DELETE WHICHEVER IS NOT APPLICABLE

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

28/09/2022
DATE

SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: J 947/22

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

Decided: **In Chambers**

Delivered: **28 September 2020**

Summary: Leave to appeal – no proper grounds made out – application for leave to appeal dismissed

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JUDGMENT – LEAVE TO APPEAL

SNYMAN, AJ

Introduction

[1] In this instance, the applicants had brought an application in two parts. The first part of the application (Part A) was the urgent application, and was brought seeking interim relief pending the determination of part B of the application. This interim relief sought was firstly that the first respondent (MEIBC) be interdicted and restrained from requesting the Minister of Employment and Labour (the Minister), being the third respondent, to extend the current Main Agreement of the MEIBC 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. Part B of the application was 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 Labour Relations Act (LRA)[1] to extend the Main Agreement to non-parties.

[2] The application came before me on 23 August 2022, and in a written judgment handed down on 31 August 2022, I dismissed the applicants' entire application, with costs.

[3] On 5 September 2022, the applicants filed an application for leave to appeal. The applicants further filed written submissions as contemplated by Rule 30(3A) of the Labour Court Rules and clause 15.2 of the Practice Manual on 13 September 2022. This was followed by the fourth and further respondents' (the

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

respondents) written submissions filed on 20 September 2022. As matters therefore stand, the application for leave to appeal is ripe for determination.

[4] Clause 15.2 of the Practice Manual further provides that an application for leave to appeal will be determined by a Judge in chambers, unless the Judge directs otherwise. I see no reason to direct otherwise and will therefore determine the applicants' leave to appeal application in chambers.

Analysis

[5] In *J & L Lining (Pty) Ltd v National Union of Metalworkers of SA and Others (2)*[2] the Court summarized the legal position that applies when a litigant seeks leave to appeal from this Court as follows:

> 'Leave to appeal is not there for the asking. When deciding whether to grant leave to appeal to the Labour Appeal Court, the Labour Court must determine whether there is a reasonable prospect that another court would come to a different conclusion to that of the court a quo, or in other words, whether the appeal would have a reasonable prospect of success. This was summarised in *SA Clothing & Textile Workers Union & others v Stephead Military Headwear CC*, as follows:
> 'It is trite that for an application for leave to appeal to be successful, it is required of the party seeking such leave to demonstrate that there are reasonable prospects that another court, in this instance, the Labour Appeal Court, would come to a different conclusion to that reached in the judgment that is sought to be taken on appeal."

[6] As to the meaning of '*reasonable prospects of success*', the Court in *Member of the Executive Council for Health, Eastern Cape v Mkhitha and Another*[3] said the following:

> 'Once again it is necessary to say that leave to appeal, especially to this Court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave

[2] (2019) 40 ILJ 1303 (LC) at para 5.
[3] [2016] JOL 36940 (SCA) at paras 16 – 17.

to appeal may only be given where the judge concerned is of the opinion that the appeal *would* have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.'

[7] The applicants contend that there is a reasonable prospect of another Court coming to a different conclusion as contemplated by the above test, and further contend that there exist conflicting judgments on the test that should be applied when determining whether a meeting of a bargaining council as contemplated by section 32(1) of the LRA would pass muster. The applicants further complain that I was predisposed in favour of the notion of the extension of collective agreements concluded in bargaining councils which predisposition unduly tainted the conclusion I arrived at.

[8] First things first. It is wrong to suggest that I was predisposed to any outcome in favour of the extension of bargaining council collective agreements. All that I did was to consider and then apply several *dicta* from judgments in the higher Courts relating to the issue of the importance of bargaining councils, the need for uniformity where it came to wages and conditions of employment of employees employed in the industries regulated by such bargaining councils, and the primacy that must be afforded to sectoral level bargaining. I see little prospect that another Court would conclude differently in this regard, as these principles are well-settled.

[9] Truth be told, I am instead convinced that it is the applicants that have shown a predisposition to the notion that bargaining councils are bad for smaller employers, despite the opportunistic acknowledgement of the fact that the LRA promoted collective bargaining at sectoral level. The history of the conduct of especially NEASA, found in all the reported judgments referred to in my judgment, shows this. The applicants appear to be incapable of looking beyond the interests of their individual members, and to the benefit of the industry as a

whole. It is this predisposition that motivated the litigation, and still motivates this application for leave to appeal. On the facts, I do not see any reasonable prospect that another Court could come to a different conclusion in this regard, as to the conduct of the applicants in pursuing this litigation.

[10] The applicants take issue with the use of words like "block" and "scupper" in my judgment. The fact that the applicants may not like my terminology certainly does establish prospects of success on appeal. What the applicants seem to ignore is that the instances where NEASA was successful in challenging the extension of the Main Agreement in the MEIBC all relate to the decision of the Minister, namely where the Minister had decided to extend the said Main Agreement in terms of section 32(2) / 32(5). In all the instances where NEASA sought to challenge the decision in the MEIBC itself to request the Minister to extend the Main Agreement, it did not turn out so well for them. The current application is yet another example of this same conduct, as the Minister has not yet even made a decision to extend the Main Agreement. The applicants have no reasonable prospects of success on appeal where it comes to my findings in this regard.

[11] The applicants further contend that I applied the wrong test in deciding this matter, in that what was sought by the applicants was interim relief, and not final relief. I remain unconvinced by the further arguments now submitted by the applicants in the application for leave to appeal that what the applicants were in effect seeking was interim relief, and remain satisfied, for the reasons fully elaborated on in my judgment, that what the applicants were actually seeking was final relief under the guise of interim relief. The undeniable reality is that a finding in favour of the applicants under part A of the application, considering the rights the applicants sought to assert to substantiate a finding in their favour under part A, would for all practical purposes dispose of the relief sought under part B. To split it in two is artificial, and a stratagem to avoid having to pass the hurdle of a clear right needing to be established in order to obtain relief. On the facts, and properly considered, what was being asked for was final relief, for the reasons fully ventilated in my judgment. I have little hesitation in concluding that there are no reasonable prospects of an appeal court concluding otherwise.

[12] Where is comes to the issue of clause 8(12) of the MEIBC Constitution, I believe that the applicants, properly considered, simply disagree with my interpretation of the clause. But such a disagreement does not establish prospects of success on appeal. A proper interpretation of this clause supports the findings I arrived at in my judgment in this regard, and it is in my view highly unlikely that another court would interfere with my conclusions relating to the proper interpretation of clause 8(12).

[13] I remain unconvinced that the separation of the MEIBC into chapters each having their own collective agreements, means that parties in one chapter are effectively prohibited from participating in or deciding upon the extension of collective agreements in other chapters. The extension of each individual collective agreement in each chapter still remains an overall industry consideration, in which all parties to the bargaining council must participate. The applicants have still failed to make out a proper case that this is what section 32(1) requires. In my view, there are no reasonable prospects that another court would come to a different conclusion in this regard.

[14] But even if a chapter is to be removed from the equation where it comes to the extension of a collective agreement in another chapter, then the whole chapter must be removed. The proposition that an employer in another chapter must be out where it comes to the vote on extension, however the employees must remain be in where it comes to that vote, is an untenable proposition. It makes no sense. The chapter consists of employers and employees. As correctly pointed out by the respondents, even clause 8(12), properly considered, contemplated that any exclusion of a party from voting contemplates a complete proportional exclusion and adjustment of the total vote to be considered. I remain unconvinced that any of the submissions as contained in the applicants' application for leave to appeal would reasonably result in another court coming to a different conclusion.

[15] Whether it comes to my findings relating to section 206 of the LRA, I must once again find that the applicants have no prospects of success on appeal. I remain satisfied that section 206 was enacted precisely to avoid the kind of arguments the applicants attempted to put forward in this case. To distinguish between the removal of the chairperson on the one hand, and the appointment of another

chairperson in his stead on the other, and to argue that section 206 does not cover the former and only covers the latter is bereft of common sense and logic. The removal and appointment constitutes a single unitary exercise, brought about by the exact same circumstances. Further, the applicants' attempts to diminish the section to only apply to what the applicants in effect say are minor "technical difficulties" fly in the face of the wording "*any irregularity*" specifically contemplation by section 206. To describe it as simply as possible, the section does not distinguish between small or large irregularities, for the want of a better description. Section 206 undoubtedly stands squarely in the way of the applicants' case relating to the removal of Neanor as chairperson. At best for the applicants, they once again disagree with my conclusion in this regard as being wrong, and I am once again compelled to say this does not make out a case for leave to appeal.

[16] The conduct of Neanor speaks for itself, and is established by the undisputed facts relating to what transpired in the meeting of 29 June 2022. It does not assist the applicants to try and argue about what may have been the case if Neanor's application of clause 8(12) of the Constitution was correct, because on the facts it was not correct and was clearly motivated by ulterior considerations in pursuit of NEASA's own objectives. On the facts, Neanor acted to avoid a favourable vote on a request to the Minister to extend the Main Agreement. He attempted to avoid a party being entitled to vote from voting and refused to allow the meeting to proceed on this basis. This in itself justified his removal as chairperson, which the entire Council meeting voted in favour of. The applicants have no reasonable prospects of success on appeal on this regard, once the undisputed facts are applied.

[17] The applicants argue that my judgment in effect condones 'mob rule'. There can be no substance in this argument. On the applicants' own version, Neanor never had the power to make a ruling, but despite this, he clearly did. As stated above, his ruling was that PCASA was not entitled to vote, and he then refused to allow the meeting to proceed in any manner at odds with this purported ruling. So then, and using the applicants' own argument, what was the meeting to do? Just leave it? Surely not. Clause 8(14) of the Constitution of the MEIBC allows for any motion to be tabled and seconded in a meeting of the MEIBC, and then to be voted on. This would obviously cover a situation of the removal of an

obstructive chairperson and the appointment of a competent and permitted replacement, such as the Vice-President, to act as chairperson. If the meeting votes in favour of such a motion, it cannot be mob rule. It is simply the application of the meeting provisions allowed by the MEIBC Constitution itself. The applicants' arguments in this regard have no reasonable prospects of success on appeal.

[18] The applicants contend that there are conflicting judgments as to the type of meeting which constitutes a valid meeting for the purposes of section 32(1) of the LRA. I do not believe this is the case. In my view, it is fairly trite that what is required is a meeting of the "bargaining council", and there are no prescripts on what form this meeting must take, provided there is always a proper vote conducted. In this case, it was undisputed that there was a proper meeting of the bargaining council convened, and that a vote was conducted. Stripped away from all peripheral camouflage put forward by the applicants, what was in reality the issue was whether the vote at the meeting satisfied the requirements of a majority as contemplated by section 32(1). The applicants, simply put, held the view the vote was not a majority vote, once the Constitution of the MEIBC, and in particular clause 8(12), was applied. Deciding this case involves a specific factual determination as well as deciding the issue of the interpretation and application of clause 8(12). There are no conflicting judgments dealing with this kind of determination. There is nothing in this case that contradicts the fact that there was still a valid and proper meeting of the bargaining council on the issue of requesting the Minister to extend the Main Agreement, and that a vote was conducted in respect of making that request, which is all that is required by all the judgments referred to by the applicants. In short, the fact that the applicants disagree with the outcome of that meeting and what should be considered as the vote does not detract from the validity of the meeting as being a proper bargaining council meeting and a vote for the purposes of section 32(1). There is no reasonable prospect of another Court concluding otherwise.

[19] The facts of this case in fact demonstrate the fallacy of the applicants' reasoning. Assuming for the purposes of argument that the Constitution of the MEIBC contained no clause 8(12), which is a clause that simply determines when a party cannot vote or speak at a meeting of the bargaining council on particular issues serving before such a meeting. In the absence of this clause, there would

be nothing standing in the way of any party at any time being entitled to speak and / or vote at a bargaining council meeting on any issue. If it was not for clause 8(12), the applicants would have no argument, on the undisputed facts and on their own case, as the vote taken at the meeting on 29 June 2022 would constitute the requisite majority as contemplated by section 32(1). Therefore, and once again, it is not a case that there was no valid meeting of the bargaining council as contemplated by section 32(1), as the section contains no prescripts for such a meeting. It is about whether the majority requirements for a request to the Minister to extend the Main Agreement, have been met. In my view, none of the judgments alleged by the applicants to constitute conflicting judgments deal with this. The applicants' reliance on purported conflicting judgments is thus misconceived and this cannot serve as a basis for establishing reasonable prospects of success on appeal.

[20] Where is comes to the issue of an alternative remedy, it cannot, in my view, be gainsaid that the applicants have a proper remedy available. There is nothing stopping the Minister from deciding, for whatever reason he may deem appropriate, that any of the requirements of section 32(1) have not been met. The Minister, once properly seized of the matter, and in exercising the powers bestowed upon him by section 32, could still decide that the request for extension made to him in the first place was not valid. In this context, he can still consider the arguments raised by the applicants in this case. This is not tantamount to expecting the Minister to fulfil the functions of this Court. It is about a suitable alternative remedy being available to the applicants, being a specific requirement to be considered in deciding whether the applicants qualify for the relief sought in their application before this Court. This the applicants seem not to appreciate. I am unconvinced that my findings relating to the availability of an alternative remedy establish reasonable prospects of success on appeal.

[21] On the issue of prejudice, I am not satisfied that the applicants have demonstrated any prospects of success on appeal where it comes to the findings I made in this regard. I dealt with this in detail in my judgment, and here is no reason to deal with it again. I never said that the applicants' members could not suffer prejudice. What I said is that the prejudice, not only to employees in the industry but also to the industry as a whole, if the relief sought by the

applicants was granted, would outweigh such prejudice. There is no legitimate basis to interfere with my findings in this regard.

[22] The applicants' issue concerning the constitutionality of section 32(1) of the LRA was not decided in my judgment. I made no final and binding findings in this regard. The observations I made in my judgment concerning this issue are just that, namely observations in a particular context. The applicants remain free to raise this challenge in the proper form in due course. This issue cannot serve to justify an application for leave to appeal.

[23] This leaves only the issue of my findings relating to the inappropriateness of piecemeal reviews. In my view, this requires a proper consideration of section 158(1B) of the LRA, which has not appeared to have been considered as yet, in a case such as this. The terms of this section are however, clear, and the requirement of 'just and equitable' must be satisfied. I cannot see how a dispensation endorsed by a recent amendment of the LRA, namely to hold over all reviews until the end, cannot apply in this case. This is after all what is envisaged by the expeditious resolution of employment law disputes, which is a fundamental imperative of the LRA, with the failure of this principle being the subject matter of much criticism emanating from the Constitutional Court.[4] The fact is that the section 32(1) request is the first step in many steps to follow where it comes to the extension of the Main Agreement. Simply put, it is far more appropriate, and in fact envisaged by the LRA, that all steps are completed, and one review be brought at the end, unless it is just and equitable not to follow this default approach. The applicants have made out no case that it would be just and equitable to separate out the current review. They thus have no reasonable prospects of success on appeal.

[24] In their opposition to the application for leave to appeal, the respondents raise the issue of mootness. According to the respondents, the Labour Appeal Court (LAC) dismissed an appeal by NEASA under identical circumstances in the judgment of *National Employers' Association of SA v Metal and Engineering Industries Bargaining Council and Others*[5], on the basis of mootness. The only difference of course between the case *in casu*, and the judgment of the LAC

[4] See for example *Strategic Liquor Services v Mvumbi NO and Others* 2010 (2) SA 92 (CC) at para 12.
[5] (2015) 36 ILJ 2032 (LAC).

referred to above, is that as matters now stand before me, the Minister has not extended the Main Agreement, whereas when the LAC considered the above case, the Main Agreement had already been extended by the Minister. According to the respondents, this difference does not matter, as by the time an appeal is heard, the Main Agreement will have been extended. I however cannot agree with proposition. I must decide the case as it stands before me, and at this point, it cannot be moot. If the case perhaps one day comes before the LAC, and it is then moot, then it would be up to the LAC to so pronounce. Also, this argument by the respondents assumes the Minister will extend the Main Agreement, and I do not intend to be so presumptuous as to speculate what the Minister would do. I therefore reject the mootness point raised by the respondents.

[25] All the above considered, I thus conclude that the applicants have shown no reasonable prospect that another Court would come to a different conclusion, and that the applicants thus have little prospect of success on appeal. The application for leave to appeal falls to be dismissed. I believe the following *dictum* from the judgment in *Martin & East (Pty) Ltd v National Union of Mineworkers and Others*[6] to be appropriate in deciding to refuse leave to appeal:

> '... The Labour Relations Act was designed to ensure an expeditious resolution of industrial disputes. This means that courts, particularly courts in the position of the court a quo, need to be cautious when leave to appeal is granted. ...'

[26] This only leaves the issue of costs. I will follow the same approach as in my original judgment, where it comes to the issue of costs, and therefore the application for leave to appeal falls to be dismissed with costs.

[27] In the premises the following order is made:

Order

1. The applicants' application for leave to appeal is dismissed with costs.

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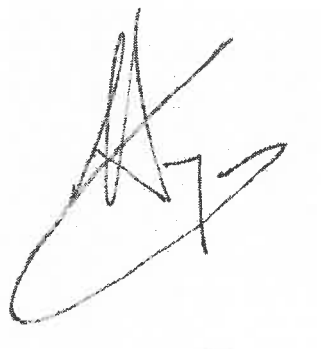
[6] (2014) 35 *ILJ* 2399 (LAC) at 2405J-2406A



S. Snyman
Acting Judge of the Labour Court of South Africa