IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case No: C 409/2021

In the matter between:

GOLDEN ARROW BUS SERVICES (PTY) LTD	First Applicant
SIBANYE BUS SERVICES (PTY) LTD	Second Applicant
And	
MINISTER OF EMPLOYMENT AND LABOUR	First Respondent
SOUTH AFRICAN ROAD PASSENGER BARGAINING COUNCIL	Second Respondent
SOUTH AFRICAN BUS EMPLOYERS ASSOCIATION	Third Respondent
COMMUTER BUS EMPLOYERS ASSOCIATION	Fourth Respondent
SOUTH AFRICAN TRANSPORT & ALLIED WORKERS UNION	Fifth Respondent
NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA	Sixth Respondent
TRANSPORT AND ALLIED WORKERS UNION OF SOUTH AFRICA	Seventh Respondent
TRANSPORT AND OMNIBUS WORKERS UNION	Eighth Respondent
UNITED ASSOCIATION OF SOUTH AFRICA	Ninth Respondent
NON-UNIONISED EMPLOYEES LISTED IN ANNEXURE "A"	Tenth and Further Respondents

Heard: **01 February 2023**

Delivered: This judgment was handed down electronically by circulation to the Applicant's and the First and Sixth Respondents' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 15h00 on 04 May 2023

JUDGMENT

LALLIE, J

[1]The applicants launched this application in an attempt to obtain the following relief:

"1. Reviewing and setting aside the decision of the first respondent, contained in Government Notice 366 of 2021 published in Government Gazette No 44724 on 18 June 2021, to extend the collective agreement which appeared in the schedule thereto ("the 2021 MCA"), to non-party employers and employees in the road passenger transport industry until 31 March 2022 or until replaced by a subsequent agreement;

2. Declaring Government Notice 366 of 2021 published in Government Gazette No 44724 to be invalid and of no force and effect;

3. Insofar as may be necessary:

3.1 Declaring sections 32(2) and (3) of the Labour Relations Act 66 of 1995 ("the LRA") unconstitutional and invalid to the extent that they do not require the Minister to follow a procedurally fair process before deciding to extend a collective agreement to non-parties; and

3.2 Reading-in and severing the following words in section 32(3) of the LRA (deletions and <u>insertions</u>):

"(f) the collective agreement contains criteria that must be applied by the independent body when it considers an appeal, and that those criteria are fair and promote the primary objects of this Act:

(g) the terms of the collective agreement do not discriminate against non-parties:

(h) the minister has published a notice in the Government Gazette stating that an application for an extension in terms of this subsection has been received, stating where a copy may be inspected or obtained and inviting comment within a period of not less than 14 days from the date of the publication of the notice; and

(i) the Minister has considered all comments received during the period referred to in paragraph (h)".

4. Reviewing and setting aside the second respondent's decision, apparently taken on 14 May 2021, to request the Minister to extend the terms of the 2021 MCA to non-party employers and employees in the road passenger transport industry;

5. Declaring clause 3 of the 2021 MCA to be ultra vires the LRA, invalid and of no force and effect, insofar as seeks to impose an across-the-board increase of 4% on the base rate of pay of employees of employers that are not members of employers' organisations that are parties to the second respondent;

6. Directing any party who opposes this application to pay the costs thereof, jointly and severally, the one paying the other(s) to be absolved, including the costs of two counsel where employed";

The application is opposed by the first and sixth respondents who will collectively be referred to as the respondents in this judgment.

[2] Section 27 of the Labour Relations Act[1] (the LRA) enables one or more registered trade unions and one or more registered employers' organisations to establish a bargaining council for a sector and area. The second respondent was established in terms of section 27 of the LRA for the road passenger transport sector. The applicants conduct business in the same sector. As membership to the bargaining council is not mandatory, the applicants elected not to be members of any of the parties to the bargaining council. They are therefore referred to as non-parties in part C of Chapter 111 of the LRA. The core function of a bargaining council is to regulate the employment relationship in a sector through collective agreements in which the parties agree on certain terms and conditions of employment. The collective agreements are binding to parties to the bargaining council. They may, with the consent of the Minister of Employment and Labour be extended to non-parties that operate within the registered scope of the bargaining council.

[3] Purporting to act in terms of section 28 of the LRA, the parties to the second respondent concluded a main collective agreement on 22 April 2021 which will be referred to as the 2021 MCA in this judgment. At the request of the second respondent, the first respondent, hereinafter referred to as the Minister, exercised his powers in terms of section 32 of the LRA and extended the 2021 MCA to non-parties in Government Notice 366 of 2021 published in Government Gazette No 44724 on 28 June 2021. The effect of the extension was that the applicants had to apply a 4% ATB increase on the actual wage rate of each employee. The applicants are vehemently opposed to the extension owing to its adverse effects on their business which include the unfair wage competition in the sector. Owing to historical wage agreements, the wage rates of the applicants' employees are higher than their counterparts in the industry. In this application the applicants seek, mainly, to have the decision textending the 2021 MCA reviewed and set aside and Government Notice 366 of 2021 declared invalid and of no force and effect.

[1]Act 66 of 1995 as amended.

[4] The first respondent raised a point in *limine* to the effect that the issue before me is moot. The basis of the contention is that the Minister cancelled the government notice pertaining to the 2021 MCA in Government Notice 1103 of 2022 published in the Government Gazette on 24 June 2022. The cancellation is with effect from the second Monday after the date of publication of Notice 1103 of 2022 in which the Minister extended the 2022 MCA to non-parties with effect from the second Monday after the date of the Publication of Notice 1103 of 2022. The applicants have taken the extension of the 2022 MCA on review.

[5] The applicants deny that the matter is moot, mainly, on the grounds that they have not complied with the 2021 MCA in that they have not given their employees the 4% ATB wage increase provided for in the MCA. They expressed the view that their obligation to pay their employees in the affected job categories in respect of the period purported to be governed by the 2021 MCA is a live issue between the applicants and those employees and the trade unions representing them. It is a finding in this application, that the 2021 MCA was not validly concluded and extended to non-parties which will relieve the applicants of the obligation to pay the 4% ATB wage increase in terms of the 2021 MCA. It was further contended that the 2021 MCA has an impact on the wage increase agreed in the 2022 MCA as the increase on actual wage due in terms of the 2022 MCA has to be calculated on the actual wage payable on the date of its implementation.

[6] The circumstances in which a case can be declared moot are aptly expressed as follows in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[2]*:*

"A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinion on abstract propositions of law"

[2] 2000 (2) SA 1 (CC) at 18 fn 18

[7] The above authority was referred to with approval in *National Employer's Association of SA v Metal & Engineering Industries Bargaining Council & Others*[3] a decision the applicants sought to rely on. In that case the court refused to grant interdictory relief because the action it was formulated to prevent had occurred. The matter was considered moot as the relief that was sought had become academic.

[8] In deciding whether the matter is moot I have taken into account that the 2021 MCA which appeared in Government Notice No. R.366 of 18 June 2021 was extended by the Minister to non-parties including the applicants with effect from the second Monday after 18 June 2021 to 31 March 2022. The same Government Notice was cancelled by the Minister with effect from the second Monday after 24 June 2022 in Government Notice 1103 of 2022. The 2021 MCA is therefore binding on the applicants for the duration of its validity. That period being the date from which it became binding to non-parties until the day preceding the coming into effect of its cancellation. The cancellation of the 2021 MCA therefore had no effect on the rights and obligations which resulted from its extension to non-parties. The applicants' obligation to pay its employees the 4% wage increase ATP on actual wages for the duration of the extension remained. The employees and their trade unions to whom the right to receive the wage increase accrued were equally unaffected. At no stage did they waive their right to the wage increase. The controversy whether the pay increase for the duration of the 2021 MCA is due by the applicants to its employees is still live. The issue whether the Minster's decision extending the 2021 MCA should be reviewed and set aside is in the circumstances live. It is through the determination of that dispute that the applicants' obligation to pay the wage increase in terms of the 2021 MCA will either be confirmed or cancelled. The point in *limine* that the dispute is moot can therefore not succeed.

Review

[9] The applicants mounted their review application on a number of grounds. They submitted that a number of jurisdictional requirements which had to precede the

[3] (2015) 36 ILJ 2032 (LAC) at para 6

Minister's decision to extend the 2021 MCA were not fulfilled. As a result of the omission, it was submitted, the second respondent's request for the extension and the Minister's decision to grant it stand to be reviewed and set aside. It was further the applicants' case that the Minister committed a reviewable irregularity in not affording them an opportunity to make limited representations before taking the decision to extend the 2021 MCA. It was argued that based on the cumulative effect of all the irregularities, the Minister's decision to extend the 2021 MCA to non-parties has to be reviewed and set aside. The first, second and sixth respondents denied the validity of the grounds the applicants sought to rely on.

[10] The extension of collective agreements is governed by section 32 of the LRA subsection (1) of which provides of follows:

> "(1) A bargaining council may ask the Minister in writing to extend a collective agreement concluded in the bargaining council to any non-parties to the collective agreement that are within its registered scope and are identified in the request, if at a meeting of the bargaining council-
>
> (a) one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favor of the extension; and
>
> (b) one or more registered employers' organisations, whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension".

[11] The applicants submitted that the 2021 MCA does not constitute a collective agreement concluded in the bargaining council as envisaged in section 32 (1) of the LRA. Relying on the documents filed by the second respondent, the applicants submitted that the 2021 MCA had not been concluded when the second respondent's General Secretary sent his April 2021 report to representatives of the parties to the council. He arranged for it to be signed between the Fincom and Central Committee meetings which were scheduled for 22 April 2021. The

document further reveals that the 2021 MCA was concluded by being signed by representatives of each of five parties to the council on 22 April 2021. The applicants further alleged that the version of the 2021 MCA that the Minister extended contained a clause reflecting the scope of the council as amended by the registrar on 3 May 2021. It was the applicants' case that the 2021 MCA was not concluded by the National Bargaining Forum (the NBF) as required because no NBF meeting was held on 22 April 2021. According to the submission, the NBF which is the only body mandated by the second respondent's constitution to conclude collective agreements never reached a resolution defining the industry within which the agreement was to be observed. The applicants expressed the view that the 2021 MCA which formed the basis for the request for the extension was therefore invalid and a nullity.

[12] The second respondent denied the validity of the applicants' attempts to prove the 2021 MCA a nullity and insisted that it is valid. It was submitted that the NBF reached agreement on the terms of the 2021 MCA. The agreement was recorded in a document signed on 12 April 2021 by all parties to the second respondent and the NBF. The document is, however, not the 2021 MCA in its final form. When the 5 NBF representatives of the parties signed the 2021 MCA on 22 April 2021, they agreed to the inclusion of the amended scope of the 2021 MCA and to all the terms of the 2021 MCA which they signed.

[13] For the Minister to exercise the powers vested in him in section 32 (2) of the LRA one of the jurisdictional requirements that must be fulfilled is the existence of a collective agreement concluded in the bargaining council as envisaged in section 32(1) of the LRA. In determining whether the applicants have established that the 2021 MCA does not constitute a collective agreement concluded in the bargaining council in terms of section 32(1) of the LRA. I have considered the submissions made and the authorities the parties sought to rely upon. The second respondent is a bargaining council. It is therefore a creature of section 27 of the LRA section (1) (a) of which requires it to adopt a constitution that meets the requirements of section 30. Section 30 of the LRA sets out the minimum provisions a constitution of a bargaining council should have. Section 27 (1)(a) read with section 30 of the LRA make the purpose of a bargaining council's constitution very clear. It is to

govern the manner in which the bargaining council operates. The activities of a bargaining council therefore must be conducted in terms of its constitution which gives all the role players the necessary authority to act. It is for that reason that I find that the meaning to be ascribed to a collective agreement concluded in the bargaining council is a collective agreement concluded in terms of the constitution of the bargaining council.

A collective agreement is defined as follows in section 213 of the LRA:

> "a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-
>
> (a) one or more employer;
>
> (b) one or more registered employers' organisations; or
>
> (c) one or more employers and one or more registered employers' organisations".

[14] In the second respondent's constitution a collective agreement is defined as 'a written agreement concerning Substantive Conditions of Employment or other matter of mutual interest to the Parties'. A further reference relating to the meaning of a collective agreement is encompassed in the words used in the constitution to define the main agreement which is defined as 'the Collective Agreement concerning Substantive Conditions of Employment concluded within the National Bargaining Council. The National Bargaining Council is defined as 'a body of persons, comprising an equal number of representatives of both the Employers and the Trade Union Parties who shall come together at agreed intervals to negotiate and endeavor to conclude a Main Agreement. Clause 15.1 of the Constitution provides that 'The National Bargaining Forum shall as provided for in Appendix "A" to this Constitution, be the sole forum for negotiating Collective Agreements on Substantive Conditions of Employment'. Clause 15.2 provides that the procedure to be observed is set out in Appendix "A" to the Constitution. Clause

2 of Appendix "A" re-iterates clause 15.1 of the Constitution. The procedure to be followed by the NFB is stated as follows:

> "8.2 The National Bargaining Forum shall comprise fifteen (15) Representatives nominated by the Employers and fifteen (15) Representatives nominated by the Trade Unions that are party to SARPBAC.
>
> 8.5 A maximum of five (5) observers from the Employer Parties and a maximum of five (5) observers from the Trade Union Parties may attend meetings of the National Bargaining Forum. Such observers will have full caucus rights, but will not be either spokespersons or have any voting rights.
>
> Clause 10 provides that:
>
> Collective Agreements concluded by a majority of the Trade Union Parties to SARPBAC and a majority of Employers' Organisations to SARPBAC bind all Parties to SARPBAC and their members as well as all Employers and Employees bound in law by such Collective Agreements".

[15] I accept the second respondent's argument that the purpose of the phrase concluded 'in the bargaining council' is to circumscribe the types of agreements that the Minister can extend by excluding those concluded outside the bargaining council. I, however, do not agree that the correctness of the argument is dispositive of the applicants' challenge. For purposes of the dispute at hand, the term "in the bargaining council" must be interpreted with the words "collective agreement concluded" which precedes it in section 32 (1) of the LRA. The document that gets concluded in the bargaining council must be a collective agreement concluded in terms of the constitution which governs its existence.

[16] The second respondent's version of how the 2021 MCA was concluded does not succeed in refuting the applicants' assertion that it does not comply with the second respondent's constitution. The second respondent submitted that

negotiations took place within the NBF in January and February 2021 but the parties were unable to reach an agreement. An attempt to resolve the dispute that arose during the negotiations was successfully resolved when all the parties in the second respondent reached agreement on the terms of the 2021 MCA which they recorded and signed on 12 April 2021. The final 2021 MCA that was presented to the Minister to be extended to non-parties was signed on 22 April 2021 before the commencement to the Central Committee by NBF members representing all parties to the second respondent. The 2021 MCA is signed by 5 individuals representing 2 employers' organisations and 3 trade unions. All the submissions made on behalf of the second respondent are silent on compliance with clause 8.2 of its constitution which provides that the NBF shall comprise of 15 representatives nominated by the employers and 15 representatives nominated by the trade unions that are party to the second respondent. The second respondent did not prove that the NBF in which the 2021 MCA was negotiated and eventually signed was quorate. An NBF that is not quorate cannot validly perform its constitutional duties. I must, in the circumstance uphold the applicants' submissions that the 2021 MCA which was presented to the Minister did not constitute "a collective agreement concluded in the bargaining council" within the meaning of section 32 (1) of the LRA.

[17] A further ground for review is based on the manner in which the Minister exercised his power to extend the 2021 MCA. The first attack is based on the Minister's refusal to afford non-parties including the applicants a hearing before taking his decision to extend the 2021 MCA. The second is based on his reliance on the certificate of representativeness that was issued by the registrar on 03 August 2020 in taking the decision. The respondents denied the validity of both grounds.

[18] The applicants based their right to be heard before the decision to extend the 2021 MCA was taken on section 4 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and what they consider a proper interpretation of sections 32 (2) and (3) of the LRA. It is common cause that there is no statutory provision that expressly required to the Minister to give non-parties any form of hearing before exercising his powers in section 32 (2) of the LRA to extend a collective

agreement. The applicants limited their purported right to be heard to making representations about whether the agreement complied with the mandatory requirements in section 32 (2) of the LRA.

[19] I accept the first respondent's submissions that there is no general duty on the Minister to afford non-parties the right to be heard before exercising his statutory powers. A proper reading of the PAJA does not create that obligation. Each case is determined on its merits. The provisions of Section 32 (2) and (3) of the LRA. support the first respondent's submissions that affording non-parties and minority unions the right to be heard will erode the very premise of the principle of majoritarianism and the collective bargaining process. The applicants expressly submitted that the principle of majoritarianism is not challenged. Section 32 (3) (a) requires the Minister to be satisfied that the decision of the bargaining council requesting the extension complies with section 32 (1) before exercising the right to extend the collective agreement. The right to be heard will invariably grant the applicants the right to interfere with the decision of the majority parties in violation of the letter and spirit of section 32 of the LRA. The applicants took the decision not to be party to the second respondent. Each decision has consequences. The applicants cannot avoid the consequences of their decision and seek to participate in collective bargaining by circumventing majoritarianism. The applicants failed to prove their entitlement to the right to be heard and therefore did not establish that the Minister denied them that right unlawfully or unreasonably.

[20] The applicant submitted that the Minister erred in relying on the certificate issued by the registrar on 13 August 2020 as the certificate was not issued in accordance with the provisions of section 32 (3) (b) of the LRA. The subsection provides as follows:

"(3) A collective agreement may not be extended in terms of Section (2) unless the *Minister* is satisfied that-

(b)(i) The registrar, in terms of section 49(A)(a), has determined that the majority of all the employees who extension of the collective agreement, fall within

the scope of the agreement, are the members of the trade unions that are parties to the bargaining council;"

[21] Section 49 (4A) provides that:

"A determination made by the *registrar* in terms of—

(a) section 32(3)(b) is sufficient proof that the members of the employer organisations that are party to the bargaining council, upon extension of the collective agreement, employ the majority of the employees who fall within the scope of that agreement; and

(b) section 32(5)(a) is sufficient proof that the parties to the collective agreement are sufficiently representative within the registered scope of the bargaining council"

[22] The nub of the applicants' attack is that the certificate which forms part of the documents the Minister based his decision on is not the one referred to in section 32 (3) of the LRA. The first respondent denied and sought to rely mainly on section 49 (4) of the LRA. The second respondent requested the extension from the Minister on 14 May 2021.The Minister took the decision to extend 2021 MCA on 1 June 2021.The certificate of representativeness which was presented with the request was issued by the Registrar on 03 August 2020 in terms Section 49 (2) of the LRA in respect of a collective agreement valid until 31 July 2022.

[23] It is common cause that the Registrar did not issue the certificate in respect of the 2021 MCA. It was the applicants' case that the wording of section 49 (4A) (a) reinforces the fact that the contemplated determination pertains to the specific agreement being extended. The respondents submitted that the certificate presented to the Minister complies with the provisions of section 32 (3) (b) (i) of the LRA. Reliance was made on section 49 (4) of the LRA which provides as follows:

"(4) A determination of the representativeness of a bargaining council in terms of this section is sufficient proof of the representativeness of the council for the two

years following the determination of any purpose in terms of this Act, including a decision by the Minister in terms of sections 32(3)(b) and 32(5)"

[24] It cannot be denied that provisions of section 49 (4A) (a) are couched in specific terms pertaining to the collective agreement that is being extended. Section 49 (2) in terms of which the certificate was issued deals with a collective agreement that has already been extended. Section 32 (3) (b) deals with collective agreements that are still in the process of being extended. Section 49 (4) refers to the determination of 'representativeness of a bargaining council in terms of this section', the section being section 49. The determination therefore covers all the representativeness referred to in all the subsections of Section 49. It includes representativeness for collective agreements that are in the process of being extended and those that have been extended. Section 49 (4) expressly provides that the validity of the proof of representativeness is two years following the determination. The applicants' argument based on the purpose for which the certificate was issued cannot assist them. Section 49 (4) states in clear term that for the duration of its validity the certificate constitutes sufficient proof for any purpose in terms of the LRA including a decision by the Minister in terms of section 32 (3) (b) of the LRA.

[25] The certificate was issued for a purpose provided for in section 49 (2) of the LRA on 03 August 2020.The Minister considered it in a decision he took in June 2021 while the certificate is valid. The applicants provided no cogent reason precluding the Minister from relying on it. The irregularity of the Minster's reliance on the certificate was, in the circumstances, not established.

[26] In light of the finding that the 2021 MCA does not constitute a collective agreement concluded in the bargaining council as envisaged in section 32 (1) of the LRA, the Minister's decision extending it cannot survive. Absent the collective agreement, the Minister lacked the necessary basis for exercising his powers in terms of section 32 of the LRA. As the applicants have been granted the main relief, the determination of their alternative claim has become unnecessary.

[27] The parties did not act unreasonably in bringing and opposing this application. A costs order will, in the circumstances, not be granted.

[28] In the premises the following order is made:

Order:

1. The point *in limine* that this dispute is moot is dismissed.

2. The decision of the First Respondent contained in Government Notice 366 of 2021 published in Government Gazette No 44724 on 18 June 2021 to extend the 2021 main collective agreement to non-part employers and employees in the Road Passenger Transport Industry until 31 March 2022 or until replaced by a subsequent agreement is reviewed and set aside.

3. There is no order as to costs.
4.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv. A Freud SC & Adv.G Leslie SC
Instructed by:	Edward Nathan Sonnenbergs Inc.
For the First Respondent:	Adv N Arendse SC & Adv.CA Daniels
Instructed by:	State Attorney Cape Town
For the Second Respondent:	Adv A Myburgh SC & Adv.R Itzkin
Instructed by:	Ivings. Mc Farlane Attorneys
For the Sixth Respondent:	Adv. S Harvey
Instructed by:	NUMSA