IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no. C 399/99

In the matter between:

NATIONAL EDUCATION HEALTH AND ALLIED

Applicant

AND

1ST Respondent

2ND Respondent

3RD Respondent

4TH Respondent

5TH Respondent

JUDGMENT (vires)

MLAMBO J.

1.The issue in this matter is the validity of the resolution adopted on 26 August 1999 by the council of the University of Cape Town ("the University"). A further issue for consideration is whether that resolution was validly ratified subsequently.

Facts

2.At the time the University council adopted the resolution of 26 August 1999 it purported to act in terms of the

University of Cape town (Private) Act no 8 of 1999 ("the 1999 Act") which it believed to have come into effect in and around July 1999. The Act had, as a matter of fact, not come into effect as at 26 August 1999. In view, presumably, of the fact that the University had taken certain decisions pursuant to this resolution, and in a bid to resolve the difficulty that had arisen, it appears that the University decided that upon promulgation of the 1999 Act, it would urgently convene a meeting of the Council. It appears that the thinking of the University was that at the reconvened meeting of the Council the matters which had been on the agenda for the meeting of 26 August 1999 would be submitted to the Council for ratification, alternatively to be resolved afresh should that be necessary.

3.On 27 September 1999 notices of a Council meeting to be held on 29 September 1999 were issued. It appears that at this meeting the Vice – Chancellor was to propose that the Council ratify its resolution of 26 August 1999 and should it be necessary, to consider the issue of outsourcing again, amongst others. The meeting of 29 September 1999 did not materialize and a special Council meeting was then rescheduled for 30 September 1999 on an emergency basis. At that meeting the Council took a decision to ratify the Resolution of 26 August 1999 which had amongst others authorised an outsourcing exercise. However at the meeting of 30 September 1999 the Council was constituted by 57.9% of persons who were not employed by or students of the University. In this regard it must be pointed out that section 27 of the Higher Education Act 101 of 1997 provided that: *"At least 60% of the members of a Council must be persons who are not employed by or students of, the public higher institution concerned."* It is not disputed that the provisions of this Act apply to the University and it appears that a student member, a nominee of organised labour and three members who were to be coopted by the Council had yet to be appointed. It must be mentioned that at the time of the Council meeting of 30 September 1999 the 1999 Act had then come into effect. A further Council meeting took place on 3 November 1999. At this meeting a resolution was adopted which went as follows: *"The Council ratify each and everyone of the decisions taken at the meetings held on 4 August 1999, 26 August 1999, 1 September 1999, 30 September*

1999 and 6 October 1999, and to the extent that it may be found necessary to have considered any, or all of these issues again to do so and to approve them afresh."

4.In the light of the afore going facts the Applicant petition for the following relief:

"1. Declaring that the First Respondent's Council resolution adopted on the 26th August 1999 to:

11_outsource all tasks associated with cleaning, gardening, sports ground maintenance and non-core activities;

1.2 disestablish posts affected by outsourcing;

1.3 terminate the employment of employees affected by the outsourcing;

1.4 delegate authority to the Vice Chancellor or officers nominated by her to take the necessary steps to give effect to the resolution,

is null and void and not capable of subsequent ratification.

2.Declaring that the First Respondent's Council resolution of 30th September 1999 to:

2.1 ratify the decision to outsource all tasks associated with cleaning, gardening, sports ground maintenance and non-core cleaning activities usually combined with cleaning tasks in a faculty such as photocopying, messenger services and tea-making;

2.2 ratify the decisions made by the meeting of 26th August to:

ii)disestablish posts affected by outsourcing;

(ii terminate the employment of employees affected by the outsourcing;

(iii delegate authority to the Vice Chancellor to contract with third parties for the supply of services covering all tasks associated with cleaning, gardening, sports ground maintenance and non-core cleaning activities.

2.3 ratify the dismissals made in pursuance of the decision to outsource, has no validity and is of no fore and effect.

4.Declaring that the notices of dismissal issued pursuant to the Council resolution of 26 August 1999 are null and void."

In turn the University has argued that in the first place this Court lacks jurisdiction to enquire into the validity of its Council resolutions and secondly that, in any way, the 26 August 1999 resolution was properly ratified subsequently i.e on 30 September 1999 and 3 November 1999.

Jurisdiction of the Labour Court

5.The University's argument is that the validity of its Council's resolutions does not fall under section 157and 158 of the Labour Relations Act no 66 of 1995 ("the Act"). It was further argued, by Mr Duminy on the University's behalf that the alleged invalidity of the 26 August 1999 resolution does not arise from employment and labour relations, and further that it does not arise from a dispute over the constitutionality of any act or conduct. Mr Duminy argued that the issue at stake was a simple common law issue relating to the constitutionality of the Council of the University and as such was beyond the jurisdiction of the Labour Court i.e on a proper reading of the Labour Relations Act. He argued further that checking the composition of the Council goes to common law review and had nothing to do with the Labour Court.

6. The Labour Relations Act as a whole is a piece of legislation that is designed to regulate issues emanating from the relationship between employer and employee. In my view section 157(1), in particular, must be understood within the whole context of the Labour Relations Act. The LRA does not confer jurisdiction on the Labour Court like other pieces of legislation such as the Magistrate Court Act no 32 of 1944 as amended. The Magistrate Court act for instance deals with the jurisdiction of the Magistrate Court along the lines of causes of

action, amounts of claims and even on the basis of residence, place of employment or place where the cause of action arose. The LRA on the other hand confers jurisdiction on the Labour Court *"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". (Section 157(1)).*

7.The matters covered by the LRA are wide ranging and it is to these matters that one must look to see if the Labour Court has jurisdiction. To me a piecemeal approach is not helpful in determining whether the Labour Court has jurisdiction. As an example the LRA deals with strikes and lockouts. A wide range of conduct takes place in support of or during strikes and lockouts. It may happen that some of the conduct could amount to criminal conduct such as the assault or intimidation of non-strikers. It is not correct to say that because the conduct of the strikers amounts to criminal conduct therefore the Court lacks jurisdiction, say, too entertain an interdict application aimed at that conduct. The jurisdiction of the Labour Court does not depend on the conduct complained of only, but on the whole context within which the conduct takes place. Thus it is ill-advised and against the spirit of the LRA to approach the High Court to interdict criminal conduct and then revert to the Labour Court to deal with other facets of the strike such as picketing. See in this regard the comments of Nicholson J in **Mondi Paper (a division of Mondi Ltd v Paper Printing, Wood And Allied Workers Union & Others (1997) 18 ILJ 84 (D).**

8. With dismissals it is also ill-advised to compartmentalize dismissals that are allegedly unfair and those that are irregular or invalid. It could never have been intended that if a dismissal is found to be invalid then the Labour Court must give way to the High Court. In this regard the fairness of the decision could be affected by the legality of the decision. It can never be that the Labour Court has jurisdiction over unfair as opposed to invalid dismissals. In my view the context of the LRA indicates in no uncertain terms that the legislative intent was to have an enactment that regulates the relationship between employer and employee. In my view it is

unnecessarily restrictive to interpret the Act in a way that excludes matters that are incidental to the relationship between employer and employee from the processes of the LRA. One cannot therefore seek to restrict the Labour Court within the four corners of what is specifically mentioned in section 157 and 158. By establishing the Labour Court as a specialist Court with specialist– judges in the labour field the legislature clearly intended to keep labour disputes and their consequences in the very wide sense of the term solely under the umbrella of the Labour Court.

9.In my view it would lead to undesirable consequences if a piecemeal approach was adopted regarding the jurisdiction of the Labour Court. The provision equating the Labour Court to the High Court in status regarding matters under its jurisdiction must mean that those matters that were incidental to labour disputes or the resolution thereof that were referred to the High Court were so referred because there was no court equal in status to the High Court to deal with those matters. The old industrial court comes to mind and according to the 1956 LRA that court was a court of equity only whose jurisdiction was circumscribed in section 17 of that Act. In those days the High Court played a very active role in the resolution of disputes not within the jurisdiction of the industrial court. The High Court also had review jurisdiction over the Industrial Court . On the other hand the Labour Court is, in terms of section 151 established as a Court of law and equity and equal in status to the High Court regarding matters under its jurisdiction. This must mean that the role of the High Court is excluded in matters arising from and/or incidental to the relationship between employer and employee. The injunction to interpret the LRA's provisions in a purposive way must mean that the interpretation of the provisions of the LRA must not be done in a manner that will lead to a proliferation and multiplicity of court proceedings. In my view the Labour Court has jurisdiction to consider whether the resolutions of the Council of the University were properly adopted and also whether the Council was properly constituted. In fact the adoption of those resolution is incidental to the resolution of the section 189 and 197 disputes.

Ratification

10.Mr Unterhalter for the Applicant, submitted that an invalid act is incapable of subsequent ratification. He submitted that there can be no question of the University Council validly having performed the act of termination de novo on 30 September 1999. Mr Unterhulter further argued that it is an essential requirement for ratification of an administrative decision that the body which makes the initial decision has the power to make it, albeit subject to ratification by a superior body. He stated that there can be no suggestion in the present matter that the Council, once properly constituted, could acquire for itself some kind of *ex post facto* right of delegation to the incorrectly-constituted council of 26 August 1999,and that a body which has no power to delegate its functions to some other official can have no power to ratify what that official has done. He argued further thatalthough the adoption by the council on 26 August 1999 of the resolution is not expressly prohibited by statute - one is here concerned more with the powers of the council to have acted at all than with its power to have adopted a specific resolution.

11.Mr Unterhalter further argued that in order validly to ratify a resolution which was adopted *ultra vires,* it was necessary to discover some statutory basis for such ratification. He made reference to the decision in **Neugarten & Others v Standard Bank of South Africa Ltd 1989 (1) SA 797 (A)** at 802H- 803(F) where Nicholson AJA said:

"In ordinary parlance the word ratification 'is used to express the giving of consent by one without whose consent a transaction entered into by others would be incomplete or invalid....' (See Stewart v Kennedy (1890) 15 App Cas (HL) 75 at 99 per Lord Watson). The meaning in our law is no essentially different. In Edelstein v Edelstein NO and Others 1952 (3) SA 1 (A) Van den Heever JA said (at 10G-H):

"By ratification a Latin author does not mean to convey the reinforcement of something tainted with less than the absolute degree of voidness (whatever that may mean) but to give a legal basis to something which hitherto

had no legal foundation at all. Accordingly inani obligatio confimatur (d 46.3.95.3) and legitima conventio est quae lege aliqua confimatur (D 2. 14.6; 50.16.130).
Ratification is equivalent to prior authorisation and confirms the transaction concerned with retroactive effect. Omnis ratihabitio retrotrahitur et mandato priori aequiparatur.

In practice, no doubt, the consent of members under ss(2) [of section 226 of the Companies Act 61 of 1973] will ordinarily be asked for, and given, prior to the conclusion of the transaction concerned. But it does not follow that the transaction is incapable of ratification if for any reason prior consent is not given.

It might be argued that a transaction hit by s 226(1) to which prior consent was not given is incapable of ratification, for the reason that:
'ratification relates back to the original transaction, and there can be no ratification of a transaction which is prohibited and made illegal by statute.'

I do not think that the argument could be sustained. There is a fundamental distinction to be drawn. The dictum of Innes CJ was in the context of a transaction which was absolutely prohibited and illegal per se; consent was not an issue. (The transaction in the Cape Dairy case was a contract made on a Sunday which was prohibited and made illegal by Transvaal Law 28 of 1896.) The transaction set out in ss (1) of s 226 are prohibited and illegal only in the absence of consent of all the members. The questioning any specific case is whether such consent has been given": if it has, the transaction is not prohibited or illegal. Consequently, to postulate that he transaction is prohibited is to beg the question. If the requisite consent is given to the transaction ini initioi, it is a valid transaction. If the transaction is subsequently ratified by the no-consenting members, the ratification relates back to the original transaction and the position is the same as if consent had originally been given.

I do not think that any assistance in the solution of the problem is to be obtained from decisions on other statutes which prohibit the doing of acts without the permission, or consent or authorisation of some third person. Each case depends on the terms of the particular statute."

12.On the other hand, as argued by Mr Duminy, for the University, there is a line of authority which testifies to the contrary. He argued that in **Baeck &Co (Pty) Ltd v Van Zummeren 1982 (2)SA 112 (W),** Goldstone J (as he then was) allowed a party to ratify the otherwise void institution of legal proceedings a decision which was subsequently followed. The Appellate Division approved this decision in **Moosa and Cassim NN.O v Community Development Board 1990 (3) SA 659(C),** albeit subject to the apparent qualification that it in that case it was allowed because proof of supplementation of the authority was easy (at 660I-J). A similar approach was recently taken in relation to ratification of a liquidator's actions see **De Wet N.O v Uys N.O 1998 (4)SA 694(T) (at 704E-F,** and before that in **National Co-operative Dairies Ltd v Smith 1996 (2) SA 717 (N) at 78I-719D.** This line of cases draws attention to the difference between acts that would be completely beyond the powers or vires of the body concerned (e.g. a resolution by the University's council that all teaching cease henceforth) and acts that are within its overall powers, but were invalidly performed. Goldstone J summarized the **ratio decidendi** of Schreiner JA in **Garment Workers Union of the Cape Garment Workers Union 1946 AD 370,** in this respect, as follows:

"The ratio decidendi of the judgment of schreiner JA is undoubtedly that while the original act may still validly be performed its unauthorised execution may be retrospectively ratified..."

13.These decisions do not dwell on the reasons of invalidity, and do not ask whether the original act was void or voidable. They analyze the question purely from the angle of capacity. The reasoning therein supplants the

rigid classification of allegedly invalid acts as either void or voidable. Applying that approach in the present case gives rise to this position: the decision of 26 August 1999 fell within the overall powers of the Council; since it is something which the Council could then and may now validly do, it can be ratified retrospectively. That is what was done at the meetings of 30 September 1999 and 3 November 1999.

14. In my view the preferred approach is the one found is the Gament Workers Union case which considers whether the act sought to be ratified is within the competence of the organization concerned. Subsequent ratification by that body remains binding. Mr Untehalter further relied on the following quotation from **Baxter: Administrative Law (1984)** at pages 363 to 364:

"An invalid Act can be 'validated' neither by its perpetrator nor by a superior authority. Thus where an administrative board collected an extra amount of rental, from the tenant of a property governed by the Housing Act, without the authority of a Housing Commission determination, the fact that the Minister of Co-operation and Development had approved of its action was held to be irrelevant; the board's action was found to be 'ultra vires, null and void'. Where regulations are ultra vires, their tabling in parliament and the latter's subsequent approval of them by resolution does not validate them. Nor will invalid regulations be validated merely because they are referred to in an Act of parliament, unless the act clearly intends them to be validated. On the other hand a higher administrative authority with power to do so may validly perform the act de novo. When a superior authority re-enats validly what its subordinates has done validly, this is often misleadingly referred to as 'validation'. Although this has the effect of 'regularizing' the position, in truth the superior body has done no more than decide or authorize the act itself in accordance with its own powers. It has acted de novo and has not breathed life into earlier, stillborn act; whether the second act is valid will depend entirely upon the powers of the superior body to perform it. For this reason invalid acts cannot be 'cured' by amendments or indirect reference."

This view must be understood within the context of decisions that are beyond the competence of the body concerned.

15. It appears justified therefore to find that it was within the power and competence of the Council of he University to ratify its prior decisions. In view of this finding I do not deem it necessary to consider whether the provisions of section 72(4) of the Higher Education act, 101 of 1997 are peremptory or directory.

16. In the circumstances the application must fail. I make no order as to costs.

MLAMBO J

ent: 29 March 2000.

ant: Unterhalter SC with Mr Fagan instructed by Cheadle Thompson & Haysom.

For the First Respondent: Mr Duminy SC with Mr Steltzner instructed by Jan S Devilliers & Son.