REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR 2814-04

In the matter between:

National Entitled Workers' Union	Applicant
and	
METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL CENTRE FOR DISPUTE RESOLUTION	First Respondent
ARBITRATOR ANTHONY GEVISSER	Second Respondent
SMALL ENTERPRISE EMPLOYERS OF SOUTH AFRICA ("SEESA")	Third Respondent
BOKSBURG ALUMINIUM CO (PTY) LTD	Fourth Respondent

JUDGMENT

VAN NIEKERK AJ

1. This is an application to review and set aside an award made by the Second Respondent, an arbitrator appointed by the First Respondent to consider a dispute between the Applicant ('the Union') and the Fourth Respondent ('the Company'). In his award made on 20 October 2004, the arbitrator dismissed the referral of the dispute to arbitration for want of jurisdiction, on the basis that the Union had invoked the incorrect procedure.

2. At the outset of these proceedings, Mr Maluleke, who appeared for the Union, raised the issue of representation. During the course of the arbitration that is the subject of this application, the Small Enterprise Employers of South Africa ("SEESA") acted on the Company's behalf. When the present proceedings were initiated, Edward Hobbs Attorneys were appointed as attorneys of record. Mr Maluleke noted that Mr Hobbs had acted in relation to the arbitration as an official of SEESA, and as the Third and Fourth Respondents' attorney of record in these proceedings. On this basis, he submitted that the representation of the Third and Fourth Respondents had not been proper and as I understand his argument, that this called into question the validity of these proceedings.

3. Advocate Beaton, who appeared for the Third and Fourth Respondents, advised the Court that that Edward Hobbs Attorney was properly appointed as the Company's attorney of record in the present application, and that he (Adv. Beaton) was properly briefed by that firm. The Court unconditionally accepts Adv. Beaton's assurance. Should the Union wish to pursue any allegations of impropriety in relation to Mr Hobb's dual roles of attorney and employers' organisation, there are channels open to it to do so, but it is not a matter that affects the validity of these proceedings.

4. The arbitration award under review in these proceedings has its roots in a dispute between the Union and the Company concerning the working of short-time. The Union claimed that during April and May 2004, a number of its members employed by the Company had been placed on short-time in contravention of the provisions of the Main Agreement concluded by the Metal and Engineering Industries Bargaining Council ('MEIBC'). The details and the merits of the claim are not relevant for present purposes, and I do not

intend to canvass these further. What is relevant is the Union's choice to refer the matter to arbitration under section 24 of the LRA as a dispute concerning the interpretation and application of the Main Agreement. It is common cause that the Company and its employees, including those who are members of the Union, are bound by the Main Agreement, a collective agreement for the purposes of section 24 of the LRA, as well as the MEIBC's Dispute Resolution Agreement. Both the Main Agreement and the Dispute Resolution Agreement have been extended by the Minister, acting in terms of section 32 of the LRA, to bind non-parties to the agreements.

5. In the referral of the dispute to the MEIBC and the subsequent arbitration proceedings, the Union alleged that that the Company had acted in breach of the Main Agreement, and sought payment to its members of the wages that they had lost consequent on the imposition of short-time.

6. The arbitration award records an *in limine* objection raised by the Company at the outset of the proceedings. The point is to the effect that the Union's case was based not an interpretation or application of the collective agreement, rather than a claim that the Main Agreement had been contravened, coupled with a claim for compensation. On this basis, the Company argued that the arbitrator did not have jurisdiction to entertain the claim, which should have been referred to the MEIBC as one of non-compliance with the Main Agreement.

7. The statutory context within which the arbitration was conducted concerned the application of sections 24 and 33A of the LRA. Section 24(2) of the LRA reads as follows:

> "*If there is a dispute about the interpretation or application of a collective agreement any party to the dispute may refer the*

dispute in writing to the Commission if –

(a) the collective agreement does not provide for a procedure;
(b) the procedure provided for in the collective agreement is not operative, or
(c) *any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement*."

8. Section 33A of the LRA makes specific provision for the enforcement of collective agreements concluded in a bargaining council. That section reads as follows:

> "*(1) Despite any other provision in this Act, a bargaining council may monitor and enforce compliance with its collective agreements in terms of this section or a collective agreement concluded by the parties to the council*.
> *(2) For the purposes of this section, a collective agreement is deemed to include -*
> *(a) any basic condition of employment which in terms of section 49(1) of the Basic Conditions of Employment Act constitutes a term of employment of any employee covered by the collective agreement; and*
> *(b) the rules of any fund or scheme established by the bargaining council."*

Section 33A(4)(a) provides that any unresolved dispute concerning compliance with any provision of a collective agreement may be referred to arbitration by the council.

9. Clause 36 of the MEIBC's Main Agreement requires that disputes in the sector be dealt with in terms of the Metal Engineering Industries Dispute Resolution Agreement, published on 15 August 2003. The clause reads as follows:

> "*(1) This Bargaining Council shall, within the sector and*

area in respect of which it has been registered, endeavour, by the negotiation of agreements or otherwise, to prevent disputes from arising, and to settle disputes that have arisen or may arise between employers or employers' organisations and employees or trade unions, and take such steps as it may think expedient to bring about the regulation or settlement of matters of mutual interest to employers or employers' organisations and employees or trade unions. Any dispute concerning the interpretation, application or enforcement of this Agreement shall be dealt with in accordance with subclause (2) below.
(2) For the purpose of subclause (1) above the Council shall follow the procedure set out in the Metal and Engineering Industries Dispute Resolution Agreement (published under Government Notice R1174 of 15 August 2003)."

10. Consistent with clause 36 of the Main Agreement, clause 4.2.4 of the MEIBC's Dispute Resolution Agreement regulates the resolution of disputes about the interpretation or application of collective agreements, including the Main Agreement. The agreement provides for a referral of the dispute to the MEIBC by a party to the dispute, an attempt at a resolution of a dispute through conciliation, and thereafter, if conciliation fails, a reference to arbitration.

11. The Dispute Resolution Agreement draws a clear distinction between disputes about the interpretation or application of the MEIBC's collective agreements, and the enforcement of collective agreements by the MEIBC. Clause 4.2.2 of the Agreement provides that the MEIBC may refer any unresolved dispute concerning compliance with any provision of a collective agreement to arbitration, to be conducted by an arbitrator appointed by the council.

12. What is particularly significant is that clause 4.2.2 (7) permits an

arbitrator acting in terms of the provisions relevant to the enforcement of the MEIBC's collective agreements to determine any dispute concerning the interpretation or application of a collective agreement. But the converse is not true – an arbitrator appointed to determine an interpretation or application dispute under clause 4.2.1(a) of the Dispute Resolution Agreement is not empowered to enforce a collective agreement. Also relevant is the fact that in proceedings to enforce a collective agreement, the arbitrator is given a wide range of remedial powers. These include ordering payment of any amount owing in terms of a collective agreement, and payment of a fine. In the case of a dispute about the interpretation and application of a collective agreement, no such remedies are specifically made available. In the procedure applicable to the enforcement of its collective agreements, the MEIBC is accorded a 'gate-keeping' role. Clause 4.2.2(3) provides that the MEIBC may refer an unresolved dispute concerning compliance with a collective agreement to arbitration. This provision presumably permits the MEIBC to engage with those employees who contravene collective agreements and to attempt to secure compliance by means short of a referral of the dispute to arbitration. Whatever the Union's views on the merits of the MEIBC's role may be, the procedure established by clause 4.2.2 is precisely that envisaged by section 33A of the LRA, and is, of course, itself the subject of a collective agreement that is binding on the parties to these proceedings.

13. The arbitrator concluded that the dispute referred to the MEIBC by the Union concerned the Company's alleged failure to comply with a clause of the Main Agreement. To the extent that the Union submitted that a dispute concerning the application of a collective agreement encapsulates a dispute about non-compliance with the agreement, the arbitrator held that there might have been merit in

this argument, but for the provisions of section 33A of the LRA. As I have already noted, that section deals specifically with an allegation of non-compliance with the terms of a collective agreement concluded in a bargaining council. On this basis, the arbitrator concluded that section 24 (the section of the LRA in terms of which the dispute had been referred to the MEIBC) did not apply, and that he accordingly had no jurisdiction to hear the dispute.

14. In these proceedings, the Union makes a number of broad-ranging submissions in support of its application to set aside the arbitrator's award, amongst others that the arbitrator exceeded his powers by having failed to resolve the dispute properly before him, that he failed to apply his mind to the issues before him, and that he made an award that is 'incomprehensible and self-contradictory'. Mr Maluleke submitted further that that the Union and the Company had different interpretations of the Main Agreement. As I understood his submission, this necessarily implied that dispute was one concerning the interpretation of the agreement and thus amenable to determination under section 25 of the LRA. There is no support for these submissions in the record, nor from the terms of the arbitration award.

15. Mr Maluleke's primary assertion is perhaps best captured by his submission that the Union relied correctly on section 24 of the LRA and on the terms of the Main Agreement, and that these in combination encapsulated a dispute about the application and interpretation of the Main Agreement regarding what the Union saw as a lay-off disguised as short-time.

16. To the extent that it might be suggested (not that Mr Maluleke

made a submission to this effect) that one or the other of the procedures established by the dispute resolution agreement could be invoked in circumstances such as the present, at the election of the Union, this was clearly not the intention of the parties to the Dispute Resolution Agreement. A reading of the dispute procedure as a whole indicates that there is a clear purpose to establishing discreet procedures for different categories of disputes. It is not for parties bound by the procedure to decide, for whatever reasons (and none were forthcoming in the present instance) to frame a dispute so as to avoid one or the other. Just a mutton cannot (and should not) be dressed up as lamb, parties to disputes that are to be resolved in terms of particular procedures under the auspices of the MEIBC ought not to be permitted to dress up a dispute so as to gain access to a preferred procedure, or avoid a procedure that would ordinarily apply.

17. In this sense, the reviewability or otherwise of the arbitrator's award turns primarily on whether the dispute was, in fact, about compliance with the MEIBC's Main Agreement. This is the basis on which the arbitrator made his award, and in terms of which the reasonableness of his conclusion stands to be assessed.

18. It is clear from the Union’s dispute referral form and other papers filed in these proceedings that there was a basis for the arbitrator reasonably to conclude that the dispute was one that concerned an alleged failure by the Company to comply with the Main Agreement before implementing short-time, and a claim for the losses suffered by its members in consequence of the Company’s conduct to be made good. In short, the Union's case was that the Company had contravened the Main Agreement, and that the Company should be held to account for that breach. As such, the dispute concerned compliance rather than interpretation and application, and fell to be

treated on that basis in terms of the procedures that are respectively applicable.

19. The arbitrator's award is brief, and the legal issues raised by the Company's point *in limine* are not comprehensively canvassed. But he has rendered a logical, reasonable award, one that suggests that if the Union believed that the Company was guilty of a breach of the terms of the MEIBC's Main Agreement, it was at liberty to invoke the enforcement proceedings specifically provided by clause 4.2.2 of the dispute resolution agreement, and to request the MEIBC to have the matter referred to arbitration in terms of paragraph 4.2.5 of that agreement. The effect of arbitrator's ruling is to give recognise the true nature of the dispute between the Company and the Union, to uphold the terms of the collective agreements concluded by the MEIBC and to respect the principle of self-regulation that underpins the bargaining council system. I am unable to fault the arbitrator’s reasoning or his conclusion.

20. I accordingly make the following order:

20.1 the application is dismissed;

20.2 the Applicant is to pay the Fourth Respondent’s costs.

ANDRÉ VAN NIEKERK

Acting Judge of the Labour Court

Date of hearing: 6 June 2007

Date of judgment: 6 December 2007

For Applicant: Mr Maluleke
NEWU

Counsel for Third and
Fourth Respondents: Adv R Beaton

Attorneys for Third and
Fourth Respondents: Edward Hobbs