IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 4 May 2016

CASE NO: 13762/13

In the matter between:

FREE MARKET FOUNDATION Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

....

DATE SIGNATURE

THE MINISTER OF LABOUR First Respondent

THE MINISTER OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT Second Respondent

THE BARGAINING COUNCILS LISTED

IN ANNEXURE "A" Third to Fiftieth Respondents

NUMSA Fifty First Respondent

SOUTHERN AFRICAN CLOTHING AND

TEXTILE WORKERS' UNION (SACTWU) Fifty Second Respondent

JUDGMENT

MURPHY J

1. This application concerns a significant constitutional challenge to the system of collective bargaining in South Africa, and more particularly to section 32 of the Labour Relations Act[1] ("the LRA").

2. The applicant, the Free Market Foundation ("FMF"), is an independent policy research and education organisation promoting the principles of limited government, economic freedom and individual liberty. It is inspired by classical liberal principles and believes in an open society founded on the rule of law, human rights, economic freedom and democracy.

3. The respondents are the Minister of Labour, the Minister of Justice and Constitutional Development and forty-seven bargaining councils identified in Annexure A of the notice of motion. In addition, the Congress of South African Trade Unions ("COSATU"), the National Union of Metalworkers of South Africa ("NUMSA") and the Southern African Clothing and Textile Workers Union ("SACTWU") intervened in the matter and were joined as respondents.

4. Section 23(5) of the Constitution enshrines the right to collective bargaining. It provides:

> "Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

[1] Act 66 of 1995

5. The national legislation contemplated in section 23(5) of the Constitution is the LRA. Section 36(1) of the Constitution is the provision allowing for the limitation of the rights in the Bill of Rights by measures which are reasonable and justifiable in an open and democratic society.

6. Section 1 of the LRA specifies the purpose of the LRA as follows:

> "The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are:-
>
> (a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution;
>
> (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
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> (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can-
>
> (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
>
> (ii) formulate industrial policy; and
>
> (d) to promote-
>
> (i) orderly collective bargaining;
>
> (ii) collective bargaining at sectoral level;
>
> (iii) employee participation in decision-making in the workplace; and
>
> (iv) the effective resolution of labour disputes."

7. Section 3 of the LRA requires any person applying the LRA to interpret its provisions to give effect to its primary objects; in compliance with the Constitution; and in accordance with the public international law obligations of the Republic. In *Chirwa v Transnet Ltd and others*[2] the Constitutional Court stated that the objects of the LRA set out in section 1 are not just textual aids to be employed where the language is ambiguous, rather the primary objects must inform the interpretive process and the provisions of the LRA must be read in the light of its objects. The objects of particular relevance to the constitutional challenge by FMF to section 32 of the LRA are those aimed at promoting orderly collective bargaining and collective bargaining at sectoral level.

8. Section 32 of the LRA permits the extension of collective bargaining agreements concluded at sectoral level to persons not directly involved in the collective negotiations and not party to the agreement concluded in the bargaining forum, being the relevant bargaining council.

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[2] 2008 (4) SA 367 (CC)

Government policy favours such an arrangement because it is perceived to advance: (i) the promotion of collective bargaining at sectoral level; (ii) the promotion of majoritarianism; (iii) the prevention of unfair competition; (iv) the benefit of workers who have no collective bargaining strength to negotiate wages and terms and conditions of employment; and (v) a pluralistic system of industrial relations based on voluntarism (self-regulation) rather than state interference in the collective bargaining relationship.[3]

9. The FMF questions the economic efficacy and morality of these policy objectives. Its attack on the system is predicated upon a free market perspective opposed to the prevailing orthodoxy. From its ideological standpoint, sectoral bargaining and the extension of the products of it to non-participants, far from advancing the protection of vulnerable workers, are an impediment to the growth of small businesses resulting in less job creation and a higher rate of unemployment. The present litigation is part of its broader campaign aimed at confronting government policy in the hope of infusing it with a more libertarian dimension. The FMF's position at the time it filed the application was that section 32 infringes various fundamental rights enshrined in the Bill of Rights,[4] including the rights to equality, freedom of association, administrative justice, dignity and fair labour practices. After the respondents filed their answering affidavits, the FMF narrowed the dispute by abandoning all its attacks upon section 32 of the LRA based on alleged violations of the Bill of Rights. Its challenge has been reduced now to a claim that section 32 of the LRA violates the principle of legality under section 1(c) of the Constitution,[5] the so-called rule of law provision, because it permits the extension of collective agreements to non-parties contrary to the public interest by persons ostensibly not subject to adequate state supervision. The constitutional principle of legality is an aspect of the rule of law and constrains the use of all public power. Its precise content is matter for casuistic development by the courts. The FMF sought to persuade us that legality requires all governmental power to be exercised in the public interest.

Section 32 of the LRA: text, statutory context, scope and purpose

10. The relevant part of section 32 of the LRA reads as follows:

> "(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-

[3] *Kem-Lin Fashions CC v Brunton and another* (2001) 22 ILJ 109 (LAC) para 20-21; and *CUSA v Tao Ying Metal Industries and others* 2009 (2) SA 204 (CC) para 56.

[4] Chapter 2 of the Constitution

[5] Section 1(c) provides: "The Republic of South Africa is one, sovereign, democratic state founded on the following values:……(c) Supremacy of the constitution and the rule of law." This broad constitutional principle of legality governs the use of all public power. It demands *inter alia* that the exercise of public power should not be arbitrary or irrational.

(a) one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favour of the extension; and

(b) one or more registered employers' organisations, whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension.

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) …

(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; 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;

(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;

(d) the Minister has considered all comments received during the period referred to in paragraph (c).

(5A) When determining whether the parties to the bargaining council are sufficiently representative for the purpose of subsection (5)(a), the Minister may take into account the composition of the workforce in the sector, including the extent to which there are employees assigned to work by temporary employment services, employees employed on fixed term contracts, part-time employees or employees in other categories of non-standard employment."

11. Section 32 of the LRA must be read and interpreted in the context of Part C of the LRA dealing with bargaining councils. Our law has never compelled the formation of centralised bargaining structures at industry level, nor has it prohibited bargaining outside the statutory framework. Resort to the statutory framework was necessary only if the parties wanted their collective agreements to have statutory effect at industry or sectoral level. In the legislative scheme which existed prior to the enactment of the LRA in 1996, the statutory centralised bargaining forums were the industrial councils formed by registered trade unions and employers or employers' organisations. The LRA preserved this voluntarist policy. The formation of bargaining councils remains voluntary, requires the collaboration of both industrial partners and is accomplished by a simple process of registration.[6] However, in order to promote sectoral bargaining, the LRA offers a range of inducements for participation in bargaining councils (for example preferential workplace access and stop order rights).

12. The primary functions of bargaining councils[7] are to conclude and enforce collective agreements in relation to terms and conditions of employment or matters of mutual interest; and to prevent and resolve labour disputes. The residual functions of bargaining councils include the power to promote, establish and administer various schemes including training, education, pension, medical aid, sick pay, and unemployment schemes or funds. Section 28(h) of the LRA confers upon bargaining councils the function of developing policy and legislation proposals for consideration by relevant policy making bodies.

13. Collective agreements are the end product of collective bargaining. The legal effect of a collective agreement is governed by section 23 of the LRA. A collective agreement in the first instance contractually binds the parties to it. In terms of section 23(1)(b) of the LRA, a collective agreement establishes contractual rights and obligations between each party to the agreement and the members of every other party to the agreement in so far as the provisions are applicable to them. It will also create rights and obligations between members of a union

[6] Sections 27 and 29 of the LRA
[7] Section 28 of the LRA

party to the agreement and employer members of an employer organisation party in relation to terms and conditions of employment. And finally, section 23(1)(d) of the LRA provides that a collective agreement binds employees who are not members of the union parties to the agreement provided the union represents a majority of employees in the workplace, provided further that those employees are expressly identified and expressly bound in the collective agreement. This provision binding non-parties to the agreement operates at workplace level.

14. Section 31 of the LRA regulates the legal effect of collective agreements concluded in bargaining councils. A collective agreement concluded in a bargaining council binds only the parties to the council who are parties to the collective agreements. Parties to the council who are not party to the collective agreement will not be bound to it. This section altered the legislative dispensation existing before 1996. Under section 27(7) read with section 48 of the Labour Relations Act 28 of 1956 it was possible for a collective agreement to be made binding by an industrial council on parties to the council who were not party to the agreement. Nowadays, under the 1996 Act, in order for parties to the council who are not parties to the collective agreement to become bound to it, the agreement must be extended to them in terms of section 32 of the LRA. Thus, the term "any non-parties" referred to in section 32(1) of the LRA comprises two categories: i) parties to the council who are not party to the collective agreement; and ii) non-parties to the council.

15. Section 31(b) and (c) of the LRA provide for the members of parties to a bargaining council collective agreement to be bound to the parties to the agreement.

16. Within this legislative scheme, section 32 of the LRA, the impugned provision, is the means whereby a bargaining council may extend the product of sectoral bargaining to non-parties to the agreement within its registered scope that would otherwise not be bound by it.

17. There are a number of juridical acts at play in the process leading to the extension of collective agreements to non-parties at sectoral level.

18. Firstly, there are the contractual negotiations between the parties in the bargaining council which ultimately result in the conclusion of the collective agreement.

19. Secondly, there is the decision taken by the bargaining council asking the Minister to extend the collective agreement to any non-parties to the collective agreement. Section 32(1) of the LRA stipulates a number of legal pre-requisites to the bargaining council's action. The collective agreement in question must be concluded in the bargaining council. The decision to ask the Minister to extend it to non-parties must be by way of a resolution taken at a bargaining council meeting. The resolution must be supported by one or more trade unions

whose members constitute the majority of members of all the trade union parties to the council. Likewise, the resolution must be supported by one or more employer's organisations which employ the majority of employees employed by the employer organisation members who are party to the council. The request to the Minister must be in writing. The non-parties sought to be bound must be identified in the written request to the Minister and they must fall within the registered scope of the council.

20. The third juridical act in the process of extension is the decision of the Minister to extend the agreement in terms of sections 32(2) and 32(3) of the LRA. The Minister's decision-making power in terms of these provisions is the main target of the FMF constitutional challenge; the objection being that the duty of the Minister to extend the agreement is in effect non-discretionary or mechanical and subject to limited judicial supervision. The Minister "must" extend the collective agreement as requested. However, before the Minister acquires jurisdiction to extend the collective agreements, the conditions precedent to jurisdiction, the jurisdictional facts, specified in section 32(3) of the LRA must be fulfilled. These are: firstly, the Minister must be satisfied that the numerical requirements of majoritarianism have been met;[8] secondly, the decision of the bargaining council must comply with the legal pre-requisites of section 32(1);[9] thirdly, there must be in existence an effective exemption procedure applying fair criteria for exemption promoting the primary objects of the LRA;[10] and fourthly, the terms of the collective agreement must not discriminate against non-parties.[11] If the jurisdictional facts are present, the Minister "must" extend the collective agreement as requested within 60 days of receiving the request. She does so by publishing a notice in the Government Gazette declaring the collective agreement to be binding on the specified non-parties from a specified date and for a specified period.

21. The non-discretionary duty (mechanical power) of the Minister to extend bargaining council collective agreements applies only in situations where the majority of employees who will be covered by the agreement once extended are members of trade unions that are parties to the council. This means, among other things, that the membership of minority unions who are party to the council, but who are not party to the collective agreement, will be taken into account in determining whether the numerical threshold for extension has been reached. The additional threshold numerical requirement is that the members of employers' organisations party to the agreement must employ the majority of all the employees within the scope of the collective agreement once it is extended.

22. The numerical thresholds of the level of majoritarianism required by section 32(3) of the LRA are therefore in fact quite high; and in practice may prove difficult to achieve. Any obstacle of this order can be overcome by resort to section 32(5) of the LRA.

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[8] Section 32(3)(b) and (c)
[9] Section 32(3)(a) and (d)
[10] Section 32(3)(dA), (e) and (f).
[11] Section 32(3)(g)

23. Section 32(5) confers a discretion upon the Minister to extend a collective agreement to non-parties when the numerical thresholds in section 32(3)(b) and (c) have not been attained. Where the requirements of majoritarianism are absent, the Minister "may" extend the agreement provided other jurisdictional conditions are present. The conditions precedent to the exercise of that discretion are: i) a requirement that the parties to the bargaining council (not necessarily the collective agreement) are sufficiently representative within the registered scope of the council; ii) the Minister is satisfied that the failure to extend the agreement may undermine collective bargaining at sectoral level or in the public service as a whole; and iii) the Minister has invited and considered comments on the application for extension as contemplated in section 32(5)(c) and (d) of the LRA. If the jurisdictional facts exist the Minister must apply her mind and exercise the discretion to extend the collective agreement or not. It is important to note that section 208A(1) of the LRA prohibits the Minister from delegating any of the powers, functions and duties conferred upon her by section 32. The Minister accordingly must personally decide whether to extend the agreement in terms of section 32(5).

24. The other juridical act which can come into play after a collective agreement is extended is a decision in relation to an application for exemption. Section 32 requires bargaining councils wanting to extend collective agreements to have in place effective procedures to deal with applications by non-parties for exemption from the provisions of a collective agreement and an independent appeal body to determine appeals against refusals and withdrawals of exemptions.[12]

Background to the enactment of section 32 of the LRA

25. This scheme for the extension of collective agreements concluded in bargaining councils differs markedly from that which existed prior to the enactment of the LRA in 1996. Under section 48 of Act 28 of 1956, the Minister had a wide discretion to accede to a request for extension of an agreement concluded in an industrial council or not. He could extend the agreement if he deemed it expedient to do so. In terms of section 48(2)(b) he had nonetheless to satisfy himself that the parties to the agreement were sufficiently representative of the employees and employers in the industry. In determining whether it was expedient to extend a collective agreement to non-parties, the Minister in practice would take into account i) the restrictive effect of the provisions on business practices; ii) the degree of consultation with non-parties and the extent to which their views had been given consideration by the council; iii) the allowance made for wage differentiation on an area basis; iv) the provision made for small employers or new entrants to the industry; and v) the opportunities for small employers to obtain exemption from the agreement.[13]

[12] Section 32(3)(dA), (e) and (f); and section 32(3A).
[13] D du Toit et al *Protecting Workers or Stifling Enterprise? Industrial Councils and Small Business* (1995) 2-5.

26. In heads of argument filed on behalf of the 20th respondent, the Metal and Engineering Industries Bargaining Council, Mr Myburgh SC sketched the background to the change of legislative policy and the political decision to constrain the discretion of the Minister in section 32(2) and (3) of the LRA. There is no dispute about this history.

27. In 1988 COSATU laid a complaint with the International Labour Organisation ("ILO") regarding the discretion of the Minister not to promulgate collective agreements concluded in an industrial council. This led to an investigation by an ILO Fact Finding and Conciliation Commission ("FFCC") in 1992. In its report the FFCC emphasised that the Minister should proceed cautiously in deciding whether to promulgate collective agreements with the effect of converting them from contractual arrangements to a form of subordinate legislation. The system of industrial pluralism and voluntarism expects the public authorities to refrain from any interference in order to modify the content of collective bargaining. It concluded:

> "The Commission is not required by its mandate to examine the exercise by the Minister of his discretion in particular cases. However, if the principle of non-interference in freely concluded agreements is to be respected, s48(1) should be amended in order that the Minister's role in checking concluded agreements remains a technical one. Its purpose should simply be to verify questions of form or compliance with overriding statutory provisions, such as the minimum standards set out in the labour law. In such a context, once he has been presented with a request for promulgation, he should proceed to do so without intervening in the contents."[14]

28. This pronouncement, though limited to a recommendation regarding promulgation of collective agreements as opposed to their extension to non-parties, was relied upon by government to opt for a scheme of extension that provides for less executive interference in the extension of collective agreements to non-parties. The requirement in section 32(2) of the LRA that the Minister "must" extend the agreement once the jurisdictional facts are established, is predicated upon the notion that collective bargaining at sectoral level will be undermined if bargaining agents in a majoritarian setting were uncertain at the outset of negotiations about whether or not their agreements would be extended in terms of section 32(2) of the LRA. An advantage from the employer perspective is that an extended sectoral agreement will become binding on trade union members within the workplace of a particular employer who are not party to the council or the collective agreement with the result often that they will be prohibited from taking industrial action over matters dealt with in the agreement by virtue of peace clauses in the agreement and the provisions of section 65(1)(a) of the LRA.[15] The compulsory extension of a majority collective agreement can ensure orderly industrial relations and be an effective progenitor of industrial peace.

29. Parliament when enacting the LRA therefore deliberately refrained from conferring a wide discretion upon the Minister to extend collective agreements to non-parties in those cases

[14] Paras 708-710.

[15] Section 65(1)(a) of the LRA prohibits participation in industrial action by parties bound by a collective agreement that prohibits industrial action in respect of the issue in dispute.

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

An overview of the FMF challenge

30. The shift in policy in relation to the discretionary powers of the Minister to extend collective agreements to non-parties is at the heart of the FMF's constitutional challenge. As noted already, the FMF initially mounted a wide-ranging attack on section 32 of the LRA in the form of a Bill of Rights review on various grounds. It has now jettisoned most of these and relies solely on the principle of legality.

31. The FMF furthermore placed substantial reliance on expert opinion evidence and academic commentary taking issue with the economic merits of the extension mechanism. With its change of stance, it has backed away from engaging fully with this evidence as well. The economic debate has attracted media attention, generating interest among members of the public, and remains relevant as background to the issues at stake. It is thus deserving of brief mention.

32. The expert reports say that the system of extension, by equating a grouping of organised employees and employers who share a common interest with counterparts who share no such common interest, erects barriers to entry that operate to the detriment of small firms and the unemployed. Trade unions have a natural interest in inflating the benefits their members receive from employment. They are consequently inclined to prevent undercutting by non-members. Binding non-members by extending collective agreements setting mandatory standards for wages and working conditions makes undercutting more difficult. Some employers also have a corresponding interest in inflating the levels at which labour is hired. Higher wages and standards increase the costs of production for new entrants to the industry, or those who dissent, and thus provide a brake on unwanted competition to established businesses. The FMF claims the results are highly prejudicial. Unemployment is made appreciably worse and entrepreneurship is retarded to a material degree. If such "rent-

seeking" is to be countenanced, then, says the FMF, proper supervision by the state is necessary.

33. This line of thinking and the legitimate concerns it raises form the sub-text of the FMF challenge. The FMF recognises that our constitutional landscape embraces industrial pluralism, collective bargaining and the setting of minimum standards. While it frankly does not embrace the system, it accepts it as the prevalent reality. It would prefer however to see the system subject to more effective state control and judicial supervision. Its stance is summarised in paragraph 13.3 of the founding affidavit deposed to by its chairperson, Mr Herman Mashaba, as follows:

> "Finally, it is not disputed in these proceedings that the state may, by way of ministerial regulation properly designed to promote the public interest, impose terms and conditions of employment on employers and employees within the economy. Whether this is economically desirable is a matter on which the FMF has considered views, but this is a matter beyond the compass of this application. In addition, the FMF accepts, for the purposes of this application that the State can, in formulating such regulations, take the counsel of experts and even interest groups such as bargaining councils. What the FMF does say, however, is that the decision on the terms to impose must be that of the State and, under our Constitution, it must ultimately be actuated by a genuine understanding of the public interest that is informed by a proper application of the tenets of due process. The LRA's breach of these requirements provides a basis for challenge not just through the political process but also through the courts."

34. From this point of departure, the FMF contests the notion that bargaining councils (in its view "private actors") can, without breaching the dictates of the Constitution, be entrusted by law with an autonomous coercive power to impose terms and conditions of employment on others. This, it contends, is what section 32 of the LRA achieves by making it obligatory for the Minister to heed a request by a bargaining council for the extension to non-parties of collective agreements concluded in the council. It objects especially to the mechanical non-discretionary power conferred upon the Minister in terms of section 32(2) of the LRA, and submits that the tenets of constitutionality require that if terms and conditions of employment are to be imposed, this can only properly be done by an organ of state (the Minister) appropriately charged with a substantive discretion that is to be exercised in the public interest and in accordance with the principles of procedural fairness. Since no provision is made in section 32 for this kind of discretion or adequate due process, section 32, in its view, is unconstitutional for that reason.

35. The FMF originally advanced two bases for its constitutional challenge. The first, which I have just described, is to the effect that section 32 impermissibly entrusts coercive statutory powers to private actors. The second was that employment conditions are imposed on third parties in breach of the majoritarian principle. It all but abandoned the second challenge in the course of argument, while in relation to the first it opted to narrow the scope of the attack by constituting its case exclusively on the principle of legality and eschewing reliance upon any Bill of Rights violation.

The majoritarian principle in collective bargaining and its alleged adverse impact

36. Although the FMF's change in strategy has obviated the need to canvass the alleged unconstitutional breach of the majoritarian principle, majoritarianism is a relevant feature in assessing the constitutionality of the statutory scheme. It is necessary therefore to refer briefly to the FMF's abandoned argument, as it casts some light upon the nature and application of the majoritarian principle under section 32 of the LRA.

37. The usual justification for the extension of collective agreements to non-parties is the assumed legitimacy, on the basis of the principle of majority rule, in propping up the collective bargain to prevent undercutting. The system established by section 32 of the LRA, according to the FMF, is however not one of true majority rule. Firstly, the parties seeking extension need not represent the majority of employers and employees in the sector. Under section 32(1) of the LRA it is sufficient if the union side represents a majority of trade union members of the unions party to the council and the employer side employs a majority of the employees employed by employer members of the bargaining council. Be that as it may, section 32(3) introduces a more stringent requirement in relation to the decision by the Minister to accede to the bargaining council request for extension. The Minister can only extend the agreement if the majority of employees within the scope of the extended agreement are members of the trade unions party to the council and are employed by the employer parties. However, those employees need not be members of the unions assenting to the agreement. It is enough that they are members of unions that are party to the council, even if such unions do not concur in the agreement. As the FMF put it, dissenters are treated as if they are assenters. The numerical strength or representivity of the employers is not relevant. The applicable consideration is the number of employees employed. A single employer employing the majority of workers in a sector, acting in concert with the unions, can determine terms and conditions for all employers in the sector. Moreover, the principle of majoritarianism is diluted by the power of the Minister to jettison the requirements of majoritarianism completely under section 32(5) of the LRA if satisfied that the parties to the council are sufficiently representative and extension will serve orderly collective bargaining at sectoral level. The FMF demurred further that in framing the constituency within which the computation of representativeness is to be made, the LRA fails to bring prospective entrants to the industry into account.

38. These derogations from true majoritarianism, the FMF contended, constitute a breach of the principles entrenching equality in section 9 and the freedom of association in sections 18 and 23 of the Bill of Rights. How exactly that is the case, was not fleshed out completely in the founding affidavit. With its change of tack the FMF did not persist with this line of argument and limited itself to the assertion that the mode of computation is not legitimate.

39. The respondents, COSATU in particular, have put up a spirited defence of majoritarianism and dispute the correctness of the economic impacts alleged in the expert reports. To the

extent that any fundamental right might be limited by majoritarianism, in their view, the limitation is reasonable and justifiable in terms of section 36 of the Constitution.[16] The model of majoritarianism adopted by section 32 of the LRA embodies a legislative policy choice that is specifically envisaged and permitted by the Constitution, the LRA and international law. The provisions of the LRA, they argued, seek to strike an appropriate balance between ensuring that bargaining councils and collective agreements represent and cover a majority of the employers and employees in the sector, while also seeking to ensure that these systems are practicable and do not unduly depend on a strict numerical form of majoritarianism, of the sort supported by the FMF, based on the representivity of the bargaining agents rather than the coverage of the agreement.

40. COSATU made various points in support of the system. The FMF's attack on the majoritarian approach in section 32, in its opinion, is based on a misconception of representativeness in the regulation of collective bargaining structures and processes. It acknowledged that the extension of a collective agreement is indeed not dependent on the numerical strength of employers. Instead, section 32 is concerned more with whether the employer parties employ the majority of employees who fall within the scope of the extended collective agreement. The FMF characterises representativeness as being only about representation rather than coverage. International comparative law demonstrates that a collective agreement may legitimately be extended to all the employees in a workplace or sectors if a sufficient proportion of them are bound by it in the first place. At the level of sector it is the coverage of the agreement that is the central issue – not the representativeness of the parties. A collective agreement binds the members of the union parties to the agreement. If they constitute a sufficient proportion of the entire workforce, then the agreement may be extended to all of them. The determinative consideration is not that the union 'represents' the whole workforce but that the agreement covers a sufficient number of employees to justify extension. And the policy considerations underwriting coverage are the promotion of orderly and stable collective bargaining, equality of treatment, setting minimum employment standards and industrial peace. The central purpose of section 32 is to secure appropriate standardisation of employment conditions across sectors for the protection of vulnerable employees.

41. COSATU also challenged the FMF's claims regarding the adverse impact of the extension of collective agreements. In this regard it referred to a paper annexed by the FMF to its founding affidavit, namely - Bhorat et al: *Analysing Wage Formation in the South African Labour Market: The Role of Bargaining Councils*. The article records its findings as follows:

> "One of the main criticisms levelled against the extension of bargaining council agreements is that large firms dominate the employer party bargaining during negotiations. These agreements (via the

[16] Section 36 of the Constitution permits the rights in the Bill of Rights (Chapter 2 of the Constitution) to be limited by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human rights taking account of the nature of the right, the purpose of the limitation and less restrictive means of achieving the purpose.

> extensions) are then imposed on parties that did not take part in the negotiations, particularly affecting non-party SMMEs. The aim of the requirements in the LRA is therefore to ensure that representivity thresholds are met before an agreement can be extended and that SMME's are adequately represented on councils (Godfrey et al 2006:1). The extension to non-parties was the subject of fierce debate in the mid-1990's in terms of the unintended consequence it ostensibly had in increasing regulatory oversight and labour costs for SMMEs. While it is generally difficult to accurately estimate the share of workers covered by extensions of bargaining council agreements, Godfrey et al (2006: 24) has found that of the estimated 32.6 per cent of formally employed workers (with the total excluding all Managers and Professionals in the private sector) covered by bargaining councils, only 4.6 per cent were covered by extensions to agreements. In other words, extended bargaining council agreements covered a very small share of the labour force. This initial evidence does suggest that the extension to non-parties as a source of potential rigidity in the labour market, may be overstated. Put differently, the evidence that non-parties to the main bargaining council agreement suffered as a consequence of the automatic extension clause is not particularly strong."[17]

42. Moreover, even if there is some evidence of the adverse impacts alleged, COSATU made the valid point that we have here to do with a complex set of legislative and executive policy choices bearing upon an imperative to secure decent work conditions weighed against the maximisation of employment and competition. There are a variety of factors at play with debatable economic effects, and a range of competing policy considerations of a polycentric character. The economic policy preferences of the FMF, COSATU argued, are insufficient basis to strike down section 32 of the LRA, which is consistent with ILO standards and justifiable in an open and democratic society.

The FMF's narrower legality challenge and the relief sought

43. Although not explicitly acknowledged by the FMF, the arguments put forward by COSATU probably contributed to its decision to abandon its second attack, restrict its challenge to the narrow legality attack and thus avoid the need for a justifiability analysis under section 36 of the Constitution of the impact of the extension system enacted by section 32 of the LRA.

44. The FMF's first challenge, as set out above, and with which it persists, albeit in a diluted form, is that section 32(2) read with section 32(3) of the LRA is inconsistent with the rule of law provision in section 1 of the Constitution, essentially because it confers "unfettered" power upon bargaining councils to legislate terms and conditions of employment for an entire sector. The crux of the complaint is that the limited nature of the mechanical discretion of the Minister under section 32(2) excludes substantive review leaving the exercise of power subject to inadequate judicial supervision. This arrangement, it submitted, constitutes improper delegation to bargaining councils by the state of core coercive functions in matters of consequence and hence violates the principle of legality embodied in section 1 of the Constitution.

[17] Pg 79

45. According to the FMF, it is unconstitutional to empower "private actors" (including bargaining councils) to determine the terms and conditions of employment for an industry or a sector of an industry without the consent of the parties affected by such an extension, unless the determination on the substantive merits of the extension has at least the imprimatur of state approval that would proceed from the exercise of a discretion properly designed to promote and advance the public interest. The grant by the legislature of substantively unconstrained power to determine the working conditions of non-parties, it alleged, infringes both the principle of legality and the right to just administrative action in section 33 of the Constitution by conferring on private actors a power "unbounded by state control". In paragraph 38 of the founding affidavit the FMF captured the essence of its complaint as follows:

> "Private actors, in contrast to state officials, are under no duty to act in the public interest, owe no obligation of accountability to democratically elected leaders and are unconstrained by the principles of judicial review for *inter alia* rationality. Giving them the power to impose employment terms and conditions on third parties is in breach of the Rule of Law, which forecloses on state action that is actually or potentially arbitrary or capricious."

46. Notably, the FMF failed to explain in its founding papers why it considered the bargaining council and the Minister to be unconstrained by the principles of judicial review. During the course of argument, however, it became evident that the FMF had proceeded on the assumption that a decision of a bargaining council to request the Minister to extend a collective agreement, as well as the Minister's act of extension, are not "administrative action" as defined in section 1 of the Promotion of Administrative Justice Act[18] ("PAJA"), with the consequence, if that proposition is correct, that the courts would not have the power to judicially review the action on the bases set forth in section 6 of PAJA, which permit review on various grounds of legality, reasonableness and procedural fairness.[19]

47. The FMF made no attempt to analyse the definition of "administrative action" in PAJA, or the term as used in section 33 of the Constitution, in order to assess whether the actions of the actors involved in the extension process under section 32 of the LRA fall within its scope. The evident assumption of the FMF, at least in relation to bargaining councils, is that the request to the Minister to extend a collective agreement is not administrative action because such bodies are private actors and not organs of state. As will appear later, that supposition comprises a category error or mistaken premise.

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[18] Act 3 of 2000

[19] The FMF's supposition that the actions of the Minister and the bargaining councils are not administrative action is evident in the argument it made (now partly abandoned) to the effect that the statutory provisions infringed the right to lawful, reasonable and procedurally fair administrative action in section 33 of the Constitution "since the current regulatory framework is being delineated by private actors who may be legally accountable ….. but are certainly not accountable through the democratic political process as organs of state".

48. Despite that assumption and it repeatedly stating that it was not relying on any Bill of Rights violation, the FMF in its heads of argument more than once referred to section 32 as being an infringement of the constitutional right to administrative justice (lawful, reasonable and procedurally fair administrative action) in section 33 of the Constitution. Its stance is confused and confusing. The FMF described the alleged infringement of the fundamental right to administrative justice by section 32 of the LRA as follows:

> "The power is not being exercised in a manner that is reasonable and procedurally fair. Councils, comprising vested interests as they do, can hardly be expected to act in the public interest, and as a fact do not. In addition, they do not call for representations from non-parties before seeking extensions, nor do they even invite comment on the terms and conditions of employment they seek to impose. To suggest that they act arbitrarily would be to understate the objection: in fact they act in the way that is common to everyone given unfettered and unaccountable powers, that is, in pursuit of their own self-interest."

49. The FMF's abandoned Bill of Rights challenge alleged that the provisions of the statute also violated the fundamental rights to freedom of association enshrined in section 18 of the Constitution, the right to dignity and fair labour practices (section 8 and 23 of the Constitution), and the right to equality in section 9. The core of the objection under all these grounds was essentially the same. Thus, the contention that freedom of association is infringed rested upon the assertion that the system of extensions obliges persons who are outside the framework of the bargaining council to subscribe to rules and regulations set without their consent "by persons who have no legitimate, responsive and accountable authority over them". The affront on dignity and fairness was said to arise from the obligation on employers and employees "to submit on important matters of self-actualisation to the exclusionary diktats of private actors that are undemocratic, unaccountable and beyond state supervision". The alleged infringement of equality was of similar import but with the added dimension that by failing to vest the Minister with supervisory powers in the public interest, the system of extension permits the imposition on non-parties of conditions of employment that unfairly discriminate against work-seekers and prospective business entrants – in other words, non-party outsiders.

50. The FMF's criticism of the system is founded partly on the infringement of the individual freedom of contract implicated by the imposition of the collective bargain on non-parties. Through the extension process collective agreements become binding on non-parties to the contract as though they themselves had subscribed to it. The power of the Minister to extend a majority agreement is mechanical and non-discretionary. This means that once the conditions precedent to jurisdiction are present the Minister is under an obligation to promulgate the agreement once requested by the "private actor" bargaining council to do so. The result is that bargaining councils can insist upon the extension of their agreements to non-parties irrespective of what the public interest may demand. Upon their extension, the agreements, which on promulgation in the Government Gazette are a species of subordinate legislation, become binding on non-parties. In this way "private actors" acting in their own interest determine the fate of those who have not voluntarily subscribed to the process.

51. Hence, according to the FMF, bargaining councils have the power under the LRA to impose and make their will legally binding on non-parties "without the interposition, control and direction of an organ of state". In effect, the bargaining councils enjoy legislative power even though, not being public instrumentalities bound by law to pursue the public interest, they are at liberty to pursue their own self-interest and, in bargaining collectively, can be taken to do precisely this. The arrangement, the FMF says, is "hopelessly unconstitutional" because "at the core of the democratic system enshrined in the Constitution is the principle that regulatory decisions must be taken in the public interest and are judicially reviewable for a failure to promote this goal".

52. As already noted more than once, all the arguments based on alleged Bill of Rights violations were abandoned by the FMF (despite its continued and inconsistent reliance on the fundamental right to administrative justice) thus side-stepping the need for any justifiability analysis under section 36 of the Constitution, the limitation clause. Nonetheless, their rationale implicitly forms the basis for the allegation of constitutional inconsistency and the remedy sought in paragraph 1 of the notice of motion, which relief the FMF still seeks on the basis of the narrower legality challenge under section 1 of the Constitution.

53. The relief pursued by the FMF is an order in terms of section 172(1) of the Constitution, the relevant part of which reads:

> "When deciding a constitutional matter within its power, a court –
>
> > (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> >
> > (b) may make an order that is just and equitable ……"

54. In paragraph 1 of the notice of motion the FMF seeks an order in the following terms:

> "1.1 Declaring that section 32(2) of the Labour Relations Act 66 of 1995 ("the LRA") conflicts with the Constitution of the Republic of South Africa 100 of 1996 ("the Constitution") to the extent that –
>
> > 1.1.1 it gives a bargaining council, which comprises mere private actors, a power (provided the formal requirements of subsection (3) are satisfied) to secure, by means of a collective agreement contemplated by section 32, the imposition of binding obligations on employers and employees who are not members of parties to the council; and/or
> >
> > 1.1.2 it operates in the absence of a substantive discretion, exercisable by the Minister or other repository of state power in the interests of the public, to decline a request by a bargaining council to make a collective agreement

> contemplated by section 32 binding on employers and employees who are not members of parties to the council.
>
> 1.2 Substituting the word "must" in section 32(2) with "may"."

55. The remedy sought as the appropriate solution to the alleged constitutional inconsistency is thus an amendment by substitution, a form of reading-in. The substitution of the word "must" in section 32(2) of the LRA with "may" would replace the Minister's mechanical and limited discretionary power with a discretionary power subject to more expansive judicial review. It is not clear whether the proposed discretion would inevitably impose an obligation on the Minister to act in the public interest. Prayer 1 of the notice of motion has not been amended to introduce a pre-requisite that a bargaining council collective agreement may be extended to non-parties by the Minister only if it is in the public interest to do so. The FMF seems to assume rather that all administrative discretion if it is to be lawful must be exercised in the public interest and it seeks a declarator to that effect in prayer 1.1.2. Accordingly, were the relief in paragraph 1.2 of the notice of motion to be granted, and the word "must" in section 32 substituted by "may", and provided further that an exercise of the discretionary power constitutes administrative action in terms of PAJA, judicial review of a decision to extend a collective agreement would be possible not only for non-compliance with another legal condition precedent, a substantive ground of public interest, but also on grounds of reasonableness and procedural fairness under PAJA. Such a result would introduce a wide scope of judicial review extending considerably beyond that intended by the legislature.

56. In a nutshell, the FMF submitted that section 32(2) is inconsistent with the Constitution because the courts lack adequate review power to strike down an extension of a collective agreement by the Minister. It therefore seeks an order for the correction of the offending provision by restoring to the Minister a general discretion constrained by a duty to act in the public interest. The question left begging is what standard of scrutiny by a reviewing court such a ground of review might entail. None of the parties addressed this issue in evidence or argument. The vague and variable concept of the "public interest" generally signifies the common concern among and the stake of citizens in the affairs of government. Acting in the public interest is aimed at maximising the welfare or the well-being of the general public as opposed to the selfish interests of individual private actors. The whole society has a stake which warrants recognition and protection by an administrator tasked with a decision to be taken in the public interest. As with other open-ended or value–laden legal standards, the concept of the public interest can only acquire content and meaning as a ground and standard of judicial review by the courts, case-by-case, prudentially balancing the expected gains and potential costs associated with a relevant decision or exercise of power. Whether its inclusion in the LRA as a ground of review would lead to a standard of review more protective or intrusive than the conventional administrative justice standards of reasonableness or rationality is uncertain and debatable. The entire thrust of the FMF line of argument, predicated upon its ideological adherence to the freedom of contract as a fundamental value, suggests that it favours a high level of scrutiny of an order of the substantive due process standard applied in some circumstances by courts in the United States of America. However, in my opinion, reading in an obligation to act in the public interest as a potential ground of

review will not inevitably bring forth a standard of review akin to a requirement of "a direct and substantial relationship" to a legitimate legislative purpose.[20] Comparative constitutional doctrine teaches that rationality normally suffices as the preferred form of judicial scrutiny in economic or commercial matters. In the United States, for instance, regulatory measures affecting ordinary commercial transactions or contractual arrangements will not be pronounced unconstitutional unless of such a character as to preclude the assumption that the measure rests upon some rational basis within the knowledge and experience of the regulator.[21] I will return to this topic later when discussing the extent of judicial supervision available under our law in relation to the extension process.

57. The fundamental premise of the FMF constitutional attack though is that there is inadequate judicial supervision of the decision-making involved in the extension of collective agreements to non-parties. If that hypothesis is found to be mistaken, as all the respondents say it is, the constitutional challenge cannot succeed. The pivotal enquiry in this application therefore comprises the testing of that premise. That exercise cannot be restricted to a myopic peering at the power of the Minister under section 32(2) of the LRA alone. It is necessary to examine the legislative scheme purposively, holistically and contextually with reference to legislative policy and the constitutional ethos.

58. The various respondents filed detailed answering affidavits supported by extensive annexures which for the most part mounted a defence of the collective bargaining system, bargaining councils, sectoral bargaining and the preferred system of majoritarianism as being justifiable in an open and democratic society based on human rights and in compliance with international law. And, as already discussed, they also took issue with the expert economic impact analysis maintaining that the evidence does not sufficiently support the conclusion that the system is a significant impediment to small enterprise development and job creation. While much of what is said is interesting, these averments are now less relevant owing to the constitutional attack having been narrowed to an alleged infringement of the principle of legality, administrative justice and due process.

59. The FMF in reply maintained that the respondents failed to appreciate that its case is based on non-compliance with the principle of legality embodied in section 1 of the Constitution. The misconception, it said, was evident in the reliance of the respondents on justifications advanced in terms of section 36 of the Bill of Rights, which applies only to contraventions of the fundamental rights in the Bill of Rights. It also criticised certain of the union respondents for exhibiting a failure to understand that the application is concerned not with the merits of collective bargaining but merely with the process by which bargaining council agreements are extended "without proper state oversight". The criticisms are not entirely warranted. The respondents responded appropriately to the FMF's extensive Bill of Rights challenge to both the process of extension and the majoritarian system. The

[20] The renowned standard of substantive due process laid down by the US Supreme Court in *Lochner v New York* 243 US 426 (1917) which I discuss below.
[21] *United States v Carolene Products Co.* 304 U.S. 144 (1938)

respondents can hardly be criticised for dealing with arguments raised by the FMF before it chose to change tack. In any event, most of the respondents replied adequately to the legality, administrative justice and due process challenges, the gravamen and implications of which, I will demonstrate presently, have been misunderstood by the FMF.

60. Mr Bheki Ntshalintshali, the Acting General Secretary of COSATU, who deposed to COSATU's answering affidavit, criticised the FMF's analysis as fundamentally misconceived. He submitted that the FMF's characterisation of bargaining councils as private bodies exercising private power is incorrect. Bargaining councils derive their power both from the LRA and collective agreements. They perform public functions under the LRA. Secondly, in COSATU's opinion, the FMF misconstrues the nature of the Minister's discretion under section 32(2) of the LRA and the manner in which the interests of non-parties are protected in the legislative scheme. In paragraph 13.3 of the answering affidavit Mr Ntshalintshali averred:

> "Although section 32(2) provides that the Minister "must extend a collective agreement", section 32(3) provides that the Minister may not do so "unless the Minister is satisfied" that the substantive requirements set out in section 32(3) are met. Accordingly, the Minister is required to form a view on whether the requirements are met and to extend a collective agreement only if satisfied that they are met. This approach is more protective of the interests of non-parties than conferring a "free" discretion on the Minister to extend collective agreements based on broad policy considerations or the public interest."

61. When dealing with the FMF's assertion that section 32 of the LRA is unconstitutional because it violates the right to just administrative action in section 33 of the Constitution (technically abandoned by the FMF, but, for reasons soon to be evident, nonetheless germane), Mr Ntshalintshali said:

> "I deny this contention. In addition to the point I have already raised regarding the mischaracterisation of bargaining councils as "private actors", what the FMF overlooks is the impact of PAJA.
>
> PAJA is the legislation enacted by Parliament to give effect to section 33 of the Constitution. Other statutes that authorise administrative action must now be read together with PAJA unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA. Thus, to the extent that the present context involves administrative decision-making, the decisions in question would be subject to the provisions of the PAJA."

62. Other deponents on behalf of other respondents said likewise. Thus, Mr Deon Koen, of the National Bargaining Council for the Road Freight and Logistics Industry, who deposed to an answering affidavit on behalf of a number of bargaining council, stated in relation to this issue in paragraph 65 of his affidavit:

> "Second, and in any event, it is incorrect to characterise bargaining councils as "private actors" which act without constraints. Bargaining councils plainly fall within the definition of "organ of state" set out in section 239 of the Constitution and are subject to a range of constraints as a consequence. Various of their decisions are subject to the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). Moreover, an important part of the collective bargaining system is the requirement that non-parties be able to seek exemption from collective agreements and have any refusal adjudicated by an independent tribunal. This too demonstrates that the notion of a private actor acting without constraints is simply not applicable."

63. NUMSA advanced similar arguments. In heads of argument filed on its behalf counsel dealt with the issue as follows:

> "Applicant's analysis of the manner in which collective agreements are extended to non-parties is flawed. Extension is not achieved by the members of the bargaining council exercising legislative power as the Applicant contends. Extension is achieved by a decision of the Minister. While it is true that the Minister's discretion in this regard is limited, it is still the Minister who takes the decision to extend. Plainly, that decision is susceptible to review in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). There is therefore simply no exercise of "non-reviewable private power" as the Applicant contends. Ultimately, as we will seek to demonstrate below, the Applicant's true complaint is not about unbridled and unchecked private power, it is about the limited nature of the Minister's discretion under section 32 of the LRA. The decision to curtail the Minister's discretion was however a policy decision taken by the drafters of the LRA. As such, we respectfully submit that it must be deferred to by the courts.
>
> In the alternative to the above, in the event that it may be found that the decision to extend collective agreements to non-parties is effectively taken by bargaining councils or their members (which is denied) then we submit that it is clear that in respect of that function bargaining councils exercise public power in terms of legislation and are therefore organs of state as defined in section 239 of the Constitution. The exercise of such public power is plainly reviewable under PAJA. This being the case, there is no merit in the Applicant's key complaint.

64. The FMF did not adequately deal with these contentions in reply, proceeded on the assumption that PAJA was not applicable and thus did not address the issue in its written arguments. When the matter was raised with counsel for the FMF by the court, he opined that if PAJA is applicable then this would hand the FMF more than it asked for. He in effect conceded that if PAJA does indeed apply, COSATU would be correct in its assertion that the FMF application was fundamentally misconceived. In fairness though, the FMF persisted with the contention that the substantive conditions precedent in section 32(3) of the LRA contain insufficient safeguards to secure the public interest. It submitted that the numerical requirements, the necessity for an exemption process and the protection of non-parties against discrimination were not sufficient. These are requirements, in its view, which go to process, not to substance and policy.

65. In addition, but related to its point about inadequate judicial supervision, FMF alleged that the legislative scheme is also an excessive delegation of legislative power. It accepts that generally it will sometimes be acceptable constitutionally to give private actors the power to

exercise coercive statutory power. But before that is permissible the institution must be akin to an organ of state. In its view, two requirements must be met: first it must be clear that the powers being conferred are to be exercised in the public interest; and second, it must be evident that the powers are of the sort that can be properly delegated to the institution in question. In relation to this latter point I would immediately point out that the only relevant power or function delegated to the bargaining council is that of requesting an extension. Considering the limited scope of discretion available to the Minister under section 32(2) of the LRA, the quasi-legislative power or function may indeed be extensive in circumstances where majoritarianism applies. That being the case, is the bargaining council obliged to make the request, and the Minister to execute it, only if in the public interest?

Administrative action

66. The entire saga thus resolves to two related decisive questions. First, what is the nature and scope of judicial review available in relation to the decisions and actions involved in the extension of bargaining council collective agreements to non-parties? Secondly, are bargaining councils and the Minister obliged to act in the public interest when extending such agreements?

67. The answer to the first question depends to some extent upon whether the decisions and actions in question constitute "administrative action" in terms of PAJA and are in consequence reviewable on the grounds specified in section 6 of PAJA. None of the parties, either in the papers or in argument, made explicit reference to the definition of administrative action in section 1 of PAJA or sought to apply it to the facts. The outcome of any such enquiry and analysis will be conclusive. The relevant part of the definition reads:

> "administrative action means any decision taken, or any failure to take a decision, by –
>
> (a) an organ of state, when –
>
> (i) exercising a power in terms of the Constitution or a provincial constitution;
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect …"

68. The first element of the definition relevant to the present enquiry is that the action must be "a decision". Section 1 of PAJA defines a decision extensively with reference to specific modes of decision which we need not consider. The introductory part of the definition is however relevant. A decision means "a decision of an administrative nature made, proposed

to be made, or required to be made, as the case may be, under an empowering provision ….” The primary question of whether an action or decision is indeed one of an administrative nature is not straightforward and inescapably depends on the context. Deciding what is and what is not administrative has to be done on a case-by-case basis.[22] Regard must be had to the source and nature of the power, its subject matter, whether it involves the exercise of a public duty and how closely it is related to policy matters which are not administrative or to the implementation of legislation. The focus of the enquiry is not on the arm of government to which the relevant actor belongs but on the nature of the power being exercised.[23]A real difficulty facing the court in this matter is that the various parties presented no or little argument in relation to the existence or otherwise of the constituent elements of administrative action in the juridical acts involved in the extension of a collective agreement, and in particular whether the decisions in question were administrative in nature. When the question of the definition was raised with counsel for the FMF during argument, he accepted that PAJA was applicable, on the basis that the remedies available would advance the cause of his client. Counsel for the respondents, consistent with the averments made in the answering affidavits, accepted likewise.

69. The second constituent of the definition requires the decision to be taken by one of three possible actors: an organ of state (a public actor), a natural person or a juristic person (private actors). PAJA defines these three different kinds of actors to be “administrators”.

70. If the administrator is an organ of state, in order for its decision to be administrative action it must involve one of three actions: an exercise of power in terms of the national or provincial constitution; the exercise of a public power in terms of legislation; or the performance of a public function in terms of legislation.

71. If the administrator is a natural or juristic person, other than an organ of state, the action must involve either the exercise of a public power in terms of an empowering provision or the performance of a public function in terms of an empowering provision.

72. The remaining elements of the definition of administrative action are that the decision must adversely affect the rights of any person and have a direct, external legal effect.

Judicial review of the decision of the bargaining council

73. In *Calibre Clinical Consultants (Pty) Ltd and another v National Bargaining Council for the Road Freight Industry and another*[24] the Supreme Court of Appeal held that a bargaining

[22] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 143
[23] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 141
[24] 2010 (9) SA (SCA)

council, when managing its wellness fund and procuring services for that purpose, performs a domestic function, and its decision in that regard was not subject to review under PAJA. The bargaining council was not exercising a public power or performing a public function in that instance. The court recognised that such might not be the case when a bargaining council performs other functions. There can be little doubt that when a bargaining council requests the Minister to extend a collective agreement to non-parties that it does so either as an organ of state or as a juristic person exercising a public power or performing a public function under legislation or an empowering provision.

74. Applying the definition of administrative action to the process of collective bargaining undertaken by a bargaining council, it seems clear that the negotiation and conclusion of the collective agreement will not constitute administrative action. The decision is not of an administrative nature, being inherently contractual; and the only decision involved is that by the bargaining agents to conclude the agreement, which at that stage would have no external legal effect outside the council.

75. However, the request made under section 32(1) of the LRA can be viewed differently. In order to extend its collective agreement to non-parties, the bargaining council must meet and pass a resolution. The resolution must in turn generate a written request to the Minister identifying the non-parties to the agreement, who fall within the registered scope of the council, and to whom it seeks to extend the collective agreement. The resolution must obtain the votes of the majorities as stipulated in section 32(1)(a) and (b) of the LRA. Two arguments might be raised against construing the resolution and the written request to the Minister as administrative action. The first is that the resolution and request are merely administrative conduct preparatory to the making of the decision. The decision having direct external and an adverse effect is that of the Minister and not the bargaining council. Secondly, it might be argued with reference to the nature of the power being exercised that the resolution of the bargaining council is a deliberative quasi-legislative decision and thus not a decision of an administrative nature.

76. The requirement that administrative action should be a decision having a direct, external legal effect is borrowed from the German law principle that only final decisions ought to be subject to judicial scrutiny. If a decision requires several steps to be taken by different authorities, only the last of which is directed at the citizen, all previous steps taken within the sphere of public administration lack direct effect, and only the last decision may be taken to court for review.[25] The idea is to concentrate judicial review pragmatically on the more important administrative decision. Instead of allowing challenges to intermediate or preliminary decisions, litigants are obliged to wait until a final decision has been made.

[25] See C Hoexter *Administrative Law in South Africa* (2ed) 228.

77. I hesitate to pronounce too definitively upon the application of this principle in relation to a bargaining council resolution to request the Minister to extend a collective agreement. The scope of the principle will depend on its concrete application and in that sense it is context specific. The case before us is general and abstract. There is no challenge to a particular resolution or request to the Minister to extend an agreement. That caution duly observed, the logic of the German principle may prove less cogent in cases where, as in the present, the final decision might comprise the exercise of a non-discretionary mechanical power constrained only by formal jurisdictional facts. By contrast, where the final decision involves an exercise of discretion, such as one under section 32(5) of the LRA to extend an agreement when the majoritarian threshold has not been achieved, there are obvious advantages in reserving review to the final decision of the Minister. But even then, there will be cases where the bargaining council decision may be tainted on reviewable grounds causing the entire decision-making process to be flawed. Much will depend upon the circumstances of the concrete case in which the legal challenge arises. In some instances, viewing the two stages of the process as unrelated, separate and independent action, each on its own subject to PAJA, may put form above substance, in others it will not.[26]

78. It is debatable too whether the bargaining council resolution and the request for an extension will have direct external legal effect or will adversely affect the rights of non-parties until such time as the Minister acts. The resolution and written request to the Minister may have an external legal effect by virtue of their seizing the Minister with the legal obligation to act mechanically under section 32(2) of the LRA or to exercise her discretion to extend a minority agreement under section 32(5). Once the written request for extension of the agreement to the identified non-parties within the registered scope has been received by the Minister, she must act. She must do what her duty dictates under section 32(2), or section 32(5), whichever is applicable. The resolution and the written request of the bargaining council hence could have an external effect of some consequence.

79. Likewise, while the resolution and written request will not themselves adversely affect the rights of non-parties they certainly have the potential and capacity to do so; that potential attaining a high level of probability where the Minister is compelled to act under section 32(2) of the LRA. In *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works*[27] Nugent JA observed:

> "While PAJA's definition purports to restrict administrative action to decisions that, as fact, "adversely affects the rights of any person", I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on section 33 of the Constitution. Moreover, that literal construction would be inconsonant with section 3(1) (of PAJA), which envisages that administrative action might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a direct and external legal effect, was probably intended rather to convey that

[26] *Minister of Health v New Clicks SA (Pty) Ltd and others* 2006 (2) SA 311 (CC) para 136-142.
[27] 2005 (6) SA 313 (SCA) para 23

> administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."

80. As regards the possibly deliberative or quasi-legislative nature of a bargaining council resolution, there is no textual basis supporting a finding that such is not a decision as defined, or is excluded from the definition of administrative action.[28] There is, though, perhaps an argument that it is not one of "an administrative nature". Laws made by administrative functionaries exercising delegated powers might possibly be classified as administrative, but laws made by original legislative bodies can seldom be so described. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*[29] the Constitutional Court held that legislative bodies exercising original, deliberative law making powers are not engaged in administrative action. The negotiation of a collective agreement coupled with a request to the Minister to promulgate it, however, might be regarded, like the making of regulations, not as original legislation but as delegated rulemaking. Under section 32 of the LRA it is ultimately the Minister who legislates by the act of promulgation; and the preceding request to the Minister by the bargaining council is strictly speaking not legislative in nature because that action does not result in law-making. The bargaining council request might thus better be seen as an antecedent administrative part of a delegated law-making process. In *Minister of Health v New Clicks SA (Pty) Ltd and others*[30] Chaskalson CJ held that the making of regulations fell within the scope of administrative action. This was not however the view of the majority of the court and there remains uncertainty about whether the making of regulations by a functionary will always be administrative action.

81. From the foregoing discussion it is evident that any determination of whether a bargaining council resolution is administrative action in terms of PAJA will depend in the final analysis on the peculiar facts. I incline to agree with COSATU, NUMSA, the Minister and the bargaining councils that PAJA ordinarily will apply and thus that the decision of the bargaining council will be subject to PAJA review. The strongest argument against such a conclusion may be that the resolution being deliberative is not a decision of an administrative nature. Unfortunately, as said, no argument was presented in relation to this issue, which was not specifically raised in the affidavits. If the decision is administrative action then it will be reviewable on grounds of reasonableness (at least rationality),[31] legality and due process. If, on the other hand, the bargaining council resolution is not administrative action under PAJA, it still will be subject to rationality and legality review under the rule of law provision in section 1 of the

[28] Section 1(dd) of PAJA excludes the legislative functions of Parliament, a provincial legislature or a municipal council from the definition of administrative action.
[29] 1999 (1) SA 374 (CC) para 27
[30] 2006 (2) SA 311 (CC)
[31] I discuss the standard of scrutiny under a reasonableness review later in the judgment when I deal with the review of the discretion of the Minster in terms of section 32 of the LRA.

Constitution.[32] Review in terms of the principle of legality may involve a lower standard of scrutiny than a reasonableness review under PAJA, but it still can be far-reaching and includes the requirements of rationality, legality and a duty not to act arbitrarily, capriciously or with ulterior purpose.[33] There must be a rational relationship between the exercise of the power and the purpose for which the power was given. Moreover, there is explicit statutory protection against discrimination. In terms of section 32(3)(g) of the LRA the collective agreement may not discriminate against non-parties, a matter I will discuss later. And hence the charge of inconsistency with the Constitution for want of adequate judicial supervision of the bargaining council process is not sustainable.

Judicial review of the decision of the Minister under section 32(5) of the LRA

82. Although the target of the FMF challenge is section 32(2) of the LRA, it will be better first to examine the review of the Minister's discretion under section 32(5) because it sets a yardstick against which the more restricted review under section 32(2) may be measured.

83. Is an exercise of power by the Minister under either section 32(2) or section 32(5) of the LRA administrative action in terms of section 1 of PAJA? The Minister undoubtedly exercises a public power or performs a public function in terms of legislation, when acting in terms of section 32 of the LRA.[34] 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. Consequently, the Minister's decision to extend an agreement would seem (at least *prima facie)* to be administrative action subject to PAJA review. Here again though, the difficult question to answer is whether the action or decision of the Minister is of an administrative nature; or is it executive or legislative action? The executive functions of cabinet ministers are excluded from the definition of administrative action in PAJA.[35] However, giving effect to a bargaining council resolution does not involve the formulation of policy or political decision-making. It is the implementation of legislation or the formulation of policy in a narrower sense, a function regarded as typically administrative.[36] The decision is one of policy execution rather than policy formulation.[37] Likewise, while the promulgation

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[32] *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 85

[33] *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 91

[34] The text of the relevant part of section 239 of the Constitution is set out below in paragraph 124 of this judgment.

[35] Section 1(aa) of PAJA

[36] *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U College (PE) (Section 21)* 2001 (2) SA 1 (CC) para 18

[37] *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 27

of the agreement under section 32(2) of the LRA may be legislative, the antecedent exercise of mechanical or discretionary power is not.

84. Whenever the Minister receives a written request from a bargaining council to extend a collective agreement transmitted to her in terms of section 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 section 208A of the LRA, she must do it personally. As discussed already, by reason of section 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.[38] 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 employer organisation that are party to the bargaining council. The second arithmetic calculation to be performed by the Minister is that required by section 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 section 32(3) of the LRA are present, she is obliged to exercise the mechanical power to extend the collective agreement and to promulgate it in the Government Gazette. If the majoritarian levels in section 32(3)(b) and (c) of the LRA are not reached then the Minister must choose whether or not to act in terms of section 32(5) of the LRA. Unlike section 32(3) which provides that the Minister "*must*" extend once the conditions precedent in section 32(3) have been fulfilled, section 32(5) provides that despite subsection (3)(b) and (c) (the numerical requirements), the Minister "*may*" extend, provided the jurisdictional facts in section 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 section 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 section 32(5) is in stark contrast to the ministerial or mechanical power in section 32(2) which involves little choice on the part of the Minister. Mechanical powers are more in the way of duties.[39]

[38] Section 32(3)(a) of the LRA

[39] C Hoexter *Administrative Law in South Africa* (2ed) 47

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. These considerations, however, do not apply when the Minister exercises her discretion to extend a product of collective bargaining which has only the support of a minority of bargaining agents. Such administrative action justifiably attracts judicial scrutiny of a more exacting standard. Where broad discretionary powers are conferred, there must be some constraints on the exercise of such powers so that those affected by their exercise will know what is relevant or in what circumstances they are entitled to seek relief from an adverse decision.[40]

87. The Minister's power to extend a minority collective agreement under section 32(5) of the LRA is subject to compliance with the mandatory and material conditions prescribed in paragraphs (a) – (d) in the subsection. Compliance is a pre-requisite to 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.[41] That may be so, but the obligation on the Minister to check the level of representivity 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 section 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-

[40] *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 47
[41] See section 29(11) and section 61(3)(b) of the LRA

extension will have negative effects, such as opportunistic bargaining at workplace level or something of that kind. The jurisdictional fact "is satisfied" in section 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 (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.[42] With the advent of the Constitution this approach became unsustainable. The right to lawful and reasonable administrative action in section 33 of the Constitution and in section 6 of PAJA requires the courts to satisfy themselves to any factual assumptions on which that action is based. The Constitutional Court outlined the position in *Walele v City of Cape Town*[43] as follows:

> "In the past, when reasonableness was not taken as a self-standing ground for review, the [decision-makers] *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.[44] 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 pre-requisite to the exercise of power.

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

93. The third jurisdictional prerequisite to the exercise of power under section 32(5) of the LRA consists of the duty imposed upon the Minister by section 32(5)(c) and (d) to invite comments from the public, non-parties and outsiders alike, and to consider these comments. The jurisdictional pre-condition is aimed at ensuring procedural fairness in fulfilment of the statutory imperative in section 3 of PAJA which requires that administrative action which materially and adversely affects the rights or legitimate expectations of any person to be procedurally fair. Like reasonableness, procedural fairness is context specific. A fair administrative procedure depends on the circumstances of each case. However, it would seem to me that the procedure in section 32(5)(c) and (d) of the LRA is a reasonable means of providing adequate notice of the possibility of an extension of a minority collective agreement and an opportunity to make representations. In considering any comments received the Minister will be obliged to consider all relevant considerations, exclude

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[42] *Kabinet van die Tussentydse Regering vir Suidwes-Afrika v Katofa* 1987 (1) SA 695 (A)
[43] 2008 (6) SA 129 (CC) para 60
[44] C Hoexter *Administrative Law in South Africa* (2ed) 300-302.

irrelevant considerations, weigh them in good faith and without ulterior purpose, and to properly apply her mind to them.[45]

94. In short, therefore, if PAJA applies, the discretion of the Minister to extend a minority collective agreement concluded in a bargaining council would be significantly constrained by the requisites of legality and procedural fairness. Perhaps more contentious will be the nature and extent of any review of the Minister's decision under section 32(5) of the LRA on grounds of unreasonableness, on the assumption, of course, that PAJA is applicable.

95. The tenor and thrust of the FMF's challenge, particularly in relation to the exercise of power under section 32(2) of the LRA, indicates that it favours review akin to substantive due process review in the USA. This appears from its reliance on the decision in 1936 of the United States Supreme Court in *Carter Coal Co et al v Carter*[46] in which it struck down provisions of the Bituminous Coal Conservation Act delegating the power to fix, by means of collective agreements binding on non-parties, minimum wages and maximum hours of work for the coal industry as a whole provided the agreement enjoyed the support of at least a majority of producers and miners in the industry.

96. Before dealing with that case, something needs to be said about the approach to review of administrative action on the grounds of unreasonableness in our law. Reasonableness is an open ended review ground, subsuming within it elements of rationality and proportionality, as well as the standard of substantive unreasonableness expressed in the value judgment that administrative action is reviewable if it is so unreasonable that no reasonable decision-maker could have taken it.[47] Rationality as a review ground requires that a decision be rationally connected to the purpose for which it was taken, is supported by the evidence and furthers the purpose for which the legislative power was given to the administrator.[48] Proportionality is not listed as a specific review ground in PAJA. The principal aim of proportionality review is to avoid an imbalance between the adverse and beneficial effects of an action or measure by balancing the necessity for the action with the suitability of the means deployed to achieve the purpose. While this ground, as I have just said, is not part of the suite of PAJA review grounds, it still plays a role in the assessment of the reasonableness of the effects or impact of administrative action or subordinate legislation.

97. The standard of reasonableness in section 6(2)(h) of PAJA is borrowed from the English case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporations*[49] As Prof Hoexter points out, a ground of review expressed as "so unreasonable that no reasonable authority

[45] Section 6(2)(e) of PAJA. Section 3(5) of PAJA allows administrators to follow statutory procedures different to those in PAJA.
[46] 298 US 238, 56 S. Ct 855 (1936)
[47] In section 6(2)(h) of PAJA
[48] Section 6(2)(f)(ii) of PAJA
[49] [1947] 2 All ER 680 (CA).

could ever have come to it" offers no real clues as to the content or meaning of reasonableness. The standard is "unhelpfully circular, merely linking the reasonableness of the action to the reasonableness of the actor." [50] Despite that, it is clear that all that is expected is that administrative action must be reasonable, and what is reasonable will depend on the context and circumstances. The concept of reasonableness, like fairness or the public interest, by its very nature defies rigid definition. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[51] O Regan J held that what is reasonable in a particular case depends on the circumstances and identified the following factors as relevant to the inquiry: the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on those affected by it. This confirms the inherent variability of the concept and the need for flexibility in its application. It also points for the need for appropriate deference by requiring a prudential (cost-benefit) balance to be struck between a range of competing interests or considerations by decision-makers with technical expertise and insight, and implies flexibility and variation in the application of the standard. This is what is meant when reasonableness is referred to as being "context specific".

98. Thus, a challenge on the grounds of unreasonableness to a decision by the Minister to extend a collective agreement under section 32(5) of the LRA will involve a balancing of the range of competing interests. The delineation of the standard of review is best left to a concrete case in which the extension of an agreement is attacked as unreasonable. But, it must be said, it seems unlikely, if PAJA applies, that the standard of substantive due process preferred by the FMF would also apply.

99. The *Carter Coal* decision of the US Supreme Court, referred to earlier and relied upon by the FMF, was decided during the era following the decision in *Lochner v New York,*[52]and was influenced by the line of thinking in it. In *Lochner* the court held invalid as a deprivation of liberty without due process of law a New York statute which limited employment in bakeries to a maximum of 60 hours per week and 10 hours per day. The majority found the statute to be an unwarranted interference with liberty of contract. The court referred to the right to purchase or to sell labour as part of the liberty protected by the 14th Amendment under which no state can deprive any person of life, liberty or property without due process of law, and expressed concern about the right of the individual to labour "for such time as he may choose", as against a police (regulatory) power measure that infringed on that freedom. The court struck the legislation down on the ground that there was no direct and substantial relationship between securing the health of the employees (the legislative purpose) and the regulation of the terms and conditions of employment.

100. The *Lochner* decision is regarded as one of the least defensible in American constitutional law. The direct and substantial relationship standard entails a high level of scrutiny. It unduly

[50] C Hoexter *Administrative Law in South Africa* (2ed) 346.
[51] 2004 (4) SA 490 (CC) para 45
[52] 198 US 45 (1905)

extended the assumed liberty of contract and undeservedly narrowed the concept of legitimate legislative objectives by finding that the statute had no legitimate health objective and by implication the legislative purpose of regulating work hours was somehow illegitimate. As Justice Holmes noted in his dissenting minority judgment, the majority were imposing a value judgment as to "a particular economic theory" on the state and federal legislatures.

101. The political crisis around President Roosevelt's New Deal ultimately led to a shift in attitude and approach and a move away from *Lochner* reasoning, which stubbornly persisted despite it having in effect been overruled in 1917 in *Bunting v Oregon*[53] when the Supreme Court upheld a maximum hour law for factory workers. The ultimate death knell to *Lochner* reasoning came in *Nebbia v New York*[54] where the court sustained as a legitimate exercise of police power, New York's regulation of minimum prices for retail sales of milk. The court departed from absolutist and libertarian notions of freedom of contract and evolved a more deferential standard of constitutional and reasonableness review in relation to economic regulation. The court held:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied …."

102. These decisions confirm that judicial review is situational and can fluctuate in intensity. Courts adopt variable standards of review and judicial scrutiny depending upon the subject matter of the litigation. Measures directly impacting on liberty or dignity deserve stricter scrutiny whereas commercial matters allow for governmental intrusion which is rational. A rational basis test sanctions judicial deference to the proper role of the other branches of government in economic affairs.[55] Hence, when assessing the reasonableness of economic regulation, a standard of rationality (relational rather than substantive in nature) is ordinarily the yardstick, not substantive reasonableness. Though variable, substantive reasonableness is typically a higher standard calling for a more intensive scrutiny of the administrative action.[56] A rational basis test is deferential because it calls for rationality and justification rather than the substitution of the court's opinion for that of the functionary on the basis that it finds the decision substantively incorrect.[57] A condition of rationality in the relationship between the method and outcome of decision-making, itself a species of reasonableness review, will most likely be the standard of scrutiny applied to any decision of the Minister under section 32(5) of the LRA if challenged on grounds of reasonableness. There is no need

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[53] 243 US 426 (1917)
[54] 291 US 502 (1934)
[55] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 48
[56] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) para 108
[57] *Niewoudt v Chairman, Amnesty Subcommittee, Truth and Reconciliation Commission* 2002 (3) SA 143 (C) 164G-H

to decide the issue in this case; it suffices to say that structural, prudential and doctrinal considerations favour such an interpretation.

103. In the final analysis, the judicial power of review in relation to the decision of the Minister under section 32(5) of the LRA to extend a minority collective agreement concluded in a bargaining council, if not extensive, is certainly adequate and *prima facie* or presumptively consonant with the right to administrative justice in section 33 of the Constitution. The whole gamut of appropriate review grounds is probably available to any aggrieved litigant. But even were it to be held that the Minister's exercise of discretion under section 32(5) of the LRA is not administrative action, on account of it being delegated legislative action, and thus PAJA has no application, then again it would still be subject to legality review under the rule of law provision in section 1 of the Constitution.[58] The result will not be much different. Review on grounds of legality and rationality will be available to aggrieved litigants. While perhaps not as extensive as a PAJA review, the availability of such a safeguard negates the FMF argument that the extension of a collective agreement by the Minister is not subject to judicial supervision. And, as I discuss more fully later, there is no legal or constitutional basis for substituting the standard of rationality in a legality review with a requirement of public interest.

Judicial review of the decision of the Minister under section 32(2) of the LRA

104. The extent of judicial supervision of the Minister's power to extend a majority collective agreement of a bargaining council is undeniably less far-reaching or protective. It is this incontestable truth that lies at the heart of the FMF complaint. The rationale for a more restricted review finds validation in the principle of majoritarianism. Where the agreement is negotiated and concluded by bargaining agents who represent and employ the majority falling within its coverage, the legislature considers it justifiable to lower the level of Ministerial and judicial scrutiny. The FMF doubts the legitimacy, morality and legality of that justification. It urges the court to hold the scheme constitutionally invalid or inconsistent and to introduce a standard of administrative justice applicable to the extension of majority collective agreements under section 32(2), if not quite equivalent at least of similar effect to that applicable under section 32(5) of the LRA, by converting the Minister's mechanical power or duty to a discretionary power to extend agreements only if it is in the public interest to do so.

105. While it may be true that the review remedy in relation to exercises of power under section 32(2) of the LRA is more attenuated, the FMF is guilty of overstatement when it complains that there will be no supervision. It is inevitable from a practical perspective that the constitutional right to reasonable and fair administrative action will be abridged where the action in question comprises the exercise of a mechanical power. In such instances the reasonableness or rationality requirement lies in making the connection between the

[58] *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)

jurisdictional facts and the exercise of the non-discretionary power. The determination of the jurisdictional facts and the action following upon it cannot be isolated from each other. Should the functionary refuse to exercise the power even though the jurisdictional facts are present (or exercise the power when a jurisdictional fact is not present), the administrative action would not only be unlawful, but also unreasonable or irrational.

106. The jurisdictional facts set out in section 32(3) of the LRA are moreover objectively justiciable and are preconditions to jurisdiction and legality. They are of three kinds: the first are the pre-requisites of majoritarianism; the second guarantee an independent and fair system of exemption; while the third (in section 32(3)(g) of the LRA) offers protection against discrimination – the terms of the collective agreement may not discriminate against non-parties. It is only once and if these objectively justiciable preconditions are present that the agreement can be extended. But once they are confirmed, the Minister has no discretion and must act mechanically. Although her decision in this regard constitutes administrative action, it is doubtful, once the legality requirements are met, that her decision will be reviewable on grounds of substantive reasonableness or strict due process. The legislature consciously constructed the mechanical power to exclude a broad or extensive reasonableness review. Where the legislative remedy to the perceived mischief so clearly indicates otherwise, any suggestion that section 32(2) should be suffused with a reasonableness requirement is misplaced. And any departure from the strict requirements of due process may well be reasonable and justifiable in the circumstances.[59]

107. And this supposition brings us to what should have been the true (or at least the most appropriate) question for determination in this application. The exclusion of reasonableness and strict due process review in relation to the power in section 32(2) of the LRA is a limitation of the constitutional right to reasonable and procedurally fair administrative action enshrined in section 33 of the Constitution. The analysis then shifts to an investigation by the court under section 36(1) of the Constitution as to whether the limitation is reasonable and justifiable in an open and democratic society based on human rights, taking into account all relevant factors, including: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve its purpose. Perhaps distracted by the rule of law argument, and the abandonment of reliance on the Bill of Rights and section 36 of the Constitution, none of the parties got to grips in a meaningful way in argument with this key enquiry.

108. In paragraph 47 of the founding affidavit the FMF made out a cogent case that section 32(2) and (3) of the LRA infringe section 33 of the Constitution. As described earlier, it altered course after some of the answering affidavits were filed. Its initial argument asserted erroneously that coercive powers can only be exercised by organs of state. But more pertinently, the FMF contended further that a coercive power must be exercised in a manner

[59] See sections 3(4)(a) and 4(4)(a) of PAJA

that is reasonable and procedurally fair and that a decision-maker's concern must be with the public interest before it can be reasonable (a doubtful proposition to which I revert later). Any deficiency in this regard, it maintained, would be an infringement of section 33 of the Constitution.[60] Confronted with the justifiability analysis put up by some of the respondents, the FMF changed tack and accused the respondents of misconceiving the application because the case now advanced on behalf of the FMF chose not rely on a contravention of the Bill of Rights. Despite that stance, it complained in its heads of argument that the absence of a reasonableness or rationality review infringed the constitutional right. The FMF's precise standpoint about whether section 32(2) of the LRA infringes section 33 of the Constitution was thus something of a moving target and difficult to pin down.

109. The FMF's reliance upon a legality review under section 1 of the Constitution seems to me to be an expedient (albeit not very convincing) way of avoiding a justifiability analysis under section 36 of the Constitution. If an analysis under section 36 of the Constitution concludes that the circumscribed and limited nature of the remedy for review of the mechanical power in section 32(2) and (3) of the LRA is a reasonable and justifiable limitation of the right to administrative justice, despite excluding review on broader grounds of reasonableness and strict due process, then the provisions are more than presumptively constitutional, lawful and in compliance with the principle of legality. A finding of constitutionality under section 36 of the Constitution surely will preclude any argument that the principle of constitutional supremacy and the rule of law in section 1(c) of the Constitution have been violated. The constitutional paradigm and the rule of law (encompassing the principle of reasonable and justifiable constitutional limitation) are brought to bear in a section 36 analysis. If the analysis yields a result that the mechanical power is a reasonable and justifiable limitation of the rights to administrative justice, the provisions of the LRA are consistent with the Constitution and hence there can be no legal basis for supplying a constitutional remedy under section 172 of the Constitution in the form of substituting the mechanical power with a discretion and the reading in of a requirement that the discretion may only be exercised in the public interest or for that matter in a reasonable and fair manner.

110. On the basis of the limited evidence and argument placed before us in relation to this narrow but decisive issue, it seems to me that the restricted judicial power of review in relation to the mechanical power of the Minister under section 32(2) and (3) of the LRA is indeed a reasonable and justifiable limitation upon the right to reasonable administrative action for the following reasons. The section aims to give effect to a legislative policy of industrial pluralism, voluntarism and orderly collective bargaining permitted by the spirit and purport of the constitutional right to engage in collective bargaining in section 23(5) of the Constitution, and international law. The perceived advantage of the constrained discretion in section 32(2) of the LRA in a majoritarian situation is certainty and predictability in the outcomes of bargaining that incentivise participation at sectoral level, which will result in uniformity brought about by a balance of power at that level. That is a legitimate legislative purpose. Though there may be forceful ideological, moral and practical objections to that legislative policy, due judicial deference recognises that Parliament is free to adopt whatever

[60] Paragraph 36.3 of the founding affidavit

economic policy may reasonably be deemed to promote public welfare. In *Nebbia v New York*[61] the US Supreme Court made the point in this way:

> "With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorised to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favour of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

111. A law which has a reasonable (rational) relation to a proper legislative purpose will not be in excess of legislative power. Our Constitutional Court has equally emphasised that it is not the function of the courts to decide whether one legislative route is preferable to another. In *Ronald Bobroff and Parties Inc v De La Guerre*[62] it held:

> "The Constitution allows judicial review of legislation, but in a circumscribed manner. Underlying the caution is the recognition that courts should not unduly interfere with the formulation and implementation of policy. Courts do not prescribe to the legislative arm of government the subject-matter on which it may make laws. But the principle of legality that underlies the Constitution requires that, in general, the laws made by the legislature must pass a legally defined test of 'rationality':
>
> > 'The fact that rationality is an important requirement for the exercise of power in a constitutional state does not mean that a Court may take over the function of government to formulate and implement policy. If more ways than one are available to deal with a problem or achieve an objective through legislation, any preference which a Court has is immaterial. There must merely be a rationally objective basis justifying the conduct of the legislature'."

112. The principle of majoritarianism in collective bargaining, based on coverage rather than agent representivity, is consistent with international law. Section 39(1)(b) of the Constitution provides that when interpreting the Bill of Rights a court must consider international law. Likewise, section 3 of the LRA obliges the courts interpreting the LRA to do so in accordance with the public international law obligations of the Republic. The ILO in various instruments has confirmed that systems of collective bargaining with exclusive rights for the most representative trade union are compatible with the principles of freedom of association and that the extension of collective agreements to non-parties is not contrary to the principle of voluntary collective bargaining.[63]Majoritarianism is a legitimate means of fostering strong collective bargaining agents providing a counter-balance to the organised and collective shareholder power of corporate employers. The system has advantages for both employers

[61] 291 US 502 (1934)

[62] 2014 (3) SA 134 (CC) para 6

[63] *Digest of the ILO Freedom of Association Committee* para 950 and 1052. It may be that *Recommendation 98 of the ILO* sets a higher standard of procedural fairness than that in section 32(2) of the LRA by providing that non-parties should be given an opportunity "to submit their observations" before any extension. No argument was made, or relief sought from us, that section 32(2) of the LRA should be corrected to provide due process akin to that available to non-parties under section 32(5)(c) and (d).

and workers in the promotion of orderly collective bargaining and the avoidance of the proliferation of trade unions. Our law is proportionately tailored in that it does not compel majoritarianism, it merely offers inducements and benefits for bargaining agents in contexts where it is achieved. The mechanical extension of bargaining council collective agreements is one example. Despite the subordination of individual interests to those of the group, the high numerical threshold requirements, together with the additional safeguards provided in section 32(3) of the LRA, ensure proportionality in the system of extension and amount to a justifiable limitation of the constitutional rights to administrative justice, equality and freedom of association in a majoritarian situation.

113. What is more, the limitation of the right of administrative justice by section 32(2) and (3) of the LRA is ameliorated considerably by two of the substantive jurisdictional preconditions in section 32(3): the necessity for an independent system of exemption and the protection against discrimination. These are "the main safety valves" to protect the interests of non-parties in a majoritarian situation. They are purposely intended as carefully tailored and proportional means to minimise adverse impacts on non-parties.

114. Once again, it is not the place of the courts to prescribe to the legislature about its preferred policy choices about the means of legislative intervention; provided they are proportionately tailored. Parliament's choice of this mechanism over a broad Ministerial discretion is a legitimate policy preference to favour the resolution of labour issues by domestic expert tribunals. The exemption procedure provides several layers of protection where a majority collective agreement has been extended to non-parties by the Minister. A person wishing to be exempted from an extended collective agreement will have a right to apply to the bargaining council for an exemption; appeal the refusal of exemption to an independent appeal body; and apply to have the decision judicially reviewed and set aside if the application is ultimately denied. The decision of the appeal body will constitute administrative action and hence will be subject to PAJA review. There is uncontroverted evidence that the exemption bodies have had some success in practice and provide an effective safeguard.

115. The FMF maintains that the exemption remedy is insufficient in three respects. It contended in general terms that the public interest requirement is not satisfied by the provisions governing exemption. In its view, the process of exemption may mitigate the hardship that extension of a collective agreement can cause, but that is no answer to the argument that an extension of a collective agreement to non-parties which is not in the public interest is unconstitutional. However, it follows logically that if the argument itself is wrong, which it is, then the exemption process does play a mitigating role. Secondly, consistent with its stratagem to avoid a justifiability analysis, the FMF argued that the existence of an exemption process was "at best a factor to be taken into account under the limitation clause (section 36 of the Constitution)". For the reasons explained, a justifiability analysis under section 36 is unavoidable in this dispute. That being the case, the exemption procedure is indeed a factor to be taken into account, and a decisive one at that. Finally, the FMF complains

that the right to seek exemption is not extended to the categories of members of the public most severely affected by extensions – the outsiders, the unemployed and new employer entrants. It did not elucidate this point with reference to the text of the statute. I assume though that it believes (rightly in my view) that the provisions of section 32 can be interpreted to limit the right to seek exemption to non-parties identified in the collective agreement, the bargaining council resolution for extension and the written request to the Minister. If that is indeed correct, outsiders may not be able to seek exemption but are nonetheless not entirely without a remedy. If adversely affected, there will be no obligation on them to exhaust domestic remedies not available to them. They can resort to the ordinary administrative law and Bill of Rights remedies. The exemption remedy is nonetheless a useful protective mechanism for those persons immediately impacted by any extension of a collective agreement.

116. In addition, the Minister may not exercise her mechanical power under section 32(2) of the LRA unless she is satisfied in terms of section 32(3)(g) that the terms of the collective agreement do not discriminate against non-parties. None of the parties made any submissions about the nature and extent of this protection. For the reasons explained earlier, this jurisdictional fact is objectively justiciable. If it is in fact found that the terms of a collective agreement do discriminate then the legal pre-requisites to the Minister's jurisdiction and exercise of power will be absent. One can anticipate that non-parties might complain that they are not similarly situated to the large employers and trade unions that are members of bargaining councils and should therefore not be similarly treated. The Minister and the courts will need to be satisfied that there is a rational basis for any differential treatment.

117. Finally, sight must not be lost of the fact that once the Minister publishes the extended collective agreement in the Government Gazette, as required in terms of section 32(2) of the LRA, the agreement assumes the character of subordinate legislation.[64] At common law such legislation is reviewable on the grounds enumerated in the English case of *Kruse v Johnson*[65] where Lord Russell famously held:

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

[64] *South African Association of Municipal Employees (Pretoria Branch) and Another v Pretoria City Council* 1948 (1) SA 11 (T) at 17; and *S v Prefabricated Housing Corporation (Pty) Ltd and Another* 1974 (1) SA 535 (A) at 540B

[65] [1898] 2 QB 91 at 99-100. It has been suggested that the need for review on these grounds is diminished by reason of the existence of Bill of Rights review – C *Hoexter: Administrative Law in South Africa* (2ed) 333.

118. In conclusion, therefore, the contention of the FMF that the legislative scheme for the extension of bargaining council collective agreements is unconstitutional because of the absence of adequate state and judicial control is wholly wrong. COSATU, NUMSA and the Minister are correct in their submissions that the constraints and judicial supervision provided in the LRA, read with PAJA or the constitutional principle of legality, give adequate expression to the constitutional right to administrative justice and in practice may prove more protective than the remedy sought by the FMF. There is a possibility that bargaining council decisions may be reviewed on PAJA or rationality grounds, but even if they cannot be, the discretionary power of the Minister to extend minority collective agreements certainly is reviewable on PAJA grounds or for rationality, and the attenuated power to review the extension of majority collective agreements is a reasonable and justifiable limitation upon the rights of administrative justice, by reason of the legitimate and rational basis for the application of the majoritarian principle in collective bargaining, the proportional safeguards afforded by the exemption system, the protection against discrimination granted by section 32(3)(g) and the common law.

119. In the premises, section 32 is not inconsistent with the Constitution and there is accordingly no jurisdictional basis to make an order in terms of section 172 of the Constitution substituting the word “must” in section 32(2) of the LRA with the word “may”.

The requirement to act in the public interest and the alleged excessive delegation of legislative power

120. There is another dimension to the FMF argument deserving of separate consideration; albeit at risk of being repetitive. The crux of the FMF constitutional challenge, as we have seen, concerned the limited scope of judicial review; the other angle to it is the contention that the scheme amounts to an excessive delegation of legislative power to a private actor not obliged to act in the public interest and the claim that such too is inconsistent with the rule of law requirement in section 1 of the Constitution. As Mr Brassey SC, counsel for the FMF, put it, the bargaining councils in effect enjoy legislative power even though, they are not public instrumentalities bound by law to pursue the public interest, are at liberty to pursue their own self-interest and do so. The FMF’s solution to this once again would be to bestow a discretionary power on the Minister requiring her to act in the public interest when deciding to extend a collective agreement under section 32 of the LRA.

121. The argument misconstrues the situation at a number of levels. Firstly, the characterisation of the bargaining councils as private actors is misleading. The participants in the bargaining council, the unions and the employers’ organisations might be private actors, and their negotiations something other than administrative action, but the bargaining council vested with legal personality by the provisions of the LRA, exercising public powers and performing public functions, is an organ of state whose conduct in certain circumstances will constitute administrative action or be subject to the constitutional principle of legality. But even were it not an organ of state (a functionary or institution exercising a public power of

performing a public function) in terms of section 239 of the Constitution, but merely a juristic person exercising public power or performing a public function, all else being equal, its decisions in such instances will be administrative action as defined in section 1 of PAJA or at least subject to legality review. It is the public nature of the power or function implicated in the action, not the character of the person exercising it that is relevant and decisive.[66] The term "private actor" if not a mischaracterisation is perhaps something of a red herring. Furthermore, the bargaining council arguably does not exercise any legislative power. It is the Minister under section 32(2) of the LRA who exercises the delegated power of law-making through the act of promulgation. The bargaining council perhaps exercises no power at all under section 32(1) of the LRA. It merely makes a written request (maybe a recommendation) to the Minister. Possibly, therefore, it only performs a public function.

122. That said, there is truth in the assertion that any collective agreement normally will advance the private interests of the parties to the bargaining council. The safeguard against that must lie in the judicial power of review with its inherent protection against conduct *inter alia* tainted by ulterior purpose, arbitrariness or bad faith, and in circumscribed instances by the legitimate claims of majority rule in a social democracy. The FMF believes more is required and insists that legislative power may be exercised only in the public interest.

123. The FMF's argument in this respect (coinciding with its argument about judicial review) is that section 1(c) of the Constitution, the rule of law provision, would have us introduce a free standing constitutional requirement for all legislation that public power should be exercised only in the public interest. Thus Parliament may allocate public legislative power to private actors, only if and to the extent that they can exercise these powers in the public interest.

124. Mr Trengove SC, for COSATU, argued convincingly that there is no such constitutional requirement. The clearest indication of that is in the definition of an "organ of state" in section 239 of the Constitution, which is defined to mean:

> "(a) any department of state or administration in the national, provincial or local sphere of government; or
>
> (b) any other functionary or institution –
>
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of and legislation, but does not include a court or a judicial officer."

[66] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) at paras 40 et seq

The definition is a clear indication that the Constitution is comfortable to vest public power in private hands (any other institution) and imposes no duty to act in the public interest. Plainly, the power or function performed must be for a public purpose, otherwise it would lose its public quality. Public power vested in a state body or a private institution must be exercised for public purposes. And when a private institution exercises public power it is held to account under the Constitution and PAJA as if it were a state body.

125. It is true, as Mr Trengove pointed out, that in many instances legislation may require a public or private institution to act in the public interest. If that is found to be the case, such will be an indicator that the power required to be exercised or the function required to be performed will be a public power or function. It by no means follows that all public powers and functions must be attended by that constraint. The presence of a public interest obligation in specific statutes does not lead to an over-arching constitutional principle or duty requiring all public power to be exercised in the public interest in order to be legal. Moreover, as held earlier, the availability of appropriate review remedies defeats the FMF's claim of constitutional inconsistency, meaning there is no legal basis for granting relief reading in a public interest requirement to substitute the applicable rational basis standard.

126. The FMF in addition placed reliance upon the decision of the Irish Supreme Court in *McGowan and others v Labour Court, Ireland and others*[67] in support of its complaint of excessive delegation. The court in that case was required to pronounce on the lawfulness of Part III of the Industrial Relations Act of 1946. The provisions in question provided for a mechanism by which a group of employers and trade unions could apply to the Irish Labour Court to register an employment agreement regulating remuneration and other conditions of employment. Once registered, the agreement was deemed to form part of the employment contract of all employers and employees in the sector whether they consented to it or not. The court tested the legitimacy of the enactment by asking

> "whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits – if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body – there is no authorised delegation of legislative power."

127. The Irish Supreme Court held:

[67] [2013] IESC 21

> "This is not a grant of a power to make regulations over a limited area subject to explicit or implicit guidance and review. It is an unlimited grant of power in relation to employment terms, made to bodies unidentifiable at the time of the passage of the legislation and without intermediate review. On its surface therefore, this appears to be a fatal breach of Article 15.2.1 "Law" is undoubtedly being made for the State, and by persons other than the Oireachtas."

In other words, it concluded that there was an unconstitutional and impermissible delegation of legislative power.

128. Mr Budlender, led by Mr Marcus SC, counsel for the Minister, submitted correctly that the decision is unhelpful in the South African context because of the obvious contrasts between the two constitutional systems and the different legislative frameworks. He made four points, all of which are well founded. First, in *McGowan*, the Court emphasised that the terms of the agreement were determined by private parties – not a subordinate public body governed by public law. Second, the court applied a strict approach to the question of delegation of legislative powers and, in particular, concluded that such delegations to private bodies violated the Constitution. In *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another*,[68] our Constitutional Court adopted precisely the opposite approach. Third, there was no exemption provision in the Irish legislation. On the contrary, the Irish court emphasised that non-parties are "at risk of enforcement by prosecution or civil claim, but cannot seek a variation of the agreement". This is in complete contrast to the exemption provisions in section 32 of the LRA. Lastly, unlike our Constitution, the Irish Constitution contains no fundamental right to fair labour practices or collective bargaining.

129. I agree with Mr Budlender that in light of these differences the *McGowan* decision is of no assistance and cannot be relied upon to hold that section 32 of the LRA is inconsistent with the Constitution on the grounds of excessive delegation of legislative powers.

130. In the premises, the application cannot succeed and must be dismissed in its entirety.

Costs

131. With regard to the question of costs, while the FMF application has been shown in a number of respects to be misconceived, and fundamentally so, I have no doubt that it was motivated by the best of intentions. Our country prides itself in the promotion of a strong civil society. Although there will be many opposed ideologically to the classic liberal and free market agenda advanced by the FMF, there should be no quibble with its activism on behalf of small business and the unemployed. The most intractable social and economic problem facing our country is the persistently high level of unemployment and its attendant negative social consequences. There are differing views about how to solve it. Many will argue that as

[68] 2007 (1) SA 343 (CC) at paras 40 et seq

a society we need to think outside the box and cannot simply continue with business as usual. The FMF is intent upon challenging the prevailing dogma. It does so as a morally responsible citizen whose opinion, if not heeded, deserves at least to be heard. We need not look back far into our history to recall that the censured opinions of today may well become the moral directives of tomorrow. As the Constitutional Court said in *S v Mamabolo,*[69] the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. For that reason civil society activists should not be discouraged from pursuing constitutional claims for fear of being mulcted in costs.[70]

132. Moreover, although the FMF's constitutional argument, no doubt crafted by Mr Brassey, misses the mark, that in no way detracts from its elegance and admirable ingenuity. It might not have yielded what the FMF asked for, but by compelling the debate in the way it did, the application in its result has usefully demarcated the parameters of power and administrative justice in the legislative scheme governing collective bargaining at sectoral level.

133. For those reasons, despite its lack of success in the application, I am inclined not to award costs against the FMF.

The order

134. In the premises, the following orders are made:

i) The application is dismissed.

ii) There is no order as to costs.

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JR MURPHY

JUDGE OF THE HIGH COURT

[69] 2001 (3) SA 409 (CC) para 37

[70] *Biowatch Trust v Genetic Resources* 2009 (6) SA 232 (CC).

I agree

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KE MATOJANE

JUDGE OF THE HIGH COURT

I agree

_____

AC BASSON

JUDGE OF THE HIGH COURT

Date Heard:	22 February 2016
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	Adv F Rautenbach
	Adv MJ Engelbrecht
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(The Minister):	Adv M Ramaepadi
	Adv S Budlender
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Counsel for the Bargaining Councils:	Adv G Marcus SC
	Adv S Budlender

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Instructed by:	Moodie & Robertson c/o Manamela Marobela & Associates
Counsel for MEIBC (20th Respondent)	Adv AT Myburgh SC
	Adv FA Boda
Instructed by:	Patelia Cachalia Attorneys c/o Bester & Rhoodie Attorneys
Instructed by(31st-34th Respondents):	Cliffe Dekker Hofmeyer Inc. c/o Van der Merwe Dutoit Attorneys
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