



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

REPORTABLE
Case No: JR2749/22

In the matter between:

INNOVATIVE STAFFING SOLUTIONS (PTY) LTD

Applicant

and

MINISTER OF EMPLOYMENT AND LABOUR

First Respondent

**NATIONAL BARGAINING COUNCIL FOR
THE ROAD FREIGHT AND LOGISTICS INDUSTRY**

Second Respondent

REGISTRAR OF LABOUR RELATIONS

Third Respondent

DEPUTY REGISTRAR OF LABOUR RELATIONS

Fourth Respondent

ROAD FREIGHT ASSOCIATION

Fifth Respondent

NATIONAL EMPLOYERS ASSOCIATION OF SA

Sixth Respondent

CONSOLIDATED EMPLOYERS ORGANISATION

Seventh Respondent

SOUTH AFRICAN TRANSPORT

Eighth Respondent

AND ALLIED WORKERS UNION

**MOTOR TRANSPORT WORKERS
UNION OF SOUTH AFRICA**

Ninth Respondent

**PROFESSIONAL TRANSPORT & ALLIED
WORKERS UNION**

Tenth Respondent

TRANSPORT AND ALLIED WORKERS UNION

Eleventh Respondent

Heard: 20 March 2025

Delivered: 3 April 2025

Summary: Application to review and set aside the determination issued by the registrar of labour relations in terms of section 49(2) of the LRA. Application dismissed with costs.

JUDGMENT

DANIELS J

Introduction

- [1] This judgment relates to an application brought to review and set aside the determination of the third and/or fourth respondents (“registrar” or “deputy registrar”) of the representativeness of the parties to the second respondent (“Bargaining Council” or simply “Council”) and the certificate dated 9 December 2021 (“the certificate”) issued in terms of section 49(2) of the Labour Relations Act No. 66 of 1996 as amended (“LRA”). Alternatively, the applicant seeks a declaration that the certificate is not a “determination” that is contemplated by section 49(4A) of the LRA.

- [2] This application was consolidated and heard together with two other review applications. This application is concerned, in broad terms, with the issue of the determination or certificate while the other two, under case numbers J668/22 and JR1518/23, are concerned with the decision of the first respondent to extend, to non-parties, the Main Collective Agreement (“MCA”) of the Bargaining Council. It was common cause that all the extensions occurred through the mechanism of section 32(2) of the LRA. For simplicity, a separate judgment will be handed down in respect of those applications. Despite this, the grounds of review in the application under J668/22 does overlap with this application to some extent.

Supplementary affidavit

- [3] The applicant brought a formal application seeking leave to file a supplementary affidavit and amend its notice of motion. In effect, through this, the applicant sought to review and set aside a further extension¹ of the MCA of the Bargaining Council. The first and second respondents opposed the application at the hearing, on the basis that it amounted to a separate review application. The applicant withdrew the application, and indicated it may launch a further review application.

Condonation

- [4] The first respondent (the “minister”) filed its answering affidavit a few days late. The applicant initially objected to the late filing of the affidavit, but, at the hearing of the matter, withdrew its objection. Condonation was therefore unnecessary.
- [5] The applicant launched this application, on 6 December 2022, to review and set aside the decision of the deputy registrar, on 9 December 2021, to issue

¹ The applicant sought to review and set aside the minister's decision, to extend the period of the Main Collective Agreement, as published in GN R4988 GG 50841 on 21 June 2024, in terms of which the minister extended the period of the Main Collective Agreement to 28 February 2027.

the certificate. The applicant became aware of the certificate on 9 June 2022, and it brought this application during the following 180 days.

- [6] The 180-day period is relevant because this application relies on the grounds of review contemplated in the Promotion of Administrative Justice Act No. 3 of 2000² (hereafter “PAJA” or “the PAJA”) read with section 158(1)(a)(iii) - (iv), 158(1)(b) and 158(1)(g) of the LRA.³ The certificate was not published in the *Government Gazette* (given that there is no such statutory requirement) and it only came into the applicant’s possession when it was filed by the minister together with the record of the review application under case number JR668/22.
- [7] While the applicant may have guessed of the existence of the certificate earlier, it could not have known that the certificate might be problematic on its own terms. Furthermore, there was no expeditious or guaranteed manner, available to the applicant, to secure the certificate before it was voluntarily disclosed. The applicant could not reasonably have been expected to be aware of the certificate, or the reasons for its terms, earlier than 9 June 2022.
- [8] Accordingly, the applicant acted with due expedition, and acted within the statutory periods stipulated in section 7(1) of the PAJA. Thus, condonation for the filing of the application is unnecessary.

Mootness

- [9] A case is moot, and not justiciable, when it “*no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory*

² Section 7(1) of PAJA states that an application to review administrative action must be brought within 180 days of: (1) the applicant becoming aware of the administrative action and the reasons for it, or (2) the time when the applicant might reasonably have been expected to have become aware of the administrative action and the reasons for it.

³ It must be noted that the applicant also alleges that the determination of the registrar, or deputy registrar, is reviewable on the basis of legality and there is no applicable time period for such review.

opinions on abstract propositions of law."⁴ The question is whether the decisions will have no practical effect or result.⁵

- [10] In *Golden Arrow Bus Services (Pty) Ltd and Another v Minister of Employment and Labour and others*⁶ the court, per Lallie J, held that the issue of whether the collective agreement of the Bargaining Council had been validly extended was not moot because the obligation to pay the wage increase, arising from the extension, was still a live issue. In this matter, the minister states, the applicant has already paid the monies due under the MCA. However, the rights and duties of the applicant in relation to its employees, as well as the Bargaining Council, remain an ongoing issue. It is both appropriate and necessary that those disputes be finally resolved.
- [11] In any event, mootness is not finally determinative of whether the court should hear the dispute. The court retains a discretion to do so, and will be guided by the interests of justice.⁷ Factors relevant to the court's discretion include the nature and extent of the practical effect that any possible court order might have either on the parties or on others, the importance of the issue, the complexity of the issue, the fullness or otherwise of the argument advanced, and the need to resolve disputes between different courts. As previously mentioned, judgment in two other review applications are pending, both of which challenge the lawfulness of various extensions of the MCA, by the minister, to non-parties. The lawfulness of the certificate is a fundamental consideration in those applications. The minister and the registrar, key role players in relation to the extension of collective agreements, require clarity as to the position of this court relating to the lawfulness of the process prior to the determination of representativeness made by the registrar in terms of section 49 of the LRA.

⁴ *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* [2000] JOL 5877 (CC)

⁵ *Agribee Beef Fund (Pty) Ltd and another v Eastern Cape Rural Development Agency and another* [2023] JOL 57428 (CC)

⁶ (C 409/2021) 2023 ZALCCT 17 (4 May 2023); (2023) 44 ILJ 1715 (LC)

⁷ *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at para 11; *MEC for Education, Kwa-Zulu Natal, and Others v Pillay* 2008 (1) SA 474 (CC) at para 32

- [12] At court, during the extension review under J668/22, the applicant became aware of a certificate of representatives which had been issued by the registrar earlier this year. The applicant advised the parties and the court that it was likely to review the issuing of that certificate as well. In the circumstances, the manner in which the registrar discharges his or her function in relation to the determination of representativeness, as contemplated in section 49, remains a live issue between the parties. This judgment will impact on the conduct of the parties to the Council, the conduct of the minister, and the registrar, in relation to similar issues.
- [13] In light of the above circumstances, I do not believe that the dispute is moot. Even if this is incorrect, the interests of justice dictate that the dispute be heard. The dispute raises issues of substantial importance to the parties to this dispute, as well as to the labour fraternity more generally. The determination made by the registrar, in terms of section 49, are central to the exercise of the minister's function in extending collective agreements of the Bargaining Council. The extension of such agreements, in turn, are essential to one of the primary objects of the LRA - namely the promotion of collective bargaining at sectoral level. The learned academic Prof Du Toit acknowledged that it is difficult to conceive of centralised bargaining in any form without a mechanism for the extension of collective agreements.⁸

Factual background

- [14] The factual background to the dispute is as follows:

14.1 The Bargaining Council referred a demarcation dispute to the CCMA on 30 October 2018 requesting an award that the applicant fell within its registered scope. On 2 March 2021, the CCMA commissioner found that the applicant was a temporary employment service and part of its operations fell within the scope of the Bargaining Council. As a result, the applicant was required to register with the Bargaining Council and comply

⁸ Prof D Du Toit "*The Extension of Bargaining Council Agreements: Do the Amendments Address the Constitutional Challenge?*" (2014) 35 ILJ 2637 at 2643

with collective agreements of the Council which had been or would be extended to non-parties. The applicant launched an application to review and set aside the demarcation award under case number JR510/2021.

14.2 The demarcation award led to a flurry of court applications:

14.2.1 The applicant launched a further application, under case number JR482/21, to stay the demarcation award pending the review. A court order was granted by agreement (on 11 May 2021) between the parties in terms of which the demarcation award would be stayed, pending the determination of the application under JR510/2021, but the applicant would comply with certain provisions of the MCA and submit returns to the Council demonstrating compliance.

14.2.2 The applicant launched a further application, under case number J1428/2021, seeking an order *inter alia* declaring that it had complied with the court order of 11 May 2021.

14.2.3 The applicant launched a further application, under case number J1380/2021, seeking a court order *inter alia* interdicting the Council from representing to any of the applicant's clients that it was acting in breach of the court order dated 11 May 2021 and that a writ of arrest had been issued for the director of the applicant regarding his alleged refusal to register the applicant with the Bargaining Council. The Council opposed the application and brought a counter application seeking a court order *inter alia* interdicting the applicant from holding out to any employers in the road freight industry that the applicant is entitled not to comply with the MCA and that if they engage the services of the applicant their employees would not longer be subject to the MCA. The application came before my sister, Mahosi J, on 16 November 2021 who delivered her judgment a short while later.

14.2.4 The court dismissed the application and pending the final determination of the application under JR510/21, granted the relief sought by the Bargaining Council. In effect, the applicant was ordered to comply with the MCA, and to refrain from advising employers in the road freight industry that the applicant was entitled not to comply with the MCA.

14.2.5 The applicant's application for leave to appeal against the judgment of Mahosi J was dismissed, and its petition to the Labour Appeal Court was dismissed. Its subsequent application for leave to appeal to the Constitutional Court was also dismissed.

14.3 Several years earlier, the minister had issued a letter to Ms Ngwetjana appointing her as the deputy registrar and requested her *"to perform all functions assigned to this position in the absence of the Registrar of Labour Relations."*⁹ In these proceedings, we are concerned with the conduct of the deputy registrar and the determinations made by her. In what follows, any reference to registrar includes the deputy registrar.

14.4 On 9 December 2021, the deputy registrar signed a certificate, in terms of section 49(2) of the LRA, which reads:

⁹ Section 108(2) of the LRA states: (a) The minister may designate any number of officials in the Department as deputy registrars of labour relations to assist the registrar to perform the function of the registrar in terms of this Act. (b) A deputy registrar may exercise any of the functions of the registrar that have been generally or specifically delegated to the deputy.

DEPARTMENT OF LABOUR

**CERTIFICATE OF REPRESENTATIVENESS
OF PARTIES TO A COLLECTIVE AGREEMENT**

**National Bargaining Council for the Road Freight
and Logistics Industry**

In terms of section 49(2) of the Labour Relations Act, 1995, I am satisfied that the parties to your Council's Main Agreement are representative and will be regarded as such until 31 December 2023

1. On 7 December 2021 there were 108 673 employees employed within the scope of the Collective Agreement.
2. On 7 December 2021 there were 26 827 members of the trade unions to the Council that were employed within the scope of the Collective Agreement.
3. On 7 December 2021 there were 60 555 employees employed within the scope of the Agreement by members of the employers' organisations, party to the Collective Agreement.

Date: 9 December 2021

Reference number: 2/6/6/55

Deputy Registrar of Labour Relations

14.5 It bears noting that the certificate relates to the representativeness of the parties, to the Bargaining Council, in relation to the scope of the MCA.

14.6 On 10 February 2022, the minister extended the period of the MCA to 29 February 2024, by publication in *GG 45897 GN813*.

14.7 On 11 February 2022, the minister extended the MCA to non-parties until 29 February 2024 by publication in *GG 45905 GN831*.

14.8 The minister's extension of the period of the MCA and its extension to non-parties led the applicant to file the review application under case number J668/22. The minister relied on the certificate to do so.

Determination of representativeness

[15] In this dispute, the minister filed a joint answering affidavit with the registrar.

[16] The minister and the registrar stated that determinations, or certificates, are made and issued following an intensive process of investigation, by the registrar, which takes several weeks.¹⁰ The process was explained as follows:

16.1 The registrar attends the offices of the Bargaining Council, the employer organisations, and the trade unions to conduct investigations. The visits are pre-arranged to ensure that the organisations are properly prepared.

16.2 During the investigation, the registrar meets with the officials of these organisations to conduct a verification exercise. The registrar inspects the membership figures, which are presented by means of projector. The registrar considers discrepancies or other issues of interest, and calls for explanations, wherever necessary, from those officials who present on behalf of the organisation.

16.3 The registrar inspects the subscriptions paid by the members of the organisation and inspects any other information he or she deems relevant. The focus is always on the year in which the inspection is conducted.

16.4 After the inspection is conducted, the registrar compiles a preliminary report and presents this to the Bargaining Council, and the parties to the Council, for comment. Sometimes these comments lead to the submission of further information to the registrar.

16.5 Thereafter, a final determination is made by the registrar, in the form of the certificate.

¹⁰ The process was set out in the minister's answering affidavit in paras 32 – 50 of the extension review (under case number J668/22) and incorporated by reference in the answering affidavit of this application. The deputy registrar filed a confirmatory affidavit in the extension review confirming the process followed.

- [17] The registrar explained the investigative process conducted prior to the issue of the certificate relevant to this application. The registrar attended the offices of the Bargaining Council, as well as the various employer organisations (namely the fifth, sixth, and seventh respondents) to conduct the verification exercises. There were four meetings, held over the period from 2 to 25 November 2021. A preliminary report was sent to the Bargaining Council, which accepted the figures on 1 December 2021. On 9 December 2021, the deputy registrar issued a determination in the form of the certificate, which was sent to the Bargaining Council.
- [18] The applicant, in its replying affidavit, states that it has no knowledge of the process and heard of the process, for the first time, upon perusing the answering affidavits of the minister and the registrar in J668/22. The applicant stated that, in the absence of a confirmatory affidavit from the registrar, it denied the investigative process (alluded to above) was conducted. The confirmatory affidavit of the deputy registrar was subsequently filed. Accordingly, the process conducted by the registrar, or the deputy registrar, set out in para 17 above, is not in dispute. This puts an end to the applicant's argument that the registrar merely rubber stamped the data from the Bargaining Council.

Legal basis of challenge to section 49 determination

- [19] It is trite that the grounds of review must be pertinently set out in the applicant's founding and supplementary affidavits.¹¹
- [20] As previously explained, this application is brought on the grounds set out in PAJA, alternatively, the principle of legality. This is permissible because this court has the power to review the performance or purported performance of any function provided for in the LRA on any grounds that are permissible in law.¹²

¹¹ *Communication Workers Union and others v SA Post Office Ltd and others* (2013) 34 ILJ 626 (LC) at paras 35, 36 and 39

¹² Section 158(1)(g) of the LRA

- [21] The grounds of review in PAJA,¹³ which applies only to the review of administrative action, are extensive. However, in relation to legislative and executive acts, which are not 'administrative action', the more limited principle of legality applies, this principle being implicit in the content and design of our Constitution. The principle of legality permits review of *all* public power on the basis of rationality,¹⁴ bad faith, or that such power is *ultra vires* the empowering statute.¹⁵ Rationality requires that the exercise of public power may not be arbitrary and the exercise of such power must be rationally related to the purpose for which the power was given - which requires an objective enquiry.¹⁶
- [22] If the determination by the registrar constitutes administrative action, and the grounds of review applicable under PAJA are available to the applicant, there is no need to decide the application under the principle of legality.
- [23] In my view, the issuing of the determination, by the registrar, falls neatly within the definition of administrative action as contemplated by section 1(a) of PAJA. However, even if the registrar is not an organ of state, then the

¹³ Section 6(1) of PAJA permits the review of administrative action if the administrator: (a) (i) was not authorised to do so by the empowering provision; (ii) acted under a delegation of power which was not authorised by the empowering provision; or (iii) was biased or reasonably suspected of bias; (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; (c) the action was procedurally unfair; (d) the action was materially influenced by an error of law; (e) the action was taken - (i) for a reason not authorised by the empowering provision; (ii) for an ulterior purpose or motive; (iii) because irrelevant considerations were taken into account or relevant considerations were not considered; (iv) because of the unauthorised or unwarranted dictates of another person or body; (v) in bad faith; or (vi) arbitrarily or capriciously; (f) the action itself - (i) contravenes a law or is not authorised by the empowering provision; or (ii) is not rationally connected to - (aa) the purpose for which it was taken; (bb) the purpose of the empowering provision; (cc) the information before the administrator; or (dd) the reasons given for it by the administrator; (g) the action concerned consists of a failure to take a decision; (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or (i) the action is otherwise unconstitutional or unlawful.

¹⁴ Rationality requires that the exercise of public power must not be arbitrary. Such decisions must be rationally related to the purpose for which the power was given, which calls for an objective enquiry. See *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the RSA and others* 2000 (2) SA 674 (CC) at paras 85 and 86

¹⁵ *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA) paras 28 – 30

¹⁶ *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC) at paras 85 and 86

determination falls neatly within the definition in section 1(b) of PAJA. It is clear that the determination by the registrar adversely affects the rights of any person and has a direct, external legal effect. Our courts have stated that administrative action is “... *in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals*”.¹⁷

[24] In the circumstances, this application will be determined on the basis of the grounds of review applicable under PAJA.

[25] The grounds of review, articulated in the founding and supplementary affidavits, are that:

25.1 The applicant contends that the registrar, or deputy registrar, rubber stamped the data or information submitted to him or her by the Bargaining Council.¹⁸ Given what is set out in paras 17 and 18 above, this need not be debated further. The argument lacks cogency.

25.2 The applicant submitted that the certificate was not properly issued because it was not issued by the registrar but by the deputy registrar.¹⁹ This issue was not actively pursued during argument, in light of the letter from the minister delegating the functions of the registrar to the deputy registrar. In any event, section 108(2) of the LRA is broad and entitles the deputy registrar to assist the registrar to perform the functions of the registrar. In light of the contents of section 108(2), I consider this argument frivolous and will not entertain it further.

¹⁷ *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) at para 24

¹⁸ Founding Affidavit at para 49

¹⁹ Founding Affidavit at para 52

25.1 The applicant contends, in its founding affidavit, that the certificate is not a “determination”²⁰ by the registrar because the determination is made prior to the certificate, alternatively the certificate only reflects the outcome of the determination.²¹ The minister and the registrar both confirm that the certificate is the determination of representativeness. It is artificial, in the extreme, to say that the determination was made prior to the issue of the certificate. In any event, the applicant does not explain when the earlier determination was made, or how this differed to the certificate. In the result, the argument is frivolous and cannot be entertained.

25.2 The applicant contends that the certificate was issued under the wrong section.²² The applicant contends that the determination should have been issued under section 49(4A)(a) but was issued under section 49(2) of the LRA. This is considered below and will be referred to as “the first ground.”

25.3 The certificate is invalid because it is inconsistent with the figures provided to him by the Bargaining Council in the request for extension.²³ This was irrational, alternatively capricious. This too is addressed below and will be referred to as “the second ground.”

25.4 The registrar was required to make a determination *inter alia* by reference to various public databases and other independent sources.²⁴ This will be referred to as “the third ground.”

²⁰ Under section 49(4A)(a) of the LRA

²¹ Founding Affidavit at para 42.1, read with Supplementary Affidavit at para 10

²² Heads of Argument at para 121

²³ Founding Affidavit at paras 43 and 44; Supplementary Affidavit at para 10

²⁴ The applicant contends that the registrar ought to have regard to data and information available from Statistics South Africa, the register of the Unemployment Insurance Fund, the register of the Compensation Commissioner, the register of the SETA, the South African Labour Force Surveys, SANRAL, information from the companies operating the tolls, and possibly even the traffic department which keeps data on the number of trucks on the road and the number of public driving permits issued. In addition, the applicant conducted its own investigation which it contends demonstrates that the total number of employees in the industry is 300 890 employees, a far cry from the number in the certificate – 108 673 employees.

25.5 The process was unfair, and unlawful, because the registrar did not invite non-parties to make representations.²⁵ This will be referred to as “the fourth ground.”

The broader statutory framework and context

[26] Sectoral bargaining, and the promotion of sectoral bargaining, lies at the heart of the LRA.²⁶ The LRA seeks to provide a framework whereby both employers and employees and their organisations can participate in collective bargaining and the formulation of industrial policy. Our courts, at the highest level, have recognized that the LRA seeks to promote orderly collective bargaining with an emphasis on bargaining at sectoral level, employee participation in decisions in the workplace, and the effective resolution of labour disputes.²⁷

[27] Through the LRA, the legislature has, unashamedly, embraced collective bargaining based on majoritarian principles. In *Kem-Lin Fashions CC v Brunton & another*²⁸ Zondo JP (as he was then) 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. That 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.”

[28] Additionally, it must be noted, the LRA is specifically designed to give legislative effect to our international treaty obligations arising from our

²⁵ Supplementary Affidavit at paras 24 and 47.2

²⁶ Section 1(d)(ii) of the LRA; see also *AMCU v Chamber of Mines & Others* (2017) 38 ILJ 831 (CC) at para 44

²⁷ *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC) at para 26

²⁸ (2001) 22 ILJ 109 (LAC)

membership of the International Labour Organisation (“ILO”) and the ratification, by South Africa, of its conventions. These international obligations are of significance to the interpretation of the LRA.²⁹

[29] Extension through the mechanism of section 32(2) has aptly been described as non-discretionary and mechanical.³⁰ In respect of such extensions, the minister is obliged to extend the collective agreement submitted to him by the bargaining council provided that the statutory preconditions are met. This includes the requirements that the thresholds in section 32(1)(a) and (b) are met, and the minister is satisfied that the requirements in section 32(3) (a) to (g) are met.

[30] In respect of an extension of a collective agreement through section 32(3)(b) *Valuline CC v Minister of Labour and others*³¹ held that the minister was required to “do the maths” in order to objectively determine if the required thresholds in section 32(3)(b) were met.³² That case, heard and determined before the 2018 amendments to the LRA were even contemplated, considered provisions of the LRA which required the minister to satisfy himself that the parties to the Bargaining Council had met the required representativeness thresholds.

[31] Of importance in this matter is section 32, particularly section 32(3), and section 49.

[32] Section 32(3)(b) requires that the minister must be “satisfied” that:

“(i) The registrar in terms of section 49(4A) has determined that the majority of all employees who, upon the 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; or

²⁹ Section 1(b) of the LRA

³⁰ *Free Market Foundation v Minister of Labour and others* (2016) 37 ILJ 1638 (GP)

³¹ [2013] 6 BLLR 614 (KZP) at para 67

³² See *Free Market Foundation* (fn. 25) at para 84

(ii) The registrar in terms of section 49 (4A) has determined that the members of the employer organisations that are party to the bargaining council will, upon the extension of the collective agreement, be found to employ the majority of all employees who fall within the scope of the agreement." (own emphasis)

[33] Section 49 provides:

- "(1) When considering the representativeness of the parties to a council, or parties seeking registration of a council, the registrar, having regard to the nature of the sector and the situation of the area in respect of which registration is sought, may regard the parties to a council as representative in respect of the whole area, even if a trade union or employers' organisation that is a party to the council has no members in part of that area.
- (2) A bargaining council, having a collective agreement that has been extended by the Minister in terms of section 32, must inform the registrar annually, in writing, on a date to be determined by the registrar as to the information specified in subsection (3) and the number of employees who are-
- (a) covered by the collective agreement;
 - (b) members of the trade unions that are parties to the agreement;
 - (c) employed by members of the employers' organisations that are party to the agreement.
- (3) A bargaining council other than one contemplated in subsection (2) must on request by the registrar, inform the registrar in writing within the period specified in the request as to the number of employees who are-
- (a) employed within the registered scope of the council;
 - (b) members of the trade unions that are parties to the council;
 - (c) employed by members of the employers' organisations that are party to the council.

(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.”*

[34] The Labour Relations Amendment Act No. 8 of 2018 amended various sections of the LRA including sections 32 and 49. This application requires that the court consider the purpose of these amendments. It is trite that the court may have regard to so-called “preparatory documents” (*travaux préparatoires*) to discern the purpose of statutory provisions.³³ It is fitting to consider the purpose of the 2018 amendments as informed by the Memorandum on the Objects of the Labour Relations Amendment Bill, 2017.

[35] Of importance, for our purposes, the 2018 amendments had the following impact:

35.1 The LRA no longer required that the minister must be satisfied that the representativeness thresholds in section 32(3)(b) are indeed met. Instead, the minister must be satisfied that the registrar has decided the

³³ *Mansingh v General Council of the Bar & others* [2013] ZACC 40; 2014 (2) SA 26 (CC) at para 27

representativeness of the parties to the Council, and their representativeness in relation to the scope of the collective agreement to be extended.

35.2 The legislature removed the requirement that the minister must be satisfied that the parties to the Council met the representativeness thresholds. The legislature wanted to remove any opportunity for disgruntled employers to frustrate the extension of collective agreements by demanding exacting and onerous standards for verification, or authentication, of representativeness.

35.3 In *Bargaining Council for the Building Industry (Cape of Good Hope) v Minister of Employment and Labour*³⁴ the court, per my brother Lagrange J, was concerned with a review of the minister's decision not to extend a collective agreement in terms of section 32(5) of the LRA. The court pointed out, at para 42, a fundamental error in the minister's reasoning. The minister erroneously believed that he must still determine if the Bargaining Council was sufficiently representative when the registrar's determination was dispositive of the issue. I align myself with the statements by the learned Judge in para 42.

35.4 The conjunction "and" between sections 32(3)(b)(i) and (ii) was changed to "or". This meant the thresholds for representativeness, for the purposes of section 32(2) extensions, could rely either on the membership of the union parties to the Council, or the number of employees engaged by the employer organisations who are party to the agreement. As explained in the Memorandum, the principle "*is now one of coverage rather than strict representativeness.*"

35.5 Section 49(4) was amended to make it clear that determinations by the registrar were sufficient proof of representativeness for the purposes of extensions under section 32(3)(b) and 32(5).

³⁴ [2023] 8 BLLR 755 (LC)

35.6 Section 49(4) was also amended to provide that the period of the determinations would be valid for two years and not only one. The Memorandum explained that it was not the intention of the LRA to require determinations by the registrar every time that collective agreements are to be extended.

[36] It is clear that the purpose of the amendments was to make extensions of bargaining council agreements less onerous, in order to achieve one of the primary objects of the LRA – the promotion of sectoral bargaining.

[37] There are two kinds of determinations of representativeness that are contemplated by section 32, read with section 49, of the LRA:

37.1 The first kind, contemplated by section 49(4A)(a) relates to a determination, by the registrar, that: (i) 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; and/or (ii) the majority of all 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;

37.2 The second kind, contemplated by section 49(4A)(b), relates to a determination, by the registrar, that the parties to the bargaining council are sufficiently representative within the registered scope of the bargaining council.

[38] For the purposes of this judgment, following is notable:

38.1 Section 32(3)(b) states that the registrar acts "in terms of" section 49(4A) when he determines representativeness of the parties to the Council. Confusingly, section 49(4A) refers to a determination made by the registrar "in terms of" section 32(3)(b) and 32(5)(a).

38.2 Section 49(2) requires Bargaining Councils, which have had their collective agreement (s) extended, to submit information, annually, to the registrar regarding the representativeness of the parties to the Council. However, such information must also include the total number of employees covered by the extended *collective agreement*, the number of such employees who are also members of the union parties to the agreement, and the number of such employees who are employed by members of the *employers' organisations* that are party to the agreement.

38.3 Though section 49(2) makes no reference to the determination of representativeness by the registrar, and relates solely to the submission of information to the registrar, this information assists the registrar to make a determination in terms of section 49(4A).

[39] Thus, in respect of Bargaining Councils which have their collective agreements extended, the Council must *annually* submit to the registrar such information necessary for him to determine the representativeness of the parties to the Council, as well as their representativeness in relation to the extended scope of the collective agreement.

[40] Aside from the other statutory requirements, to lawfully effect an extension of a collective agreement, through section 32(2), the registrar must “determine” the representativeness of the parties to the Council, while the minister must be “satisfied” that the requirements of section 32(1) and (3) are met. In the circumstances, the minister must be satisfied that the registrar has indeed determined “representativeness” as contemplated by section 32(3)(b). The minister is not required to determine the correctness of the determination. The minister is not required “to do the maths.”

[41] The language, context, and purpose all indicate that the word “satisfy” in section 32(3) insofar as it relates to the representativeness of the parties, for the purposes section 32(3)(b), relates to a subjective jurisdictional fact, and the

minister is only required to satisfy himself that the registrar has made a determination in terms of section 49(4A)(a).³⁵

First review ground: was the certificate was issued under the wrong section?

[42] The applicant contends that the certificate issued by the registrar was issued in terms of the wrong section because it was issued under section 49(2) instead of section 49(4A)(a). The applicant does not allege that this error was deliberate or male fide, nor does it allege that the registrar is not empowered by the statute to make such a determination.

[43] There is no requirement for the registrar to precisely state the section or subsection under which his determination was made. Section 49(4) refers to a determination of representativeness of a bargaining council “in terms of this section”. Accordingly, it appears, the determination may be issued in terms of section 49(2) or section 49(4A). What matters is the content of the determination, its substance, not its form. Indeed, this court dismissed a similar argument in *Golden Arrow Bus Services*.³⁶

[44] Additionally, it must be noted, the court disposed of a similar argument in *Howick District Landowners Association v Umgeni Municipality and Others*³⁷ where SCA stated: “Under the doctrine in *Latib's case*, where an empowering statute does not require that the provision in terms of which a power is exercised be expressly specified, the decision-maker need not mention it. Provided moreover that the enabling statute grants the power sought to be exercised, the fact that the decision-maker mentions the wrong provision does not invalidate the legislative or administrative act.” In the circumstances, this ground of review lacks substance.

Second review ground: certificate inconsistent data from Bargaining Council?

³⁵ See *Kimberley Junior School and another v Head, Northern Cape Education Department and others* 2010 (1) SA 217 (SCA) at para 13; see also *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 31 (C) at 34 – 35.

³⁶ See fn. 6 at para 24

³⁷ 2007 (1) SA 206 (SCA) at para 19

[45] The applicant submits that the determination, or certificate, was irrational because the figures on the certificate are inconsistent with the figures provided by Bargaining Council in its subsequent request for extension. As a matter of logic, the certificate does not become invalid merely because subsequent figures in a different document differs. In any event, in its answering affidavit, the minister explained that the determination (i.e. the certificate) is followed by a request for extension. The figures in the request may be different from those in the certificate because time has passed since the determination. As a result, it is common for the figures to vary. This ground too is flimsy.

Third review ground: No consideration of independent/public sources of data?

[46] The applicant contended that the registrar must have regard to public databases and independent sources before making any determination. There is no such requirement in the LRA, and the court cannot read in such a requirement. The legislature saw fit not to prescribe to the registrar how to make such determination. The doctrine of separation of powers compel our courts to respect that decision.³⁸

[47] In any event, as previously explained, the purpose of the 2018 amendments was to make the determination of representativeness, in the context of extensions of Bargaining Council agreements, less onerous.

Fourth review ground: The process was unfair and unlawful because the registrar did not invite non-parties to make representations?

³⁸ See *International Trade Administration Commission v Scaw SA (Pty) Ltd* 2012 (4) SA 618 (CC) where the Constitutional Court said: “[95] Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.”

[48] The applicant contends that sections 3 and 4 of PAJA provides for the right to make representations and for a consultation process. Accordingly, so the applicant submits, the registrar was obliged to invite and consider representations from non-parties or other potential affected parties. This argument has no merit for the reasons which follow:

48.1 The submission ignores section 3(2)(a) of PAJA which states that a fair administrative procedure depends on the circumstances of each case. The applicant made out no case as to why, on the facts of this matter, fairness requires the registrar to invite representations from the public, or affected parties.

48.2 The LRA does not require any representation process prior to a determination by the registrar in terms of section 49. Despite this, the applicant pertinently refrained from any challenge to the constitutionality of the relevant provisions in the LRA. In any event, even if there was a conflict between the PAJA and the LRA, which is incorrect, section 210 of the LRA provides that (where there is a conflict relating to the matters dealt with in the LRA and the provisions of any other law save the Constitution or any other Act expressly amending the LRA) the provisions in the LRA must prevail.

48.3 The extension process can become derailed by a representations procedure, which could undermine collective bargaining at sectoral level. For similar reasons, the kind of process proposed by the applicant, was rejected in para 19 of *Golden Arrow Bus Services*³⁹ albeit that there the court was concerned with whether the minister should invite representations before extending a collective agreement through section 32(2).

³⁹ See full citation in fn. 6

[49] In the circumstances, as explained above, there is no requirement that the registrar must invite comment and representations before making any determination under section 49(4A)(a).

[50] For the reasons already explained, the process used by the Registrar to make the determination was rationally connected to the purpose of the determination and the process was fair. It was not irrational, unfair, or capricious. Thus, the applicant's submission lacks substance.

[51] There has been an academic article suggesting that the LRA ought to incorporate a requirement that, prior to the extension of a collective agreement, the employers, and workers to whom the agreement would be made applicable through extension, should be given an opportunity to comment. The article relies on article 5 of the *ILO Recommendation (No. 91) on Collective Agreements*.⁴⁰ Such recommendations are persuasive, and non-binding. The article fails to consider how a requirement for representations, in the context of section 32(2) extensions, could be used to derail extensions. Even if the suggestion can somehow be reconciled with the purpose of the 2018 amendments, which is denied, such a requirements cannot implied into the legislation. For this court to do so would be in violation of the separation of powers.

Conclusion

[52] As explained above, none of the grounds of review have merit. The *application* falls to be dismissed.

Costs

[53] I was urged by the first and second respondents to make a cost order against the applicant because the application was brought in bad faith and the applicant misrepresented the facts. The applicant, on the other hand, argued

⁴⁰ M Kriek, S Van Eck "The Extension of Bargaining Council Agreements: What Guidelines Can South Africa Gain from the International Labour Organisation?" (2010) 41 ILJ 71

that there should be no costs because the matter concerned a novel issue. It is trite that costs in labour matters do not follow the result but costs orders must be made where required by law and fairness. I agree that the matter is a novel, given that there are few authorities relating to the procedure to be followed in relation to determinations made by the Registrar. However, I must also take into consideration that the applicant omitted to draw the court's attention to provisions in the statute and authorities⁴¹ which did not support its argument. Furthermore, several of the challenges to the determination of the registrar were frivolous, and lacking in substance. Accordingly, law and fairness dictates that the applicant must bear the costs of the first, second and third respondents.

Order

[54] In the circumstances, for the reasons set out above, I make the following order:

54.1 The review application is dismissed,

54.2 The applicant is ordered to pay the costs of first, second, third and fourth respondents, including the costs of two counsel.

Reynaud Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

⁴¹ *Bargaining Council for the Building Industry (Cape of Good Hope) v Minister of Employment and Labour* (cited in fn. 26); *Golden Arrow Bus Services (Pty) Ltd and Another v Minister of Employment and Labour and others* (cited in fn. 6)

Adv Boda SC with Adv R Itzkin and Adv Karim
Instructed by Hanelle Vrey Inc

For the First, Third and Fourth Respondents:
Adv L Kutumela and Adv M Mguta
Instructed by State Attorney

For the Second Respondent:
Adv H Barnes SC and Adv A Pillay
Tricker Inc

LABOUR COURT