(1) REPORTABLE NO / ~~YES~~
(2) OF INTEREST TO OTHER JUDGES NO / ~~YES~~
(3) REVISED ~~NO~~/YES

C. E.
SIGNATURE

DATE : 12/12/14

Judgment 04042012

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO: JR860/13

In the matter between:

NATIONAL EMPLOYERS ASSOCIATION OF SOUTH AFRICA	1st Applicant
PLASTIC CONVERTERS ASSOCIATION OF SOUTH AFRICA	2nd Applicant
RIVERPARK CRANE HIRE CC	3rd Applicant
and	
MINISTER OF LABOUR FIRST RESPONDENT	1st Respondent
METAL AND ENGINEERING INDUSTRIES BARGAINING COUNSEL	2nd Respondent
PARTIES TO THE AGREEMENT	3rd to 32nd Respondents
BOARDER INDUSTRIAL EMPLOYER'S ASSOCIATION	33rd Respondent
FEDERATED EMPLOYERS ORGANISATION OF SOUTH AFRICA	34th Respondent
CAESAR EMPLOYERS ASSOCIATION	35th Respondent

JUDGMENT

WATT-PRINGLE, AJ

1. This is an application in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 ("**the LRA**") and section 6 of the Promotion of

Administrative Justice Act, 3 of 2000 ("**PAJA**") for an order reviewing and setting aside the decision of the Minister of Labour ("**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 Metal and Engineering Industries Bargaining Council ("**the Bargaining Council**"), declaring that Government Notice R268 published in the Government Gazette No. 36338 of 12 April 2013 is invalid and of no force or effect and for the costs of the application to be paid by any party who opposes the application.

2. Several grounds of review were raised, including the questions whether the collective agreement complied with sections 32 (3) (e) and 32 (5) of the LRA. However, the conclusion which I have reached in this judgement is that the submission to the Minister to extend the purported collective agreement referred to in the submission and reflected in the Government Gazette No. 36338 of 12 April 2013 does not comply with section 32 (1) of the LRA in that:

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

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

3. This renders it unnecessary for me to consider the remaining grounds of review, as those referred to above go to the very heart of the matter. Without a valid collective agreement (as referred to in the submission) and without a valid decision to request the extension, the Minister is simply in no position to consider the merits of the submission purportedly made in terms of section 32.

4. An interesting debate as to whether PAJA applies to the Minister's decision need not be resolved. A decision which is not competent in terms of the empowering statute is clearly reviewable under 158 (1) (g) of the LRA, which empowers this Court to review the performance or purported performance of any of any function provided for in the LRA on any grounds that are permissible in law.

5. A material part of the initial background to this application appears from a judgment of this Court (van Niekerk J) under case number JR3062/2011, handed down on 20 December 2012.

6. In that application as in the present, the first applicant ("**NEASA**") was the first applicant and driving force behind the application. The judgment noted that NEASA represented some 1250 employers who operate within the Bargaining Council's registered scope.

7. On 18 July 2011 a collective agreement was concluded in the Bargaining Council which amended certain clauses in the Bargaining Council's main

collective agreement relating to sectoral conditions of employment and other matters of mutual interest between employers and employees in the sector. The agreement was intended to regulate these matters until 30 June 2014. NEASA was not a signatory to the collective agreement. On the same day the Bargaining Council resolved to request the Minister to extend the agreement to non-parties within the Council's registered scope as contemplated by section 32(1) of the LRA.

8. On 23 September 2011, the Minister, in response to a request from the Bargaining Council, issued a notice extending the collective agreement to non-parties for the period 26 September 2011 to 30 June 2014.

9. The application before van Niekerk J was an application in terms of section 158(1) (g) of the LRA and section 6 of PAJA to review and set aside the Minister's decision to extend the collective agreement to non-parties.

10. It is sufficient for present purposes to record that the Court upheld the review on the basis of non-compliance with the peremptory requirements of section 32(3) (b) and (c) of the LRA. In short, those sub-sections provide that a collective agreement may not be extended in terms of sub-section 32(2) unless the Minister is satisfied that 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 and that the members of the employers' organisations that are parties to the Bargaining Council will, upon the extension of the collective agreement, be found to employ the majority of all the employees who fall within the scope of the collective agreement.

11. Before van Niekerk J, the Minister submitted that in the event that the Court was to set aside her decision to extend the collective agreement, such order ought to be suspended for a period of ninety days to afford the Minister an opportunity to consider whether to exercise the further power under section 32(5) of the LRA to extend the agreement to non-parties on the grounds set out in that section.

12. Sub-section 32(5) reads as follows:

> *"(5) Despite sub-section (3)(b) and (c), the Minister may extend a collective agreement in terms of sub-section 2 if –*
>
> *(a) the parties to the Bargaining Council are sufficiently representative within the registered scope of the Bargaining Council; and*
>
> (b) *the Minister is satisfied that failure to extend the agreement may undermine collective bargaining at sectoral level or in the public service as a whole."*

13. In the event, van Niekerk J set aside the decision by the Minister to extend the collective agreement to non-parties and declared invalid and of no force or effect the Government Notice published on 23 September 2011 in which that decision was published.

14. On 20 December 2012, the learned judge granted the following orders, as corrected on 21 December 2012:

> *"(1) The decision by the first respondent in terms of which the collective agreement concluded on 18 July 2011 under the auspices of the second respondent was extended to non-parties who fall within the registered scope of the second respondent, is set aside.*
>
> *(2) Government Notice R 748 published in the Government Gazette number 34613 on 23 September 2011 is declared invalid and of no force and effect.*
>
> *(3) Paragraphs 1 and 2 of this order is suspended for a period of four months to enable the first respondent to consider whether or not to make a decision to extend the collective agreement in terms of section 32(5) of the Labour Relations Act, 66 of 1995. In the absence of any decision within the period stipulated, this order shall lapse."*

15. On 14 January 2013, the Bargaining Council addressed a submission for extension of the collective agreement in terms of section 32(5) of the LRA to the Minister. The submission states that it is in effect a request to republish the previous Government notice dated 23 September 2011 which was declared null and void by the Labour Court on 20 December 2012.

16. The accompanying LRA Form 3.5 which has to be submitted when Bargaining Councils request extension of collective agreements to non-parties pursuant to section 32(1) of the LRA records the inclusion of three copies of a collective agreement dated 14 January 2013.

17. In this submission, under the heading "*Details of Amendments*", item 15 relating to wages and/or earnings contains a note stating:

> "*An explanatory note is being inserted to clarify any confusion relating to the percentage wage spread between Grades A and H of the second and third years.*"

18. The full import of that note is the following:

    18.1 In the collective agreement published by the Minister in September 2011, the wage table for the period 26 September 2011 to 30 June 2012 applicable to Grades A to H contains percentage increases on actual hourly rates of pay excluding allowances of which the employee was in receipt on 30 June 2011, the amount thereof per

hour and the new minimum hourly wage rates for Grades A, A1, AA, AA (start), AB, B, C, D, DD, DDD, E, F, G and H respectively.

19. However, that 2011 agreement states the following for each of the ensuing two years respectively:

> "***B.*** ***For the period 1 July 2012 to 30 June 2013***
> *Grade A – 7%*
> *Grade H – 8%*
>
> *This adjustment will be implemented on the proviso that if the CPI (April figure published in May) is 7% or above, then the actual wage adjustment will be based on CPI plus 2%.*
>
> ***C.*** ***For the period 1 July 2013 to 30 June 2014***
> *Grade A – 7%*
> *Grade H – 8%*
>
> *This adjustment will be implemented on the proviso that if the CPI (April figure published in May) is 8% or above, then the actual wage adjustment will be based on CPI plus 2%.*"

20. In the "*agreement dated 14 January 2013*" submitted to the Minister for extension, a note appears immediately above paragraphs B and C quoted above:

> "*Note:*
>
> *The same percentage wage spread between the respective Grades will be applied in respect of the following wage tables:*
>
> - *All the wage tables set out at Clause 3(A)(a) to (f) above.*

- *The wage table set out at item 8 of Annexure B.*

- *The wage table set out at item 1.8 of Annexure H."*

21. This purported amendment to the collective agreement concluded in the Bargaining Council on 18 July 2011 is a major bone of contention in the present application. It is the applicants' contention that the collective agreement of 18 July 2011 was never validly amended by the parties to the Bargaining Council and that the documents submitted to the Minister as a collective agreement amended on 14 January 2013 was not an agreement negotiated or concluded in the Bargaining Council at all.

22. The applicants contend that the parties to the Bargaining Council did not conclude a new collective agreement amending the previous one, nor did they conclude a new collective agreement incorporating the 2011 agreement and the variations to which I have referred above.

23. The following chronology is relevant to this question.

24. The applicants, in their supplementary founding affidavit, referred to the absence of detailed, specified increases in wage rates relating to the second and third years of the collective agreement concluded in July 2011.

25. In May 2012 the Bargaining Council attempted unilaterally to impose wage increases in respect of the Grades between Grades A and H by publishing

a notice detailing such wage increases. When NEASA pointed out that this was *ultra vires* the powers of the Bargaining Council, the Council brought an application to this Court under case number J1864/2012 to "*rectify*" the 2011 agreement to provide for wage increases for Grades A and H. The Minister, who was cited as a respondent in that application, opposed the application, pointing out that an agreement once extended to non-parties could not be amended save in accordance with the provisions of section 32(8) of the LRA. 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-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.

26. It follows that the Minister was aware of the lacuna in the July 2011 collective agreement and of the fact that for that agreement to be amended for purposes of the new request for extension under section 32(5), it would have to be amended by the parties to the Bargaining Council. (The applicants' contention is that this did not occur. In essence, the "*agreement*" submitted to the Minister on 14 January 2013 for extension to non-parties was not a collective agreement properly so called.

It was a document which purported to be an amended version of the earlier collective agreement, signed off by certain representatives of the Bargaining Council and some of the parties thereto.)

27. On 1 February 2013, the Minister caused a notice to be published in the Government Gazette calling for submissions from affected parties relating to the possible extension of the 2011 main agreement in terms of section 32(5) of the LRA. Notably, there is no indication in the notice that affected parties were called upon to comment on the agreement as "*amended*" on 14 January 2013.

28. The minute of a meeting of the management committee of the Bargaining Council held on 26 March 2013 records the following:

> "*Main Agreement*
>
> *It was noted that the wage tables for 2013/2014 had been calculated in terms of the wage model in the 2011/2014 Settlement Agreement providing for a 7% increase at Rate A and 8% at Rate H with an agreed intermediate percentage wage spread between the grades.*
>
> - *The wage tables for 2012-2013 had been calculated on a similar basis and issued to the industry.*
> - *It was also agreed that both wage tables be gazette. (sic)*

- *Both wage tables had been calculated in terms of the wage models in the 2011-2014 Settlement Agreement, which has been gazette. (sic)*

- *It was accordingly resolved to request the Minister of Labour to publish the wage tables and to amend and extend the Main Collective Agreement concluded in the Bargaining Council to non-parties falling within the scope of the Collective Agreement within its registered scope."*

29. Neasa challenges both the validity of any decisions of this meeting on the basis that it was excluded from participation therein and the representivity of the employer parties who supported the resolution. In view of the conclusion to which I have arrived it is unnecessary to make any finding in this regard.

30. The minute neither reflects the conclusion of an agreement amending the 2011 agreement, nor a resolution requesting the Minister to extend any such agreement to non-parties.

31. On 28 March 2013, the Department of Labour addressed an email to an official of the Bargaining Council in which the Department stated its requirement for a resolution of the Bargaining Council in compliance with

section 32(1), reflecting the decision to request the extension of the agreement dated 14 January 2013.[1]

32. On 2 April 2013, the general secretary of the Bargaining Council replied that no resolution to this effect was taken after the Labour Court judgment of 20 December 2012 and that the original resolution was taken at a special Management Committee meeting on 18 July 2011 and submitted to the Department both under cover of a letter dated 22 July 2011 and again under cover of the Bargaining Council's letter dated 14 January 2013.

33. Apparently in response to a further communication from the Department which is not reflected in the record of decision filed by the Minister, on 4 April 2013, the Bargaining Council purported to conduct a postal vote pursuant to clause 10(3) of the constitution. The notice of the postal vote

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[1] Section 32 (1) reads:

2 Extension of collective agreement concluded in bargaining council

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

which was distributed via email at 12h39 on 4 April 2013 and required a response by close of business on the same day, a time period of just over four hours. The email records that the Department of Labour has requested that the office urgently submit a resolution in respect of the "*note*" which was inserted in the 2011 agreement relating to wage increases for the period 1 July 2013 to 30 June 2014 and which relates to the percentage wage spread between the wage Grade A to H for the aforementioned period. The note, quoted earlier in this judgment, is then reproduced. The email further states that this matter was dealt with at item 9 of the Management Committee meeting on 22 May 2012 and agreed by all parties to the 2011 collective agreement. All parties are requested to indicate their agreement or otherwise to the resolution on the enclosed ballot paper. The first annexure to the email purports to be a resolution[2] passed on 4 April 2013 "*to request the Minister of Labour to amend the main collective agreement for the period 1 July 2013 to 30 June 2014 concluded in the Bargaining Council and to extend the agreement to all non parties falling within the scope of the collective agreement within its registered scope*". The second annexure consists of the minutes of the Management Committee meeting held on 22 May 2012. Item 9 of that minute records that members were requested to note and confirm the new

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[2] The resolution does not state by which body t was passed, but I will assume that it was a resolution of the Bargaining Council's Management Committee.

industry wage rates and increases for the period 1 July 2012 to 30 June 2013 attached as Annexure D. It records that NEASA opposed the motion on the basis that neither the agreement nor the Government Gazette publication thereof specified the increases for the rates between Grades A and H. The minute appears to record an agreement that the Bargaining Council would obtain senior counsel's opinion on whether or not it was necessary to seek re-publication of the 2012/2013 industry wage increases. It was further agreed that the Office be authorised to do whatever is legally necessary to ensure the observance of the 2012/2013 wage increases by the parties and the extension of the wage increases to other non-parties.

34. The ballot paper requested the parties to state whether they agreed or disagreed with each of the following proposed resolutions:

34.1 that the Management Committee be (and is hereby) authorised and empowered to proceed with the publication in terms of the resolution attached in accordance with the recommendations as set out in the covering letter hereto; and

34.2 that subject to a majority vote in favour of the abovementioned main agreement, the President, Vice President and General Secretary, or representative delegated by them, be authorised and empowered to sign all documentation pertaining thereto for and on

behalf of the parties and submit same to the Department of Labour for amendment in terms of the provisions of the LRA.

35. The Minister having invited and received certain submissions in relation to the proposed extension of the collective agreement to non-parties, published a notice in the Government Gazette on 12 April 2013 announcing 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.

36. Section 213 of the LRA defines a collective agreement as a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions on the one hand and on the other hand one or more employers; one or more registered employers' organisations; or one or more employers and one or more registered employers' organisations.

37. As will become apparent, the document which purports to be a collective agreement concluded on 14 January 2013 neither meets the description of a collective agreement as defined in the LRA nor as contemplated in the Bargaining Council's constitution which deals with the manner in which collective agreements amongst parties to the Bargaining Council are concluded.

38. Clause 10 of the Bargaining Council's constitution deals with the conclusion of collective agreements. Clause 10(2) provides that any party or group of parties may submit to the Council's secretary any proposals in writing for the amendment of the Council's existing agreements or for the introduction of a new agreement. Clause 10(3) 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.

39. Item 2 of Annexure E provides that where any party to the Council wishes to initiate negotiations for the amendment of any existing agreement or the introduction of a new agreement that party shall submit its proposals in writing to the secretary of the Council who shall immediately arrange for the proposals to be circulated to all interested parties and shall take steps to arrange a negotiating meeting within forty five days of receipt of the proposal.

40. Where the Secretary in consultation with the President of the Council decides that the proposal relates to the negotiation of an industry matter, the date of the first negotiation meeting shall be decided at the next meeting of the Council's Management Committee and such negotiating meeting shall be held within thirty days of the Management Committee meeting. It is unnecessary to refer to the further provisions of this item.

41. The Bargaining Council's response to the contention that neither a collective agreement as published in April 2013, nor any collective agreement to amend the 2011 agreement was concluded on 14 January 2013, is confusing and contradictory to say the least.

42. Far from alleging the conclusion of any such agreement, the Bargaining Council contended before this Court that the explanatory note dealing with the Grades between A and H did not constitute an amendment to the 2011 agreement. Elsewhere the bargaining Council's deponent stated:

> "*The amendment to the collective agreement dated 14 January 2013 constituted the sum total of an explanatory note relating to the percentage wage spread between the A rate and H rates of the wage table calculated per the wage modules for the years 2012 to 2013 and 2013 to 2014 as outlined in the July 2011 agreement.*"

43. It further contended that the explanatory note was consistent with the outcome of the Management Committee meetings of 22 May 2012 and 26 March 2013. The explanatory notes did not, in principle, constitute amendments to the collective agreement and accordingly no amendment process was required. Even if the Court was to conclude that the explanatory note constitutes an amendment to the collective agreement it was submitted that there was substantial compliance with section 32(1) of

the LRA by virtue of the Management Committee meetings of 22 May 2012 and 26 March 2013.

44. The Minister, in her answering affidavit, articulated this ground of review as follows:

44.1 The attack is that the Minister exceeded her powers in extending the collective agreement.

44.2 The applicants contend that the extended collective agreement differs from the collective agreement concluded in July 2011.

44.3 Since no amended collective agreement was concluded and no meeting of the Council was held to vote on a request to extend an amended collective agreement, there was no compliance with sections 32(1), (2), (3) and (8) of the LRA.

45. The Minister contended that the applicant's argument was premised on assertions that:

45.1 the extended agreement was purportedly concluded on 14 January 2013;

45.2 that the parties that concluded the amended agreement are different from the parties that concluded the 18 July 2011 collective agreement;

45.3 that the extended agreement seeks to introduce certain amendments to the initial settlement agreement concluded on 18 July 2011;

45.4 that the parties to the Council had not concluded a collective agreement to amend the collective agreement of 18 July 2011;

45.5 that there was no meeting of the Management Committee scheduled for January 2013;

45.6 that none of the parties that signed the 14 January 2013 agreement have capacity or authority to conclude a collective agreement on behalf of the parties to the Council, seventh, that the purported amendment to the collective agreement was not done in the Council and in accordance with the constitution of the Council; and

45.7 that the Council did not meet or resolve to request extension of the amended collective agreement.

46. The Minister noted that the contention of the applicants was that because the amendment of the collective agreement was not effected in accordance with the provisions of the constitution of the Bargaining Council and there was no request by the Bargaining Council to extend the amended collective agreement, the Minister acted *ultra vires* her powers

and acted irrationally in extending the amended collective agreement to non-parties.

47. The Minister dismissed these contentions on the following basis:

47.1 the applicants appear to accept that the Bargaining Council had amended the collective agreement. The contention of the applicants is, however, that the amendments were decided without negotiations as required by the constitution of the Bargaining Council and not by an organ of the Bargaining Council such as the Management Committee duly constituted;

47.2 the Council submitted a new request for the extension of the amended agreement, that is the LRA Form 3.5 date stamped 14 January 2013 to which I have made reference above;

47.3 the Bargaining Council submitted an extract of the minutes of the Management Committee Meeting held on 22 May 2012 at which meeting it was resolved that the "*Office*" be authorised to do whatever was legally necessary to ensure the observance of the 2012/2013 industry wage increases by the parties and the extension of the wage increases to all other non-parties;

47.4 the applicants cannot challenge the decision to extend the amended collective agreement on the grounds that the amendments were not effected in accordance with the procedures

provided for in the constitution of the Council and that the amendments were not decided on by an organ of the Council such as the Management Committee duly constituted. Clause 2(d) read with clause 6 of Annexure E to the constitution of the Bargaining Council requires disputes relating to alleged non-compliance with the procedures provided in the Council's constitution to be resolved through arbitration. Thus this Court lacks jurisdiction to entertain such disputes alternatively should not deal with the issue until arbitration has been exhausted.

48. In argument before me, counsel for the Minister invoked section 206 of the LRA, contending that mere technical non-compliance with a Bargaining Council's constitution does not provide a valid ground on which to challenge the resulting collective agreement. Section 206 reads as follows:

> **"206 Effect of certain defects and irregularities**
> (1) Despite any provision in *this Act* or any other law, a defect does not invalidate-
> *(a)* the constitution or the registration of any registered *trade union*, registered *employers' organisation* or *council*;
> *(b)* any *collective agreement* or arbitration award that would otherwise be binding in terms of *this Act*;
> *(c)* any act of a *council*; or
> *(d)* any act of the *director* or a commissioner.
> (2) A defect referred to in subsection (1) means-
> *(a)* a defect in, or omission from, the constitution of any registered *trade union*, registered *employers' organisation* or *council*;
> *(b)* a vacancy in the membership of any *council*; or
> *(c)* any irregularity in the appointment or election of-
> (i) a representative to a *council*;
> (ii) an alternate to any representative to a *council*;

(iii) a chairperson or any other person presiding over any meeting of a *council* or a committee of a *council*; or
(iv) the *director* or a commissioner."

49. Counsel furthermore invoked the judgement of van Niekerk J in the urgent application which preceded the matter decided on 20 December 2012 and referred to above. In that matter, **National Employers' Association of South Africa & others v Minister of Labour & others** [2012] 2 BLLR 198 (LC), van Niekerk J held as follows at paragraph 20:

> "[20] In any event, in so far as the requirement of an existing right is concerned, the provisions of section 206(1)(c) of the LRA preclude the applicants, as least in as the relief they seek is directed against the minister, from relying on any irregularity in the appointment or election of a representative to a council effectively to invalidate any collective agreement or act of the bargaining council that would otherwise be binding in terms of the Act. It seems to me that section 206 was enacted specifically to protect processes against technical shortcomings and deficiencies in the functioning of bargaining councils. The ordinary grammatical meaning of section 206(1)(b) read with subsection (2)(c) immunises collective agreements and acts of bargaining councils from attacks on their validity on account of any irregularity in the appointment or election of any representative to a council, or any of its structures. The applicants' attack on the validity of an act of the bargaining council, at least that part of it premised on the failure by the bargaining council to comply with its constitution in so far as appointments to the management committee are concerned, is precisely the kind of attack envisaged by

section 206. What section 206 means is that even if the council or its management committee were not constituted in accordance with its constitution when it requested the minister to extend the agreement, that defect does not invalidate the request, nor does it affect the validity of the agreement. It would do violence to the plain wording of the section and its obvious purpose to find, as the applicants submit, that a distinction ought to be drawn between void and voidable acts, and that only the latter are contemplated by section 206."

50. It follows that neither section 206 nor the judgment referred to above assist the respondents in circumstances in which the problem is not some technical deficiency as alluded to in section 206, but the total absence of any agreement such as is referred to in the request to the Minister in January 2013.

51. In my view, the Bargaining Council's response to this ground of review is at best obfuscatory and the Minister's response fails to come to grips with the real issue.

52. 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.

53. Nor does the postal ballot referred to above remedy the situation. Apart from the fact that the Bargaining Council's constitution does not envisage the use of a postal vote in order to conclude agreements not negotiated between the parties, the extremely short time given to parties to submit their votes is not reasonable and resulted in a very small poll, not representative of the parties eligible to vote. This is hardly surprising.

54. Furthermore, the ballot asks parties to agree to the resolution of the Management Committee to seek extension of the collective agreement to non-parties. It does not seek agreement to the amendment of the 2011 collective agreement in the manner contemplated in the "*Note*", or at all.

55. The Minister's contention that the applicants do not in substance dispute that the collective agreement of 2011 was in fact amended is difficult to understand. The applicants, in their supplementary founding affidavit, point out that the 2011 agreement does not stipulate wage increases for Grades other than A and H for the 2012 to 2014 period. The parties to the

Bargaining Council have not concluded a further collective agreement in the Council dealing with wage increases since the 2011 agreement. The new agreement as extended by the Minister in April 2013 differs from the 2011 agreement *inter alia*, in that it purports to incorporate some or all of the amendments that the Bargaining Council seeks to introduce in the pending rectification application and by the insertion of the note in the "*14 January 2013*" agreement, quoted above.

56. In the circumstances, I find that the "*agreement*" which the Minister purportedly extended to non-parties by publication in the Government Gazette on 12 April 2013 was not in fact a collective agreement and the Minister was thus not empowered by section 32 to do so. Her actions were therefore *ultra vires* and fall to be set aside on review on this ground alone.

57. In these circumstances, it is not necessary for me to consider any other grounds of review advanced by the applicants.

58. The National Union of Metalworkers of South Africa (NUMSA), the Bargaining Council and the Minister all submitted that any decision setting aside the Minister's decision and the extension of the collective agreement to non-parties should be suspended in the interests of justice. The applicants on the other hand submitted that I should not do so.

59. The Constitutional Court in **Dawood, Shalabi and Thomas v Minister of Home Affairs** 2000 (3) SA 936 (CC) at paras 59-60 held that if administrative action is inconsistent with the Constitution, the Court is compelled to declare the conduct unconstitutional and invalid. See also *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) at para 10:

> "A Court's power under s 172 of the Constitution is a unique remedy created by the Constitution. The section is the constitutional source of the power to declare law or conduct that is inconsistent with the Constitution invalid. It provides that when a Court decides a constitutional matter, it *must* declare invalid any law or conduct inconsistent with the Constitution."

60. One of the submissions made was that this Court has a discretion not to review administrative action even if grounds of review are found to exist. However, Froneman J in **Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and Others** 2011 (4) SA 113 (CC) held as follows at paragraph 84.

> "[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."

61. As to the decision whether to ameliorate the effect of a declaration of invalidity, Froneman J stated:

"[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."

62. In the present matter, the fact that a decision by the Minister to extend a collective agreement to non-parties constitutes an infringement of the rights of non-parties freely to negotiate the terms of engagement applicable between employer and employee must be borne in mind. I do not intend to embark on the enquiry as to whether that infringement, sanctioned as it is by law and in place for a considerable time without successful challenge, constitutes a reasonable infringement. It is however in my view a valid consideration that whilst section 32 sanctions the imposition of a collective agreement on non-parties, it does so subject to reasonable requirements and safeguards calculated to ensure that this is not done in an arbitrary manner and without strict compliance with the requirements of that section.

63. Where, as here, the Bargaining Council and the Minister have been given two opportunities to get their proverbial house in order and have failed to

do so in ways that are both obvious and fundamental, the time comes when the Court ought not to lend its imprimatur to such unauthorised infringement of the rights of affected parties.

64. For this Court to accede to the contention that it would be just and equitable to suspend the effect of the order of invalidity would result in the Court doing precisely that which the Minister was not authorised to do by section 32 and thereby imposing a purported collective agreement on non-parties which was never even concluded by the putative parties thereto.

65. This matter was heard one day after the collective agreement had lapsed in accordance with its own terms. 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 speculation, is insufficient for me to exercise my discretion in such a manner as to give effect to unauthorised administrative action.

66. On the question of costs, I am persuaded that it is in the interests of justice that the applicants are entitled to their costs. NUMSA's opposition was extremely limited and did not contribute in any material way to the burden

of costs borne by the applicants. Whilst I consider that the Bargaining Council is more culpable for the irregular way in which it sought extension of the collective agreement and for its failure candidly to deal with the status of the 14 January 2013 "agreement", the Department of Labour was also aware of the absence of any valid decision to request the extension of the agreement to non-parties. Its acceptance of the postal vote as a means to paper over that particular crack, after affected parties had already made their submissions to the Minister and as the Minister was about to make her decision, is unfortunate.

67. The following order is made:

67.1 The decision of the Minister of Labour taken in April 2013 to extend the terms of a collective to non-parties that fall within the registered scope of the second respondent is reviewed and set aside

67.2 Government notice R268 published in the Government Gazette No. 36338 on 12 April 2013, is declared invalid and of no force or effect.

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

CE WATT-PRINGLE, AJ
Acting Judge of the Labour Court

Date Argued: 1 July 2014
Date of Judgment: ~~12~~ 17 December 2014

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