Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

JUDGMENT

Case No: JR 75/15

In the matter between:

NATIONAL EMPLOYERS' ASSOCIATION OF SOUTH AFRICA ('NEASA')	**First Applicant**
PLASTIC CONVERTORS ASSOCIATION OF SOUTH AFRICA ('PCASA')	**Second Applicant**
BORDER INDUSTRIAL EMPLOYERS' ASSOCIATION ('BIEA')	**Third Applicant**
H G MOLENAAR & CO (PTY) LTD	**Fourth Applicant**
ADMIN CRANE MAINTENANCE CC	**Fifth Applicant**
PETER BRESLER & ASSOCIATES t/a MAGNADOR	**Sixth Applicant**
HEINZ FISCHER ENGINEERING (PTY) LTD t/a FISCHER PROFILE SA	**Seventh Applicant**

and

MINISTER OF LABOUR	**First Respondent**
METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL ('MEIBC')	**Second Respondent**
PARTIES TO THE MEIBC	**Third to Thirty Fifth Respondents (set out in the Notice of Motion)**

Heard: 18 and 19 October 2016

Delivered: 26 April 2017

Summary: (Review – decision to extend bargaining council agreement to non-parties and to renew and extend previous main agreement – failure to provide objecting parties with a fair opportunity to make representations prior to decision to extend agreement – agreement extended containing additional substantive provisions which had not been part of collective agreement concluded in the council – agreement purportedly extended based on a previous extension of the agreement which had been nullified instead of renewing the consolidated agreement as it had existed before the extension was nullified – remedy – circumstances justifying setting aside of invalid renewal and extension of agreement)

JUDGMENT

LAGRANGE J

Introduction

[1] This application is brought by various employer organisations and a few individual employers engaged in the metal and engineering industry falling within the scope of the Metal and Engineering Industrial Bargaining Council ('MEIBC' or 'the Council'). The application seeks to set aside the decision by the Minister of Labour ('the Minister') to extend the collective agreement concluded between

certain parties to the bargaining Council to non-parties under Government Notice R1051 (GG 38366 dated 24 December 2014) under section 32 (2) read with section 32 (5) of the Labour Relations Act 66 of 1995 ('the LRA'). Further, it wishes to set aside the Minister's renewal of the period of operation of the previous main agreement until 30 June 2017 under government notice number R1050 (GG 38366 dated 24 December 2014) under section 32 (6) (a)(ii) of the LRA.

[2] A few days before the application was heard on 18 October 2016, the applicants applied to amend the relief sought to include an additional alternative prayer that, the decision to request the Minister to extend the agreement should only be reviewed and set aside to the extent necessary.

[3] The applicants also ask the court to strike down section 32(5) of the LRA as unconstitutional, in so far as it might be necessary. That provision permits the Minister to extend an agreement where parties to the bargaining council in which a collective agreement is reached are not representative enough to require the Minister to extend the agreement under section 32(3), but are nonetheless 'sufficiently representative' within the scope of the council and that the Minister is satisfied that, a failure to extend it may undermine collective bargaining in the sector.

[4] The application was heard jointly with a separate application under case number JR 1457/15 to set aside the decision of the Minister to renew a so-called 2015 Administrative Agreement.

[5] There are a number of similarities in the issues raised in both applications because the grounds of review overlap considerably even though they relate to distinct events and different agreements. Consequently, certain common legal questions arise in both applications they are dealt with in separate judgements as the applications were simply heard together for the sake of convenience and were not consolidated.

Outline of the principal issues

[6] The applicants contend that the Minister's decision to extend the main agreement was preceded by a process in the Council leading up to the request to the Minister to extend and renew the main agreement, which was fundamentally flawed. The applicants also contend that the Minister's decisions were, in any event, taken in breach of their constitutional right to procedurally fair administrative action and more particularly stand to be set aside because they are so flawed that they were in breach of sections 6 (2) (f) (i), (6) (f) (ii) and (6 (2) (i) of the Promotion of Administrative Justice Act ('PAJA'). In the alternative, they also contend that the Minister's decisions stand to be set aside for want of legality. In the judgment I have dealt with those grounds which I consider the weightiest of those raised by the applicants which I consider most likely to be determinative of the review application in one way or another.

Chronology of events

[7] I do not intend to detail every step of the process leading to the Minister's decisions, but merely to outline the most salient aspects of the chronology for the sake of contextualisation. Where necessary, some of the events will be discussed in more detail in the course of analysing the grounds of review.

[8] The previous main agreement expired on 30 June 2014. With a view to concluding a new main agreement, the parties had entered negotiations but these deadlocked in May 2014 and strike action and lockouts ensued when agreement could not be reached.

[9] A new substantive agreement was concluded between the trade union parties to the Council and 22 employer organisations affiliated to the Steel Engineering Industries Federation of South Africa ('Seifsa'). The applicants (Neasa, PCASA and BCIEA) amongst other employer organisations were not a party to this agreement. Neasa and Seifsa affiliats represent 3044 and 1989 employers respectively operating under the scope of the council. Although Neasa

numerically represents more employers than members of Seifsa affiliates, its membership is made up primarily of employers with smaller businesses employing fewer workers than Seifsa affiliates. Thus, the members of Seifsa affiliates which were party to the agreement employ approximately 140,000 employees, whereas Neasa members employ over 41,000 employees falling under the main agreement.

[10] Similarly, the Plastics Convertors Association of South Africa ('PCASA') has 433 members in the plastics sector as opposed to 12 who are members of Seifsa affiliates. PCASA's members employed approximately 33,000 employees in the plastics sector as opposed to approximately 1,500 workers employed by members of Seifsa affiliates in the same sector.

[11] The applicants believe that the wage settlement concluded, which provided for 10% increases to lower paid categories of workers, would never have been achieved if it had not been for the violence which accompanied the protected strike and that the increases were not realistically affordable.

[12] At a management committee ('Manco') meeting on 17 September 2014 a resolution was passed to request the Minister to extend an amended main agreement to non-members incorporating the changes brought about by the settlement agreement. The applicants dispute that the resolution complied with the requirement of section 32 (1) (b) of the LRA because the employer organisations which voted in favour of the extension did not represent employers employing the majority of employees employed by employer organisations which are party to the bargaining Council.

[13] At approximately 13h00 on 25 September 2014, the Council submitted a formal request to the Minister for the extension of the Consolidated Main Agreement to non-parties ("the 25 September 2014 submission"). The 25 September 2014 submission included *inter alia*:

13.1 Signed LRA forms 3.5 and 3.6 which have the same content as the unsigned LRA forms 3.5 and 3.6 enclosed with the Council's signed submission to the Department dated 4 December 2014; and

13.2 A Schedule of the changes to the Main Agreement, adopted by the MANCO resolution of 17 September 2014, which arise from the terms of the Settlement Agreement.

[14] On the same day at about 13h40, Justice Rabkin-Naicker heard an urgent application brought by Neasa. Rabkin-Naicker J granted an interim order which interdicted and restrained the Council from requesting the Minister to extend the Consolidated Main Agreement to non-parties based on the Manco decision taken on 17 September 2014 and/or the ballot vote concluded on 24 September 2014. Effectively, the interim interdict handed down by Justice Rabkin-Naicker at about 16h00 on that same day interdicted conduct that had taken place earlier that day.

[15] On 2 October 2014, the President of the Council ("the President") gave notice of a Special Manco Meeting to be held on 8 October 2014. A few days later on 6 October 2014, the council secretary, Mr T L Mthiyane ('Mthiyane') confirmed in a letter to Seifsa that the President had extended an invitation in the following somewhat ambiguous terms:

"As a party to the council and a signatory to the Main agreement the SIEFSA Associations are invited by the President of the MEIBC to attend a Special MANCO meeting meeting scheduled for 8 October 2014

SEIFSA on behalf of:

1 ..."

The letter then listed 19 Seifsa-affiliated employer organisations, and continued:

"**The purpose of the meeting**

The special MANCO meeting is called in order for registered trade unions and the registered employers' organisation is that are parties to the MEIBC,

to ratify and/or to vote afresh in terms of section 32 (1) of the Labour Relations Act, 66 of 1996 [sic] in respect of the extension of the following collective agreement concluded in the MEIBC to all employers and employees are nonparties to such collective agreement and are within the MEIBC's registered scope:

The Main Agreement 2014/2017 incorporating the provisions of the MEIBC Settlement Agreement: 1 July 2014 to 30 June 2017 and its annexures A, B, C, D and E dated 29 July 2014;

Please find a document attached, setting out the details of the issues to be dealt with at the Special MANCO Meeting.

It is the view of the MEIBC that the registered trade unions and the registered employers' organisations already voted and resolved to request the Minister to extend the collective agreement to nonparties within the MEIBC's registered scope. However for the avoidance of any doubt on the part of any person, the purpose of the meeting is to:

1. Ratify the decision; and/or

2. Vote thereupon afresh; and/or

3. Resolve to issue a ballot in this regard. ...."

(emphasis added)

Ordinarily, only the Seifsa affiliates CEFA, KZNEIA, LEIA and SAEFA sat on Manco, and no other Seifsa affiliates had representatives sitting on Manco, nor did Seifsa itself.

[16] The document attached to the notice of the special Manco meeting read:

"WHEREAS the following collective agreement has been concluded in the MEIBC:

The Main Agreement 2014/2017 incorporating the provisions of the MEIBC Settlement Agreement: 1 July 2014 to 30 June 2017 and its annexures A, B, C, D and E dated 29 July 2014;

("the Collective Agreement");

AND WHEREAS the powers and functions of the MEIBC in relation to its registered scope include concluding and enforcing collective agreements and preventing and resolving labour disputes;

AND WHEREAS numerous employers within the registered scope of the MEIBC which are not parties to the Collective Agreement, provide their employees with terms and conditions of employment that significantly less favourable than those provided for in the Collective Agreement;

AND WHEREAS the MEIBC considers that it is in the interests of labour peace, stability, equity and the avoidance of labour disputes, that employer and employee parties within its registered scope who are not parties to the Collective Agreement, to be bound by the Collective Agreement;

AND WHEREAS section 32(1) of the Labour Relations Act 66 of 1995 provides for the MEIBC to request the Minister of Labour to extend the Collective Agreement to non-parties to the Collective Agreement that are within its registered scope and are identified in the request, if at a meeting of the MEIBC –

One or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the MEIBC, vote in favour of the extension; and

One or more registered employers' organisations, whose members employ the majority of employees employed by the members of the employers' organisations that are party to the MEIBC, vote in favour of the extension.

NOW THEREFORE the registered trade unions and the registered employers' organisations that are parties to the MEIBC, are invited to:

Vote in terms of section 32(1) of the Labour Relations Act 66 of 199[5] ("the LRA") in respect of the extension of the Collective Agreement to all employers and employees who are within the MEIBC's registered scope and are non-parties to the Collective Agreement; and

To ratify the decision take[n] at the MANCO Meeting of 17 September 2014 to adopt resolution one, which reads as follows:

RESOLUTION ONE

To ask the Minister in writing in terms of section 32 of the Labour Relations Act 66 of 1995, for the extension to non-parties that are within the registered scope of the MEIBC of an amended Collective Main Agreement, incorporating the provisions of the MEIBC Settlement Agreement: 1 July 2014 to 30 June 2017 and its annexures A, B, C, D and E dated 29 July 2014."; and

3[1]. To adopt a resolution instructing the General Secretary of the MEIBC to conduct a ballot of the Council representatives and employer organisations who are members of the MEIBC on the extension of the Collective Agreement to all employers and employees who are within the MEIBC's registered scope and are non-parties to the Collective Agreement."

[17] On 7 October, the Minister declined to consider the request for extension because a final decision on the urgent application was pending.

[18] On 8 October 2014, and before the return date of the urgent application, the council held the Special Manco Meeting and made a second attempt to obtain another resolution requesting the extension of the agreement to non-parties.

[19] This led Neasa to launch another application on 24 October 2014, which was enrolled for hearing on 4 November 2014 ('the second urgent application'). Neasa sought to restrain the Council from requesting the Minister to extend the Consolidated Main Agreement to non-parties based on the Manco decision taken on 8 October 2014 and, or alternatively, the ballot vote of the Council's representatives concluded on 14 October 2014. This application was subsequently consolidated with the first application and both matters served before Justice Rabkin-Naicker on 14 November 2014 in which Neasa sought final interdictory relief and, or alternatively, an order reviewing and setting aside the Council's extension request decision(s). The Minister was cited as a party in both applications.

[1] [Sic] this number appears to have been an anomaly

[20] Before the application could be heard, the council withdrew its previous request for an extension of 25 September 2014, which the Minister had also refused to consider pending the outcome of the first interdict. In a letter from the Council's attorneys to the Minister dated 30 October 2014, titled "Withdrawal of section 32 application made on 25 September 2014" the council advised that it withdrew the request made on that date. The withdrawal letter did not state that the withdrawal was contingent on the outcome of any court proceedings. It was also alleged by the applicants that counsel for the council had confirmed in a meeting in judge's chambers that the council would not be resubmitting an extension request based on the resolution of 17 September. This account is only disputed by way of a bald denial by in the council's answering affidavit. Consequently, Neasa no longer sought confirmation of the interim order issued on 25 September 2014, which was due to be heard together with the new interim application on 14 November 2014.

[21] An attendance register of the delegates due to attend the "Special MANCO Meeting" was prepared by the council and signed by the persons attending. Ten employer representatives signed as Neasa representatives and nine signed as representatives of four SEIFSA-affiliated employers' organisations (CEFA, KZNEIA, SAEFA and LEIA) having employer representative seats on Manco. These included Mr K Nyatsumba, who signed as a representative of SAEFA (and of no other organisation). Neasa complained that three of the purported representatives of SAEFA and the purported representative of the LEIA present at the meeting who are employees of SEIFSA were not "persons engaged or employed in the Industry or full-time paid officials of the parties", within the meaning of clause 5(3) of the council's constitution and were therefore not eligible – without two-thirds support from a general meeting of the council, which had not been obtained – to attend as representatives. These persons included Mr Lucio Trentini (LEIA) and Mr Nyatsumba (SAEFA). Clause 5 (3) provides:

"Representatives and alternatives shall be appointed by the employers' organisation is and the trade unions in the manner prescribed in their respective constitutions, shall hold office for a period of one year and thereafter until their successors are appointed, and shall be eligible for re-election. There shall be persons engaged or employed in the Industry or full-time paid officials of the parties: Notwithstanding the aforesaid a person who is not engaged or employed in the industry or a full time paid official of a party may be admitted as a representative or alternate provided the council so agrees that the annual general meeting by a majority vote of not less than 2/3 to his appointment. Any representative or alternate who ceases to be eligible in terms hereof shall automatically forfeit his seat as a representative or alternate as the case may be."

[22] Further, clause 5 (5) provides that if a seat on the council becomes vacant because of the withdrawal, resignation or disqualification or death of a representative or alternate, the vacancy must be filled by the party which appointed that representative and the replacement will hold office for the unexpired period of the predecessor's term of office. The appointment of representatives to Manco is dealt with in terms of clause 7 of the Constitution which provides, inter-alia:

"(1) The Council shall appoint a Management Committee consisting of the President and Vice President and an equal number of members from each of the employers and employees party representatives. It is specifically required the composition of the Management Committee should reflect the national character of the Council.

...

(3) If a seat becomes vacant on the Management Committee, the remaining members shall co-opt from the employer or the employee representatives on the Council, as the case may be, a person to fill the vacancy. Any person so co-opted shall hold office for the unexpired period of office of the predecessor, or for such period for which he was appointed to the Council, whichever is the shorter."

In addition, Clause 7 (6) provides that "the entire functions, powers and duties of the Council" are "delegated to the management committee between general meetings of the Council'

[23] The meeting was acrimonious. The council averred that at the Special Manco Meeting, Neasa's and Solidarity's delegates attempted to disrupt the meeting in the following respects:

23.1 At the beginning of the meeting, Neasa made it clear that they were not going to allow anyone affiliated to SEIFSA to speak and took up all the seating positions with microphones.

23.2 Neasa repeatedly interrupted the President throughout the meeting.

23.3 Solidarity and Neasa at the outset of the meeting both said that they were not going to allow the meeting to continue.

23.4 Neasa and Solidarity both accused the President of being incompetent.

23.5 Neasa requested a caucus which was denied by the President. Neasa then continually interrupted the meeting by asking for a caucus while the President was going through the resolutions.

23.6 Neasa and Solidarity both questioned the intelligence of the President at various points in the meeting. Neasa questioned the intelligence of LEIA and SAEFA representatives.

[24] Be that as it may, the chairperson called for a vote on the extension resolution by show of hands 'of those eligible to vote'. This prompted a spat over whether or not Neasa was entitled to vote in view of the chairperson having earlier invoked clause 8(12) of the constitution to prevent its representatives from speaking. That provision prevents a party which is not a party to an agreement to vote or speak at any meeting connected with or arising from that agreement without the permission of the chairperson. The provision is subject to a proviso which states:

"... where by reason of this provision any representative or alternate is disenfranchised, the value of votes recorded for or against any proposition shall be reduced to a common denominator in order to ascertain the result of the voting."

[25] In the vote which followed, 7 of the 9 employer party representatives voted in favour of the resolution, all of whom were representatives of either LEIA, SAEFA or KZNEIA. CEFA's representatives did not vote in favour of the resolution. Mr Nyatsumba , who was recorded on the attendance register as a representative of SAEFA, made a claim to speak with a broader mandate, viz:

> "Chair on the 29th of July I had the privilege of signing this settlement agreement on behalf of 22 associations federated to SEIFSA with the exception of one, the [Cape] Engineering and Founders Association. I stand to speak on behalf of the SA Engineers and Founders Association with whose mandate I endorse the resolution <u>but I also have the mandate to represent the 19 other associations that are on the list</u> … (rest inaudible)… (interrupted)."

(emphasis added)

[26] Neasa and Solidarity representatives objected to this purported proxy vote tendered by Nyatsumba on the basis that the Council Constitution did not provide for proxy votes. They also challenged him to provide proof of the mandates, which were not tabled at the meeting.

[27] The chairperson made no express ruling on whether the alleged proxy mandates were accepted and would be included in the voting tally of the employer representatives. Despite this lack of clarity, the chairperson then proceeded to invite the union representatives to vote on the resolution. It was only when the answering affidavit of was filed that evidence of these mandates in the form of resolutions from the various Seifsa affiliates were tendered. The council contends that these mandates recorded that the Seifsa affiliates supported the extension of the Consolidated Main Agreement to all employers and employees within the Council's registered scope that are non-parties to such agreement, and accordingly authorised SEIFSA to vote on their behalf in favour of the extension. The applicants dispute the authenticity and validity of the mandates,

which did not purport to authorise Nyatsumba to vote on behalf of those employer organisations, but purportedly mandated Seifsa.

[28] After the unions had voted, the chairperson declared that the resolution had been voted "by the majority" and then proceeded to the next resolution on the agenda. Although the invitation of 6 October appeared to invite other Seifsa affiliates either in their own right or represented by Seifsa to attend the meeting, other employer organisations, which had been parties to the Council since 8 October 2014, but did not have employer representative seats on the council, were however not invited, namely PCASA, BIEA; and the South African United Employers' Organisation ("SAUEO"). The applicants argue that the position of these three organisations was the same as the 19 employer organisations affiliated to Seifsa, which also are members of the council but were not entitled to employer representative seats on council structures.

[29] According to the Council, the outcome of the vote on 8 October on the extension of the agreement was as follows:

Unions who voted in favour of the extension	**REPRESENT**
Chemical, Energy, Paper, Printing, Wood & Allied Workers Union (CEPPWAWU)	1525
Metal & Electrical Workers Union of S.A. (MEWUSA)	5614
National Union of Metalworkers of S.A. (NUMSA)	143 337
S.A. Equity Wokers Association	1922
UASA	7395
Unions who voted against the extension	**REPRESENT**
Solidarity	12719

Employers Organisations on MANCO who voted in favour of the extension	**REPRESENT**
Light Engineering Industries Association of SA	18731
Kwa Zulu Natal Engineering Industries Association	17052

South African Engineers and Founders' Association	35878
Employers Organisations who gave SEIFSA authority to vote in favour of the extension on their behalf	**REPRESENT**
Association of Electric Cable Manufacturers of South Africa	2995
Association of Metal Service Centres of South Africa	4672
Constructional Engineering Association (South Africa)	33212
Electrical Engineering and Allied Industries Association	9245
Electrical Manufacturers' Association of South Africa (EMASA)	2080
Gate and Fence Association	395
Hand Tool Manufacturer's Association	723
Lift Engineering Association of South Africa	964
Non-Ferrous Metal Industries Association of South Africa	1368
Eastern Cape Engineering and Allied Industries Association (ECEAIA)	3594
Pressure Equipment Manufacturer's Association (PEMA)	496
Refrigeration and Air-Conditioning Manufacturers' and Suppliers' Association (RAMSA)	658
SA Electro-Plating Industries Association	287
South African Fasteners Manufacturers' Association (SAFMA)	937
South Africa Refrigeration and Air-Conditioning Contractors' Association (SARACCA)	1291
South African Post Tensioning Association (SAPTA)	128
South African Pump Manufacturers' Association (SAPMA)	1466
SA Reinforced Concrete Engineers' Association (SARCEA)	366
SA Valve and Actuators Manufacturers' Association (SAVAMA)	553

[30] The council maintains that the vote met the requirements of section 32(1)(a) and (b) of the LRA, because:

30.1 The total number of employees who are members of the trade unions which are parties to the Council and which voted in favour of the extension was 159,793.

30.2 The total number of the employees who are members of the trade unions which are parties to the Council was 172,512.

30.3 The total number of employees employed by employers that are members of the employers' organisations which are parties to the Council and voted in favour of the extension was 137,091.

30.4 The total number of employees employed by members of employer organisations that are parties to the Council is 233,027.

If the council's method at arriving at this voting tally is correct, then there would be no question that the requirements of s 32(1)(a) and (b) had been met.

[31] However a major bone of contention between the applicants and the council is which figures were legitimately considered in determining whether s 32(1) thresholds were met. The applicants maintain that the only Seifsa affiliates entitled to vote at the meeting were those having seats on Manco, namely CEFA, KZNEIA, SAEFA and LEIA. Because CEFA representatives did not vote, only the votes of KZNEIA, SAEFA and LEIA should have been reckoned in deciding if the employers' organisations voting in favour of the extension employed a majority of employees employed by employer parties to the council. The applicants contend that if that was done, irrespective of which figures are considered, this threshold was not attained. It is not important to decide the correct employment figures for the purposes of this judgment, but it is important to note that the applicants wished to contest the basis on which it could be argued that the threshold was attained, and that was one of the important reasons for wanting sight of the final request made to the Minister and the documents used to support the request.

[32] Following the Special Manco meeting, the Council sent out ballot forms[2] to conduct a vote by parties to the Council in relation to the extension in accordance with clause 10(3) of the Council's

[2] pp. 1406 - 1409

Constitution. According to the Council the outcome of the ballot was as follows:

NAME OF ORGANISATION	YES VOTES	NO VOTES	ABSTAINED
NEASA	0	22	0
SEIFSA	30	1	1
NUMSA	10	0	0
SAEWA	4	0	0
MEWUSA	1	0	0
Solidarity	1	0	0
UASA	2	0	0
CEPPWAWU	1	0	0
TOTAL	**49**	**23**	**1**

[33] Clause 10 (3) of the Council's Constitution provides that:

> "Any proposals received relating to agreements shall be dealt with in terms of the provisions of item (2) of Annexure E of this Constitution. When negotiations have clarified the issues upon which amendment of any existing agreement or the introduction of a new agreement is desired, the Management Committee shall arrange that a vote of all representatives of the Council be taken by post and/or facsimile upon the said proposals, placing the question or questions upon the ballot paper in such form as it may determine, together with a general question as to whether the proposals as a whole are accepted, provided that the total number of votes returned by post and/or faxed by the return date set by the Council, shall determine the outcome of the ballot provided that if the date of the next Annual General Meeting is within 3 months of the conclusion of such negotiations the proposal shall be voted upon at the said Annual General Meeting and not by post/fax. Provided further that a vote may also be taken at a Special General Meeting where the Management Committee so decides."

(emphasis added)

[34] Judgement in the interim application was handed down on 1 December 2014. The upshot of that application was that the court dismissed the urgent application to interdict the Council requesting the extension of the agreement. In her judgement, Rabkin-Naicker J held that, the 8 October resolution complied with section 32 (1). On the same day, Neasa asked the council to provide it with any copy of any new request made by the Council to the Minister to extend the agreement.

[35] It must be mentioned that part of Rabkin-Naicker's judgment concerned whether the council was entitled to adopt the settlement agreement as a collective agreement of the council if it was not properly constituted in terms of its constitution. That dispute had been submitted to arbitration and was pending at the time and was still not resolved when this application was heard. However, the applicants do not raise that issue again in this application. The pillars of the court's reasoning in concluding that the 8 October resolution was compliant with s 32(1) can be summarised as follows:

35.1 Notwithstanding the challenge to the validity of council structures, s 206 of the LRA provides that agreements and acts of councils are immunised from being attacked on account of non-compliance with the council's constitution. Moreover, "*...the ILO's Convention on Collective Bargaining, particularly its article 5 ... provides inter alia that collective bargaining should not be hampered by the absence of rules governing agreed procedures between workers and employers' organisations or by the inadequacy or inappropriateness of such rules."* Accordingly, it could be accepted that the settlement agreement was concluded in the bargaining council.[3]

35.2 It is legally permissible for employers' organisations to vote at a meeting of the bargaining council for a referral in terms of s 32(1) even if they do not have representatives with a vote on Manco or similar council structure. A sensible interpretation of

[3] At 736-8, paras [6]-[10].

the Council's Constitution meant that at a meeting of the Council, provided 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, and 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, then the requirements of section 32(1) are met. The court accepted that the meeting on 8 October constituted a meeting of the bargaining Council for the purposes of that section, on the basis that the effect of s 206 meant that any irregularities in meeting would not invalidate it. Further, a pending dispute over interpretation of the council's constitution could not derail the functioning of the council and undermine centralised collective bargaining.[4]

35.3 For all intents and purposes, Seifsa could be considered an employer's organisation entitled to represent its affiliates in the bargaining council for two reasons. Firstly, it is in essence simply a group of employer organisations. Secondly, there is the persuasive authority of the High Court judgment in *Steel & Engineering Industries Federation & others v NUMSA (1)*[5], a decision made under the 1956 Labour Relations Act, which recognised Seifsa's role as a collective bargaining agent of its members with a substantial interest in collective bargaining. The same considerations allowed it to vote by proxy on behalf of its affiliates in the ballot conducted by the council and enjoy the 'protection afforded by s 206'.[6]

[36] On 2 December Neasa wrote to the Minister advising her of its intention to apply for urgent leave to appeal against the judgement and asked her to hold any decision to extend the agreement in terms

[4] At 739-740, paras [14] – [16]

[5] (1992) 13 *ILJ* 1416 (T)

[6] At 741-2, paras [18] – [19].

of section 32 in abeyance pending the outcome of the appeal. On 3 December, Neasa sought confirmation from the Minister if any such request for an extension had been made by the council. Neasa also asked for copies thereof in the event that a request had been submitted in view of the Council's refusal to provide the same. It reiterated its request for an opportunity to make representations before any extension was granted.

[37] On 4 December, Neasa also asked the Department of Labour ('the Department') to confirm if any request for extension had been submitted. Apart from reiterating the request that any decision on an extension be held in abeyance pending the outcome of the appeal, it also asked for an opportunity to make representations and to be heard before any decision to extend the agreement to non-parties was made. Further, on the same date, Neasa asked the council to state whether it had made a new extension request to the Minister. Unbeknownst to Neasa, on the same day the council had submitted a covering letter and additional documentation in support of the supposedly withdrawn request of 25 September 2014.

[38] On 4 December 2014, the Council delivered a signed submission[7] to the Department of Labour ("**the Department**") in support of its "*Application for the Re-enactment and Amendment of the Main Agreement and Extension to non-parties for the years 2014 to 2017*". Enclosed with this submission were the following documents:

38.1 Annexure A: The Rabkin-Naicker judgment dated 1 December 2014;

38.2 Annexure B: The relevant LRA Forms - unsigned;

38.3 Annexure C: The Settlement Agreement;

38.4 Annexure D: The Manco resolutions dated 8 October 2014;

38.5 Annexure E: The Council's Constitution;

[7] pp. 1517 - 1970

38.6 Annexure F: The schedule setting out details of the MEIBC agreement to be extended to non-parties;

38.7 Annexure G: The Interim Agreement entered into between the member employers' organisations, Neasa and SEIFSA, regarding the allocation of seats;

38.8 Annexure H: The extensive Pre-Bargaining Conferences held in all major centres;

38.9 Annexure I: A circular forwarded to non-parties requesting comments and proposals;

38.10 Annexure J: The schedule of demands incorporating the proposals received;

38.11 Annexure K: The General Secretary's report dated 23 July 2014 on the state of negotiations;

38.12 Annexure L: The certificate of non-resolution issued by the General Secretary pursuant to NUMSA's declared dispute;

38.13 Annexure M: Item 8 – The facilitation by two senior CCMA commissioners;

38.14 Annexure N: The Manco resolutions of 15 August 2014;

38.15 Annexure O: The Labour Court judgment regarding the urgent interdict sought by NUMSA against Neasa pursuant to the lock-out of its members;

38.16 Annexure P: The results of the ballot following the Manco meeting of 17 September 2014;

38.17 Annexure R: The Schedules;

38.18 Annexure S: The Department of Labour's representativity figures of the Council;

38.19 Annexure T: The Council's National Exemptions Policy;

38.20 Annexure U: The Constitution of the Independent Exemptions Appeals Board; and

38.21 Annexure V: A summary of the historical development of the extensions of agreements.

[39] On 8 December, Mthiyane advised Neasa that he would not provide it with the documents without a Manco decision authorising him to do so. On 9 December, Neasa responded contending that the secretary was acting in breach of his duties as assigned to him by Manco in that there were previous resolutions of Manco that any documents to be forwarded to the Department had to be scrutinised by a task team before they could be submitted.

[40] On 10 December, despite initially confirming that no request had been received from the Council to extend the agreement, the Department's Director of Collective Bargaining, Mr I Macun ('Macun'), stated in an email to the applicant's attorneys of record:

> "In light of the judgement by Rabkin-Naicker which dismissed the interdictory relief sought by Neasa, we do have a request for the Minister to extend the MEIBC agreement which was the agreement submitted in September 2014. We are, therefore, currently bound by section 32 (2)."

The Department therefore accepted that the referral of 25 September 2014 was still pending, despite the fact that the Council had withdrawn it before the court hearing on 4 November 2014. It appears, it was on 4 November that the Council resubmitted the original application on the basis that it had only been withdrawn pending the outcome of the Labour Court application to prevent it from making the submission.

[41] On 10 December 2014, the Council delivered a submission to the Minister regarding its application for extension of the Consolidated Agreement in terms of section 32 of the LRA. Therein, the Council confirms that the "*application was originally made on 25 September 2014. The application was withdrawn pending the outcome of the Labour Court application brought by the National Employers Association of South Africa ("Neasa") to curtail the Metal and Engineering Industries Bargaining Council ("MEIBC") from submitting this application*". Ultimately however the council did not persist in

contending it was entitled to revive this request and relied on the request submitted following the 8 October Manco meeting.

[42] On 10 December 2014, the Council through its attorneys also delivered a note to the Minister written by its senior counsel to clarify the council's legal position in the light of Justice Rabkin-Naicker's judgment. The import of that note was that the lodging of an application for leave to appeal against the judgement did not stay its operation and that the Minister was obliged to extend the agreement within sixty days of receiving the request under section 32 (2) of the LRA.

[43] On 11 December 2014, the Director-General of the Department made the following recommendations to the Minister:[8]

"***RECOMMENDATIONS***

10.

10.1 It is recommended that:

10.1.1 The Minister regard the parties to the Council as sufficiently representative for the purpose of extending this agreement to non-parties.

10.1.2 In view of the above particulars and reasoning, the Minister accepts that the Council has satisfied the requirements of section 32(2) read with 32(5) of the Act.

10.1.3 In terms of section 32(2) read with 32(5) of the Act, the Minister extend the whole of the agreement to the non-parties identified in the request, as set out in the attached notices (Annexures R and S).

10.1.4 Renew the period of operation of the Agreement in terms of section 32(6)(ii) of the Act (Annexure T)…."

[8] These recommendations are as contained in the Minister's Reasons at pp. 443 - 462

[44] On 15 December 2014, the Minister accepted the Director-General's recommendations.

[45] On 17 December 2014, Acting Justice Watt-Pringle handed down his judgment dated 12 December 2014 relating to an earlier extension and amendment of the main agreement in 2013. He ordered *inter alia* that "(1) [t]he decision of the Minister taken in April 2013 to extend the terms of a collective [agreement] to non-parties that fall within the registered scope of the Council is reviewed and set aside"; and (2) "Government Notice R268 published in the Government Gazette No. 36338 on 12 April 2013 is declared invalid and of no force and effect" ("the Watt-Pringle judgment")[9]. Both the Council and the NUMSA applied for leave to appeal to the Labour Appeal Court against this judgment, which was ultimately upheld after the LAC agreed to entertain the appeal.

[46] On 19 December 2014, Neasa brought it to the Minister's attention that the request of 25 September had been withdrawn and accordingly could not be pending before her. In response, on 23 December 2014, the Minister stated that because leave to appeal against the Rabkin-Naicker's judgement of 1 December 2014 had still not been granted, there was no basis for holding up the extension of the agreement. The Minister appears to have been unaware that leave to appeal had already been granted on 18 December 2014. The Minister also expressed the view that Neasa had been given a full and reasonable opportunity to be heard before any decision was taken and that there was no requirement in the LRA obliging her to provide such an opportunity before extending the agreement. Despite being told that the Council had refused to provide documents pertaining to the request for extension, the Minister advised Neasa to obtain these from the Council.

[9] *National Employers Association of South Africa and Others v Minister of Labour Matal And Engineering and Others* (JR860/13) [2014] ZALCJHB 524 (12 December 2014)

[47] On 24 December 2014, the Minister published the following notices extending the agreement to non-parties for the period 5 January 2015 to 30 June 2017 inclusive.

47.1 Government Notice No. R1051 which declared that, in terms of section 32(2) read with 32(5) of the LRA, the collective agreement concluded in the Council and attached thereto is extended to non-parties with effect from 5 January 2015 until 30 June 2017 ("GN R1051"); and

47.2 Government Notice No. R1050 which declared that, in terms of section 32(6)(a)(ii) read with section 32(5) of the LRA, the provisions of Government Notice R268 of 12 April 2013 and R314 of 26 April 2014[10] is effective from the date of publication, being 24 December 2014, until 30 June 2017 ("GN R1050").

[48] The reasons for the Minister agreeing to the extension and the renewal of the main agreement were set out in written submissions on 20 January 2015. From the submissions it would appear that the decision was primarily based on consideration of the requirements of s 32(3) in terms of which "...(a) collective agreement may not be extended in terms of subsection (2) unless the Minister is satisfied" that the requirements of that section are met, namely:

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

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

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

[10] Government Notice R314 of 26 April 2014 was published to correct the typing reference of "section 32(3) read with section 32(5)" in the English Government Notice No. R. 268 to "section 32(2) read with section 32(5)".

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

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

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

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

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

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

[49] The issues canvassed in the submissions were:

49.1 Whether the request for extension dated 25 September 2014 complied with the LRA;

49.2 objections raised by the BIEA, CEFA and Neasa;

49.3 the negotiation process which led to the conclusion of the settlement agreement including the industrial action which ensued, including the fact that a ballot in favour of adopting the resolution to extend the agreement was favourable;

49.4 a consideration of the wage increases contained in the agreement;

49.5 whether the requirements of section 32 of the LRA had been met;

49.6 the exemption procedure and the existence of an independent appeal body;

49.7 whether the agreement discriminated against non-parties;

49.8 whether SMMEs were accommodated by the agreement;

49.9 the representivity of parties to the agreement, which led the Minister conclude that the parties did not constitute a majority as required by section 32 (3) (b) and (c) of the LRA;

49.10 whether the parties to the bargaining Council were sufficiently representative within the scope of the bargaining Council terms of section 32 (5) (a) of the LRA, which she concluded that they were;

49.11 if a failure to extend the agreement would undermine collective bargaining at sectoral level.

[50] Having satisfied herself that the criteria had been met after considering the above, the Minister extended the amended agreement in terms of s 32(5)(a) and (b) of the LRA and not under the mandatory provisions of s 32(2). In other words, the Minister extended the agreement in the exercise of her discretion rather than acting under an automatic obligation to extend. Any review of her decision is therefore a review of her exercise of that discretionary power.

[51] On 26 March 2015, the Labour Appeal Court dismissed the appeal against the decision of Rabkin-Naicker J, on the basis that the conduct which the applicants had sought to interdict, namely the submission of a request for extension, had already taken place by the time the appeal was heard and the issue was moot. In the result, the applicants argued that the correctness of the court *a quo*'s was not confirmed on appeal. By the same token, the judgment still stands.

[52] On 13 April 2015, Watt-Pringle AJ refused leave to appeal against his judgment.[11] The Council consequently petitioned for leave to appeal to the Labour Appeal Court against his judgment. On 28 May 2015, the Labour Appeal Court refused the petition for leave to appeal.

[11] *National Employers Association of South Africa and Others v Minister of Labour and Others* (JS 860/13) [2015] ZALCJHB 121; JS 860/13 (13 April 2015)

Grounds of review

[53] For the purposes of the application, it is common cause that the Minister's decision to extend the agreement constitutes administrative action and as such is susceptible to review in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The specific grounds of review, which are numerous, each attack different stages of the process leading to the Minister decision to extend the agreement, and are dealt with below.

Existence of a valid extension request before the Minister

[54] The applicants contend that the Minister ought to have been satisfied that the request for extension complied with the provisions of section 32 (1) of the LRA which states:

> "(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."

[55] The council and NUMSA defend the council's tally of votes at the meeting and assert that the requirements of the sections 32(1)(a) and (b) were met and were confirmed by the subsequent ballot in terms of clause 10 (3) of the constitution.

[56] The Minister takes a different and bolder tack, relying not on whether the request for extension was validly made under of s 32(1), but arguing that she only needed to be satisfied that a request for extension had been made and unless that request is set aside as

invalid on review, the factual pre-requisites for the exercise of her discretion were met. She argues that because the applicants have not applied in this application to set aside the request as invalid, it must presumed to be a valid request. Indeed, it is difficult to see how they could raise the issue again for re-determination because the judgment of Rabkin-Naicker J determined that the requirements of s 32(1) had been met.

[57] Despite this, the applicants persisted in arguing that this court should accept that the validity of the request was a pre-condition for the exercise of the Minister's discretion and if the request was a nullity, the court should treat it as such irrespective of the earlier judgment. Initially, I had considered that it might be necessary to revisit whether or not the requirements of s 32(1) were met. In my own view they plainly were not and I would not have reached the same conclusions as Rabkin-Naicker J if I had to determine that question, but no purpose will be served here in setting out my reasons in light of the discussion which follows.

Was the minister entitled to simply rely on the existence of a request to extend the agreement before exercising her discretion whether to extend the agreement?

[58] The first issue which must be addressed is whether the court can set aside the Minister's decision to extend the agreement in the absence of the applicants specifically applying to review and set aside the request of the Council on the above basis, or any of the alternative grounds they raise for setting aside the request.

[59] It was forcefully argued by *Mr Maenetje SC* for the Minister that the validity of the Minister's decision to extend the agreement could not be set aside on the basis of irregularities in making the request because the existence of the request was merely a factual prerequisite for the exercise of her discretion and, until such time as the request was set aside, her subsequent decision would continue to have legal effect in keeping with the principle expressed in

Oudekraal Estates (Pty) Ltd v City Of Cape Town And Others. In *Oudekraal* the court stated:

"[29] In our view, the apparent anomaly - which has been described as giving rise to 'terminological and conceptual problems of excruciating complexity' -is convincingly explained in a recent illuminating analysis of the problem by Christopher Forsyth. Central to that analysis is the distinction between what exists in law and what exists in fact. Forsyth points out that while a void administrative act is not an act in law, it is, and remains, an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions or acts. In other words

'. . . an invalid administrative act may, notwithstanding its non-existence [in law], serve as the basis for another perfectly valid decision. Its factual existence, rather than its invalidity, is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second.'

It follows that

'(t)here is no need to have any recourse to a concept of voidability or a presumption of effectiveness to explain what has happened [when legal effect is given to an invalid act]. The distinction between fact and law is enough.'

The author concludes as follows:

'(I)t has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. *The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act*. And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void.'

(Our emphasis.)

[30] Lord Hoffmann drew the same distinction in R v Wicks [1998] AC 92 (HL) ([1997] 2 All ER 801; [1997] 2 WLR 876) when he said the following at 117A - C (AC) (815h - j (All ER)):

'(T)he statute may upon its true construction merely require an act which appears formally valid and has not been quashed by judicial review. In such a case, nothing but the formal validity of the act will be relevant to an issue before the justices.'

[31] Thus the proper enquiry in each case - at least at first - is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court."[12]

(footnotes omitted)

[60] The applicants naturally argue that the validity of the Minister's decision to extend the agreement depended not merely on the fact that she received a request but whether the request itself was a valid one. They contend applicants contend that since a request to extend an agreement to non-parties can only be made if the requirements of section 32 (1) are met, the request purportedly agreed to by the meeting on 8 October 2014 must be treated as a legal nullity because some of the requirements were not satisfied. In the applicants' view the existence of a *valid* request is a jurisdictional prerequisite for the Minister to exercise her discretion and as the request was a nullity what she received did not constitute a request and she had no power to consider it.

[61] Therefore the crisp is issue is whether it was necessary for the minister's consideration of the request that the request was substantively valid, or whether the Minister was entitled to exercise her discretion provided she had a request for extension of an agreement before her, whether or not that request had been validly made.

[62] The provisions of section 32 (1) have already been cited above. It is useful at this juncture the remaining provisions of the section which

[12] 2004 (6) SA 222 (SCA) at 243-4

mainly deal with what the Minister is required to consider and determine before extending an agreement:

"**32. Extension of collective agreement concluded in bargaining council**

...

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

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

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

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

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

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

(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.

[(4) . . . . . deleted in 1998]

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

(a) the parties to the bargaining council are sufficiently representative within the registered scope of the bargaining council;

(b) the Minister is satisfied that failure to extend the agreement may undermine collective bargaining at sectoral level or in the public service as a whole."

(emphasis added)

It is important to note is that subsection 32 (3) (a) stipulates that it is for the Minister to determine if the request to extend the agreement satisfied the requirements in s 32(1). Accordingly, it is not the validity of the request which is a necessary prerequisite for the Minister to exercise her discretion, but she must be satisfied, amongst other things, that the request did comply with s 32(1) before she is entitled to extend the agreement. Consequently, the existence of a valid request, objectively determined, is not a prerequisite for the Minister to consider the extension of an agreement. She cannot act unless a request has been made, but once it is made then it is for her to determine if that request meets the requirements of section 32 (1). Presumably, the provision still does not prevent a party from seeking to review and set aside an invalid request, but in the absence of doing so, a party who believes the request did not comply with the provision is confined to attacking the Minister's own determination of that issue, which falls within her remit to decide.

[63] Consequently in this application, since it is common cause the Minister received a request from the Council to extend the agreement to non-parties, that fact was sufficient for the Minister to trigger the exercise of her jurisdiction under sections 32 (3) and (5) of the LRA.

Because the applicants did not separately apply to set aside the request as invalid, their grounds of review are confined to reviewing the minister's performance of her functions under section 32(3) and (5), which means that the validity of the request can only be challenged indirectly by reviewing the ministers findings under s 32(3)(a). Quite apart from this, in the absence of Rabkin-Naicker J's decision being set aside on appeal, her findings on whether the request objectively complied with s 32(1) still stand.

The actions of the Minister in deciding to extend the amended agreement

[64] The applicants argue that the Minister's decision to extend the agreement is itself reviewable on a number of grounds and the principle ones are addressed belwo.

Terms of Settlement Agreement Differ from Terms Extended by Minister

[65] The applicants argue that there were numerous discrepancies between the agreement that was extended by the Minister and the settlement agreement itself. The decision taken by Manco on 8 October, was in conformity with the resolution which the Council had submitted to a ballot. According to the council, the ballot was concluded on 22 August 2014. The resolution stated:

"The Consolidated Main Agreement of the MEIBC is amended to incorporate the provisions of the 29 July 2014 MEIBC Settlement agreement: 1 July 2014 to 30 June 2017 and its and its annexure A, B, C, D and E shall be known as the consolidated Main agreement 2014/2017."

[66] However, the applicants argue that the Council made various amendments to the main agreement which were never part of the settlement agreement and such changes were never submitted to a postal ballot as required by clause 10 (3) of the Council Constitution. They also argued that, after the Manco meeting of 8 October 2014 the council engaged with the Department and in consultation further changes to the agreement were affected, without such changes being approved by Manco. There is an additional question

concerning whether or not the main agreement could be extended, which is dealt with separately below.

[67] The applicants maintain that merely because the agreement gazetted was not identical to the one referred to in the extension request that was sufficient to set aside the extension. If substantive changes were effected to the existing main agreement or the settlement agreement I agree that would create an obstacle to the Minister extending the agreement in the absence of those alteration is being subjected to further ratification as a collective agreement of the Council. But mere changes in wording to frame the settlement agreement to accord with previous gazetted formulations of standard provisions provided they do not change the substance of the agreement, should present no difficulties. Adopting an absolutely literal approach which would require the extended agreement to be the exact replica of the settlement agreement, would be impractical and be a sensible interpretation of s 32(3).

[68] The Council does not dispute that alterations were made to the settlement agreement but it defends the changes on the basis that they were occasioned by requests from the Department and were necessary to align the terms of the Consolidated Main Agreement with legislation, a specific previous Manco resolution and a provision of a previous Settlement Agreement. It contends that the changes were neither substantive nor material to the essence and purpose of the Consolidated Main Agreement.

[69] More particularly, the Council claims some of the changes introduced in the published schedule relate to previous decisions taken in Manco meetings on 26 March, 9 July and 26 November 2013, which respectively provided for:

69.1 an amendment to schedule G entailing the addition of a new job description of winch assembly under rate E;

69.2 an amendment to schedule G which had the effect of making structural engineering wage rates applicable to the scaffolding industry, and

69.3 the deletion of certain sections of clause 1 (3) of the scope of the application of the main agreement which would have the effect of cancelling the exclusion of certain sectors from the application of the main agreement.

These decisions taken in the previous Manco meetings were simply incorporated in the schedule submitted to the Minister, even though they had not been submitted to a ballot nor were they part of the resolutions tabled at the Manco meetings in September and October 2014. However, clearly these were substantive amendments to the main agreement and in the absence of being ratified as changes to a collective agreement by the Council, should not have been included in the schedule submitted to the Minister.

[70] Other provisions having a substantive impact which were included in the schedule submitted to the Minister concerned:

70.1 the introduction of a provision recognising traditional healers for the purposes of sick leave (clause 34 (13));

70.2 a limited consequential amendment relating to the calculation of leave enhancement pay in clause 14 (1) (a);

70.3 the exclusion of clause 20 of the settlement agreement which provided inter alia that existing company level agreements would not be affected by the agreement and that conditions of employment not amended by the agreement would continue to apply;

70.4 the introduction of a new requirement in clause 23 (1)(c) of the agreement that applications for wage exemptions must be filed within thirty days of the extended agreement being gazetted;

70.5 the introduction of a new definition of “short time” in clause 7 of the agreement which was not canvassed in the settlement agreement;

70.6 the introduction of a new sub-clause 3(a)(viii) providing for the treatment of time off for training as shifts were worked for the purposes of calculating paid leave and leave enhancement pay,

which appears to be a material addition to the provision contained in the settlement agreement dealing with shop steward leave;

70.7 the insertion of a substantive provision as a preamble to clause 20 of the extended agreement governing the use of temporary employment services which cannot be reasonably interpreted to simply be a reformulation of what is contained in clause 5 of the settlement agreement;

70.8 clause 1(3) of part II of the gazetted agreement dealing with the payment of employees engaged in higher grade at work elaborated considerably on material issues concerning the provision for acting allowances in clause 18 of the settlement agreement, and

70.9 the insertion of an entirely new Annexure J in the extended agreement dealing with 'Future Collective Bargaining', which finds no comparable reference in the settlement agreement.

[71] One provision which was not part of the settlement agreement but did not appear to introduce any substantive changes and, in my view, was reasonably necessary for the purposes of clarity in the gazetted agreement concerned the inclusion of a new sub clause 1(e). This stipulated that the agreement bound scheduled employees as defined in section 3 of the schedule, which in turn confined the agreement to those employees whose rates of pay were scheduled in the agreement or specifically exempted from it.

[72] On the basis of the above, I am satisfied that there were certain material changes made to the extended agreement which were not canvassed with the parties to the original settlement agreement, nor ratified through any recognised procedure for concluding collective agreements in the Council. As mentioned I accept that it may not always be possible that the gazetted agreement will reflect the *ipsissima verba* of the negotiated agreement, but where variations or additions are introduced which alter the substance of the agreement or which clarify the way a provision should be interpreted (and

thereby exclude alternative interpretations), it is not sufficient simply for an informal ratification process to take place between the Department and the bargaining council functionaries.

[73] Strictly speaking then, there were parts of the gazetted agreement which were not part of the collective agreement negotiated in the council and accordingly the agreement extended by the Minister was not the one which the council had requested she extend and to that extent she acted ultra vires section 32 (3) and (5) in that the collective agreement she extended was not the one Manco had requested her to extend under s 32(1).

[74] Whether the remedy for this would necessitate setting aside the whole extension is another matter. The applicants argue on the basis that the case is on all fours with Watt-Pringle decision, but it seems to me there is a marked difference between the facts of this application and that one: In that case, the Minister had extended the main agreement and included a schedule stipulating the wages for the remaining two years of the collective agreement. The court had this to say about it:

> "The position, in essence, is this, the July 2011 agreement was lacking in relation to the determination of wage increases for the Grades that fall between A and H in the final two years of the agreement which was set to expire at the end of June 2014. The Bargaining Council, to the extent that it contended that the parties' intention at the time of concluding the July 2011 agreement was clear albeit not adequately expressed in the written agreement, appreciated the need for rectification: hence their application for rectification. An alternative to rectification would have been for the parties validly to have amended that collective agreement. It is clear that no valid amendment was effected in accordance with the Bargaining Council's constitution or indeed on any basis recognised by the law of contract."[13]

(emphasis added)

In that application, there was no validly concluded agreement at all for the Minister to extend. In this instance, some changes were made to what is

[13] At para [51]

otherwise accepted to have been a validly concluded agreement. Whether this remedy would be appropriate in this instance is ultimately something that must be evaluated in the light of all the grounds of review bearing on the validity of the extension and renewal notices and is dealt with at the end of the judgment.

The Minister acted in a procedurally unfair manner

[75] It is not a matter of dispute that the Minister in issuing the extension notice was bound to act procedurally fairly, even if the notice was published before the amendments to section 32(5) that took effect on 1 March 2015. The amendments now require the Minister to follow a notice and comment procedure before extending an agreement under that section.[14] In the absence of those express requirements, the question is what obligations rested on the Minister to consider additional representations before deciding to extend the agreement?

[76] The Minister maintains that procedural fairness was achieved because the applicants were entitled to present their views in the bargaining Council and also could avail themselves of the exemption provisions. Moreover, the Minister points out that even though the existing provisions of section 32 (5) did not provide for formal representations, Neasa and other employer parties nevertheless made representations and it was only after considering them that the extension decision was made.

[77] The applicants dispute this, saying that it is absurd to suggest that non-party employers who would be affected by the extension are not entitled to any form of hearing by the Minister and especially on the

[14] From 1 March 2015 the more onerous requirements were introduced in the form of s 32(5) (c) and (d), viz:

> "(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)."

question whether the jurisdictional facts necessary for the exercise of her powers under section 32 (5) were met.

[78] The Promotion of Administrative Justice Act 3 of 2000 ('PAJA') requires that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. What constitutes procedural fairness will depend on the circumstances of each case.[15] Further, in cases where

[15] See section 3 of PAJA, viz:

"3.Procedurally fair administrative action affecting any person

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
(2)(a) A fair administrative procedure depends on the circumstances of each case.
(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-
(i) adequate notice of the nature and purpose of the proposedadministrative action;
(ii) a reasonable opportunity to make representations;
(iii) a clear statement of the administrative action;
(iv) adequate notice of any right of review or internal appeal, where applicable; and
(v) adequate notice of the right to request reasons in terms of section 5.
(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to-
(a) obtain assistance and, in serious or complex cases, legal representation;
(b) present and dispute information and arguments; and
(c) appear in person.
(4)(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).
(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including-
(i) the objects of the empowering provision;
(ii) the nature and purpose of, and the need to take, the administrative action;
(iii) the likely effect of the administrative action;
(iv) the urgency of taking the administrative action or the urgency of the matter; and
(v) the need to promote an efficient administration and good governance.
(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure."

administrative action materially and adversely affects the rights of the public, an administrator must decide what is the appropriate procedure to follow and, if the administrator is empowered by a provision, which is fair but different, the administrator must decide whether to follow that procedure or another which gives effect to the right to procedural fairness.[16]

[79] In the *Free Market Foundation v Minister of Labour & others* [17] case the Court dealt with impact of the right to procedurally fair administrative action on s 32(2) or s 32(5) thus :

"[83] Is an exercise of power by the minister under either s 32(2) or s 32(5) of the LRA administrative action in terms of s 1 of PAJA? The minister undoubtedly exercises a public power or performs a public function in terms of legislation when acting in terms of s 32 of the LRA. The decision by the Minister to extend a bargaining council collective agreement often will adversely affect the rights of various persons, particularly employers who are not party to the collective agreement, in that it determines their obligations to provide work in accordance with minimum standards and conditions, depriving them of the freedom to contract on the terms of their choice. The decision will also have a direct, external legal effect. It will be determinative of employer and employee rights and obligations with direct bearing upon persons who are non-participants in the statutory centralised bargaining system."[18]

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[16] See s 4 of PAJA,viz:

"4 Administrative action affecting public
(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether-
(a) to hold a public inquiry in terms of subsection (2);
(b) to follow a notice and comment procedure in terms of subsection (3);
(c) to follow the procedures in both subsections (2) and (3);
(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or
(e) to follow another appropriate procedure which gives effect to section 3."

[17] (2016) 37 *ILJ* 1638 (GP)

[18] At 1668.

[80] Correspondingly, it is also obvious that a decision not to extend the agreement would affect the legitimate interest of excluded employees in maintaining and improving their living standards. Accordingly, sections 3 and 4 of PAJA are applicable to the decision to extend the agreement. The amended provisions of section 32 in effect recognised this *lacuna* in s 32 and sought to remedy it. In this regard, I do not agree with Numsa's submission that the legislature's failure to include it in the original section, means the applicants' were not entitled to make representations. The right to fair administrative action existed independently of what the LRA provided for.

[81] On 9 December 2014, Neasa's attorneys wrote letters to the Council and the Minister respectively. In the letter to the Council, Neasa raised its objection to the secretary's refusal to provide it with a copy of the documents sent to the Minister, which he had defended on the basis that an express decision of Manco was required before he could do that.[19] The letter referred to previous decisions of Manco in which Neasa claimed it had been agreed that all documentation would be presented to a task team before being submitted to the Department, to ensure legal and constitutional compliance. It is difficult to understand that the secretary could have genuinely believed he was legitimately entitled to refuse a party to the Council access to official documents of the Council. In passing, the Minister also clearly did not understand why Neasa could not get the documents from the Council since it was a party to it. The Secretary's purported reliance on the extent of his obligations as set out in clause

[19] Clause 13 (1) states:

"The Council shall appoint a council secretary, whose duty it shall be to conduct the correspondence of the Council, attend all meetings of the Council and the Management Committee, record minutes of such meetings and circulate copies thereof to representatives and alternates. He shall keep such books of account shall be prescribed by the Management committee, and shall, in addition, perform such duties as may be assigned to him by the Council or Management Committee."

13(1) of the Council Constitution borders on the ridiculous and strongly suggests he was not acting in good faith.

[82] In Neasa's letter to the Minister, the request for a copy of the documentation submitted in support of the extension request was repeated. The request was motivated on the basis of the Council's refusal to provide same to Neasa. The letter further placed before the minister its motivation why Neasa believed it had good prospects of success in its urgent appeal against the decision of Rabkin-Naicker, as a reason for holding the extension in abeyance because the decision would materially affect the question whether or not the prerequisites of section 32 (1) were met. Secondly, the letter expressly requested a full and reasonable opportunity to make representations prior to any extension decision being made. The letter specifically emphasised the importance of Neasa having access to the documents submitted by the Council in support of the extension request. Further, it indicated that it wished to make representations about whether the criteria under section 32 (5) were met. The applicants also point out that they wanted to have had an opportunity to make representations on the issue of the exemption criteria which they claim are inappropriate and unfair. The fairness of selection criteria and whether they promote the objects of the LRA, is one of the pre-requisite issues the Minister is specifically required satisfy herself of under s 32(3)(f). The need for careful consideration of the input of parties most opposed to the extension of the agreement, for whom the exemption process would offer the only relief from the terms of the agreement should be obvious in securing the right balance between the competing interests of larger and smaller enterprises and the interests of affected employees. It is possible that the applicants input might well have led the Minister to reconsider the fairness of the criteria in the exemption policy.

[83] The Minister's rejection of this request, dated 15 December but only received on 23 December 2014, noted that the leave to appeal had not yet been granted by the court and therefore there was no basis to delay the extension of the agreement. In relation to the alternative

request to be given an opportunity to make submissions the following was stated:

> *"You have indicated in the alternative and in any event should the Minister be minded to consider an extension request notwithstanding the pending appeal then, he requested that your client be given a reasonable opportunity to be heard prior to any decision being taken. Unfortunately there is no requirement in the LRA to provide your client with a reasonable opportunity to be head (sic) before an extension in terms of section 32 of the LRA. The Minister must comply with provisions of section 32 of the Act regarding extension of collective agreements to non-parties.*
>
> *Given that your client is a party to the Metal and Engineering Industries Bargaining Council, you are advised to request a copy of the request submitted from the bargaining Council."*

[84] On the following day, 24 December 2014, the Minister's decision to extend the agreement to non-parties in the industry was gazetted.

[85] In essence, apart from arguing that she was under no obligation to entertain representations from the applicants before deciding to extend the agreement, the minister's rationale is that, the process of collective bargaining in which non-parties could make an input and the existence of an exemption procedure satisfied the need for procedural fairness. This argument is not persuasive. The fact that the applicants had an opportunity to make an input in a collective bargaining process which resulted in a collective agreement they were not party to, is not the same as being able to make representations on whether the agreement concluded should also apply to them and their employees. Further, an exemption application presupposes that the extension has already taken place and by its nature cannot meaningfully deal with motivations based on reasons why the agreement should not have been extended in the first place.

[86] The minister's alternative argument is that she did in fact consider the representations and accordingly they were not denied the opportunity of being heard. It must be said that this assertion does not square with the Minister's letter sent to Neasa on 23 December

2014. On the eve of the extension being gazetted, the Minister's letter gives every indication that she had not seen it necessary to consider any representations by Neasa before she took the decision. The somewhat cursory response to the submissions contained in the reasons she subsequently provided for her decision need to be read in this light.

[87] In any event, it ought to have been obvious that Neasa needed a copy of the extension request documents in order to make its submissions in particular in relation to whether the requirements of section 32 (5) were met. Consequently, it would have been equally obvious that such submissions it made prior to the Minister's decision to gazette the extension were incomplete, except perhaps for those relating to the pending application for leave to appeal which were fairly comprehensive. In the circumstances, it is difficult to understand how the Minister could be said to have acted procedurally unfairly when she knew that Neasa was not in a position to make representations on a material issue and could only meaningful do so once it had a copy of the documents which had been submitted to her to support the extension request. There is no evidence on the papers that the applicants had sight of the submissions of the council and was in a position to make any representations in relation to them, even if it could make representations in relation to issues relating to the pending application for leave to appeal. I do not wish to suggest the Minister had an obligation to provide copies of the submissions to the applicants but they should at least have been afforded access to them. The idea that parties should be allowed to make representation on the extension of an agreement was not something that was foreign to the Department. The Minister had previously requested an opportunity to do this when this court found that an extension was invalid.[20] It is puzzling in the light of that experience that the same procedure was not repeated in this instance. I am also mindful of the

[20] See *National Employers' Association of South Africa & Others v Minister of Labour & Others* (2013) 34 *ILJ* 1556 (LC) at par [23]/

fact that the applicant's request included an opportunity to make oral representations and a hearing.[21] I do not wish to suggest that the circumstances of extending a collective agreement to non-parties require more than an opportunity to make representations why the agreement should not be extended and have access to the submissions made in support of such a decision.

[88] There is also no evidence that the Minister applied her mind to the question of how to deal with the request to make representations as she was obliged to in terms of section 4 of PAJA. On the contrary, everything she said prior to gazetting the agreement created an overwhelming impression that she saw no need to make provision for this because the LRA did not require her to.

[89] As a result, I am persuaded that the Minister did not act in accordance with the requirements of sections 3 and 4 of PAJA.

The Minister acted unreasonably in extending the agreement

[90] In explaining her decision to extend the agreement the Minister relied on the submission prepared by her officials, which she adopted as her own reasons. In that submission the representations of the applicants objecting to the proposed extension are summarily recorded. After recording the various objections raised, the following statement appears:

> "3.4 Unfortunately the Minister cannot refuse to extend the main collective agreement on the basis of these objections or hold the extension in abeyance. The Minister must comply with provisions of section 32 of the act regarding extension of collective agreements to non-parties.
>
> 3.5 For these main reasons it is recommended that the submissions in favour of extending the agreement in terms of section 32 (5) should be seen to outweigh the arguments not to extend the agreement. "

[21] See *Premier, Mpumulanga and another v Executive Committee of State-Aided Schools, Eastern Transvaal* (1999) 2 SA (CC) 91 at 109, para [39].

[91] The document then contains an analysis which the Minister endorsed as setting out the reasoning process she adopted, which entailed *inter alia* the following considerations and subsidiary conclusions:

91.1 The bargaining process including: the consultative process of regional pre-Bargaining conferences which preceded the negotiations in which comments and proposals were invited which were then incorporated into the schedule of demands considered at the negotiation meetings; the appointment of an independent facilitator to assist the parties in conducting the negotiations; the numerous negotiation meetings held ; the fact that talks deadlocked and a protected strike ensued, and the ensuing settlement agreement.

The Minister's own evaluation of whether the requirements of section 32 were met.

[92] In this regard the Minister considered whether or not the necessary prerequisites of sections 32 (1) (a) and (b) had been met and was satisfied on the strength of the Council submissions and the results of the Rabkin Naicker judgement that the prerequisites had been satisfied and accordingly concluded that a proper request had been made, notwithstanding the pending urgent application for leave to appeal against that decision.

[93] The Minister also concluded that:

93.1 The non-parties to whom the agreement would be extended fell within the registered scope of the bargaining Council as required by section 32 (3) (d).

93.2 Clause 23 of the agreement provided for an independent exemption body as required by s 32(3)(e).

93.3 Clause 23 (1) in the form of Annexure A to the settlement agreement contained the criteria to be applied by the independent body in considering appeals and the council had submitted that most appeals are granted.

93.4 As required by section 32 (3)(g), the proposed amendments did not discriminate against non-parties.

93.5 Annexure 'O' to the agreement demonstrated that the Council had complied with the requirement to report to the Department on the accommodation of small and medium enterprises ('SMME's) and the agreement catered for these through the exemption mechanism.

[94] On the question of the representative position of the parties to the agreement, the Minister concluded that the parties to the main agreement did not satisfy the majoritarian thresholds required by s32 (3)(b) and (c) of the LRA. This conclusion was based on the Department's own verification exercise, which had been undertaken to ensure her that she would have "credible data" on which to base her assessment of section 32.

[95] This necessarily required the Minister to consider whether the requirements of section 32(5) had been met. In December 2014, prior to the amendment of s 32, there were only two issues the Minister had to consider, namely whether the parties to the Council were sufficiently representative within the scope of the Council and if she was satisfied that the "failure to extend the agreement may undermine collective bargaining at sectoral level". In respect of the first, she concluded on the basis of the Department's own verification exercise that trade union parties represented 38% of the employees falling under the scope of the Council and the employer organisation parties employed 60.1% of employees within its scope. On these figures, the Minister deemed the parties to be sufficiently representative for the purposes of the section.

[96] At this point that must be mentioned that the reliability of these figures was one of the issues contested by the applicants who claimed that the figures were derived from an exercise conducted by the Department in May 2015 on figures which were significantly out of date even at that stage. The applicants contend that the Minister was obliged to rely on figures produced by the registrar but it is only

after the 2015 amendments took effect that a determination of the representativeness of a bargaining council under s 49 is deemed to be sufficient proof thereof also for the Minister acting under sections 32(3)(b), 32(3)(c) and 32(5).[22]

[97] In deciding whether the second and more complex leg of the test was met, the following factors appear to materially affect her conclusion that a failure to extend the agreement may undermine collective bargaining in the sector:

97.1 the council had a long track record of negotiating collective agreements extending over seventy years which had insured stability and fair labour practices in the sector;

97.2 non-party employers and employees were invited to submit proposals and comments for consideration in the negotiations;

97.3 the agreement concluded would ensure stability in the industry over the next three years;

97.4 if it were not extended nearly 250,000 employees employed in over 10,000 non-party firms would not be subject to regulation and would not enjoy the protection of social benefit funds;

97.5 non-party firms and employees were not rigidly forced to comply with agreements as exemptions were generously granted;

97.6 the Council was in the process of developing a number of initiatives within fixed timeframes such as: appointing a labour broker compliance officer and possibly an ombudsman; establishing a collective bargaining forum and to deal with levels of bargaining; a special dispensation for regional centres and distressed areas and small businesses.

[22] S 49(4) with effect from 1 March 2015 reads:

> "(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 year following the determination for any purpose in terms of *this Act*, including a decision by the *Minister* in terms of sections 32(3)*(b)*, 32(3)*(c)* and 32(5)."

[98] In the constitutional court case of *Walele V City of Cape Town and others,* the court had to deal with a review of a decision to approve building plans.[23] Under the s7(1)(a) of Building Standards Act, a local authority is obliged to approve a building plans if "...it is satisfied that the application in question complies with the requirements of this Act and any other applicable law". In considering the nature of the enquiry the local authority is required to undertake, the Constitutional Court stated:

"[59] In this case the City asserts that the decision-maker was satisfied before approving the plans that none of the disqualifying factors would be triggered. The difficulty with this contention is that it is not borne out by the objective facts provided by the City itself. As mentioned earlier, when asked to furnish the list of documents placed before the decision-maker, the City mentioned the application for the approval of plans, the form endorsed by various departments and a document titled 'Land Information System - Ratepayers Data'. It was asked to confirm if these were the only documents placed before the decision-maker and the City confirmed this to have been the position.

[60] There can be no doubt that these documents could not reasonably have satisfied the decision-maker that none of the disqualifying factors would be triggered. None of these documents refers to those factors. If indeed the decision-maker was so satisfied on the basis of these three documents, his satisfaction was not based on reasonable grounds. The documents fall far short as a basis for forming a rational opinion. Nor does the mere statement by the City to the effect that the decision-maker was satisfied suffice. In the past, when reasonableness was not taken as a self-standing ground for review, the City's ipse dixit could have been adequate. But that is no longer the position in our law. More is now required if the decision-maker's opinion is challenged on the basis that the subjective precondition did not exist. The decision-maker must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds. In this case, it cannot be said that the information, which the City admitted had been placed before the decision-maker, constituted reasonable grounds for the latter to be satisfied.

[23] 2008 (6) SA 129 (CC).

[61] The determination of whether the decision-maker was satisfied that the disqualifying factors will not be triggered by the erection of the block of flats concerned entails a factual enquiry."[24]

(footnotes omitted-emphasis added)

[99] In *Free Market* case, the court followed the approach in *Walele* with specific reference to how the Minister's discretion under s 32(3) and 32 (5) should be exercised, viz:

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

[85] As already explained, if the minister determines that the majoritarian numerical thresholds and the other jurisdictional facts in s 32(3) of the LRA are present, she is obliged to exercise the mechanical power to extend the collective agreement and to promulgate it in the Government Gazette. If the

[24] At 159-160

majoritarian levels in s 32(3)(b) and (c) of the LRA are not reached then the minister must choose whether or not to act in terms of s 32(5) of the LRA. Unlike s 32(3), which provides that the minister 'must' extend once the conditions precedent in s 32(3) have been fulfilled, s 32(5) provides that, despite subsection (3)(b) and (c) (the numerical requirements), the minister 'may' extend, provided the jurisdictional facts in s 32(5)(a)-(d) exist. The express use of the word 'may' in the subsection confers precisely the kind of discretionary power that the FMF would have us read in to s 32(2) of the LRA. Permissive statutory language of this order leaves the minister free to make a choice among possible courses of action and inaction. The discretionary power in s 32(5) is in stark contrast to the ministerial or mechanical power in s 32(2) which involves little choice on the part of the minister. Mechanical powers are more in the way of duties.

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

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

[88] The first condition precedent to the exercise of the power to extend a minority collective agreement is that the parties to the bargaining council

must be sufficiently representative within the registered scope of the bargaining council. The phrase 'sufficiently representative' is not defined in the LRA but by implication suggests less than majority membership within the sector. The issue must be determined objectively. The established practice is to determine the matter with regard to various factors besides numerical representativeness, including the nature of the sector and the organisational history within it.

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

[90] The second condition precedent to the exercise of the power in s 32(5) of the LRA is that the minister must be satisfied that the failure to extend the agreement may undermine collective bargaining at sectoral level. The minister will need to show objectively that non-extension will[25] have negative effects, such as opportunistic bargaining at workplace level or something of that kind. The jurisdictional fact 'is satisfied' in s 32(5)(b) of the LRA is subjectively phrased. At common law, prior to the adoption of our fundamental Constitution in 1994, such subjective clauses were not subject to extensive objective review. The court would accept the functionary's assurance that the state of affairs (that is, his or her satisfaction) existed and would enquire no further. There was no need to establish that there were good or reasonable grounds for that satisfaction. With the advent of the Constitution this approach became unsustainable. The right to lawful and reasonable administrative action in s 33 of the Constitution and in s 6 of PAJA requires the courts to satisfy themselves as to any factual assumptions on which that action is based. The

[25] In passing, the use of the verb 'will' by the High Court was criticized by the Minister as overstating the extent to which the possibility of undermining collective bargaining needs to be established to her satisfaction, but for the purposes of this review it is not necessary to consider this issue, because the reasonableness of the Minister's evaluation of this complex issue is not determinative of the review.

Constitutional Court outlined the position in *Walele v City of Cape Town & others* as follows:

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

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

[92] What is said in relation to the subjectively phrased jurisdictional fact in s 32(5) of the LRA applies equally to that in s 32(3) of the LRA, which I will discuss presently."[26]

(emphasis added – footnotes omitted)

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

[101] The first issue the Minister had to decide was if she was satisfied that the decision by the bargaining council to request the extension of the collective agreement complied with the provisions of subsection 32(1). It was argued on behalf of the Minister that she did have reasonable grounds for being satisfied that the decision to request the extension was properly made. In this case, when the minister had to decide this issue, she had the judgement of Rabkin Naicker before her. Even though she was aware of the applicants' urgent application for leave to appeal and the main grounds of their objection, it is

[26] At 1669-1671

difficult to see how it can be said that the Minister did not have reasonable grounds for accepting that section 32 (1) had been complied with when there was a judgement to this effect, irrespective of whether that judgement was correct. In my view, the judgement was a sufficient basis for the minister to reasonably conclude that the decision of the bargaining Council to request the extension of the collective agreement complied with the subsection. In circumstances, where a court had concluded that the request was valid, I do not see how it can logically be argued that the Minister was unreasonable in concurring with the court.

[102] There is no contention that non-parties specified in the request did not fall within the bargaining Council's registered scope. Consequently, it can be accepted that compliance with s 32(3) is not an issue.

[103] The next prerequisite which the applicants claim was lacking concerns whether the Minister could reasonably be satisfied that *"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 objects of the Act"* in terms of in terms of section 32(3)(f) of the LRA. They stress that the criteria must be contained in the agreement itself, and not some other policy or instrument.

[104] The provision in the schedule of the extended agreement published under notice No R 1051 dealing with exemptions sets out an amendment to clause 23 of the main agreement which states:

"11. CLAUSE 23: EXEMPTIONS

(1) substitute the following for subclause 1(c):

'1(c) Applications for a wage increase exemptions must be submitted to the bargaining Council not later than 30 days after the gazettal of this Agreement i.e. the date on which the extension to nonparties becomes operational."

(2) Insert the following new subclause 1(e):

'1(e) the provisions of the national exemptions policy per Annexure K, as approved by the Council shall apply when considering exemption applications and appeals.' "

(emphasis added)

[105] Annexure K to the published schedule contains a national exemptions policy, to which is also attached a sub-annexure (Annexure 3) containing appeals guidelines. The exemption policy contains provisions dealing, inter-alia, with fundamental principles and criteria for exemption. Following Annexure 3 in the published extension notice is the Constitution of the independent exemptions appeal board, though no specific reference is made to it in the amending provisions of clause 23 of the main agreement as set out above. The provision dealing with the establishment of the appeal body was last amended in 2003.[27]

[106] The Minister dealt with s32(3)(f) in the following terms in her reasoning as it was set out in the submissions of her officials, which she in turn endorsed as her own:

"Clause 23 of the agreement provides for an independent exemptions body as required by section 32 (3) (e) of the Act…

The Council has adopted a National Exemptions Policy (Annexure N) as well as an independent exemptions appeal board Constitution (Annexure N) …

[27] Per Government Notice R570 of 2 May 2003:

" 23 (5). Appeals (a) An independent body, referred to as the Independent Exemptions Appeal Board (the Board), shall be appointed and shall consider any appeal against an exemption granted or refused by the Council, or a withdrawal of an exemption in respect of parties and non-parties. (b) The Council Secretary shall, on receipt of an appeal against a decision of the Council, submit it to the Independent Exemptions Appeal Board for consideration and finalisation. (c) In considering an appeal the Board shall consider the recommendations of the Council, any further submissions by the employers or employees and shall take into account the criteria set out above and also any other representations received in relation to the application. (d) Should the appeal be successful an exemption licence shall be issued in terms of subclause (4)(a) and (b) above and shall be subject to subclauses (4)(c) and (d)."

> Clause 23(1) (Annexure A[28]) of the collective agreement contains the criteria to be applied by the independent body in considering the appeals …
>
> According to the council the majority of appeals are granted."

The applicants complain that this demonstrates that the Minister did not have regard to the fairness of the alleged criteria. They also claim that it is not obvious that she even had the text of the exemption criteria before her, namely the provisions of sections 23 (2) and (5) of the main agreement, those provisions do not contain any criteria for the assessment of exemptions but merely set out procedures.[29] The applicants assert that the applicable exemption provisions are those in Annexure K and on the Minister's own version, she had no regard to that policy and the exemption criteria it contains. Lastly, they maintain that the minister's statement in her answering affidavit that the exemption criteria are: "self-evidently fair and

[28] Note: It appears this reference is to Annexure 'K'

[29] Sub-clause 23(5) is set out in footnote 35 above. Sub-clause 23 (2) reads:

> 23 (2) Fundamental principles for consideration
>
> (a) All applications must be in writing and fully motivated and sent to the Regional Office of the Council for the area in which the applicant is located.
> (b) In scrutinising an application for exemption the Council will consider the views expressed by the employer and the workforce, together with any other representations received in relation to that application.
> (c) The employer must consult with the workforce, through a trade union representative or, where no trade union is involved, with the workforce itself, and must include the views expressed by the workforce in the application. Where the views of the workforce differ from that of the employer, the reasons for the views expressed must be submitted with the application. Where an agreement between the employer and the workforce is reached, the signed written agreement must accompany the application.
> (d) The exemption shall not contain terms that would have an unreasonably detrimental effect on the fair, equitable and uniform application of this Agreement in the Industry.
> (e) Wage and wage related exemptions shall not generally be granted beyond the expiration of the Agreement provided that the Council may at its discretion and on good cause shown agree to a longer period (but not an indefinite period).
> (f) Applications for exemptions involving monetary issues may not be granted retrospectively.
> (g) An application for exemption shall not be considered if the contents of the application are covered by an arbitration award binding the applicant."

promote the objects of the LRA" is patently insufficient to demonstrate that she did in fact consider them.

[107] In her answering affidavit, the minister reaffirmed the submissions which she endorsed and pointed out that she also expressly considered whether the agreement catered for SMME's because this was an issue which some of the employer organisations had complained about. The applicants made much of the fact that the Minister did not refer to Annexure K in her reasons as a basis for saying she did not have regard to the criteria. It appears to me that the reference to Annexure "A" could only have been intended to be a reference to Annexure "K" and I am not persuaded that she was not cognisant of the criteria for granting exemptions. It is true that her explanation why she felt they were self-evidently fair and supportive of the objects of the LRA is somewhat circular. However, equally the applicants reasons for disputing the fairness of the various types of exemption criteria (small businesses, struggling businesses and financial criteria) were not properly canvassed in the material before her and in my view she cannot be criticized for not taking a more critical view of the criteria in the policy, though this also points to the effect of the procedural flaw in her approach to allowing representations. On the material before her, I do not believe it can be said she acted unreasonably in her assessment of whether s 32(3)(f) was satisfied.

[108] More generally when it comes to the Minister's evaluation of the weight to be attached by the Minister when weighing up the complex question of whether or not it would undermine collective bargaining if the agreement were not extended, I am mindful that the weight accorded by her to factors pertaining to this issue is one that resides largely within her remit.[30] Whether she gave enough thought to the employment consequences of extending the agreement to marginal manufacturing areas may be criticized, but she obviously believed

[30] See *MEC For Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) at 240-1, paras [20] to [22]

there was an effective exemption process which would cater for that, and it is not for the court to second guess whether her evaluation was correct as long as she exercises her discretion within the bounds of reasonableness. That is not to say her consideration of this difficult question is beyond the court's ability to evaluate on review. It is all too easy to misconstrue the nature of the question of what it means to say collective bargaining would be undermined in such a way that even unrepresentative bargaining will be promoted. However, on the material before her, I cannot say her reasoning is assailable on review.

Did the Minister misconstrue the discretion she had?

[109] In a related argument, the applicants also raised a further question whether the Minister misconstrued her discretion to extend the agreement on the basis of her comments in her letter dated 15 December 2014 responding to concerns raised by the BIEO about the impact of extending the agreement to nonparties in the Border region. Apart from other indications in the letter that the minister believed her hands were tied in deciding whether to extend the agreement or not, the following concluding comments made in the letter are revealing:

"While I note your concerns in relation to the possible implications of the extension of the Council's collective agreement to nonparties, I wish to draw your attention to the fact that I have no discretion in the publication of agreements. The Act only requires the Minister to be satisfied that the provisions of 32 (3) of the Act of been complied with and despite sub-section 3 (b) and (c), a pivotal factor that must be considered is whether failure to extend would undermine collective bargaining at sectoral level which is the preferred *modus operandi* for determining wages and conditions of employment.

Your request that I vary the recent main collective agreement not to apply to the border region is noted. Unfortunately, I cannot act on your request as I can only exercise powers in terms of section 32 of the Act."

(emphasis added)

[110] Evidently, the minister did not consider the possibility of excluding an area like that the border region from the extension, which clearly fell within the ambit of her power under section 32 (5). Leaving that aside, there does seem to be some scope for inferring that the Minister was under the impression that her discretion whether to extend agreements was a mechanical exercise. Nevertheless, whether the Minister felt that her discretion was constrained, it cannot be said she did not attempt to come to grips with whether the pre-requisites of s 32(5) were met.

The Minister's decision to extend the period of operation of the 2013 main agreement (Notice R1050) and its effect on the validity of Notice R 1051.

[111] This was an issue extensively canvassed in argument, but was not set out in the applicants' founding or supplementary papers as a ground of review. Nonetheless it has a bearing on the question of appropriate remedies.

[112] In notice R268 of 12 April 2014, the Minister announced the extension to non-parties of the main collective agreement dated 18 July 2011 as amended and re-enacted on 14 January 2013 in terms of section 32(2) read with section 32(5) of the LRA for the period ending June 2014. On 24 December 2014, the Minister (per Government Notice R1050) declared that the provisions of Government Notice R268 of 12 April 2014 would "be effective from the date of publication of this notice and for a further period ending 30 June 2017".

[113] Section 32(6) states:

"(a) After a notice has been published in terms of subsection (2), the Minister, at the request of the bargaining council, may publish a further notice in the Government Gazette(i) extending the period specified in the earlier notice by a further period determined by the Minister; or

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

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

[114] It is common cause that the Minister published GN R1050 days after GN R268 was set aside by the Watt-Pringle judgment and has no legal effect. But the Minister and the Council argue that, this does not affect the validity of GN R 1051.

[115] It was submitted on behalf of the Minister that Watt-Pringle AJ's judgement did not strike down the 18 July 2011 agreement as amended in January 2013, which still subsisted. Hence it was possible for the bargaining Council to amend that agreement and to request the consolidation thereof with the 2014 changes to be extended. It is true that the order in Watt-Pringle's judgement did not mention the collective agreement. Nonetheless, as mentioned above, it was an integral and central part of the *ratio* of his decision that no amending agreement had been properly concluded in the Council and therefore there was nothing to extend. Consequently, I am not persuaded that it can be argued that the court accepted that the agreement itself had been validly concluded and therefore subsisted.

[116] Watt-Pringle AJ also made another important observation in his judgment regarding s 32(8)[31] which is relevant in this matter too:

"That section provides that whenever any collective agreement in respect of which a notice has been published in terms of sub-section 32(2) or (6) is amended, amplified or replaced by a new collective agreement, the provisions of section 32 apply to that new collective agreement. In other words, any amendment to a collective agreement already extended to non-

[31] Viz:

"32(8) Whenever any collective agreement in respect of which a notice has been published in terms of subsection (2) or (6) is amended, amplified or replaced by a new collective agreement, the provisions of this section apply to that new collective agreement."

parties must be dealt with on the same basis as any collective agreement which the Minister is requested to extend to non-parties under section 32."

The implication of s 32(8) in this instance is that, if the council sought to reinstate the agreement which notice R 268 attempted to extend to non-parties, the request for extension ought to have expressly included that. The resolution requesting the extension merely referred to the Collective Main Agreement amended by the 2014 settlement agreement. Nothing in the resolution indicated precisely what was meant by the Collective Main Agreement, which was amended by the 2014 settlement. The minister clearly assumed it referred to the main agreement as purportedly amended and extended to non-parties under notice R 268, which Watt-Pringle AJ found did not constitute a collective agreement concluded in the bargaining council.

[117] To restore continuity in the applicability of the main agreement to non-parties, the council ought at least to have clarified that the main agreement was the one adopted by the council in 2011, without the 2013 additions, and as recently amended by the 2014 settlement agreement. However, the preamble to the amending schedule described the main agreement as first "published under government notice R404 of 31 March 1998 as re-enacted and amended" under various subsequent notices ending with "...notice R 268 of 12 April 2013 as corrected by Government Notice R 314 of 26 April 2013". It is not surprising then that the Minister simply accepted that R 268 set out the last extended iteration of the Main Agreement prior to the 2014 notices, but failed to appreciate that the invalidity of that notice disrupted the continuity of the extended main agreement.

[118] Watt-Pringle AJ struck down the extension notice R 268 as invalid and of no force and effect. Consequently, the Minister's notice of 24 November 2014 in effect amounted to an attempt to revive the amended main agreement as it stood at that point by extending a legally non-existent notice. The resurrection of a legal nullity in this way by means of declaring a legally non-existent notice effective is plainly impossible. Further, nothing in the notice of 24 November 2014 conveys a separate intention to extend any other collective

agreement than the one which Watt Pringle AJ found had not been properly concluded in the Council. Consequently, GN R1050 is equally of no legal force and effect.

[119] The applicants argue that this is also fatal to Notice R 1051 which extended "the collective agreement appearing in the schedule hereto" to non-parties. The schedule in question is the same schedule referred to above which purports to incorporate the main agreement as extended by all previous notices and by notice R 268, which by the time Notice R 1051 was published had been invalidated. Effectively, the extension notice purports to extend an agreement which did not legally exist because that extended agreement cease to exist when notice R 268 was invalidated. Even if one is prepared to read the schedule as excluding any reference to R 268, the schedule then refers to a consolidated agreement as amended and extended by notices R 531 of 18 June 2010 and R 628 of 18 July 2010, both of which expired on 30 June 2011.[32]

[120] What the council ought to have done was to recognise that the invalid notice could not be used as the starting point for the next extension. The council needed to go back to the last valid extension of the agreement and request an extension of that notice by the Minister exercising her powers under s 36(a)(ii) of the LRA by declaring a new date from which the expired notices of 2010 would again be effective.

[121] It must be stressed that, what is being referred to here is not the status of the underlying collective agreements concluded at the bargaining Council up to and including the 2011 amending agreement and the 2014 amendments: what is at issue is the legal status of the agreements as extended to non-parties by the Minister after GN 268 was set aside. I am confident that, it was not the Minister's intention to extend an invalid agreement, but that is the effect of the notices she issued, induced no doubt by the wording of the schedule describing the agreement submitted by the Council.

[32] GG 33286 dated 18 June 2010 and GG 33385 dated 23 July 2010 respectively.

However, it is the legal effect of her action in promulgating the extensions which affects the enforceability of the extended agreements and not her intention.

[122] If the notices are not set aside as invalid, these problems raised about the legality of the notices remain a potential difficulty for attempts to enforce the agreement as a party could resist enforcement efforts simply on the basis that the schedule refers to an agreement that never was extended by GN 268 and is therefore non-existent as a matter of interpretation, whether or not it is actually struck down. I mention this because although the legality of the two notices is clearly questionable in light of the discussion above neither the applicants' founding nor supplementary affidavits raised this issue as a ground of review, as correctly pointed out in argument by Numsa. As such the court cannot entertain this as a ground of review irrespective of its merits and despite the fact that it was extensively argued at the hearing of the application, but its potential ramifications for enforcement of the agreement cannot be ignored.

Conclusion

[123] In light of the above, I am satisfied that the notices issued by the Minister on 24 December are invalid on one or more of the following grounds:

123.1 In deciding to extend the agreements, the Minister was in breach of her duty to act in a procedurally fair manner in terms of sections 3 and 4 of PAJA.

123.2 The agreement the minister extended was in substantive respects not the same as the agreement which the Manco meeting of 8 October 2014 requested the Minister to extend and was not confirmed as a collective agreement of the council and in so doing the Minister extended an agreement which was not the subject matter of the request agreed to at the Manco meeting of 8 October.

Remedy

[124] In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*,[33] the Constitutional Court determined that:

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

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

[33] 2011 (4) SA 113 (CC)

[125] Further, in *Khumalo and Another v MEC for Education: Kwazulu-Natal*,[34] the Labour Appeal Court held that:

> "[42] …In reviewing and considering whether to set aside an administrative action, Courts are imbued with a discretion and may in the exercise thereof refuse to order the setting aside of an administrative action, notwithstanding substantive grounds being present for doing so (Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2010 (1) SA 333 (SCA) at para 33) (Oudekraal 2). Sections 172 (1) (b) of the Constitution and 8 of PAJA are statutory provisions providing the source of the Courts' discretion. In terms of section 172 (1) (b) of the Constitution a Court, when deciding a constitutional matter within its powers, may make any order that is just and equitable, including an order suspending the declaration of invalidity for any period. Similarly, under section 8 (1) of PAJA the Court in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable (Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC) at para 82; Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) (Oudekraal 1); Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others 2008 (2) SA 638 (SCA) at para 28)."

[126] The applicants argue that the only meaningful remedy is to set the notices aside on account of being unlawful. They had launched the review timeously and if the court having decided the notices were invalid, nonetheless declined to set them aside, their members would not obtain the substantive remedy they seek, because the effect would be that they would be bound by an agreement they should never have been bound by.

[127] In this matter, if the invalidity of GN R1050 and GN R1051 was solely owing to notice GN 268 being a nullity and if this had been properly raised as a ground of review, I would be more inclined not to set those notices aside on the basis that any individual party who objected to complying with the extended agreement would, in principle, be able to resist such attempts on the basis that the

[34] [2012] 12 BLLR 1232 (LAC)

agreement purportedly extended is non-existent because of GN 268 being a nullity. But the failure of the Minister to provide the applicants with a clear opportunity to make representations having had access to the final submissions of the council raises different considerations. Had the applicants been given that opportunity to deal with the submissions under s 32 before the decision was taken, the Minister might have been less confident of the appropriateness of extending the agreement, particularly if serious doubts were raised about the council's representativeness or the effect of extending the agreement to certain areas. The exemption criteria were also important matters on which the Minister ought to have allowed representations and also bear directly on the pre-requisites for extending agreements.

[128] The employer parties to the council who were not parties to the settlement agreement do not represent a marginal interest group, but employ approximately 40 % of the employees employed by members of employer parties to the council. Neasa has more employer members than the affiliates of Seifsa and accordingly represents a significant constituency among employers, even if Neasa's membership is comprised mainly of owners of smaller enterprises. Consequently, those affected by the extension comprise a significant group of employers. In the circumstances, if they did not get a reasonable opportunity to make representations, that is an important omission in the extension process. It is not sufficient just to say that the interests of their employees in higher wages they might get by virtue of the agreement being extended automatically renders such procedural flaws irrelevant. It will almost always be the case that employees who are excluded from an extended agreement will be prejudiced, but if that factor is always the paramount consideration, there would be no point in having other pre-requisites for extending agreements.

[129] Another factor bearing on the remedy is that, the Minister knew from previous experience that it would be prudent to allow a process of representations to unfold before making her decision, but having

adopted such an approach as correct previously, chose not to on this occasion for no apparent reason.

[130] The further difficulty is that the agreement does contain additional items which were not part of the settlement agreement concluded in the council and cutting out those portions from the agreement whilst leaving intact an agreement whose very existence is in doubt because of the effect of it incorporating a non-existent extension and amendment, would in my view lend undue legitimacy to the rest of the agreement.

[131] It was argued by Numsa that the court should not disturb the effect of the gazetted agreement because it would offend against the principle against the principle of retrospectivity.[35] But that concerns a situation where new legislation interferes with pre-existing entitlements. In this situation we are dealing with the very issue whether such entitlements were lawfully created. Inasmuch as employee may have received increases by virtue of the extension it is by no means clear that their salaries could just be cut if the extended agreement is invalidated as contractual obligations might also to be implicated by such a change. On the other hand it would be wrong to uphold the enforceability of the agreement against employers who were not obliged in law to comply with it. In the Watt-Pringle matter, the case was heard the day after the agreement had lapsed. In this case the extended agreement has not yet lapsed. The following comments of Watt-Pringle AJ are still apposite here albeit to a lesser extent as the agreement still has a few months to run:

> "The extent to which that agreement was implemented and observed by those purportedly required to give effect thereto is not disclosed on the papers. It is in my view unlikely that the declaration of invalidity which follows will have any meaningful impact on those to whom it was intended to apply. I would not expect parties to behave in a precipitate manner which will occasion industrial action and the mere spectre thereof, as a matter of

[35] See *Du Toit v Minister for Safety and Security and Another* 2009 (6) SA 128 (CC) 2009 (6) SA p128 at 141, paras [35] and [36]

speculation, is insufficient for me to exercise my discretion in such a manner as to give effect to unauthorised administrative action."

[132] Under these circumstances, I am reluctant simply to deny the applicants any meaningful remedy and believe it would be equitable to set the notices aside.

Costs

[133] The ongoing and repetitious litigation between the parties over these issues as evidenced by some of the other cases mentioned above is regrettable, and could probably be avoided if past lessons were learned. In my view, it should not have been necessary for the applicants to litigate to assert the need for compliance with council procedures and to exercise their right to make representations when agreements are to be extended to non-parties. Accordingly, I believe they are entitled to their costs. The only party to the MEIBC which opposed the application in its own name was the National Union of Metalworkers' ('Numsa'), the thirty-fourth respondent which accordingly should also bear its share of the applicants' costs.

Order

[134] The following order is made:

1. The decisions of the first respondent taken in December 2014 to renew and extend the terms of a collective agreement to non-parties that fall within the registered scope of the second respondent, as embodied in Government notices R 1050 and R 1051 published in Government Gazette No. 38366 dated 24 December are reviewed and set aside

2. Government notices R 1050 and R 1051 published in Government Gazette No. 38366 dated 24 December 2014 are declared invalid and of no force or effect.

3. The costs of the application are to be paid by the first, second and thirty-fourth respondents jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	AJ Freund SC assisted by G Leslie instructed by Anton Bakker Inc.
FIRST RESPONDENT:	H Maenetje SC assisted by JM Ramaepadi instructed by the State Attorney
SECOND RESPONDENT	N A Cassim SC assisted by V September instructed by Patelia Cachalia Attorneys
THIRTY- FIFTH RESPONDENT:	J G Van der Riet SC assisted by C Orr instructed by Haffegee Roskam Savage Attorneys