



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 289/10

In the matter between:

**CONFEDERATION OF SOUTH AFRICAN
WORKERS' UNIONS (CONSAWU)**

Appellant

and

NEDLAC

First Respondent

THE MINISTER OF LABOUR

Second Respondent

COSATU

Third Respondent

NACTU

Fourth Respondent

FEDUSA

Fifth Respondent

BUSINESS SOUTH AFRICA

Sixth Respondent

Neutral citation: *CONSAWU v Nedlac* (289/10) [2011] ZASCA 57
(31 MARCH 2011)

Coram: STREICHER, NUGENT, SNYDERS, BOSIELO and
MAJIEDT JJA

Heard: 24 FEBRUARY 2011

Delivered: 31 MARCH 2011

Summary: Labour Law – National Economic Development and Labour Council – validity of clauses 9.3 to 9.6 of its constitution – meaning of ‘to provide for’ in section 4(d) of the National Economic Development and Labour Council Act, 35 of 1994.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Msimeki J sitting as court of first instance)

The appeal is dismissed with costs that include the costs of two counsel.

JUDGMENT

NUGENT and MAJIEDT JJA (SNYDERS and BOSIELO JJA concurring)

[1] The National Economic Development and Labour Council – NEDLAC – serves as a forum for various constituencies to find consensus on matters of economic and labour policy. The principal constituencies are business, labour and the state. Business is represented by Business Unity South Africa – a federation of employer and business organisations. Three trade union federations – Cosatu, Nactu and Fedusa – represent labour (we will refer to them as the founding federations).

[2] The Confederation of South African Workers' Unions (CONSAWU) applied to NEDLAC to gain entry to its ranks but its application was declined. CONSAWU applied to the North Gauteng High Court for relief that we come to presently. The application was dismissed by Msimeki J and CONSAWU now appeals with the leave of that court.

[3] The application cited NEDLAC, the Minister of Labour, Business Unity South Africa, and the founding federations as respondents. At that stage CONSAWU claimed declarations directed to the constitutional validity of the Act and to the validity of parts of NEDLAC's constitution. NEDLAC and the Minister opposed the application. When CONSAWU later withdrew its claims directed at the constitutional validity of the Act the Minister ceased to have an interest in the matter and CONSAWU withdrew the application so far as it concerned the Minister. The founding federations did not oppose the application, no doubt because they associated themselves with NEDLAC's opposition. Business Unity South Africa also did not oppose the application. In an affidavit that was filed on its behalf later in the proceedings it explained that it had not opposed because the relief that was then sought did not affect it directly. Only CONSAWU and NEDLAC are thus parties to this appeal.

[4] The National Economic Development and Labour Council Act 35 of 1994 purports¹ to establish NEDLAC as a juristic body having a constitution that would be adopted at an 'inaugural meeting'. The meeting was to be convened by the Minister of Labour. Present at that meeting were to be representatives of the employer and employee interests that were then represented on the National Manpower Commission² (which would then cease to exist) and the National Economic Forum, representatives of the state, and representatives of community and development interests. Their duty at the meeting was,

¹The Act seems to us to be conceptually flawed. The Act purports both to create NEDLAC and to provide for its creation by the adoption of a constitution by its founding members. In that way NEDLAC purports to come into existence by pulling itself up by its bootstraps. Despite its express language we think that the effect of the Act was not to create NEDLAC but instead to decree that NEDLAC should be created in the manner and form provided for in the Act.

²Established by s 2A of the Labour Relations Act 28 of 1956.

amongst other things, to ‘adopt a constitution for [NEDLAC]’.³ The meeting was duly held and a constitution was adopted.

[5] In keeping with the provisions of the Act the constitution structured NEDLAC as a corporate body that would have an executive council (which would be its governing body) and four chambers (each having a specialized function). The members of NEDLAC would be representatives of each of four constituencies – organised business, organised labour, the state, and organisations of community and development interests – nominated by the constituency concerned and appointed by the Minister to the executive council and the four chambers. The executive council would comprise an equal number of representatives (not exceeding 18) nominated by each of the constituencies. The chambers would each comprise an equal number of representatives (not exceeding six) nominated by organised business, organised labour and the state, and such number of representatives of community and development interests as the executive council would determine. As it turns out, those last interests are represented on only one of the chambers. For convenience we deal hereafter with only two of the constituencies – organised business and organised labour.

[6] Business was represented at the inaugural meeting by Business South Africa.⁴ Its representatives became the initial members of the business constituency on the various structures of NEDLAC. Labour was represented at the meeting by the founding federations.⁵ Representatives of each federation, in proportion to their respective paid-up membership, became the initial members representing organised labour.

³Section 9(6).

⁴NAFCOC was later admitted and the two organisations subsequently amalgamated to form Business Unity South Africa.

⁵Fedusa was then known as Fedsal.

[7] Clauses 9.3 – 9.6 deal with entry to membership of NEDLAC after the inaugural meeting. They provide as follows:

‘9.3 Applications for admission to membership by organised business, organised labour and the State after the inaugural meeting shall be made to the secretariat, in writing, in the form required by the executive council. Such applications shall be considered according to the process outlined in 9.4 – 9.6 below.

9.4 The secretariat on receiving such an application, shall submit such application to the convenor of the affected constituency on the executive council.

9.5 The convenor shall, within one (1) month of receipt of an application from the secretariat, convene a meeting within the affected constituency to consider the application. This shall be done in terms of the procedures and criteria determined by each constituency.

9.6 In the event that members of the affected constituency decide to approve a nomination, then that nomination shall be forwarded to the Minister who shall appoint the representatives to the executive council and/or chambers.’

[8] It is apparent from the culmination of the process described by those clauses that clause 9.3 contemplates applications being made to NEDLAC for approval of nominations for appointment to membership of the various structures of NEDLAC. Once such an application is made it must be referred by NEDLAC to the convenor of the constituency concerned. A meeting of the constituency will then be called to consider the application. The application will then be considered in accordance with procedures and criteria that the constituency has determined for deciding such applications (clause 9.5). Thus the effect of clause 9.5 is to appoint each constituency as the gate-keeper to the appointment of members to represent that constituency on the structures of NEDLAC. At present Business Unity South Africa is the gate-keeper for organised business and for organised labour the gate-keepers are the founding federations. The dispute in this matter centres on that clause because the

founding federations closed the gate to CONSAWU.

[9] In August 2003 CONSAWU wrote a letter to the Executive Director of NEDLAC in which it made ‘application for membership of NEDLAC’. We have pointed out that the members of NEDLAC are representatives of the various organisations and not the organisations themselves so in that respect the language was not strictly correct but that is of no consequence. The application was referred to the convenor of the labour constituency in accordance with clause 9.4 and further information was sought from CONSAWU.

[10] In July 2004 the convenor of the labour constituency replied to CONSAWU. He told CONSAWU that the ‘criteria that had been developed by the founding federations to the labour caucus’ for ‘membership of the organized labour constituency’ was that a federation should represent at least 300 000 employed workers. It said that on the information that CONSAWU had provided it represented only 226 148 employed workers. That fell below the established threshold and on that basis, it was told, its ‘application for membership’ was declined.⁶ Correspondence ensued that culminated in a letter from CONSAWU’s attorneys advising that CONSAWU ‘had no option but to turn to the Court for the necessary relief.’ It then brought the application that is the subject of this appeal.

[11] There has been some vacillation by CONSAWU as to the nature of its case. The case that it first advanced in its founding affidavit was amended in the course of the proceedings so substantially as to constitute

⁶The convenor of the labour constituency said in the answering affidavit filed on behalf of NEDLAC that the application was neither granted nor refused but placed on hold until such time as CONSAWU demonstrated that it had the threshold membership.

a new case altogether. We nonetheless find it necessary to deal briefly with the case that it first advanced.

[12] On the case as it was first advanced it was not in issue that the Act requires each constituency to set the criteria for entry to membership of that constituency on NEDLAC. That was precisely CONSAWU's complaint. It said that because the Act required each constituency to determine its own criteria for entry to NEDLAC it offended various provisions of the Bill of Rights and it sought declarations to that effect.⁷

[13] That case was later abandoned. New relief was claimed in an amendment to the notice of motion that withdrew all the claims that had been made and substituted them with altogether different claims. The constitutional validity of the Act was no longer placed in issue and CONSAWU withdrew its application against the Minister. CONSAWU filed what it called a 'supplementary' founding affidavit in support of the new relief that was sought. That is the case that is now before us.

[14] The case that CONSAWU now advances is quite the opposite of the case that it initially advanced. Far from the Act requiring each constituency to be its own gate-keeper for entry to NEDLAC – which is what CONSAWU said initially – it now says that the Act prohibits it. The prohibition is said to be found in s 4(b) and s 4(d) of the Act and it claimed an order declaring clause 9 to be in conflict with those sections. It also claimed an order that NEDLAC 'effects compliance with the provisions of section 4(b) and section 4(d) of the Act' within a stipulated time. Significantly, it did not specify what will constitute compliance.

⁷A subsidiary claim was advanced should its main claim fail but that is not material.

[15] Its case is founded upon two submissions that are advanced, it seems, to buttress one another. We turn to those arguments presently but for the moment it is convenient to summarise what its case comes down to. CONSAWU says that the Act does not permit a constituency to be the gate-keeper to its own constituency on NEDLAC. What the Act requires is that the criteria for entry to each constituency must be stated expressly in the constitution with the consequence that they must be determined by NEDLAC itself. By that it hopes to escape being beholden to the founding federations and to be able to appeal to the other constituencies on NEDLAC.⁸

[16] That turnabout in its stance, says the General Secretary of CONSAWU in his supplementary affidavit, was brought about by advice that it received from counsel who had replaced its earlier counsel.⁹ Although it is placed at the door of the ingenuity of counsel we still find it remarkable that a substantial labour federation should be so fickle on such a fundamental feature of the institution that it wishes to join.

[17] Nonetheless, that led to considerable debate before us as to whether the Act indeed requires NEDLAC itself to determine who might or might not be admitted to represent a constituency, or whether it is competent for that to be decided by the constituency itself. In our view one needs only to know the nature of NEDLAC as it is described in the affidavits that it filed to know that the arguments advanced by CONSAWU cannot be correct.

[18] NEDLAC is not a forum for settling wages and conditions of

⁸Amendments to the constitution are made by the executive council and require the support of two thirds of each constituency represented on the executive council.

⁹Who is not necessarily counsel who argued the matter before us.

employment, in which employers and employees might each wish to confront a friendly face. We pointed out earlier that NEDLAC serves as a forum for attempting to reach tripartite consensus on national economic and labour policy. The interest that each constituency has in the composition of the other in those circumstances is only to ensure that it properly represents the most influential voice that has been chosen by that other constituency. It is naturally not for one constituency to decide for the other which voice that might be. To leave out in the cold a voice that any particular constituency has chosen would undermine what NEDLAC is all about. There would be no point at all in one constituency talking to a voice of its own choosing. Nor would there be any point in talking to organisations which have such disparate interests that they are bickering amongst themselves. If that were to occur then the constituencies might just as well each be talking to themselves. The interest of each lies in confronting the most influential and cohesive voice of the other and that must necessarily be one that has been chosen by the particular constituency.

[19] NEDLAC and all its founders – Business Unity South Africa,¹⁰ the founding federations, and the state – have made it perfectly clear on the papers before us that that was the principle upon which they founded NEDLAC. Indeed, the ministry that was responsible for the Act entered this case at the outset to defend the constitutionality of that principle when its presence in the Act was attacked. We would require considerable persuasion that although all those responsible for founding NEDLAC were of one view parliament enacted the legislation with

¹⁰In an affidavit that was filed by Business Unity South Africa when CONSAWU altered its case it associated itself with what NEDLAC had said concerning the functioning of NEDLAC and in particular the deponent confirmed ‘that it is an important feature of the composition of NEDLAC that each of the constituencies should itself be able to determine the criteria for its membership in order ... that it should be in a position to participate effectively in the business of NEDLAC’.

something else in mind. But CONSAWU says that parliament indeed had something else in mind and we turn to the grounds upon which it says that.

[20] We have pointed out that the Act called upon the representatives of the constituencies at what was called the ‘inaugural meeting’ to adopt a constitution for NEDLAC. Section 4 required the constitution that they were to adopt to ‘provide for’ various things. The two subsections that are now in issue required it to provide for the following:

‘(b) the manner in which organized labour may nominate persons for appointment as members and the manner in which members may be removed.

(d) the criteria by which and manner in which organized labour shall admit federations of trade unions.’

[21] So far as organised business is concerned those subsections are replicated in ss 4(a) and 4(c). It was because of the impact that the case might have on those equivalent provisions that an affidavit was filed on behalf of Business Unity South Africa in which it aligned itself with what NEDLAC had said.¹¹ We deal hereafter only with the provisions so far as they relate to organised labour but it applies as much to organised business.

[22] CONSAWU’s case rests on two submissions. For its first submission it refers us to the definition of organised labour in the Act, which means the founding federations and ‘any association that is admitted thereafter’¹² It says that s 4(d) requires the constitution to provide for the manner in which and the criteria by which trade union federations are to be admitted to ‘organised labour’. It says that s 4(b), on

¹¹See footnote 10.

¹²“Organised labour” means the federations of trade unions that are the founding parties of [NEDLAC] and any association that is admitted thereafter’.

the other hand, requires the constitution to provide also for the manner in which organised labour may nominate persons for appointment as members of NEDLAC. It says that clause 9 of the constitution deals only with the manner in which organised labour may nominate persons for membership of NEDLAC. It does not provide for the manner in which and criteria by which federations might be admitted to ‘organised labour’ and in that respect it is deficient.

[23] Its case is sought to be buttressed by its second submission. That submission, as we understand it, is that the effect of s 4(d) is to empower NEDLAC to set the criteria for admission to ‘organised labour’. By providing in clause 9.5 that those criteria are to be determined by the labour constituency NEDLAC has unlawfully delegated its authority.

[24] When those two submissions are taken together the case that emerges comes down to this: CONSAWU says that NEDLAC must state in the constitution itself what the criteria are for admission of a federation to ‘organised labour’ so as to comply with s 4(d). It may not permit those criteria to be set by the constituency itself – as it has purported to do in clause 9.5 – because that would be an unlawful delegation of its power to determine those criteria. Needless to say, the second submission contradicts the first and we deal with it immediately.

[25] The second submission rests on the supposition that clause 4(d) confers power on NEDLAC to determine the criteria for admission to ‘organised labour’ and that is not correct. The section does not purport to confer any powers on NEDLAC at all. Indeed, we have considerable doubt that NEDLAC even existed until the constitution was adopted.¹³

¹³See footnote 1.

Clause 4(d) does no more than to require that the constitution that was to be adopted must make provision for the relevant criteria. So far as clause 9.5 empowers the labour constituency to set those criteria the labour constituency is not exercising delegated powers when it does so. It is exercising original powers that emanate from the constitution. The submission has no merit but it sows the seed for the destruction of the other submission.

[26] The submission that we have disposed of correctly identifies the criteria that are referred to in clause 9.5 as being the criteria that are required to be provided for by s 4(d). The very foundation of that submission was that clause 9.5 purports to delegate to the labour constituency the power to set the criteria referred to in s 4(d). If that is so it is difficult to see how the first submission can be sustained. CONSAWU's argument becomes then no more than a matter of form so far as it says that the criteria themselves must be stated in the constitution. Whether the criteria are to be found in the constitution itself, or whether they are to be found in the minute book of the constituency, is a question of where they are located and not whether they have been provided for. Quite clearly they have been provided for. It was precisely because they have been provided for that CONSAWU found itself being stopped at the gate.

[27] The fallacy in the submission lies in its argument that clause 9.5 provides only for the manner in which representatives for membership of NEDLAC are nominated, and does not deal with the manner in which and criteria by which new federations might become included in 'organised labour'. 'Organised labour' is not a corporate entity or organisation of some kind to which one might apply for membership. The definition is

merely descriptive of the group of federations that are represented on NEDLAC. Representation on NEDLAC and inclusion amongst that group go hand in hand.

[28] It is true that clause 9 provides the process by which nominations are made for membership of NEDLAC. Whatever one might make of clause 9.3, which initiates the process, its culmination in nominations being approved or rejected makes it clear that that is so. But in order to have its representative appointed to NEDLAC the nominator must obviously be an organisation that is entitled to representation. The process of deciding whether a nomination should be approved necessarily calls for the decision-maker to determine whether the nominator qualifies. If the nominator does qualify, and its nomination is approved, then by that fact alone the nominator becomes included in the group that is described as 'organised labour'. To suggest that two distinct processes must be provided for and that both decisions may not be made in the course of a single process is pedantry.

[29] The hurdle that was put up to that construction of clause 9 was that clause 9.3 contemplates applications being made by 'organised labour'. It was argued that that means only federations that are already included amongst 'organised labour'. On that construction clause 9.3 leaves no room for federations that are not yet included amongst 'organised labour' to make an application, which, so it is argued, shows that the process is not one for admission to 'organised labour'. No doubt the logic is sound. But where the broad scheme of the enterprise is clear we are not moved by reliance upon what are clearly a few inapt words here and there in a document that is replete with imprecision. In our view the inclusion of clause 9.5 places it beyond dispute that the process incorporates the

requirements of both s 4(b) and s (4)(d).

[30] In our view both submissions fail and the application was correctly dismissed. The appeal should be dismissed with costs that include the costs of two counsel.

R W NUGENT
JUDGE OF APPEAL

S A MAJIEDT
JUDGE OF APPEAL

STREICHER JA:

[31] I disagree with my colleagues Nugent and Majiedt JJA that the appeal should be dismissed. In my view it should succeed.

[32] The Confederation of South African Workers' Unions ('Consawu'), the appellant, applied to the North Gauteng High Court (Pretoria) for an order declaring that the Constitution of the National Economic Development and Labour Council (Nedlac), the first respondent, does not comply with the requirements of s 4(d) of the National Economic Development and Labour Council Act 35 of 1994 (the Act). The court below dismissed the application but granted the appellant leave to appeal to this court.

[33] Nedlac is a juristic person established by the Act. It is governed by

an executive council and in addition consists of four chambers namely the public finance and monetary policy chamber, the trade and industry chamber, the labour market chamber and the development chamber (s 2). The council consists of members who represent organised business, members who represent organised labour, members who represent organised community interests and members who represent the State (s 3(1)). The members representing organised business and organised labour are appointed by the Minister of Labour from persons nominated by the relevant constituency (s 3(2) and (3)). The members representing the organised community interests are appointed by the Minister without Portfolio in the Office of the President and from persons nominated by that constituency (s 3(4)) and the members representing the State are appointed by the President (s 3(6)).

[34] In terms of s 1 of the Act ‘organised business’ means business represented by those employer and business associations and federations of such associations that are the founding parties of Nedlac and any association that is admitted thereafter. ‘Organised labour’ means the federations of trade unions that are the founding parties of Nedlac and any association that is admitted thereafter. Cosatu, Fedstal (now Fedusa) and Nactu, three federations of trade unions, were founding parties of Nedlac and, at present constitute ‘organised labour’ as defined in the Act.

[35] From the foregoing it is clear that in terms of the Act there are four constituencies each of which is represented on the council. Membership of a constituency should therefore not be equated with membership of the council. Whereas membership of the council is provided for in the Act admission to a constituency is in terms of s 4(d) of the Act to be provided for in the constitution of Nedlac. The section

reads: ‘Subject to the provisions of this Act, the constitution of the Council shall provide for ... the criteria by which and manner in which organised labour shall admit federations of trade unions’.

[36] Consawu applied for admission to the labour constituency of Nedlac but was advised by Mr Ebrahim Patel, the convenor of the constituency, that its membership did not meet the threshold of 300 000 members established by the constituency. According to the evidence presented by the respondents the members of the labour constituency initially agreed on a threshold of 200 000 members for admission to the constituency. The threshold was subsequently increased, first to 250 000 and thereafter to 300 000. No minutes recording those increases could be located. According to Patel discussions in the constituency take place informally.

[37] Consawu did indeed not have 300 000 members. Nedlac contends that the threshold was established in terms of clause 9(5) of its constitution which, so it submits, provides that admissions to a constituency should be done in terms of criteria determined by the relevant constituency. The appellant on the other hand contends that clause 9(5) deals with membership of the executive council of Nedlac and not with membership of the labour constituency. In the alternative the appellant contends that, in so far as it may be held that clause 9(5) deals with admission to the labour constituency, it is contrary to s 4(d) of the Act and therefore invalid. In order to understand the appellant’s submissions it is necessary to quote clauses 9.1 to 9.6 of the Nedlac Constitution. The clauses read:

‘9. ADMISSION OF MEMBERS

9.1 The State, organised business and organised labour shall nominate not more than 18

representatives as members of the executive council and not more than six representatives of each chamber.

9.2 Unless otherwise agreed within each constituency, representation at the inaugural meeting shall be determined as follows:

9.2.1 for organised business, by Business South Africa;

9.2.2 for the State, by the President of the Republic of South Africa;

9.2.3 for organised labour, by proportional representation according to paid-up membership of the founding trade union federations – Cosatu, Fedsal and Nactu;

9.2.4 for the organisations representing community and development interests, by the Minister without portfolio in consultation with organised business, organised labour and the Minister.

9.3 Applications for admission to membership by organised business, organised labour and the State after the inaugural meeting shall be made to the secretariat, in writing, in the form required by the executive council. Such applications shall be considered according to the process outlined in 9.4 - 9.6 below.

9.4 the secretariat on receiving such an application, shall submit such application to the convenor of the affected constituency on the executive council.

9.5 the convenor shall, within one (1) month of receipt of an application from the secretariat, convene a meeting within the affected constituency to consider the application. This shall be done in terms of the procedures and criteria determined by each constituency.

9.6 In the event that members of the affected constituency decide to approve a nomination, then that nomination shall be forwarded to the Minister who shall appoint the representatives to the executive council and/or chambers.

....?

[38] Clause 9(1) prescribes what number of representatives each of the organised business and organised labour constituencies may nominate to the executive council and chambers. It does not deal with membership of the two constituencies. Clause 9.2 deals with the representation of the various constituencies at the inaugural meeting of Nedlac and does not deal with membership of the various constituencies either. Clauses 9.3 to 9.6 deal with the representation of the various constituencies after the

inaugural meeting and does not deal with membership of the various constituencies either. Clause 9.3 speaks of '[a]pplications for admission to membership by organised business, organised labour and the State after the inaugural meeting'. Organised labour means labour as represented by the federations of trade unions that are the founding parties of Nedlac and any federation admitted subsequently. Applications by organised business or organised labour for admission to membership can therefore not be applications for membership of the organised business constituency or organised labour constituency, they can only be applications for membership of the executive council and chambers of Nedlac. The applications are to be made to the secretariat of Nedlac and are then to be dealt with in terms of clauses 9.4 and 9.6. The secretariat of Nedlac refers the applications to the relevant constituency (cl 9.4) which is to consider them in terms of the procedures and criteria determined by each constituency (cl 9.5). If approved the applications culminate in nominations and appointments to the executive council or one of the chambers of Nedlac (cl 9.6). In other words, in the case of organised labour, Cosatu, Nactu and Fedusa being the founding members of Nedlac and constituting organised labour in terms of the Act, would submit their applications for membership of the executive council and chambers of Nedlac to the secretariat of Nedlac. The secretariat will refer the applications to the convenor of the labour constituency whereupon the labour constituency ie Cosatu, Nactu and Fedusa will consider the applications in terms of the procedures and criteria determined by the constituency and will decide who should be nominated. The agreed nominations are forwarded to the minister who is obliged to appoint the nominees as the representatives of organised labour to the executive council and the chambers.

[39] Clauses 9.3 to 9.6 thus interpreted, purport to give effect to s 4(b) of the Act which provides that Nedlac's constitution 'shall provide . . . for the manner in which organised labour may nominate persons for appointment as members' It does not give effect to s 4(d) which deals with the admission of federations of trade unions as members of organised labour as defined in the Act.

[40] But, even if clause 9.5 of the constitution is interpreted to deal with applications for admission to the labour constituency I am of the view, for the reasons that follow, that it does not comply with s 4(d) of the Act.

[41] Nedlac is a body created by the legislature and is publicly funded (s 7(3)). The legislature prescribed its objects, powers and functions. One of the powers so conferred on Nedlac is the power to adopt a constitution which provides for the matters stated in s 4 of the Act. One of the matters that had to be provided for is 'the criteria by which and the manner in which organised labour shall admit federations of trade unions' (s 4(d)). The legislature therefore conferred on Nedlac the power and the function to determine the criteria for admission of federations of trade unions as members of the labour constituency. Nedlac purported to exercise that power and perform that function by requiring the labour constituency itself to determine the criteria for admission. By doing so Nedlac delegated the power conferred on it to the labour constituency. The question to be decided in this appeal is whether the legislature intended the power and function conferred on Nedlac to be delegable.

[42] Having conferred authority on Nedlac to determine the criteria for admission to the labour constituency one must assume that, unless there are indications to the contrary, the legislature intended Nedlac and not

someone else to do so. Sir William Wade and Christopher Forsyth *Administrative Law* 9 ed (2004) p 317 say:

‘There is no general principle that administrative functions are delegable. The principle is rather that, where any sort of decision has to be made, it must be made by the authority designated by Parliament and by no one else.’

Lawrence Baxter *Administrative Law* (1984) p 434 states:

‘In modern democracies original power derives from the political authority of elected legislatures. Because of the practical requirements of government it is recognized that such bodies may delegate their powers. In South Africa, Parliament is recognized to have unlimited powers of delegation. Considerable latitude is also given to such “original” authorities as provincial councils. But all other administrative authorities are treated as *delegees*, power having been delegated to them by the original authority. Not being the direct repositories of public trust they are not permitted the same freedom to choose who shall exercise their powers. There is a presumption that they may not further delegate (ie sub-delegate) their powers: *delegatus non potest delegare*.’

In *Attorney-General, OFS v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 (A) at 639C-D Botha JA said:

‘The maxim *delegatus delegare non potest* is based upon the assumption that, where the legislature has delegated powers and functions to a subordinate authority, it intended that authority itself to exercise those powers and to perform those functions, and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate. It is not every delegation of delegated powers that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers.’

[43] There is no express indication to be found in the Act that the legislature intended Nedlac to have the power to authorise somebody else to determine ‘the criteria by which and the manner in which organised labour shall admit federations of trade unions’ to the labour constituency. In my view such power was not conferred on Nedlac by necessary implication either.

[44] The object of the legislature in creating Nedlac was to create a body consisting of representatives of organised labour, organised business, the State and community organisations which could assist in the formulation of a co-ordinated policy on social and economic matters by inter alia seeking to reach consensus and conclude agreements on matters pertaining to social and economic policy, by considering all proposed labour legislation relating to labour market policy before it is introduced in Parliament and by considering all significant changes to social and economic policy before they are implemented or introduced in Parliament (s 5 of the Act). In order to achieve its object the various constituencies particularly business and labour need to be adequately represented in Nedlac. Not only will the work of Nedlac be of very little value if the constituencies are not adequately represented but it is also unlikely that organised labour will be interested in being represented on this body and in spending time and effort in trying to reach consensus with an unrepresentative business constituency and vice versa.

[45] Each constituency has an interest in the proper functioning of Nedlac and therefore has an interest in the composition of Nedlac. Nedlac itself submits that its proper functioning requires that only the most representative federations of organisations take part in the negotiations. It submits that it is impracticable to include in Nedlac's process a host of representative employee or employer organisations. In these circumstances it is unlikely that the legislature would have intended to confer the authority to determine the criteria for admission to the labour constituency to someone other than Nedlac in which each constituency is represented. It is particularly unlikely that it would have intended that the authority could be delegated to the labour constituency. The legislature

no doubt considered the founding parties of organised business and organised labour to be substantially representative of their respective constituencies. But circumstances may change, other federations of trade unions and other business associations may be formed causing the existing members of the relevant constituencies no longer to be adequately representative of their constituencies and making it desirable that new members be admitted. However, although the admission of a new member to for example the labour constituency may be in the interests of the proper functioning of Nedlac it may not be in the interests of the incumbent members of the constituency. The incumbent members of the labour constituency may well consider it in their interests that they and not other trade union federations should speak on behalf of labour. For these reasons they may be unduly reluctant to admit other trade union federations to the detriment of the proper functioning of Nedlac ie they may be influenced by their own interests as opposed to the interests of Nedlac in determining the criteria for admission to the labour constituency. That trade unions are often in competition with one another and that a federation of trade unions may aspire to be the only representative of workers is confirmed by statements made by Cosatu's president and by Mr Ebrahim Patel, at the time the convenor of the labour constituency at Nedlac. In a keynote address of the Cosatu president to Cosatu's Central Committee in April 2003 he said: 'Let me repeat the call we have been making: in the context of the challenges we face, the need to create one federation in one country cannot be over-emphasised.' Mr Patel stated in his answering affidavit: 'It is an historical truism, not only in South Africa but elsewhere in the democratic world, that trade unions are more often than not involved in a keenly competitive relationship with rival unions.'

[46] Nedlac submits that the individual constituencies are best placed to appreciate what criteria would ensure effective membership in order to achieve the purposes of the Act. It was also suggested that the legislature could not have intended that business should be able to prescribe to labour by whom it should be represented and vice versa. It may be that the individual constituencies are best placed to appreciate what criteria would ensure effective membership in order to achieve the purposes of the Act but, as pointed out above, there is a danger that they may be influenced by self interest not to act in the best interest of Nedlac. To require Nedlac itself to determine the criteria for admission to a particular constituency is also not to allow one constituency to prescribe to another by whom it should be represented. First, representation on the council as opposed to representation in the labour constituency is decided upon by each constituency and nobody else. The constituency nominates its representatives and the minister concerned is obliged to appoint the nominees. Second, the criteria has to be provided for in the constitution of Nedlac which requires the agreement of all the constituencies. The business constituency cannot force labour to agree to criteria for admission that are not acceptable to labour and vice versa. Each constituency can use its superior knowledge, assuming that it has such knowledge, of what criteria would ensure effective membership in order to achieve the purposes of the Act, to persuade the other constituencies to agree to what it considers to be the appropriate criteria. The legislature had no reason to think that the constituencies would not be able to reach agreement and, in the event, none of the other constituencies would seem to have a problem with the criteria determined by the labour constituency.

[47] It was further suggested that the fact that the criteria determined by the labour constituency would appear to be acceptable to the other

constituencies renders this application academical. I do not agree. Should the appeal succeed Nedlac would be compelled to spell out in its constitution what the criteria for admission to the labour constituency are and the labour constituency will be prevented from unilaterally adjusting the criteria at informal meetings. The Nedlac constitution provides that it may only be amended by the executive council and that an endorsement by two thirds of each of the constituencies is required.

[48] The court below and the appellant rely on the decision in *Minister of Agriculture, Economics and Marketing & another v Peyper* 1964 (1) SA 206 (T) in support of the finding that the Nedlac constitution provides for the criteria by which organised labour shall admit federations of trade unions. The Marketing Act 26 of 1937 provided for the proclamation of schemes to control the marketing of certain agricultural products. Section 18(1)(e)*bis* provided that the Scheme should ‘provide for the establishment of one or more reserve funds . . .’ The Milk Scheme proclaimed in terms of the Marketing Act provided that the board constituted in terms of the Scheme should establish one or more reserve funds into which shall be paid certain amounts. It was submitted that this was not a power that could be delegated to the board. The court held that the Act required the Scheme to make provision for the establishment of reserve funds and that the Scheme did so. In my view a reserve fund could only be established through some agency such as the board. Provision for the establishment of a reserve fund therefore meant that an agency had to be charged with the duty of establishing a reserve fund or funds. That is exactly what the Milk Scheme did. Providing for ‘the criteria by which and the manner in which organised labour shall admit federations of trade unions’ does not mean that an agency has to be charged with the duty of determining the criteria. In my view it means

and was intended by the legislature to mean that the criteria have to be spelled out in the constitution. Other matters that ‘shall be provided for’ in the constitution are the manner in which organised business and organised labour may nominate persons for appointment as members, the manner in which members may be removed, ‘the appointment of alternates to members’, ‘the appointment of *ex officio* members’, ‘the removal of members’, ‘the appointment, removal, duties and powers of the chairpersons . . .’, ‘the establishment, composition, and functions of the executive council’, ‘the keeping of minutes’, ‘the manner in which decisions are taken’, ‘the amendment of the constitution’ etc. These are clearly all matters that were required to be spelled out in the constitution.

[49] Nedlac’s case is that it would be inappropriate for anybody except the labour constituency to determine the criteria by which organised labour should admit federations of trade unions. However, one should not lose sight of the fact that in interpreting the Act one is trying to give effect to the intention of the legislature. If the legislature was of that view it would not have required the Nedlac constitution to provide for such criteria it would simply have stated that organised labour should determine the criteria. The fact that it did not do so is in my view a clear indication that the legislature was not of that view.

[50] For these reasons I am satisfied that the legislature was not of the view that the Nedlac constitution failed to provide for ‘the criteria by which organised labour shall admit federations of trade unions’ and that a provision in the constitution that such criteria should be determined by the labour constituency is not authorised by the Act.

[51] I would accordingly have upheld the appeal and have granted the

application.

P E STREICHER
JUDGE OF APPEAL

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