



National Office
 Union Corporation Building • 1st Floor
 77 Marshall Street • Johannesburg 2001
 P.O. Box 9381 • Johannesburg 2001
 Telephone: (011) 639 8000 • Facsimile: 086 636 8690
 www.meibc.co.za
 VAT No: 4430117889

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CIRCULAR

To: Employers, Trade Unions, Regional Managers, Senior Agents and Agents

RESPONSE TO CIRCULARS ISSUED BY NEASA

1. The purpose of this circular is to respond to Industry circulars issued by the National Employers Association of South Africa (NEASA) dated the 19 January 2015 and 02 February 2015 respectively.
2. The Minister of Labour on 24 December 2014 extended the MEIBC Main Agreement to non-parties with effect from 5 January 2015. In terms of the gazetted agreement the deadline for submitting applications to be exempted from the implementation of the wage increase is 4 February 2015. The deadline for submitting Leave Enhancement Pay (LEP) exemption applications remains 31 October 2015.
3. NEASA alleged that it had obtained a consent order in 2012 in terms of which the Council must consider all applications for exemption irrespective of the basis on which it is founded. This allegation is contained in NEASA's letter dated the 19th January 2015.

East Region P.O. Box 676 Johannesburg 2002	Border Region P.O. Box 13 05 Francistown	KwaZulu-Natal Region P.O. Box 556 Durban 4002	Midwest Region P.O. Box 13745 Grahamstown 6005	Golden Region P.O. Box 1933 Johannesburg 2003	Free State & Northern Cape Region P.O. Box 2002 Maseru 6300	Centre for Dispute Resolution P.O. Box 2881 Johannesburg 2000
Tel: 021 421 6149 Fax: 086 636 8695	Tel: 043 741 7290 Fax: 086 636 8695	Tel: 03 305 4761 Fax: 086 636 8693	Tel: 04 588 1542 Fax: 086 636 8694	Tel: 011 639 8000 Fax: 086 636 8695	Tel: 067 352 8142 Fax: 066 636 8497	Tel: 011 014 4669 Fax: 086 636 8699

4. Following the judgment in the case NEASA v MEIBC & Minister of Labour & Others under case number J216/14, a request was made, in fact, by the Council to the Minister on the 10th December 2014 in terms of section 32(1) of the Labour Relations Act, for the extension of the Main Agreement to non-parties.
5. The Minister extended the Main Agreement on the 24th December 2014 per Government Notice R. 1051 in Government Gazette number 38366, dated 24th December 2014. The Main Agreement has been extended to non-parties in terms of section 32(2) and 32(5) of the LRA, with effect from the 5th January 2015 to 30th June 2017.
6. As a result of the judgment and extension of the Main Agreement, NEASA is both appealing the judgment handed down on 1st December 2014 by Judge Rabinaicker, as well reviewing the Minister's decision to extend the Main Agreement.
7. Notwithstanding the pending Labour Court review application in respect of the 2011/2014 Main Agreement, the Council is compelled to accept that the applicable Ministerial extension of 24th December 2014 is valid and enforceable until set aside by a competent court of law. The fact that NAESA is challenging the validity of the extension in the Labour Court does not mean that employers should not apply for exemption from the Main Agreement until the review application has been decided by a competent court of law.
8. The approach to be adopted is consistent with the *Oudekraal* principle which was recently upheld in the majority judgment of the Constitutional Court of ***MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*** delivered on 25 March 2014

"The essential basis of the Oudekraal principle is that invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process."

9. The Council is compelled to accept that, until such time that the Ministerial extension of 24th December 2014 is set aside by a competent court of law, the extension of the collective agreement to parties and non-parties is **legally valid, binding and enforceable**.

10. In any event, it is further submitted that on a policy consideration, the collective agreement is lawful, valid and enforceable. What is sort to be achieved is uniformity in the industry concerned and not to permit any party to be unduly advantaged at the expense of its employees.

EXEMPTION PROCESS

11. It has been brought to the Council's attention that on the 2nd February 2015 NEASA issued an industry alert advising all its members that they must use a pro-forma exemption application and motivation prepared by NEASA in support of all applications for exemption.

12. In terms of paragraph 4 of the pro-forma prepared by NEASA, it is recorded that *"The Applicant respectfully requests the Committee to grant the exemption applied for in terms of Clause 5 of the National Exemptions Policy until litigation has finalised the matter"*. (NEASA submission emphasis).

13. The Council wishes to reiterate that any person may apply for exemption from the application of the Main Agreement, which exemptions would be granted in circumstances where the qualifying criteria for exemptions are met. In this regard the Council submits that the allegation by NEASA that even employers that do not meet the criteria must apply for exemption simply because there is litigation pending, is unfounded.
14. In compliance with section 30 of the LRA as amended, the Constitution of the MEIBC provides in clause 14, as follows: *'all exemption applications concerning any collective agreement of the council shall be considered in accordance with the exemption procedure contained in that particular agreement from which exemption is sought'*.
15. Clauses 23(2)(a) to (g) of the Main Agreement very clearly state that the following fundamental principles will apply when any person intends on applying for an exemption:
- all applications for exemption must be in writing and fully motivated and sent to the Regional Office of the Council for the area in which the applicant making an application for exemption is situated or located.
 - In scrutinizing an application for exemption the Council having jurisdiction to hear the matter (Exemption Application) will consider the views expressed by the employer and the workforce, together with any other representations received in relation to that application.
 - The employer must consult with the workforce, through a trade union representative or, where no trade union is involved, with the workforce itself, and must include the views expressed by the workforce in the application.

Where the views of the workforce differ from that of the employer, the reasons for the views expressed must be submitted with the application. Where an agreement between the employer and the workforce is reached, the signed written agreement must accompany the application.

- The exemption shall not contain terms that would have an unreasonable detrimental effect on the fair, equitable and uniform application of the collective agreement in the Industry.
- Wage and wage-related exemptions shall not generally be granted beyond the expiration of the Agreement: Provided that the Council may at its discretion and on good cause shown, agree to a longer period (but not an indefinite period).
- Applications for exemption involving monetary issues may not be granted retrospectively.
- An application for exemption shall not be considered if the contents of the application are covered by an arbitration award binding the applicant.

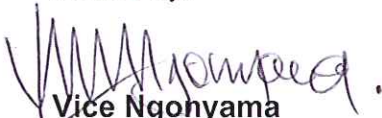
16. On considering all the above criteria, the council may request a financial review report from a qualified external accountant and all factors are taken into account when a decision is made to grant and/or decline an application.

17. If an applicant is not satisfied with the outcome of the exemption application, he/she may approach the Independent Exemptions Appeal Board (IEAB). Applicants are guided to refer to the IEAB Constitution and the National Exemptions Policy when making an application for exemption.

18. The exemption process however does not suspend the validity and enforceability of the Main Agreement. The Agreement remains enforceable and binding to all employers that fall within the scope of the Council until the exemption committee decides otherwise.

19. In conclusion notice is hereby given to all employers and employees that fall within the scope of the Metal and Engineering Industry that in terms of the Labour Relations Amendment Act 13 of 2014, all exemption applications submitted by any party must be finalised or considered within 30 days from the date when the application is received by the Council.

Issued by:


Vice Ngonyama
G M: Operations