviewable

[42] It is clear from this discussion that the decision of the Council on 28 July 2016 did not meet the jurisdictional prerequisites stipulated by s 32(1)(b) of the LRA. It is reviewable in terms of s 158(1)(g) of the LRA; whether it is also reviewable under PAJA and under the Constitutional principle of legality, becomes moot.

Relief

[43] Mr *Van der Riet* urged the Court, even if it should find that the decision is reviewable, not to set it aside. That is because the Court has a discretion whether or not to set a decision aside, even if a defect has been shown to exist.

[44] But this is not a situation such as that in *Oudekraal*,[17] or in a case where a SASSA tender has already been awarded and payments are being made[18]. The egg that would otherwise need to be unscrambled is still intact. The Minister has not yet extended the agreement. The time to set it aside is now: in that way, no further steps can be taken that may be costly and administratively burdensome to undo at a later stage.

LABOUR COURT

[16] [2015] 2 BLLR 157 (LC); (2015) 36 *ILJ* 732 (LC) [per Rabkin-Naicker J].

[17] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA).

[18] Cf *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO, South African Social Security Agency* 2014 (4) SA 1179 (CC).

[45] Mr *Van der Riet* quoted in support of his argument *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd*[19], where the SCA held that the award of certain tenders was unlawful, yet decided not to set it aside since most of the work had already been done and that it would be disruptive and impractical to start the whole process all over again. This is not such a case. On the contrary, it would be disruptive and impractical to allow the decision to stand, only for the Minister to extend the agreement and for that action to be subject to judicial review.

Costs

[46] Mr *Redding* argued that costs should follow the result. I agree with him that there was little need for the Minister to brief counsel to appear in these proceedings. Nevertheless, there is an ongoing relationship between all the parties to this litigation. There will be ongoing negotiations between them. A costs order at this stage may have a chilling effect on an already fraught relationship. I do not consider a costs award to be appropriate, taking into account both law and fairness.

Order

The decision of the MEIBC (the first respondent) to request the Minister of Labour (the third respondent) to extend the Registration and Administration Expenses Collective Agreement to non-parties, submitted to the Minister on 30 August 2016, is reviewed and set aside.

LABOUR COURT

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Anton Steenkamp

Judge of the Labour Court of South Africa

[19] 2008 (2) SA 638 (SCA).

APPEARANCES

APPLICANTS:	Andrew Redding SC
Instructed by	Anton Bakker.
FIRST AND SECOND RESPONDENTS:	K P Nchaupe (MEIBC official).
THIRD RESPONDENT (MINISTER):	S B Nhlapo
Instructed by	The State Attorney.
FOURTH RESPONDENT (NUMSA):	Hans van der Riet SC
	(with him Mmakgomo Maenetje)
Instructed by	Haffegee Roskam Savage.

LABOUR COURT