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NUMSA v LUFIL: Does the Constitutional Court judgment accord with government's policy of orderly bargaining at sectoral level?

3 June 2020 *7 min read*

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This article is a follow up to the article dealing with the case National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe) (A Division of Bidvest Paperplus (Pty) Limited) (Unreported) Case No. CCT172/19, which addresses the specific position taken by the Constitutional Court (the Concourt) in handing down its judgment.

By way of background, the Concourt made a ruling on a dispute between NUMSA and Lufil, which arose out of NUMSA seeking to organise workers at Lufil, and Lufil denying NUMSA the right to organise its workers on the basis that NUMSA was acting unlawfully in seeking to organise its (Lufil's) workers because it (NUMSA) was in violation of its own constitution, which restricted it to organising in the metal industry, whereas Lufil was in the paper and packaging sector.

The Concourt confirmed the earlier Labour Appeal Court (LAC) judgment, which had reversed the earlier decisions of the CCMA and the Labour Court (LC), which had ruled in favour of NUMSA. The effect of the latter's respective rulings was that NUMSA had a right to organise workers at Lufil, where it had recruited a significant number of the total workforce at Lufil on the basis of which it (NUMSA) argued that it made it sufficiently representative of the workforce at Lufil.

In upholding the decision of the LAC, the Concourt confirmed that NUMSA was bound by the limitations it had placed on itself in its own constitution as to the scope of its organising reach. The Concourt essentially said that NUMSA was the author of its own misery: it tied itself to a short leash by restricting its scope of organising to the metal industry. NUMSA made its bed and it had to lie on it; it could not be permitted to approbate and reprobate or to eat its cake and still have it.

In the course of its judgment, the Concourt reasoned that if NUMSA had merely amended its constitution to widen its scope of organising to include the paper and packaging industry in which Lufil operated, it would have not encountered the problems it did. Effectively, the Concourt left the door open for NUMSA to amend its constitution and then claim the right to organise workers at Lufil. The effect of the pronouncement has much more serious implications: it also allows other unions to amend or draft their constitutions in broad terms as to their scope of organising, which will effectively allow them to operate in any sector/industry they fancy.

It is with the effect of the Concourt judgement on future organised bargaining that this article is concerned. Does the decision have the potential of creating super unions, whose tentacles are spread to every conceivable sector of the economy? Would the existence of these super unions be good for collective bargaining in this country? What would be the effect of the super unions on the government policy of orderly collective bargaining at sectoral level, as expressed in the Labour Relations Act, 66 of 1995 (the LRA)? Is it in fact correct to say that unions can change their constitutions willy-nilly and claim the right to organise in any sector/industry they please?

Both the LAC and the Concourt acknowledged the government's policy of orderly collective bargaining at sectoral level. In the course of laying the basis of its ruling, the Concourt acknowledged the LAC's endorsement of the government's policy of orderly collective bargaining at sectoral level (paragraph 7 of the Concourt judgment). It further endorsed the LAC's position more emphatically in paragraph 37 when it said, *"[T]he Labour Appeal Court was correct to find that the role of a union's constitution gives effect to legitimate government policy of orderly collective bargaining at sectoral level"*. The Court was referring to the limitation in NUMSA's constitution regarding its scope of organising. I submit that by this statement, the judge undoubtedly endorsed the government's policy of orderly bargaining at sectoral level, as the LAC had done earlier.

For completeness, the policy is expressed in various provisions of the LRA. For instance, in its preamble the LRA states its objective or primary objects as, among others, *"... to promote and facilitate collective bargaining at the workplace and at sectoral level"*. Furthermore, section 1 states that:

"[T]he purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are –

"...

(d) to promote:

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level..."

The preamble and section 1 of the LRA clearly stipulate that collective bargaining must be orderly, and must occur at the workplace or at sectoral level. This suggests that sectoral level is the widest scope for collective bargaining envisaged in the LRA. This being the case, collective bargaining is not envisaged to straddle sectors of the economy, as it were.

In the light of the Court's endorsement of the government's policy of orderly bargaining at sectoral level, the key question is, does the Concourt's reasoning in paragraphs 59, 60, 62 and 69 of its judgment accord with the policy? Notably, in paragraphs 59 and 60 the Court's expressed the following sentiments:

"[59] NUMSA could have simply passed a resolution of its central committee to amend its scope, if it sought to admit Lufil employees into membership."

"[60] It is common cause that the paper and packaging industry is not listed in Annexure B of NUMSA's constitution...An amendment of its constitution could so easily have been effected to incorporate the paper and packaging industry."

In my view, these pronouncements by the Concourt do not accord with the policy, and its earlier endorsement thereof. If unions can willy-nilly amend or craft their constitutions in broad strokes, which allow them to organise in multiple sectors, that would not be in keeping with the government's policy of orderly bargaining as sectoral level.

It bears mention that in dealing with registrations of trade unions, the LRA does not place many restrictions on them. Section 8 essentially stipulates that every trade union has the right, subject to the provisions of Chapter VI, to determine its own constitution and rules. Further requirements are stipulated in section 95, the key requirement being that a trade union, which applies for registration must have adopted a constitution that meets the requirements of subsections (5) and (6) of section 95 [section 95(10) (b)]. Subsection (5) prescribes that a trade union that intends to register *must*, among other things, prescribe qualifications for, and admission to, membership [(5)(b)]. There is no restriction to the effect that membership may only be limited to a sector a trade union chooses, nor is there a limitation regarding the number of sectors a trade union may organise in.

On the other hand, subsection (6) essentially stipulates that constitutions of any trade union or employer's organisation seeking registration may not include any provision that discriminates directly or indirectly against any person on the grounds of race or sex. Furthermore, section 101 permits a trade union to amend or replace its constitution. It does not place any restriction as to which amendments are permissible.

In the final analysis, in the light of the stated government policy of organised bargaining at sectoral level on the one hand, and the absence of restrictions regarding union's scope of organising, on the other, does the Concourt's stance that NUMSA could have simply amended its constitution to give it a right to organise in another, unrelated sector compared to the one it was already organising in accord with the government's policy of orderly bargaining at sectoral level? Does the fact that the LRA places no sector restrictions on trade unions seeking registration fly against the government policy? The jury is out. And it will remain out until these specific questions come before the Concourt.



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