
Reportable

# THE LABOUR COURT OF SOUTH AFRICA,

# HELD AT CAPE TOWN

**Case: C 100/2023**

In the matter between:

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| **THE BARGAINING COUNCIL FOR THE BUILDING INDUSTRY (CAPE OF GOOD HOPE)** | **Applicant** |
| and | |
| **THE MINISTER OF EMPLOYMENT AND LABOUR** | **First Respondent** |
| **THE REGISTRAR OF LABOUR RELATIONS** | **Second Respondent** |
| **MASTER BUILDERS AND ALLIED TRADES' ASSOCIATION, WESTERN CAPE** | **Third Respondent** |
| **MASTER BUILDERS AND ALLIED TRADES' ASSOCIATION, BOLAND** | **Fourth Respondent** |
| **UNION OF SOUTH AFRICA** | **Fifth Respondent** |

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| **BUILDERS WORKERS UNION** | **Sixth Respondent** |
| **NATIONAL UNION OF MINEWORKERS** | **Seventh Respondent** |
| **NATIONAL EMPLOYERS' ASSOCIATION OF SOUTH AFRICA (NEASA)** | **Eighth Respondent** |
| **CONSOLIDATED EMPLOYER ORGANISATION (CEO)** | **Ninth Respondent** |



**Date of Hearing:** 16 May 2023

**Date of Judgment:** 26 May 2023

**Summary:** (Review – minister's decision not to extend a bargaining council agreement to non-parties under s 32(5) of the LRA – Decision based chiefly on fundamental legal concerning the minister's power to independently decide if the bargaining council parties are sufficiently representative, once the Registrar of Labour Relations has already done so – minister also failing to determine if not extending the agreement would undermine collective bargaining – Urgency – matter semi-urgent – respondent's time frames for filing opposing papers not attenuated - Relief – notwithstanding considerations against remitting the matter back to the minister matter remitted for fresh reconsideration – Costs)

## JUDGMENT [i]

LAGRANGE J

Nature of the application

[1] This is an opposed application to review of the First Respondent's (the minister's) decision to refuse to extend a collective agreement entered into by the parties to the Building Industry Bargaining Council ('the BIBC' or 'the bargaining council') to non-parties in terms of section 32(5) of the Labour Relations Act, 1995 ('the LRA'). The application was brought on a semi-urgent

basis. The minister is opposing the application. The answering affidavit was filed later than the parties had agreed to and as the court had ordered, but there was no material prejudice to the bargaining council and the condonation application was not opposed. In the circumstances, there is no reason not to grant condonation as requested.

Background

[2] The BIBC concluded a collective agreement and on 19 September 2016 resolved to ask the minister to extend that agreement to non-parties. On 12 May 2017, the minister extended the agreement to non-parties until 31 October 2019.

[3] The minister has further extended that agreement in 2019, 2020 and 2022 at the BIBC's request. The current extension expires on 31 October 2023. The reason for the last extension was to bridge the period between the expiry of the extension of the agreement in 2022 and the minister's promulgation of the extension of the new Consolidated Main Agreement concluded on 23 April 2022 ('the CMA') and submitted to the minister on 3 August 2022.

[4] On 13 May 2022, the Registrar of Labour Relations ('the registrar') issued a letter of determination in terms of section 49(4) of the LRA to the effect that the BIBC was sufficiently representative for the purposes of section 32(3)(b) and (5) of the LRA for a period of 2 years.

[5] On 3 August 2022, the BIBC asked the minister to extend the CMA to non-parties for 3 years with effect from 1 November 2022. The request was accompanied with a detailed motivation for the extension of the Agreement.

[6] On 14 October 2022, the Agreement was published in accordance with section 32(5)(c) of the LRA inviting public comments. The Eighth Respondent, NEASA, made submissions opposing the extension *inter alia* on the basis that the minister was required to decide whether a bargaining council is sufficiently representative, even though the registrar had already determined that it was. The 21 day period for public comment ended on 4 November 2022.

[7] During November 2022, a meeting took place between officials of the Department of Employment and Labour and BIBC representatives, following which the Department addressed a letter to the BIBC requesting it to formally withdraw its request for the CMA extension to non-parties on the grounds that it

would be "unfair to extend the collective agreement to non-parties in the industry as it does not serve the interest of the larger employer component within the industry".

[8] On 7 December 2022, the BIBC responded to the minister pointing out that all the elements of section 32(5) had been met and that "unfairness" is not a relevant consideration in the minister's exercise of his discretion under the section.

[9] On 24 January 2023, the minister advised the BIBC of his decision not to extend the Consolidated Main Agreement to non-parties and set out his reasons for doing so. His letter was received by the bargaining council on 27 January. In motivating his decision, the minister emphasised certain considerations he had taken into account, namely:

9.1 The low representativeness of parties to the bargaining council which had been raised by the department with bargaining council officials on 4 November 2022.

9.2 At that meeting, bargaining council officials had agreed the extension request would be withdrawn until representativeness had improved.

9.3 The fact that previously the department had to facilitate negotiations between the bargaining council and subcontractors.

9.4 The representativeness of party trade unions and employer organisations were below the threshold required for the registration of a statutory bargaining council under s 39(1) of the LRA.

9.5 Council representations that non-party employers would employ workers at national minimum wage rates, which are below the agreement rates and make no contribution to benefits provided by the bargaining council[1].

9.6 Council representations that the unfair competition posed to party employers would lead to the employer organisations losing members and this would lead to the collapse of the bargaining council.

[1] These benefits include, *inter alia,* industry-wide retirement, sick pay, medical aid and holiday funds.

9.7 The fact that the bargaining council contended that all the pre-requisites for extension of the agreement under s 32(5) of the LRA had been met.

9.8 The objections lodged by National Employers Association of South Africa (NEASA) and one member of the public opposing the extension of the Consolidated Main Collective Agreement to non-parties on rounds. In particular, the minister highlighted NEASA's complaint that the minister had to decide if parties were sufficiently representative in accordance with the guidelines in s 32(5A) of the LRA, in particular the various types of standard and non-standard employment comprising the workforce, and that, if that was done, the bargaining council was not sufficiently representative.

9.9 Noting that, even though the Registrar had certified under s 49(4) that the bargaining council was sufficiently representative[2], the minister was

> "… of the view that It would be unfair to extend the collective agreement to the non-parties in the Industry as it does not serve the interest of the larger employer component within the Industry,
>
> I have come to the conclusion that, it will be unfair and improper to extend the collective agreement to the majority non-parties who did not negotiate the provisions of the collective agreement.
>
> If the collective agreement is extended to non-parties It will mean that the minority will be forcing their will on the majority, this is contrary to our democratic princlples endorsed by our Industrial relations framework, our broader democratic political principles and legislation."

[10] The excerpts above encapsulate the crux of the minister's reasons for not agreeing to extend the agreement to non-parties. It is immediately apparent from the minister's reasoning that he did not regard the registrar's determination under section 49(4) read with section 32(5)(a) of the LRA as dispositive of representativeness requirements in deciding whether or not to extend the agreement to non-parties.

[2] The figures on which the Registrar issued the certificate of representativeness were:

a) The trade union parties reflected a representlvity figure of 5 428 (19.75%) out of 27 481 employees employed within the scope of the collective agreement; b) The employers' organisation parties reflected 368 (15.29%) employers out of a total of 2406 employers operating within the scope of the collective agreement, and c) The employees employed by the employer parties are 9 000 (32.74%) out of total of 27 481 employees employed within the scope of the collective agreement.

Urgency

[11] On 2 March 2023 the applicant instituted urgent proceedings for an application to be heard on 26 April 2023. On 31 January 2023, the bargaining council took the decision to contest the minister's decision. The application was filed on 2 March 2023, seeking a hearing on 26 April 2023, about eight weeks later. The respondents were called upon to file any answering affidavits by 22 March 2023. As it happened it was only at the hearing that on 26 April, that the State Attorney advised that the minister wanted to oppose the application.

[12] The hearing was accordingly postponed to 11 May, with the minister having a further three weeks until 5 May 2023 to file an answering affidavit and heads of argument. Costs of preparation and attendance at the first hearing were reserved.

[13] The bargaining council correctly points out that it sought no abbreviated time frames for respondents to file answering papers. They were afforced more than the usual 10 day period prescribed Rule 7(4)(b) to do so. It argues that an expedited hearing was justified because there is an inherent urgency pertaining to the extension of collective agreements. This is implicit in the time strict period within which the minister is required to publish any notice extending the agreement, where parties to the bargaining council are sufficiently representative, namely within 90 days of receiving the request for extension.[3] Secondly, it submits that every week that passes since the request for extension was made is another week during which employees of non-party employers will earn less than those of party employers for the same work, and party employers will be prejudiced by undercutting by non-party employers. Though some way off, if the extension of the August 2022 CMA is not promulgated, there will be no agreement whatsoever stipulating any minimum wages and conditions of employment in the regional industry after 31 October 2023 when the last extension expires.

[14] The minister questioned the delay between the bargaining council deciding to litigate and the launching of the review itself and the absence of a special justification for enrolling the matter on 26 April 2023. Without addressing these

3 Section 32(2A) of the LRA.

points, the bargaining council argues that, in any event, the postponed hearing date was agreed to by the state attorney and the matter is ripe for determination. As a matter of convenience there was no reason for not dealing with the matter, though ordinarily an agreement to an extended time frame for filing opposing papers will not necessarily dispose of the question of urgency.

[15] However, I accept that this matter is one that should be dealt with more quickly than the crowded and backlogged motion court roll of this court normally permits. A degree of expedition is justified in the same way that it is generally recognised in restraint of trade applications, because the efficacy of any relief obtainable by the applicant gradually evaporates with the elapse of time. In this type of matter, the option of alternative relief simply does not exist either. There was no prejudice to the respondents occasioned by the initial timeline for opposing the application and the extended one nearly doubled the time which had been made available to the minister to file its opposing papers. In light of these considerations, I think the matter is sufficiently urgent to warrant it being heard on that basis.

Merits

[16] The merits of the application essentially lie in whether the minister has correctly interpreted the provisions of s 32(5), particularly s 32(5)(a), and whether, in deciding to extend the agreement, the choice he made is reviewable under the Promotion of Administrative Justice Act, 3 of 2000.

The statutory framework

*Legal policy informing the extension of collective agreements under s 32*

[17] The minister correctly implicitly identified that the LRA favours collective bargaining based on majoritarian principles. In *Kem-Lin Fashions CC v Brunton & another* (2001) 22 *ILJ* 109 (LAC), the LAC held:

> "The legislature has also made certain policy choices in the Act which are relevant to this matter. One policy choice is that the will of the majority should prevail over that of the minority. This is good for orderly collective bargaining as well as for the democratization of the workplace and sectors. A situation where the minority dictates to the majority is, quite obviously, untenable. But

> also a proliferation of trade unions in one workplace or in a sector should be discouraged. There are various provisions in the Act which support the legislative policy choice of majoritarianism." [4]

[18] Even so, it is also readily apparent that the LRA does not exclusively promote majoritarian bargaining. The Act also envisages a number of other ways in which collective bargaining can be fostered and provides for the results of collective bargaining to be extended to other parties even when the negotiating partners do not employ the majority of workers falling within the scope of a collective agreement, nor represent them as union members. In *Free Market Foundation v Minister of Labour & others* (2016) 37 ILJ 1638 (GP), the high court highlighted that the LRA also facilitates the extension of agreements concluded under non-majoritarian collective bargaining arrangements and that the way in which the majoritarian status of collective bargaining parties is determined for the purpose of extending agreements, is not simply a matter of the union parties to the agreement representing a majority of employees within its scope, nor is it dependent on employer parties to the agreement representing a majority of employers, viz:

> "[37] The usual justification for the extension of collective agreements to non-parties is the assumed legitimacy, on the basis of the principle of majority rule, in propping up the collective bargain to prevent undercutting. The system established by s 32 of the LRA, according to the FMF, is however not one of true majority rule. Firstly, the parties seeking extension need not represent the majority of employers and employees in the sector. Under s 32(1) of the LRA it is sufficient if the union side represents a majority of trade union members of the unions party to the council and the employer side employs a majority of the employees employed by employer members of the bargaining council. Be that as it may, s 32(3) introduces a more stringent requirement in relation to the decision by the minister to accede to the bargaining council request for extension. The minister can only extend the agreement if the majority of employees within the scope of the extended agreement are members of the trade unions party to the council and are employed by the employer parties. However, those employees need not be members of the unions assenting to the agreement. It is enough that they are members of unions that are party to the council, even if such unions do not concur in the agreement. As the FMF put it, dissenters are treated as if they are assenters. The numerical strength or representativeness of the employers is not relevant. The applicable consideration is the number of employees employed. A single employer

[4] At para [19] cited with approval in *Association of Mineworkers & Construction Union & others v Chamber of Mines of SA & others* (2017) 38 *ILJ* 831 (CC) at para [43].

> employing the majority of workers in a sector, acting in concert with the unions, can determine terms and conditions for all employers in the sector. Moreover, the principle of majoritarianism is diluted by the power of the minister to jettison the requirements of majoritarianism completely under s 32(5) of the LRA if satisfied that the parties to the council are sufficiently representative and extension will serve orderly collective bargaining at sectoral level."

(emphasis added)

[19] In *Association of Mineworkers & Construction Union & others v Chamber of Mines of SA & others* (2017) 38 *ILJ* 831 (CC), the Constitutional Court was dealing with the extension of a collective agreement concluded between unions and employer members of the Chamber of Mines which was extended to non-parties. AMCU had recruited a majority of employees at five mines but those members did not constitute a majority of the workforce employed by any of the mining houses party to the agreement. The agreement was extended under the provisions of s23(1)(d) of the LRA. Section 23 reads:

> 23 Legal effect of collective agreement
>
> (1) A collective agreement binds-
>
> (a) the parties to the collective agreement;
>
> (b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them;
>
> (c) the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates-
>
> (i) terms and conditions of employment; or
>
> (ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;
>
> (d) employees who are not members of the registered trade union or trade unions party to the agreement if-
>
> (i) the employees are identified in the agreement;
>
> (ii) the agreement expressly binds the employees; and
>
> (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

[20] The court accepted that there were good reasons why majority rule in the workplace should be the basis for collective bargaining:

> "[44] It may be posited that if there is to be orderly and productive collective bargaining, some form of majority rule in the workplace has to apply. What s 23(1)(d) does is to give enhanced power within a workplace, as defined, to a majority union: and it does so for powerful reasons that are functional to enhancing employees' bargaining power through a single representative bargaining agent."

[21] The court also noted that even though majoritarian representation is seen as functional to collective bargaining, the promotion of collective bargaining *per se* is nevertheless encouraged even where majoritarian thresholds are not met:

> "[56] That majoritarianism is functional to enhanced collective bargaining is internationally recognised. Instruments NUM relied upon in oral argument clearly display this. Indeed, seemingly paradoxically, promotion of collective bargaining is so deeply rooted a principle of internationally recognised labour dispensations that they require merely adequate or sufficient representativity for enforcement against non-members, and not necessarily majority representation."

(emphasis added)

The *Chamber of Mines* case concerned what constituted a workplace for the purposes of extending an agreement to all employees in a workplace concluded by a union with majority membership in the workplace. The requirement of a majority union as a pre-requisite for extending an agreement in a workplace must be understood in the context of workplace bargaining. Section 32(5) of the LRA clearly contemplates that extensions of agreements in the sectoral context are still possible even when majoritarian requirements are not met.

[22] The use of preparatory documents (travaux preparatoires) to assist in interpreting legislation is an established principle in the law.[5] Such a document is the Explanatory Memorandum to the Draft Negotiation Document in the Form of a Labour Relations Bill.[6] One of the problems identified in that Explanatory Memorandum in respect of the extension of industrial council agreements was the wide discretion given to the minister in respect of their extension in terms of the previous LRA.[7] The recommendation of the task team was that the "The

[5] *Association of Mineworkers and Construction Union and others v AngloGold Ashanti Ltd t/a AngloGold Ashanti and others* [2022] 2 BLLR 115 (CC) at paras [58] – [60].

[6] GN 97 GG 16259 10 February 1995 and published as the 'Explanatory Memorandum to the Draft Labour Relations Bill, 1995' in (1995) 16 *ILJ* 278.

[7] Section 48(1) and 48(2)(b)of the Labour Relations Act, 28 of 1956 gave the Minister the discretion to extend an industrial council agreement only 'if he deems expedient to do so', if the Minister was

Minister is obliged to extend an agreement if the terms of the agreement do not discriminate against non-parties and if the failure to do so will undermine collective bargaining at industry level", and that "the Minister may not extend an agreement unless provision is made for the speedy granting of exemptions by an independent body". These recommendations were incorporated in section 32 of the LRA.

[23] There is also a layer of public international which informs the interpretation of s 32. Both section 39(1) of the Constitution and s1 of the LRA require that the LRA must be interpreted in a manner that gives effect to public international law and, in particular, the obligations incurred as a result of being a member state of the International Labour Organisation (ILO).[8]

[24] ILO Convention 98 on the Right to Organise and Collective Bargaining, which South Africa ratified on 19 February 1996, states among other obligations that a member state must take measures appropriate to national conditions "to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers and employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements".

[25] Article IV of ILO Recommendation 91 on Collective Agreements, provides guidance on how member states should meet their obligations under Convention 98, and states:

> "(1) Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement.
>
> (2) National laws or regulations may make the extension of a collective agreement subject to the following, among other, conditions;
>
> > (a) that the collective agreement already covers a number of the employers and workers concerned <u>which is, in the opinion of the competent authority, sufficiently representative</u>;

'satisfied that the parties to the agreement are sufficiently representative of the employers and employees engaged or employed in the undertaking, industry, trade or occupation to which the agreement relates in the area in which the agreement is in terms of such notice to be made binding.'

[8] *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* 2003 (3) SA 513 (CC) at paras [26] to [28].

> (b) that, as a general rule, the request for extension of the agreement shall be made by one or more organisations of workers or employers who are parties to the agreement;
>
> (c) that, prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations."

(emphasis added)

[26] In light of the above discussion, it must be accepted that the LRA does not only promote majoritarian collective bargaining arrangements but seeks to promote the growth and expansion of collective bargaining in general and that it goes so far as to provide for the imposition of agreements on non-parties even in situations where the bargaining parties are in the minority but at least represent a significant portion of the workforce in a sector by union membership and employment. It is important to highlight this in light of the minister's reasoning in deciding not to extend the agreement.

*The scope of the minister's discretion under s 32(5)*

[27] The critical issue is what is the ambit of the minister's role in determining when agreements are to be extended under s 32(5).

[28] In *FMF*, the court was seized with determining the legality of s 32(2) of the LRA before the amendments to s 32 by the Labour Relations Amendment Act 8 of 2018, which came into effect on 1 January 2019 ('the 2019 amendments'). In outlining the pre-requisites for the minister to exercise the power to extend a collective agreement concluded in a bargaining council to non-parties, the High Court held:

> "[16] Within this legislative scheme, s 32 of the LRA, the impugned provision, is the means whereby a bargaining council may extend the product of sectoral bargaining to non-parties to the agreement within its registered scope that would otherwise not be bound by it.
>
> [17] There are a number of juridical acts at play in the process leading to the extension of collective agreements to non-parties at sectoral level.
>
> [18] Firstly, there are the contractual negotiations between the parties in the bargaining council which ultimately result in the conclusion of the collective agreement.

[19] Secondly, there is the decision taken by the bargaining council asking the minister to extend the collective agreement to any non-parties to the collective agreement. Section 32(1) of the LRA stipulates a number of legal prerequisites to the bargaining council's action. The collective agreement in question must be concluded in the bargaining council. The decision to ask the minister to extend it to non-parties must be by way of a resolution taken at a bargaining council meeting. The resolution must be supported by one or more trade unions whose members constitute the majority of members of all the trade union parties to the council. Likewise, the resolution must be supported by one or more employers' organisations which employ the majority of employees employed by the employers' organisation members who are party to the council. The request to the minister must be in writing. The non-parties sought to be bound must be identified in the written request to the minister and they must fall within the registered scope of the council.

[20] The third juridical act in the process of extension is the decision of the minister to extend the agreement in terms of s 32(2) and 32(3) of the LRA. The minister's decision-making power in terms of these provisions is the main target of the *FMF* constitutional challenge; the objection being that the duty of the minister to extend the agreement is in effect non-discretionary or mechanical and subject to limited judicial supervision. The minister 'must' extend the collective agreement as requested. However, before the minister acquires jurisdiction to extend the collective agreements, the conditions precedent to jurisdiction, the jurisdictional facts specified in s 32(3) of the LRA must be fulfilled. These are: firstly, the minister must be satisfied that the numerical requirements of majoritarianism have been met; 8 secondly, the decision of the bargaining council must comply with the legal prerequisites of s 32(1); thirdly, there must be in existence an effective exemption procedure applying fair criteria for exemption promoting the primary objects of the LRA; and fourthly, the terms of the collective agreement must not discriminate against non-parties. If the jurisdictional facts are present, the minister 'must' extend the collective agreement as requested within 60 days of receiving the request. She does so by publishing a notice in the Government Gazette declaring the collective agreement to be binding on the specified non-parties from a specified date and for a specified period.

[21] The non-discretionary duty (mechanical power) of the minister to extend bargaining council collective agreements applies only in situations where the majority of employees who will be covered by the agreement once extended are members of trade unions that are parties to the council. This means, among other things, that the membership of minority unions who are party to the council, but who are not party to the collective agreement, will be taken into account in determining whether the numerical threshold for extension has been reached. The additional threshold numerical requirement is that the members of employers' organisations party to the agreement must employ the majority of all the employees within the scope of the collective agreement once it is extended.

[22] The numerical thresholds of the level of majoritarianism required by s 32(3) of the LRA are therefore in fact quite high, and in practice may prove difficult to

> achieve. Any obstacle of this order can be overcome by resort to s 32(5) of the LRA.
>
> [23] Section 32(5) confers a discretion upon the minister to extend a collective agreement to non-parties when the numerical thresholds in s 32(3)(b) and (c) have not been attained. Where the requirements of majoritarianism are absent, the minister 'may' extend the agreement provided other jurisdictional conditions are present. The conditions precedent to the exercise of that discretion are: (i) a requirement that the parties to the bargaining council (not necessarily the collective agreement) are sufficiently representative within the registered scope of the council; (ii) the minister is satisfied that the failure to extend the agreement may undermine collective bargaining at sectoral level or in the public service as a whole; and (iii) the minister has invited and considered comments on the application for extension as contemplated in s 32(5)(c) and (d) of the LRA. If the jurisdictional facts exist the minister must apply her mind and exercise the discretion to extend the collective agreement or not."

(emphasis added)

[29] In 2019, the previously mentioned amendments to s 32 came into effect. Prior to the amendments, it was the minister who had to be satisfied that the membership of union parties to a bargaining council comprised the majority of employees falling within the extended scope of the agreement, and that employer members of employer organisations party to the bargaining council employed a majority of employees within the scope of the extended agreement.[9] Similarly the minister was responsible for deciding whether parties were sufficiently representative within the scope of the bargaining council.[10]

[30] The 2019 amendments divested the minister of the function of determining majority representativeness, which was necessary for extending an agreement under s 32(2), and the function of determining if parties were sufficiently representative for the purposes of extending an agreement under s 32(5). The determination of both of these thresholds now vests in the Registrar under s 49(4A)(a) and 49(4A)(b) of the LRA respectively, and the Registrar's determination is deemed to be sufficient proof of representativeness for the purposes of the minister's decision to extend an agreement under s 32(2)(b) and 32(5).[11]

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[9] Sections 32(3)(b) and (c) prior to the amendments.

[10] Sections 32(5)(a) read with 32(5A).

[11] Viz:

[31] S 35(2) of the LRA currently states[12]:

> (5) Despite subsection (3) (b) and (c), the Minister may extend a collective agreement in terms of subsection (2) if-
>
> (a) the registrar has, in terms of section 49 (4A) (b), determined that the parties to the bargaining council are sufficiently representative within the registered scope of the bargaining council;
>
> (b) the Minister is satisfied that failure to extend the agreement may undermine collective bargaining at sectoral level or in the public service as a whole;
>
> (c) 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 21 days from the date of the publication of the notice; and
>
> (d) the Minister has considered all comments received during the period referred to in paragraph (c).

[32] The bargaining council argues that at the time the *FMF* judgement was handed down, the minister's discretionary powers under s 32(5) related only to two issues. Firstly, he had to satisfy himself that a failure to extend the agreement may undermine collective bargaining at sectoral level or in the public service as

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49 (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 for any purpose in terms of this Act, including a decision by the Minister in terms of sections 32 (3) (b), and 32 (5).

(4A) 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.

[12] Prior to the 2019 amendments, s 32(5) read:

> "(5) Despite subsection (3)(b) and (c), the Minister may extend a collective agreement in terms of subsection (2) if—
>
> (a) the parties to the bargaining council are sufficiently representative within the registered scope of the bargaining council; and
>
> (b) the Minister is satisfied that failure to extend the agreement may undermine collective bargaining at sectoral level or in the public service as a whole;
>
> (c) 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 21 days from the date of the publication of the notice;
>
> (d) the Minister has considered all comments received during the period referred to in paragraph (c).

a whole. Secondly, the minister had to decide if the parties were sufficiently representative within the scope of the bargaining council taking account of the factors mentioned in s 32(5A)[13]. However, since the determination of the latter issue now rests with the Registrar, it is only the first question the minister needs to independently exercise his judgment on. The bargaining council contends that the minister should exercise his discretion bearing in mind the main purpose of why collective agreements reached at sectoral level should be extended, as formulated by the LAC in *Kem-Lin Fashions*, albeit in referring to s 32(2), namely:

> "[20] The rationale behind the extension of collective agreements by the Minister of Labour in terms of s 32(2) is to prevent unfair competition which employers who are not party to collective agreements concluded in a bargaining council may pose to their competitors who are bound by collective agreements. This is because a collective agreement concluded in a bargaining council lays down minimum wages and other terms and conditions of employment to be observed in respect of employees.
>
> [21] If the collective agreement is not extended to non-parties, the non-parties would be able to pay employees at rates which are lower than those which their competitors who are party to collective agreements have to pay to their employees. The result of this would be a serious threat to the business of those who are parties to collective agreements. This would seriously discourage orderly collective bargaining in general and collective bargaining at sectoral level in particular which are part of the primary object of the Act. If this were allowed, there would be little, if any, point in any employer seeking to be a party to a bargaining council. That would be a threat to one of the pillars of the labour relations system in this country. "

[33] The bargaining council contends that this rationale still applies even where the pre-requisites of a majoritarian sectoral bargaining structure are not met. The conditions for extension of agreements where parties do not satisfy the majoritarian criteria in S 32(5) are also in conformity with ILO Convention 98 and Recommendation 91 and with the aim of restricting the scope of the minister's discretion based on the principles identified in the Explanatory Memorandum.

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[13] Viz;

> (5A) When determining whether the parties to the bargaining council are sufficiently representative for the purpose of subsection (5)(a), the Minister may take into account the composition of the workforce in the sector, including the extent to which there are employees assigned to work by temporary employment services, employees employed on fixed term contracts, part-time employees or employees in other categories of nonstandard employment.

The amended version of s32(5A) substitutes the Registrar for the Minister.

[34] By contrast, the minister argues that his discretion under s 32(5) to decide whether or not to extend an agreement is much wider and is not limited to considering whether or not a failure to do so would undermine collective bargaining. He also defends his view that extending the bargaining council parties' agreement to non-parties would amount to oppression by a minority, albeit that this view is at least partly based on an erroneous understanding that the pre-2019 version of s 32(5) still applied.

[35] He submits that the usual justification for the extension of collective agreements to non-parties is the assumed legitimacy, on the basis of the principle of majority rule, of the need to prevent undercutting. The lower the representativeness levels of the parties in the Bargaining Council the less inclined he should be to impose the will of the Bargaining Council members on non-parties and there is no legal policy justification for compelling non-parties to adhere to wage rates and other terms and conditions agreed on by minority parties in the industry.

[36] Quite apart from these substantive considerations, which the minister believes he must take account of, he contends that the use of the word 'may' in s 32(5), rather than 'must' as in s 32(2), could only have been intended to give him the option of declining to extend an agreement to non-parties even if all the other pre-requisites of s 32(5) are met. Support for this view can be found in the *FMF* decision in which the High Court held:

> "[85] As already explained, if the minister determines that the majoritarian numerical thresholds and the other jurisdictional facts in s 32(3) of the LRA are present, she is obliged to exercise the mechanical power to extend the collective agreement and to promulgate it in the Government Gazette. If the majoritarian levels in s 32(3)(b) and (c) of the LRA are not reached then the minister must choose whether or not to act in terms of s 32(5) of the LRA. Unlike s 32(3), which provides that the minister 'must' extend once the conditions precedent in s 32(3) have been fulfilled, s 32(5) provides that, despite subsection (3)(b) and (c)A (the numerical requirements), the minister 'may' extend, <u>provided the jurisdictional facts in s 32(5)(a)-(d) exist.</u> <u>The express use of the word 'may' in the subsection confers precisely the kind of discretionary power that the FMF would have us read in to s 32(2) of the LRA. Permissive statutory language of this order leaves the minister free to make a choice among possible courses of action and inaction. The discretionary power in s 32(5) is in stark contrast to the ministerial or mechanical power in s 32(2)</u>

> which involves little choice on the part of the minister. Mechanical powers are more in the way of duties."

(emphasis added)

[37] Although the court in *FMF* was essentially concerned with the application of s32(2) it clearly distinguished the mechanical application of that provision from s 32(5) which governs non-majoritarian extension scenarios, and held that sufficient representativeness, whether collective bargaining would be undermined and whether comments had been invited and considered, are simply pre-requisites for the exercise of the minister's discretion. Even though the power to determine sufficient representativeness now rests with the registrar, I do not understand the court in *FMF* to be saying that the minister's discretion under s 32(5) is confined only to the determination of those pre-requisites which require him to exercise his own judgment. Rather it is to be exercised *once* those pre-conditions have been met.

[38] Although the minister will be shown to have erred fundamentally in purporting to determine the pre-requisite of sufficient representativeness himself and in basing his decision on that, I must accept that the *FMF* judgment clearly decided that the minister's discretion is not confined to the determination of certain pre-requisites, but that the minister has been accorded an overall discretion not to extend an agreement under s 32(5) even if the pre-requisites have been met.

[39] Obviously that discretion must nonetheless be exercised reasonably and rationally and bearing in mind the objects of the LRA. It is not an open-ended or unlimitedly wide discretion.

The review

[40] The review of the minister's decision not to extend the agreement is an administrative review in terms of the Promotion of Administrative Justice Act, 2 of 2000 ('PAJA').

[41] The bargaining council argues it is reviewable on three different grounds, namely that the minister relied on an unlawful reason, failed to take account of relevant considerations, and failed to give reasons why he rejected the bargaining council's motivation for extending the agreement.

*Unlawfulness of the decision*

[42] Earlier in the judgment, I have already hinted at a fundamental flaw in the minister's reasoning, namely that he decided he could override or ignore the Registrar's determination that the bargaining council was sufficiently representative. The reassignment of the power to determine if a bargaining council is sufficiently representative to the registrar has clearly removed it completely from the minister's consideration. It is noteworthy that the employer association, NEASA, made submissions premised on the assumption that the pre-2019 provisions of s 32(5) still applied and that the minister was still charged with determining if the bargaining council was sufficiently representative or not. Plainly, the minister and NEASA erred in law in believing that he could still entertain the question of whether the bargaining council was sufficiently representative, whereas the LRA has clearly reassigned the determination of that issue to the registrar. The registrar's determination is dispositive of the question, unless set aside on review. It is not for the minister to treat the registrar's determination as an opinion, which he could agree or disagree with. Equally, since the categorisation of a bargaining council as 'sufficiently representative' is a determination to be made before the minister is empowered to extend the, agreement, he cannot take account of considerations which might undermine the status of that determination. As the minister's decision not to extend the agreement was made on the strength of him effectively unlawfully second-guessing the registrar's determination, which was not within the scope of his power, his decision must be set aside in terms of sections 6(2)(a)(i) and (e)(i) of PAJA.

*Failure to consider relevant factors*

38 It is apparent that even though the minister states in his letter that he has taken into consideration that the BIBC made detailed submissions to the effect that the failure to extend the Agreement may undermine collective bargaining at sectoral, level the minister does not explain why he was not satisfied with those submissions. Determination of this issue is one of the pre-requisites for the exercise of the minister's discretion yet in his letter dismissing the request for extension he does not even purport to decide whether a failure to extend the

agreement would undermine collective bargaining. His complete failure to address a single one of the bargaining council's submissions in paragraphs 41 to 52 of its motivating letter coupled with his failure to expressly make a decision on the issue, overwhelmingly leads to the conclusion he did not consider this primary issue.

39 At worst for the minister he did not comply with a mandatory condition for exercising his discretion by determining the question, as prescribed by s 32(5)(b), rendering his decision reviewable under s 6(2)(b) of PAJA. At best he simply failed to consider a relevant matter of cardinal importance to the exercise of his discretion and it is reviewable under s 6(2)(e)(iii) of PAJA. It is also worth mentioning that this is a particularly important consideration in the context of a sector in which certain groups of unregistered sub-contractors have aggressively, and in some instances violently, resisted the implementation of the bargaining council's agreement and prevented the bargaining council's inspectorate from performing their duties. It was contended by the Minister's counsel, *Mr C Kahanovitz* SC, that they were 'angry' with having to comply with the bargaining council agreements. However, the fact that non-parties may resort to intimidatory conduct to resist compliance with collective agreements lawfully extended to them cannot be a legitimate consideration for not continuing to extend agreements. Quite apart from engaging with the exemption process, they have the option of forming their own employer's organisations which can become parties to the bargaining council through which their concerns and interests can be brought to bear on the negotiations. It is noteworthy that there is nothing to suggest that the employees of such non-party employers are also angered by the bargaining council's attempt to implement the provisions of the agreement for all employers and employees falling within its scope.

[43] Assuming that section 32(5) authorised the minister to take fairness of the extension of the agreement to non-parties into account, which is not a factor the legislator identified as a pre-requisite, the minister plainly only considered the position of non-party employers and failed to consider the fairness of not extending the agreement to employees of non-party employers who would be

denied the benefits flowing from the agreement and the negative impact it would have on party employers who are trying to compete with non-compliant employers. Plainly such a lopsided consideration of fairness is at odds with the very principle itself.

[44] Related to the question of fairness, but also independently relevant to the Minister's decision, is the existence of an independent exemption body and appeals procedure. The minister also failed to consider whether the requirements relating to exemptions for non-parties set out in s 35(3)(dA) to (f), which are intended to provide a safety-valve for non-parties with sound reasons for being exempted from compliance with an agreement, have been met. This is another respect in which the minister's decision falls foul of s 6(2)(e)(iii) of PAJA.

[45] In conclusion, the minister's decision to refuse to extend the agreement to non-parties must be set aside on account of breaching sections 6(2)(a)(i) and (e)(i) and 6(2)(e)(iii) of PAJA.

Relief

[46] The common law of administrative review[14] and PAJA both share a strong reticence about the court stepping into the shoes of the administrator after setting aside an administrator's decision. Section 8(1) of PAJA empowers a court on review to "grant any order that is just and equitable" which may include substituting the administrator's decision but only "in exceptional cases". The bargaining council urges the court not to remit the matter back to the Minister for reconsideration, but to substitute its own decision for the minister's.

[47] The bargaining council relies on four grounds that have previously been considered acceptable reasons to depart from the normal remedy of remitting the matter back for reconsideration. Firstly, it contends that it would be a foregone conclusion to refer the matter back. Secondly, it also argues that the court is in as good a position to decide the matter as it has all the relevant facts and documents before it to determine the matter itself. These two grounds are

[14] *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council: Johannesburg Administration and Another* 1999 (1) SA 104 (SCA) at para [109].

usually closely related, in the sense that the court cannot determine the outcome is a foregone conclusion unless it has all the relevant information before it.

[48] The bargaining council contends that the only reason for the minister not agreeing to extend the agreement was his erroneous belief that the jurisdictional fact of the bargaining council being sufficiently representative was not met. Rectifying that error on the basis that the registrar had already determined the bargaining council was sufficiently representative, it also submits that all the other requirements for extension have consequently been met. This contention is based on the bargaining council's argument that once the so-called pre-conditions of s 32(5)(a) – (d) are satisfied the minister has no choice but to extend the agreement. However, in terms of the analysis above, these are only pre-conditions for exercising his discretion and not ultimately determinative of the outcome of his decision. Accordingly, it does not follow automatically that the agreement will be extended.

[49] The bargaining council's argument also does not address the problem that the minister completely failed to determine if collective bargaining would be undermined if the extension was not approved. Although it is difficult to conceive of situations where the failure to extend an agreement would be unlikely to undermine the existing collective bargaining arrangement, that is not an issue which has been determined and is not a matter to be decided simply as a matter of law. Moreover, the court would be determining a question the minister had not even deliberated on.

[50] The bargaining council further urges the court to substitute the minister's decision, because of the relative urgency of the matter. I accept that it is undesirable for all affected parties to have to deal with a situation in which the decision on extending the agreement is still not finalised. I am mindful too that the current extension of the 2019 agreement expires on 31 October 2023, after which there will be no floor of labour standards for the sector. Nonetheless, there is no reason why the time pressure cannot be met by imposing a deadline on the minister to reconsider his decision. As the failings of the original decision are evident from the judgment, the minister needs to approach the matter by addressing those failings while disregarding his previous reasoning based on an erroneous appreciation of the dispositive finding of the registrar.

[51] The last ground raised by the bargaining council for substituting the court's decision for that of the minister concerns whether the minister is willing to genuinely consider the decision afresh, or whether he is so set in his views that it is improbable he can approach the decision with a mindset that is not simply aimed at arriving at the same conclusion, no matter what. This is an issue of concern to the court. However, it cannot be discounted that the decision was largely based on a misconception of what the minister had to determine, which had been reinforced or induced by misleading submissions based on the pre 2019 version of s 32(5).

Costs

[52] The bargaining council should not have needed to bring this application and the minister ought to have realised, on receiving it, of the fundamental error made on the question of his ability to effectively reconsider the registrar's determination that the parties are sufficiently representative. Instead, the minister opposed the application, and did so belatedly. It was only the day before the application was set down on the unopposed roll that a notice of opposition was served. The state attorney's office provides no explanation why the notice of opposition was filed nearly six weeks after receiving the application, nor why steps were not taken to file an answering affidavit. An explanation was only tendered why the answering affidavit was filed later than the court ordered when postponing the matter. In the circumstances, there is no reason why the bargaining council should not be entitled to the costs of preparation and appearance on 26 April 2023 and for the costs of the opposed application.

Order

[1] The matter is heard as one of urgency and any non-compliance with the Rules of the Labour Court relating to time limits or enrolment of the application for hearing is condoned.

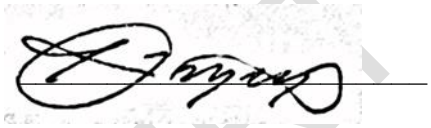
[2] The late filing of the First Respondent' s answering affidavit is condoned.

[3] The decision of the First Respondent on 24 January 2023 not to extend to non-parties within the registered scope of the Applicant, the Consolidated Main

Agreement, which was submitted by the Applicant to the First Respondent on 3 August 2022, is reviewed and set aside.

[4] The First Respondent must reconsider the aforesaid decision afresh in the light of this judgment and arrive at a new decision to be sent to the Applicant by 26 June 2023 with full written reasons for the decision.

[5] The First Respondent must pay the Applicant's costs of the application.



**Lagrange J**
**Judge of the Labour Court of South Africa**

**Appearances/Representatives**

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|---|---|
| For the Applicant | (26 April 2023) H Cheadle of BCHC Attorneys<br>(11 May 2023) G Leslie SC instructed by BCHC Attorneys |
| For the First Respondent: | C Kahanovitz SC instructed by the State Attorney (Cape Town) |



[i] With patent errors as to counsel's name, date for reconsidering order and costs corrected.