

EMPLOYMENT

When can a trade union operate outside the ambit of its constitution?

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This question was answered by the Labour Appeal Court recently in ***National Union of Metalworkers of SA & others v Afgri Animal Feeds (Pty) Ltd (2022) 43 ILJ 1998 (LAC)***.

NUMSA lodged an appeal with the LAC after the Labour Court had decided in favour of Afgri Animal Feeds (AAF).

The case involved NUMSA's right to represent employees who were dismissed by AAF in the aftermath of the employees embarking on an unprotected strike and failing to heed its ultimatum to terminate it.

The background to the dispute is that after AAF had refused [NUMSA](#) workplace organisational rights, some of AAF's employees embarked on an unprotected strike to try to strong-arm AAF to grant NUMSA the rights.

Meanwhile, the scope of NUMSA's constitution did not include the industry in which AAF operated namely, manufacture of animal feeds. Following the unprotected strike, the striking employees were given notice to attend a disciplinary hearing.

At the end of the hearing, some of the employees were given final written warnings arising from their conduct, while others were dismissed.

The dismissed employees referred an unfair dismissal dispute to the CCMA, which failed to conciliate it.

Thereafter NUMSA, referred an unfair dismissal dispute to the Labour Court for adjudication as the first applicant, and the employees as the second and further applicants.

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NUMSA and the employees were represented by their attorneys of record. The respondent raised a preliminary point that both NUMSA lacked locus standi and authority to act on behalf of the employees.

In support of its preliminary point, the respondent argued notwithstanding that NUMSA claimed that the employees were its members, the employees were employed in a sector which fell outside NUMSA's constitution, thereby rendering NUMSA's referral of the matter for adjudication in terms of s200 of the LRA invalid *ab initio*.

Relying on an earlier case, coincidentally involving NUMSA, namely ***National Union of Metalworkers of SA v Lufil Packaging (Isithebe) (A Division of Bidvest Paperplus (Pty) Ltd) & others*** (2020) 41 ILJ 1846 (CC) (Lufil), the Labour Court found in favour of AAF that the employees' membership of NUMSA was invalid and void *ab initio* because the employees were employed in a sector which fell outside of the scope of the NUMSA's constitution, and that NUMSA's representation of the employees was consequently invalid.

The earlier case of Lufil established the principle that a trade union is not entitled to be granted workplace organisational rights in an industry which fell outside its scope, as defined in its own constitution.

NUMSA Appeal

Back to the AAF case, not satisfied with the Labour Court's order, NUMSA and the employees took the issue on appeal to the LAC and argued that their case was distinguishable from Lufil, and therefore the Labour Court's reliance on Lufil was misplaced.

In support of their case, they argued that Lufil concerned organisational rights, whereas their case concerned NUMSA's right to represent individual employees in unfair dismissal proceedings.

In opposing the appeal, the respondent contended that NUMSA was prevented from referring the unfair dismissal dispute to the Labour Court when the employees concerned were precluded from membership of NUMSA in terms of its constitution.

The LAC noted that a crucial consideration in resolving the dispute was that both NUMSA and the employees were represented by their attorney of record in the referral of the matter to the Labour Court and in the proceedings before that court, in accordance with s 161(1).

The Court reasoned that *"[g]iven their legal representation, the employees were not represented in the proceedings by an 'office bearer or official of that party's registered trade union' in terms of s 161(1)(c). Rather, NUMSA's representation of the employees took the form contemplated in s 200(1)(b) and (c) and s 200(2), in that the union acted as a party to the proceedings on behalf of or in the interest of the employees.*

" It further noted that where a union represented employees on that basis, the LAC recognized that it acts collectively with its members, asserting its members' rights and not its own.

Based on what it noted earlier, the LAC stated that the pivotal issue before it was whether NUMSA could represent the employees in the unfair dismissal dispute even though AAF operated in an industry outside NUMSA's scope, as prescribed in its constitution.

In dealing with this issue, the LAC considered to effect of the scope defined in NUMSA's constitution and stated that a union's scope of operation only places a restriction on the union in relation to industries in which the union is entitled to organise and bargain collectively and does not bar the union from representing its member or members (in terms s 200(1)(b) and (c) and s 200(2) of the LRA) in an individual dispute with their employer, even outside its scope.

Furthermore, the LAC also highlighted that the case before it was distinguishable from *Lufil* in that *Lufil* concerned NUMSA's contention for the right to workplace organisational rights, whereas the case before it concerned NUMSA's suitability to represent its member employees in unfair dismissal dispute.

Based on the reasoning above, it concluded by stating that the Labour Court had erred in finding that the employees' membership of NUMSA was invalid and void *ab initio* and it had similarly *"erred in finding that NUMSA's referral of the matter to the Labour Court was invalid and void ab initio and in finding that the union was precluded from the proceedings before it on the basis that it lacked locus standi...."* Consequently, it set the order of the Labour Court aside and dismissed the respondent's point *in limine*.

In the end, the principle established in the AAF case is that a union is not precluded from recruiting members outside its scope of operation.

However, it will be limited in the service offering it can give such members. It can act collectively with its members in asserting its members' rights in their individual unfair labour practice and unfair dismissal disputes, based on the principle that an employee has a right to choose who will represent him or her in such proceedings.

However, it cannot engage in collective bargaining on their behalf.

The court refrained from pronouncing on the issue of whether a union official in the circumstances described above can represent the employees in unfair labour practice and unfair dismissal disputes, as the issue was not raised before it.



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