NOT REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR 587/06

In the matter between:

METAL AND ELECTRICAL WORKERS OF SOUTH AFRICA Applicant

and

NATIONAL BARGAINING COUNCIL FOR THE ELECTRICAL INDUSTRY OF SOUTH AFRICA First Respondent

ELECTRICAL CONTRACTORS' ASSOCIATION Second Respondent

SOUTH AFRICAN EQUITY WORKERS ASSOCIATION Third Respondent

JUDGMENT

VAN NIEKERK AJ

1. The Applicant seeks an order declaring that the refusal by the First Respondent's refusal to permit the Applicant to be represented on the Council in terms of its constitution is a breach of the constitution and, accordingly, unlawful. The Applicant also seeks an order directing the First Respondent (the Bargaining Council) to permit the Applicant to be represented on the Council in terms of its constitution. The Applicant had initially sought interdictory relief in relation to the deduction of agency fees from its members, but that relief was not pursued at the hearing of this application. The Bargaining Council opposed the application.

2. It is common cause that in the Bargaining Council addressed a letter to the Applicant in November 2005 in the following terms:

> "*Kindly note that in terms of Clause 12.7 of the constitution of the National Bargaining Council for the Electrical Industry of South Africa your Party has failed to meet the minimum threshold of 10% National representivity required to remain as a Party on the Council.*
>
> *Your Party has further failed to rectify this deficiency within the twelve (12) month window period provided for in the abovenamed constitutional provision. Such period commenced on the 5th of November 2004.*
>
> *According to the record of the Council, representivity of your Party currently stands at 7.07% Nationally.*
>
> *As such the Council is obliged, and hereby does give notice that your status as a Party to this Council is now terminated."*

3. The Applicant's case is that it is a "major role player" in the electrical contracting sector and that it was a founding member of the Bargaining Council. The Applicant alleges that the parties who attended a meeting convened under the auspices of the Bargaining Council in November 2004 agreed that the minimum threshold requirement for representation on the Council be fixed at 10% of employees in the industry, and that in order to give effect to that threshold, it was agreed that each parties' membership would be audited. The Applicant avers that no decision was taken at the meeting as to who would conduct the audit, or what the terms of reference or timeframe for the audit would be. Further, the Applicant alleges that there was no process

agreed in the event of a party not meeting the required threshold.

4. The Bargaining Council disputes the Applicant's version of what transpired at the November 2004 meeting. The Council avers that the minimum threshold of 10% had been agreed earlier, during 2003, when the Council's constitution was drafted. In essence, the Council contends that it was inaccurate and improbable to suggest that any agreement on a minimum threshold for representation on the Council was agreed in November 2004, primarily because of the discussion on the issue in May 2003 and the fact that the constitution, which specifically included the 10% minimum threshold requirement, had been adopted by the parties and published by the Department of Labour before the November 2004 meeting took place.

5. In so far as the Applicant's representivity is concerned, the Council annexed to its Answering Affidavit a copy of LRA form 3.5 (request for Extension of Collective Agreement to non-parties) submitted by the Council to the Department of Labour during February 2005. In this return, the Applicant's representivity is recorded as 7.68%, being the percentage of the Applicant's members then within the scope of the collective agreement. This was the same figure submitted by the Council on 29 October 2004, a figure that remained unchanged between then and February 2005. On 5 November 2005, 12 months after the publication of the Council's constitution, an investigation and membership verification exercise conducted by the Council's officials fixed the Applicant's representivity at 7.07% of employees within the Council's registered scope.

6. The Council contends that at the November 2004 meeting, it was understood and agreed by all parties that the period of 12 months within which the Applicant was obliged to rectify the deficiency in its membership commenced on 5 November 2004, the date of publication of the constitution. The Council's insistence that the Applicant rectify any failure to meet the required threshold within 12 months, was acknowledged by the Applicant itself in a letter addressed to the Council on 9 December 2004.

7. There is no merit in resolving the factual dispute that exists on the papers. The Applicant does not contest the Bargaining Council's contention that its level of representivity, for the period November 2004 to November 2005, fell below the agreed threshold. Instead, the Applicant raises three legal grounds on which it challenges the termination of its membership of the Council. These grounds are:

7.1 that the Applicant had a reasonable expectation that the Bargaining Council would either convene an annual general meeting or seek direction from the Council's national executive to appoint an auditor and to make a finding on the Applicant's representivity. Only after that had been done, would the twelve month period allowing the Applicant to remedy the situation, be invoked;

7.2 that the Applicant had an expectation to be heard prior to the termination of its membership of the Council; and

7.3 that the Council's conduct was neither endorsed nor ratified by its structures.

8. The Applicant's claims, based as they are on the Bargaining Council's constitution, must be viewed broadly in the context of the policy and purpose underlying bargaining councils, and more particularly in terms of the Council's constitution.

9. Clause 12.7 of the Council's constitution reads as follows:

> "*Any employer organisation or trade union, that was previously admitted to the Council or a regional committee, as the case may be, in terms of this clause, but whose paid-up membership subsequently falls below 10%, shall be required within a period of twelve (12) months to rectify such deficiency in its membership failing which such employers organisation or trade union shall no longer be deemed to be representative and shall no longer qualify to remain as a party on the Council or regional committee, as the case may be.*

10. The manner in which the minimum threshold is to be calculated is set out in clause 12.3 of the constitution. That clause reads as follows:

> "*Any trade union registered in terms of the Act in respect of employees engaged in the Electrical Industry may be admitted as a party to the Council if such trade union has a registered paid up national membership of no less than 10% of the total number of employees registered within the scope of the Council's agreements."*

11. In interpreting the Council's constitution, the Court is giving effect to a product of collective bargaining. As a matter of policy, the Labour Relations Act does not compel collective bargaining and

therefore precludes the Courts from prescribing to parties who they should bargain with, what they should bargain about or whether they should bargain at all. In *National Police Services Union & Others v National Negotiating Forum & Others* (1999) 20 *ILJ* 1081 LC at para 52, this Court observed that:

> "*In this regime, the courts have no right to intervene and influence collectively bargained outcomes. Those outcomes must depend on the relative power of each party to the bargaining process."* (at 1095 D – E)

12. A multi-union approach is not inconsistent with the LRA's promotion of collective bargaining at sectoral level. It is no doubt also true that the more representation a bargaining council has of the parties over which it exercises jurisdiction, the more effective the role of the council. On the other hand, the LRA establishes self-government as the basis for sectoral level bargaining, a consideration that demands respect and accordingly precludes interference by the Courts in respect of a bargaining council's constitution and its collective agreements, except where this is specifically contemplated by the LRA, or where there is otherwise some palpable breach of the Act.

13. Turning now to the arguments raised by the Applicant, in my view, the Applicant has failed to make out a case, either in its papers or in its argument, on which any legitimate expectation is based. The constitution to which it was a party, clearly provides that a failure to rectify any deficiency in membership will have the consequence that the employers' organisation or trade union concerned will no longer be representative and will cease to qualify to remain as a party to the Council. I fail to appreciate how, in these circumstances, the Applicant can claim a legitimate

expectation to the convening of an annual general meeting or further direction from the Council's national executive.

14. Similarly, in relation to the argument that the Applicant had a right to be heard before its membership of the Council terminated, cannot be sustained by reference to the papers before the Court. The constitution makes no provision for any further rights on expiry of the twelve month period within which a party to the Council whose representivity is found wanting to regain sufficient members to meet the threshold. It was not suggested that the Council, in acting as it did, exercised an administrative or public function and that a statutory right to be heard applied in this instance. The Applicant was itself a party to a provision in the constitution that effectively provides for an automatic termination of membership once a twelve-month window period for the rectification of the situation has lapsed.

15. Finally, there is no merit in what might be termed the Applicant's ratification argument. There are no provision in the constitution which require the ratification of the removal of any party for failing to maintain the required threshold. The provision and the constitution operates automatically. In any event, the Council in its answering papers has recorded that the removal of the Applicant was ratified by the Council's National Executive Committee, and the Council's annual general meeting. The Applicant's replying affidavit confirms what it refers to as 'the subsequent ratification and endorsement by the full Council' but notes that this 'does not cure the material defect of the November 2004 meeting' (at para 23.3). On this basis, even if any ratification of the Council's decision was necessary, on the Applicant's own version, the decision was ratified.

16. It follows that there is no basis in law upon which to reinstate the Applicant as a party to the Bargaining Council. The Applicant's membership was below the required 10% threshold in November 2004, and the Applicant has never contended that it was unaware of this, or that its membership in fact exceeded the threshold. Twelve months later, by November 2005, the position had not altered. That led, in my view, to the automatic removal of the Applicant as a party to the Council.

17. The application is dismissed, with costs.

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ANDRÉ VAN NIEKERK

Acting Judge of the Labour Court

Date of judgment: 19 December 2007

Applicant's Attorneys: Lebea & Asssociates

First Respondent's Attorneys: Cheadle Thompson & Haysom Inc.