



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA112/14

In the matter between:

PLASTIC CONVERTERS ASSOCIATION

OF SOUTH AFRICA (PCASA) obo MEMBERS

Appellant

and

NATIONAL UNION OF METALWORKERS

UNION OF SOUTH AFRICA

First Respondent

METAL AND ELECTRICAL WORKERS

OF SOUTH AFRICA

Second Respondent

CHEMICAL ENERGY PAPER PRINTING

WOOD & ALLIED WORKERS UNION OF

SOUTH AFRICA (CEPPWAWU)

Third Respondent

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL

Fourth Respondent

Heard: 10 March 2016

Delivered: 06 July 2016

Summary: Membership of an employer's organisation to a bargaining council – union contending that employer's organisation not admitted as a

member of the bargaining council and consequently does not have *locus standi* to bring an application to declare strike unprotected and associated relief – employer’s organisation contending that a negotiation forum for the plastic sector (PNF) falling within the bargaining council (MEIBC) has been established—contending that the PNF is an exclusive forum for collective bargaining for the plastic sector within MEIBC..

On the issue of membership Court finding that the overwhelming evidence showed that employer’s organisation was admitted as a member and Secretary General of bargaining council confirming approval and congratulating it – employer’s organisation invited as observer at various meetings of the bargaining council pending determination and allocation of seats. Labour Court’s finding that employer’s organisation not properly admitted as a member of the bargaining council unsustainable.

Regarding the PNF as the exclusive forum for collective bargaining for the plastic industry within the MEIBC, Court finding that the MANCO of MEIBC had duly adopted the terms of reference to the effect that the PNF was the sole forum to engage in respect of any matter related to the plastic sector – that the adoption shall stand until rescinded or set aside in court – Labour Court erring in finding otherwise. Appeal upheld with costs.

Coram: Tlaletsi DJP, Davis et Musi JJA

JUDGMENT

TLALETSI DJP

[1] This is an appeal against the whole judgment and order of the Labour Court (per Lagrange J) in which it dismissed an urgent application brought by the appellant against the respondents for interdictory and declaratory relief. What triggered the dispute was the strike action embarked upon by employees in the broader metal and engineering industry within the Metal and Engineering Industries Bargaining Council (MEIBC). The core issue for determination was the status of that strike action in relation to employers in the plastic industry, including the appellant’s members. The appellant held the view that the

aforesaid strike action was unprotected *vis-à-vis* such employees because bargaining in that sector was required to take place in the newly established Plastics Negotiating Forum ('the PNF'). The first respondent, however, contended to the contrary. The application in the court *a quo* was opposed by the first and second respondents. The fourth respondent elected to abide by the decision of the court. However, an affidavit was filed on its behalf by its General Secretary with a view to clarify certain matters addressed in the affidavit. The appeal is opposed by the first respondent only.

- [2] Most of the facts that led to the dispute are largely common cause or not disputed. The first to third respondents are trade unions duly registered in terms of s95 of the Labour Relations Act¹ ("the Act"). The fourth respondent is the MEIBC, which is duly registered in terms of s29 of the Act. Its registered scope is in respect of a number of industries, that includes the iron, steel, engineering and metallurgical industries, the electrical engineering industry, the lift escalator industry and the plastics industry. The unions referred to above are members of the MEIBC.
- [3] The appellant is an employer's organisation² representing employers who operate in the plastic industry within the registered scope of the MEIBC. It is not disputed that for years, the appellant was not satisfied with the bargaining arrangement within the MEIBC that affected it and its employees. Its preference was for the appellant and its employees not to be bungled up with other industries for bargaining purposes, but to have a separate negotiating chamber within the MEIBC solely for the plastic industry. It is fair to say that the appellant envied the existing arrangement relating to the lift and escalator industry, which though falling under the MEIBC, had a separate negotiating chamber where collective agreements governing the terms and conditions of employment for employers and employees in that industry were negotiated and concluded.
- [4] During June 2008, the parties to the MEIBC concluded a collective agreement in terms of which it was *inter alia* agreed, that the parties confirm their in –

¹ Labour Relations Act 66 of 1995.

² Established under Chapter 11 of the Act.

principle commitment to the establishment of a Plastic Chamber under the auspices of the MEIBC and that the parties will further agree on the modalities for the process and timeframe to complete the establishment of the said Plastic Chamber. However, according to the appellant, insufficient efforts were being made to establish the aforesaid separate chamber by other parties to the collective agreement. In protest, the appellant terminated its membership of the MEIBC with effect from 1 February 2011.

- [5] Following the departure of the appellant from the MEIBC, the Registrar of Labour Relations published a notice in the Government Gazette notifying interested parties that he was commencing a process of varying the registered scope of the MEIBC. The main reason for such a process was that the Registrar had formed a *prima facie* view that the MEIBC was “*no longer representative of the Plastic Industry in South Africa*”. In due course, before making a final decision on his intention to vary the registered scope of the MEIBC, the Registrar initiated a facilitation process aimed at reaching an agreement between the appellant and the first respondent (NUMSA), which appeared to be opposed to the establishment of a separate chamber for the plastic Industry.
- [6] On 23 May 2012, NEDLAC³ also gave its input, by expressing *inter alia*, that a negotiated settlement should be further pursued. It further observed that it was apparent that there was a mutual desire by those concerned to establish a separate chamber under the auspices of the MEIBC and “*such a Chamber should establish a separate wage schedule for the sub-sector and commence negotiation on the content of such a schedule in order to accommodate the particular economic conditions facing employers and employees in the sub-sector*”. NEDLAC recommended that the MEIBC be encouraged to give effect to the agreement concluded by the parties to establish a separate chamber for the plastic industry at its earliest convenience.
- [7] It is common cause that a mediation process involving the parties to the MEIBC ensued. Such process culminated in the parties, on 16 August 2013,

³ National Economic Development and Labour Council established by s2 of the National Development and Labour Council Act 35 of 1994.

recording a unanimous written recommendation that was to be tabled at the MEIBC's MANCO⁴ meeting on 10 September 2013. The recommendation was couched in the following terms:

'1 The PCA (SA) will submit its application to become a member of the MEIBC by no later than 3 September 2013 for consideration by the MEIBC's MANCO on 10 September 2013.

2 The status quo with regards to the MEIBC's jurisdiction over plastics remains.

3 The MEIBC's MANCO which will convene on 10 September 2013 will establish a Plastics Negotiating Forum (PNF) which will be accountable to the MANCO.

The MANCO will authorize the convening of the first PNF meeting within 3 weeks of the MANCO meeting of 10 September 2013.

The first meeting of the PNF will confine itself to establishing terms of reference, participants and house-keeping rules.

The first meeting of the PNF will be convened under the auspices of the MEIBC and will be independently facilitated.

4 Collective Bargaining between the parties within the Plastics Negotiating Forum will take place within the constitutional requirements and structure of the MEIBC.

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

[8] On 2 September 2013, the appellant, in compliance with clause 1 of the recommendation submitted its application for membership of the MEIBC. In the said application, the appellant inter *alia* expressed a view that the application for membership is brought on the clear understanding that the "forum" referred to in clause 3, 4, and 5 of the recommendation to the MANCO is a dispensation for the Plastic Industry; that the "forum" will be

⁴ MANCO refers to the Management Committee of the MEIBC.

operating no different to the type of arrangement the MEIBC currently have in place across “*many so-called House Agreement companies including the Lift Engineering Industry Agreement*”; and that such a “*Forum*” should commence negotiation to accommodate the particular economic conditions facing employers and employees in the Plastic Industry.

- [9] It is common cause that MANCO met on 10 September 2013. The recommendation referred to above was among the items for consideration. The minutes of the meeting reflect that a proposal was made by LEIA’s representative for the adoption of the recommendation. The proposal was supported by Solidarity’s representative and the motion was agreed to. It is significant to note that the LEIA’s representative highlighted at the meeting that:

‘...there were a number of steps which needed to take place as outlined in the document, MEIBC/Parties and PCA(SA) recommendation to the MANCO, namely to convene the first Plastics Negotiating Forum (PNF) meeting within 3 weeks of the MANCO meeting of 10 September 2013. The first meeting of the PNF would establish the terms of the reference for the PNF, participants and house-keeping rules. The office accordingly needed to schedule the first meeting.’

It was further recorded that:

‘The LEIA representative proposed that from a MANCO point of view, both applicants were in principle accepted and in terms of the current practice the office would verify their respective membership⁵

The Solidarity representative supported the proposal and the motion was agreed.

The NUMSA representative referred to the conditions which the PCA (SA) had given in their application and proposed that the conditions be disregarded.’

- [10] On 18 September 2013, the General Secretary of the MEIBC wrote a letter to the appellant advising that its application for membership was approved at the

⁵ The application for membership by South African United Employers Organisation (SAUEO) was considered simultaneously with that of the appellant, hence reference to verification of respective membership.

MANCO meeting of 10 September 2013. In addition to congratulating the appellant, he invited the appellant to participate in all the Council activities such as MANCO, Financial and Administration meetings, standing committee meetings, Regional Council meetings, Negotiations and any other Council meetings or events. He concluded by stating that the current employer parties were involved in an arbitration regarding the allocation of seats to a party on the various meetings and, as such, he is unable to advise on the number of seats the appellant is entitled to at meetings. He mentioned further that the parties agreed that appellant could attend as an observer until the matter is resolved.

[11] The next development was the Registrar of Labour Relations writing to the appellant on 20 October 2013 advising that the Department [of Labour] had satisfied itself that the appellant has a membership in the Plastic Sector of 403 employers who are employing 28 792 workers.

[12] The first meeting of the PNF convened in compliance with MANCO resolution by the General Secretary and a Facilitator took place on 4 October 2013. However, NUMSA, MEWUSA and CEPPWAWU, who are first to third respondents respectively, did not attend the meeting and their apologies were noted. At the beginning of the meeting, the General Secretary confirmed that the quorum requirements of the constitution of the council had been met and that the meeting could proceed. It was agreed that all decisions and agreements reached at the PNF would be taken to MANCO for ratification and for possible extension purposes to the Department of Labour. The Chairperson as well as the Deputy Chairperson of the PNF were elected. The Facilitator presented a document containing the Terms of Reference for the PNF. The document was formally adopted after some discussions which brought about amendments to the document. The document was also signed by those present. The meeting agreed that the parties who were absent be included as signatories to the document.

[13] The terms of reference provided *inter alia*, that the PNF will be the sole forum to:

‘Engage in respect of any matter related to the Plastic Sector;

- This will include but not limited to
 - a. Substantive negotiations within the Sector
 - b. Task team matters
 - c. Scope of registration of MEIBC in respect 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.'

[14] On 9 October 2013, the appellant formally initiated negotiations for the introduction of a new collective agreement which was intended to regulate the terms and conditions of employment in the plastic sector. It further called on the General Secretary of the Bargaining Council to circulate a proposed agreement and arrange a negotiating meeting of the PNF within 45 days of the notice as required by the constitution of the Bargaining Council. It is common cause that although the General Secretary circulated the proposed agreement, he did not arrange or convene a meeting within 45 days as required. He however, notified the parties that the proposal would also be included on the MANCO Agenda of the 5th of November 2013.

[15] The MEIBC held its MANCO meeting on 26 November 2013. The Terms of Reference adopted by the PNF were tabled as part of the report from the PNF. NUMSA representative indicated that they were unable to attend the PNF meeting of 10 September 2013 due to the strike action they were involved in and appealed to the parties to allow NUMSA the opportunity to contribute to the Term of Reference. After lengthy discussions on the Terms of Reference, with NUMSA indicating that it does not support the adoption of the Terms of Reference, the Terms of Reference were adopted with NUMSA's position being noted. As will be shown later, the respondents' view is that the

Terms of Reference were not adopted. The relevant extract of the minutes relied upon by the respondents reads thus:

'The Chairperson confirmed that the parties note that the discussion has taken place and that the Terms of Reference is adopted noting the objection that was raised by NUMSA stating that they do not adopt the current Terms of Reference and that all parties will be given the opportunity at the next PNF meeting to raise any issues on the Terms of Reference that would be discussed at point 1 of the agenda.'

- [16] According to the appellant, it made several requests that a meeting of the PNF be convened without any success. As a result, on 19 February 2014, the appellant gave written notice of its intention to resign from the MEIBC on the requisite three months' notice, citing several reasons including failure of the bargaining council to perform its functions as identified by the Registrar of Labour Relations.
- [17] On 15 January 2014, the Registrar of Labour Relations wrote a letter to the MEIBC advising *inter alia*, that he had been informed that the appellant had joined the council as a full party, thereby improving the representative position of the bargaining council in the subsector to such an extent that the Department sees no need to pursue its previous intention of varying the scope of registration of the MEIBC and that the matter had formerly been closed.
- [18] On 24 March 2014, the appellant withdrew its notice of withdrawal from MEIBC after being persuaded by the General Secretary to do so. The appellant's retraction of its withdrawal from the Council was accepted by the General Secretary who notified all the member parties within MANCO by circular. The retraction of appellant's withdrawal of its resignation was further reported by the General Secretary at the Bargaining Council's Annual General Meeting held on 26 March 2014.
- [19] It is signified to note that the MEIBC issued invitations to attend all negotiation meetings of the PNF to all parties to the Bargaining council, including the appellant. Meetings of the PNF conducted under the auspices of a facilitator appointed by the Bargaining Council were held on 16, 19, and 21 May and 3,

23, and 30 June 2014. Furthermore, updates on the negotiations were issued per industry circular by the MEIBC. On 30 June 2014, a written collective agreement intended to regulate terms and conditions of employment in the plastics sector was concluded between the participating parties in the PNF.

[20] What triggered the current dispute is the strike by the three respondent unions in support of their demand for the conclusion of a new main collective agreement within the MEIBC on 17 July 2014. The strike was also pursued within the plastic sector. The appellant considered the strike within the plastic sector to be unprotected and unlawful because in its view, the plastic sector had its own bargaining chamber, being the PNF wherein a collective agreement had been concluded. It was of the view that the plastic sector as was the case with the lift industry had to be excluded from the said strike action.

[21] The appellant approached the Labour Court on urgent basis on 11 July 2014 seeking relief on the following terms:

- '1 That the Honourable Court dispenses with the form and times for service and filing as required by the Rules and hear this application as a matter of urgency.
- 2 Declaring that the plastics negotiating forum ("forum") constitutes a duly established and separate negotiation chamber within the MEIBC.
- 3 Declaring that the strike conducted by the first, second and third respondents and their members in respect of the employers who are members of the applicant is unlawful and/ or unprotected.
- 4 Interdicting and restraining the first, second and third respondents and their members from taking part or being associated with the strike action referred to above.
- 5 Directing the first, second and third respondent's members employed by the applicant's members to report for duty within 6 hours from being notified of the granting of this order.

- 6 Interdicting and restraining the first, second, and third respondents and their members from unlawfully interfering in any way with the conduct of the applicant's members business operations.
- 7 Interdicting and restraining the first, second and third respondents and their members from damaging or threatening to damage the applicant's members premises, blockading points of access to and egress from the applicant's members' premises, interfering with the access or access control to any of the premises.
- 8 An order to the first, Second and Third Respondents to instruct their members to desist from-
 - 8.1 assaulting, threatening to assault or harm, intimidating any staff member, non-striking employee, customer, supplier or visitor to the applicant's members' premises; and
 - 8.2 damaging, threatening to damage the applicant's members' premises, blockading points of access to and egress from the applicant's members' premises, interfering with the access or access control to any of the applicant's members' premises, interfering with proper working of the applicant's members property or property under their control.
- 9 An order that, should the first, second and third respondents and their members fail to comply with the terms of this order or any part thereof, within 6 hours of same having been served upon all parties, the SAPS and/or Public Order Policing unit are directed to take any steps or measures to ensure compliance with this order;
- 10 This order should be served on the respondents by serving it on the first, second and third respondents (or their attorneys) by fax or hand, and reading it out to those present at the applicant's members respective entrances and by displaying it prominently at all entrances of the applicant's members premises;
- 11 The first, second and third respondents are ordered to publicly call upon their respective members, to abide by the provisions of this order by announcement via loud hailer to the striking employees who are present

at such time at the applicant's members' premises, in such languages which are commonly used for communication by them within 6 hours of receipt of this order;

12 Granting the applicant further and/or alternative relief.

13 Costs against those respondents who oppose the relief sought.'

[22] The Labour Court recorded the primary question to be determined in the application before it as whether the respondent unions were entitled to invoke the strike action against the members of the appellant on the basis that the main agreement, if agreed to, would apply to them because collective bargaining for the plastic 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 PNF, which now constituted the agreed forum within which conditions in that sector would be negotiated. The court *a quo* recorded further that if the appellant is correct, it followed that until such time as the respondent unions engage with the employers in that forum and follow the dispute resolution processes in s64 of the Act, they may not embark on protected strike action.

[23] Before dealing with the primary question identified above, the Labour Court had to consider the appellant's *locus standi* to bring the application as challenged by the respondent unions. The challenge, which raised a factual dispute, was that the appellant 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 to be verified. As a result, it was contended, the appellant as a non-party to MEIBC had no *locus standi* to bring the application. The second basis for the challenge to the *locus standi* was on the contention that the PNF had not been properly established as a sectional bargaining forum within the MEIBC and therefore negotiations for the plastic sector were still part and parcel of a new main agreement which would be binding on the employers in the plastic sector. This would according to NUMSA, be the case irrespective of what transpired in the NPF.

[24] In deciding the membership issue, the Labour Court held that the available evidence tend to suggest on a balance of probabilities, that the appellant was not properly admitted as a member of the council and that its own complaint when it announced its withdrawal seemed to confirm that fact; that even if it was not expressly refused membership the failure to admit it unconditionally by 2 December 2013 means its application was declared to have been refused from that date, notwithstanding its participation in the MANCO and the PNF; that it could not as such participate in the deliberations of the PNF nor be a party to any agreement concluded in that forum. The Labour Court concluded that as a non-party to the council, appellant 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 plastic industry.

[25] With regard to the establishment of the PNF as the sole bargaining chamber for the plastic sector within the MEIBC, the Labour Court was not satisfied that the appellant had demonstrated with sufficient certainty on the facts that the PNF was properly constituted as an exclusive bargaining forum or that the MEIBC and the parties to it had agreed to establish an exclusive bargaining forum for the plastics industry as envisaged by the appellant. The Court concluded thus:

‘consequently, it cannot be said that there exists a properly constituted forum in terms of which the parties and their members are obliged to negotiate on wages and conditions in the plastic 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 [appellants] members was not unprotected”

[26] The application was consequently dismissed with costs.

The appeal

[27] The grounds upon which the judgment of the court *a quo* is challenged are that the court *a quo* erred in finding that the appellant had not been admitted as a party to the MEIBC and further erred in finding that the PNF had not

been duly established as a separate forum for collective bargaining in the plastic industry under the auspices of MEIBC.

- [28] On behalf of the first respondent, it was contended that the appeal is entirely academic because the strike came to an end on 29 July 2014 and can no longer be interdicted. As regards the merits of the appeal, it was contended that the court *a quo* correctly found that the appellant had not established that the bargaining arrangement in the council had been changed before the industry strike had started on 1 July 2014.
- [29] It is opportune to dispose of the moot issue at this stage. Mr Freund SC who appeared on behalf of the appellant conceded that the prayers relating to the lawfulness of and the interdict against the strike are moot and that the appellant does not persist in orders being made in that regard. However, there is a live dispute between the parties regarding what he termed the “establishment” issue and the “exclusivity” issue. Under the establishment issue, the question is whether the appellant was entitled to an order in terms of prayer 2 of the Notice of Motion which required a declaration that the PNF had been duly established and as a separate negotiation chamber within the MEIBC. Under the “exclusivity” issue, the question is whether the PNF was established with exclusive powers.
- [30] Mr Van der Riet SC who appeared on behalf of the first respondent extended his argument on mootness beyond what is contained in the respondent’s Heads of Argument. He contended that the court *a quo* only made a factual finding as to whether as at 17 July 2014, there was an exclusive separate chamber established in so far as one has to decide the question whether the strike was unprotected or not. Put differently, he submitted that the court *a quo* had to decide whether on the facts before it, it had been established that the PNF was given exclusive powers as a separate negotiating chamber for the plastic industry within the MEIBC, and that a finding against the appellant did not create a live issue but an opportunity to revert to the MEIBC to renegotiate the establishment of the PNF.

[31] The first respondent's contention in this regard is simply without merit. It suggests that all decisions of the Labour Court should not be appealed against since they are invariably based on a factual situation existing at the time of the judgment. Generally, an appellate court is required to decide a case that had been decided by the court *a quo*, on the facts that served before that court. In this case, the court *a quo* made a definite finding to the effect that the appellant had failed to demonstrate that the PNF was *properly constituted* as an exclusive bargaining forum for the plastics industry within the scope of the MEIBC. It further found that appellant had failed to establish that the MEIBC and the parties to it had agreed to establish *an exclusive bargaining forum* for the plastics industry *as envisaged by the appellant*. These findings have consequences and will forever be live issues between the parties. The judgment of the court *a quo* will always be in the way of the appellant should it try and assert its rights about bargaining within the MEIBC. The matter is therefore not moot.

[32] I now proceed to deal with the membership of the appellant at the MEIBC. The Labour Court found that the evidence tendered tends to suggest on a balance of probabilities that the appellant was not properly admitted as a member of the council. The appellant, the Labour Court continued, as a non-party to the MEIBC, lacked *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 plastic industry.

[33] On this aspect, Mr Van der Riet submitted that it was not necessary for a finding to be made as to whether the appellant was ever properly admitted as a member of the MEIBC. He however, supported the finding of the Labour Court that there was no evidence that the in-principle decision to admit the appellant was ever confirmed before the 90 day period stipulated in s56(3) of the Act⁶ had expired.

⁶ A council, within 90 days of receiving an application for admission, must decide whether to grant or refuse an applicant's admission, and must advise the applicant of its decision, failing which the council is deemed to have refused the applicant's admission.

[34] In my view, it is significant to determine the membership of the appellant to the MEIBC because as the court *a quo* correctly pointed out, it may lack *locus standi* to enforce any purported agreement between the parties to the council about the establishment of the PNF.

[35] The undisputed facts are that the appellant had been a long standing member of the MEIBC and had resigned in protest against its inability to realise its ambition to have a separate negotiating chamber for the plastic industry established within the MEIBC. Its membership up to its resignation from 1 February 2011 was not at all questioned. The dispute about its membership relate to the appellant's readmission pursuant to a recommendation to MANCO dated 16 August 2013. It is not in dispute that the appellant complied with the formal requirements for membership. What seems to be controversial is the meaning or interpretation of the MEIBC resolution in accepting the appellant's membership to the council. The controversy finds its origin in the minutes of the MANCO meeting of 10 September 2013, where a recommendation dealing among others, with the application for membership of the appellant to the MEIBC. The proposal made by LEIA's representative which was supported by solidarity's representative and the motion carried was that "from a MANCO point of view both applications were in principle accepted and in terms of the current practice the office would verify their respective membership." The letter from the General Secretary of MEIBC dated 18 September 2013 clears any doubt as to the acceptance of the appellant's membership to the council. It categorically states that the application for membership was approved, and in addition to congratulating the appellant, he was looking forward to a long and rewarding relationship with it. Appellant was further invited to participate at various structures of the MEIBC.

[36] The finding by the Court *a quo* that the appellant was not properly admitted as a member of the MEIBC or that its membership was dependant on the council conducting a verification exercise and or was admitted only as an observer is not supported by the facts. In this regard, the court *a quo* seems to have conflated the issue of the appellant's membership of the council with the question of the appellant's entitlement to representative seats on the council's

various structures by virtue of its membership. The appellant, being an employer's organisation was duly admitted as a full member of the MEIBC in compliance with clause 4 of its Constitution once a party has met a threshold of membership; the allocation of seats to a newly admitted member is a matter to be undertaken by the administrative structure of the MEIBC. What the Secretary General conveyed to the appellant was that seats allocation could not be determined at that stage due to a pending arbitration dispute involving the current employer parties to the council regarding employer's allocation of seats to the parties on the various meetings.

[37] Membership verification in the circumstances was not a form of a suspensive condition to admission as a member, but that allocation of seats could not be determined at that stage due to a pending dispute which was a subject of arbitration. Similarly, being accorded observer status at some of the meetings did not detract from the fact that the appellant had been accepted as a member; it had to do with its participation based on the allotted seats. It would in any case make no sense to refuse to admit a party as a member and at the same time establish a negotiating chamber for such a party to participate in. Subsequent conduct of the General Secretary of inviting the appellant to meetings is indicative of acceptance that appellant had been admitted as a member. It is significant to note that there are no facts placed on record that could have barred the appellant from becoming a member of the bargaining council. Neither is an indication that the parties to the bargaining council did not want the applicant to become a member.

[38] It is also safe to state that it was in the interests of all parties as well as the Registrar of Labour Relations and NEDLAC at the time for the appellant to be readmitted as a member of the MEIBC. The parties to the MEIBC also wanted the appellant to be a member and the only concern, particularly to the respondents, was the role and powers of the separate bargaining forum which had been suggested. The acceptance of the appellant to MEIBC as a party is also confirmed by the concession by the General Secretary at paragraph 17 of his Answering Affidavit on behalf of the MEIBC. The exclusion of the appellant as member already carried a risk of the scope of the bargaining

council being varied by the Registrar of Labour Relations. This risk was abandoned when the Registrar of Labour Relations was satisfied that the appellant was back in the MEIBC. I am therefore satisfied that it has been shown that the appellant was admitted as a member to MEIBC.

[39] As regards the establishment of the PNF, Mr Van der Riet conceded that at the 10 September 2013 meeting of MANCO, a recommendation that was accepted did in fact establish the PNF. It had come into existence as a forum which is a substructure to the main decision-making body. His concern was however, that the created forum had neither powers nor members and that its role was not spelt out. It was also not determined what it could or could not do. Mr van der Riet contended that the Terms of Reference for the PNF were not adopted by MANCO. He referred to an extract of the minutes of the MANCO meeting of 26 November 2013 quoted at paragraph [16] above referring to NUMSA's objection to the Terms of Reference and that all parties will be given an opportunity to raise their issues at the next PNF.

[40] This contention is based on the deliberations in the course of the meeting. What was ultimately resolved was that the Terms of Reference document was adopted on motion for adoption proposed by LEIA's representative and seconded by Solidarity. The motion noted the position of NUMSA not being in favour of the Terms of Reference. What counsel referred to was a suggestion that any party that was not happy with the Terms of Reference could still raise such concerns at the PNF meeting. The adoption of the Terms of Reference is also confirmed by the General Secretary at paragraph [21] of his Answering Affidavit that: "*The Council had established the Plastics Negotiating Forum (PNF) in compliance with the Manco resolution of 10 September 2013. These terms of reference were adopted by all parties except for NUMSA.*" The reasoning and finding by the court *a quo* that the Terms of Reference were not adopted is therefore unsustainable. The decision to adopt the Terms of Reference was taken by the majority of members at the MANCO meeting and

that decision stands with legal consequences until such time that it is properly and procedurally rescinded by the MEIBC or through legal proceedings⁷.

[41] This brings me to the exclusivity issue. The question to be answered relates to prayer 2 of the notice of motion being a declaration that the PNF constitutes a duly established and separate negotiation chamber within the MEIBC. The court *a quo* framed the question thus: ‘The status of the PNF as properly constituted exclusive forum for collective bargaining in the plastics industry under the [MEIBC]. Mr Freund moved for an amendment of prayer 2 by substitution of the word “separate” with the word “exclusive” and the addition of the words for the plastic industry at the end of the prayer. In finding that the PNF was not properly constituted exclusive forum for collective bargaining in the plastics industry under the MEIBC, the court *a quo* reasoned that: the unanimous recommendation adopted by MANCO at its meeting of 10 September 2013 did not provide that the PNF would be an exclusive forum for collective bargaining in the plastics industry; the PNF could not determine its terms of reference at its first meeting of 4 October 2013 since it was not quorate; and that the adoption of the document containing the Terms of Reference was not properly adopted by MANCO because of irregularities such the exclusion of NUMSA and those in its support by the chairperson of the meeting from deliberating the determination of the terms of reference as well as the fact that the terms of reference were not voted on.

[42] The terms of reference concluded by the PNF at its first meeting on 4 October 2013 provided that the PNF will be the sole forum to, *inter alia*, engage in respect of any matter related to the plastic sector and all other matters that require a position to be adopted in respect of the sector. The terms further provided that all agreements reached within the PNF will be submitted to MANCO for ratification and extension purposes. The terms of reference themselves is an agreement reached at the PNF and were tabled at the MANCO meeting of 26 November 2013 were they were adopted by the majority members of MANCO. The Terms of Reference followed a process

⁷ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at 242A-C; *Metal & Electrical Workers Union of South Africa v National Panasonic Co (Parrow Factory)* 1991 (2) SA 527 (C) at 530C-D and 531 F-532B.

which was the subject of recommendation by the facilitation process and adopted by MANCO on 10 September 2013. For all intents and purposes the idea was to create a separate chamber for the plastic industry which was to be similar to the lift industry. That chamber for the lift industry has been established as an exclusive chamber for bargaining for that industry. The conclusion that the terms of reference does not provide that the PNF is the exclusive chamber for collective bargaining for the plastic sector is therefore unsustainable. The employment of the word "SOLE" in the document itself as well as the historical context within which the resolution was adopted to support the view that the PNF was intended to an exclusive forum for collective bargaining within the plastic sector subject to ratification by MANCO and MEIBC constitution.

[43] In my view, reference in clause 5 of the recommendation to the MEIBC of 10 September 2013 that "Any amendments to terms and conditions of employment including matters relating to future bargaining arrangements will be a product of collective bargaining" can only refer to the PNF as the bargaining forum. It would not make sense to establish the PNF and not cloth it with the function of collective bargaining. The sole purpose of the negotiations exercise was to establish the PNF as demanded by the appellant. That would constitute a sensible interpretation of clause 5. Holding otherwise would lead to a situation where collective bargaining for the plastic industry is taken outside the body established for that purpose, which would be absurd.⁸

[44] The meeting of 4 October 2013 was convened by MANCO for the sole purpose of formally constituting the PNF and determining its terms of reference in line with MANCO's resolution. It can therefore not be contended that the meeting was not properly constituted because the PNF did not have any defined membership criteria at that point in terms of which a quorum could be determined resulting in whatever agreement reached not possible of being construed as a decision of a duly constituted meeting. I have already

⁸ See: *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

found that the meeting of 26 November 2013 was duly constituted and properly adopted the terms of reference of the PNF.

[45] In conclusion, I am of the view that the appeal should succeed and that the appellant is entitled to the amendment of prayer 2 as requested. The matter was considered by the court *a quo* and dismissed the application on the basis that, *inter alia*, the PNF is not a forum properly constituted as an exclusive collective bargaining forum for the plastic sector within the MEIBC. Furthermore, no prejudice will be suffered by the respondents since they had an opportunity to make their submissions on the issue and the court *a quo* and the First Respondent in this Court.

[46] What remains is the issue of costs. Both counsel agree that costs should follow the result. In the Heads of Argument, the appellant prayed for costs on an attorney and own client scale against the respondents jointly and severally, the one paying the others to be absolved, in the event of it being successful. The motivation for such a special award is based on the submission that by pushing the appellant to re-join the bargaining council and later obstructing the promised establishment of the PNF as an exclusive collective bargaining forum for the plastic industry, the respondents acted in bad faith that falls a little short of an industrial fraud. I am not convinced that a special award of costs is warranted. The scale of attorney and client is an extra-ordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.

[47] I am of the view that it would be in accordance with the requirements of the law and fairness that costs should follow the result in the court *a quo* and in this Court. Costs in the court *a quo* should only be against the respondents who opposed the application. Costs on appeal should include costs of employment of two counsel and should only be limited to the First Respondent who opposed the appeal.

[48] In the result, the following order is made:

1. The Appeal succeeds and the order of the Labour Court is set aside and replaced with the following:
 - a. It is declared that the Plastics Negotiating Forum (PNF) constitutes a duly established and exclusive negotiating chamber within the MEIBC for the plastic sector.
 - b. The respondents are to pay the applicant's costs on party and party scale jointly and severally the one paying the other to be absolve.
2. The First Respondent is to pay the appellant's costs inclusive of costs for the employment of two counsel.

Tlaletsi DJP

Davis *et* Musi JJA concur in the judgment of Tlaletsi DJP.

APPEARANCES:

FOR THE APPELLANT:

A J Freund SC and Adv G A Leslie

Instructed by Anton Bakker Attorneys.

FOR THE FIRST RESPONDENT:

J G Van der Riet SC

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