IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

CASE NO: 5642/2011

In the matter between:

VALULINE CC	First Applicant
AFRIKA HK MANUFACTURING (PTY) LTD	Second Applicant
SATCOTRADE (PTY) LTD	Third Applicant
JCR CLOTHING CC	Fourth Applicant
GOLD SHU-LIN CLOTHING CC	Fifth Applicant
UNITED CLOTHING AND TEXTILE ASSOCIATION	Sixth Applicant

and

THE MINISTER OF LABOUR	First Respondent
THE NATIONAL BARGAINING COUNCIL FOR THE CLOTHING MANUFACTURING INDUSTRY	Second Respondent
SOUTH AFRICAN CLOTHING AND TEXTILE WORKERS' UNION	Third Respondent
THE EMPLOYEES OF FIRST APPLICANT	Fourth Respondent
THE EMPLOYEES OF SECOND APPLICANT	Fifth Respondent
THE EMPLOYEES OF THIRD APPLICANT	Sixth Respondent

THE EMPLOYEES OF FOURTH APPLICANT	Seventh Respondent
THE EMPLOYESS OF FIFTH APPLICANT	Eighth Respondent
THE EMPLOYEES OF THE MEMBERS OF SIXTH APPLICANT	Ninth Respondent

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J U D G M E N T

KOEN J:

INTRODUCTION:

[1] The first, second, third, fourth and fifth applicants, and the one hundred plus employers associated in the sixth applicant, all conduct their business in the 'clothing industry', as that term is defined in the National Main Collective Agreement ('the collective agreement) of the second respondent, the National Bargaining Council for the Clothing Manufacturing Industry.

[2] This collective agreement was the result of negotiations in the second respondent between certain employer organisations and the third respondent, the South African Clothing and Textile Workers' Union, the only registered trade union representing employees in the second respondent. The collective agreement contains binding provisions including *inter alia* minimum wages payable to workers in the clothing industry.

[3] The applicants are not or have chosen not to be members of or to be represented in the second respondent. They were thus not party to any such negotiations and not signatories to the collective agreement.

[4] The collective agreement was subsequently extended by the first respondent to the applicants and other non-signatories (hereinafter all collectively referred to as the 'non-parties') pursuant to a request made by the second respondent to the first respondent in terms of s 32 of the Labour Relations Act No. 66 of 1995 ('the LRA') [1] to make the collective agreement generally applicable in the clothing industry. This extension (referred to in the application as 'the decision') was published in the *Government Gazette* No 33893, GNR 1220 of 24 December 2010. The extension is effective from 3 January 2011.

[5] It is this decision of the first respondent to extend the application of the collective agreement to non-parties which is the subject matter of this litigation.

THE RELIEF CLAIMED:

[6] The Applicant's claim the following relief in terms of their amended notice of motion:

'1. Reviewing and setting aside the decision of the First Respondent to extend the National Main Collective Agreement of the National Bargaining Council for the Clothing Manufacturing Industry to non-parties in the clothing industry

[1] All references to section numbers hereafter are to the LRA, unless expressly stated otherwise.

(including the first to fifth applicants) as published in Government Gazette No. 33893, GNR 1220 of 24 December 2010, under the heading "*National Bargaining Council for the Clothing Manufacturing Industry: Extension to Non-Parties of the National Main Collective Re-enacting and Amending Agreement".*

2. In the alternative:

2.1 declaring section 32 of the Labour Relations Act No. 66 of 1995 to be unconstitutional;

2.2 setting aside the First Respondent's aforesaid decision.

3. Ordering the First Respondent to pay the costs of this application, and in the event of the Second Respondent opposing the application, ordering the Respondents to pay the costs of the application, jointly and severally the one paying the other to be absolved.

4. Granting the Applicants such further and/alternative relief as this Honourable Court may deem fit.'

THE BASIS ON WHICH THE RELIEF IS CLAIMED:

[7] In broad terms the applicants rely on the principle of legality and on the provisions of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') as basis to impugn the decision. Reliance on PAJA presupposes the decision to be 'administrative action'. Whether the decision constitutes administrative action is irrelevant to a review based on the principle of legality.

[8] In the alternative to the review, a declaration is sought that the provisions of s 32 are constitutionally invalid. This declaration is sought on the basis that the provisions of s 32 offend against certain fundamental rights contained in chapter 2 of the Constitution of the Republic of South Africa, 1996, notably freedom of trade, occupation and profession,[2] freedom of an association,[3] equality,[4] human dignity[5] and just administrative action.[6] The constitutional validity of s 32 only arises if no non-constitutional basis exists upon which a review may succeed.

PRELIMINARY ISSUES:

[9] The first to third respondents *in limine:*

(a) challenge the jurisdiction of this court to entertain the application for the relief claimed;

(b) raised the alleged initial fatal non-joinder of the employees of the applicants;

(c) challenged the *locus standi in iudicio* of the sixth applicant to act on behalf of its members.

The alleged fatal non-joinder of the applicants' employees was cured by them being joined as the fourth, fifth, sixth, seventh, eighth and ninth respondents respectively. Apart possibly from the issue of liability for the costs relating to such joinder, this defence requires no further comment.

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[2] S 22.
[3] S 18.
[4] S 9.
[5] S 10.
[6] S 33.

The *locus standi in iudicio* of the sixth applicant to act on behalf of its members has also been accepted and this point was not persisted with.

The only point *in limine* remaining is the one of the jurisdiction of this court. It will be considered below

ANCILLIARY ISSUES:

[10] A number of ancillary issues arise from the papers, including:

(a) The striking out of:

(i) the report of professors Cheadle and Thompson on the grounds that their report contains inadmissible opinion and hearsay evidence (and failing it being struck out, their independence and hence the reliability of the report being questioned); and

(ii) certain alleged unfounded and scurrilous allegations in the answering affidavits;

(b) The contention that the applicant's application is premature as they have not exhausted what was referred to as 'an internal remedy' available to them, or alternatively that they had misconceived their remedy as they should first have applied for exemptions from the provisions of the collective agreement in accordance with the exemption procedure provided in the collective agreement, as required by s 32(3)(e) and (f);

(c) The failure of the first respondent to have filed an affidavit personally, the application having been opposed on her behalf by the Chief Director; Labour Relations in the Department of Labour.

In view of the conclusion to which I have come it is not necessary to deal with the applications to strike out, and the issue whether the applicants indeed had an internal remedy available to them, or whether they misconceived their remedy in not first applying for an exemption. The third issue above also fell away as the first respondent subsequently filed a confirmatory affidavit. This point was accordingly not persisted with.

THE STRUCTURE OF THIS JUDGMENT:

[11] In the light of the view I take of the matter, many issues raised as a basis to challenge the validity of the decision, or as a defence to the challenge, are not necessary to deal with. Interesting and persuasive as some of the detailed arguments in respect of such issues may be, I refrain from commenting thereon. They will have to remain for debate in future litigation, should the need arise.

[12] The crucial issues arising for consideration on the merits of this application are:

(a) Whether the requirements of s 32(3) were satisfied,[7]

[7] What the nature of the Minister's decision in terms of s 32(2) is, particularly whether in extending a collective agreement she is confined to a consideration of the express requirements listed in s 32(3), on which, if she is so satisfied, leaves her with no discretion but to accede to a request to extend a collective agreement, or whether she has a discretion, either in her own right or on an extended interpretation of the requirements in s 32(3) to also have regard to the potential consequences of extending a collective agreement, before doing so, accordingly do not have to be decided in this application.

(b) If not, whether the decision is reviewable on the principle of legality,[8]

(c) Whether this court has the jurisdiction to entertain such review.

[13] I have concluded that the first respondent's decision to extend the collective agreement falls to be reviewed in accordance with the principle of legality for non-compliance with s 32(3)(c) for the reasons which will appear below. In the light of that conclusion, this judgment will firstly deal with the jurisdiction of this court to entertain such a review and grant relief pursuant thereto based on the principle of legality; consider the nature of the first respondent's decision to extend a collective agreement; and consider the specific requirement of s 32(3)(c) and whether this requirement was complied with, specifically whether it was sufficient for the first respondent to have relied on a 'certificate of representivity issued pursuant to s 49(4).[9] In conclusion the appropriate relief to be granted will be discussed, [10] and finally costs.

[8] Whether properly construed the Minister's decision amounts to administrative action (in so far as the review might be based or is based on PAJA), and considering whether her decision was arrived at in a procedurally fair manner, will also not arise, if the failure to have been satisfied of the requirements in terms of s 32(3) are reviewable on the principle of legality.

[9] Many of these aspects are not separate and distinct enquiries and there will accordingly be some overlapping.

[10] Subsequent to the matter being argued an opportunity was granted to the parties to file further submissions on the appropriate relief to be granted. Submissions were filed by the first and second respondents and replied to by the applicants. Unfortunately this resulted in a slight delay in the handing down of this judgment.

JURISDICTION:

[14] In the light of my conclusion, the specific enquiry here is whether a review of the decision of the first respondent in terms of s 32 to extend the collective agreement to non-parties on the grounds on non-compliance with the principle of legality, is an issue or relief falling exclusively within the jurisdiction of the labour court in terms of s 157, which if not, will mean that this court has such jurisdiction.

[15] In terms of section 1(c) of the Constitution, the Republic of South Africa is founded on the value *inter alia* of:

> 'Supremacy of the Constitution and the Rule of Law'.

That is the foundation for the legality principle.[11]

[16] It is common cause, alternatively not disputed, that:

(a) The first respondent is an organ of state as contemplated in s 239 of the Constitution.

(b) Extending the operation of a collective agreement clearly involves the exercise of a public power.

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[11] *Affordable Medicines Trust and others v Minister of Health and others* 2006 (3) SA 247 (CC) paras 48 - 50, 74 - 78; *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 (SCA) paras 21 - 22; *Democratic Alliance and others v Acting National Director of Public Prosecutions and others* 2012 (3) SA 486 (SCA) paras 27 – 32; *Democratic Alliance v President of the Republic of South Africa and others* 2013 (1) SA 248 (CC) para 27, 34, 38 – 40 and 86-91; *Cape Bar Council v Judicial Service Commission and another* 2012 (4) BCLR 406 (CC) paras 47 – 60 and *Judicial Service Commission v Cape Bar Council* 2012 (11) BCLR 1239 (SCA) paras 21 - 22.

(c) Any review of such a public power by the first respondent in accordance with the principle of legality would constitute a 'constitutional matter'.

[17] In terms of s 169 of the Constitution:

'A High Court may decide

(a) any constitutional matter except a matter that –

(i) only the Constitutional Court may decide; or

(ii) is assigned by an Act of Parliament to another court of a similar status to a High Court;

(b) any other matter not assigned to another court by an Act of Parliament'.

[18] As is apparent from section 169 of the Constitution, and held in *Fredricks v MEC for Education and Training, Eastern Cape,*[12] the exclusion of the high court's jurisdiction, by it being 'assigned by an Act of Parliament to another court of a similar status to a high court' or it being 'assigned to another court by an Act of Parliament', would have to be express, or at least necessarily implied. This is not lightly inferred.

[19] In *City of Tshwane Metropolitan Municipality v Engineering Council of SA and Another*[13] it was held:

'There was a strong body of authority prior to the Constitution that held that the jurisdiction of the then Supreme Court was not lightly excluded [*Paper, Printing, Wood and Allied Workers' Union v Pienaar NO and Others* 1993 (4) SA 621 (A) at 635A – C].

[12] 2002 (2) SA 693 (CC) para 35.
[13] 2010 (2) SA 333 (SCA) para 37.

That is now reinforced by the Constitution, which provides in s 169(b) that the High Court may decide any matter not assigned to another court by an Act of Parliament'.

[20] The respondents however contend that the jurisdiction of the High Court to entertain a review of the first respondent's decision to extend a collective agreement to non-parties, has been 'assigned' to the Labour Court exclusively. For this contention, reliance was placed only on the provisions of the LRA,[14] as the 'Act of Parliament' which has allegedly assigned that matter i.e. a review on the grounds of legality, to the Labour Court.

[21] S 157[15] provides:

'Jurisdiction of Labour Court -

(1) Subject to the Constitution and section 173, and except where *this Act* provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of *this Act* or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –

(a) employment and from labour relations;

(b) any *dispute* over the constitutionality of any executive or administrative act or conduct, or any threatened executive or

[14] No other 'Act of Parliament' was relied upon for the submission that the High Court lacks jurisdiction.
[15] As indicated earlier, all references to section numbers are to sections of the LRA, unless otherwise indicated expressly.

administrative act or conduct, by the State in its capacity as an employer; and,

(c) the application of any law for the administration of which the *Minister* is responsible.'

[22] Section 158 provides:

'Powers of Labour Court –

(1) The Labour Court may –

(a) make any appropriate order, including –

(i) the grant of urgent interim relief;

(ii) an interdict;

(iii) an order directing the performance of any particular Act which order, when implemented, will remedy a wrong and give effect to the primary objects of *this Act*;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated in *this Act* ;

(vi) an award of damages in any circumstances contemplated in *this Act;* and

(vii) an order for costs;

(b) order compliance with any provision of *this Act*;

(c) make any arbitration award or any settlement agreement an order of the Court;

(d) request the Commission to conduct an investigation to assist the Court and to submit a report to the Court;

(e) determine a *dispute* between a registered *trade union* or registered *employers' organisation* and any one of the members or applicants for membership thereof, about any alleged non-compliance with –

(i) the constitution of that *trade union* or *employers' organisation* (as the case may be); or

(ii) section 26(5)(b);

(f) subject to the provisions of *this Act*, condone the late filing of any document with, or the late referral of any *dispute* to, the Court;

(g) subject to section 145, review the performance or purported performance of any function provided for in *this Act* on any grounds that are permissible in law;

(h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;

(i) hear and determine any appeal in terms of section 35 of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993); and,

(j) deal with all matters necessary or incidental to performing its functions in terms of *this Act* or any other law.'

[23] Exclusive jurisdiction is conferred on the Labour Court in terms of s 157, subject to the Constitution and s 173,[16] only where any other law[17] or '*this Act*' (the LRA) provides that it is a matter 'to be determined by the Labour Court'.

[24] Both the Supreme Court of Appeal in *Fedlife Insurance Limited v Wolfaardt*[18] and the Constitutional Court in *Fredericks and Others v MEC for Education and Training,*

[16] S 173 deals with the jurisdiction of the Labour Appeal Court.
[17] *In casu* no other law is relied upon.

Eastern Cape and Others[19] have held that s 157(1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in respect of employment – related matters.

[25] The respondents primarily rely on s 158(1)(g) as being the provision in '*this Act*' in terms whereof a review of any function provided for in the *Act* on any grounds permissible in law, 'is to be determined by the Labour Court' exclusively as contemplated by s 157(1).

[26] The express requirement in s 157 that the subject matter of the dispute must be one of a range of 'matters' which 'is … to be determined'[20] by the Labour Court', must be contrasted to powers conferred on the Labour Court and which it 'may'[21] exercise when it decides any dispute.[22] S 158(1)(g) does not provide expressly that such a review 'is' a 'matter' which 'is … to be determined by the Labour Court', but merely that it is a matter that 'the Labour Court may' review.

[27] As the provisions of the LRA do not expressly, or by necessary implication, provide that such a review is to be determined by the Labour Court, the jurisdiction of the High Court to determine such reviews is not ousted and jurisdiction of the Labour Court therefore not exclusive.

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[18] 2002 (1) SA 49 (SCA) para 25.
[19] 2002 (2) SA 693 (CC) paras 38 – 40.
[20] My emphasis.
[21] My emphasis.
[22] As provided in s 158.

[28] The interpretation of the provisions of s 158(1)(e) do not arise in this application, except to the limited extent that it might affect the proper interpretation to be given to s 158(1)(g). S 158(1)(e), in referring to 'determine a dispute', might be closer to complying with the requirement of s 157(1) conferring exclusive jurisdiction on the Labour Court in respect of matters that 'are to be determined by the Labour Court', as contended for by the respondents. Nevertheless, I am not persuaded that it does. The correct interpretation of s 158(1) is simply that it confers enabling powers on the Labour Court. S158 does not provide for matters of substantive jurisdiction.[23]

[29] What s 158(1)(g) does is to provide and place it beyond any doubt that where the Labour Court has jurisdiction in a particular matter, whether exclusive or in a situation of concurrent jurisdiction with the High Court,[24] and the subject matter of such dispute entails a review and relief consequent upon a review, that the Labour Court will have the power to review the performance or purported performance of any such function.

[30] S 158(1)(g) confers on the Labour Court the power that it 'may ... review' the performance of any function, similar to the balance of the provisions in s 158(1)

[23] Even if I was wrong in that interpretation, the wording of ss 158(1)(e) is still far removed from the provisions of ss 158 (1)(g).

[24] As contemplated in s 157(2) relating to the violation of a fundamental right entrenched in chapter 2 of the Constitution. In *Gcaba v Minister for Safely and Security and Others* 2010 (1) SA 238 (CC), the Constitutional Court held that s 157(2) should not be understood to extend the jurisdiction of the High Court to determine issues which (as contemplated by s 157(1)) have been expressly conferred upon the Labour Court by the LRA. Rather, it should be interpreted to mean that the Labour Court will be able to determine Constitutional issues which arise before it, in the specific jurisdictional areas which have been created for it by the LRA and which are covered by s 157(2)(a)(b) and (c)'. Any reliance on the decision in Gcaba v Minister for Safety and Security and Others or Chirwa v Transnet Limited and Others 2008 (4) SA 367 (CC) as decisive of the issue of jurisdiction, seems in my view misplaced in the context of the present matter. Both involved conduct held not to constitute administrative action, dealt with entirely different matters, namely non promotion and dismissal in an employee relationship, and were in respect of different labour issues to the issue of legality before this court.

conferring on the Labour Court the power, if warranted, that it may make any appropriate order,[25] including the grant of urgent interim relief,[26] an interdict,[27] an order directing the performance of any particular act,[28] a declaratory order,[29] an award of compensation in circumstances contemplated in the LRA,[30] an award of damages in any circumstances contemplated in the LRA,[31] an order for costs,[32] etc. all as contemplated in s 158(1).

[31] If the respondent's interpretation of s 158(1)(g) that the granting of the permissive power to review contained in s 158(1)(g) constitutes a direction that any matter involving a review 'is to be determined' by the Labour Court, whether express or by necessary implication, as contemplated in s 157(1), thus conferring exclusive jurisdiction on the Labour Court, then by parity of reasoning, any dispute in respect of which 'any appropriate order'[33] may be granted would also confer exclusive jurisdiction on the Labour Court. That would entail exclusive jurisdiction being conferred on the Labour Court in probably almost all matters that could conceivably come before it with reference to the kind of relief that may be granted, rather than with reference to the cause of action relied upon. An exception to the express provisions of section 169 of the Constitution should not be inferred that readily and can certainly not be implied by any considerations of necessity.

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[25] S 158(1)(a).
[26] S 158(1)(a)(i).
[27] S 158(1)(a)(ii).
[28] S 158(1)(a)(iii).
[29] S 158(1)(a)(iv).
[30] S 158(1)(a)(v).
[31] S 158(1)(a)(vi).
[32] S 158(1)(a)(vii).
[33] Whether it is one of the specific stated forms of relief in s 158(1)(a)(i) – (vii) or elsewhere in s 158(1).

[32] The proper construction of s 158(1)(g) is that if the Labour Court has jurisdiction in respect of the subject matter of the litigation (specifically relating to any function provided for in the LRA as contemplated in s 158(1)(g)), that it will then have the power to grant the remedy of review in respect of such subject matter. Thus, the review of a decision of the Minister of Labour to extend a collective agreement of the Metal and Engineering Industries Bargaining Council to non-members to that agreement, would clearly be a matter falling within the jurisdiction of the Labour Court as it is expressly provided with the power to 'review the performance ... of any function [in terms of s 32] provided for in *this Act'* as happened in the *Neasa* judgment.[34] But this does not mean that the Labour Court has exclusive jurisdiction to entertain such a review.

[33] The provisions of s 158(1)(g) granting permissive powers to the Labour Court are a far cry from the kind of specific provisions directing that certain disputes are to be 'determined by the Labour Court', provided for in the LRA for example in relation to disputes about unfair dismissals and unfair labour practices.[35]

[34] The third respondent also relied on the provisions of s 63(1) and (4) for its contention that this court lacks jurisdiction to entertain the present application.

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[34] This is exactly what happened in *National Employers Association of S A and Others v Minister of Labour and Others* Case No. JR 3062/2011 (unreported), delivered 20 December 2012 Labour Court (Johannesburg) – hereinafter referred to as the '*Neasa* judgment' – although the issue of jurisdiction did not arise in that application.

[35] S 191(6).

[35] S 63 of the LRA provides:

> '(1) Any party to a *dispute* about the interpretation or application of Parts A and C to F of this Chapter [s 32 falls in part C of the Chapter], may refer the *dispute* in writing to the Commission unless-
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> (a) the *dispute* has arisen in the course of arbitration proceedings or proceedings in the Labour Court; or
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> (b) the *dispute* is otherwise to be dealt with in terms of Parts A and C to F;
>
> (2) The party who refers the *dispute* to the Commission must satisfy it that a copy of the referral has been *served* on all the other parties to the *dispute*.
>
> (3) The Commission must attempt to resolve the *dispute* through conciliation.
>
> (4) If the *dispute* remains unresolved, any party to the *dispute* may refer to the Labour Court for adjudication'.

S 63 forms part of Part F under the heading 'General provisions concerning councils' i.e. bargaining councils.

[36] Again, s 63 employs the permissive term 'may'. It does not provide that any such 'dispute', assuming it to include a decision of the first respondent to extend the Collective Agreement to non-parties, is a 'matter to be determined by the Labour Court'. Any such dispute may be referred by any party thereto to the Commission. It is only '(i)f' the dispute remains unresolved…(that) …any party to the dispute <u>may</u> refer it to the Labour Court for adjudication'.[36] The circumstance contemplated by s 63 is therefore a dispute which could[37] be determined by the Commission and which only if the

[36] My underlining.
[37] Note the reference to 'may' in s 63(1).

Commission cannot resolve it then 'may'[38] be referred to the Labour Court for adjudication.[39] The present review does not entail such a 'dispute'.

[37] In view of my aforesaid conclusion, it is unnecessary to consider the exact parameters of s 157(2) and whether it includes reviews based on PAJA, or whether it is confined to any alleged infringement of s 33 of the Constitution, but not infringements of PAJA.

[38] In my judgment this court has jurisdiction, concurrent with the Labour Court, to entertain a review of the first respondent's decision based on the principle of legality.

THE NATURE OF THE FIRST RESPONDENT'S DECISION:

[39] S 23(5) of the Constitution provides:

> 'Every trade union, employer's 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)'.

[40] One of the primary aims of the LRA, contained in its preamble and s 1, is 'to promote and facilitate collective bargaining at work place and at sectoral level'. The key bargaining institution under the LRA is the bargaining council, *in casu* the second

[38] As opposed to 'are to be determined by the Labour Court' in s 157(1).
[39] S 63(4) refers to 'adjudication' rather than 'determine' or 'determined' in s 157(1).

respondent, membership of which is voluntarily. Negotiating and concluding a collective agreement is an inherent part of that process.

[41] S 23(1) of the LRA specifically provides that the legal effect of such a collective agreement is that it binds:

> '(a) the parties to the *collective agreement*;
>
> (b) each party to the *collective agreement* and the members of every other party to the *collective agreement*, insofar as the provisions are applicable between them'.

[42] Authors like Godfrey, Maree, Du Toit and Theron: *Collective Barging in SA*[40] and Du Toit *et al Labour Relations Law: A Comprehensive Guide*[41] state that the power of the first respondent to extend collective agreements of bargaining councils to non-members within a bargaining council's registered scope,[42] is of critical importance in ensuring the continued existence of the bargaining council system.

[43] Accordingly, the respondents contend that the first respondent's power to extend a collective agreement is narrowly circumscribed: If the first respondent is satisfied that ss (a) to (g) of s 32(3) have been complied with, she, in the wording of ss (2) '<u>must</u> extend the c*ollective agreement*, as requested, by publishing a notice in the Government Gazette ...'[43] Particular situations of hardship of manufacturers in the

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[40] (2010) 23 and 93.
[41] 5ed (2007) 284.
[42] S 32(3)(d).
[43] My underlining.

industry to whom the collective agreement is extended need to be addressed through the exemption system provided for in any such collective agreement.[44] The LRA places primacy on collective bargaining and industry–wide centralised self-determination, thus leaving it to the industry parties to determine inter alia the rate at which wages are set.

[44] The structure of the collective bargaining process as contained in the LRA clearly is aimed at providing controls against significant adverse effects on economic welfare including employment, while at the same time establishing minimum standards of employment through a system of self-administration. The controls in achieving this include *inter alia*:

(a) The requirement of majority or sufficient representation;

(b) The fact that negotiating parties themselves will set the terms of their agreement including wages and that where unduly onerous, provision is made for exemption.

[45] With those brief introductory comments, it requires to be noted that two mechanisms are created in terms of s 32 by which collective agreements concluded in bargaining councils may be extended by the first respondent to non-parties, namely that pursuant to s 32(2) and that pursuant to s 32(5). The requirements in terms of s 32(2) are mandatory, having regard to the use of the imperative term 'must', whereas the procedure provided for in terms of s 32(5) is discretionary, having regard to the wording that '*the Minister* <u>may</u> extend a C*ollective Agreement'* apparently regardless of the representativeness requirement in ss 3(b) and (c), provided she is satisfied in respect of

[44] As required by s 32(3)(e) and also (f).

the requirements in s 32(5)(a) and (b). Since the first respondent did not rely on s 32(5) when she decided to extend the collective agreement in the present matter, it is not necessary to consider the nature and extent of the threshold requirements in regard to that procedure any further in this judgment.

[46] There is no dispute between the parties that the first respondent must be satisfied in regard to the threshold requirements specified in s 32(3)(a) to (g) before she 'must' extend a collective agreement in accordance with any request for its extension.

[47] The applicants however contend that when deciding whether to extend a collective agreement to non-parties in terms of s 32(2) the first respondent is obliged to consider the impact of such extension particularly the potential job losses in the sector concerned. It is not disputed by the respondents that the first respondent did not take any such consequence of her decision into account in extending the collective agreement to non-parties. In view of the conclusion to which I have come it is not necessary to decide this issue either.[45]

[48] In my view the first respondent enjoys no discretion in terms of s 32 once 'satisfied' as to the threshold requirements in s 32(3)(a) to (g). S 32(2) requires that

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[45] It is by no means clear that the possibility of potential job losses is a relevant consideration necessarily implied in s 32, within s 32(3)(e) – (g) as the Applicant's contend, or elsewhere. S 32(3)(e) and (f) in fact provide for an exemptions body to consider claims by non-parties if they are unable to comply with the collective agreement extended to apply to them, which would appear superfluous if that was a matter which the Minister herself was required to consider, albeit in general terms as opposed to the exemption process applicable on an individual basis.

within 60 days of receiving a request from Bargaining Council, the Minister 'must' extend the agreement by publishing it in the Government Gazette. This is a peremptory requirement and the extension of the collective agreement must follow once the Minister is satisfied in regard to the requirements in s 32(3); but once so satisfied she has no discretion not to extend the agreement.

[49] This circumscription of the first respondent's power and obligation in terms of s 32 appears to suggest a deliberate policy choice and a deviation from the practice which previously prevailed where the first respondent had a discretion. In terms of s 48 of the Labour Relations Act No. 28 of 1956, the first respondent had a wide discretion as to whether or not to extend a collective agreement to non-parties. S 49 of that Act provided that:

> '... the Minister may, if he deems it expedient to do so, at the request of a counsel ... extend their agreement to non-parties in the particular industry concerned'.[46]

[50] This interpretation is also consistent with that in the *Neasa* decision[47] where it was held that:

> 'The use of the word "must" in s 32(2) makes it plain that unless any of the provisions of s 32(3) precludes the extension of an agreement that otherwise complies with the provisions of s 32(1), the minister has no discretion but to extend the collective

[46] My emphasis. Following the decision in *Minister of Health v New Clicks SA (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at para [199] to [201] it is permissible to have regard to the explanatory memorandum which accompanied the LRA to ascertain the 'mischief' that a statutory provision was aimed at where that would be relevant to its interpretation. The explanatory memorandum which accompanied the LRA specifically identified the discretion afforded to the Minister by the previous LRA as one of the problems with a pre-existing system which the new LRA sought to address. This mischief was clearly addressed in the current LRA by the removal of any discretion on the part of the First Respondent.

[47] Para 11.

agreement to non-parties within the time period and in the manner provided for in s 32(2)'.

[51] S 32(3) sets out the 'jurisdictional facts' which must exist if a collective agreement is to be extended lawfully to non-parties. On any party's approach to the application the express requirement in s 32(3)(a) to (d) were required to be complied with as jurisdictional prerequisites. What the threshold requirements in s 32(3) entail, are questions of statutory interpretation.

[52] In my view s 32(3)(c) was not complied with, which renders a determination of whether any further additional requirements or considerations relating to potential job losses were to be implied unnecessary to decide.

THE REQUIREMENTS OF S 32(3)(c):

[53] In the *Neasa* decision Van Niekerk J held:

> Accordingly, for the purposes of s 32(3)(b) and (c), before deciding to agree a valid request from a Bargaining Council to extend a Collective Agreement to non-parties, the Minister must determine the scope of the agreement that is sought to be extended, and for the purposes of compliance with the majority threshold requirements, thereafter be satisfied of two things. The first is that the majority of those employees who fall within the scope of the agreement are members of trade unions that are parties to the council. The second is that the majority of employees who will fall within the scope of the

agreement are employed by employers who are members of employer's organisations that are parties to the council'.

[54] As to what is required and meant by the first respondent being 'satisfied' the following is relevant:

(a) Professor Hoexter in *Administrative Law in SA*[48] states:

'Since the decision in *Hurley* the courts have treated "reason to believe" and similar clauses objectively, and this is evident in the recent case law. But what about clauses that are more obviously subjective, such as "is satisfied"? Even before 1994 there was some judicial acknowledgment that a subjective opinion is not unfettered. Nevertheless, such clauses are deliberately used by the legislature to signal wide discretionary power and thus to minimise the scope of judicial review. Does the advent of the Constitutional era make them less effective in this regard?

The answer must be yes, inevitably so. First, the right to lawful administrative action in s 33(1) of the Constitution implies that the courts must be able to satisfy themselves as to the lawfulness of administrative action, including any factual assumptions on which that action is based ...

The effect of *Walele* is to make all jurisdictional facts objectively justiciable whatever their wording'.

[48] 2ed (2011) 301 – 302. Also referred to with approval by Van Niekerk J in the *Neasa* judgment para 19.

(b) In *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) at para 60 the Constitutional Court held:

> '[i]n the past, when reasonableness was taken as a self-standing ground for review, the City's *ipse dixit* could have been adequate. But that is no longer the position in our law. More is now required if the decision makers opinion is challenged on the basis that the subjective precondition did not exist. The decision-maker must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds. In this case it cannot be said that the information, which the city admitted had been placed before the decision-maker, constituted reasonable grounds for the latter to be satisfied.'

[55] The requirement is not whether the requisite majority was in fact employed by members of party employer's organisations, but whether the Minister was 'satisfied' objectively of this at the time of exercising her power.

[56] Not being thus 'satisfied' can entail, as indicated in *SA Defence and AID Fund and Another v Minister of Justice,*[49] that the Minister as repository of the power acted *mala fide,* or from ulterior motive, or failed to apply her mind to the matter. *In casu* the former two possibilities have not been suggested. Reliance was only placed on her failure to apply her mind properly to the matter.

[57] Whether the first respondent properly applied her mind to the issue of representation or representivity is objectively justiciable.

[49] 1967 (1) SA 31 (C) at 35A.

[58] It must be accepted that the number of employees employed in a particular industry and which would fall within the scope of an extended collective agreement, is in a constant state of fluctuation due to continuous hiring and termination of employment for whatever reason. The level of representation at a particular point in time is therefore always at best assessed on the basis of objective evidence or information placed before the first respondent at the time that the request to extend the collective agreement is made, and in relation to which she then concludes that she is so 'satisfied'.

[59] It is not the respondents' case that the first respondent actually attempted to gauge the representivity of employers, or was presented with any kind of data which demonstrated objectively that the representivity requirement in s 32(3)(c) was met. Rather it is contended that in satisfying herself that the requirements of s 32(3)(c) were met, the first respondent relied upon a certificate of representativeness issued by the Registrar of Labour Relations in terms of s 49(4) of the LRA, which she accepted as being decisive.

[60] S 49 of the LRA, which forms part of 'Part F – General provisions concerning councils' provides:

> 'Representativeness of council –
>
> (1) When considering the representativeness of the parties to a *council,* or parties seeking registration of a *council*, the *registrar*, having regard to the nature of the *sector* and the situation of the *area* in respect of which registration is sought, may regard the parties to a *council* as representative in respect of the whole *area*

even if a *trade union* or *employer's organisation* that is a party to the *council* has no members in part of that *area.*

(2) A *bargaining council* having a *collective agreement* that has been extended by the *Minister* in terms of section 32, must inform the *registrar* annually in writing, on a date to be determined by the *registrar* as to the number of *employees* who are –

(a) covered by the *collective agreement* ;

(b) members of the *trade unions* that are parties to the agreement;

(c) employed by members of the *employers' organisations* that are party to the agreement.

(3) A *bargaining council* must on request by the *registrar* inform the *registrar* in writing within the period specified in the request as to the number of employees who are –

(a) employed within the *registered scope* of the *council*;

(b) members of the *trade unions* that are parties to the *council* ;

(c) employed by members of the *employer's organisations* that are party to the *council.*

(4) A determination of the representativeness of a *bargaining council* in terms of this section is sufficient proof of the representativeness of the *council* for the year following the determination.

(5) This section does not apply to the *public service.*'

[61] The s 49 certificate certified amongst other things that 51% of the employees falling within the second respondent's registered scope, that is within the clothing industry as defined in its registration certificate, were employed by members of the

employer's organisations which are parties to the council.[50] The submission is that this certificate was valid at the time when the extension was made on the 24 December 2010, and in the absence of a review and setting aside of the certificate, it remained valid and of full legal force and effect.

[62] S 32(3)(b) and (c) are evidently designed to ensure a form of majoritarism by requiring that a majority of the persons bound by a collective agreement after its extension, were through representatives on the Bargaining Council, party to the conclusion of that agreement and bound thereby. In terms of s 32(3)(c) employers must employ more than 50% of the employees who fall in the scope of the agreement after it has been extended.

[63] The schedule attached to the Bargaining Council's application to the first respondent for extension of the collective agreement recorded that employer's organisations that were party to the collective agreement employed 48.58% of the total number of employees covered by the collective agreement. Paragraph 5 records that the total number of employees employed within the scope of the collective agreement by employers who belonged to the employers' organisation who are party to the collective agreement is '27 371' and that the total number of employees employed within the scope of the collective agreement is '56 341'.

[50] It certified that 30 530 employees were employed by members of party employers organisations and that there were 59 428 employees employed within the councils registered scope.

[64] S 32 refers to ‘the majority of all the employees who fall within the scope of the collective agreement’, as contrasted to the provisions of s 49(4) which refers to the representativeness of a ‘Bargaining Council’ and ‘employees registered within the scope of the council’.

[65] The representativeness of the second respondent is clearly something very different to representativeness arising from a collective agreement. The respondents however submit that there is no significant difference between the number of employees falling within the registered scope of the council and the number of employees falling within the scope of the collective agreement because ‘the council’s scope of registration is substantively identical to the definition contained in the collective agreement’.

[66] Being ‘substantively identical’ is of course not the same as being identical or the same. However, even assuming some substantive measure of similarity or identity, the figures as per the certificate differed crucially as to whether the representation was more or less than 50%, from the figures provided by the second respondent itself in its application to the first respondent. At the very least, the first respondent should have applied her mind to the application and the basis upon which it was brought. If *ex facie* that application itself the required degree of representivity required by s 32(3)(c) would not be satisfied, as indeed the application indicated, then she could not simply ignore those figures and accept those in the s 49(4) certificate, in the absence of a cogent explanation justifying her disregarding the figures furnished by the second respondent in the application. Although s 49(4) contains a deeming provision it does not assist the

respondents' case as it has a different purpose, but in any event also was in respect of some form of assessment done on 30 April 2010 whereas the actual figures in the application were in respect of a later date closer to the application being made.

[67] Reliance on the s 49 certificate was misplaced and did not amount to a proper application of the first respondent's mind to the requirements in s 32(3)(c) for at least one or more or all of the following reasons:

(a) S 32(3)(c) refers to an actual factual position, not a deemed one. The first respondent had to be satisfied that the majority of all employees falling within the scope of the collective agreement once extended were in the employ of members of the employer parties to the Bargaining Council;

(b) S 32 does not provide that any determination as to the representativeness of a Bargaining Council in terms of s 49 is sufficient for the purposes of the inquiry to be undertaken in terms of s 32(3)(c). Indeed, the provisions of s 49(2) requiring particulars to be furnished annually by the Registrar in writing as to the number of employees covered by a collective agreement and the like, indicates that reliance on the certificate was not proper. There will be no need for these particulars to be furnished if reliance would simply be placed on the certificate of representativeness of the council;

(c) S 32 does not indicate, whether expressly or by implication, that all the first respondent needed to do to satisfy herself that the requirements of s 32(3) (c) had been met, was to consider a determination made under s 49;

(d) If the first respondent could satisfy herself as to level of representativeness required by s 32(3)(c) by considering a certificate of representativeness in terms of s 49, it would constitute an impermissible fettering of her discretion in relation to the very inquiry she is required to undertake and to be satisfied on;

(e) S 49, relating to the 'representativeness of council' is to determine the representativeness of a bargaining council and is made in respect of criteria very different to those under s 32(3)(b) and (c).

(f) The certificate referred to the number of employees 'within the registered scope of the council', information required by s 49(3)(a), and does not indicate the number of employees 'covered by the Collective Agreement', the information required by s 49(2)(a) and pertinent to the enquiry in terms of s 32(3)(c).

[68] As in the *Neasa* judgment the unavoidable conclusion is that the factual assumption on which the first respondent based her decision to extend the collective agreement, namely the adequacy of the certificate of representivity in terms of s 49, was incorrect. As it was put in that judgment 'put another way, there were no reasonable grounds for the Minister to be satisfied that the conditions set out in paragraphs (b) and (c) of s 32(3) had been met. The Minister's decision to extend the Collective Agreement to non-parties put forward in the registered scope of the agreement is invalid and accordingly stands to be reviewed and set aside.

REMEDY[51]:

[69] In the *Neasa* judgment the decision reviewing and setting aside the decision of the first respondent was suspended for a period of four months.

[70] The second respondent does not contend for a suspension in those terms but submits that any order of invalidity should not have retrospective effect, save that the second respondent should not be permitted to commence compliance proceedings against non-parties in respect of non-compliance with the terms of the collective agreement. This order is sought on the basis that s 8 of PAJA accords a court a broad discretion to make an order that is just and equitable.

[71] The first respondent in principle makes common cause with the second respondent's contention that an order of invalidity should not operate retrospectively, but proposes a differently worded order. When regard is had to the wording proposed by the first respondent, it appears that the first respondent does not actually propose a limitation on retrospectivity, but a suspension of any order of invalidity for a period of four months, as was done in the *Neasa* matter.

[72] The present application concerns an invalid administrative act, not an instance of constitutional invalidity to which the provisions of s 172(1)(b)(i) of the Constitution,

[51] After the application had been argued and at the request of the second respondent I allowed further submissions to be filed in relation to the issue as to what an appropriate remedy would be in the event of the first respondent's decision being reviewed and set aside. The second respondent, the first respondent and the applicants filed further submissions. This part of the judgment is in respect of those further submissions.

providing that an order may be made limiting the retrospective effect of the declaration of invalidity, would apply.[52] Even in instances where s 172(1)(b)(i) of the Constitution might find application, it is only applied when there are compelling reasons for withholding the requested remedy.

[73] I shall accept in this judgment in favour of the respondents that the discretion to grant an order that is just and equitable would include limiting the retrospective operation of such an order. It is clear that it is only in exceptional instances that a court will exercise its discretion to withhold an order setting aside an invalid administrative act.[53]

[74] In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd and others*,[54] Froneman J held that:

> 'The apparent anomaly that an unlawful act can produce legally effective consequences is not one that permits easy and consistently logical solutions. But then the law is often a pragmatic blend of logic and experience … The rule of law must never be relinquished but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented – direct or collateral; the interests involved, and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case'.

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[52] Even then, a successful litigant should be afforded 'effective relief' – *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69; *Gory v Kolver NO and others (Starke and others intervening)* 2007 (4) SA 97 (CC) at para 40; *Mvumvu and others v Minister for Transport and another* 2011 (2) SA 473 (CC) at paras 46 and 48.
[53] *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) para 46.
[54] 2011 (4) SA 113 (CC) para 85.

[75] The effect of an order setting aside the decision of the first respondent will normally in the ordinary course, by its very nature, operate retrospectively.[55]

[76] The enquiry is simply whether the present is such an exceptional case, and if so, what form any limitation should take.

[77] The second respondent contends that an unqualified order of invalidity would not be just and equitable in the circumstances as it would have the effect of upsetting thousands of settled transactions and payments already made pursuant to the agreement, to the prejudice of not only second respondent but also third parties. Particular reference is made to wages that have been paid to employees, with the fear being expressed that these might be recoverable on the grounds that the *causu* giving rise to such payments was invalid, and further that contributions to the clothing industry Health Care Fund, which provides medical and related benefits to employees and their dependents, would be affected. Other payments which might be affected are contributions to the Industry Protection Fund, contributions to bargaining council expenses, trade union subscriptions including the HIV/Ace project, Trade Union Capacity Building Fund and the collective bargaining – dispute resolution levy. It is submitted that exactly these kinds of considerations caused the court in the *Neasa* matter to suspend the order of invalidity for a period of four months to allow the first respondent to consider whether to extend the collective agreement in terms of s 32(5).

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[55] See *Eskom Holdings Ltd and another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 9; *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others* supra paras 84 to 87.

[78] The first respondent likewise appeals for what she submits would be ‘a dynamic and nuanced approach to judicial oversight over the exercise of public power’, by providing for a suspension of the order of invalidity, and thus allowing an opportunity for the first respondent to consider whether to rely on s 32(5) instead.

[79] The rule of law must never be relinquished. The circumstance of each case must be examined in order to determine whether some amelioration of legality is required, and if so, the extent thereof. Ultimately, the court must exercise a judicial discretion, but as with all judicial discretions it must not be exercised arbitrarily or capriciously or for insufficient reason.

[80] The applicants justifiably in my view take issue with the respondents’ conclusion that ‘there will be wide spread prejudice not only to the council and its constituents but to related third parties’. The foundational difficulty with this submission is that these issues were not raised and fully addressed in the affidavits. One simply does not know how many non-parties might have made payments pursuant to the extension of the collective agreement and how many not. Employer and employees who are members of the Employers’ Organisations and Trade Unions that are parties to the collective agreement presumably would have made payments, but the setting aside of the decision to extend the collective agreement will not affect them.

[81] The applicants correctly point out that if the order setting aside the extension by the first respondent was not to have retrospective affect, the applicants and other non-

parties would still be bound by the provisions of the collective agreement although the extension thereof to them was invalid in law. Even if the order of invalidity was not to have retrospective effect save to the extent that the second respondent should not be entitled to commence compliance proceedings against non-parties in respect of non-compliance with the agreement, it would still permit the second respondent to continue with compliance proceedings which it might have already instituted against non-parties.[56]

[82] In the light of the aforesaid, I am not persuaded that the limited retrospectivity which the second respondent proposes, or a suspension of the order as contended for by the first respondent is 'just and equitable' on the facts before me. As much as I appreciate that the review and setting aside of the first respondent's decision will have some impact, I do not have actual evidence of what this impact would be. Even if a suspension of the order of invalidity might be justified in principle, the question arises whether such suspension should be for two or three or four or perhaps more months. The fixing of such a time limit would be entirely arbitrary.

[83] One would obviously be reluctant to expose vulnerable employees to possible claims for the reimbursement of higher remuneration packages that might have become payable to them in terms of the extended collective agreement. Whether that will in fact happen, remains to a large extent speculative with no evidence of the potential of such fears having been placed before me.

[56] It seems that only 269 of approximately 1000 businesses in the clothing industry are compliant.

[84] It might be irresponsible for employers who have paid employees higher wages in terms of the extended agreement to now seek to recover the extent of such overpayment. That could obviously bring disruption to the industry, but particularly to individual work places, which employers presumably would want to avoid. I however have no evidence on the application before me that any non-parties to the extended collective agreement contemplate such action.

[85] An invalid administrative act remains invalid. It is of no force and effect. It would also not be just and equitable if administrative functionaries were, in all instances where a challenge to the validity of their administrative action is raised, to have the assurance, even in the absence of an evidential basis supporting any potential prejudice, that if they are unsuccessful in opposing the challenge to the validity of their actions and it is found that the administrative act is indeed invalid, that this would make no difference, because that which was achieved pursuant to invalid action will stand with an opportunity being granted to correct it by other means.

[86] The present matter is not an instance where invalid administrative action understandably occurred.

[87] Having regard to what has been placed before me, it is not just and equitable that the applicants and other non-parties be burdened with obligations extended to them invalidly whilst an arbitrary period of four months or two months, or whatever, is allowed to enable the first respondent to consider whether the same result could be achieved

validly by other means. The first respondent should not have to operate within or under those constraints. She should consider whether the collective agreement should be extended at all, objectively and dispassionately.

[88] If any limitation of the nature contended for by the first or second respondents is to be placed on an order of invalidity then it should have been firmly founded on a factual and evidential basis.

COSTS:

[89] The applicants have been successful. There is no reason why they should not be awarded the costs of the application including the costs of their experts and the costs relating to the joinder of the Fourth to Ninth Respondents.

[90] In view of the conclusion I have reached it is not necessary to consider the merits of the applications to strike out and no order is made in respect thereof. The costs relating thereto will follow the result.

ORDER:

[91] (a) An order is granted in terms of paragraph 1 of the Notice of Motion as amended.

(b) The first, second and third respondents are directed to pay the costs of the application including the costs of the applicants' experts and the costs relating to the joinder of the Fourth to Ninth Respondents jointly and severally, one or more paying, the others to be absolved.

DATE OF MATTER: 29 February 2013

DATE JUDGMENT DELIVERED: 13 March 2013

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