IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

J534/08

In the matter between

CI GARDNER	**First applicant**
SM THULARE	**Second applicant**
MS MANDEW	**Third applicant**
RFS STONE	**Fourth applicant**

and

CENTRAL UNIVERSITY OF TECHNOLOGY
FREE STATE **Respondent**

HEARD ON 27 NOVEMBER 2009

JUDGEMENT BY FULTON AJ

DELIVERED ON

Introduction

[1] This is an application in which the applicants seek to review and set aside the decision of the respondent on 15 June 2007 in relation to severance pay. The review is brought in terms of sections 6 and 7 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The applicants seek payment to them of amounts totalling some R6 million in terms of the respondent's retrenchment policy of 1 November 2004, plus interest at the rate of 15,5% *a tempore morae,* from the date of service of their review application (28 March 2008) to date of payment, as well as the costs of the application.

Amendment to Notice of Motion

[2] At the commencement of the hearing the applicants sought an amendment to the first prayer of their notice of motion. The applicants originally sought to review and set aside the decision of the respondent on 5 June 2007 in relation to the respondent's retrenchment policy. The applicants sought to amend the date in their first prayer to 15 June 2007 and this amendment was granted.

Condonation

[3] On 28 October 2008 the applicants applied for condonation for the late filing of their review application and requested that the application for condonation be heard together with this review application. The respondent did not oppose the application for condonation.

[4] Section 7(1) of PAJA requires any proceedings for judicial review in terms of section 6(1) of PAJA to be instituted not later than 180 days after any proceedings instituted in terms of internal remedies contemplated in section 7(2) of PAJA have been concluded; or where no such remedies exist, not later than 180 days after the date on which the person concerned was informed of the impugned administrative action. In terms of section 9 of PAJA, however, the period may be extended by agreement or on application by the applicants concerned and an extension may be granted where the interests of justice so require.

[5] In terms of these provisions the applicants' review application should have been launched by 5 December 2007 but was in fact only launched on 28 March 2008. The application was therefore some 4 months late. The reasons advanced for the delay are firstly, that the certificates of outcome issued by the CCMA for the Free State Province were only issued on 29 December 2007 and 10 January 2008; secondly, the applicants had difficulty obtaining relevant documents from the respondent and were reluctant to institute proceedings until they had obtained advice on their case after all the relevant documents were before their representatives and, lastly, there were logistical difficulties in settling the pleadings as most of the applicants are based in Johannesburg, their attorney and junior counsel are based in Bloemfontein, and their senior counsel is based in Cape Town. As regards prospects of success the applicants referred me to their review application. The applicant also contended that the matter was an important one as it deals with the lawfulness or otherwise of the actions of an organ of state.

[6] In deciding to exercise my discretion to grant the applicants condonation for the late filing of their review application I took into account the degree of lateness and the explanation therefore, as well as the importance of the case to the parties. The applicants provided a reasonable explanation for their delay which whilst not slight was also not substantial. In the circumstances condonation was granted.

The Applicants' Claim

[7] The applicants were all employed by the respondent in executive positions and, together with the respondent's registrar, were members of the Vice-Chancellor's Executive Team (referred to in the papers as VCET). All of the applicants served on a committee known as "Mancom" which is an abbreviation for the management committee of the respondent. The first, second and third applicants were retrenched on 30 November 2007. The pleadings do not contain the date on which the fourth applicant was retrenched but he was given formal notification of his retrenchment on or about 27 November 2007. All of the applicants were paid a severance package of two weeks' remuneration for every year of continuous service at the respondent.

[8] The applicants contend that they are contractually entitled to substantially higher severance packages in terms of the respondent's retrenchment policy of 1 November 2004. The applicants further contend that the council of the respondent on 15 June 2007 resolved not to pay them severance packages in terms of the retrenchment policy of 1 November 2004 and it is this decision that they seek to review and set aside.

The Higher Education Act 101 of 1997

[9] In terms of section 32 of the Higher Education Act 101 of 1997, the council of a public higher education institution has the power to make an institutional statute to give effect to any matter not expressly prescribed in the Act; and also institutional rules to give effect to the institutional statute. In terms of section 27 of the Act the council of the public higher education institution must govern the public higher education institution subject to the Act and the institutional statute. Section 34(3) of the Act states that the council of a public higher education institution must determine conditions of employment, disciplinary provisions and functions of employees of the public higher education institution, subject to applicable labour law. Section 68 of the Act permits the council on such conditions as it may determine to delegate any of its powers under the Act, subject to certain exceptions which are not relevant to this matter.

The Facts

[10] The applicants commenced by referring me to a collective agreement of 1996 entered into by the respondent and a trade union, NUTESA. The collective agreement provides that upon retrenchment certain employees will receive generous severance packages on a sliding scale dependent on years of service. It is common cause that the collective agreement did not apply to the applicants.

[11] The applicants then referred me to a set of rules of the respondent and contended that the terms of the collective agreement "*were elevated to the Statutes of the Technikon*". Contrary to the applicants' assertion the document in fact contains rules (as opposed to statutes) drafted by the council of the respondent. The exact date on which these rules came into being is uncertain, but section 64 thereof, which deals with severance packages, was added on 16 September 1996. The respondent for convenience referred to these rules as "the 1996 rules" and I shall do the same. The retrenchment policy contained in the 1996 rules did not apply to the applicants. As is evident from section 64 of the rules, the same categories of employees are mentioned in the 1996 rules as in the 1996 collective agreement.

[12] In 1999 the respondent made an institutional statute in terms of section 32 of the Higher Education Act. Chapter 12, section 86 of this institutional statute repealed all previous institutional statutes of the respondent. The 1999 institutional statute does not contain any retrenchment policy and, in fact, contains only three employment related provisions. Only one of these is relevant for present purposes and that is the provision found in Chapter 9, section 76. This provision states as follows, *"The conditions of service of terms or employment (sic) of CUT employees* (CUT being the name of the respondent at the time) *relating to hours of work, leave privilege, holidays, benefits, allowances, grievances, achievement, performance appraisal, termination of service, promotion, working conditions and others are as determined by the council, subject to the applicable labour law."* It is important to note that conditions of service relating to benefits and termination of service are "*as determined by council".*

[13] Conditions of service were subsequently adopted by the respondent in terms of institutional rules implemented with effect from 19 September 2001. These rules repealed the 1996 rules referred to above. Save to state that the Vice-Chancellor may terminate an employee's services as a result of the operational requirements of CUT, the 2001 institutional rules are silent on retrenchment and severance packages.

[14] Consequently, as at 19 September 2001, it is clear, firstly, that any matter relating to conditions of service [and more particularly, benefits and termination of service] had to be determined by the respondent's council though these could be delegated in terms of section 68 of the Higher Education Act and, secondly, the retrenchment policy that was applicable to the non-executive employees of the respondent was repealed.

[15] On 1 November 2004 the respondent apparently adopted a retrenchment policy. I shall elaborate below on the circumstances in which this policy (to which I shall refer as the 2004 retrenchment policy) seems to have been adopted. The 2004 retrenchment policy contains generous severance package provisions. For example, an employee who has more than 10 years' service and who is retrenched where a position becomes redundant will receive three years' gross remuneration as a severance package. Unlike the 1996 collective agreement the applicability of the policy is not limited to certain categories of employees. The front page of the policy contains this table:

Policy B/11.5 Retrenchment of employees at the Central University of Technology, Free State	
Contact Officer	Senior Director: HR-Systems and Employee Relations
Approval Date	2004-11-01
Approval Authority	Executive Director: Human Resources/Principal and Vice-Chancellor
Date of Next Review	2005-11-01

[16] At the time that the policy was implemented the first applicant occupied the position of Executive Director: Human Resources. The last two pages of the policy contain a further table:

Modification History

Date Published	**IRC Section**	**Source of Approval**	**Sections Amended & Details of Amendment**
2005-02-09	Section B, item 11.5	(1) VCET- 2004-11-01 (resolution VCET 2/04/20); (2) Executive Director: Human Resources; (3) Principal and Vice-Chancellor	Newly formulated IRC document

[17] As one of the issues to be determined in this matter is whether or not the 2004 retrenchment policy was lawfully approved by the respondent I turn now to the respondent's delegations register. The delegations register sets out which functions of the respondent's council may be delegated, to whom they may be delegated and, in certain instances, the limitation on such delegation. The delegations register has four

different sections: Human Resources, Finance and Operations, Students and Academic Affairs and General. It also contains interpretation rules. Clause 5 of the interpretation rules states:

"All delegated responsibilities and authority must be executed strictly in accordance with institutional policy, procedure and institutional planning documents. If such documents are not in place, it will be the responsibility of the delegate to first obtain authority for such policy, procedure or plan from the body/person delegating the responsibility/ authority."

There are several delegations that are relevant to the matter at hand:

- Delegation 15 delegates "*changes to conditions of employment as approved by council and the employment rules of council*" from council to the vice-chancellor.
- Delegation 30 delegates *"redundancy and retrenchment"* from council to the vice-chancellor.
- Delegation 36 delegates *"employment benefits and privileges"* from council to the vice-chancellor.
- Delegation 50 delegates "*approval of institutional HR management plans and strategies"* from council to the vice-chancellor.
- Delegation 93 delegates "*the authorisation of expenditure of a non capital nature up to R1 million and not provided for in the budget"*, from council to the vice-chancellor.
- Delegation 135 delegates the "*concluding of contracts*" from council to the vice-chancellor.

[18] The Vice-Chancellor of the respondent, Prof Thandwa Mthembu, was appointed the Vice-Chancellor at the beginning of 2007. On 8 March 2007 Prof Mthembu approached the respondent's council and informed it that he was to follow a restructuring exercise as far as the internal workings of the respondent were concerned. Prof Mthembu devised a plan which had at its core the restructuring of the executive management team or the team that reported to him at that stage, i.e. the applicants.

[19] On 14 March 2007 Prof Mthembu issued a communiqué. From the actual document it is not clear to whom the communiqué was addressed but I assume that this communiqué went to the applicants. In the communiqué Prof Mthembu stated that he was to submit to the council of the respondent a document identifying three stages of restructuring starting with top management.

[20] On 19 March 2007 all of the applicants were written a letter by Prof Mthembu notifying them of his plans to restructure top management and informing them that once a

restructuring proposal had been produced he would engage with the employees affected by this process. After receiving this letter the first applicant had a discussion with Prof Mthembu and informed him of the effect of the 2004 retrenchment policy. Prof Mthembu indicated to the first applicant that he needed a copy of the policy and the first applicant said that he would provide him with a copy. It is common cause that prior to this discussion Prof Mthembu did not have a copy of the 2004 retrenchment policy and had acted without knowledge of its terms.

[21] Under cover of a letter dated 13 April 2007 the first applicant provided a copy of the 2004 retrenchment policy to Prof Mthembu. In the letter the first applicant informed Prof Mthembu that if the policy were applied *"these benefits would hold significant financial implications"* for the respondent and also that he thought it would be very important to discuss the implications of applying the policy.

[22] On 27 April 2007 Prof Mthembu submitted a proposal document to council titled "*Restructuring of Executive Management"*. The proposal was accepted by council.

[23] In May 2007, after the first applicant had provided Prof Mthembu with a copy of the 2004 retrenchment policy, the first applicant had a further discussion with Prof Mthembu about the retrenchment policy. During this discussion Prof Mthembu indicated to the first applicant that there was no prospect that any of the incumbents would receive a severance package in terms of the policy. The first applicant states in his founding affidavit that *"I chose not to respond at that stage."*

[24] Thereafter on 7 May 2007 Prof Mthembu sent a communiqué by email to "everyone", including the applicants. The communiqué set out Prof Mthembu's restructuring proposals and the rationale behind his proposals, i.e., that there could be a substantial cost saving if the executive team were reduced in size.

[25] On 14 May 2007 Prof Mthembu held a meeting with the applicants regarding the restructuring. Several issues were raised but a proposed severance package was not discussed.

[26] On 16 May 2007 the first applicant did the calculations of the financial ramifications of paying severance packages in terms of the 2004 retrenchment policy to senior employees, including the applicants, and sent this information to Prof Mthembu by email.

[27] On 5 June 2007 Prof Mthembu again reported to the respondent's council. In his report Prof Mthembu deals with the 2004 retrenchment policy. Prof Mthembu appears to have requested the respondent's registrar at that time, Dr Vinger, to check the approval process of the retrenchment policy. Dr Vinger reported that there was no record of approval of the policy by the council and suggested that approval had been delegated to the Vice-Chancellor and that VCET then approved the policy as part of the Human Resources Change Management Plan (Resolution VCET 2/04/20) around September 2004. Dr Vinger also reported that he believed that this had occurred in accordance with Delegation 50 – "Approval of institutional HR Management Plans and strategies." In response (and this is contained in the report) Prof Mthembu contended that Delegation 50 did not say that the approval of policies was delegated to the Vice-Chancellor and that there is a vast difference between "HR management plans and strategies" and "policy". Prof Mthembu contended that the approval of HR policy is an integral part of the council's governance function that may not be delegated and he referred to section 27(1) of the Higher Education Act and section 76 of the respondent's institutional statutes [both of which are referred to above]. Prof Mthembu disputed that the 2004 retrenchment policy was properly approved but stated that even if the policy could be considered approved it was well past its review date of 1 November 2005 and would in any event need to be reviewed. Prof Mthembu then made this unfortunately worded recommendation: *"Because it might take quite long to take the policies (or revisions thereof) through consultative processes before approval, I recommend that vacuously, Council rather revert to the provisions of the relevant labour act; essentially, one week per 1 year of service as a retrenchment package until these policies could be approved by the next Council meeting in October/November 2007".* As to the potential cost of the restructuring exercise, Prof Mthembu's report sets out that if the Labour Relations Act 66 of 1995 were applied the potential cost of the restructuring exercise would be R1 million, whereas if the 2004 retrenchment policy were applied the potential cost would be R8.3 million.

[28] Prior to making this recommendation Prof Mthembu had obtained the opinion of an attorney in Bloemfontein, Mr CM Dell. The crux of the opinion was that the then Vice-Chancellor, Prof Koorts, could not, in view of section 76 of the institutional statutes, have approved the 2004 retrenchment policy. In the opinion Mr Dell dealt with the contentions around Delegation 50, i.e., that the council had delegated approval of institutional HR management plans and strategies to the Vice-Chancellor. Mr Dell was of the view that the 2004 retrenchment policy could not be viewed as an institutional HR management

plan or strategy and could therefore not have been validly approved by the Vice-Chancellor.

[29] The restructuring exercise was again considered by the respondent's council on 15 June 2007. At this meeting the respondent's council resolved:

"***Restructuring and consultations***

……..

- *At its meeting of 16 March 2007 Council had agreed in principle to the executive management structure presented, pending a report on consultations and implications.*
- *There was no record of Council approval of the policies on redeployment and retrenchment. Approval had been delegated to the Vice-Chancellor and Principal, and the VCET approved these policies as part of the Human Resources Change Management Plan (Resolution VCET 02/04/20) in September 2004. Council was yet to approve the redeployment and retrenchment policies.*
- *These policies would have serious implications, including financial implications, for the institution and would have to be reviewed.*
- *The Vice-Chancellor and Principal had obtained legal advice, which supported the proposal to rather revert to the provisions of the relevant labour act until these policies could be approved by Council.*
- *……..*

RESOLUTION CR 06/07/04

1. *…….*
2. *Since it might take some time to take the policies (or revisions thereof) through consultative processes before being approved, Council was to rather revert to the provisions of the relevant labour act; essentially, one week per year of service as a retrenchment package until these policies could be approved at the next Council meeting in November 2007.*
3. *The Vice-Chancellor and Principal was to seek legal advice from labour experts in reviewing the redeployment and retrenchment policies."*

[30] On 25 July 2007 Prof Mthembu discussed the opinion he had received from Mr Dell, as well as the council's resolution of 15 June 2007, at a Mancom meeting. As stated above, all of the applicants were members of Mancom. After this meeting the first applicant sent Prof Mthembu an email. In the email the first applicant referred Prof Mthembu to

Delegation 36 [the delegation from council to the Vice-Chancellor of employment benefits] and Delegation 15 [the delegation from council to the Vice-Chancellor of changes to conditions of employment as approved by council]. In my view this was a further attempt on the part of the first applicant to convince Prof Mthembu that the 2004 retrenchment policy was validly approved. Near the end of his representations the first applicant states the following: *"I am not sure that all documentation and practices were considered and wish to offer any further HR assistance where such might be needed. This is an attempt to ensure that all possible avenues had been exhausted before a final decision is made."*

[31] From this point onwards Prof M Ralekhetho, the Acting Executive Director: Office of the Vice-Chancellor, ran the consultation process with the applicants and he held several meetings with the applicants. There is a dispute of fact as to whether or not proper consultations were held with the applicants: the applicants contend that as a matter of form several meetings were held, whereas the respondent contends that the applicants were given a full and proper opportunity and audience in relation to the whole restructuring exercise. Be that as it may, it is common cause that the applicants in all of these meetings indicated to Prof Ralekhetho that they were not satisfied with the "purported unilateral variation" of the retrenchment policy.

[32] The respondent's council held a further meeting on 14 September 2007. The following was resolved at this meeting:

*"**Restructuring of executive management: 2007***

Positions rendered redundant

Noted:

- *As a result of the restructuring process, Professors Mandew and Thulare, Dr Du Plooy and Messrs Gardner and Stone have effectively lost their positions at CUT.*
- *……..*
- *The CUT had commenced formal discussions with these individuals in view of alternative arrangements or retrenchment packages, as required by law (Section 189 of the Labour Relations Act).*

RESOLUTION CR 08/08/07

1. An offer of two weeks' pay for each year of service, amounting to R1.3 million, was approved as a retrenchment package for those executives whose positions

had been affected by the restructuring of executive management, in the event of their being no alternatives such as redeployment.

2. ……"

[33] That the applicants were not satisfied with their severance packages is also apparent from an email that the first applicant sent to Prof Ralekhetho, and copied to Prof Mthembu, on 18 September 2007. The first applicant informed Prof Ralekhetho as follows, *"I am still not in agreement with Council's decision to have the relevant retrenchment and redeployment policies revised. This happened midway through restructuring and should have been done before the restructuring commenced."* Later in the email the first applicant recorded that Prof Ralekhetho had responded to this complaint by indicating that council had made a decision regarding the retrenchment package and that past practice had been incorrect and should not be continued.

[34] The first applicant wrote one last letter to Prof Ralekhetho before his retrenchment. This was on 12 October 2007. In the letter the first applicant confirmed, inter alia, that neither he nor any of the other incumbents had been consulted on "*this unilateral change of the retrenchment policy".* Prof Ralekhetho responded on 19 October 2007 by email. He stated in response that *"At this point this* (referring to the two weeks' for every year of service) *is the only offer on the table that we will implement. Council decreed that it did not approve the policies you refer to at any point. They remain, therefore, illegitimate regardless of whether they were used in the past to remunerate those departed from CUT a long time ago. Knowing that fact the Office of the Vice-Chancellor could not, therefore, perpetuate their illegitimacy. Consequently, until properly approved, if they will be, the Office of the Vice-Chancellor considers them non-existent".*

[35] The applicants were then retrenched. In terms of the decision to pay the applicants two weeks' pay for every year of employment the first applicant received R176 892.00, the second applicant R383 687.00, the third applicant R383 687.00 and the fourth applicant R146 493.41. If paid in terms of the 2004 retrenchment policy, the first applicant would receive R1 218 858, the second applicant would receive R2 146 891, the third applicant would receive R2 146 891 and the fourth applicant R697 308.59.

The pleadings

[36] After pleadings had closed the respondent sought leave from this court to file a supplementary affidavit. Leave was granted and the applicants then filed an answer to the supplementary affidavit. There were consequently four sets of heads of argument

before me. However, by the time of the hearing the true issues in dispute had narrowed considerably and many of the arguments initially raised [on both sides] were not pursued. I mention also that I requested Mr Gauntlett to provide me with a list of authorities on a particular point and after the hearing the applicants then filed a "further note" which was followed by an "answering note" by the respondent.

The issues

[37] The applicants sought to review and set aside the decision of the council on 15 June 2007 to revert to the provisions of the relevant labour act, that is, one week per year of service as a retrenchment package. The effect of this decision, say the applicants, is that the respondent decided not to pay them severance packages in terms of the 2004 retrenchment policy. The applicants contend that the 15 June 2007 decision was procedurally unfair in that the respondent did not inform the applicants that it intended taking a decision on this basis and did not give the applicants an opportunity to be heard before the decision was taken.

[38] In response the respondent argued that the 2004 retrenchment policy was not lawfully approved by the respondent and in the circumstances the respondent was entitled to disregard that policy. The respondent's submissions in this regard were based on various grounds which I will deal with in more detail later.

[39] As a counter to these submissions the applicants argued that the 2004 retrenchment policy was lawfully approved, but that if it was not, the applicants nevertheless had rights in terms of that policy. In this regard the applicants sought to rely on the decision in **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2004 (6) SA 222 (SCA).

[40] It is consequently necessary to first deal with the question of whether or not the 2004 retrenchment policy was lawfully approved. If it was, then that is the end of the matter. This is so because the respondent did not mount any serious challenge to the applicants' contention that the 15 June 2007 decision was procedurally unfair. Consequently in the event that the 2004 retrenchment policy was lawfully adopted or approved the review must succeed. However, if the 2004 retrenchment policy was not lawfully approved then it is necessary to consider what effect, if any, the policy had and whether or not the policy nevertheless conferred rights on the applicants.

Was the retrenchment policy lawfully adopted or approved?

[41] Both parties sought to rely on different delegations in the delegations register to advance their contentions. So, for example, the applicants sought to rely on Delegation 30 [redundancy and retrenchment], Delegation 36 [employment benefits and privileges] and Delegation 50 [approval of institutional HR management plans and strategies] to advance their contention that the Vice-Chancellor could lawfully approve the 2004 retrenchment policy. The respondent on the other hand sought to rely on Delegation 93 [the Vice-Chancellor could only authorise expenditure of a non-capital nature not provided for in the budget up to R1 million] and clause 5 of the interpretation rules to the delegations register to advance its contention that the Vice-Chancellor could not lawfully approve the 2004 retrenchment policy. In essence both parties want me to prefer one delegation over another.

[42] In my view both parties failed to read the delegations in the context of the Higher Education Act, the applicable institutional statute and the institutional rules. The critical portions of the empowering legislation are as follows:

- Section 34(3) of the Higher Education Act - provides that the council must determine conditions of service, subject to the applicable labour law.
- Section 68(2) of the Higher Education Act - permits the council to delegate its powers on such conditions as it may determine (my emphasis) and subject to certain exceptions not relevant to this matter.
- Section 76 of the institutional statutes - provides that conditions of service relating to, *inter alia,* benefits and termination of service are as determined by the council, subject to the applicable labour law.
- The institutional rules, in line with section 76 of the institutional statutes, determine conditions of employment. The rules are comprehensive and cover appointment, promotion, termination of services, retirement, resignation, incapacity or incompetence, the duties of an employee, increments, medical aid, grievances, personal information, the working week and leave of all kinds but are silent on retrenchment or severance packages.

If one reads the institutional rules together with the delegations it is clear that the delegations are meant to give effect to the day to day application of the rules and not to give the Vice-Chancellor [or anyone else] the power to determine new or different conditions of service or benefits not already determined by the respondent's council. By way of example the institutional rules set out all the different types of leave that employees may take, the amount of leave that can be taken and in some instances, when it can be taken. The Delegations register then delegates [Delegation 23] *"All forms*

of leave" to the Vice-Chancellor. Does this mean that the Vice-Chancellor may then lawfully adopt or approve a new type of leave? I think not. In my view the Vice-Chancellor's powers are limited by sections 34(3) of the Higher Education Act, section 76 of the institutional statute and the institutional rules, all of which make it clear that it is council that must determine conditions of service. In my opinion this is why Delegation 15 provides that *"Changes to conditions of employment* ***as approved by council and the employment rules of council*** (my emphasis)*"* are delegated to the Vice-Chancellor.

[43] Moreover, Baxter, in his still authoritative work "Administrative Law", Juta 2nd edition 1994, at page 433 states:

"While the practical need for delegation must be recognized, there is a danger that power which the legislature has chosen to be exercised by a specific office-holder or body might in fact be exercised by someone who is neither as well qualified nor as responsible (politically or otherwise) as the chosen repository of the power. For this reason the courts tend to interpret delegatory powers restrictively, and it has been held, rightly it is submitted, that such powers may be exercised once, the delegee being unable to delegate the powers still further."

As authority for this proposition Baxter cites **Citimakers (Pty) Ltd v Sandton Town Council 1977 (4) SA 959 (W)** (see also **SA Airways Pilots Association and Others v Minister of Transport Affairs and Another 1988 (1) SA 362 (W)** at 374B-F and **Kasiyamhuru v Minister of Home Affairs and Others 1999 (1) SA 643 (W)** at 651D-E.)

[44] That the delegations should be interpreted restrictively is supported by a note on page 2 of the delegations register [page 513 of the papers] which states that *"only those responsibilities which council deemed fit to delegate have been listed. Responsibilities not listed here therefore remain within the approving authority of the council."*

[45] In my view if one considers the delegations contextually and interprets them restrictively then I am compelled to hold that the Vice-Chancellor did not have the power to determine the 2004 severance benefits. If Delegations 30, 36 and 50 are interpreted contextually and restrictively then the logical consequence is that the power to determine severance packages cannot be implied. And as the institutional rules are silent in relation to severance benefits one cannot say that council had approved severance benefits of the kind set out in the 2004 retrenchment policy. Lastly, as the 2004 retrenchment policy changes the applicants' conditions of employment Delegation 15

prohibits a delegation to the Vice-Chancellor unless the change is approved by the respondent's council which in this matter did not occur.

[46] Interestingly in the two instances cited in the papers where executives received severance packages akin to those contained in the collective agreement [and the 2004 retrenchment policy although at the time of these retrenchments the policy had not yet been implemented] the respondent's council specifically approved the packages. Prof Hechter, for example, was retrenched with effect from 31 December 2003, about a month after the delegations register was approved. On the applicants' case the Vice-Chancellor could have approved the severance package to Prof Hechter in terms of Delegations 30 and 36 yet the respondent's council was nevertheless asked to approve the package. These facts support the conclusion I have made above.

[47] Even if I am wrong on this I believe that the applicants' contention that the 2004 retrenchment policy was lawfully approved must fail on another ground. In order for the applicants to succeed on this issue they must show that it was indeed Prof Koorts that determined and approved the policy. In this regard the applicants' counsel sought to convince me that the papers did not reveal a genuine dispute of fact. I disagree. The founding affidavit at paragraph 16.3 contains the following statement, *"It is necessary to indicate that the Vice-Chancellor at that stage, Prof AS Koorts, had adopted the policy."* In answer to this the respondent stated in paragraph 96, *"There is no proof that the vice-chancellor at that stage, Prof AS Koorts, had in fact adopted and approved the two policies."* In reply the applicants say that *"The respondent has not disputed the authenticity of the documents* (sic) *attached to the founding affidavit as annexure "E"* [the retrenchment policy]. *This on its face reflects the adoption by Professor Koorts pursuant to his delegated authority."* I pause here to point out that this is by no means the case. In order to succeed the applicant is required to show that it was Prof Koorts and only Prof Koorts that adopted or approved the policy under his delegated authority. As is set out above the retrenchment policy states in the introductory table that the *"Approval Authority"* was *"Executive Director: Human Resources/Principal and Vice-Chancellor".* Does this mean that the approval of the Executive Director: Human Resources was obtained or that that of the Vice-Chancellor was obtained? Does it mean that the approval of both was obtained? Furthermore, under the heading *"Source of Approval"* there are three sources referred to: a resolution of the VCET, the Executive Director: Human Resources and the Principal and Vice-Chancellor. Does this mean that all three approved the retrenchment policy? Moving to the respondent's supplementary affidavit the respondent at paragraph 51 states *"From the document itself, it appears that at best*

for the Applicants, it was approved by the Vice-Chancellor's Executive Team, (significantly consisting of the Applicants and the then Registrar), The Executive Director: Human Resources, (the First Applicant) and the Vice-Chancellor." In the answer to the supplementary affidavit at paragraph 14 the applicants respond as follows, *The Executive Management team (the applicants) had endorsed the Retrenchment Policy ……and the policy was approved and adopted by Koorts. It has never been the applicants' case that the Executive Management team had the power to validly adopt the Retrenchment policy. ……the proposed Retrenchment Policy was the subject of thorough consultation in all internal structures of the respondent. Only after all relevant steps were taken did Koorts approve the policy."* Bearing in mind the well known dictum of Corbett JA in **Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) 623 (AD)** at 634E to 635C, I do not believe that the applicants have discharged their onus of showing that Prof Koorts adopted or approved the retrenchment policy.

[48] There were other grounds on which the respondent contended that the 2004 retrenchment policy was not lawfully adopted or approved. In view of my findings set out above it is unnecessary to deal with these.

Did the retrenchment policy nevertheless confer rights on the applicants?

[49] The respondent's case is that as the retrenchment policy was not lawfully adopted it was entitled to treat it as nugatory. The respondent's defence is encapsulated in paragraph 146 and 147 of the answering affidavit:

"146. There was no retrenchment policy in existence to be amended.

147. The council of the respondent merely asserted that no such policy exists and that the so-called retrenchment and redeployment policies were not adopted by council and that those 'policies' were not legal and binding but ab initio void and a nullity."

[50] The applicants' counter is that the respondent was not entitled to do this because the collateral review of an administrative act (here, by disregarding it) is in principle not lawful. The applicants sought to rely on what they say is the basic principle that a public authority may not *"rely, without more, on the invalidity of the originating administrative act: it is required to take action to have it set aside and not simply to ignore it"* [**Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA)** at 246G-H]. The applicants accepted that the respondent's council had the power to review and rescind the policy adopted by delegated authority or if the respondent for some reason

wished rather to have the policy adopted by the Vice-Chancellor set aside on any contended legal ground, it was free to seek a court order to review and set aside its own decision as unauthorised. But, say the applicants, the respondent did neither.

[51] In addition, the respondent referred me to the English case of **Boddington v British Transport Police [1998] 2 All ER 203** quoted with approval in the **Oudekraal** decision and the article "The Metaphysic of Nullity: Invalidity, Conceptual Reasoning and the Rule of Law" in *The Golden Metwand and the Crooked Cord: Essays On Public Law in Honour of Sir William Wade QC* (Christopher Forsyth and Ivan Hare) also referred to in the **Oudekraal** decision. At 244A - C in **Oudekraal** the SCA held:

"But just as some consequences might be dependent for validity upon the mere factual existence of the contested administrative act so there might be consequences that will depend for their legal force upon the substantive validity of the act in question. When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. It is in those cases – where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act – that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a 'defensive' or a 'collateral' challenge to the validity of an administrative act. Such a challenge was allowed, for example, in Boddington v British Transport Police, *in which the defendant was charged with smoking a cigarette in a railway carriage in contravention of a prohibitory notice posted in the carriage pursuant to a byelaw. The House of Lords held that the defendant was entitled to seek to raise the defence that the decision to post the notice (which activated the prohibition in the byelaw) was invalid because the validity of the decision was essential to the existence of the offence."*

[52] At 245 F-G in **Oudekraal** the SCA quotes with approval an extract from Forsyth's article:

"…(O)nly where an individual is required by an administrative authority to do or not to do a particular thing, may that individual, if he doubts the lawfulness of the administrative act in question, choose to treat it as void and await developments. Enforcement proceedings will have to be brought by the administrative authority involved; and the individual will be able to raise the voidness of the underlying administrative act as a defence."

[53] The applicants argue that **Oudekraal**, **Boddington** and Forsyth's article all support the principle that the repository (as opposed to the subject) of a power is not entitled to

simply disregard is own unlawful administrative act: it is required to explicitly undo the act itself or seek an order from a court to set it aside.

[54] In an article to be published in the *South African Law Journal* later this year, *"The Status and Force of Defective Administrative Decisions Pending Judicial Pronouncement"* Daniel Pretorius argues that **Oudekraal** is not authority for the principle that all unlawful administrative acts remain binding until they are set aside in judicial review proceedings. In a careful analysis of the **Oudekraal** decision he states:

"In general terms, Oudekraal was concerned with the question 'whether, or in what circumstances, an unlawful administrative act might simply be ignored, and on what basis the law might give recognition to such acts'. However, the SCA considered this question in a particular factual context: regardless of whether the general plan had been lodged timeously, it had, in fact, been approved by the Surveyor-General and acted upon by the Registrar. What the SCA was concerned with was the implications of the invalidity of an initial administrative act for the validity of subsequent acts performed on the basis of the earlier act. Having regard to the facts (further acts had been performed by 'second actors' – the Surveyor-General and the Registrar – on the assumption that the Administrator's initial act had been valid), the question that required the SCA's attention was whether the invalid initial act could be ignored in view of the fact that later acts had been performed pursuant to it. The principles articulated in Oudekraal should be viewed in this context.

One must distinguish between two discrete questions: (i) whether a decision which is prima facie invalid, and which has not been challenged and set aside on review, may be ignored by persons affected by that decision, and (ii) whether such a decision might nevertheless sometimes be given legal recognition and provide the foundation for subsequent acts, which might have legal force despite the invalidity of the initial decision, which consequently cannot simply be ignored. If one were to read paragraph 26 of Oudekraal in isolation from the remainder of the judgment, one might think that the SCA elided the two questions; and reading that paragraph in isolation might obfuscate the distinction between these two questions. But, of course, that paragraph should be read in its proper context.

A careful reading of the judgment indicates that the SCA was alive to the distinction between these two questions, and that, on its facts, Oudekraal was concerned with the latter question. Indeed, the SCA has subsequently confirmed that Oudekraal dealt with

the situation where a 'second actor' has acted on, or has made further decisions on the basis of, an initial decision. However, the question as to the legal status of a decision which is prima facie invalid, and whether such a decision may be ignored, can also arise in a context where no 'second actor' has performed acts on the basis of that initial decision. Oudekraal is distinguishable from that class of cases by the fact that the Surveyor-General and the Registrar had, in fact, performed further acts pursuant to the Administrator's initial act, and it was partly for that reason that the SCA found that the Council had not been entitled to ignore the Administrator's approval, despite its invalidity."

[55] Pretorius refers to **Seale v Van Rooyen NO; Provincial Government, North West Province v Van Rooyen NO 2008 (4) SA 43 (SCA)** at para 13 and **Shunmugam v National Democratic Convention [2009] 2 All SA 285 (SCA)** at para 15 in support of his contention that the SCA has subsequently confirmed that **Oudekraal** dealt with the situation where a 'second actor' has acted on, or has made further decisions on the basis of the initial decision. Also see **Van Schalkwyk v Mkiva (2009) 30 ILJ 1266 (O) 1274C-D**; and **Northern Free State District Municipality v Matshai [2005] JOL 14055 (SCA)** at para 15-16.

[56] Pretorius then looks at the question of whether an invalid decision may be ignored by its author where a 'second actor' has not made further decisions based on that decision:

"Considered carelessly, Oudekraal could be construed as asserting that an invalid administrative decision will always be effective unless and until it is set aside on judicial review. On that construction, the author of an apparently invalid administrative decision would be bound by that decision despite its infirmities and would have to seek judicial relief if it wanted to be released from its consequences. Such an interpretation would be consistent with the general principle that a public body that has made a decision which is facially invalid is functus officio and cannot revoke that decision unless the applicable legislation empowers it to do so. However, as explained below, it is not an absolute rule that an apparently invalid administrative act may never be ignored by its author. On the other hand, though, public bodies do not have carte blanche to disregard their own decisions on account of perceived invalidity. Unlawful administrative decisions produce legal and practical consequences and are generally considered valid until set aside by a court."

[57] I respectfully agree with the views of Mr Pretorius.

[58] In considering the circumstances in which invalid decisions may be ignored by its author Pretorius considers the case law in relation to, for example, incomplete proceedings, fraud and acts beyond jurisdiction. In relation to the latter Pretorius submits that an act which is ultra vires (in the sense that the decision-maker had no jurisdiction to perform that act) may be ignored by its author, without the need for revocation or judicial review and he cites various cases in support of this proposition. To my mind there should in principle be no difference where the act which is ultra vires is so because the decision-maker had no power to perform that act.

[59] The applicants criticized Mr Pretorius' arguments on several grounds and argued that the **Oudekraal** decision is clear that in principle acts said to be invalid are not to be ignored. The applicants fail though to deal with the factual distinction between this case and the **Oudekraal** decision and with Pretorius' contention that the principles articulated in **Oudekraal** should be viewed in a particular factual context. The applicants further failed to deal with Pretorius' reference to the **Seale** and **Shunmugam** decisions in support of his contention that the SCA has subsequently confirmed that **Oudekraal** dealt with the situation where a 'second actor' has acted on, or has made further decisions on the basis of the initial decision.

[60] In support of the respondent's contention that the retrenchment policy was a nullity the respondent relied primarily on **Abrahamse v Connock's Pension Fund 1963 (2) SA 76 (W)** and **City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) 2008 (3) SA 1 (SCA)**. In **Tshwane** the SCA held that a distinction must be made between a failure of a statutory body to comply with provisions which the legislature has prescribed for the validity of a specified transaction (which cannot be remedied by estoppel because that will give rise to a transaction which is unlawful and therefore ultra vires) and the failure of a statutory body to comply with all the relevant internal arrangements and formalities (in respect of which estoppel may be successfully invoked). The applicants conceded that estoppel cannot be raised against a statutory body to get it to implement an ultra vires act but sought to distinguish this matter by contending that on the facts it fell in the second category described by **Tshwane**.

[61] Being of the view that the respondent's council did not delegate the power to determine new severance benefits to the Vice-Chancellor [or to anyone for that matter] I must respectfully disagree. Once again if I am wrong on this point and the respondent's council did delegate the power to determine new severance benefits to the Vice-

Chancellor then it was for the applicants to show that it was indeed the Vice-Chancellor that determined the retrenchment policy. There is no question that if the VCET or the Executive Director: Human Resources determined the retrenchment policy then they had no power to do so and this act too would have been invalid and ultra vires the empowering legislation.

[62] I accordingly agree with the respondent's contention that the retrenchment policy was a nullity and could be disregarded by the respondent. In **Tshwane** at para 17 the court held:

"The amending of the supply contract was at the instance of one of the defendant's employees who was clearly not authorised to do so. The defendant had thus not acted in fact nor, for that matter, is it considered in law to have acted at all. No amendment of the supply contract had therefore occurred."

[63] In the circumstances the applicants' application must fail. As to costs I have followed the ordinary principle of costs following cause.

[64] I therefore make the following order:

1. The applicants' application is dismissed.
2. The respondent is granted costs, including the cost of two counsel.

FULTON AJ

On behalf of the applicants: JJ Gauntlett SC and S Grobler
Instructed by: SJ Burger of Horn & Van Rensburg Attorneys

On behalf of the respondent: L Halgryn and L Malan
Instructed by: CM Dell of Lovius Block