



Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case No: J 1475/15

In the matter between:

**NATIONAL EMPLOYERS'
ASSOCIATION OF SOUTH AFRICA
(‘NEASA’)**

First Applicant

**PLASTIC CONVERTORS
ASSOCIATION OF SOUTH AFRICA
(‘PCASA’)**

Second Applicant

and

MINISTER OF LABOUR

First Respondent

**METAL AND ENGINEERING
INDUSTRIES BARGAINING
COUNCIL (‘MEIBC’)**

Second Respondent

PARTIES TO THE MEIBC

**Third to Thirty Fifth
Respondents (set out in
the Notice of Motion)**

Delivered: 15 February 2018

Summary: (Review – decision to extend bargaining council administration agreement to non-parties – non-compliance with provisions of s 32(3), 32(5) read with s 32(1) – minister could not reasonably have been satisfied that jurisdictional pre-requisites for exercising her discretion under s 32(5) to decide whether or not to extend the agreement to non-parties had been met – Minister also unreasonably concluding that s 32(3)(f) requirement met when she purportedly exercised her discretion under s 32(5) – application not moot merely because agreement elapsed – just and equitable remedy, declaration of invalidity)

JUDGMENT

LAGRANGE J

Background

- [1] This application is brought by National Employers' Association of South Africa ('NEASA') and Plastic Convertors Association of South Africa ('PCASA') to set aside the decision by the Minister of Labour ('the Minister') to extend the Consolidated Registration and Administrative Expenses collective agreement concluded between certain parties in Metal and Engineering Industrial Bargaining Council ('MEIBC' or 'the Council') to non-parties under Government Notice R758 (GG 39043 dated 31 July 2015) under section 32 (2) read with section 32 (5) of the Labour Relations Act 66 of 1995 ('the LRA'). The notice also declared that the agreement had been concluded in the bargaining council and was binding in terms of s 31(1) of the LRA. The review application is a review of administrative action brought under section 158 (1) (g) of the LRA.
- [2] The application was opposed by the first respondent, ('the Minister'), the second respondent ('the council') and the thirty-fifth respondent ('NUMSA').
- [3] The agreement was extended to non-parties for the period 10 August 2015 until 30 June 2016. It had already expired some four and a half

months before the application was heard, but had been launched in September 2015. The application was heard jointly with a separate application under case number JR 75/15 to set aside the decision of the Minister to renew and extend the main agreement of the council, in which judgement has been handed down previously.¹ As the agreement had already expired a few months before the application was heard in October 2016, the respondents contend the review application was moot.

- [4] A day before the application was heard on 18 October 2016, the applicants applied to amend the relief sought to include an additional alternative prayer that the decision to request the Minister to extend the agreement should only be reviewed and set aside to the extent necessary.
- [5] The applicants also asked the court to strike down section 32(5) of the LRA as unconstitutional, in so far as it might be necessary. That provision permits the Minister to extend an agreement where parties to the bargaining council in which a collective agreement is reached are not representative enough to require the Minister to extend the agreement under section 32(3), but are nonetheless 'sufficiently representative' within the scope of the council and that the Minister is satisfied that, a failure to extend it may undermine collective bargaining in the sector. It was not necessary to consider this relief in view of the decision on the review application.
- [6] Insofar as the Minister was late in filing her answering affidavit, I am satisfied no material prejudice was occasioned by this and the late filing thereof should be condoned.

Background

- [7] The General Secretary of the Council convened a Special Management Committee (MANCO) meeting to be held on 3 February 2015. The agenda referred amongst other things to a draft resolution that would be tabled. The wording of the draft resolution read:

¹ *National Employers' Association of SA & others v Minister of Labour & others* (2017) 38 ILJ 2034 (LC)

“It is thus resolved

That, subject to a postal vote in terms of section 10(3) of the Constitution:

For the Consolidated Registration and Administration Expenses Agreement (as amended) to take effect for a period of five years from 1 April 2015.

To request the Minister of Labour in terms of section 32 of the LRA to publish and extend to non-parties:

An amendment to the Consolidated Registration and Administration Expenses Agreement in respect of the registration and administration expense levies to be increased by a rate of 9.5%.

The extension of the Consolidated Registration and Administration Expenses Agreement (as amended) to take effect for a period of five years from 1 April 2015 alternatively the date of publication of the notice by the Minister confirming the extension.”

- [8] At the meeting, a resolution was taken to request the extension of the existing Registration and Administration agreement for five years, save that the 9.5% increase was abandoned as part of the resolution.
- [9] NEASA representatives attended the meeting. Other employer organisations belonging to SEIFSA whose representatives attended the Manco meeting were: Cape Engineers and Founders Association (CEFA); KwaZulu-Natal Engineering Industries Association (KZNEIA); South African Engineers' and Founders' Association (SAEFA); and Light Engineering Industries Association of South Africa (LEIA) employing about 37 % of the employees employed by employers which were members of employer parties to the council.
- [10] However, the LEIA representative, Mr Trentini ('Trentini'), placed on record at the meeting that he was also voting on behalf of 21 other SEIFSA-affiliated employers' organisations, which like PCASA, were parties to the council but do not have any representatives' seats on any of the council's structures, including Manco. NEASA objected to Trentini's purported attempt to exercise a proxy vote and called on him to produce the

mandates, which he would not do. The resolution was voted on by show of hands and the president expressly excluded the purported proxy votes exercised by Trenitini and only counted only the votes of the trade union representatives and the four representatives of SEIFSA affiliates. Consequently, insofar as these four representatives were the only ones able to vote in favour of the request to have the agreement extended, the applicants contend that the employer organisations voting in favour of the resolution did not meet the minimum representation criteria of section 32 (1) (b) of the LRA.

- [11] On 12 February 2015 the council submitted its first extension request ('the first extension request') to the Minister under section 32(1) of the LRA. Attached to the first extension request was a "Resolution" document signed by the council's President and General Secretary purporting to be a "true extract" from the minutes of the 3 February MANCO meeting. The resolution stated that the 3 February MANCO meeting had been solely aimed at extending the period of operation of the 2011 Admin Agreement but that 25 employer organisations affiliated to SEIFSA had voted at the meeting, in favour of the extension, rather than only the four organisations whose representatives attended the meeting. The resolution was described in the following terms:

"...to request the Minister of Labour to extend the period of operation of the Registration and Administration Expenses Collective Agreement concluded in the Bargaining Council for a further period of five years ending 31 March 2020"

Following communications between the Department of Labour ("the department") and council staff concerning problems with the request, the council withdrew the first extension request and on 20 February made a fresh application for extension ('the second extension request'). However, the schedule of the 2015 Admin Agreement attached to the agreement contained a number of amendments to the 2011 Admin Agreement, which the applicants contended had never been validly adopted by the council and in particular were not in the agreement considered by Manco at the 3 February meeting.

- [12] In April 2015, the Minister duly published a notice in terms of section 32(5)(c) of the LRA, inviting representations from the public in response to the extension request. On 22 May 2015 the applicants filed representations in response to the invitation. In their representations, among other things, they pointed out perceived defects in the council's section 32(1) request and advanced other reasons why it should be refused. In particular, they pointed out the 3 February resolution was only intended to extend the period of operation of the 2011 Admin Agreement, but the Admin Agreement contained in the second extension request entailed a number of amendments which the council had not deliberated on.
- [13] On 27 May 2015, five days after the applicants filed their representations, the council then submitted a second, "certified resolution", also signed by the Secretary and President, and again purporting to be a "true extract" of the minutes of the 3 February MANCO meeting. NEASA contends the submission of this second resolution was prompted by its own representations. The second certified resolution now reflected that MANCO had decided both "to extend the period of operation of the Registration and Administration Expenses Agreement ..." and to "effect such consequential amendments as may be required in terms of the Labour Relations Amendment Act 6/2014". Obviously this purported resolution was a variation of the original one filed with the initial extension request.
- [14] After receiving submissions from the council, the Minister agreed to the extension request on 21 July 2015. She accepted, notwithstanding the applicants representations that the agreement "...was approved in accordance with s 32(1)..." of the LRA.

Mootness

- [15] Although this point would ordinarily be determined without entertaining the merits of the application, the relevant questions to be considered in

relation to this question also fall to be considered with the question of an appropriate remedy and will be discussed there.

Grounds of review

[16] The main grounds of review may be summarised as follows:

16.1 Various factual pre-requisites were absent which meant that there was both no collective agreement concluded by the council and no decision by the bargaining council to request the extension of the collective agreement which complied with the provisions of subsection 32(1). On what was before her, the Minister could not have been satisfied that those requirements were met and could not have extended the agreement under s 32(3) read with s 32(5).

16.2 Secondly, the Minister acted in a procedurally unfair manner in extending the agreement.

16.3 Thirdly, she failed to apply her mind properly in considering various factors listed under s 32(3)(e),(f) and (g) of the LRA.

16.4 Fourthly she failed to apply her mind properly under s 32(5)(b) in considering if the extension of the agreement would undermine collective bargaining.

16.5 Fifthly, she took irrelevant considerations into account in considering whether the agreement accommodated small and medium enterprises ('SMME's').

16.6 Sixthly, the agreement was arbitrary and irrational in providing for a minimum flat rate contribution for employers of ten or fewer employees, which had the effect of requiring them to pay higher levies per employee than employers with eleven or more workers.

16.7 The agreement was unenforceable because it imposed interest rates in excess of the maximum rates in the National Credit Act, 34 of 2005 and extending the agreement with these provisions to non-parties was ultra vires the Minister's powers.

[17] Because of my findings in respect of the first ground of review, it is not necessary for me to deal with all of them, though it is possible some of

those mentioned in paragraphs 16.3 and 16.6 above might also have had merit.

Evaluation

The Minister's decision to extend the Administrative agreement and the requirements of s 32

[18] Section 32, as it then was after the amendments to the LRA effected on 1 March 2015², read:

32. Extension of collective agreement concluded in bargaining council

(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 agreement 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 favour 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.

(2) Within 60 days of receiving the request, the Minister must extend the collective agreement, as requested, by publishing a notice in the Government Gazette declaring that, from a specified date and for a specified period, the collective agreement will be binding on the non-parties specified in the notice.

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

(a) the decision by the bargaining council to request the extension of the collective agreement complies with the provisions of subsection (1);

² Government Notice No. 1877. 13 December 1995

(b) the majority of all the employees who, upon extension of the collective agreement, will fall within the scope of the agreement, are members of the trade unions that are parties to the bargaining council;

(c) the members of the employers' organisations that are parties to the bargaining council will, upon the extension of the collective agreement, be found to employ the majority of all the employees who fall within the scope of the collective agreement;

(d) the non-parties specified in the request fall within the bargaining council's registered scope;

(dA) the bargaining council has in place an effective procedure to deal with applications by non-parties for exemptions from the provisions of the collective agreement and is able to decide an application for an exemption within 30 days;

(e) provision is made in the collective agreement for an independent body to hear and decide , as soon as possible and not later than 30 days after the appeal is lodged, any appeal brought against -

(i) the bargaining council's refusal of a non-party's application for exemption from the provisions of the collective agreement;

(ii) the withdrawal of such an exemption by the bargaining council;

(e) provision is made in the collective agreement for an independent body to hear and decide , as soon as possible, any appeal brought against -

(i) the bargaining council's refusal of a non-party's application for exemption from the provisions of the collective agreement;

(ii) the withdrawal of such an exemption by the bargaining council;

(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; and

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

(3A) No representative, office-bearer or official of a trade union or employers' organisation party to the bargaining council may be a member of, or participate in the deliberations of, the appeal body established in terms of subsection (3)(e).

...

(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;

(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).

(5A) When determining whether the parties to the bargaining council are sufficiently representative for the purposes 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 non-standard employment.

(6) (a) After a notice has been published in terms of subsection (2), the Minister, at the request of the bargaining council, may publish a further notice in the Government Gazette

(i) extending the period specified in the earlier notice by a further period determined by the Minister; or

(ii) if the period specified in the earlier notice has expired, declaring a new date from which, and a further period during which, the provisions of the earlier notice will be effective.

(b) The provisions of subsections (3) and (5), read with the changes required by the context, apply in respect of the publication of any notice in terms of this subsection.

(7) The Minister, at the request of the bargaining council, must publish a notice in the Government Gazette cancelling all or part of any notice published in terms of subsection (2) or (6) from a date specified in the notice.

(8) Whenever any collective agreement in respect of which a notice has been published in terms of subsection (2) or (6) is amended, amplified or replaced by a new collective agreement, the provisions of this section apply to that new collective agreement.

(9) For the purposes of extending collective agreements concluded in the Public Service Co-ordinating Bargaining Council or any bargaining council contemplated in section 37(3) or (4)-

- (a) any reference in this section to an employers' organisation must be read as a reference to the State as employer; and
- (b) subsections (3)(c), (e) and (f) and (4) of this section will not apply.

(10) If the parties to a collective agreement that has been extended in terms of this section terminate the agreement, they must notify the Minister in writing.

(11) A bargaining council that has a collective agreement extended in terms of this section must ensure that the independent appeal body is able to determine appeals within the period specified in subsection (3)(f)."

(emphasis added)

[19] In an earlier case of ***National Employers Association of South Africa and Others v Minister of Labour Metal and Engineering and Others***³, Watt-Pringle AJ found that the council's submission to the Minister to extend the purported collective agreement referred to in the submission and reflected in the Government Gazette No. 36338 of 12 April 2013 did not comply with section 32 (1) of the LRA in that:

"2.1 No such collective agreement was ever concluded under the auspices of the bargaining Council; and

³ (JR860/13) [2014] ZALCJHB 524 (12 December 2014) ('the Watt Pringle decision'),

2.2 No valid decision was ever taken to request the extension of the purported collective agreement to non-parties pursuant to section 32 (5) or at all.”

[20] The grounds of review mentioned in paragraph 15.1 above are very similar to grounds on which Watt-Pringle AJ decided the case before him. In that instance, the court was concerned with the extension of the main agreement, in which certain additions had been made to the wage schedule.⁴ They also coincide with the one of the grounds of review in ***National Employers’ Association of SA & others v Minister of Labour & others***⁵, which I decided previously. In that case, I cited the following extract which sets out the standard of scrutiny the Minister’s discretion must meet when deciding to extend an agreement where the numerical requirements do not satisfy the requirements of s 32(1)(a) or (b) and the Minister must decide whether to extend an agreement under s 32(5):

“[98] In the *Free Market*⁶ case, the court followed the approach in *Walele*⁷ with specific reference to how the minister’s discretion under s 32(3) and 32(5) should be exercised, viz:

‘[84] Whenever the minister receives a written request from a bargaining council to extend a collective agreement transmitted to her in terms of s 32(1) of the LRA, the first thing she will have to do, practically speaking, is to ascertain whether the numerical thresholds discussed above have been achieved. She must do the math, and, courtesy of s 208A of the LRA, she must do it personally. As discussed already, by reason of s 32(3)(a), (b) and (c) there are two arithmetic calculations that need to be performed. Firstly, the minister must determine if the resolution taken by the bargaining council to refer a written request for extension to her was supported by the requisite majority. The resolution must be supported by one or more trade unions whose members make up the majority of members of all the trade unions who are parties to the bargaining council. The resolution must also enjoy the support of one or more employers’ organisations whose members employ the majority of employees employed by the employers who are members of the employers’ organisation that are party to the bargaining council. The second arithmetic calculation to be performed by the minister is that required by s 32(3)(b) and (c) of the LRA. She must determine whether the majority of employees who will fall within the scope of the collective agreement, once it has been extended, are members of trade unions that are parties to the bargaining council; and

⁴ At para [19] of the judgment.

⁵ (2017) 38 ILJ 2034 (LC)

⁶ *Free Market Foundation v Minister of Labour & others* (2016) 37 ILJ 1638 (GP)

⁷ *Walele v City of Cape Town & others* 2008 (6) SA 129 (CC).

additionally she must establish whether the members of the employers' organisations party to the council will employ the majority of all employees falling within the scope of the agreement once it has been extended.

[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) (the numerical requirements), the minister "may" extend, provided the jurisdictional facts in s 32(5)(a)-(d) exist. 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) which involves little choice on the part of the minister. Mechanical powers are more in the way of duties.

[86] The normal requirements of administrative justice, that is legality, reasonableness and fairness, applied flexibly and contextually, enhance constraint and accountability in relation to administrative action in ways different to the exercise of a mechanical power or duty where pre-ordained conditions precedent of legality are chosen legislatively as the preferred means of achieving certainty and predictability in the advancement of policy. By deliberately electing to limit the minister's discretion in a majoritarian situation, parliament recognised that a broad discretion giving the minister a power to second guess the outcome would weaken the effectiveness of the majoritarian system of collective bargaining. However, these considerations do not apply when the minister exercises her discretion to extend a product of collective bargaining which has only the support of a minority of bargaining agents. Such administrative action justifiably attracts judicial scrutiny of a more exacting standard. Where broad discretionary powers are conferred, there must be some constraints on the exercise of such powers so that those affected by their exercise will know what is relevant or in what circumstances they are entitled to seek relief from an adverse decision.

[87] The minister's power to extend a minority collective agreement under s 32(5) of the LRA is subject to compliance with the mandatory and material conditions prescribed in paras (a) to (d) in the subsection. Compliance is a prerequisite for jurisdiction and legality.

[88] *The first condition precedent to the exercise of the power to extend a minority collective agreement is that the parties to the bargaining council must be sufficiently representative within the registered scope of the bargaining council. The phrase "sufficiently representative" is not defined in the LRA but by implication suggests less than majority membership within the sector. The issue must be determined objectively. The established practice is to determine the matter with regard to various factors*

besides numerical representativeness, including the nature of the sector and the organisational history within it.

[89] The FMF maintains that this requirement is otiose since a bargaining council's formation and its continued existence in any event depends on its fulfilment. *That may be so, but the obligation on the minister to check the level of representativeness remains a safeguard.* If in the process of checking it is determined that the bargaining council is not sufficiently representative, the registrar will be obliged to take steps towards cancellation of bargaining council's registration and in such circumstances it is unlikely that any extension by the minister might be regarded as reasonable.

[90] The second condition precedent to the exercise of the power in s 32(5) of the LRA is that the minister must be satisfied that the failure to extend the agreement may undermine collective bargaining at sectoral level. *The minister will need to show objectively that non-extension will have negative effects, such as opportunistic bargaining at workplace level or something of that kind. The jurisdictional fact "is satisfied" in s 32(5)(b) of the LRA is subjectively phrased. At common law, prior to the adoption of our fundamental Constitution in 1994, such subjective clauses were not subject to extensive objective review. The court would accept the functionary's assurance that the state of affairs (that is, his or her satisfaction) existed and would enquire no further. There was no need to establish that there were good or reasonable grounds for that satisfaction. With the advent of the Constitution this approach became unsustainable. The right to lawful and reasonable administrative action in s 33 of the Constitution and in s 6 of PAJA requires the courts to satisfy themselves as to any factual assumptions on which that action is based. The Constitutional Court outlined the position in Walele v City of Cape Town & others as follows:*

"In the past, when reasonableness was not taken as a self-standing ground for review, the [decision-maker's] ipse dixit could have been adequate. But that is no longer the position in our law. More is now required if the decision-maker's opinion is challenged on the basis that the subjective precondition did not exist. The decision-maker must now show that the subjective opinion it relied on for exercising the power was based on reasonable grounds."

[91] *The effect of this pronouncement is to make all jurisdictional facts objectively justiciable, whatever their wording. At most, the subjective formulation of the jurisdictional fact may signal a need for judicial deference in the interpretation and application of the provision, allowing for a measure of technical and experiential expertise on the part of the decision maker in the jurisdictional and factual determination prerequisite to the exercise of power.*

[92] *What is said in relation to the subjectively phrased jurisdictional fact in s 32(5) of the LRA applies equally to that in s 32(3) of the LRA, which I will discuss presently.'*

[99] From the above, it is clear that in deciding if the minister's decision that the prerequisites of s 32(3) had been met, the same standard of reasonableness as set out in para 91 of the Free Market Foundation decision must apply in this case.

[100] The First issue the minister had to decide was if she was satisfied that the decision by the bargaining council to request the extension of the collective agreement complied with the provisions of s 32(1)."⁸

(footnotes omitted, emphasis added)

Minister's finding that the decision to request the extension of the Administration agreement complied with s 32(1) read with sections 32(5) and 32(3)(a)

[21] Section 32 (5) permits the Minister to extend a collective agreement under subsection (2) "(d)espite subsection 3 (b) and (c)". Although this allows the Minister to extend the agreement where the necessary numerical thresholds are not achieved in terms of those subsections s 32(5) does not allow her to extend the agreement in spite of section 32 (3)(a). In terms of that subsection she must still be satisfied that the decision to request the extension of the collective agreement complies with section 32 (1). In essence that requires the Minister, at the very least, on receiving a written request to extend a collective agreement purportedly concluded in the bargaining council, to be satisfied there was a meeting of the bargaining council at which the requisite numerical requirements of subsections (a) and (b) were met by the trade union and employer organisation parties which voted in favour of the extension of the agreement. In view of the dictum in the *FMF* judgement, the Minister must have had reasonable grounds for concluding that those requirements were met.

[22] It is not in dispute that the extended agreement, which included amendments that had not been tabled at the meeting on 3 February, was never subjected to a postal vote in terms of s 10(3) of the council constitution. The postal ballot which was completed by 20 February merely asked representatives to confirm that Manco be authorised to "...proceed with the extension of the period of operation of the Registration and Administration Expenses Agreement in accordance with the recommendations as set out in covering letter hereto" (emphasis added). Secondly, the decision also did not meet the numerical threshold stipulated in s 32(1)(b) of the LRA because on the council's own record of

⁸ At 2068-2071

that meeting the chairperson excluded from the counting of the employer organisation votes the 21 'proxy votes' of the 21 SEIFSA affiliates purportedly exercised by Trenitini. The Minister simply took the second certified resolution at face value as evidence that the decision was compliant. In the answering affidavit, the Minister's explanation is that having received the resolution, "... which, prima facie, was passed by the Manco of the Council to extend the agreement to non-parties and to renew the period of operation of the agreement to 2020...(t)he Minister had no reason to disbelieve this" (emphasis added) .The Minister also claims that she had no reason to doubt the integrity of Manco and its decisions.

- [23] However, the Minister had before her ample material that ought to have raised reasonable doubts in her mind about whether the agreement she was being requested to extend satisfied the requirements of the section. Firstly, she had the minutes of the meeting of 3 February in which it is clear that in so far as there was a proper decision regarding the Administration agreement, it was simply to extend it until 2020. That was what was recorded in the first purported 'true extract' of the minutes of the meeting signed by the president and the secretary on 20 February. However, she also had before her another purported 'true extract' from the minutes (only received by the Department on 27 May 2015) which now claimed that the resolution had also requested consequential amendments. Even at face value, one of these purported extracts could not have been true and the Minister was duty bound to make further inquiries when faced with this manifest contradiction, before blithely accepting that the second extract was correct, even though the first extension request had been withdrawn. In itself, the manifest contradiction between the two supposedly true versions of the resolution ought to have raised doubts in her mind about what extension decision, if any, was actually taken at the 3 February meeting. There is no rational explanation why she simply accepted the second version of the resolution as being the correct one. Her doubts ought to also have been alerted by the fact that the minutes of the meeting did not support the second version of the resolution.

- [24] Secondly, when the applicants made their representations to the Minister on 22 May 2015, they brought to the Minister's attention that the Manco meeting on 3 February had not been called upon to request the extension of an amended administration agreement and that the amendments had not been agreed to in conformity with clause 10 of the Council Constitution. Moreover, it ought to have been obvious from the Department's own correspondence with the council that various amendments particularly in relation to the exemption provisions had been proposed by the Department itself *after* the first request for extension was received. The council's response as set out in its letter explaining the "consolidated agreement" dated 20 February 2015 which details the amendments and references some of them directly to the Department's queries could only have been amendments made *after* the interaction with the Department. Accordingly, there was no reasonable basis for assuming that these amendments had been considered by the meeting on 3 February 2015, because logically that meeting could not have considered amendments made in response to queries raised after the meeting was held. That to ought to have alerted the Minister to the fact that a subsequent Manco resolution was essential to confirm that those amendments were also mandated by a decision of a meeting which satisfied the requirements of section 32 (1).
- [25] The amendments included in the second extension agreement were not mere formalities. They included the extension of the scope of the agreement to three distinct types of economic activity previously not covered by the existing agreement. The letter motivating this amendment was based on a Manco resolution of 26 November 2013, but that resolution was only in respect of the main agreement and not the administration agreement, and in any event there was no evidence that, that resolution met the requirements of section 32 (1) either. Further, amendments were made to clause 9 (1)(c) of the existing agreement without that being placed before Manco and a new clause 9 (1) (d) was included also without being canvassed by Manco. A number of other amendments were introduced, which were not even brought to the attention of the department. The important point about these changes is

simply that with the addition of these alterations, it is simply inconceivable on any rational basis that the ones which were disclosed could have been part of the resolution adopted by the Council on 3 February 2015, and could only have been the subject of a subsequent Council decision, for which there was no evidence before the Minister.

Non-inclusion of criteria in the agreement for exemption appeals

- [26] The extended agreement also did not contain criteria that must be applied by the independent appeal body considering an appeal against a decision on an exemption application. Under s 32(3)(f) the Minister also had to be satisfied that such criteria were contained in the agreement and that they were fair and promoted the objects of the LRA. Clause 9(5)(c) alluded to the presence of such criteria, but the other provisions in clause 9 merely deal with aspects of the exemption application procedure. Despite being aware of the omission to include such criteria in the agreement, the Minister was content to rely on the existence of the exemption criteria in the council's exemption policy as satisfying the two requirements of s 32(3)(f).
- [27] Part of what the Minister was required to satisfy herself of under s 32(3)(f) could not have been more simple to determine, namely if the exemption criteria were set out in the agreement itself. That evaluation is so elementary, it barely involves the exercise of judgment, unlike the second consideration which requires the minister to determine if the criteria in the agreement are fair and promote the objects of the LRA. Yet the Minister sidestepped determining if the agreement contained the criteria. This is not a mere question of technical compliance. Firstly, parties seeking exemptions should not have to source a separate document from the council to determine what the criteria are. The LRA intended such criteria to be published as part of the agreement so they were as accessible as the terms of the agreement itself. Secondly, the criteria contained in a policy adopted by the council could be amended by the council, without having to be scrutinised by the Minister to determine if the amended criteria are fair and promote the objects of the LRA.

- [28] The Minister could not reasonably have concluded that exemption criteria included in a policy that was not part of the agreement was substantially the same as those criteria being included in the agreement itself.

Minister's conclusion that the requirements of s 32(1)(b) were met

- [29] Quite apart from this, the respondents brought to the Minister's attention that the numerical requirements of section 32(1)(b) could not have been met. She was expressly referred to the ruling by the President himself that the 21 SEIFSA organisations, purportedly represented by Trenitini acting as their proxy "...did not vote therefore they are not counted in the meeting". Accordingly, as the four remaining employer organisations who could and did vote only represented employers employing 94533 employees, according to the Council's own figures, which amounted to 37.5% of employees employed by employer organisations which were party to the Council, on the representativity figures determined by the Department. In addition, her attention was drawn to the serious flaws with the alternative explanation that Trenitini could lawfully exercise a proxy vote on their behalf in any event was seriously flawed, even if the president's own ruling that the proxy votes of 21 SEIFSA affiliates could not be counted ought to be ignored despite never being set aside. In light of this, the Minister could not reasonably have been satisfied that this important numerical prerequisite had been met.

Conclusions

- [30] In light of the reasons given in paragraphs [21] to [25] above, I am satisfied for these reasons alone that the Minister could not reasonably have assumed that the extension of the final version of the agreement had been the subject matter of a vote by the relevant parties. This has nothing to do with whether or not council procedures were properly complied with and accordingly nothing to do with the correct interpretation of section 206 of the LRA and is distinguishable from the case of *National Employers' Association of SA v Metal & Engineering Industries Bargaining Council &*

*others*⁹ where the court held that despite manifest non-compliance with constitutional decision-making procedures of the Council in requesting the extension of a collective agreement, section 206 of the LRA immunised that decision from being set aside on account of those irregularities.¹⁰ Secondly, in light of paragraphs [26] to [28], the minister could not have reasonably concluded that the requirements of s 32(3)(f) were met, when she purportedly exercised her discretion under s 32(5).

[31] In respect of the employer organisations' non-compliance with the numerical representation requirements of section 32(1)(b), this issue is a straightforward question of compliance with the statutory requirements. Simply put, it relates to the fact that, given the president's ruling that the proxy votes did not count in the tally of employer organisations voting in favour of the extension of the administrative agreement, the requirements of that sub-section were not met. For the reasons mentioned above, the Minister could not reasonably have been satisfied on the information before her that the threshold was met and accordingly the jurisdictional prerequisites for exercising her discretion under section 32(5) was not fulfilled, namely that even if the request to extend the agreement in its consolidated form had been decided on at the Council meeting of 3 February 2015, it was not a decision of the Council which complied with the requirements of section 32(1)(b). Consequently, her decision to extend the agreement to non-parties for this reason also was not valid.

[32] In summary, the Minister could not reasonably have been satisfied that the prerequisites for the exercise of her discretion to extend the Consolidated agreement that was presented to her had been met. Accordingly, the extension of the agreement was invalid and it is necessary to determine an appropriate remedy which is dealt with below.

⁹ (2015) 36 ILJ 732 (LC)

¹⁰ At 740, para [15].

Mootness and Remedy

[33] In the light of my conclusions above, the Minister's decision to extend the Administrative agreement was invalid. That does not necessarily mean the extension of that agreement to non-parties must be set aside.

[34] One of the considerations would be that the issue under consideration is effectively moot or of little practical significance. In ***National Employers' Association of SA v Metal & Engineering Industries Bargaining Council & others***¹¹ the LAC cited the Constitutional Court decision in ***National Coalition for Gay & Lesbian Equality & others v Minister of Home Affairs & others***¹² in which it was held that:

'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 opinions on abstract propositions of law.'

[35] In the LAC case, the appeal against a review judgment in respect of the council's decision to request the extension of the agreement had been overtaken by events because the Minister had since extended the agreement in any event. In this instance, the agreement was not in force at the time the matter was argued, having expired over four months' previously. It obviously of little practical consequence for affected parties' obligations going forward whether the extension of the agreement is set aside.

[36] However, the validity of the agreement would nonetheless affect past obligations incurred as a result of the agreement being in force, in particular to pay the levies imposed by that agreement. Consequently, the agreement still created legal obligations during the time it was in force and it is not unimaginable that the council might still be seeking to recover arrear contributions, which it can do so long as it can state without fear of correction that the agreement was validly extended to non-parties. There may also be instances where a dispute exists over liability to pay the levies imposed by the agreement while it was in force and an employer had collaterally disputed its liability on the basis that the agreement was

¹¹ (2015) 36 ILJ 2032 (LAC) at 2035, para [6].

¹² 2000 (2) SA 1 (CC)

invalidly extended. In the case of members of parties to the agreement, such a defence could not be raised because they are bound to the agreement even if it had not been extended by the Minister.

[37] Therefore, the status of the extended agreement cannot be said to be of no practical consequence even if only that it determines historic liabilities that non-party employers might have incurred. Accordingly it is not a moot issue. In arriving at this conclusion I have considered the judgment in *Workforce Group (Pty) Ltd v Motor Industry Bargaining Council and Others*¹³ in which the court accepted that a matter concerning an extended agreement which had expired was moot. That case is not particularly helpful because the parties agreed the dispute over the validity of the agreement was moot. As far as it can be discerned from that judgment, the impugned provision in the agreement concerned restrictions on the use of temporary employment services and it is not obvious how any declaration that the agreement was a nullity could have had any practical consequences for parties that might have been in breach of those restrictions in the past.

[38] In *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others*¹⁴, the Constitutional Court held that:

‘[84] It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then the

¹³ (2007/6/2014) [2015] ZASCA 66 (15 May 2015)

¹⁴ 2011 (4) SA 113 (CC)

“desirability of certainty” needs to be justified against the fundamental importance of the principle of legality.

[85] The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented — direct or collateral; the interests involved and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case.¹⁵

[39] In *Khumalo & another v MEC for Education, KwaZulu-Natal*,¹⁶ the Labour Appeal Court also held that:

‘In reviewing and considering whether to set aside an administrative action, courts are imbued with a discretion and may in the exercise thereof refuse to order the setting aside of an administrative action, notwithstanding substantive grounds being present for doing so (*Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2010 (1) SA 333 (SCA) at para 33 (*Oudekraal 2*). Section 17(1)(b) of the Constitution and s 8 of PAJA are statutory provisions providing the source of the courts’ discretion. In terms of s 172(1)(b) of the Constitution a court, when deciding a constitutional matter within its powers, may make any order that is just and equitable, including an order suspending the declaration of invalidity for any period. Similarly, under s 8(1) of PAJA the court in proceedings for judicial review in terms of s 6(1), may grant any order that is just and equitable (*Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others* 2011 (4) SA 113 (CC) at para 82; *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA)(*Oudekraal 1*);

¹⁵ At 146-7.

¹⁶ (2013) 34 *ILJ* 296 (LAC)

Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others 2008 (2) SA 638 (SCA) at para 28).'

[40] In this instance, the attack is a direct one on the validity of the extension of the agreement to non-parties. The breach of the right to fair administrative action concerned the unlawful exercise of the Minister's power to extend the agreement to non-parties in the absence of there being reasonable grounds for her being satisfied certain pre-requisites for exercising her power had been met. On the other hand, the agreement did not increase the contributions which all employers covered by the 2011 Administrative agreement would previously have been paying, given that the 9.5 % increase proposal was abandoned. It is true that some employers who had previously not been covered by the agreement were now included. Like other employers who were not members of parties to the agreement, they were entitled to raise a collateral attack on the validity of the extension if they were opposed to their inclusion. There was no evidence of widespread non-compliance or a multiplicity of disputes raised by those affected.

[41] In the circumstances, I believe that the most just and equitable approach is that a declaration of invalidity would preclude those purportedly given rights by the administrative action from extracting outstanding performance by those affected by the action, but without undoing past performance by those who had acceded to comply with the extended agreement even though they could have raised a collateral attack on its validity.

Costs

[42] Although the ultimate relief granted is limited, the Minister ought never to have extended the agreement for the reasons above, at the very least until such time as she could be justifiably confident that the agreement she was extending was one that had been the subject matter of a decision by the Council, quite apart from whether or not the extension would pass muster for other reasons such as the absence of exemption criteria and other problems identified in the other grounds of review not considered above. Moreover, some of the amendments were not insubstantial and in the

case of the absence of exemption criteria in the agreement were a material departure from the requirements of the LRA. In the circumstances, the applicants were justified in attacking the validity of the extension. In the circumstances there is no reason why costs should not follow the result.

Order

- [1] The late filing of the first respondent's answering affidavit is condoned.
- [2] Government notice R 758 published in Government Gazette 39043 on 31 July 2015 is declared invalid and of no force or effect.
- [3] The first, second and thirty-fifth respondents are jointly and severally liable for the applicants' costs, including the costs of two counsel, the one paying the others to be absolved.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:

AJ Freund SC assisted by G
Leslie instructed by Anton
Bakker Inc.

FIRST RESPONDENT:

H Maenetje SC assisted by
JM Ramaepadi instructed by
the State Attorney

SECOND RESPONDENT

N A Cassim SC assisted by
V September instructed by
Patelia Cachalia Attorneys

THIRTY- FIFTH RESPONDENT:

J G Van der Riet SC

assisted by C Orr instructed
by Haffegge Roskam
Savage Attorneys

LABOUR COURT