



DLA CLIFFE DEKKER
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EMPLOYMENT ALERT

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THE FUTURE OF THE EXTENSION OF BARGAINING COUNCIL AGREEMENTS

The North Gauteng High Court will today hear argument on whether s32 of the Labour Relations Act, No 66 of 1995 is unconstitutional. This section empowers the Minister of Labour to extend agreements concluded in a Bargaining Council to non-parties.

The Confederation of Associations in the Private Employment Sector, with other parties, are applying to court to declare this section unconstitutional. The Motor Industry Bargaining Council, Minister of Labour, Numsa and the employer organisations who are parties to the Council are opposing the application.

The case holds implications for all bargaining councils. The extension of their agreements is important to the councils and if the application is successful all the bargaining councils whose agreements have been extended will be affected.

In an earlier case, the Court held that the extension of such an agreement is unlawful as the extension did not comply with the prescribed requirements of s32. This is the first opportunity for the court to consider the constitutionality of s32.

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WHICH TRADE UNIONS ARE ALLOWED TO REPRESENT EMPLOYEES AT THE CCMA?

According to s200(2) of the Labour Relations Act, No 66 of 1995 (LRA), an employee may be represented by an official from his trade union during proceedings at the CCMA.

However, what if that employee is not a valid member of his union?

An interesting situation arose in the case of *NUM obo Mabote v Kalahari Country Club* (unreported judgment C1010/12 dated 21 June 2013). In this case the employee, a Mr Mabote, was a member of the National Union of Mineworkers (NUM). NUM's Constitution states that membership is open to all workers who are employed in the mining, energy, construction and allied industries. However, it just so happened that the Mabote was employed by the Kalahari Country Club (KCC), which is part of the hospitality industry and not the mining industry.

When a dispute was referred to the CCMA, KCC argued that Mabote was not entitled to be represented by a NUM official because Mabote was not a valid member of NUM and because NUM was not entitled to organise in the hospitality sector. The CCMA commissioner agreed with the submissions made by KCC and held that NUM had no *locus standi* to represent Mabote.

However, when the matter went on review to the Labour Court, Steenkamp J reached a different conclusion. The learned judge did not deal with the question of whether or not trade unions may organise outside of their registered scope. Instead, he found that the essence of the dispute had to do with the right to representation as stipulate in the LRA, and by doing so, the judge drew a distinction between organisation on the one hand, and representation on the other.

When s100(2) of the LRA states that an employee may be represented by a trade union, it makes no reference to the trade union's registered scope. Therefore, on a plain reading of this section, an employee may be represented by any trade union, so long as the employee is a valid member of that union.

However, s4(1)(b) of the LRA states that even though every employee has the right to join a trade union, employee's may only do so subject to the trade union's Constitution. It would therefore appear that, because Mabote did not work in the mining sector, he was not a valid member of NUM and NUM could not represent him. However, the judge held these provisions of the LRA should not be interpreted so restrictively.

The court held that:

It is for the trade union to decide whether or not to accept an application for membership and whether or not that member is covered by its constitution. It could not have been the intention of the legislature to unduly restrict the right to representation by a trade union to the extent that it is up to a third party... to deny a worker that right, based on the trade union's constitution.

The NUM constitution makes it clear that eligibility for membership is "subject to the approval of the branch committee which has jurisdiction." It is up to the union and its branch committee to deal with any challenge to membership. It is not for an employer to interfere with the internal decisions of a trade union as to whom to allow to become a member.

The court therefore held that the right to representation by a trade union is unaffected by a defect in that union's internal administration. Accordingly, a union may represent its members in legal proceedings contemplated by the LRA even if the employee does not work within the union's registered scope.

While the court did not go so far as to say that employer's cannot query the validity of actions taken by trade unions in contravention of their own constitutions, it did send a clear signal that employees' rights under the LRA will not lightly be interfered with on the basis of non-compliance with a trade union's constitution.

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