



THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case No: CA 16/2023

In the matter between:

SOUTH AFRICAN ROAD PASSENGER BARGAINING COUNCIL **Appellant**

and

GOLDEN ARROW BUS SERVICES (PTY) LTD **First Respondent**

SIBANYE BUS SERVICES (PTY) LTD & OTHERS **Second Respondents**

SA BUS EMPLOYERS ASSOCIATION **Third Respondents**

COMMUTER BUS EMPLOYERS ASSOCIATION **Fourth Respondents**

SA TRANSPORT & ALLIED WORKERS UNION **Fifth Respondents**

NATIONAL UNION OF METALWORKERS OF SA **Sixth Respondents**

TRANSPORT & ALLIED WORKERS UNION OF SA **Seventh Respondents**

TRANSPORT & OMNIBUS WORKERS UNION **Eighth Respondents**

UNITED ASSOCIATION OF SA **Ninth Respondents**

MINISTER OF EMPLOYMENT & LABOUR **Tenth Respondents**

NON-UNIONISED EPLYEES LISTED IN ANNEXURE "A"

TO APPLICANTS' NOTICE OF MOTION **Eleventh Respondents
& Further
Respondents**

Heard: 14 May 2025

Delivered: 13 November 2025

Coram: Savage JA, Musi AJA et Waglay AJA

Summary: Appeal and cross-appeal concerning extension of main collective agreement in terms of section 32 of the Labour Relations Act, 1995, where the Minister has not heard representations from non-parties before decision is made and constitutionality of sections 32(2) and (3) impugned where the Act does not allow for the right to make representations, infringing right to fair administrative action – Following sections 36 limitations analysis, determined that section 32(2) is a deliberate choice in favour of majoritarianism to promote collective bargaining and workplace democracy while reducing ministerial discretion – Appeal and cross-appeal dismissed.

JUDGMENT

MUSI, AJA

Introduction

[1] This is an appeal against a judgment and order of the Labour Court in which it reviewed and set aside a decision by the Minister of Employment and Labour (Minister) to extend the main collective agreement (MCA) to non-party employees and employers to the South African Road Passenger and Bargaining Council (SARPBAC). The appeal is with the leave of the Labour Court.

[2] The Labour Court found that the Minister had no duty to hear any non-parties before extending an agreement. The SARPBAC lodged a cross-appeal

because the Labour Court did not deal with a constitutional issue that it pertinently raised: if the Labour Court found that a non-party, who is bound by the MCA, does not have the right to make representations before the Minister extends an agreement, then sections 32(2) and (3) of the Labour Relations Act¹ (LRA) unreasonably limits the right to administrative action that is lawful, reasonable and procedurally fair in terms of section 33 of the Constitution and is therefore unconstitutional.

Background facts

- [3] The first and second respondents, Golden Arrow Bus Services (Pty) Ltd (Golden Arrow) and Sibanye Bus Services (Pty) Ltd (Sibanye), are not parties to the SARPAC. I shall henceforth refer to these two companies collectively as the bus companies.
- [4] They allege that the across-the-board salary increases determined by the SARPAC and made applicable by the Minister to non-parties prejudice them because of the wage disparity it creates. They assert that there is a substantial disparity between the wages which they are obliged to pay their employees, on the one hand, and the wages which other employers must pay theirs, on the other.
- [5] The disparity arose because of the notch system agreed between the two bus companies and the Transport and Omnibus Workers Union (TOWU), before the establishment of the SARPAC. The SARPAC main collective agreements have invariably provided for across-the-board wage increases to be applied to employees' actual wages and have generally retained *status quo* clauses, which historically governed the terms and conditions of employment applied by employers covered by the historical agreements.
- [6] In terms of the SARPAC's constitution (constitution), the National Bargaining Forum (NBF) comprises of an equal number of representatives of both the employers and the trade union parties who shall come together at agreed intervals to negotiate and endeavour to conclude a main agreement. The

¹ Act 66 of 1995, as amended.

constitution also makes provision for a Central Committee (CC), which is a committee of nominated representatives charged with the responsibility of administering the constitution and the affairs of the SARPBAC. The CC comprises ten representatives nominated by the employers' organisations and ten representatives nominated by the trade unions that are party to the SARPBAC.

- [7] In terms of the constitution, the CC is charged with administering SARPBAC's constitution, the setting up of subcommittees, the appointment of staff, matters of policy, the establishment and maintenance of a dispute resolution process as provided for in section 28(1)(d) read with section 51 of the LRA and any other function as detailed in the constitution. The constitution does not make provision for a meeting of the SARPBAC.
- [8] On 25 March 2021, the NBF signed the MCA, in terms of which they agreed to implement a 4% increase on the actual wage rate of employees (clause 3.2). The implementation date of the agreement was 1 April 2021, valid for one year until 31 March 2022.
- [9] According to the SARPBAC, on 22 April 2021, before the commencement of the meeting of its CC, all parties to the SARPBAC and the MCA met to sign the amended collective agreement, which was submitted to the Minister.
- [10] On 7 June 2021, the Minister extended the MCA to non-parties, and the extension was subsequently published in the Government Gazette on 18 June 2021. On 11 June 2021, the bus companies wrote to the Minister requesting information and pointing out that the extension would discriminate against them. The Minister did not respond to this letter. On 25 June 2021, they again wrote to the Minister requesting information and reasons for the extension.
- [11] On 28 June 2021, the Director General responded, pointing out that the Minister had relied on the determination of representativeness which had been made on 3 August 2020 and would expire on 31 July 2022. Furthermore, they were informed that they may apply for exemptions.²

² The bus companies had, on numerous occasions, unsuccessfully applied for exemptions.

In the Labour Court

[12] The bus companies launched a review application seeking the following orders:

- 12.1 Reviewing and setting aside the Minister's decision to extend the 2021 MCA;
- 12.2 insofar as may be necessary, declaring sections 32(2) and (3) of the LRA unconstitutional and invalid to the extent that they do not require the Minister to follow a procedurally fair process before deciding to extend a collective agreement to non-parties;
- 12.3 Reviewing and setting aside the SARPBAC's decision to request the Minister to extend the 2021 MCA to non-parties; and
- 12.4 Declaring clause 3 of the 2021 MCA ultra vires the LRA, invalid and of no effect insofar as it seeks to impose a 4% across-the-board increase.

[13] The bus companies submitted that the 2021 MCA does not constitute a collective agreement concluded in the Bargaining Council as envisaged in section 32(1) of the LRA. Relying on the documents filed by the SARPBAC, they submitted that the 2021 MCA had not been concluded when the SARPBAC's General Secretary sent his April 2021 report to representatives of the parties to the Council. He arranged for it to be signed between the FinCom and CC meetings, which were scheduled for 22 April 2021. The documents further revealed that the 2021 MCA had been concluded by being signed by representatives of each of the five parties to the SARPBAC on 22 April 2021. They additionally contended that the Minister could not rely on the 2020 determination of representativeness.

[14] In terms of section 27(1) of the LRA, one or more registered trade unions and one or more registered employers' organisations may establish a bargaining council for a sector and area by—

- 14.1 adopting a constitution that meets the requirements of section 30; and

14.2 obtaining registration of the bargaining council in terms of section 29.

[15] Section 30 provides:

- ‘(1) The constitution of every bargaining council must at least provide for—
- (a) the appointment of representatives of the parties to the bargaining council, of whom half must be appointed by the trade unions that are party to the bargaining council and the other half by the employers’ organisations that are party to the bargaining council, and the appointment of alternates to the representatives;
 - ...
 - (d) rules for the convening and conducting of meetings of representatives, including the quorum required for, and the minutes to be kept of, those meetings;
 - (e) the manner in which decisions are to be made ...’

[16] In terms of section 213 of the LRA, ‘collective agreement’ means a written agreement concerning the terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand—

16.1 one or more employers;

16.2 one or more registered employers’ organisations; or

16.3 one or more employers and one or more registered employers’ organisations...’

[17] The Minister may extend a collective agreement entered into in a bargaining council to non-parties in terms of section 32 of the LRA, which reads:

- ‘(1) A bargaining council may ask the Minister in writing to extend a collective agreement concluded in the bargaining council to any non-parties to the collective agreement that are within its registered scope

and are identified in the request, if at a meeting of the bargaining council—

- (a) one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in 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) Subject to subsection (2A), the Minister must extend the collective agreement, as requested, by publishing a notice in the Government Gazette, within 60 days of receiving the request, 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.
- (2A) If the registrar determines that the parties to the bargaining council are sufficiently representative within the registered scope of the bargaining council for the purposes of subsection (5) (a), the Minister must publish the notice contemplated in subsection (2) within 90 days of the request.
- (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);
 - (b) (i) the registrar, in terms of section 49 (4A) (a), has determined that 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; or

- (ii) the registrar, in terms of section 49 (4A) (a), has determined that 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...

The determination

[18] It is common ground that the registrar did not issue a determination for the 2021 MCA. The bus companies submit that the Minister erred by relying on the determination of representativeness issued by the registrar on 13 August 2020 because the certificate had not been issued in terms of section 32(3)(b) of the LRA. They contend that the registrar must issue a determination for each and every MCA before the Minister is requested to extend it to non-parties.

[19] They argue that this must be so because the words 'collective agreement' in section 32(3)(b)(i) and (ii) are preceded by the definite article 'the'. This, so they argue, is a clear indication that there must be a determination for the specific collective agreement. Section 49(4) provides:

'(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.'

- [20] In terms of section 49(2), a bargaining council, having a collective agreement that has been extended by the Minister, must inform the registrar annually of the employees who are covered by the collective agreement, members of the trade unions that are parties to the agreement and who are employed by members of the employers' organisations that are party to the agreement. These figures assist the registrar in making the determination. The reference in section 49(4) to 'this section' is a reference to the entire section 49. The determination in terms of section 49 is sufficient proof of the representativeness of the council for two years following the determination for any purpose, including a decision by the Minister in terms of section 32(3)(b) and 32(5).
- [21] Sections 49(1) and (4) cannot be read as requiring separate determinations for each collective agreement concluded in the two years following the determination.
- [22] The bus companies contend that the Court should construe the words 'is sufficient proof' in section 49(4) as *prima facie* proof. They assert that because the industry scope of the SARPBAC changed during May 2021, the determination is invalid and therefore this constitutes countervailing evidence which displaces the *prima facie* proof. It must be accepted that changes to the representivity figures would change for various reasons. The policy choice by the legislature was to have a determination that is valid for a long period instead of having a new determination every time there is a change. In any event, a drastic change can be picked up when a bargaining council provides its annual figures.
- [23] The bus companies knew or ought to have known about the August 2020 determination; they did nothing to have it set aside or to seek an order compelling the registrar to issue a fresh determination.

- [24] The Minister stated that he had regard to the employee numbers employed within the scope of the collective agreement as at 31 July 2020, as well as the number of employees within the bargaining council as at May 2021. He further states that in May 2021, 17 368 employees fell within the scope of the collective agreement. This information was provided to him as part of the request to extend that collective agreement. The Minister, therefore, went beyond the determination.
- [25] The determination was properly issued on 3 August 2020. It was therefore valid until 31 July 2022. The Minister considered it when he took his decision on 7 June 2021. The Minister properly had regard to that determination. The argument that there must be a determination for every MCA before it is extended is rejected.

Did the SARPBAC comply with its constitution?

- [26] The SARPBAC constitution, contrary to the express provision in section 30(1)(e), does not stipulate how decisions of the SARPBAC are to be taken. It sets out the composition, powers and functions, meetings, quorum at meetings, and the filling of vacancies of the CC. I will assume for present purposes that a proper decision of the CC is a decision of the SARPBAC.
- [27] The SARPBAC contends that the conclusion of a collective agreement in a bargaining council is not the same as the conclusion of a collective agreement by a bargaining council. This is so, the SARPBAC submits, because the bargaining council is not the contracting party or the party performing the legal act of concluding the agreement. It is the individual parties who conclude the agreement. It points to the definition of 'collective agreement' to bolster its point.
- [28] The implication of the argument is that a collective agreement is concluded by the parties, and they therefore do not have to comply with the bargaining council's constitution in doing so.
- [29] In terms of section 28(1)(a) of the LRA, the powers and functions of a bargaining council are, *inter alia*, to conclude and enforce collective

agreements in relation to its registered scope. The SARPBAC constitution states that one of its objects is to negotiate, conclude, monitor and enforce collective agreements.

- [30] Section 23, which deals with the legal effect of collective agreements in the workplace, must be distinguished from sectoral collective agreements. The binding nature of sectoral-level collective agreements is governed by section 31, which states that, subject to section 32 and the constitution of the bargaining council, a collective agreement concluded in a bargaining council binds specific parties, under section 31. In *Association of Mineworkers & Construction Union and Others v Chamber of Mines of SA and Others*³, this Court held that:

‘It is apparent from a reading of sections 32 and 23, within their proper contexts within the LRA, that the two sections contemplate, essentially, two different kinds of collective agreement. In section 23, collective agreements outside bargaining councils are contemplated and provided for, whereas section 32 contemplates collective agreements concluded on a broader [sectoral] basis, and more particularly, within bargaining councils.’⁴

- [31] A bargaining council must act in terms of its constitution. In *University of the North v Franks and Others*⁵, the court held the following with regard to the decision-making powers of a juristic person:

‘A body corporate does not act through mere discussions by its members. It acts through resolutions properly passed. Its decisions are to be sought in its resolutions. If these are clear, cadit quaestio. If there is no resolution, there is no decision.’⁶

- [32] In *SALGA v IMATU*⁷, this Court held that the provisions of the constitution of a bargaining council have to be complied with for a valid and binding collective agreement to be concluded.⁸

³ (JA103/2014) [2016] ZALAC 11; (2016) 37 ILJ 1333 (LAC); [2016] 9 BLLR 872 (LAC) (24 March 2016).

⁴ Ibid at para 43.

⁵ (JA11/01) [2002] ZALAC 13; [2002] 8 BLLR 701 (LAC); (2002) 23 ILJ 1252 (LAC) (29 May 2002).

⁶ Ibid at para 35.

⁷ (JA46/2012) [2014] ZALAC 97 (4 March 2014).

- [33] The SARPBAC contended that the NBF does not have the authority to conclude collective agreements because it is merely a negotiating body. As stated above, in terms of SARPBAC's constitution, the NBF's function is to negotiate and endeavour to conclude a main agreement. 'Main agreement' is defined as a collective agreement concerning substantive conditions of employment, concluded within the NBF. In terms of clause 15 of the SARPBAC's constitution, the NBF shall be the sole forum for negotiating collective agreements on substantive conditions of employment. Wages are part of the substantive conditions of employment.
- [34] Clause 8.5 provides for a maximum of five observers, each without voting rights, to attend NBF meetings. By necessary implication, the members of the NBF do have voting rights.
- [35] I am satisfied that the NBF is the sole forum mandated by the SARPBAC constitution to decide whether to conclude a main agreement, and if so, what its terms are to be. The SARPBAC does not deny that the NBF did not take the decision to conclude the 2021 MCA in its final form. The SARPBAC's case is that the NBF's decision was not required.
- [36] It is common cause that the agreement concluded on 25 March 2021 and signed by the respective parties on 12 April 2021 was not the MCA in its final form. As at 14 April 2021, when that SARPBAC's General Secretary circulated a report in preparation for a CC meeting scheduled for 21-22 April 2021, the terms of the 2021 MCA had not yet been finalised. The final 2021 MCA was signed between the Finance committee meeting and the CC meetings on 22 April 2021. The NBF did not meet on that day. The NBF therefore did not conclude the 2021 MCA. The 2021 MCA was not concluded in the bargaining council.

Did the SARPBAC take a valid decision to request extension?

- [37] The review ground that the SARPBAC did not take a valid decision to request the Minister to extend the collective agreement was raised in the Labour

⁸ Ibid at paras 34 to 38.

Court, but it did not make any finding relating thereto. In terms of section 32(1), a bargaining council may ask the Minister in writing to extend a collective agreement concluded in the bargaining council to non-parties if, at a meeting of the bargaining council, one or more trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council, and one or more registered employers' organisations, whose members employ the majority of the employees by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension.

[38] It is the bargaining council that may ask the Minister for the extension. The bargaining council must vote in favour of the decision to request an extension. There is no evidence that the CC took a proper decision to request the extension. There was no vote. When there is no vote, there is no valid request.

[39] Moreover, clause 10.8 of the constitution provides:

'If the Chairperson so decides, a motion shall be submitted in writing, and shall be read out by him.

10.8.1 No motion shall be considered unless seconded.

10.8.2 Except where otherwise provided for in this Constitution, or decided by the Central Committee, all matters forming the subject matter of motions shall be decided by secret ballot with the votes of the majority being carried.

10.8.3 Both the Chairperson and the Vice-Chairperson shall have full voting rights but no casting vote.'

[40] The Chairperson has discretion to decide whether a motion should be in writing. It is also clear that all matters forming the subject matter of motions shall be decided by secret ballot, with the votes of the majority being carried.

[41] The SARPBAC contends that all participants at the meeting of 22 April 2021 did not feel that a secret ballot was warranted. The motion was only seconded with no subsequent voting. No motion was tabled or passed to forgo a secret

ballot. The SARPBAC admits that no vote took place regarding the decision to request the Minister to extend the collective agreement. It asserts that the motion was seconded and there was no counter motion or objection to the motion. There was therefore no need to vote. This assertion is incorrect because it is at odds with the SARPBAC's constitution. The SARPBAC's purported decision to request the extension was contrary to its constitution, improper and therefore invalid.

Clause 3.2 of the 2021 MCA

[42] Clause 3.2 of the 2021 MCA reads:

'An across-the-board increase of 4% on the base rate of pay will become due from the 1st April 2021 for parties and for non-parties on a date determined by the Minister, until 31 March 2022.'

[43] The bus companies contend that clause 3.2 is ultra vires the LRA because they are already paying their employees more than other employers in the sector. They assert that, because the SARPBAC imposes increases expressed in percentages year after year, they are obliged to maintain the same percentage differential from other employers, year after year. Instead of harmonising wage rates, the SARPBAC actually increases the differential year after year in Rand terms. This, they argue, is utterly subversive of the main purpose of sectoral bargaining. It is inimical to the primary objects of the LRA, which include the promotion of orderly collective bargaining and, in particular, collective bargaining at a sectoral level.

[44] They argue that clause 3.2 of the 2021 MCA entrenches wage competition between employers in the same industry; actively permits some employers to undercut their competitors on wages, thereby creating or perpetuating unfair competition; and promotes disharmony in conditions of service and wage fragmentation in the sector.

[45] In *Free Market Foundation v Minister of Labour and Others*⁹ (*Free Market Foundation*), the court observed that:

‘Finally, sight must not be lost of the fact that once the Minister publishes the extended collective agreement in the Government Gazette, as required in terms of section 32(2) of the LRA, the agreement assumes the character of subordinate legislation. At common law such legislation is reviewable on the grounds enumerated in the English case of *Kruse v Johnson* where Lord Russell famously held:

“If, for instance, [by-laws] were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say: “Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*”.”¹⁰

[46] In *Kem-Lin Fashions CC v Brunton and Another*¹¹, this Court held that the rationale behind the extension of collective agreements is to prevent unfair competition which non-party employers may pose to their competitors who are bound by collective agreements.¹² It further held:

‘If the collective agreement is not extended to non-parties, the non-parties would be able to pay employees at rates which are lower than those which their competitors who are party to collective agreements have to pay to their employees. The result of this would be a serious threat to the business of those who are parties to collective agreements. This would seriously discourage orderly collective bargaining in general and collective bargaining at sectoral level in particular which are part of the primary object of the Act. If this were allowed, there would be little, if any, point in any employer seeking

⁹ (13762/13) [2016] ZAGPPHC 266; (2016) 37 ILJ 1638 (GP); [2016] 3 All SA 99 (GP); 2016 (4) SA 496 (GP); [2016] 8 BLLR 805 (GP) (4 May 2016).

¹⁰ Ibid at para 117.

¹¹ (DA1015/99) [2000] ZALAC 25; [2001] 1 BLLR 25 (LAC); (2001) 22 ILJ 109 (LAC) (16 November 2000).

¹² Ibid at para 20.

to be party to a bargaining council. That would be a threat to one of the pillars of the labour relations system in this country.¹³

- [47] The disparity in the wages that the bus companies have to pay and those that their competitors pay is not caused by the 2021 MCA. It is caused by the historical notch system, which they agreed to under the auspices of the TOWU, which predates the SARPBAC. The SARPBAC points out that its successive MCAs had locked in the consequences of the notch system. This is being done in order to protect workers who are paid more due to the notch system. Clause 31 of the 2021 MCA stipulates that:

‘All substantive terms and conditions of employment and benefits that were applicable at an employer as at the effective date of this agreement and are not regulated by the agreement, shall remain in force and effect. Further, any existing substantive terms and conditions of employment and benefits that were applicable as at the effective date of this agreement at a level higher/better than regulated in this in the agreement, such higher/better terms and conditions of employment and benefits will continue to apply.’

- [48] The SARPBAC submits that across-the-board percentage wage increase extensions similar to the 2021 MCA occurred during the period when Golden Arrow was a member of the Commuter Bus Employers Organization (COBEO) and Sibanye was a member of the South African Bus Employers’ Organization (SABEA), both employers’ organisations that are party to SARPBAC. Both employers’ organisations consistently supported the extensions of the respective SARPBAC MCAs.

- [49] I cannot find anything inherently wrong with clause 3.2. I agree with the SARPBAC that no provision or principle of the LRA is offended by a collective agreement that requires employers to continue to observe prevailing plant-level terms and conditions of employment, coupled with the improvements to those terms and conditions of employment that are set out in a given collective agreement.

¹³ Ibid at para 21.

[50] The 2021 MCA treats all employers even handedly. It also ensures that all employees who are covered by the collective agreement receive adjustments that keep pace with the rising cost of living. Courts should be slow to interfere with collective agreements. These agreements are the products of rigorous engagements between the employer parties and the workers. If courts are to interfere in the collective bargaining process, it may lead to uncertainty and even foster labour unrest.

[51] The bus companies seek to nullify a clause which is beneficial to all employees in the sector because they elected to implement the notch system, which translates into higher wages for their employees. This implies that when an employer chooses to afford its employees conditions of employment that are better than the industry minimum standard, an industry-wide collective agreement must nullify the employer's choice by cancelling out the premium that the employer has chosen to pay. Collective agreements would have to take into account all of the different pre-collective agreement employment conditions implemented by all employers within its scope, and then somehow equalise disparate substantive conditions of employment by means of the collective agreement. This is impractical. In my view, it is not the 2021 MCA that is the source of the disparate treatment, but the bus companies' historical election to opt for the notch system. Clause 3.2 is not *ultra vires* the LRA.

[52] Sections 32(2) and (3) provide that:

(2) Subject to subsection (2A), the Minister must extend the collective agreement, as requested, by publishing a notice in the *Government Gazette*, within 60 days of receiving the request, 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.

(2A) If the registrar determines that the parties to the bargaining council are sufficiently representative within the registered scope of the bargaining council for the purposes of subsection (5)(a), the Minister must publish the notice contemplated in subsection (2) within 90 days of the request.

(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);
- (b) (i) the registrar, in terms of section 49(4A)(a), has determined that 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; or
 - (ii) the registrar, in terms of section 49(4A)(a), has determined that 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;
- (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).
- (3B) The Minister may make regulations on the procedures and criteria that a bargaining council must take into consideration when developing the criteria for the purposes of section 32(3)(dA), (e) and (f).'

[53] The bus companies contend that the Minister's decision to extend a collective agreement in terms of section 32 infringes their right to fair administrative action.¹⁴ The SARPAC asserts that the Minister's decision does not constitute administrative action.

[54] SARPAC submits that in deciding whether to grant a section 32(2) extension, the Minister exercises a mechanical power akin to the power to proclaim legislation or notices. It relied on *Reflect-All 1025 CC and Others v MEC Public Transport, Road and Works, Gauteng Provincial Government and Another*¹⁵, in which the Constitutional Court held:

'The narrow scope of discretion thus conferred by section 10(1) and section 10(3) is analogous to the discretion conferred upon members of the executive branch of government to determine the date on which legislation will come into force. This court has held that the power conferred by legislation upon a member of the executive to determine the date upon which legislation shall come into force is not administrative action because bringing a law into force is neither making it (thus the power is not legislative) nor is it administering the law.'

[55] The SARPAC argue that where a decision-maker has an extremely narrow discretion, and particularly where that discretion pertains to, or is analogous

¹⁴ Section 33 of the Constitution of the Republic of South Africa, 1996 reads:

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
 (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
 (3) National legislation must be enacted to give effect to these rights, and must –
 (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 (c) promote an efficient administration.'

¹⁵ (CCT 110/08) [2009] ZACC 24; 2009 (6) SA 391 (CC) ; 2010 (1) BCLR 61 (CC) (27 August 2009) at para 83.

to, a decision to proclaim legislation. It is not administrative in nature and thus does not constitute administrative action.

- [56] The Minister correctly concedes that his decision was administrative action. In *Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v Ed-U-College (PE) (Section 21) Inc*¹⁶, the Constitutional Court held:

'Policy may be formulated by the executive outside of a legislative framework. For example, the executive may determine a policy on road and rail transportation or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.'

- [57] The Minister's power in terms of section 32(2) is policy-making in the narrow sense, because it is policy-making to comply with a legislative duty. The Minister's decision is administrative action and therefore reviewable. The Minister must extend an agreement if the numerical and jurisdictional facts in section 32 are present. The Minister's power is 'mechanical'¹⁷ or an 'automatic extension'.¹⁸ So, when the majority of the trade union parties and the majority of the employers' organisations represented in a bargaining council request the Minister to extend the agreement to non-parties, the Minister is compelled to extend it.

- [58] The bus companies argue that the absence of a right of minority unions or non-parties to the SARPAC to make representations to the Minister before a collective agreement is extended renders the provisions of section 32 unfair. They accept, as they must, that majoritarianism is a policy choice by the Government and that the principle of majoritarianism is a recurrent theme throughout the LRA. They do not take issue with majoritarianism.

¹⁶ (CCT26/00) [2000] ZACC 23; 2001 (2) SA 1 (CC); 2001 (2) BCLR 118 (CC) (29 November 2000) at para 18. See also *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998) at para 27.

¹⁷ *Free Market Foundation supra* at para 85.

¹⁸ H Cheadle: 'Regulated Flexibility: Revisiting the LRA and the BCEA' (2006) 27 ILJ 663 at 697.

[59] They, however, contend that section 32 must be interpreted in a manner that affords non-parties a right to make representations before the Minister extends an agreement in terms of section 32. They further point out that section 32 must be interpreted in conformity with the Constitution.¹⁹ I agree with the bus companies that all legislation must be interpreted through the prism of the Bill of Rights.²⁰ However, I must be mindful that:

‘There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read “in conformity with the Constitution”. Such an interpretation should not, however, be unduly strained.’²¹

[60] When interpreting legislation, or any document, the court must consider the text, context and purpose. Where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.²²

[61] Section 32 does not expressly or by implication give non-parties a right to make representations before a collective agreement is extended. Section 32 postulates two types of extensions by the Minister. First, the automatic extension of the majoritarian collective agreement in terms of section 32(2). Second, the discretionary extension of a non-majoritarian collective agreement as set out in section 32(5), which reads:

‘(5) Despite subsection (3)(b) and (c), the Minister may extend a collective agreement in terms of subsection (2) if—

(a) the registrar has, in terms of section 49(4A)(b), determined that the parties to the bargaining council are sufficiently representative within the registered scope of the bargaining council;

¹⁹ Section 39(2) of the Constitution provides: ‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

²⁰ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* (CCT1/00) [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC); 2000 (2) SACR 349 (CC) (25 August 2000).

²¹ *Ibid* at para 24.

²² *Cool Ideas 1186 CC v Hubbard and Another* (CCT 99/13) [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (5 June 2014) at para 28.

- (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).'

[62] The section 32(1) and (2) request for an extension is a product of a collective bargaining process. The parties who are members of the bargaining council negotiate the agreement and agree to request the Minister to extend it. This is done without consulting non-parties or affording them an opportunity to make representations. The Minister has a very limited discretion. Absent such a request, the Minister may not extend it to non-parties.

[63] The section 32(5) extension is not because of a request by the majority. It is entirely based on the Minister's discretion. The Minister must be satisfied that if the collective agreement by parties who are sufficiently represented in a bargaining council is not extended to non-parties, it would undermine collective bargaining at a sectoral level. In this case, the Minister is obliged to give non-parties an opportunity to be heard.

[64] This difference is in deference to majoritarianism and the central place which collective bargaining holds in our labour relations. The Legislature has deliberately decided to deprive non-parties of the right to be heard in the instance of a majoritarian collective agreement. It has imposed a notice and comment procedure in respect of section 32(5) extension. I agree with the SARPBAC that to hold that section 32(2) must nonetheless be read to include a notice and comment procedure does violence to the plain meaning of the section.

[65] In *Association of Mineworkers and Construction Union (AMCU) and Others v Royal Bafokeng Platinum Limited and Others*²³ (*Royal Bafokeng*), this Court had to determine whether non-parties had the right to be heard when a collective agreement is extended to non-parties in terms of section 23(1)(d) of the LRA. This Court held:

‘Section 23(1)(d) does not require expressly or implicitly that a minority union should be consulted before a collective agreement is extended. The representative union would generally be in a better position to consult with the employer, because it will have all the necessary information at its disposal and it represents all the employees at the workplace. To grant a minority union the right to be heard in circumstances where the representative union has by means of collective bargaining acquired the right to be the only bargaining agent would be subversive to collective bargaining and the principle of majoritarianism which underpins section 23(1)(d).’²⁴

[66] Section 32(2) extensions are not done in total disregard of the rights of non-parties. The Legislature, being mindful of the hardships that may, generally, be visited upon non-parties by such extensions, made provision for applications for exemptions. The collective agreement must embody mechanisms for non-members to apply to an independent panel for exemptions. They must give reasons why the collective agreement should not be extended to them. The independent panel would then assess whether the reasons provided are sufficient to warrant exemption. This is an important safeguard, and it also gives the non-parties an opportunity to be heard. The panel must be independent so that no aspersions of bias and partisanship can be thrown at the panel, which would be the case if the panel were constituted by members of the majority parties.

[67] Giving non-parties the opportunity to be heard by the Minister would cast the Minister in an adjudicative role. The Minister would have to determine whether each representation made has merit. Representations which, on face value, might seem to address issues of process, might address substantive issues.

²³ (JA23/2017) [2018] ZALAC 27; [2018] 11 BLLR 1075 (LAC); (2018) 39 ILJ 2205 (LAC) (26 June 2018).

²⁴ Ibid at para 68.

The majority parties might end up wondering why they had to negotiate collective agreements, only for them to be questioned and maybe upset by the Minister. The section was designed to give the Minister very limited power so that collective bargaining gains are respected.

- [68] The non-parties have a further and important safeguard: the ability to judicially review the bargaining council's decision to request an extension.²⁵ In view, section 32(2) does not envisage giving non-parties the right to be heard. It justifiably deprives them of the right to be heard. My conclusion that non-parties need not be consulted or given a hearing before a collective agreement is extended in terms of section 32(2) activates the bus companies' constitutionality point.

Is section 32 unconstitutional?

- [69] Section 32(2) limits non-parties' right to administrative action that is lawful, reasonable and procedurally fair. Section 36 of the Constitution provides:

- '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

Importance of the right

²⁵ *Free Market Foundation* supra para 81.

[70] We come from a past where administrative action was used as part of the oppressive structure of government. Decisions were generally taken about people, especially black persons, without giving them an opportunity to be heard. Administrative decisions were taken in a high-handed and opaque manner, with utter disregard of the rights of the affected persons. It is *inter alia* for these reasons that a person's or the public's right to be heard should be expressly, or by necessary implication, excluded.

[71] The right to administrative action that is lawful, reasonable and procedurally fair is a very important right. When decisions are taken after the affected parties are given an opportunity to comment and make representations, it dispels suspicions of bias, underhandedness, unfairness, arrogance of the majority parties and ulterior motive. Decisions made after representations have been made promote transparency, trust in the process, inclusivity, even-handedness and that the decision was not influenced by ulterior motive. It also fosters labour peace.

Purpose and importance of the limitation

[72] The LRA gives expression to the rights in section 23 of the Constitution. Its objects are, *inter alia*, to promote orderly collective bargaining, and specifically collective bargaining at sectoral level. Section 32(2) promotes collective bargaining at sectoral level. Majoritarianism is the vehicle through which the Legislature chose to ensure that collective bargaining at sectoral level is implemented and respected.

[73] Section 32(2) strengthens the voice of the majority by limiting the bases on which the minority non-parties can challenge and possibly stymie the extension of a collective agreement. If a collective agreement is entered into by the majority parties, secure in the knowledge that there would be no interference by the Minister or minority non-parties when the Minister is requested to extend it, it creates certainty. It also promotes and respects the principle of non-interference in freely concluded collective agreements. This Court has determined that:

'The extension of a collective agreement without affording a minority union or non-union members a hearing... facilitates orderly collective bargaining; it avoids the multiplicity of consulting parties and it was this peace and order in the workplace.'²⁶

- [74] In the context of section 23(1)(d) extensions the Constitutional Court held, in *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others*²⁷:

'It may be posited that if there is to be orderly and productive collective bargaining, some form of majority rule in the workplace has to apply. What Section 23(1)(d) does is to give enhanced power within a workplace, as defined, to a majority union: and it does so for powerful reasons that are functional to enhancing employees' bargaining power through a single representative bargaining agent.'²⁸

- [75] Although the Constitutional Court was referring to section 23(1)(d) it is also applicable to section 32(2) extensions.

The nature and extent of the limitation

- [76] Section 33 of the Constitution and Promotion of Administrative Justice Act²⁹ are fact specific. The facts of a particular case will determine if and to what extent a party may be heard. They do not require that affected parties must be heard before a decision is taken. In *Royal Bafokeng*, this Court held that the majority parties have a duty to represent the interests of the minority parties. The minorities who are not members of the bargaining council are represented by the majority. The minority parties are not altogether deprived of their right individually to make representations because they may join the bargaining council and participate in its processes; they can challenge the

²⁶ *Royal Bafokeng* supra at para 69.

²⁷ (CCT87/16) [2017] ZACC 3; (2017) 38 ILJ 831 (CC); 2017 (3) SA 242 (CC); 2017 (6) BCLR 700 (CC); [2017] 7 BLLR 641 (CC) (21 February 2017).

²⁸ Ibid at para 44.

²⁹ Act 3 of 2000.

extension decision in a court of law; and importantly, they may apply for an exemption; appeal a refusal to grant an exemption; and review the refusal to uphold an appeal. In *Free Market Foundation*, it was held that the exemption procedure is a decisive consideration in the section 36 limitation analysis.³⁰

Rational relationship between the limitation and its purpose

[77] In *Royal Bafokeng*, this Court said the following about section 23(1)(d) extensions:

‘The extension of a collective agreement without affording a minority union or non-union members a hearing is rationally related to the achievement of the purpose of the section 23(1)(d) process. It facilitates orderly collective bargaining; it avoids the multiplicity of consulting parties, and it fosters peace and order in the workplace.’³¹

[78] Reducing the fora in which parties can make representations about collective agreements plainly incentivises greater participation in bargaining councils. The limitation therefore promotes greater participation in bargaining councils. The Minister’s role and discretion are narrow in that, he must extend a collective agreement on the request of the majority parties, after being satisfied that the jurisdictional facts for an extension are present. As stated above, the Minister’s discretion would be expanded if she must consider representations and adjudicate the merits and demerits of the representations. This was aptly explained in *Free Market Foundation*:

‘28. The requirement in section 32(2) of the LRA that the Minister “must” extend the agreement once the jurisdictional facts are established, is predicated upon the notion that collective bargaining at sectoral level will be undermined if bargaining agents in a majoritarian setting were uncertain at the outset of negotiations about whether or not their agreements would be extended in terms of section 32(2) of the LRA. An advantage from the employer perspective is that an extended sectoral agreement will become binding on trade union members within the workplace of a particular employer who are not party to the

³⁰ *Free Market Foundation* supra at para 115.

³¹ *Royal Bafokeng* supra at para 69.

council or the collective agreement with the result often that they will be prohibited from taking industrial action over matters dealt with in the agreement by virtue of peace clauses in the agreement and the provisions of section 65(1)(a) of the LRA. The compulsory extension of a majority collective agreement can ensure orderly industrial relations and be an effective progenitor of industrial peace.

29. Parliament when enacting the LRA therefore deliberately refrained from conferring a wide discretion upon the Minister to extend collective agreements to non-parties in those cases where the numerical thresholds of majoritarianism are achieved. Self-regulation on the basis of majoritarianism and voluntarism is a cornerstone of the policy of industrial pluralism. Parliament's choice to make the exemption process the main safety valve to protect the interests of non-parties, the Minister believes, is legitimate and justifiable. Parliament recognised that a broad Ministerial discretion over extensions would create uncertainty and weaken the effectiveness of collective bargaining. Reiterating the FFCC's line of thinking, the Minister affirmed her view that orderly bargaining would be eroded if the parties know that notwithstanding their endeavours and hard fought agreements the Minister had an open-ended discretion to refuse to extend the collective agreements or to alter their terms. Parties would have less incentive to participate in collective bargaining at sectoral level and would instead be incentivised to redirect their efforts to lobbying in an effort to persuade the Minister. The limits on the Minister's discretion are ameliorated by the provision of an effective remedy to aggrieved non-parties in the form of an independent and impartial exemption process.'

Less restrictive means

- [79] Section 36(1)(e) of the Constitution does not postulate an unattainable norm of perfection when it refers to less restrictive means. The standard is reasonableness.³² The bus companies submit that a notice and comment procedure constitutes a less restrictive measure. I disagree. It would

³² *S v Mamabolo* (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC); 2001 (1) SACR 686 (CC) (11 April 2001) at para 49.

disincentivise participation in bargaining councils – contrary to the stated purpose of the LRA to promote sectoral collective bargaining; it would weaken the voice of the majority by allowing the minority to stymie decisions through representations to the Minister.

[80] Section 32(2) extensions are strictly circumscribed – they apply to non-parties for the duration of the agreement and in respect of the issues it covers. The limited power of the Minister, the right to apply for exemptions; the right to review decisions of the bargaining council and the Minister are all indications that, in restricting the right to be heard, the Legislature embarked on a balancing act between the rights of the majority and the deprivation of the minorities' right to be heard. This is reasonable and justified.

[81] In my view, section 32(2) reflects a deliberate choice in favour of majoritarianism to promote orderly collective bargaining and to reduce ministerial discretion. It also promotes workplace democracy. Depriving the minority parties of the right to be heard in the context of section 32(2) extensions avoids giving minorities a right to veto a collective agreement negotiated by the majority parties.

Conclusion

[82] In my judgment, section 32(2) extensions are not unconstitutional. The appeal and the cross-appeal ought to be dismissed.

[83] I therefore make the following order:

Order

1. The appeal and cross-appeal are dismissed.
2. There is no order as to costs.

CJ Musi AJA

Savage JA et Waglay AJA concur.

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