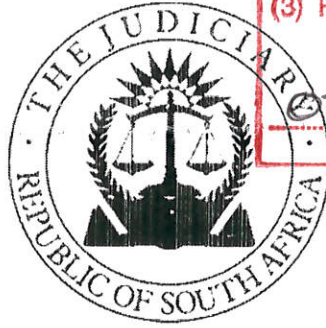


DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO.
- (2) OF INTEREST TO OTHER JUDGES: YES/NO.
- (3) REVISED.



07/10/2020
DATE

KAT Longeni
SIGNATURE

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

CASE NO: J 1619/19

In the matter between:

**PROACTIVE EMPLOYERS' ASSOCIATION OF SA
(PEASA)**

Applicant

and

**THE DIRECTOR: COMMISSION FOR
CONCILIATION, MEDIATION AND ARBITRATION**

First Respondent

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

**THE SENIOR CONVENING COMMISSIONER:
COMMISSION FOR MEDIATION AND
ARBITRATION - BLOEMFONTEIN**

Third Respondent

Date enrolled: 24 June 2020 (Via Zoom)

Date of judgment: 7 October 2020. Judgment delivered electronically, by email at 14:00

JUDGMENT

VAN NIEKERK J

- [1] This case concerns the right of representation in conciliation and arbitration proceedings in the CCMA and in particular, the right of representation by persons who are appointed as officials by an employers' organisation.
- [2] The parties have agreed to a stated case. They agree that the court need not consider a number of pending applications to review rulings made by CCMA commissioners in which they had refused to permit dispute advisers appointed by the applicant (PEASA) to represent the applicant's members at arbitration hearings. Each of the review applications will be individually dealt with based on the order given in this matter. The agreed stated case is lengthy but it needs necessarily to be recorded in its entirety, if only to provide the factual background to the dispute and define the issues in dispute. It reads as follows:

The agreed facts

1. The applicant is Proactive Active Employers' Association of South Africa ("PEASA"), an employers' organization duly registered and established in terms of the LRA, acting on its own behalf and on behalf of its members, having its principal place of business at 22 Eland Street, Koedoespoort, Pretoria. The applicant will be referred to in this stated case as "PEASA".
2. The first respondent is the Director of the CCMA, cited herein *nomine officio*, as the functionary directly responsible in terms of the LRA for the

functions, management and control of the CCMA, having his address for the purposes of these proceedings at c/o CCMA National Office, 28 Harrison Street, Johannesburg.

3. The second respondent is the Commission for Conciliation, Mediation and Arbitration ("the CCMA"), duly incorporated and established in terms of the LRA, for the National Office and Free State regions, having their respective addresses at 28 Harrison Street, Johannesburg, and CCMA House, Cnr Elizabeth and Westburger Streets, Bloemfontein.
4. Considering the terms of the consent order, further participation in these proceedings of the third respondent is no longer required. The first and second respondents will be referred in this stated case as "the CCMA".

PEASA:

5. PEASA is an employers' organization duly registered in terms of the LRA under registration number LR 2/6/3/65. Its current constitution dated 19 October 2015 is also registered under the aforesaid registration number, and the affairs of PEASA are to be regulated and conducted in terms of this constitution. The certificate of registration and constitution of PEASA are respectively annexures "A" and "B" hereto.
6. Subject to the terms of the constitution of PEASA, any employer is entitled to become a member of PEASA. Such employer then pays an annual membership fee, which currently stands at R700.00.

7. PEASA does not share its membership fee revenue with any third party.
8. PEASA currently has 1 523 active and fully paid up members. The current membership list is attached as annexure "C".
9. The annual membership fee payable by an employer to PEASA qualifies such employer to all the benefits of PEASA as a registered employers' organization under the constitution. No member of PEASA pays any additional amount or fee or other form of remuneration, either to PEASA, or any third party service provider, for enjoying such benefits. In particular, and of direct relevance to the current application, there is no separate fee payable for representation of such employer member before the CCMA or any applicable bargaining council. PEASA does not represent its members in the Labour Court.
10. The decision making of PEASA is conducted by an executive committee established in terms of its constitution, consisting of a chairperson, a vice-chairperson and a minimum of two other member representatives.

Dispute Advisors:

11. The executive committee of PEASA is empowered to appoint what is defined as 'dispute advisers' in its constitution. In clause 13(5) of the constitution, a 'dispute advisor' so appointed shall be an official of PEASA and entitled to represent members of PEASA in the CCMA and bargaining councils.
12. It is not required that a 'dispute advisor' must be an employee of PEASA under the constitution. A dispute advisor must however under the constitution

be an official of PEASA.

13. Currently, 'dispute advisers' are appointed from individual employees who are employed with the individual employer members of PEASA as and when the need arises by such employer member.
14. There is no process of appointment, of 'dispute advisers' which appointment is done by the executive committee in their discretion, from employees who are nominated by their individual employers who are members of PEASA. Also, there is no election of 'dispute advisers'.
15. Employer members are free, in their own discretion, to put forward names of employees to PEASA as nominees for possible appointment as PEASA 'dispute advisers'.
16. The 'dispute advisers' are not employed by PEASA.
17. The 'dispute advisers' are not remunerated by PEASA.
18. The total list of the current 'dispute advisers' appointed by PEASA, which list includes the individual employer members who are the individual employers of such 'dispute advisers', is annexure "D" hereto.
19. An appointed 'dispute advisor' is required to sign a contract of service with PEASA. Two examples of such contracts are annexures "E1" and "E2" hereto,
20. 'Dispute advisers' are also issued with a letter confirming their appointment as dispute advisors for purposes of presentation to third parties. Two examples are annexures "F1" and "F2" hereto.

21. The 'dispute advisors' are remunerated by their individual employers in the capacities they are employed by such employers.
22. The 'dispute advisors' are however not remunerated by their employers for discharging duties with PEASA.

'Dispute Advisor' Fees:

23. None of the employer members of PEASA pay a fee as a *quid pro quo* for being represented by an appointed PEASA 'dispute advisor' before the CCMA, or bargaining council with such representation being included in the annual membership fee.
24. No fee is payable by any PEASA employer member to any third party or other PEASA employer member that the 'dispute advisor' may be employed by. Similarly, there is no fee or any kind of payment exchange between PEASA and the employer member the appointed 'dispute advisor' is employed by.
25. A 'dispute advisor' is appointed to deal with a particular dispute before the CCMA or bargaining council on an *ad hoc* basis depending on the availability of an individual 'dispute advisor', using the list of 'dispute advisors' as it exists from time to time, considering that the 'dispute advisors' all have full time employment with their individual employer members.

LabourNet:

26. An organization known as LabourNet, which *inter alia* conducts business as

an industrial relations and labour law service provider to a variety of employer clients across the entire country, is itself an employer member of PEASA.

27. LabourNet is not in the business of representing its clients in the CCMA or bargaining councils, and it does not provide such service as part of its service offering to clients. Annexed hereto, marked annexure "G", is an example of a service agreement concluded between LabourNet and its clients. All its service agreements with its clients are the same, insofar as it concerns the general terms. This agreement does not require any LabourNet client to be a member of PEASA, nor does it establish any relationship between LabourNet, the client and PEASA.
28. LabourNet only refers individual clients that wish to become PEASA members, to PEASA.
29. LabourNet is LabourNet Central (Pty) Ltd, a juristic entity registered under the Company laws of the Republic of South Africa with registration number 2001/017821/07, having its principle place of business at LabourNet House, 17 Glenhove Road, Rosebank, Johannesburg, and 18 individual branches across the country.
30. LabourNet is never a party to or participant in any arbitration proceedings before the CCMA or bargaining councils, involving its clients, in any capacity whatsoever.
31. Even as a member of PEASA in its own right, LabourNet does not seek to represent its client base in the CCMA or bargaining councils on the basis of one member of an employers' organization seeking to represent another

employer member of that same employers' organization.

32. LabourNet is a member of PEASA under clause 7 of the constitution, as reflected in the membership certificate which is annexure "H" hereto.
33. LabourNet's first application for membership to PEASA which was considered by the EXCO of PEASA under clause 7(3) is attached marked annexure "I" hereto.
34. Currently, each branch of LabourNet has a separate membership of PEASA, as reflected in all the membership renewal applications which are annexures "J1" to "J16" hereto.

LabourNet Employees Appointed as 'Dispute Advisors':

35. Because 'dispute advisors' of PEASA are appointed from the employee corps of all the different employers across its entire membership base, as set out above, these 'dispute advisors' would include only some of the individual employees of LabourNet, as a fully paid up member of PEASA in its own right.
36. The individual employees of LabourNet appointed as dispute advisors of PEASA is reflected on the list at annexure "D" above.
37. LabourNet currently employs a total amount of 183 industrial relations and human resources consultant employees, in various capacities across the country. Of these, 46 have been appointed as PEASA 'dispute advisors'.
38. LabourNet currently has a total client base consisting of 5 345 employers across the country. Of this client base, 726 are PEASA members.

LabourNet and PEASA:

39. LabourNet was not involved in, nor did it in any way participate in, nor was it a party to, the establishment and/or the registration of PEASA.
40. The only nexus between LabourNet and PEASA is that LabourNet became a member of PEASA on 1 January 2018 in terms of the membership certificate referred to above, and makes some of its more senior employees available to be appointed as 'dispute advisors' of PEASA.
41. The function of such 'dispute advisors' are to represent employer members of PEASA in the CCMA and bargaining councils.
42. Where it comes to representation of employer members of PEASA in the CCMA or bargaining councils, the only nexus between LabourNet and PEASA is that some of LabourNet's employees have been appointed as 'dispute advisors' of PEASA. In such capacity, these LabourNet employees represent, on behalf of PEASA itself and not LabourNet, any PEASA member in CCMA or bargaining council proceedings where that member(s) may require such representation. There is no fee payable to LabourNet by either PEASA or the individual PEASA employer member, for such representation.
43. LabourNet and PEASA do not share any fees or revenue.
44. LabourNet is not involved in the collection or the payment of membership fees of PEASA, even if an employer member of PEASA may also be a LabourNet client. The relationship is purely and only between PEASA and the individual employer member. There exists no requirement imposed by LabourNet on its client base that any LabourNet client must also be a member of PEASA.

PEASA Member Representation:

45. In order to ensure that individual employers do not join PEASA purely for the purpose of procuring representation, there is a 2 (two) month waiting period between the date when the employer's membership of PEASA becomes effective, before such employer will qualify to be entitled to being represented by PEASA in the CCMA or bargaining council.

CCMA & BARGAINING COUNCIL RULINGS ON REPRESENTATION:

46. In some instances, where individual employer members of PEASA that are also LabourNet clients have sought to be represented by PEASA 'dispute advisors' appointed from amongst the employees of LabourNet, certain CCMA and bargaining council arbitrators have refused to allow such representation. Each of these individual instances are set out hereunder.

(A) *The Dickens ruling*

47. On 4 September 2018, Ryke Dealers (Pty) Ltd (Bloem 1 Stop), had an arbitration scheduled before the Motor Industry Bargaining Council in Bloemfontein.
48. The dispute concerned an unfair dismissal based on misconduct for an individual employee of Bloem 1 Stop, and came before Arbitrator C L Dickens, who is also a commissioner at the CCMA in Bloemfontein.
49. Bloem 1 Stop became a member of PEASA on 1 July 2018.
50. PEASA sought to represent Bloem 1 Stop in this arbitration, by way of one Charl Scholtz ('Scholtz'), who was an appointed 'dispute advisor' of PEASA,

and also an employee of LabourNet.

51. No dispute was raised by the employee party in the proceedings, Mr David Shasha, as to the representation of Bloem 1 Stop by Scholtz.
52. Arbitrator Dickens *mero motu* took issue with the representation by Scholtz, because Scholtz was known to her as being an employee of LabourNet. She relied on Rule 26(2)(ii) of the DRC rules to question his *bona fides*. She did not question that PEASA was not a registered employers' organization, that Bloem 1 Stop was not a member of PEASA, and that Scholtz was not appointed as a 'dispute advisor' of PEASA entitled to represent its members. She ruled that Scholtz was not entitled to represent Boem 1 Stop for the reasons as set out in a written ruling dated 17 September 2018, which is annexure "F" hereto. This ruling is currently the subject matter of a pending review application to the Labour Court under case number JR 2187/18.

(B) *The Venter Ruling*

53. On 9 October 2018, LSC Masakhe (Pty) Ltd (LSC) had an arbitration scheduled before the National Bargaining Council for the Road Freight and Logistics Industry in Bloemfontein.
54. The dispute concerned an unfair dismissal based on misconduct of an individual employee, and came before Arbitrator P M Venter, who is also a commissioner at the CCMA in Bloemfontein.
55. LSC became a member of PEASA on 1 February 2018. PEASA sought to represent LSC in this arbitration, by way of one Wiehan Schoeman

('Schoeman'), who was an appointed 'dispute advisor' of PEASA, and also an employee of LabourNet.

56. The employee party was represented by a trade union, DETAWU, which raised no dispute as to the representation of LSC by Schoeman.
57. Arbitrator Venter *mero motu* applied the aforesaid arbitration award by Arbitrator Dickens. He did not question that PEASA was a registered employers' organization and that LSC was a *bona fide* member thereof. Arbitrator Venter decided that Schoeman was not entitled to represent LSC, for the reasons as set out in a written ruling dated 15 October 2018, which is annexure "G" hereto. This ruling was also the subject matter of a review application to the Labour Court under case number JR 2585/18.

(C) *The Chavalala ruling*

58. On 12 March 2019, Le Petit Pain (Pty) Ltd (LPP), had an arbitration scheduled before the CCMA in Pretoria.
59. This dispute also concerned an unfair dismissal based on misconduct, and came before Arbitrator K P Chavalala.
60. LPP became a member of PEASA on 1 April 2018. PEASA sought to represent LPP in this arbitration, by way of one Christopher Fourie ('Fourie'), who was an appointed 'dispute advisor' of PEASA, and also an employee of LabourNet. The employee party, David Zimba, did not object to representation LPP by Fourie.
61. Arbitrator Chavalala *mero motu* took issue with Fourie as representative of

LPP.

62. Arbitrator Chavalala proceeded to apply Rule 25(5)(a) of the CCMA Rules, and concluded that Fourie had joined PEASA simply for the purposes of representation in the CCMA, and therefore he was not entitled to represent LPP in the arbitration proceedings. Arbitrator Chavalala did not question that PEASA was a registered employers' organization and that LPP was a *bona fide* member thereof.
63. Arbitrator Chavalala issued a written ruling on 22 March 2019, deciding that Fourie was not entitled to represent LPP for the reason set out in that ruling, which ruling is annexure "H" hereto. This ruling was also the subject matter of a review application to the Labour Court under case number JR 989/19.

(D) *The Plaatjies ruling*

64. On 23 July 2019, Multi-Flor (Pty) Ltd (Multi-Flor), had an arbitration scheduled before the CCMA in Bloemfontein.
65. This dispute also concerned an unfair dismissal based on misconduct, and came before Arbitrator M Plaatjies.
66. Multi-Flor became a member of PEASA on 1 February 2018. PEASA sought to represent Multi-Flor in this arbitration, by way of Scholtz.
67. The employee party, M S Kalake, did not object to representation of Multi-Flor by Scholtz.
68. Arbitrator Plaatjies *mero motu* took issue with Scholtz as representative of Multi-Flor.

69. Arbitrator Plaatjies proceeded to apply Rule 25(3) of the CCMA Rules, and concluded that Scholtz had joined PEASA simply for the purpose of representation in the CCMA, and therefore he was not entitled to represent Multi-Flor in the arbitration proceedings. Arbitrator Plaatjies did not question that PEASA was a registered employers' organization and that Multi-Flor was a *bona fide* member thereof.
70. Arbitrator Plaatjies issued a written ruling on 5 August 2019, deciding that Scholtz was not entitled to represent Multi-Flor for the reason set out in that ruling, which ruling is annexure "I" hereto.

The Legal Issues

71. The parties are *ad idem* that it is not disputed in these proceedings that PEASA is a registered employers' organization under the LRA and that all the individual employer PEASA members referred to in the factual matrix as set out above are *bona fide* members of PEASA in terms of its constitution. This issue therefore need not be decided by the Court.
72. The parties accept that it is not the function of a CCMA commissioner presiding over an unfair dismissal dispute or unfair labour practice dispute under the LRA to make any determination as to whether an employers' organization is *bona fide* and/or whether its constitution complies with the provisions of the LRA. These functions are solely the duty and responsibility of the Registrar of Labour, and there is accordingly no need for the Court to decide these issues in these proceedings.
73. The Court will be required to consider the current CCMA Rules as amended

effective 1 January 2019,¹ and in particular, the provisions of Rule 25 regulating representation.

74. In terms of CCMA Rule 25(1)(b)(iii), as read with Rule 25(1)(a)(ii) and (iv), any employer party would be entitled to be represented, in any CCMA arbitration proceedings, by any office bearer or official of a registered employers' organization the employer party is a member of. In the context of these Rules, bearing in mind the reasoning as contained in the arbitration awards as referred to above, the following issues arise for determination:

74.1. Is it sufficient for an employer party to show in arbitration proceedings that the employers' organization is registered under the LRA, that the employer party is a member of the employers' organization, and that the official is employed by the employers' organization, and authorised to represent the member in order to automatically qualify for representation.

74.2. Is it necessary for the official to be employed by the employers' organization, whether on a full time or part time basis to acquire a right to represent a member of the employers' organization. In particular, and specifically in the current matter, does the constitution of PEASA and/or the LRA contemplate and/or require employment of a 'dispute advisor' who is described in the constitution as an 'official' to also be an employee of PEASA.

74.3. Is it permissible for the 'official' of PEASA to have gainful full time employment with a third party other than the employers' organization,

¹ See GenN 776 in GG 42092 of 7 December 2018.

which would include a member of the employers' organization whilst not being an employee of PEASA.

74.4. The case of PEASA, considering the above issues, is that all that needs to be shown at any arbitration before a commissioner is that: (1) PEASA is a registered employers' organization; (2) the employer party is a member of PEASA; (3) and that the individual representative from PEASA is a 'dispute advisor' appointed in terms of the constitution of PEASA. It does not matter what other capacities or employment or positions the 'dispute advisor' may hold, and in particular, whether the 'dispute advisor' is an employee of LabourNet. That is not part of the enquiry in order to establish the existence of the right to representation.

74.5. The case of the CCMA, is that a Commissioner is entitled to interrogate if a person who appears is a *bona fide* office bearer or official of a registered employers' organization having regard to the wording of Rule 25(1)(a)(iv).

75. In terms of Rule 25(2), if any party to the dispute objects to the representation of another party, or the commissioner suspects that the representative of a party does not qualify to represent a party in terms of Rule 25, the commissioner must determine the issue. In terms of Rule 25(3), the commissioner is entitled to call upon a person seeking to represent a party to establish why he or she should be permitted to represent such party. Rule 25(4) provides that a representative must tender any documents requested by the commissioner for the purpose of compliance with Rule 25(3), including constitutions, payslips, contracts of employment, documents and forms or recognition agreements and/or proof

of membership of a trade union or employers' organization. In the context of Rules 25(2), (3) and (4), jointly considered, bearing in mind the reasoning as contained in the arbitration awards as referred to above, the following issues arise for determination:

- 75.1. Is a commissioner entitled in the determination under Rule 25(2) to decide whether the appointment of the 'dispute advisor' of PEASA, by the employers' organization, is in conformity with the constitution and/or *bona fide*.
- 75.2. Is a commissioner entitled to determine that the representative has joined the employers' organization simply for the purposes of representing an employer in the CCMA in circumstances where such representation would ordinarily not be allowed.
- 75.3. Can it legitimately be contended that a representative actually joins an employers' organization for the purpose of representation of a member(s) of the employers' organization.
- 75.4. Is a commissioner entitled to *mero motu* conduct an enquiry and/or investigations into the representative and any third party the representative may be associated with or employed by in order to determine whether the representative is lawfully appointed and not *bona fide*.
- 75.5. The case of PEASA, considering the above issues, is that Rules 25(2), (3) and (4) contemplates that the enquiry into the entitlement of a 'dispute advisor' appointed by PEASA to represent an employer member of PEASA is limited to determining whether PEASA is a registered employers' organization, whether the employer party is a member in good standing of

PEASA, and whether the individual representative concerned is appointed as a dispute adviser of PEASA. It is not permitted nor contemplated by Rule 25(3) and (4) that a commissioner may enquire into the lawfulness and/or *bona fides* or genuineness of the employers' organization or the membership of an individual employer with such organization, or the appointment of any official thereof, as such enquiry would be *ultra vires* the CCMA's Rules. The CCMA contends otherwise.

76. In terms of Rule 25(5), a commissioner may exclude any person who is representing a party in any proceedings on the basis that they are a member of the same employers' organisation as an employer party, or a member of an employers' organisation that is a party to proceedings, if the commissioner believes that: (a) the representative joined the employer's organisation for the purpose of representing parties at the Commission; or (b) the representative's participation in the dispute resolution process would be contrary to the purpose of the rule which is to promote inexpensive and expeditious dispute resolution in a manner that is equitable to all parties, is not in keeping with the objectives of the LRA, or may have the consequence of unfairly disadvantaging another party to the dispute. In the context of Rules 25(2), (3) and (4), jointly considered, bearing in mind the reasoning as contained in the arbitration awards as referred to above, the following issues arise for determination:

- 76.1. Can the enquiry in terms Rule 25(5) be applied to an individual representative appointed by the employers' organization itself, where it is the employers' organization seeking to represent the employer party and not another member of the same employers' organization.

- 76.2. Does Rule 25(5) contemplate an individual person as representative, considering the requirement in this Rule that it must be one member of an employers' organization seeking to represent another member.
- 76.3. The case of PEASA, considering the above issues, is that Rule 25(5) cannot be applied in this instance, because this is not a case where the individual 'dispute advisor' concerned is seeking to represent the employer member for and on behalf of any other organization that is also an employer member of PEASA, such as LabourNet. LabourNet is not in any manner involved in or party to the proceedings nor was it seeking to represent the employer party as member of PEASA. Rule 25(5) only applies in the scenario where one member of an employers' organization is seeking to represent another member of the same employers' organization, whilst the situation *in casu* has nothing to do with one member of an employers' organization seeking to represent another member of that same employers' organization. This is a case where PEASA as an employers' organization is itself and in its own right seeking to represent one of its own members through a 'dispute advisor' appointed by PEASA.
- 76.4. PEASA further contends that Rule 25(5) only makes mention of representation of one member by another member, and not to representation by officials of the employers' organization itself. An official is not a member of an employers' organization. These persons are not employers, do not apply for membership which application is then considered in terms of the constitution, and do not pay an annual membership fee. The entire Rule 25 draws a clear distinction between 'member' and 'official / office bearer'. The CCMA accepts such distinction

in Rule 25. It is *ultra vires* applying the provisions relating to membership in seeking to exclude representation by an individual official or office bearer.

77. The Court will be required to determine whether there is any substance and justification for the following findings by the various arbitrators in the arbitration awards referred to above:

77.1. PEASA is LabourNet under a different guise. PEASA contends that the two organizations share no connection other than LabourNet being a member of PEASA, just like any other employer member, and LabourNet is not in any manner involved in the proceedings, nor does it seek to represent any employer in the CCMA.

77.2. The individual 'dispute advisors' appointed by PEASA, are not lawfully appointed and/or as they are all employed by LabourNet, the 'dispute advisors' are not *bona fide* 'officials' of PEASA. PEASA contends that there is nothing wrong with such persons having gainful employment elsewhere as well, and when it is *ultra vires* for the CCMA to enquire into whether their appointment was *bona fide*, where Rule 25(5) does not apply. The CCMA contends that it has the necessary power under Rule 25 to make the enquiry.

77.3. The individual 'dispute advisors' joined PEASA as members in order to represent employers in the CCMA. PEASA contends that individual 'dispute advisors' are not members of PEASA, and Rule 25(5) only applies to an actual employer party member. The CCMA concedes that 'dispute advisors' are not members of PEASA.

Nature of relief

78. In the event of the Court determining any of the above legal issues in favour of PEASA on the grounds as specified, the parties agree that the following order be granted:

'It is declared that dispute advisors appointed by the Applicant, Proactive Active Employers' Association of South Africa ("PEASA"), in terms of clause 13 of its Constitution, are entitled and have the right to represent members of the Applicant in any arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration, in terms of Rule 25(1)(b) of the CCMA Rules, irrespective of whether the dispute advisor(s) may be employed by a member of the Applicant and not employed by the Applicant itself.'

79. In the event of the Court not determining any of the above legal issues in favour of PEASA on the grounds as specified, the application falls to be dismissed and the parties agree that the following order be granted:

"It is declared that dispute advisors appointed by the Applicant, Proactive Active Employers' Association of South Africa ("PEASA"), in terms of clause 13 of its Constitution, are not lawfully appointed as dispute advisors under the PEASA constitution and do not have the right to represent members of the Applicant in any conciliation or arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration, in terms of Rule 25(1)(iv) and (b) of the CCMA Rules, unless the dispute advisor(s) is/are an official and an actual employee of PEASA.'

80. There is no need for the Court to decide the merits of the pending review

applications referred to above. Each of these cases will be individually dealt with and dispensed with, based on the order given in this matter.

81. Neither party seeks costs.

[3] The CCMA has the power to make rules to regulate the practice and procedure of dispute resolution (see section 115 (2A) of the LRA). In terms of section 115(2A) (k), the CCMA can regulate the right of any person or category of persons to represent any party in any conciliation and arbitration proceedings. The CCMA has issued rules that regulate the right of representation. Rule 25 states:

'25 Representation before the Commission

- (1) (a) In conciliation proceedings a party to the dispute may appear in person or be represented only by –
- (i) if the party is an employer, a director or employee of that party and, in addition, if it is a close corporation, a member or employee of that close corporation;
 - (ii) any member of that party's registered trade union or registered employers' organisation or an office bearer or official as defined in the Act or an office bearer or official as defined in the Act of a registered federation of trade unions or registered federation of employers' organisations;
 - (iii) if the party is a registered trade union, any member of that trade union or any office bearer or official as defined in the Act and authorized to represent that party or an office bearer or official as defined in the Act of a registered federation of trade unions and authorized to represent that party; or
 - (iv) if the party is a registered employers' organisation, any director or employee of an employer that is a member of that employers' organisation or an official or office bearer as defined in the Act and authorized to

represent that party or an office bearer or official as defined in the Act of a registered federation of employers' organisations and authorized to represent that party.

- (v) if a party is the department of labour, any employee or official of the department of labour.
- (b) Subject to paragraph (c), in any arbitration proceedings a party to the dispute may appear in person or be represented only by –
- (i) a legal practitioner;
 - (ii) a candidate attorney; or
 - (iii) an individual entitled to represent the party at conciliation proceedings in terms of sub-rule (1)(a).
- (c) If the dispute being arbitrated is referred in terms of section 69(5), 73 or 73A of the BCEA or is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, a party is not entitled to be represented by a legal practitioner or a candidate attorney in the proceedings unless –
- (i) the commissioner and all the other parties consent;
 - (ii) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering –
 - the nature of the questions of law raised by the dispute;
 - the complexity of the dispute;
 - the public interest; and

- the comparative ability of the opposing parties or their representatives to deal with the dispute.
 - (d) In any facilitation of large scale retrenchments as contemplated in section 189A (3) of the Act, a party may appear in person or be represented by:
 - (i) a director or employee of the party, and, if a close corporation, a member or employee of that close corporation;
 - (ii) any member, office-bearer or official of that party's registered trade union; or;
 - (iii) any member, office-bearer or official of that party's registered union or registered employers' organisation.
 - (e) No representation by a legal practitioner or candidate attorney shall be allowed in facilitations of large scale retrenchments as contemplated in section 189A (3).
 - (f) No person representing a party in proceedings before the Commission in a capacity contemplated in sub-rule (1)(a) or (b), other than a legal practitioner or candidate attorney contemplated in sub-rule (1)(b)(i) and (ii), may charge a fee or receive a financial benefit in consideration for agreeing to represent that party.
- (2) If the party to the dispute objects to the representation of another party to the dispute or the commissioner suspects that the representative of a party does not qualify in terms of this Rule, the commissioner must determine the issue.
- (3) The commissioner may call upon the representative to establish why the representative should be permitted to appear in terms of this Rule.

- (4) A representative must tender any documents requested by the commissioner for the purposes of sub-rule (3), including constitutions, payslips, contracts of employment, documents and forms or recognition agreements and/or proof of membership of a trade union or employers' organization.
- (5) Despite the provisions of sub-rule (1), a commissioner may exclude any person who is representing a party in any proceedings on the basis that they are a member of the same employers' organization as an employer party, or a member of an employers' organization that is a party to proceedings, if the commissioner, after enquiring into the matter and considering relevant representations, believes that –
 - (a) the representative joined the employer's organization for the purpose of representing parties at the Commission; or
 - (b) the representative's participation in the dispute resolution process –
 - (i) would be contrary to the purpose of the Rule which is to promote inexpensive and expeditious dispute resolution in a manner that is equitable to all parties;
 - (ii) is not in keeping with the objectives of the Labour Relations Act 66 of 1995; or
 - (iii) may have the consequence of unfairly disadvantaging another party to the dispute.
- (6) Despite the provisions of this Rule, but subject to the provisions of sub-rule (1)(f), the commissioner may, on application brought in accordance with rule 31, allow a person not contemplated in sub-rule (1) to represent a party at arbitration proceedings before the commission, after considering –

- (a) whether it is unreasonable to expect the applicant party to deal with the dispute without representation, after considering the factors set out in sub-rule 1(c)(ii)(a) to (d);
- (b) the reason why a person contemplated in Rule 25 cannot represent the applicant party, which includes affordability, if applicable;
- (c) the ability of the proposed representative to meaningfully represent the applicant;
- (d) whether the proposed representative is subject to the oversight and discipline of a professional or statutory body;
- (e) whether the proposed representative will contribute to the fairness of the proceedings and the expeditious resolution of the dispute;
- (f) prejudice to the other party; and
- (g) any other relevant factors.

[4] Of some significance in these proceedings is clause 13.5 of PEASA's constitution. That clause reads as follows:

- '5) Dispute Adviser
 - a) The EXCO may appoint Dispute Advisers, which will be officials of the ASSOCIATION, on such basis and conditions as mutually agreed upon.
 - b) The main duties of the Dispute Adviser will be:
 - i) to enrol members;
 - ii) to investigate complaints received from members;

- iii) to deal with disputes involving members;
- iv) to represent the ASSOCIATION or its MEMBERS at the Commission for Conciliation, Mediation and Arbitration and/or at Bargaining Council and/or Labour Court;
- v) to collect membership fees; and
- vi) to perform such other duties as the EXCO may direct.

The constitution defines 'dispute advisor' to mean '*a natural person which shall be officials of the ASSOCIATION, shall be appointed by the Executive Committee on such basis and conditions as mutually agreed upon to deal with disputes involving paid up members, to represent PEASA and its members at any proceedings conducted by the Commission for Conciliation, Mediation and Arbitration, Bargaining Councils and Statutory Councils and to perform such and other duties as the Executive Committee may direct.*'

[5] The factual circumstances in which the applicant appoints dispute advisers are not disputed – PEASA appoints but does not employ them, after nomination by one of the applicant's members. The dispute advisers so nominated, for the present at least, are employees of the nominating member. Dispute advisers who are nominated and appointed sign a service contract with PEASA (but receive no remuneration from PEASA), and receive a certificate confirming their appointment as an official of PEASA. In so far as the rulings under review are concerned, they are disputes in which LabourNet employees, appointed as dispute advisers by PEASA, sought to represent clients of LabourNet. LabourNet is a member of PEASA, and makes some of its more senior employees available for appointment as dispute advisers. These dispute advisers (being LabourNet employees), represent PEASA members in their capacity as officials of PEASA.

[6] The issues that the court is called on to decide can be distilled from the stated case. The first relates to office bearers of employers' organisational and in particular, the employment status of any official of an employers' organisation

seeking to present a member of that organisation. PEASA contends that these are not relevant issues; all that is required is that PEASA prove that it is a registered employers' organisation, that the employer party to the dispute is a member of PEASA, and that the representative who appears before the CCMA is a dispute adviser appointed in terms of PEASA's constitution. The CCMA contends that in terms of rule 25 (1)(a) (iv), a commissioner is entitled to interrogate whether the representative is a *bona fide* office bearer or official of PEASA. Secondly, the court is required to consider whether a commissioner is entitled in terms of rule 25 (2), to decide whether the appointment of a dispute adviser is in conformity with PEASA's constitution and/or *bona fide*. PEASA contends that the commissioner's enquiry is limited to determining whether PEASA is a registered employers' organisation, whether the employer party to the dispute is a member in good standing and whether the individual representative concerned is appointed as a dispute adviser of PEASA. In other words, in PEASA's submission, a commissioner may not enquire into the lawfulness or *bona fides* of the employers' organisation, or the membership of an individual employer or the appointment of any official. The third issue relates to the application of rule 25 (5) and the exclusion of persons who seek to represent a party. In particular, the issue is whether the terms of rule 25(5) can be applied to an individual representative appointed by the employers' organisation, where that organisation seeks to represent the employer party, as opposed to another member of the same employers' organisation. PEASA contends that in the present instance, there is no individual dispute adviser who seeks to represent the employer party to the dispute for and on behalf of any member of PEASA. Related to this issue is the fourth issue for determination, and that is whether (as the commissioners have found in the rulings under review) that PEASA is LabourNet in a different guise. The CCMA concedes that individual dispute advisers are not members of PEASA.

Analysis

- [7] The starting point is rule 25 (1), and the extent of the right of representation before the CCMA of employer parties. Rule 25 (1)(a)(i) extends the right of representation

to a director of the employer party, an employee of that party and to members of close corporations. None of these categories is relevant for present purposes. Rule 25 (1)(a)(ii) extends the right of representation to any office bearer, official or member of an employers' organisation of which the employer party is a member. The terms 'office bearer' and 'official' are defined in section 213 respectively. An 'office bearer' is defined to be a 'person who holds office in a trade union, employers' organisation, federation of trade unions, federation of employers' organisations or council and who is not an official'. An 'official' is defined 'in relation to a trade union, employers' organisation, federation of trade unions or federation of employers' organisations means a person employed as the secretary, assistant secretary or organiser of a trade union or employers' organisation or federation, or in any other prescribed capacity, whether or not that person is employed in a full-time capacity...'. 'Prescribed' is defined in section 213 to mean 'prescribed from time to time in terms of section 208'. Section 208 empowers the Minister to make regulations not inconsistent with the Act, after consulting NEDLAC and where relevant, the CCMA. It is not disputed that the minister has issued no regulations prescribing persons as 'officials'. The list of officials is thus limited to those recorded in the definition of 'official', i.e. a person employed by the organisation as the secretary, assistant secretary or organiser.

- [8] It is not disputed that the dispute advisers appointed by PEASA do not hold office in PEASA, nor are they employed by PEASA as a secretary or assistant secretary. In these circumstances, the 'dispute advisors' are not office bearers of PEASA, nor are they officials of PEASA. It follows that for the purposes of rule 25, PEASA's dispute advisers have no right to represent either PEASA or any of its members in conciliation and arbitration proceedings conducted under the auspices of the CCMA.
- [9] This finding informs most of the issues that the parties have identified as being in dispute and requiring determination in these proceedings. The first relates to what must be shown in any arbitration proceedings to establish the right of representation. It will be recalled that PEASA's contention is that it needs to

establish only that PEASA is a registered employers' organisation, that the employer party to the dispute is a member of PEASA, and that the individual representative from PEASA is a dispute adviser appointed in terms of its constitution, regardless of any other employment or appointment that the dispute adviser may hold. This cannot be correct – for the purposes of rule 25 (1)(a)(ii), it is necessary, when an employer party to a dispute seeks to be represented by an employers' organisation, that the representative establish that he or she is an office bearer or official of that organisation, within the definition of those terms in section 213. There is no reason why a commissioner should not satisfy him or herself that the requirements for representation have been met

[10] Whether any enquiry into the lawfulness or genuineness or *bona fides* of any employers' organisation or the membership of any individual employer of that organisation or the appointment of any official of the organisation is *ultra vires* the CCMA's rules, that is a matter to be determined by the rules themselves. As I have indicated, the starting point is rule 25 (1), read with the definition of 'office bearer' and 'official' in section 213. Assuming that the person seeking to represent a party meets these criteria, it is open to a commissioner, in the second stage enquiry conducted in terms of rule 25(5), to enquire into the matters raised there, in circumstances where the person seeking to represent the employer party to the dispute relies on the fact that they are a member of the same employers' organisation. In the present instance, rule 25 (5) does not apply, since the dispute advisers concerned lay claim to the right of representation by virtue of their status as office bearers or officials of PEASA. In none of the rulings under review does the representative rely on his or her membership of PEASA directly – the right claimed flows through employment by another member of PEASA and more directly, by virtue of nomination by that member and appointment as a dispute adviser by the executive of PEASA.

[11] These conclusions also inform the last of the issues identified for determination. The question in each of the rulings under review is whether the person claiming the right of representation is an office bearer or official of PEASA. In the Dickens

ruling, referred to in paragraph 47 *et seq.* of the stated case, to the extent that the commissioner found that Mr Scholtz had joined PEASA with the sole purpose of circumventing the CCMA and DRC rules and that he was not a *bona fide* office bearer of PEASA, these findings represent answers given to the wrong questions. The only issue to be determined was whether Scholtz was a member, or an office bearer or official of PEASA, as defined in section 213. On his own version, Scholtz was not a member of PEASA, nor had he been elected to any office in PEASA nor was he the secretary or assistant secretary of PEASA. Scholtz's good faith (or the lack of it) was not in issue – the only issue was whether he met the statutory definition of an office bearer or official. The commissioner's ruling is thus correct, but for the wrong reasons. Similarly, in the Venter ruling, the commissioner found that Mr Schoeman was not a *bona fide* official of PEASA. The fact is that he was not an official at all. In the Chavalala ruling, the commissioner relied on rule 25(5) to find that Mr Fourie was an employee of LabourNet acting under the guise of PEASA and that he thus had no standing to represent the employer party because his appointment by PEASA was made solely for the purpose of representing that party. First, rule 25(5) did not apply, since Fourie did not seek to represent the employer party as a member of PEASA. Secondly, and to the extent that the enquiry ought properly to have been whether Fourie met the threshold established by rule 25 (1)(a)(ii), Fourie was patently not elected to office, nor was he PEASA's secretary or assistant secretary. That ought to have been the end of the enquiry. In the Plaatjies ruling, the commissioner found that Scholtz was not an office bearer of PEASA as he claimed to be. That finding is no doubt correct, given that Scholtz did no more than proffer a letter stating that he was an office bearer of PEASA and held the title of dispute adviser. (This would appear to be contrary to clause 13 of PEASA's constitution, which provides for the appointment of dispute advisers as officials of PEASA, and not their election as office bearers.) The commissioner concluded that Scholtz joined PEASA with the sole purpose of circumventing the CCMA rules. Again, Scholtz did not 'join' PEASA, at least not in the sense that he held out to be a member of PEASA. Again, the proper enquiry ought to have been whether he was an office bearer or official as defined in s 213.

- [12] To the extent that the parties are in dispute about the right of a commissioner to interrogate the basis on which a person seeking the right to represent an employer lays claim to that right, it seems obvious to me that a presiding commissioner is entitled to do so, at least to the extent of requiring the person concerned to satisfy the commissioner that he or she is an office bearer or official of the employers' organisation concerned having regard to the statutory definition of those terms, and if the person seeks to represent the employer party on the basis of membership of the same employers' organisation, the commissioner must be satisfied that the person is indeed a member of the same employer organisation, and if so, whether an enquiry in terms of rule 25(5) is appropriate.
- [13] To sum up: rule 25 contemplates that only natural persons may represent employer parties at conciliation or in arbitration proceedings. Rule 25(1) restricts the right of representation of an employer to a member of the employers' organisation of which the employer party is a member, or any of its office bearers or officials. When a person seeking to represent the employer party to a dispute does so as an office bearer or official of the employers' organisation concerned, reference must be made to the definitions of those terms contained in section 213 of the LRA. Persons claiming to be office bearers of an employers' organisation must hold office in the organisation; a person claiming to be an official must be employed as the secretary or assistant secretary of the organisation. It is not open to an employers' organisation to 'self-define' these terms; the CCMA's rules are made in terms of section 115(2A), and the terms 'office bearer' and 'official' carry their statutory meaning where they are defined by the LRA. Even if a person claiming the right to representation meets the above criteria, when that person seeks the right of representation on the basis that he or she is a member of the same employers' organisation as the employer party to the dispute, rule 25 (5) confers a discretion on a commissioner, to be exercised having regard to the factors listed in that sub rule, to exclude that person from any proceedings. The discretion must be exercised by reference to the listed factors and may not extend to considerations not specifically listed in rules 25 (5). Finally, a commissioner is entitled to enquire into whether as a fact, the person seeking the right to represent

an employer party is a member of the same employers' organisation as the employer party, or an office bearer or official of that organisation. There is no discreet requirement of *bona fides* in rule 25 - whether a person is entitled to represent an employer party in terms of the rule is a matter of fact; whether a person who establishes the right to representation on the grounds of membership of the same employers' organisation ought nonetheless to be excluded is a matter of discretion, having regard to the factors listed in rule 25 (5).

- [14] Finally, the agreed relief in the event of the court finding for the respondents does not accord with the principles referred to above, and the order has been adapted accordingly. By agreement, there is to be no order as to costs.

I make the following order:

1. It is declared that in the absence of any election to office or employment as the secretary or assistant secretary of the applicant, dispute advisers appointed by the applicant in terms of clause 13 of its constitution do not by virtue of that appointment have the right to represent members of the applicant in any conciliation or arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration, in terms of Rule 25 (1) of the CCMA Rules.



André van Niekerk
Judge of the Labour Court of South Africa

Representation:

For the applicant: Mr S Snyman of Snyman Attorneys

For the respondents: Advocate A Redding SC,

Instructed by: Lawtons Africa

LABOUR COURT