DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

31-August-22
DATE SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

REPORTABLE

Case no: **J 947 / 2022**

In the matter between:

NATIONAL EMPLOYERS' ASSOCIATION OF SOUTH AFRICA	First Applicant
SOUTH AFRICAN ENGINEERS' AND FOUNDERS' ASSOCIATION	Second Applicant

and

METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL (MEIBC)	First Respondent
THE GENERAL SECRETARY OF THE MEIBC	Second Respondent
THE MINISTER OF EMPLOYMENT AND LABOUR	Third Respondent
PARTIES TO THE MEIBC (AS LISTED IN ANNEXURE "A")	Fourth and Further Respondents

Heard: **23 August 2022**

Delivered: **31 August 2022**

Summary: Urgent application – principles considered – interest of justice requires that application be decided – matter urgent

Bargaining Council – extension of main agreement to non-parties – provisions of s 32(1) of Labour Relations Act (LRA) considered – section requires participation of all parties in Council in deciding to make request to Minister

Bargaining Council – meetings of Council – provisions of Council constitution considered – no provision for meeting as contemplated by s 32(1) of LRA – what is required is decision by whole Council – proper decision made

Bargaining Council – meeting provisions in Council constitution considered – clause 8(12) does not find application – even if clause finds application – proper interpretation of clause still results in majority vote as contemplated by s 32(1)(b)

Bargaining Council – removal of chairperson of meeting – does not render meeting irregular – provisions of s 206 of LRA applicable

Bargaining Council – removal of chairperson of meeting – removal in any event justified and permitted by Council constitution – removal not irregular

Alternative remedy – applicants seeking to interfere with the exercise of powers of Minister as member of executive – interference only warranted in exceptional circumstances – no exceptional circumstances shown

Alternative remedy – functions of Minister under s 32 of the LRA – applicants have opportunity to raise issues relating to validity of request in that process

Interim relief – no basis for interim relief pending review application relating to Council decision – even though relief styled as interim relief the relief is in effect final relief – no case for final relief made out

Interdict – no proper case for interdict made out – accompanying review application contemplates same decision as interdict – both applications dismissed

Costs – principles and facts considered – costs order against applicants justified

JUDGMENT

SNYMAN, AJ

Introduction

[1] This application concerns yet another episode in the saga of the continuous battle between the first applicant, the National Employers' Association of South Africa (NEASA) and the first respondent, the Metal and Engineering Industries Bargaining Council (MEIBC),[1] and I am pretty sure it will not be the last. The current application stems from the fact that finally, after almost a decade of strife, there is now a new consolidated main collective agreement for the MEIBC, signed by all parties to the MEIBC, save for NEASA and the second applicant, the South African Engineers' and Founders' Association (SAEFA). This agreement must now be extended by the Minister of Employment and Labour (the Minister), being the third respondent, to non-parties in terms of section 32 of the Labour Relations Act (LRA)[2]. The current main agreement sought to be extended is commonly referred to as the 2021/2024 Consolidated Main Agreement, and will hereinafter be referred to, in this judgment, as the '*Main Agreement*'. Unfortunately, NEASA and SAEFA are yet again seeking to block the extension of the Main Agreement to non-parties, on the basis of, not for the first time, challenging the validity of the request by the MEIBC itself to the Minister to extend the Main Agreement.

[2] In order to facilitate ease of reference in this judgment, I will refer to and identify the parties to this litigation as follows. The first applicant will be referred to as NEASA, and the second applicant as SAEFA. Where I refer to NEASA and SAEFA jointly, I will refer to them as 'the applicants'. The first respondent will be referred to as the MEIBC and the third respondent as the Minister. The other

[1] See *National Employers' Association of SA and Others v Minister of Labour and Others* (2012) 33 *ILJ* 929 (LC); *National Employers Association of SA and Others v Minister of Labour and Others* (2013) 34 *ILJ* 1556 (LC); *National Employers' Association of SA v Metal and Engineering Industries Bargaining Council and Others* (2015) 36 *ILJ* 732 (LC); *National Employers' Association of SA v Metal and Engineering Industries Bargaining Council and Others* (2015) 36 ILJ 2032 (LAC); *National Employers' Association of SA and Others v Minister of Labour and Others* (2017) 38 ILJ 2034 (LC).

[2] Act 66 of 1995 (as amended).

respondents in this application are all the other individual employers' organizations and trade union parties, that are actual parties to the MEIBC. The twenty eighth respondent is the Plastics Convertors Association of South Africa (PCASA). The fourth to twenty fourth respondents, as well as the twenty sixth and twenty seventh respondents, being all the employers' organizations and trade union parties to the application,[3] have each passed a resolution authorising PCASA to act on their behalf in these proceedings and to instruct attorneys to oppose this matter on their behalf. Consequently, when I refer to 'the respondents' in this matter, it must be considered to be a reference including all the aforesaid individual respondents, acting jointly in opposing this application. When I refer specifically to any of these respondents individually, I will refer to them by name.

[3] As a point of departure in deciding this matter, it must be said that bargaining councils under the LRA fulfil an important purpose. In *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another*[4] the Court said:

> '... the Act seeks to provide a framework whereby both employers and employees and their organizations 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.'

[4] To ensure that the above purpose is effectively achieved, it is important that collective agreements concluded in bargaining councils be extended and applied to all parties in the particular industry, even if all these parties are not parties to the actual agreement itself. If all the parties in an industry are not bound by such a collective agreement concluded in a bargaining council, this would lead to significant inequalities in the industry regulated by such bargaining council, and undermine orderly collective bargaining at sectoral level. It was to prevent such a situation and to allow for such extension that

[3] The twenty fifth respondent, UASA, did not engage in the proceedings.
[4] (2003) 24 ILJ 305 (CC) at para 26.

section 32 of the LRA was enacted in the first place. This sentiment was clearly expressed in *Kem-Lin Fashions CC v Brunton and Another*[5], where the Court said:

> 'If the collective agreement is not extended to non-parties, the non-parties would be able to pay employees at rates which are lower than those which their competitors who are party to collective agreements have to pay to their employees. The result of this would be a serious threat to the business of those who are parties to collective agreements. This would seriously discourage orderly collective bargaining in general and collective bargaining at sectoral level in particular which are part of the primary object of the Act. If this were allowed, there would be little, if any, point in any employer seeking to be party to a bargaining council. That would be a threat to one of the pillars of the labour relations system in this country.
>
> It is clear from what has been said above that the mischief which the legislature sought to prevent by s 32 is the unfair competition that I have referred to. The legislature decided that the way to prevent such mischief would be to ensure that in certain circumstances non-parties could be subjected to the same terms and conditions as parties to a collective agreement. That means ensuring that everyone in a sector is subjected to the same rules. This means that non-parties become subjected to rules to which they have not consented and on which they have not been consulted. ...'

[5] A final reference in this regard is to the judgment in *Solidarity v Metal and Engineering Industries Bargaining Council and Others*[6], where the Court held:

> '... what is therefore clear is that bargaining councils fulfil an important role as envisaged by the primary objectives of the LRA. Bargaining councils are industry specific. Collective bargaining takes place at a central level, by way of stakeholders normally dedicated to such industry, who would reasonably know what is required and appropriate for wages and conditions of employment in that industry. Also, and once accredited, dispute resolution would be conducted as a dedicated function specifically applicable to that industry, taking pressure

[5] (2001) 22 ILJ 109 (LAC) at paras 21 – 22.
[6] (2017) 38 ILJ 2109 (LC) at para 49. See also *Komatsu Southern Africa (Pty) Ltd v National Union of Metal Workers of South Africa and Others* [2013] ZALCJHB 298 (17 September 2013) at paras 32 and 41.

> off the CCMA, and advancing expeditious dispute resolution. This would include the enforcement of minimum standards in the industry, conducted by the bargaining council's own inspectorate and enforced under Section 33A of the LRA. Further, and because collective bargaining is centralized, labour peace is enhanced. Finally, and in the context of bargaining councils, social security is provided for employees in the industry, by way of the various funds to which these employees must belong and to which all parties contribute.'

[6] I specifically refer to the above case law at the outset of this judgment, because, in my view, this would constitute the core policy considerations that must be taken into account and applied when deciding the issues raised by the applicants in this application.

[7] It is clear that the current application is undoubtedly designed to have as the ultimate outcome that the Main Agreement of the MEIBC not be extended to non-parties to that agreement. It would mean that the members of the applicants would not be bound by the Main Agreement. In that context, the application is brought as a two parts application. The first part of the application (Part A) is brought for interim relief pending the determination of part B of the application. This interim relief sought is firstly that the MEIBC be interdicted and restrained from requesting the Minister to extend the Main Agreement to non-parties, and secondly that the Minister himself be interdicted and restrained from extending the Main Agreement to non-parties in terms of section 32(2) and 32(5) of the LRA. It is only part A of the application that is brought as an urgent application.

[8] Part B of the application is an application to review and set aside the decision taken at the meeting of the MEIBC on 29 June 2022, in terms of which the MEIBC resolved to request the Minister in terms of section 32(1) of the LRA to extend the Main Agreement to non-parties. Part B also contains a prayer seeking that section 32(1) of the LRA be struck down on the basis of it being unconstitutional.

[9] Despite classifying the relief sought in this matter in part A of the application as interim relief, I must immediately state that I am convinced that what the applicants want in this case is in reality not interim relief, but what is being asked

for is for all intents and purposes final relief. The division of the relief sought into two parts is an artificial creation, designed to obtain final relief under the guise of interim relief. The reason for this kind of approach is often that the requirements for obtaining interim relief is far less stringent than the requirements that apply when seeking final relief. In *Zondo and Another v Uthukela District Municipality and Another*[7], the Court dealt with a situation where the applicants also sought to label the relief sought as interim relief pending a review application,[8] and said:

> '... The applicants have couched the relief sought as an interim order. However, and to simply call the relief sought an interim order in the notice of motion does not make it so. To just attach a particular label to substantive relief sought in a notice of motion cannot change the true nature of what it is that is being applied for. There is of course good reason why applicants would want to have an application determined on the basis of seeking interim relief, being that the more stringent requirements the applicants would have to prove have been met, when final relief is sought, is avoided. Therefore it is always important to establish from the outset what the nature of the relief being sought by applicants actually is ...'

[10] In my view, determining whether the applicants have established a right to relief under part A of the application is inextricably linked to part B thereof and is actually, in reality, one and the same determination. It is also well known that it ordinarily takes approximately two years for a review application to be heard in the normal course in the Labour Court, by which the time the current period of extension of the main agreement sought in this case would virtually have run its entire course,[9] rendering any extension superfluous, and thus meaning that, practically speaking, the relief sought by the applicant under part A is indefinite.[10] In *Uthukela District Municipality supra*[11] the Court held as follows:

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[7] (2015) 36 ILJ 502 (LC) at para 2. See also *Mashiya v Sirkhot NO and Others* (2012) 33 *ILJ* 420 (LC) para 19.
[8] The Court dealt with a situation where the continuation of a disciplinary hearing was sought to be interdicted, pending an application to review a decision by the chairperson to refuse legal representation in the hearing.
[9] The period of the Main Agreement expires on 30 June 2024.
[10] *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993 (1) SA 47 (W) at 55D-F
[11] Id at para 4.

> '... what the applicants were actually seeking is that the disciplinary proceedings against the applicants be interdicted from in any way proceeding until the applicants' review application in respect of the legal representation ruling has been finally determined. This is clearly not interim relief, but final relief. In effect, the disciplinary proceedings would be permanently stayed until the event of the outcome of the legal representation review application. As matters stand, this is indefinitely ...'

[11] Because of the nature of the relief being sought constituting final relief, the test should be, in order to determine whether the applicants are entitled to the relief sought, that the applicants must show the existence of the following: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[12]

[12] By the time this application was brought and argued before me, the MEIBC had already requested the Minister to extend the main agreement to non-parties in terms of section 32(1) of the LRA. This took place on 3 August 2022. The Minister has also already decided to exercise his powers as contemplated by section 32(5)(c) of the LRA to call for submissions from all interested parties on whether the Main Agreement should be extended. It follows that the first part of the so-called interim relief sought by the applicants, being to interdict and restrain the MEIBC from requesting the Minister to extend the Main Agreement to non-parties, must fall away and has in essence become moot, as this action has already happened.[13] This is identical to the situation that faced the Labour Appeal Court (LAC) in *National Employers' Association of SA v Metal and Engineering Industries Bargaining Council and Others*[14]. In that case, as well, NEASA sought interim relief in the form of interdicting and restraining the MEIBC from requesting the Minister to extend the main agreement to non-parties in terms of s 32 of the LRA on virtually identical grounds to the grounds advanced *in casu*. But at the time when that matter was heard, this very action

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[12] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) para 20.

[13] In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) the Court held at fn 18: '*A case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law*'. See also *SA Transport and Allied Workers Union v ADT Security (Pty) Ltd* (2011) 32 ILJ 2112 (LAC) at paras 3 and 9.

[14] (2015) 36 ILJ 2032 (LAC).

sought to be interdicted had occurred. The Court consequently held as follows:[15]

> 'In my view, the mootness of this appeal is plain. The interdictory relief sought has been overtaken by events. The action which it was formulated to prevent has occurred. The relief which was sought is now perfectly academic.'

The Court added that:[16]

> '... In my view, even if a legal point remains controversial, that does not save a matter from being moot ...'

[13] Therefore, the only relief under part A that is still live and would be competent to decide is the relief seeking to interdict the Minister from extending the Main Agreement to non-parties in terms of section 32(2) and 32(5) of the LRA, until the application to review and set aside the resolution (decision) by the MEIBC to request the Minister in terms of section 32(1) to extend the Main Agreement has been heard.

[14] Before turning to the merits of the application, there are some preliminary issues that need to be dealt with. As stated, the application has been opposed by the fourth to twenty fourth, and the twenty sixth to twenty eighth respondents. PCASA, acting as the spokesperson of these respondents in the current proceedings, filed an answering affidavit, in which PCASA has raised the preliminary issues of a lack of urgency and non-joinder of parties having a substantial interest in the matter. I will deal with these issues first.

Preliminary issues

[15] In the answering affidavit, PCASA has raised the issue of a lack of urgency. The lack of urgency is based on the issues that the Minister has already been asked to extent the Main Agreement, and that as matters stand, the Minister has not yet decided whether or not to extend the Main Agreement. PCASA has also complained about a lack of the necessary expeditious action on the part of

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[15] Id at para 7. See also *Ntlokose v National Union of Metal Workers of South Africa (NUMSA) and Others* (J885/22) [2022] ZALCJHB 195 (28 July 2022) at para 27.
[16] Id at para 9.

the applicants, in that the MEIBC meeting at which the decision was taken to ask the Minister to extend the agreement took place on 29 June 2022, however the current application only followed on 3 August 2022, some five weeks later.

[16] Urgent applications are governed by Rule 8. In considering Rule 8, the Court in *Jiba v Minister: Department of Justice and Constitutional Development and Others*[17] said:

> 'Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self created when seeking a deviation from the rules.'

[17] The general principles applicable to deciding whether a matter is urgent has been summarized in *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*[18]. Applying these principles, I do accept that the applicants should have acted with more expedition. The decision of the council to request the Minister to extend the agreement indeed took place on 29 June 2022, and the application only followed more than a month later. With regard to this delay, the applicants are open to some criticism. The explanation for the delay is quite thin, with a threadbare explanation of consulting attorneys, obtaining information and documents and corresponding with the MEIBC seeking to account for the month it has taken to bring the application. Ordinarily, I may have inclined to non-suit the applicants as a result of such a delay. However, this matter is of some importance and public interest, and needs to be dealt with so the Minister can fulfil his functions without undue impediment.

[18] I also consider that the applicants have already suffered the consequence of caused by their own delay, in that the request by the MEIBC to the Minister to extend the agreement has already been made, rendering part of the relief moot,

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[17] (2010) 31 ILJ 112 (LC) at para 18.
[18] (2016) 37 ILJ 2840 (LC) at paras 21 – 26. See also *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) at para 18; *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 *ILJ* 2148 (LC) at para 11.

as set out above. It can be said that the second part of the applicants' prayer for interim relief thus in reality only arose when the request was made on 3 August 2022, and this is sufficient to clothe the application with the necessary urgency at least in this regard. It is in my view in any event important and in the interest of all the parties that this matter be disposed of on the merits, especially considering that the nature of the relief is effectively final relief.[19] I thus believe it be in the interest of justice to finally decide this application as one of urgency.

[19] I will next turn to the non-joinder point raised by the respondents. It was common cause that there are four employers' organisations that are party to the MEIBC, that were not cited in the original application. These organizations are the Federated Employers' Organization of South Africa (FEOSA), the South African United Employers' Organization (SAUEO), the Association of Metal Services Centres of South Africa (AMSCSA) and the South African Concrete Engineers' Association (SACEA). It is however also common cause that these employers' organizations to not qualify for representation on the MEIBC itself, by virtue of having insufficient membership to quality for a seat on the MEIBC. After the MEIBC had raised the issue of non-joinder in its answering affidavit, NEASA served the application on each these four organizations, on 17 and 18 August 2022. FEOSA and SAUEO answered, indicating that they had no wish to participate in the proceedings and supported the case of NEASA. AMSCSA and SACEA did not respond, but it must be mentioned that these two organizations are members of SEIFSA, being the same federation of which all the other individual employer respondents (save of course PCASA) are members and who are parties to the proceedings.

[20] The requisite principle upon which it is decided whether a party should be joined in legal proceedings relating to a particular dispute is well settled. This test is whether or not a party has a *'direct and substantial interest'* in the subject matter of the litigation. It has been said that this means a legal interest in the subject matter of the litigation which interest may be prejudicially affected by the

[19] Compare *National Employers' Association of SA and Others v Minister of Labour and Others* (2012) 33 ILJ 929 (LC) at para 7; *Raseroka v SA Airways (Soc) Ltd* (2020) 41 ILJ 978 (LC) at para 19.

judgment of the Court.[20] In *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others*[21] the Court held:

> 'The law on joinder is well settled. No court can make findings adverse to any person's interests, without that person first being a party to the proceedings before it. The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences — including a penalty of committal — for their non-compliance. All of these entitlements are fundamental to ensuring that potential contemnors' rights to freedom and security of the person are, in the end, not arbitrarily deprived ...'

[21] However, where there is a failure to join a necessary party at the outset of the litigation, this defect can be cured if informal notice is giving to such a party, enquiring from such party to indicate whether it wished to intervene, and that party provides and an unequivocal response that it would abide by the decision of the Court,[22] or that party then decides to intervene. Also, and where the Court is satisfied that a party has waived its right to be joined, then such a party need not be joined. The Court in *Matjhabeng supra*[23] recognized that the rule for a party to be joined is not inflexible, where the Court had the following to say:

> '... There is however a caveat: this should not be understood to suggest that joinder is always necessary. There may well be a situation where joinder is unnecessary, for example, when a rule nisi is issued, calling upon those concerned to appear and defend a charge or indictment against them.

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[20] See *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415E where it was held: '*It is settled law that the right of a defendant to demand the joinder of another party and the duty of the court to order such joinder or to ensure that there is waiver of the right to be joined (and this right and this duty appear to be coextensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make ...*'. See also *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC) at para 56; *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) at para 12; *Minister of Public Service and Administration and Another v Public Servants Association on behalf of Makwela and Others* (2018) 39 ILJ 376 (LAC) at para 15; *Murray & Roberts (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 2510 (LAC) at para 24.

[21] 2018 (1) SA 1 (CC) at para 92.

[22] See *South African Municipal Workers Union National Provident Fund v Dihlabeng Local Municipality* 2020 JDR 0972 (FB) at para 17.

[23] Id at para 94.

> Undeniably, in appropriate circumstances a rule nisi may be adequate even when there is a non-joinder in contempt of court proceedings. This means that the rule is not inflexible.'

[22] It has been consistently held that a mere financial interest in a particular matter constitutes an indirect interest that does not necessitate the joinder of the party to the proceedings.[24] An important consideration in the context of deciding whether a party has a direct and substantial interest that justifies the joinder is the element of prejudice.[25] As succinctly summarized in *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd*[26]

> 'It is important to distinguish between necessary joinder (where the failure to join a party amounts to a non-joinder), on the one hand, and joinder as a matter of convenience (where the joinder of a party is permissible and would not give rise to a misjoinder), on the other hand. In cases of joinder of necessity the Court may, even on appeal, *mero motu* raise the question of joinder to safeguard the interests of third parties, and decline to hear the matter until such joinder has been effected or the court is satisfied that third parties have consented to be bound by the judgment of the Court or have waived their right to be joined ...'

[23] Applying the above to the facts of the case *in casu*, it can in my view not be said that any of the four employers' organizations could suffer any prejudice as a result of not being joined to the proceedings. AMSCSA and SACEA as SEIFSA members would be bound by the position adopted by SEIFSA, which position and case is fully represented in the current proceedings. FEOSA and SAUEO threw in their lot with NEASA, whose position is also fully represented in the current proceedings. This lack of any prejudice is amplified by the fact that even though these organizations are parties to the MEIBC, they do not have sufficient numbers (where it comes to membership) to qualify for a seat on the MEIBC and participate in voting at MEIBC meetings. Whether or not the voting conducted in the MEIBC is lawful or not has little impact on them, as they

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[24] *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 169H; *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 801 (T) at 804B – E.
[25] See *Fluxmans Incorporated v Lithos Corporation of South Africa (Pty) Ltd and Another (No 2)* 2015 (2) SA 322 (GJ) at para 29.
[26] 2004 (2) SA 353 (W) at para 11.

are not participants in that process. Once again, the interest in the legitimacy or not of the voting is nothing more than a legal interest in the outcome of such a case. In *Murray & Roberts (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[27] it was held as follows:

> 'The joinder of a party is only required if it is a matter of necessity, and not for convenience. The mere fact that the party has an interest in the outcome of litigation does not warrant its joinder, and the interest must be 'direct and substantial' in the sense mentioned earlier. Similarly, in *Makwela*, this court confirmed those principles. This court specifically held that in court proceedings regarding a claim founded on a contract, a person who was not a party to the contract and had no rights or obligations in respect of it, did not have to be joined as a party ...'

[24] Even if I am wrong with regard to all of the aforesaid, the fact remains that the applicants did give all four these organizations notice of the proceedings and invited their participation.[28] Two of them waived their right to participate, making their joinder unnecessary. This leaves only AMSCSA and SACEA who did not respond. However, I do consider that they were at least given notice and, in my view, that as parties to the MEIBC and being members of SEIFSA, they must have been well aware of the current proceedings and that SEIFSA would represent their interests. It would thus simply not be in the interest of justice to not continue with these proceedings and to non-suit the applicants just because two employers' organizations ultimately did not answer an invitation to participate. I also consider that the very same issue at stake in this case would form part of the Minister's determination when deciding whether to extend the Main Agreement,[29] giving these parties a further chance to participate with regard to the same issue if they wanted. In particular, in *Transport and Allied Workers Union of SA v Putco Ltd*[30] the Court dealt with a situation where it was argued that a trade union was a party to the dispute subject to litigation because the trade union stood to benefit from a bargaining council agreement extended

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[27] (2019) 40 ILJ 2510 (LAC) at para 25.
[28] *Dihlabeng Local Municipality* (*supra*) at para 39.
[29] In *Dihlabeng Local Municipality* (*supra*) at para 30, it was said that '*... Where a plea of non-joinder is successfully raised, it usually results in an order for the joining of the further or additional respondents. It is not usual for a plea of non-joinder to result in an order for the dismissal of the action or application*'.
[30] (2016) 37 ILJ 1091 (CC) at para 56.

to non-parties in terms of section 32 of the LRA, and the Court then held as follows in deciding the trade union was not a party:

> 'The very notion of an 'extension' is telling. Collective agreements can only be extended to non-parties of a bargaining council. These parties may have an interest in the negotiations that occur within the bargaining council, and even a hope or an expectation that a collective agreement may be extended to them. It does not, however, make them party to a dispute to which, by definition, they cannot be a party. Thus, that a collective agreement concluded at the bargaining council *could* be extended to TAWUSA does not make TAWUSA a party to the dispute at the bargaining council ...'

[25] I am therefore satisfied that any non-joinder of the four employers' organizations referred to above is not fatal to the applicants' application, and does not stand in the way of the application being decided on the merits. I will now turn to deciding the merits of the application, by first setting out the relevant facts.

The facts

[26] Despite the fairly voluminous pleadings in this case, the facts are in the end simple and relatively straight forward. Also, most of the material facts are either undisputed or common cause. As to the events in the meeting of the MEIBC on 29 June 2022, which lies at the heart of this matter, a transcript has been provided by PCASA, and this transcript is not disputed. So fortunately, it is not necessary in this matter to become embroiled in an extensive exercise of resolving factual disputes.

[27] The above being said, the background facts in this matter make for depressing reading. It is in my view a text-book example of all that can go wrong where parties put their own individual interests above the greater good of all participants in an industry (all employers and employees included) and the primary objectives sought to be achieved by the LRA where it comes to sectoral bargaining and industry self-regulation.

[28] Thanks principally to the efforts of NEASA, all efforts since about 2014 to extend the main collective agreement of the MEIBC to non-parties has been

scuppered. This has left the untenable situation that non-parties to the metal and engineering industry, being the industry over which the MEIBC presides, are not bound by what had been negotiated and agreed to at industry level for the whole industry. This not only makes proper enforcement of minimum conditions of employment for the industry virtually impossible, but leads to a disparity of conditions of employment in the industry. It makes it possible for individual employers to gain a competitive advantage over others in the same industry off the back of the remuneration and conditions of employment of employees, which is not acceptable. This explains the extensive efforts since 2014 to finally get a binding main collective agreement in place for the whole industry.

[29] The applicants however at all times sought to distance themselves from all the other industry employer representatives where it came to negotiating, since 2017, what was the new consolidated main agreement of the MEIBC (the Main Agreement). Most industry employer representatives (employers' organization parties to the MEIBC) are affiliated to one federation, being the Steel and Engineering Industries Federation of South Africa (SEIFSA). There is another employers' organisation not party to SEIFSA, that is also a party to the MEIBC, being Consolidated Employers' Organisation (CEO).

[30] In the MEIBC itself, there is a distinct and separate bargaining forum for what can be called the plastics industry (sector) as a component of the metal and engineering industry, called the Plastics Negotiating Forum (PNF). The PNF has its own main collective agreement, which governs wages and conditions of employment specifically for the plastics industry. This however does not change the fact that it remains a part of the metal and engineering industry as covered by the scope and jurisdiction of the MEIBC. The parties specifically affiliated to the PNF are PCASA and the trade union parties having employees in the plastics sector.

[31] There are also further separate bargaining forums in the MEIBC, namely those for the lift and escalator sector, and the electrical engineering sector. Each of these sectors also have their own separate main collective agreements regulating wages and conditions of employment in those sectors. However, and

once again, these sectors remain part of and still resort under the scope and jurisdiction of the MEIBC. It may be added that the Lift Engineering Association is also a signatory (party) to the Main Agreement itself.

[32] It is common cause that SEIFSA, CEO, and all the employee representatives to the MEIBC (the trade unions), ultimately concluded the Main Agreement in 2021. The applicants are however not parties to and signatories of the Main Agreement, and have refused to participate with the other employer representatives parties in negotiating the same.

[33] Where it comes to the PNF, PCASA and the trade union parties to the PNF concluded a separate main collective agreement for the plastics sector on 8 October 2021, called the Consolidated 2021/2025 Plastics Industry Main Collective Agreement (hereinafter referred to as 'the Plastics Main Agreement').

[34] The next step would then be to extend the Main Agreement and the Plastics Agreement to non-parties in terms of section 32 of the LRA. It was also necessary to extend the main agreements for the lift and escalator sector and the electrical engineering sector to non-parties. For this very purpose, a special general meeting of the MEIBC was convened on 29 June 2022 so that the representatives of the participating parties in the MEIBC could vote on a request to be made to the Minister to extend all four main collective agreements, referred to above, to non-parties, in terms of section 32(1) of the LRA. It was common cause that this meeting was properly convened by way of proper notice given on 15 June 2022, and was properly constituted in terms of the constitution of the MEIBC.

[35] It is at this stage appropriate to set out how parties to the MEIBC qualify for representation and are then represented at meetings of the MEIBC. In this regard, there are 88 seats on the MEIBC, of which 44 seats are allocated to trade union parties, and 44 seats to employers' organization parties. Whether a party qualifies for a seat is dependent on the representativeness of such a party, based on a percentage of the total number of employers and/or employees represented by such party. For this reason, it is true that an employers' organization or a trade union may be a party to the MEIBC, but have

no actual representation at meetings of the MEIBC, or in other words, would not have a seat on the MEIBC. At the time when the special general meeting was convened on 29 June 2022, and from an employers' organization perspective, NEASA had 20 representatives, PCASA had 7 representatives, SAEFA had 2 representatives, and all the other employers' organizations (principally SEIFSA affiliates) had the balance of 15 representatives.

[36] In terms of clause 6 of the MEIBC constitution, a President and Vice President are elected from amongst the representatives on the Council. These two positions are shared between employer representatives and trade union representatives, in that one position will be occupied by a trade union representative and the other by an employers' organization representative. When the special general meeting took place on 29 June 2022, the elected President was Tim Neanor (Neanor), who was a representative from NEASA on the MEIBC, and the Vice-President was Victor Radebe (Radebe), a representative from NUMSA on the MEIBC. The President or Vice President, as the case may be, would also be responsible to act as the Chairperson of MEIBC meetings, and would have the duty, in terms of clause 6(3) of the constitution, to regulate the process of such meetings.

[37] The special general meeting on 29 June 2022 was attended by the above qualifying representatives (or in their absence the alternates). The President, Neanor, was the Chairperson of the meeting. The procedures applicable to meetings of the MEIBC are regulated, in general, by clause 8 of the MEIBC constitution. In the meeting, the issue of whether clause 8(12) of the constitution would find application in this case arose (this clause will be specifically dealt with later in this judgement). Neanor indicated that as far as he was concerned, clause 8(12) found application, and he then made a ruling that it would be applied. The meeting then escalated into strife about the application of clause 8(12). This will be dealt with further below.

[38] The upshot of the debate about the application of clause 8(12) was that Neanor refused to be swayed about the application of clause 8(12), and he indicated he made a ruling and that was the end of it. As far as Neanor was concerned, the application of clause 8(12) meant that PCASA, because it was not a party

to the Main Agreement, negotiated separately under the PNF, and was party to the Plastics Agreement, was not allowed to vote on the request to extend the Main Agreement to non-parties, and its membership had to thus be excluded from any determination of representativeness for the purposes of the vote. All the other representatives at the meeting strongly disagreed with this view, and was insistent on the fact that PCASA and its members had to form part of the vote.

[39] Because Neanor, based on his so-called ruling that clause 8(12) applied and that PCASA was precluded from voting, simply refused to allow any vote to take place where PCASA also voted, a motion was tabled in terms of clause 8(14) of the constitution, which motion was then carried, that Neanor be removed as Chairperson of the meeting, and that the Vice-President, Radebe, be appointed as Chairperson of the meeting. The meeting then continued with Radebe as Chairperson.

[40] The meeting then proceeded to vote on requesting the Minister to extend the Main Agreement, along with the other three main collective agreements for the other three sectors as well. NEASA and SEAFA did not vote in respect of the extension of the Main Agreement. All the other representatives in the meeting voted in favour of requesting the Minister to extend the four main collective agreements, which included the Main Agreement.

[41] Based on a tally of the votes in favour of extension, and then considering the number of employer and employee parties so represented by those votes, the MEIBC determined that a majority of both the employer and the employee parties to the MEIBC had voted in favour of requesting the Minister to extend the Main Agreement to non-parties. Therefore, and according to the MEIBC, the majority of the employees on both sides of the equation contemplated by section 32(1)(a) and (b) of the LRA, had voted in favour of extension.

[42] On 3 August 2022, the MEIBC then filed a formal request with the Minister to extend the Main Agreement to non-parties. This request, dated 2 August 2022, recorded the requisite employee numbers upon which the contention that the necessary majority was achieved, was based. It was recorded that 100% of the

trade union parties voted in favour of extension, which undoubtedly satisfied the requirements of section 32(1)(a). Where is came to the employers' organization representatives voting in favour of the extension, this constituted 60% of such employers' organization votes. The total number of employees employed by the employers' organizations represented in the MEIBC amounted to 308 605, and the 60% employers' organization representatives that voted in favour of the extension employed 184 739 of these employees, which is clearly a majority as contemplated by section 32(1)(b). The request to the Minister complied with all the other requirements in terms of section 32(1).

[43] The current application followed on 3 August 2022, which application, as set out above, has been opposed on behalf of all the respondents. After the application was filed, the Minister indicated to the applicants just before this matter was heard that he had decided to apply the provisions of section 32(5)(c) of the LRA before any extension of the Mina Agreement would be made. The importance of this will be discussed below. Undaunted, the applicants persisted with the application.

[44] When considering the applicants' application, it is, in short, a challenge of the decision taken by the MEIBC on 29 June 2022 to request the Minister to extend the Main Agreement. It is contended that the decision is unlawful, in that the MEIBC did not achieve one of the pre-requisites for a valid request for extension, being that the employer parties to the MEIBC that voted in favour of the request for extension did not employ the necessary majority of employees. It follows that this contention is founded on the issue of the proper interpretation of section 32(1) of the LRA, the application of clause 8(12) of the Constitution, as well as the consequences of what the applicants called the irregular and unlawful removal of the Chairperson of the meeting on 29 June 2022. There are also issues raised concerning the constitutionality of section 32(1) of the LRA, and that there were deficiencies and / or irregularities in the Main Agreement. I will now turn to deciding the aforesaid challenges of the applicants.

Section 32(1)

[45] The appropriate staring point in this case must be the consideration of the provisions of section 32(1) of the LRA. It reads:

> '(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.'

[46] Section 32(1) clearly contemplates a number of specific requirements that must be met before any request made to the Minister to extend a collective agreement concluded in a bargaining council can be considered to be valid. These are: (a) There must have been a collective agreement actually concluded in the bargaining council; (b) there must be a meeting of the bargaining council for the purposes of deciding whether to request the Minister to extend that collective agreement; (c) The parties at the meeting of the bargaining council must vote on the decision; (d) the 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; (e) the 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; and (f) the request to the Minister must be in writing and must identify the non-parties sought to be bound.[31]

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[31] See *Free Market Foundation v Minister of Labour and Others* (2016) 37 ILJ 1638 (GP) at para 19; *National Employers' Association of SA and Others v Minister of Labour and Others* (2012) 33 ILJ 929 (LC) at para 14; *National Employers' Association of SA v Metal and Engineering Industries Bargaining Council and Others* (2015) 36 ILJ 732 (LC) at para 14; *Plastics Convertors Association of SA and Another v Metal and Engineering Industries Bargaining Council and Others* (2017) 38 ILJ 2081 (LC) at paras 31 – 32.

[47] *In casu*, it is undisputed that there was a meeting of the MEIBC convened to decide whether to request the Minister to extend the Main Agreement and that this meeting was attended by all the representatives of the parties to the MEIBC, resulting in a vote having been taken on that decision. It is equally undisputed that the trade union parties representing a majority of the employees that are party to the MEIBC (in fact all of them), voted in favour of requesting the Minister to extend the Main Agreement. So far so good.

[48] The first question that remains to be answered is whether the vote taken at the meeting was lawful, on the basis that the meeting itself, even though properly and legitimately convened, became unlawful when Neanor as President acting as Chairperson of the meeting was removed as Chairperson of the meeting, and Radebe as Vice-President was appointed as Chairperson of the meeting in his stead. Answering this question involves a consideration of section 206 of the LRA as well as the facts of what transpired in the meeting on 29 June 2022, and will be addressed below.

[49] The second question is whether, even if the meeting and vote was lawful, it represented a majority of the employees that are employed by the employers' representatives voting in favour of the request for extension. Answering this question is not only dependent upon the consideration and interpretation of the constitution of MEIBC, but also the provisions of section 32(1) itself.

[50] It is clear to me that section 32(1), where it stipulates the requirement of the majority of the employee and employer parties to the bargaining council needing to vote in favour of extension, contemplates all of the parties to the bargaining council resorting under its scope and jurisdiction. This scope and jurisdiction are determined by the certificate of registration of the bargaining council.[32]

[51] It is not unusual for bargaining councils to have distinct and separate negotiating forums, such as the other three forums in the MEIBC referred to above, and that these forums bargain separately with the view to determine and

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[32] See *Transvaal Manufacturing Association v Bespoke Tailoring Employers' Association* 1953 (1) SA 47 (A) at 57D-E; *Golden Arrow Bus Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2005) 26 ILJ 242 (LC) at 252A-B.

agree upon specific wages and conditions of employment only applicable to employees in that forum.[33] But this does not change the fact that the parties, in these forums as well, still resort under the scope and jurisdiction of the bargaining council. It is therefore still essential for the entire bargaining council to determine whether or not it is appropriate to request an extension of such individual forum collective agreements. For example, it could possibly be that an employment term in the Plastics Main Agreement in the PNF would be incompatible with the Main Agreement, necessitating the parties to the entire MEIBC to decide that it would not be appropriate to extend the Plastics Main Agreement to non-parties, or only have it apply to the specific parties to the agreement. The point is simply that a decision to extend a part still requires a majority vote of the whole. That is what, in my view, is intended by the provisions of section 32(1)(a) and (b). In summary, any request for the extension of any collective agreement must be taken by all the parties to the bargaining council.

[52] The facts *in casu* actually speak to this intention. On the common cause facts, all four the main agreements were placed before the entire MEIBC in the special general meeting on 29 June 2022 for the purposes of the entire MEIBC voting on a request to the Minister to extend all of them. Therefore, all the MEIBC parties that have sufficient representation to qualify for a seat at the MEIBC meeting would vote in favour of or against a request to extend each of the four main collective agreements.

[53] The applicants' contention that the entitlement to vote on a collective agreement is limited only to the MEIBC parties that are an actual party to that individual agreement flies, in my view, in the face of what is contemplated by section 32(1)(b). Ascribing to such an approach may well lead to a minority determining the direction of a whole industry, and that is not a palatable state of affairs. Insofar as it may be contended that the MEIBC constitution may provide for such a situation, that constitution cannot contradict the provisions of the LRA, and what is required and contemplated by the LRA must prevail. This means

[33] In this regard, compare the Main Agreement and structure of the Motor Industry Bargaining Council (MIBCO).

that there must be a distinction between the parties covered by the Main Agreement, and the parties covered by the registered scope of the MEIBC. Section 32 contemplates the latter. In short, the majority of the actual parties falling within in the registered scope of the MEIBC must decide whether to ask the Minister to extend the Main Agreement to all the non-parties in that same registered scope.[34] As held in *National Employers Association of SA and Others v Minister of Labour and Others*[35] (*'NEASA (1)'*):

> '... The structure of the main agreement is to posit a universe comprised by the registered scope of the council, and then to expressly exclude from application the listed undertakings and activities. These categories are not exempted from the main agreement; they are expressly excluded from its application. An interpretation to the effect contended for by the respondents would render meaningless the clear distinction drawn in the Act between representativity within the registered scope of a bargaining council and representativity within the scope of a collective agreement concluded by a bargaining council. As I have indicated, this distinction finds expression not only in s 32 ..., but also in s 49(2)*(b)*, where in the context of representativity requirements there is a clear reference to the number of employees who are 'covered' by a collective agreement that has been extended by the minister in terms of s 32, as opposed to the number of members of union parties to a council, and employees employed by members of employers' organizations that are party to the council. The interpretation most consistent with these provisions, regulating as they do representativity requirements for councils, is that those employees and employers who are expressly excluded from the main agreement are not 'covered' by it. This is the interpretation applied by the council itself — all of its correspondence with the department relating to representativity requirements draws the distinction between the council's registered scope and the scope of the collective agreement. Given the significant number of employers and employees who are not covered by the main agreement but who fall within its registered scope, it cannot be said therefore that the registered scope of the council and the scope of the main agreement are one and the same thing ...'

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[34] *Free Market Foundation* (*supra*) at para 84.
[35] (2013) 34 ILJ 1556 (LC) at para 16.

[54] Therefore, and when applying the facts *in casu* to the aforesaid considerations, it must follow that a proper application of section 32(1) must mean that all parties to the MEIBC would be entitled to vote on any issue relating to a request to the Minister to extend any collective agreement concluded in the MEIBC to non-parties. In simple terms, it is an industry matter and requires full industry participation. It is in my view not permissible to limit the scope of such a vote by way of contrary internal regulation of any kind in the MEIBC itself. To do that is an artificial regulation of the concept of a majority, which runs counter to what is intended by section 32(1).

[55] On the facts, and if the vote of the while industry is considered, which would have to include PCASA and all the employees employed in the PNF, the requirements of section 32(1)(a) and (b) are satisfied. On the employees' side, there is a 100% favourable vote. On the employers' side, there is a favourable vote of just short of 60%, which is surely a majority. The applicants' complaint of a majority on the employers' side not being achieved thus has no substance, once clause 32(1) is properly applied.

The MEIBC Constitution

[56] Despite the provisions of section 32(1), the applicants argue that all meetings of the MEIBC must be regulated by what is prescribed for such meetings in its constitution, and that any valid and lawful meeting can only happen if that meeting is convened, and then conducted, in terms of the prescripts of that constitution. The applicants further argue that all the provisions relating to meetings in the constitution must find equal application to all MEIBC meetings, and none of the meeting prescripts can be ignored or excluded, just because it may be more suitable in particular circumstances to do so. Finally, the applicants contend that if there is a *lacuna* or contradiction caused by the application of the meeting provisions of the constitution, the constitution must be changed and cannot simply be negated.

[57] Deciding these issues raised by the applicants necessitates an interpretation of the constitution of the MEIBC. Like any other written instrument, this exercise

must be conducted in accordance with the following well known *dictum* in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[36]:

> '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 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.'

[58] The interpretation in this case has a unique context, which would be an important factor to consider. As said in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another*[37]: '*... the legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene ...*'. This must happen irrespective of whether the wording in the written instrument is ambiguous or

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[36] 2012 (4) SA 593 (SCA) at para 18. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12; *Association of Mineworkers and Construction Union and Others v Chamber of Mines of SA and Others* (2017) 38 ILJ 831 (CC) at fn 28; *Democratic Nursing Organisation of SA on behalf of Du Toit and Another v Western Cape Department of Health and Others* (2016) 37 ILJ 1819 (LAC) at para 33.

[37] 1950 (4) SA 653 (A) at 662G – H. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 89.

not. In *University of Johannesburg v Auckland Park Theological Seminary and Another*[38] the Court held as follows:

> 'The approach in *Endumeni* 'updated' the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to *Endumeni* that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract ...'

[59] Applying the above principles *in casu*, the contextual scene is that of the need to ensure a functional entity with the view to achieve orderly collective bargaining and regulation at industry level, and to ensure the proper and effective participation of all parties to that industry in such industry affairs, in order to achieve uniformity of conditions of employment for employees in the industry and so avoid the exploitation of employees in order for employers to achieve a competitive advantage over other complaint employers. This kind of dispensation generally also enhances industrial peace. Therefore, any interpretation should default, in the absence of a clear indication to the contrary, in favour of a full democratization of proceedings in the MEIBC with all parties to the MEIBC fully participating therein. As the Court said in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*[39]:

> 'Compliance with a collective bargaining agreement is crucial not only to the right to bargain collectively through the forum constituted by the bargaining council but it is also crucial to the sanctity of collective bargaining agreements. The right to engage in collective bargaining and to enforce the provisions of a collective agreement is an especially important right for the workers who are generally powerless to bargain individually over wages and conditions of employment. The enforcement of collective agreements is vital to industrial

[38] 2021 (6) SA 1 (CC) at para 66.
[39] (2008) 29 *ILJ* 2461 (CC) at para 56. See also *Kem-Lin Fashions CC v Brunton and Another* (2001) 22 *ILJ* 109 (LAC) at paras 20 – 21; *Confederation of Associations in the Private Employment Sector and Others v Motor Industry Bargaining Council and Others* (2015) 36 ILJ 137 (GP) at para 35.

peace and it is indeed crucial to the achievement of fair labour practices which is constitutionally entrenched. The enforcement of these agreements is indeed crucial to a society which, like ours, is founded on the rule of law.'

[60] In *Free Market Foundation v Minister of Labour and Others*[40] the Court held as follows:

> 'Section 32 of the LRA permits the extension of collective bargaining agreements concluded at sectoral level to persons not directly involved in the collective negotiations and not party to the agreement concluded in the bargaining forum, being the relevant bargaining council. Government policy favours such an arrangement because it is perceived to advance: (i) the promotion of collective bargaining at sectoral level; (ii) the promotion of majoritarianism; (iii) the prevention of unfair competition; (iv) the benefit of workers who have no collective bargaining strength to negotiate wages and terms and conditions of employment; and (v) a pluralistic system of industrial relations based on voluntarism (self-regulation) rather than state interference in the collective bargaining relationship ...'

[61] It must also be considered that one of the primary functions of a bargaining council is to enforce the collective agreements concluded in such council, and the council regulatory provisions must also be interpreted to give proper effect to this objective.[41] The above constituting the essential context within which the constitution of the MEIBC must be interpreted, I now return to the provisions of such constitution.

[62] Clause 3 of the constitution of the MEIBC provides for the objectives of the MEIBC. This includes considering and regulating matters of mutual interest, promoting a good relationship between employers and employees, maintaining industrial peace, securing the complete organization of employers and employees in the industry, administering of agreements concluded, establishing and regulating uniform conditions of employment and the securing the recognition and observance of all parties in the industry with negotiated agreements. This accords with the primary objectives discussed above.

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[40] (2016) 37 ILJ 1638 (GP) at para 8.
[41] *Free Market Foundation* (*supra*) at paras 12 and 16.

[63] According to the applicants, and because there is no specific dispensation in the constitution of the MEIBC regulating meetings as contemplated by section 32(1) of the LRA, clause 8(12) of the MEIBC constitution would find application. The clause reads as follows:

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

The respondents, on the other hand, contend that clause 8(12) does not apply and that a meeting for the purposes of applying section 32(1) of the LRA is a *sui generis* process.

[64] Why is it important to determine if clause 8(12) applies? The simple reason is that, according to the applicants, the application of this clause means that PCASA is not entitled to vote in favour of extending the Main Agreement, and if that is so, then the majority requirement where it comes to employer representation as contemplated by section 32(1)(b) would not be met. The applicants accept the total employee numbers of employees employed by employers that are parties to the MEIBC amounts to 308 605. It follows that a majority vote threshold would be 154 303. If the 33 366 employees employed by PCASA members are excluded, the number of employees employed by the employers' organizations that voted in favour of the request to the Minister drops from 184 739 to 151 373, which is then only a 48.02% representativity. On this basis, the applicants argue that the requisite majority as contemplated by section 32(1)(b) has not been achieved, and the extension request to the Minister would be invalid and unlawful.

[65] In determining whether clause 8(12) applies to exclude any vote by PCASA, it must first be decided if PCASA '*refused*' to become a party to the Main

Agreement. According to the applicants, PCASA indeed so refused, when it separated itself out into the PNF where it regulated its own affairs in such bargaining sector exclusive of the Main Agreement. I am unable to agree with this argument, for a number of reasons. Firstly, PCASA has been engaged in the PNF since 2013. It was never invited, called upon, nor required, to become a party to the Main Agreement in 2021. How it can be said that PCASA refused to become a party to an agreement it was never even invited or required to become a part of, is beyond comprehension. Secondly, the word '*refuse*' is something more than just a failure to be party to an agreement. 'Refuse' contemplates an indication that one is not willing to do something,[42] or to say that you will not do or accept something.[43] Further definitions contemplate an actual expression of an unwillingness to accept or comply with something.[44] That is why 'refuse' cannot be compared to concepts such as 'failed' or 'neglected'. By way of example, and in *Union and South-West Africa Insurance Co Ltd v Fantiso*,[45] the Court dealt with the phrase '*unreasonably refuses or fails to subject himself at the request of the authorized insurer and at the cost of that insurer, to any medical examination*',[46] and held that '*... The word "refuses" implies a specific verbal or written refusal ...*'.[47] In short, PCASA never refused to become a party to the Main Agreement. It never expressed an unwillingness to be party to the Main Agreement, nor stated that it did not accept the same. All considered, its intention to vote in favour of the extension shows the opposite. As such, the vote of PCASA cannot be compromised on the basis of clause 8(12), which simply does not find application.

[66] In any event, the proper application of section 32(1) as discussed above means a vote as contemplated by that section cannot be compromised by way of a provision such as clause 8(12). This was recognized in *National Employers' Association of SA v Metal and Engineering Industries Bargaining Council and Others*[48] ('*NEASA (2)*') where the Court dealt with a very similar challenge by

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[42] Oxford English Dictionary.
[43] Cambridge Dictionary.
[44] See the definitions in the Merriam-Webster and Collins Dictionaries.
[45] 1981 (3) SA 293 (A).
[46] This was a provision in section 23(c) of the Compulsory Motor Vehicle Insurance Act 56 of 1972.
[47] Id at 301A-B.
[48] (2015) 36 ILJ 732 (LC).

NEASA as compared to the current challenge *in casu.* In *NEASA (2)*, it was contended, also based on clause 8(12) of the MEIBC constitution, that section 32(1)(b) be read 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'*.[49] The Court in *NEASA (2)* reasoned as follows in this regard:[50]

> 'I would add that the provision is reflective of the ILO's Convention on Collective Bargaining, 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. Taking all of the above into account, NEASA's submission that the collective agreement sought to be extended was not one envisaged by s 32(1) of the LRA, in the sense that it was not 'concluded in the bargaining council' (ie 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 ...'

The Court concluded as follows in rejecting these arguments of NEASA:[51]

> 'The sensible meaning to be accorded to s 32(1) is that a collective agreement as defined in the LRA may be extended to non-parties subject to the jurisdictional prerequisites set out in that section. In contrast, NEASA's approach to the interpretation of s 32(1)*(b)* would lead to 'insensible' results, ie 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 s 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 derail the functions of the council, albeit that it is registered, with the status that such registration endows. The impact of this on orderly collective

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[49] See para 13 of the judgment.
[50] Id at para 10.
[51] Id at para 16. See also the discussion by Lagrange J in *National Employers' Association of SA and Others v Minister of Labour and Others* (2017) 38 ILJ 2034 (LC) at paras 19, 24, 31 and 34, concerning the judgment in *NEASA (2)*.

bargaining, with a bias towards bargaining at sectoral level, which is one of the objectives of the LRA, would be detrimental to say the least ...'

[67] In my view, therefore, and for the two reasons set out above, clause 8(12) would not find application in this instance, as its application would either contradict what is required by section 32(1), or it simply could not apply since there was no 'refusal' by PCASA as contemplated by such clause.

[68] But even if clause 8(12) does apply, it cannot apply in the manner contended by the applicants to be the case. According to the applicants, and where PCASA is not entitled to vote because it 'refused' to be party to the Main Agreement, only the employers' organization side of the employees employed by its members must be excluded from the vote count. But this cannot be correct. The reason why PCASA was not party to the Main Agreement is because of the fact that PCASA is part of the separate PNF bargaining forum which has its own main agreement (the Plastics Main Agreement). The fact is that the Plastics Main Agreement has trade union and employers' organization parties. It must follow that if the 'refusal' argument of the applicants is sustainable, then all the trade union parties and the employees they represent in the PNF have equally 'refused' to conclude the Main Agreement, as the Main Agreement would not apply to those employees in the PNF. In simple terms, one cannot just exclude PCASA. One must exclude the whole PNF. If the whole PNF is to be excluded from a vote on the request to the Minister to extend the Main Agreement, then all parties to the PNF must be so excluded, being both employer and employee parties. Once that is the case, then the vote of all the parties to the MEIBC (on the employer and employee sides), excluding the PNF, would still be a majority, as the 33 366 PCASA members' employees must also be deducted from the total of 308 605, leaving a number of 275 236. Once the number of 151 373 relied on by the applicants is then applied as a percentage of this reduced total of 275 236, the representation percentage is 55%, which is a majority.

[69] In my view, clause 8(12) actually contemplates such proportional reduction on both sides, where it refers to the value of the votes recorded for or against any proposition, in the case of a party being excluded from voting in terms of the

clause, being reduced to a common denominator. In any event, I agree with PCASA that a proportional reduction on both the employer and the employee side must be made if the PNF is excluded on the basis that its parties are not parties to the Main Agreement. It must follow that the majority requirement as contemplated by section 32(1)(b) is still satisfied.

[70] This leaves the applicants with their last pitch. This concerns the case that the exclusion of Neanor as Chairperson of the meeting. According to the applicants, this exclusion tainted the meeting with irregularity, and as a result, the vote taken at that meeting is compromised to the extent that the request to the Minister is rendered invalid.

[71] I am convinced that the simple answer to this case of the applicants is section 206 of the LRA. The relevant part of the section reads as follows:

> '(1) Despite any provision in this Act or any other law, a defect does not invalidate — ... *(c)* any act of a council ...
>
> (2) A defect referred to in subsection (1) means — ... *(c)* any irregularity in the appointment or election of — (iii) a chairperson or any other person presiding over any meeting of a council or a committee of a council ...'

[72] In *National Employers' Association of SA and Others v Minister of Labour and Others*[52] ('*NEASA (3)*') the Court considered whether the vote by the MEIBC to request the Minister to extend the main collective agreement in that instance was properly taken, in the context of an argument that the bargaining council's decision-making structures were not correctly and regularly constituted. The Court applied the aforesaid provisions of section 206 of the LRA and came to the following conclusion:[53]

> '... insofar as the requirement of an existing right is concerned, the provisions of s 206(1)*(c)* of the LRA preclude the applicants, at least in as far as the relief they seek is directed against the minister, from relying on any irregularity in the appointment or election of a representative to a council effectively to invalidate any collective agreement or act of the bargaining council that would otherwise

[52] (2012) 33 ILJ 929 (LC)
[53] Id at para 20. See also *NEASA (2)* (*supra*) at para 9.

be binding in terms of the Act. It seems to me that s 206 was enacted specifically to protect processes against technical shortcomings and deficiencies in the 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 s 206. 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. It would do violence to the plain wording of the section and its obvious purpose to find, as the applicants submit, that a distinction ought to be drawn between void and voidable acts, and that only the latter are contemplated by s 206 ...'

[73] In my view, the ratio in *NEASA (3) supra* applies directly to the argument of the applicants now raised before me. Whether or not the removal of the Chairperson of the special general meeting, and his replacement with the Vice-President as Chairperson, was irregular or unlawful, is precisely the kind of defect that section 206 is designed to cater for. The section makes it clear that even if this removal of the Chairperson was somehow irregular, it does not render the vote taken at the special general meeting to request the Minister to extend the Main Agreement invalid or otherwise irregular. This is especially so, considering that the request to extend the Main Agreement has already been lodged with the Minister and the Minister has decided to exercise his powers under section 32(5)(c) of the LRA, which decision currently stands. As held in *NEASA (3) supra*:[54]

'... For the purposes of the application for a declaratory order, the minister's decision is valid and enforceable until it is set aside by a court of law, and there is therefore no existing right in which the applicants have an interest. ...'

[54] Id at para 21.

[74] The applicants have sought to counter the application of section 206 of the LRA by arguing that it can only apply to the appointment of the Vice-President to act as Chairperson of the special general meeting on 29 June 2022, and not to the removal of the President as Chairperson. This distinction is entirely artificial and in my view nothing else but contrived. At stake here is one act, being a motion to remove the President as Chairperson of the meeting and appointing the Vice-President as Chairperson. It is one indivisible act. The latter would not take place without the former, or, in other words, there would be no need to appoint the Vice-President as Chairperson if it was not necessary to remove the President as Chairperson. The applicant's argument that section 206 does not apply thus falls to be rejected. It follows that the application of this section immunizes the proceedings at the meeting on 29 June 2022 from any challenge of invalidity, on the basis as complained of by the applicants.

[75] But even if I am wrong with regard to the application of section 206 in this case, it is my view that there was proper cause to remove Neanor as Chairperson of the meeting. I consider his conduct in presiding over the meeting to be deplorable. It is clear to me that Neanor came to the meeting with the intention to push the agenda of NEASA to do all it could to stand in the way of the extension of the Main Agreement. In pursuit of this agenda, he did everything he possibly could to scupper the meeting, which included several attempts to postpone the meeting for a variety of reasons, one of which was an unfounded contention that the meeting was inquorate. When none of this worked, Neanor invoked clause 8(12) and ruled that PCASA was not allowed to vote as a result (whether he has the power to make such a ruling is questionable). Virtually all the other representatives at the meeting attempted to bring him to other insights, to no avail. If the meeting did not take decisive action to stop the irregularity Neanor was perpetrating of prohibiting PCASA to vote when it was legitimately entitled to vote, such a failure may well have rendered the meeting irregular, despite the provisions of section 206.[55] The provisions of clause 8(14) of the constitution were properly applied to effect the removal of Neanor as

[55] Compare *Plastics Convertors* (*supra*) at para 76.

Chairperson, and so ensure that it proceeds to finality, and all representatives that were entitled to vote, did vote.

[76] For all the reasons as set out above, it is my conclusion that the applicants have failed to illustrate that they have any right to the relief sought. In sum, I am satisfied that PCASA was entitled to vote at the special general meeting on 29 June 2022 in favour of extending the Main Agreement, and once that was so, the requisite majority as contemplated by section 32(1)(b) had been achieved. In any event, and even if PCASA is excluded, it must follow that the whole PNF must eb excluded, in which event the requisite majority as contemplated by section 32(1)(b) would still be achieved. And finally, there is nothing irregular in the conducting of the special general meeting on 29 June 2022 that could be seen to taint the vote to request the Minister to extend the Main Agreement with any kind of irregularity, which vote is thus valid and proper. For these reasons alone, the applicants' application must fail.

Alternative remedy / Prejudice

[77] Even though the application must fail for want of the applicants establishing a clear right, I will nonetheless touch on the issue of an alternative remedy. In my view, the applicants have a perfectly suitable alternative remedy that was available to them, without having to burden this Court with the current application. The simple fact is that one of the prescribed actions the Minister must take in deciding to extend the Main Agreement to non-parties would be to decide if the request to extend the Main Agreement is a valid request as contemplated by section 32(1).[56] Should the Minister decide the request is valid, that decision would equally be subject to the review jurisdiction of this Court under section 158(1)(g) of the LRA in the ordinary course. In *NEASA (3) supra*, the Court had the following to say:[57]

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[56] See section 32(3) of the LRA that reads: '*A collective agreement may not be extended in terms of subsection (2) unless the Minister is satisfied that- (a) the decision by the bargaining council to request the extension of the collective agreement complies with the provisions of subsection (1) …*'. See also *National Employers' Association of SA and Others v Minister of Labour and Others* (2017) 38 ILJ 2034 (LC) at para 62.

[57] Id at para 22.

'... Even if I am wrong in coming to the conclusion that there is no 'right' for the purposes of the present application that pre-exists any setting aside of the minister's decision, the application stands to be dismissed on the basis that the applicants have failed to clear the second hurdle before them, ie that all of the facts and circumstances of the case require the exercise of a discretion in their favour. I come to this conclusion for two reasons. First, as I have noted, there is an alternative remedy open to the applicants. In effect, the substantive right to which they lay claim is a right to fair administrative action. The right of review under the LRA is available to the applicants on all of the grounds raised by the applicants in these proceedings relating to the vagueness of the collective agreement, the absence of fair criteria in relation to the adjudication of appeals in exemption proceedings and the failure by the minister to afford non-parties a right to be heard prior to extending the agreement. ...'

[78] The situation is exacerbated by the fact that the Minister has already decided to *prima facie* accept the request, and then exercise his powers under section 32(5)(c) of the LRA.[58] It follows that what the applicants are now attempting to do is to unduly interfere with the executive powers afforded to the Minister in terms of the LRA. The applicants can raise the exact same complaints they are raising now, to the Minister, when making any representations they may wish to make under section 32(5)(c), and the Minister must be allowed to fulfil his functions in the ordinary course when considering all such representations. The decision of the Minister should not be pre-empted, which is what the current application seeks to do.[59] As held in *Tshwane City v Afriforum and Another*[60]:

'An interim interdict should in these circumstances be granted in the rarest of cases. Intrusion into the sphere of operation reserved only for the other arms of state is an exercise not to be unreflectingly or overzealously carried out by a court of law. It calls for deeper reflection and caution. The state operates better

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[58] The section reads: '*Despite subsection (3) (b) and (c), the Minister may extend a collective agreement in terms of subsection (2) if- ... (c) the Minister has published a notice in the Government Gazette stating that an application for an extension in terms of this subsection has been received, stating where a copy may be inspected or obtained, and inviting comment within a period of not less than 21 days from the date of the publication of the notice; and (d) the Minister has considered all comments received during the period referred to in paragraph (c) ...*'.

[59] See *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC) at para 51.

[60] 2016 (6) SA 279 (CC) at para 70. See also *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at para 47.

when due deference is shown by one branch to another, obviously without approaching its obligations so timidly as to incorrectly suggest that there is an undue measure of self-restraint. That said, an attitude that is dismissive of the constitutional firewall around the powers of other arms of state is not conducive to the proper observance of separation of powers and exhibits disregard for comity among the branches of government.'

[79] The applicants have also raised issues such as the main agreement being defective, in particular challenging the provisions of the Main Agreement where it comes to the issue of exemptions. But once again, this is an issue that can be raised with the Minister by way of representations, and if the applicants are dissatisfied with the decision taken by the Minister in this regard, then once again they would have the right to pursue a review in the ordinary course under section 158(1)(g) of the LRA.

[80] The applicants have also raised an issue about the constitutionality of section 32(1). I must confess that it is my view that this challenge is nothing else but a red herring. I find it incomprehensible that the constitutionality of only section 32(1) is challenged, without challenging the entire section 32. If section 32(1) is unconstitutional and struck out, it would in effect negate the entire section 32, as the Minister cannot act in terms of this section if the Minister does not receive a request from the bargaining council in the first place. Also, and as stated above, the Constitutional Court itself has on several occasions clearly expressed itself on the importance of section 32 of the LRA, in the context of the overall primary objectives of the LRA. I however make no definitive finding in this regard, other than stating that for the purposes of this application, this issue cannot serve to afford the applicants any right to interim relief. The applicants would of course be free to raise a proper constitutional challenge in the ordinary course, should they so wish.

[81] One also cannot ignore the provisions of section 158(1B) of the LRA. This section makes it clear that piecemeal reviews are to be discouraged in favour of a single review when all proceedings are concluded, and should only be

entertained if it is just and equitable to do so. [61] What one has in this case is nothing more than a contemplated piecemeal review. There is in my view no reason why the entire proceedings under section 32 of the LRA, which have clearly commenced, should not be allowed to run its ordinary course, and if the applicants are dissatisfied with the ultimate outcome, they would be free to pursue a single review application on all issues in the ordinary course. There are in my view no particular requirements of justice and equity that would warrant the bringing of a review application at this stage, and then to stay all further proceedings under section 32 of the LRA on this basis. Comparable is the following *dictum* in *SA Broadcasting Corporation SOC Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[62] where the Court applied section 158(1B) in the following manner:

> 'There are at least two reasons why the SABC has failed to meet this threshold. First, Commissioner Mqingwana's ruling amounts to no more than a decision to provisionally assume jurisdiction, to hear evidence and to decide whether it had jurisdiction to determine the dispute (if necessary) on the basis of that evidence. This much is clear from the written ruling, in which the commissioner explicitly states that jurisdiction was assumed on the basis that if it later transpired, after the leading of evidence, that the CCMA lacked jurisdiction, a ruling to that effect would be made. In other words, there is no equivocal ruling on jurisdiction either way, certainly not one that is susceptible to review ...'

[82] This only leaves the issue of prejudice. In this context, the employee parties to the MEIBC stand to suffer a whole lot more than any prejudice the NEASA members stand to suffer. As stated above, and to entertain the current proceedings may well, considering the time taken for a review challenge, negate the entire extension of the Main Agreement, leaving the employees without any of the fruits contained in that agreement, for years to come. And because only the applicants are not parties to the Main Agreement, it is only

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[61] The section reads: '*The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined.*'

[62] (2020) 41 ILJ 493 (LC) at para 10.

their members that would benefit. This is unduly prejudicial to the industry as a whole, and in particular the objectives all bargaining councils are designed to achieve. If ultimately successful in any challenge of the extension of the Main Agreement, the applicants' members have the option of recovery of overpayments made, which is far less prejudicial to the situation of the employee parties having no benefits at all for what is an indefinite period. There is also the option of seeking exemption open to any of the members of NEASA that may have a difficulty in affording prescribed wages and benefits. One can hardly put it any better than the following dictum in *NEASA (3) supra*:[63]

> '... It is not disputed that if the interim relief sought by the applicants were to be granted, a great deal of uncertainty and confusion would be caused in the industry; hundreds of thousands of employees would be affected by the differential in wage rates that would inevitably occur. Further, any harm to which the applicants are exposed is not irreparable. It amounts to no more than the risk of paying wages in advance. Moreover, if the applicants' complaints are found either in the pending arbitration proceedings or in any review application to be valid, there is the prospect that through a process of ratification or a subsequent extension of the agreement the result that the applicants now seek to upset would in any event be achieved. On the other hand, if interim relief were to be refused pending a review that is ultimately successful, non-parties to the agreement would be entitled to recover the value of any increase paid by way of set off against subsequent wage payments adjusted to suit. In any event, those of the first applicant's members who are not able to meet the terms of a collective agreement have the remedy of an expedited application for exemption with a right of appeal ultimately to an independent panel. While the applicants have expressed their doubts about the efficiency of this process, the facts deposed to by the bargaining council appear to indicate that the system is not dysfunctional. In short: the balance of convenience favours the respondents, and the harm that would be caused by granting the interim relief that the applicants seek substantially outweighs the benefits that would be derived by what are at the end of the day two non-parties in an entire industry.'

[63] Id at para 25.

[83] Therefore, and for all the reasons as set out above, I am further convinced that the applicants have failed to make out a proper case for the relief they seek, and that the current application should be dismissed.

Conclusion

[84] In conclusion, I am unconvinced that the applicants are entitled to relief sought in their application. The applicants have failed to demonstrate that they have any right to the relief sought, let alone a clear right. I am satisfied that the applicants have proper alternative remedies available to them in the ordinary course, and that they simply would not suffer any irreparable prejudice should they not be granted the relief sought. In fact, and to the contrary, the employee parties to the industry would be unduly and probably irremediably prejudiced should the relief sought be granted. The application thus falls to be dismissed.

[85] However, and in my view, it is not just the relief sought in part A of the application that should be dismissed. The same fate must follow the relief sought in part B. I consider the relief sought in part A to be interwoven with a decision in part B, to the extent that it cannot be separated. The right to relief under part A involves the exact same cause of action and decision to be made under part B. In short, a decision under part A effectively disposes of the relief sought under part B. In very similar circumstances, the Court in *NEASA (2) supra* also decided to dispose of both the application for interim relief along with the alternative review application.[64] I can see no reason why I should not follow suit. I also consider in this regard that this same issue would be dealt with in the course of the Minister executing his duties under section 32, and there is in my view no reason to have a separate review on this same issue pending, where the Minister has not even made his decision in this regard. Consequently, the review application under part B also stands to be dismissed.

Costs

[86] This only leaves the question of costs. I have a wide discretion in terms of Section 162 of the LRA where it comes to costs. In exercising this discretion, I

[64] Id at para 20.

believe that the current matter is an appropriate case where the applicants must be ordered to pay the costs of the application. There are a number of reasons for my finding in this regard, which are set out below.

[87] First and foremost, it is my view that the current application should never have been brought. In *NEASA (2) supra*, virtually the same points raised by NEASA in the current application was raised, and failed. In addition, NEASA has also failed in the past on similar arguments in *NEASA (3) supra* based on the application of section 206 of the LRA, and has now attempted what was nothing more than an artificial construct to get around this problem. It is clear to me that the applicants, and in particular NEASA, are attempting everything in their power to try and get out of the Main Agreement. This kind of conduct is not in the interest of an orderly and effective bargaining council whose very purpose it is to take care of an industry. It is tantamount to eroding the MEIBC from within. I also take a dim view of the conduct of Neanor, who was unashamedly pushing NEASA's agenda, thereby abusing his functions as Chairperson. This all constitutes conduct deserving of a costs order.

[88] In addition, I believe it was not a tenable proposition for the applicants to have insisted on proceeding with the application when it was made clear to them that the Minister had decided to apply section 32(5)(c) of the LRA. From that point on, at the very least, they could have competently challenged the issue of the validity of the request for extension before the Minister, and need not have put all the respondent parties through the expense of having to continue to fight the application. It is an unnecessary waste of this Court's time as well. I also consider the provisions of section 158(1B) of the LRA in this context. NEASA however made a deliberate decision to proceed and as a result, they should be held accountable for costs.

Order

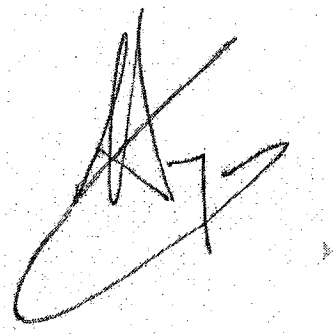
[89] In all of the above circumstances, I accordingly make the following order:

1. The application is heard as one of urgency.

2. The respondents' objection *in limine* relating to non-joinder is dismissed.

3. The applicants' application is dismissed in its entirety.

4. The applicants are ordered to pay the respondents' costs.



S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants:	Advocate C E Watt-Pringle SC together with Advocate J D Withaar
Instructed by:	Kriek Wassenaar & Venter Inc Attorneys
For the Third Respondent:	Advocate T Seneke
Instructed by:	The State Attorney
For the Fourth to Twenty Fourth and Twenty Sixth to Twenty Eighth Respondents:	Advocate G A Leslie SC
Instructed by:	Keet Attorneys

No appearance for other Respondents