THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1110/13

In the matter between

BUSINESS UNITY SOUTH AFRICA **Applicant**

and

MINISTER OF HIGHER EDUCATION AND TRAINING **First Respondent**

THE NATIONAL SKILLS AUTHORITY **Second Respondent**

THE NATIONAL SKILLS FUND **Third Respondent**

Heard: 24 June 2015

Delivered: 7 August 2015

Summary: Application to condone late filing of answering affidavit – application to review and set aside regulations issued by the Minister for non-compliance with statutory consultation process and being ultra vires– in limine points raised in respect of non-joinder, *locus standi*, undue delay for purposes of PAJA

JUDGMENT

COETZEE, AJ

[1] This is an application to:

1.1 Review and set aside the Sector Education and Training Authorities (SETAs) Grant Regulations Regarding Monies Received by a SETA and Related Matters ("the 2012 Grant Regulations") promulgated in terms of section 36 of the Skills Development Act 97 of 1998 ("the SDA") in Government Notice R990 of 3 December 2012, and

1.2 Condone the late filing of the answering affidavit of the first Respondent.

The condonation application

[2] The Labour Appeal Court has endorsed the approach in *Melane v Santam Insurance Company Ltd*.[1] Accordingly, the court is required to exercise its discretion having regard to the following factors:

2.1 The degree of lateness;

2.2 The explanation for lateness;

2.3 The prospects of success; and

2.4 The importance of the case.

[3] The degree of lateness:

3.1 The answering affidavit was delivered sixteen months after it was due and nine working days before the matter was first enrolled for hearing on 25 February 2015.

[1] 1962 (4) SA 531(A) at 532(C-D).

3.2 There is no doubt that the affidavit was delivered extremely late.

[4] The explanation for lateness:

4.1 The Minister tenders the following explanation for the lateness:

'13. The founding affidavit (read with the documentation attached as annexures) is lengthy and complex. It raised complex issues of law and fact. This required careful analysis, consideration and debate during a series of at least seven lengthy consultations which were held with our team.

14. This required the attendance and involvements of a substantial number of officials from our client, the Department of Higher Education and Training, and one of these consultations was held with the Minister and the Director-General.

15. During these consultations, counsel requested the officials to gather various further information and documentation which were not immediately available, for consideration by counsel once these were produced, and discussion at further consultations.

16. An initial draft of the answering affidavit was prepared by junior counsel but required considerable further input, both in terms of further factual instructions and documents from client, as well as input from senior counsel.

17. There were lengthy periods of delay experienced as a result of senior counsel becoming ill on a few occasions. During those periods, we were unable to maintain regular contact with counsel. It was considered appropriate by client that senior counsel should be retained in the matter in view of the fact that he was steeped in its complexities.

18. Regrettably, these delays interrupted momentum in the finalisation of the answering affidavit.'

[5] The Applicant had by 25 February 2015 repeatedly enquired from the Respondents whether they intended to oppose the application; had

given notice that the matter was enrolled for hearing on 25 February 2015; and had delivered heads of argument. The explanation does not deal with these matters and why no extension of time to file an affidavit has been directed to the Applicant.

[6] No detail is provided in respect of the consultations and process of gathering additional "information". The Respondents do not say when the consultations were held or who attended; nor do they explain to the court what steps were taken to gather information or on what dates. In the absence of that information, it is not possible to reach the conclusion that the explanation for the extensive delay is reasonable.

[7] The Respondents have failed to persuade the Court that there is an adequate explanation for the delay. Under normal circumstances, the inquiry would stop here.

[8] I have, however, considered the prospects of success:

8.1 The prospects of successfully opposing the application are considered below in detail when the merits of the application are addressed. The Respondents' prospects of success are not without merit.

[9] The importance of the case needs also to be considered:

9.1 The Respondents submit that the matter is an important one for all the parties and in the public interest.

9.2 The Applicant concedes that the matter is important.

[10] The setting aside of regulations of this nature affects a wide range of employers and probably all the SETAs.

[11] In my view, the importance of the matter outweighs the other factors (the excessive delay, inadequate explanation for the delay and the prospects or lack thereof of success in opposing the application). In this case, the public interest of the matter demands that the interests of justice should be served. It is in the interest of justice that a decision on

the subject matter of this application be made having full regard to the input of the relevant parties. I do not intend to lay down a rule that the interest of justice in all cases should play a role in granting or refusing condonation.

[12] I have therefore, during the application, condoned the late filing of the answering affidavit and the late filing of the condonation application.

[13] I have taken the dilatory conduct of the Respondents into account when considering a cost order. I have ordered the First Respondent to pay the costs of the condonation application. In order to assist the Registrar, argument and judgment on the condonation application lasted an hour. The costs include the cost of two counsel.

The parties

[14] The Applicant, Business Unity South Africa ("BUSA"), is a professional association representing businesses in South Africa. All the businesses that fall under the professional association of BUSA are directly affected by the 2012 Grant Regulations because each member is a levy-paying employer which is entitled to receive a mandatory grant.

[15] The First Respondent, the Minister of Higher Education and Training ("the Minister"), is responsible for the promulgation of regulations in terms of the SDA.

[16] The Second Respondent, the National Skills Authority ("the Authority"), does not oppose the application. It was not in a position to do so because it was not properly constituted. The Minister has, however, only during March 2015 appointed new members to the Authority as required in terms of the SDA.

[17] The Third Respondent, the National Skills Fund ("the Fund"), is a statutory body established in terms of section 27 of the SDA and administered by the Director General of the Department of Higher Education and Training ("the Department").

[18] The Minister and the Fund oppose the application on the strength of an affidavit by the Minister. The Minister and the Fund are referred to as the Respondents.

Jurisdiction

[19] The parties filed comprehensive and helpful heads of argument from which, in respect of the facts and submissions, I have borrowed extensively for purposes of this judgment.

[20] BUSA submits that the Labour Court has jurisdiction to determine the issues in dispute.

[21] The general jurisdiction of the Labour Court is set out in section 157 of the Labour Relations Act 66 of 1995 ("the LRA"):

21.1 In terms of section 157(1), 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;

21.2 In addition, 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, which arises from:

'Employment and from labour relations;

Disputes 'over the constitutionality of any executive or administrative act or conduct or any threatened executive or administrative act or conduct, by the State in its capacity as an employer'; and

The application of any law for the administration of which the Minister is responsible.'

21.3 The Labour Court and Labour Appeal Court have exercised jurisdiction in a range of challenges to laws impacting on labour relations based on their alleged inconsistency with the Constitution or the empowering legislation.

21.4 In addition, the Labour Court enjoys general review jurisdiction under section 158 (1) (g) of the LRA, which provides that it may '… 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'.

21.5 The Labour Court has held that the grounds "permissible in law" include the grounds of review set out in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), in addition to any grounds of review arising from any other applicable law.

[22] Accordingly, the Labour Court has general powers of review in relation to labour matters in respect of constitutionality and any grounds of review provided for in the LRA, PAJA or any other applicable law.

[23] Where another law provides that any matter is "to be determined by the Labour Court", the Labour Court's jurisdiction is exclusive.

[24] Section 31 of the SDA confers on the Labour Court the following specific jurisdiction:

'31 Jurisdiction of Labour Court

(1) Subject to the jurisdiction of the Labour Appeal Court and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters arising from this Act.

(2) The Labour Court may review any act or omission of any person in connection with this Act on any grounds permissible in law.

(3) If proceedings concerning any matter contemplated in subsection (1) are instituted in a court that does not have jurisdiction in respect of that matter, that court may at any stage during proceedings refer the matter to the Labour Court.'

[25] The 2012 Grant Regulations were issued in terms of section 36 of the SDA by the Minister. Accordingly, they constitute a matter "arising from [the SDA]" and a challenge to the legality of regulations made under the SDA falls within the exclusive jurisdiction of the Labour Court in terms of section 31(1) of the SDA.

[26] In any event, the Labour Court specifically has the power to review the 2012 Grant Regulations (alternatively, the Minister's decision to make the regulations) in terms of section 31(2) of the SDA.

[27] For these reasons, the Labour Court has jurisdiction to determine the issues.

The regulatory background

[28] Before the Respondents' points *in limine* are considered, it is necessary to sketch the regulatory background to the matter.

[29] The Skills Development Levies Act, 9 of 1999 established a compulsory levy scheme to which employers are required to contribute for the purpose of funding education and training as envisaged in the SDA. The amount payable is calculated as 1% of the total amount of remuneration paid to employees.

[30] In terms of the SETAs Grant Regulations Regarding Monies Received by a SETA and related Matters as published in Government Notice R713 of 18 July 2005 and as amended by Government Notice R.88 of 2 February 2007 ("the 2005 Grant Regulations"), an employer who paid skills development levies could claim 50% of those levies back in the form of a mandatory grant provided that it complied with the eligibility criteria.

[31] The 2005 Grant Regulations were repealed by regulation 10 of the 2012 Grant Regulations. It is the 2012 Grant Regulations that form the subject matter of this review application.

[32] Regulation 4(4) of the 2012 Grant Regulations reduced the mandatory grant that an employer could claim back from 50% to 20% of the total levies by the employer.

[33] It provides as follows:

> '20% of the total levies paid by the employer in terms of section 3(1) as read with section 6 of the Skills Development Levies Act during each financial year will be paid to the employer who submits a [Workplace Skills Plan] and [Annual Training Report].'

[34] In addition, the 2012 Grant Regulations introduced a "sweeping mechanism" that had not been contained in the 2005 Grant Regulations:

3.3 Regulation 3(11) provides that:

> '[a]t the end of the financial year, it is expected that a SETA must have spent or committed (through actual contractual obligations) at least 95% of discretionary funds available to it by 31 March of each year and a maximum of 5% of uncommitted funds may be carried over to the next financial year.'

3.4 Regulation 3(12) provides that:

> '[t]he remaining surplus of discretionary funds must be paid by the SETA by 1 October of each year into the National Skills Fund.'

[35] The effect of these two regulations is that if a SETA has not spent at least 95% of its discretionary funds, the surplus will be swept into the Fund on 1 October of each year. The Applicant referred to this provision as "the sweeping mechanism".

[36] The Applicant's objection is against the introduction of the reduced mandatory grant from 50% to 20% and the sweeping mechanism.

[37] The Applicant contends that the 2012 Grant Regulations should be reviewed and set aside on the basis of review grounds that fall into two categories:

37.1 The first category is concerned with the process that was followed before the 2012 Grant Regulations were made. It is submitted that the Minister failed to consult with the Authority as required in terms of section 36 of the SDA before he made the 2012 Grant Regulations. It is submitted that this irregularity vitiates the 2012 Grant Regulations in their entirety.

37.2 The second category is concerned with the substance of the 2012 Grant Regulations. It is submitted that Regulations 4(4) and 3(12) are reviewable in light of their content. Applicant submits that the reduction in the mandatory grants and the introduction of the sweeping mechanisms are irrational and unreasonable. Moreover, it is submitted that the sweeping mechanism is *ultra vires* the SDA.

First point *in limine*: non joinder

[38] The Respondents ask for the application to be dismissed or to be postponed for purposes of joining the three labour federations who have representation on the Authority. They are COSATU, FEDUSA and NACTU ("the labour federations").

[39] The Respondents argue that the labour federations and the SETAs are necessary parties to this application.

[40] The Respondent's maintain that the labour federations and the SETAs have a "direct and substantial interest".[2]

[41] The Respondent's argue that the direct and substantial interest of the labour federations flow from the fact that they adopted a specific view in respect of the two regulations which form the subject matter of this application and because they eventually persuaded the Minister to formulate the two

[2] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 651.

regulations the way they wanted them. The only opposition thereto was the Applicant and because this primarily is a dispute between the Applicant and the labour federations they have a sufficient interest to be joined to these proceedings.

[42] A "direct and substantial interest" has been defined as "a legal interest in the subject-matter of the litigation which may be affected prejudicially by the judgment of the Court".[3] The concept of a "direct and substantial interest" does not include "merely a financial interest" because such an interest is "indirect".[4] The question as to a direct and substantial interest turns on an "analysis of the rights and obligations created by (a) multi-party agreement".[5]

[43] The Supreme Court of Appeal recently in the *City of Johannesburg and Others v The South African Local Authorities Pension Fund and Others*[6] endorsed the approach in *Amalgamated Engineering*:

> '[9] As to the relevant principles of law, it has by now become well-established that, in the exercise of its inherent power, a court will refrain from deciding a dispute unless and until all persons who have a direct and substantial interest in both the subject matter and the outcome of the litigation, have been joined as parties (see eg *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657 and 659; *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) para 9). A 'direct and substantial interest' is more than a financial interest in the outcome of the litigation. A test often employed to determine whether a particular interest of a third party is the one or the other, is to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be res judicata against that party, entitling him or her to approach the court again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first place (see eg

[3] Erasmus: Superior Court Practice at B1-94.
[4] *Henry Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 169H and Illovo Opportunities Partnership #61 v Illovo Junction Properties (Pty) Limited and Another (2014) ZASCA 119 SCA
[5] *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) at para 14.
[6] Case No: 20045/2014 [2015] ZASCA 4 (9 March 2015) (Not yet reported) at para 9.

> *Amalgamated Engineering Union* at 661; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others* 2005 (4) SA 212 (SCA) paras 64-66).' (Own emphasis added).

[44] A key factor to determine whether a party has a direct and substantial interest is whether any relief is claimed against it.[7] The Supreme Court of Appeal held in *Gordon v Department of Health, KwaZulu-Natal*[8] that 'there was no potential prejudice to the successful appointees as no relief was directed against them.'[9]

[45] The SCA took the same approach in *Blue Moonlight* that:

> '… no relief is claimed against the provincial government, it cannot be said to have a real and substantial interest in any order that may be made and any order that is made can be carried out without any prejudice to the provincial government. Consequently, its joinder was not necessary.'[10]

[46] In the present matter, no relief is sought against any of these parties as the relief sought concerns the review of the funding regulations, which are made and administered by the Minister.

[47] Any indirect effect that the order sought may ultimately have on any of these parties does not constitute a direct and substantial interest warranting their joinder according to common law principles.

[48] In respect of the labour federations, they are represented on the Authority. They are not the only parties and interest groups represented on the Authority.

[49] It is, therefore, the Authority that must be consulted, not the labour federations or for that matter, the Applicant in this matter. The labour federations have a right to participate in the proceedings of the Authority. Their right to participate in the proceedings of the Authority will not be

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[7] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 (4) SA 337(SCA) at paras 43 and 44.
[8] 2008 (6) SA 522 (SCA).
[9] Ibid at para 11.
[10] *Blue Moonlight Properties* (*supra*) at para 68.

affected by the outcome of these proceedings. These proceedings affect the rights of the Busa members and those of the Minister, not those of the labour federations.

[50] The labour federations do not have sufficient interest in these proceedings to be joined.

[51] The Respondent's argue that the SETAs have a direct and substantial interest in the matter in order to be joined. That is so, it is submitted, because the allocation of mandatory grants and discretionary grants may be affected by the outcome of this application. That in turn would affect the projects that they finance.

[52] At best for the SETAs, they have a financial interest in the outcome of these proceedings. That is not sufficient to constitute a direct and substantial interest.

[53] The SETAs do not have any interest in these proceedings sufficient to be joined.

Unreasonable Delay

[54] The second preliminary point raised by the Respondents is that despite instituting the proceedings within the 180 day period provided for in PAJA, the Applicant delayed unreasonably in making the application.

[55] The Respondents argued that the need to achieve finality within a reasonable time is crucial in reviews.

[56] This the submission goes was stressed in *Gqwetha v Transkei Development Corporation Limited and Others*[11] in these terms:

> '[22] It is important for the efficient functioning of public bodies…. that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The *rationale* for that longstanding rule… is twofold. First, the failure to bring a review

[11] 2006 (2) SA 603 (SCA) at paras 22 to 23.

within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA (A) at 41E-F (my translation):

> "It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed - *interest rei publicae ut sit finis litium...* Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule."

[23] Underlying this latter aspect of the *rationale* is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of the decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight…'

[57] This *dictum* was quoted with approval by the Supreme Court of Appeal in its judgment in the *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others*[12] (*OUTA* case). That judgment held that:

> 'While it is true that the principle of legality is constitutionally entrenched, the constitutional enjoinder to fair administrative action, as it has been

[12] [2013] 4 ALL SA 639 (SCA).

expressed through PAJA, expressly recognizes that even unlawful administrative action may be rendered unassailable by delay.'[13]

[58] In this matter, the review falls under PAJA that provides in section 7(1), in its relevant part:

> '(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date:
>
> *(a)* ….
>
> *(b)* …. on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'

[59] This does not mean that a delay of 180 days is necessarily acceptable. The proper approach has been explained by the SCA in *OUTA*[14] as follows:

> 'At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned (see eg *Associated Institutions Pension Fund and Others v van Zyl and Others* 2005 (2) SA 302 (SCA) para 47). Up to a point, I think, s 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as *per se*_unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7 (1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is predetermined by the legislature. It is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay (see eg *Associated Institutions Pension Fund* para 46). That of course does not mean that, after

[13] Ibid at para 36.
[14] *OUTA* (*supra*) at para 26.

> the 180 day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not (see eg *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) para 54).'

[60] The Respondents on the strength of the *OUTA* case argue that the period of 180 days in PAJA means that any review application after 180 days *per se* shows undue delay. The reverse, however, is not the case as an applicant must launch the proceedings without any undue delay once it has knowledge of the facts.

[61] The submission is that Applicant on its own version knew on or about 3 December 2012 that the disputed 2012 grant regulations had been gazetted to come into effect on 1 April 2013.

[62] Respondents argue that despite having immediately raised its objection in the media and in correspondence, Applicant did not bring a review application at that time or, according to the Respondents, within a reasonable period of time. The Respondents argued that Applicant should have seeked an interim interdict to suspend implementation pending a review but instead waited until 30 May 2013 before instituting these proceedings.

[63] Respondents further submit that the initial delay is exacerbated by the fact that more than two years have passed since. They further argue that the Applicant cannot hide behind delays on the part of the Respondents as the Applicant is *dominus litis*.

[64] The Respondents submit that in relation to what is a reasonable period, the facts of crucial relevance is potential prejudice:

64.1 It is argued that serious prejudicial consequences would result if the regulations were to be set aside.

64.2 This is relevant as to the issue of unreasonable delay but also whether it would be just and equitable to set aside the regulations.

64.3 Examples of the disruption and prejudice which would result include: problems relating to the lengthy process of planning undertaken by SETAs; the adoption and approval of SETAs' strategic plans required for a five year period; substantial reduction of 60% in funds available for discretionary grants such as PIVOTAL projects; reduction in funds available for learnerships, scholarships and bursaries; and contractual commitments already made for hundreds of thousands of beneficiaries, which cannot be undone.

64.4 The policy objectives in the NSDS III strategy - which is not the subject of the review - cannot be achieved if the 2012 Grant Regulations are swept away. These objectives include a vast increase in the number of individuals assisted to study at universities, FET colleges and other programs.

64.5 This would be undermined if the relief sought were to be granted - with serious consequences for the overall objective of achieving far greater educational and training opportunities, aimed at overcoming the serious deficiencies which are having a crippling effect on the economy and are causing serious levels of unemployment and social problems.

[65] The Applicant points out that the Respondents' argument is "an astonishing allegation taking into account the 16 month delay in delivering the Minister's answering affidavit as well as the cumulative delays by the Minister in filing the full record of decision". The Minister filed the final portions of the record on 30 August 2013, two months after it was required to be filed in terms of the Rules of this Court.

[66] The Applicant has explained the steps it took before launching an application.

[67] It first had to obtain a mandate from its members which it obtained without delay during February 2013.

[68] A meeting was held with the Minister on 7 March 2013 to share with the Minister its concerns regarding the grant regulations. During this meeting, it was agreed to have a follow-up meeting which was held on 6 May 2013.

[69] The Minister could not attend the meeting of 6 May 2013 and the Applicant decided to launch the application as the regulations took effect from 1 April 2013. When those attempts failed the application was launched.

[70] BUSA launched the application on 30 May 2013. The first payments in terms of the grant regulations were only due on 30 September 2013.

[71] Thereafter BUSA has done what was necessary to bring the application to Court as expeditiously as possible.

[72] Applicant submits that the decision in the *OUTA* case is distinguishable:

72.1 Firstly, the extent of the delay in the *OUTA* matter. The application was brought outside the period of 180 days, four years after the impugned decision had been taken.

72.2 Secondly, the application in *OUTA*, if successful, would have absolutely prevented the proposed road tolling, and the Court found, that it therefore have resulted in "severe prejudice" to the state and the public.

72.3 By contract, the present matter does not seek to abolish regulations governing SETA funding entirely. If successful, the proceedings will not result in a lacuna. The review of the regulations will further not result in severe prejudice.

[73] The Applicant acted with due diligence and for the above reasons there was no unreasonable delay in launching the proceedings.

[74] The Respondents' point *in limine* is dismissed.

Grounds of Review

[75] The first ground of review relied on by the Applicant is that section 36 of the SDA provides that the Minister may make regulations "after consultation with the National Skills Authority". This should be read with section 5(1) (a) (v) of the SDA which provides that one of the functions of the Authority is to "advise the Minister on… any regulations to be made."

[76] Applicant argues that accordingly, consultation with the Authority is a peremptory requirement for the making of regulations by the Minister. It is a specially–crafted consultation requirement with a specific body which obliges the Minister to draw on the expertise and institutional composition of the Authority and to take advice from that body.

[77] The Applicant submits that the Minister's engagement with the Authority before the Minister made the 2012 grant regulations, was wholly inadequate and did not amount to consultation within the meaning of section 36.

[78] The Respondents on the other hand submit that there was substantial compliance with the requirement to consult the Authority. They do not deny that it was a requirement before the regulations were issued.

[79] What in fact happened was that on 12 January 2012, the Minister published a set of draft regulations. This initial set of draft regulations differed in material respects from the 2012 grant regulations as finally promulgated, in particular the draft regulations did not contain the sweeping mechanism ultimately contained in regulations 3(12) and provided for a reduction in mandatory grants from 50% of the total levies paid by an employer to 40% and not to 20% as contained in the published regulations.

[80] These draft regulations served before the Authority on 6 February 2012.

[81] In March 2012, the Minister appointed a Ministerial Task Team which prepared and circulated, but not to the Authority, a report recommending certain changes to the 2005 grant regulations. Among the proposed changes

was the Ministerial Task Team's proposal that the mandatory grant be reduced from 50% to 20%.

[82] The Department of Higher Education, on 18 April 2012, made a presentation to the National Economic, Development and Labour Council ("NEDLAC") on the draft regulations. The proposal at this stage remained that the mandatory grant should be reduced to 40% and not 20%. Instead of the sweeping mechanism which would transfer unclaimed funds into the Fund, the presentation proposed that unclaimed mandatory grants be transferred into the Pivotal Grant.

[83] NEDLAC discussed the draft regulations on 18 April 2012.

[84] The draft regulations were discussed by a sub-committee of the Authority on 15 May 2012. These were the draft regulations without the proposed reduction to 20% and without the introduction of the sweeping mechanism.

[85] Although the Authority held other meetings during 2012, the proposals of the Ministerial Task Team were never raised for discussion and the report of the Ministerial Task Team had never been provided to the Authority and the Minister did not consult the Authority on these proposals.

[86] An official of the First Respondent, on 6 November 2012, submitted a proposal to the Minister pursuant to which the Minister signed the 2012 grant regulations on 15 November 2012. This was unbeknown to the Applicant and the Authority.

[87] The Department of Higher Education and Training held a meeting on 28 November 2012 (after the Minister had signed the regulations) with some of the social partners, including the Applicant.

[88] At this meeting, the director general for the first time referred to the proposal that the mandatory grant be reduced to 20% and that the sweeping mechanism be introduced. At the meeting, the Department continued to refer to the regulations as a proposal (although it had been signed) that was open for discussion and invited comments by 14 December 2012.

[89] The officials of the Department did not disclose that the 2012 grant regulations had already been signed and were due to be promulgated on 3 December 2012. A date before the date on which comments had been invited.

[90] According to the Minister, because of a communication problem, the Department officials, on 28 November 2013, were unaware that the Minister had already signed the final regulations.

[91] The Authority met on 29 and 30 November 2012 where a "revised" set of "draft" regulations was presented. These included regulations 4(4) and 3(12) which were placed before the Authority for the first time. This, in fact was the final set of 2012 grant regulations which the Minister had already signed on 15 November 2012.

[92] The Minister promulgated the grant regulations on 3 December 2012.

[93] The Applicant submits that the consultation requirements of section 36 read with section 5(1) (a) (v) of the SDA were clearly not satisfied in the present circumstances. There was no consultation with the Authority at all regarding the reduction in the mandatory grant from 50% to 20% or the introduction of the sweeping mechanism.

[94] It is common cause that the Authority in fact was informed for the first time of these two proposals on 28 and 29 November 2012, some two weeks after the Minister had already signed the 2012 grant regulations.

[95] It cannot be disputed that the reduction of the mandatory grant to 20% and the introduction of the sweeping mechanism constituted material changes to the draft regulations published on 12 January 2012 and considered by the Authority.

[96] The Minister did not afford the Authority any opportunity to comment on the two material aspects of the regulations and no information regarding these two aspects was placed before the Authority until two weeks after the Minister had already signed the regulations in final form.

[97] I agree with the submission that the purported consultation with the Authority on 20 and 28 November 2012 did not constituted adequate or general consultation as the Minister had already signed the 2012 grant regulations on 15 November 2012 without disclosing that to the Authority. In addition, it afforded the Authority an opportunity to comment on those regulations but then promulgated the regulations before the date for submission of comments. The mere fact that the Applicant was given an opportunity to make representations to 14 December 2012 is an indication that the Minister realised that the Authority had not been consulted on material changes to some of the regulations.

[98] The Respondents submit that there was substantial compliance with the requirement to consult the Authority for the following reasons:

98.1 According to the Respondents, of particular relevance is the fact that in parallel to the Authority, there was a process conducted within NEDLAC where the relevant disputing parties - organised business and the labour constituency - were represented, according to the Respondents, often by the same people as those sitting in the Authority. They dealt with the same issue of the proposed regulations and changes to the grant system.

98.2 It became apparent to the Minister that the business and labour constituencies held, and articulated, divergent attitudes. These could not be reconciled in Nedlac. It was, therefore, clear to the Minister that it was not feasible to achieve a consensus position within the Authority.

98.3 It would accordingly serve no purpose for a formal consultation process to be pursued with the Authority where its house was irretrievably divided between the dominant schools of thought, being the business and labour constituencies.

98.4 In the circumstances, the realistic process to be followed was one in which the Department received direct input separately from the disputing parties - business and labour. This occurred in various forms:

including the discussions in NEDLAC, through receiving written submissions and the meetings held separately by the Department and ultimately the Minister with BUSA's representatives.

98.5 The clear objective of the requirement to consult the Authority was to gather and consider the views of the members or delegates who make up the Authority, as representatives of their respective constituencies. This was done outside the Authority.

98.6 Where there was no single, unifying common view held by the members of the Authority, it was not feasible or necessary to engage in further meetings with the Authority as a body. It was sensible for the Department and the Minister to engage with each of the constituencies' representatives in NEDLAC, separate meetings and correspondence.

98.7 This allowed the constituent members of the Authority and NEDLAC - particularly BUSA and organised labour - to debate and provide their respective inputs to the Department and the Minister, for their consideration before the decision was taken to issue the Regulations.

98.8 This process, accordingly, achieved the legislature's objective of the requirement that the Minister should consult the Authority.[15] The differing views of all the members of the Authority were submitted and considered.

[99] The Respondents argue that, therefore, there was substantial compliance with the requirements of the SDA in respect of consultation.

Consideration of the requirement to consult

[100] The argument that there was substantial compliance is unconvincing.

[101] The requirement is a statutory one and the function of the Authority is to advise the Minister. It is insufficient to consult NEDLAC, the individual

[15] Compare *Weenen Transitional Local Council v van Dyk* [2002] 2 All SA 482 (A), 2002 (4) SA 653 (SCA) para

representatives on the Authority or any other body to advise the Minister in the place of the Authority.

[102] The Authority is a separate legal *persona* and a distinct statutory body from NEDLAC. The legislature mandated consultation with the Authority and no other body or constituencies in its stead.

[103] The constituent membership of the Authority is also much broader than that of NEDLAC. NEDLAC comprises of three main constituencies namely business, labour and government.

[104] The Authority is widely constituted and includes subject matter experts. Apart from organised labour and business, the Authority includes representatives appointed to represent community and development interests, the interests of the State and those of education and skills development providers. Its composition is far broader than just labour, business and government.

[105] In addition, only three of the individuals on the Authority, out of thirty representatives, were part of the consultation process in NEDLAC.

[106] The Respondents' submission that the Authority could never have formulated a unified view because it could not reach consensus is unsubstantiated as the Minister did not approach the Authority for advice and cannot speculate on what the outcome would have been.

[107] It was possible for the Authority to obtain the required support for a view in the absence of the Applicant representatives. The Authority must formulate its advice to the Minister on regulations with a ⅔ vote of the members of the Authority.

[108] Excluding the five votes of the Applicant, a sufficient number of votes remains to achieve a ⅔ vote in favour of a unified point of view.

[109] The Minister, in any event, must have regard to the position of the Authority even if it were to provide the Minister with an outcome that it was unable to formulate a uniform point of view.

[110] The Respondents' submission that consultation in the other for *fora* constitute substantial compliance is without foundation.

[111] The Minister has failed to consult the Authority on the proposed regulations and particularly on the two regulations regulating the mandatory grant and the sweeping mechanism and this renders the regulations reviewable.

Unreasonableness and irrationality

[112] The second ground of review involves the alleged unreasonableness and the irrationality of regulation 4(4) dealing with the reduction in the mandatory grants to 20% and regulation 3(12) containing the sweeping mechanism.

[113] It is submitted that the reduction of the mandatory grant to 20% is unreasonable and irrational for two main reasons.

112.1 The first reason is that regulation 4(4) is not rationally related to the primary objects of the SDA but would in fact serve to frustrate those objects. It is submitted that the reduction will reduce – rather than increase – the funds available to employers to invest in education and training and will discourage –rather than encourage – employers to pursue the training and education objectives listed in section 2(c)(i)(iii) of the SDA.

112.2 According to the Applicant, the disincentive effect has already been demonstrated on the facts with SETAs reporting reductions in the number of employers submitting applications for mandatory grants.

112.3 The Respondents counter the argument and submit that the reduction of funds available to employers for training will be mitigated by the availability of more money available for discretionary grants.

112.4 The Applicants submit that, in practice, the discretionary grants are erratic and in many cases employers can only apply for them after training has been done. This is aligned with the Respondents' significant policy change in terms of which priority has been given to

academic qualifications rather than workplace skills, learning and development. Therefore, there is no basis to argue that employers are likely to have greater access to funding through discretionary funds.

112.5 It is further submitted by the Applicant that as the reduction took effect immediately without any transitional period the existing training and education programs developed by employers based on the 50% mandatory grant would have to radically reduce and possible be abandoned.

[114] The second reason advanced by the Applicant is that the Minister has offered no adequate justification for the reduction in the mandatory grant to 20%.

[115] In the absence of reasons, section 5(3) of PAJA provides that it "must be presumed in any proceedings for judicial review that the administrative action was taken without good cause".

[116] The Respondents' submission that a number of reasons have been offered is countered by the Applicant pointing out that those reasons are set out in the answering affidavit and have not been formulated and set out in the stated reasons for the reduction so that the Applicant could deal with them. The only formulated and stated reason was indeed to improve the quality of information provided by employers.

[117] Applicant made the following submissions:

116.1 This reason, to improve the quality of information provided by employers, could not explain or justify a reduction in the mandatory grant to 20%. On the contrary, the reduction is likely to lead to even fewer employers submitting the quality information (by reason of lesser funding) and the decision taken by the Minister is likely to frustrate rather than to serve the apparent reasons that might be discerned from the report of the Ministerial Task Team which the regulations were to address.

116.2 As it was even with a mandatory grant of 50% payable to employers who have submitted the required information, many employers did not even claim the mandatory grant.

116.3 By substantially reducing the amount of the mandatory grant whilst still requiring that essentially the same information to be submitted, it could not rationally be expected to result in an improved quality of information received from employers. Accordingly, the means adopted by the regulation bear no rational relation to the end sought to be achieved.

116.4 Thus regulation 4(4) falls to be reviewed and set aside as it is not rationally connected to the purpose for which it was taken or the information before the Minister as contemplated by section 6(2)(f)(bd) and (cc) of PAJA.

116.5 Secondly, it is submitted that it is so unreasonable that no reasonable person could have so exercised the power or performed the function as contemplated by section 6(2) (h) of PAJA.

Discussion of the unreasonableness and the irrationality

[118] It is difficult to understand how the training and education objectives listed in section 2(c)(i)(iii) of the SDA can be better achieved with the reduction in the mandatory grant to employers. By reducing the mandatory grant to 20% with immediate effect could only discourage employers from pursuing existing training and education programmes especially accompanied by increased reporting requirements on training and education plans in the workplace.

[119] The reduction of the mandatory grant has been irrational in relation to the stated purpose for the reduction.

The rationality of the sweeping mechanism

[120] The further submission is that regulation 3(12) is irrational and unreasonable in providing for the sweeping mechanism:

119.1 Regulation 3(11) provides that at the end of each financial year a SETA must have spent at least 95% of its discretionary funds. The effect of regulation 3(12) is that the "surplus of discretionary funds" must annually be paid to the National Skills Fund.

119.2 The Applicant argues that regulation 3 imposes significantly more complex and onerous compliance on SETAs relating to the allocation of funds in respect of discretionary grants and the requirement to spend or commit at least 95% of their discretionary funds by 31 March of each year.

119.3 It is irrational to adopt such a scheme in circumstances where the Ministerial Task Team has already found that SETAs were unable to deal adequately with the funds in the prior regime. The logical conclusion in light of the Ministerial Task Team's finding regarding the lack of capacity of SETAs is that the scheme is likely to result in substantial discretionary grant funds remaining unspent at the end of the financial year which will then be swept into the Fund.

119.4 The Fund, at the time, had net assets of more than R7 billion and was already unable to spend the money that had accumulated. It is, therefore, irrational to require that further funds be swept into it.

[121] It is, therefore, submitted that the promulgation of regulation 3(12) was not rationally connected to the purpose for which it was taken or to the information before the Minister and that it is so unreasonable that no reasonable person could have so exercised the power or performed the function.

Consideration of the rationality of the sweeping mechanism

[122] The promulgation of regulation 3(12), for the valid reasons advanced by the Applicant in paragraph 119 above, was not rationally connected to the purpose for which it was taken or to the information before the Minister and it

is so unreasonable that no reasonable person could have so exercised the power or performed the function.

The sweeping mechanism is *ultra vires*

[123] The last ground of review is that the sweeping mechanism is *ultra vires* the SDA. The submissions are:

122.1 The SDA itself is prescriptive with regard to funding and section 14(3) provides that the monies received by a SETA may be used only in a prescribed manner and in accordance with any prescribed standards to "(a) fund the performance of its function; and (b) pay for its administration within the prescribed limits".

122.2 Regulation 3(12) now over and above requires the SETAs to pay surplus money to the Fund. This is not a purpose authorised by section 14(3) of the SDA. This makes regulation 3(12) *ultra vires* the SDA as the Minister has no competence in law to require the SETAs to use money for an unauthorised purpose.

122.3 There is a second reason why regulation 3(12) is *ultra vires*. Considering the regulation from a perspective of the Fund shows that section 27(2) of the SDA provides that the Fund must be credited with "(a) 20% of the skills development levies, interest and penalties collected in respect of every SETA; (c) money appropriated by parliament for the Fund; (f) money received from any other source".

122.4 Parliament has therefore stipulated that the Fund must be credited with 20% of the Skills Development Levies while the remaining 80% goes to the SETA.

122.5 The Minister has now by regulation introduced a sweeping mechanism in terms whereof the Fund may receive more than 20% of the Skills Development Levies allocated to it by section 27(2)(a). The Minister has no competence in law to second guess Parliament in this manner. Money received from "any other source" cannot be money received

from the SETA's as they receive their allocation from the SDA and no provision is made in the SDA or other legislation to transfer part thereof to the Fund.

122.6 Parliament has the power to appropriate more funds for the Fund and it is not competent for the Minister as a delegated law maker to do so by regulation.

Consideration of the ultra vires arguments

[124] Applicant's arguments in paragraph 122 are valid. The sweeping mechanism is *ultra vires*.

Relief

[125] The Applicant asks for all the regulations to be set aside, alternatively, that the two regulations that gave rise to this application be set aside. The parties argued against relief that would leave a *lacuna* or create uncertainty.

[126] The Minister initially consulted the Authority on the regulations. The Minister, however, failed to consult the Authority on the amended proposals in respect of the mandatory grant and the sweeping mechanism. Those two regulations stand to be attacked.

[127] Of the various arguments advanced, relief that would grant the Minister time to correct the impugned regulations seems the most reasonable.

[128] The court may suspend an order of invalidity for a period of time to enable parties to take the necessary steps to be in a position to implement the Court's order

Costs

[129] In my view, the dilatory conduct of the Respondents in opposing the application warrant a cost order. Although the Respondents succeeded with the condonation application, it is just and equitable that they pay the costs of the condonation applications.

[130] There is no reason why costs should not follow the outcome of the review application.

[131] I make the following order:

130.1 The late filing of the Respondents' condonation application is condoned.

130.2 The late filing of the Respondents' answering affidavit is condoned.

130.3 Regulations 3(12) and 4(4) of the Sector Education and Training Authorities (SETAs) Grant Regulations Regarding Monies Received by a SETA and Related Matters promulgated in terms of section 36 of the Skills Development Act 97 of 1998 in Government Notice R.990 of 3 December 2012 are declared invalid and set aside.

130.4 The order in sub-paragraph 3 is suspended until 31 March 2016.

130.5 The Respondents are ordered to pay the costs of the Application including the Applicant's costs in opposing the Respondents' condonation applications and the costs to include the cost of two counsel.

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Coetzee AJ

Acting judge of the Labour Court

Appearances:

For the applicant:	Advocate Alistair Franklin SC and Jason Brickhill
Instructed by:	Bowman Gilfillan
For the Respondents:	Advocate Paul Kennedy SC and Ndumiso Mahlangu
Instructed by:	State Attorney