

Labour Appeal Court Upholds Majoritarianism in Collective Bargaining Extension

INTRODUCTION

The Labour Appeal Court of South Africa in Cape Town delivered a significant judgment concerning the tension between the principle of majoritarianism in labour relations and the constitutional right to fair administrative action. In the case of *South African Road Passenger Bargaining Council v Golden Arrow Bus Services (Pty) Ltd and Others* (Case No: CA 16/2023), the Court addressed an appeal and cross-appeal regarding the extension of a main collective agreement (MCA) under section 32 of the Labour Relations Act ("LRA").

The core dispute revolved around whether the Minister of Employment and Labour ("the Minister") was obligated to hear representations from non-parties before extending a collective agreement and whether the LRA sections that exclude this right are constitutional.

BACKGROUND TO THE DISPUTE

The appeal followed a Labour Court judgment that had previously reviewed and set aside the Minister's decision to extend the MCA of the South African Road Passenger Bargaining Council ("SARPBAC") to non-party employees and employers. The main objectors, Golden Arrow Bus Services (Pty) Ltd and Sibanye Bus Services (Pty) Ltd ("the bus companies"), are not parties to the SARPBAC.

The bus companies challenged the extension, specifically clause 3.2, which mandated a 4% across-the-board increase on employees' actual wage rates. They argued that this extension prejudiced them because it created substantial disparity in wages compared to their competitors. This disparity arose historically due to a "notch system" the bus companies had agreed to with the Transport and Omnibus Workers Union (TOWU) before SARPBAC was established, the bus companies contended that the across-the-board percentage increases entrenched wage competition and undermined the LRA's goal of promoting orderly collective bargaining at a sectoral level.

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PROCEDURAL AND SUBSTANTIVE FINDINGS

The Labour Appeal Court ("LAC") rejected several arguments put forth by the bus companies, including the submission that the Minister erred by relying on an outdated determination of representativeness. The LAC found that the determination issued in August 2020 was valid until July 2022, and the argument that a new determination is required for every MCA was rejected. Regarding the substantive clause, the Court found nothing inherently wrong with Clause 3.2. The Court determined that the disparity in wages was caused by the bus companies' historical election of the notch system, not by the 2021 MCA. The collective agreement ensures that all employees receive adjustments keeping pace with the rising cost of living and is meant to prevent non-party employers from posing a serious threat to competitors bound by collective agreements, thereby promoting orderly bargaining.

However, the Court did address procedural flaws regarding the SARPBAC's internal processes. The Court concluded that the 2021 MCA was not concluded in the bargaining council. The National Bargaining Forum (NBF), the sole forum mandated by the SARPBAC constitution to negotiate and conclude the main agreement, did not meet or take the decision to conclude the MCA in its final form. Furthermore, the purported decision to request the Minister to extend the agreement was invalid because the SARPBAC's constitution requires motions to be decided by secret ballot, and the SARPBAC admitted that no vote took place.

MAJORITARIANISM VS. PROCEDURAL FAIRNESS

The central legal issue was the constitutionality of sections 32(2) and (3) of the LRA, which do not allow non-parties the right to make representations before the Minister extends a collective agreement.

The Minister correctly conceded that the decision to extend the agreement constitutes administrative action. However, the LAC upheld the principle that section 32(2) deliberately excludes the right to be heard for non-parties. The Court distinguished between:

- 1. Automatic Extension (Section 32(2)):** Applied when majority parties request it, granting the Minister limited, “mechanical” power.
- 2. Discretionary Extension (Section 32(5)):** Applied when there is sufficient representation, requiring the Minister to invite comment and consider representations from the public.

The exclusion of a hearing under Section 32(2) reflects a deliberate choice in favour of majoritarianism to promote orderly collective bargaining, reduce ministerial discretion, and ensure certainty. Granting non-parties a right to be heard in this context would undermine collective bargaining and allow the minority to potentially veto agreements negotiated by the majority.

The Court affirmed that the limitation of the right to fair administrative action is reasonable and justifiable under Section 36 of the Constitution. This is because non-parties are not left without recourse; the LRA provides important safeguards, including:

- The right to apply to an independent panel for exemptions from the collective agreement.
- The right to appeal the refusal of an exemption.
- The ability to judicially review the bargaining council's decision to request an extension.

The limitation on the right to be heard is rationally related to the purpose of Section 32(2): promoting sectoral bargaining, avoiding a multiplicity of consulting parties, and fostering industrial peace.

Ultimately, the LAC dismissed both the appeal and the cross-appeal, Section 32(2) was found not to be unconstitutional.

CONCLUSION

The LAC dismissed both the appeal and the cross-appeal, finding that Section 32(2) of the LRA is not unconstitutional. This significant ruling affirms majoritarianism as a deliberate policy choice to promote orderly collective bargaining, reduce ministerial discretion, and foster workplace democracy. Although the right of non-parties to be heard before the extension is limited, the Court deemed this justifiable because non-parties retain recourse through the right to apply to an independent panel for exemptions from the collective agreement.



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