REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No. JA 65/10

In the matter between:

GARDNER, C I	**First Appellant**
THULARE, S M	**Second Appellant**
MANDEW, M S	**Third Appellant**
STONE, R F S	**Fourth Appellant**

and

CENTRAL UNIVERSITY OF TECHNOLOGY FREE STATE	**Respondent**

Heard: **08 November 2011**

Delivered: **25 July 2012**

Summary: Appellants formerly employed by the respondent university (the CUT) in executive management positions. Upon retrenchment appellants sought to have their severance packages calculated on the basis of a controversial retrenchment policy that was allegedly approved by the former vice-chancellor by virtue of the power delegated to him by the Council. The policy was challenged by the CUT on various grounds. The defined issues included:

(1) Whether the retrenchment policy constituted integral part of CUT's governance functions, exclusively assigned to Council by the Act. (2)

Delegation of (discretionary) power – Concept & Restrictive Interpretation thereof. (3) Factual disputes in final relief applications – Principle restated.

JUDGMENT

NDLOVU JA

Introduction

[1] This appeal is against the judgment of the Labour Court (Fulton AJ) in which the Court *a quo* dismissed with costs the review application launched by the appellants seeking an order in the following terms:

> '1. That the purported decision by the respondent on 15 June 2007 relating to the retrenchment policy of the respondent be reviewed and set aside;
>
> 2. That the respondent be ordered to effect payment to the individual applicants, as severance packages, pursuant to their retrenchment by the respondent as follows:
>
> 2.1 To the first applicant the amount of R1 218 858,00;
>
> 2.2 To the second applicant the amount of R2 146 891,00;
>
> 2.3 To the third applicant the amount of R2 146 891,00;
>
> 2.4 To the fourth applicant the amount of R297 308,59.
>
> 3. Alternatively that the respondent be ordered to pay compensation to the applicants in terms of section 8(1)(c)(ii)(bb) of the Promotion of Administrative Justice Act, totalling the amounts indicated in prayer 2 above.'

[2] The Court *a quo* granted the appellants leave to appeal to this Court.

[3] During arguments, it turned out that the appellants no longer sought to pursue the appeal against prayers 1 and 3. In other words, the appeal was to proceed only in respect of the quantum of the severance pay which the appellants were entitled to on their retrenchments, plus *mora* interest thereon and costs.

[4] The respondent, known as The Central University of Technology Free State (the CUT), is a higher education institution in terms of section 1 of the Higher Education Act[1] (the Act) and is an organ of State in terms of section 239(b) of the Constitution[2]. The CUT was formerly known as the Technikon Free State until about 2004 when this name was changed to that of the CUT.

[5] All four appellants were formerly employed by the CUT in various executive management positions which are set out hereunder. On or about 30 November 2007, they were all dismissed from employment on the ground of the CUT's operational requirements in that their jobs became redundant upon the restructuring and reorganisation of the CUT's executive management personnel.

4.1 The first appellant was appointed as chief director: human resources (HR) on pheromones post level 4 (P4) with effect from 1 November 2001 and elevated to the post of executive director: human resources on post level 3 (P3) with effect from 1 January 2003, which was the post he occupied at the time of his dismissal.

4.2 Both the second and third appellants were appointed on 1 January 1997 and were each elevated to the post of deputy vice-chancellor: student services, post level 2 (P2), with effect from 1 December 2001 and these were the positions they held at the time of their retrenchment.

[1] Act 101 of 1997.
[2] The Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution).

4.3 The fourth appellant was appointed to the position of executive director: finance and operations on post level 2 (P2), with effect from 1 October 2003. Although his date of retrenchment was not specifically disclosed in the papers – an apparent inadvertent oversight – it was common cause that he was served with the notice of his retrenchment on 27 November 2007 and, on this basis, it followed that he was retrenched on or about the same date as his co-appellants.

[6] The fact that the appellants were dismissed for a fair reason based on the CUT's operational requirements was not in dispute. However, they were not satisfied with the manner their severance packages were determined. They contended that the procedure followed by the CUT in this regard was unfair in that the CUT did not accord them an opportunity to be heard before it unilaterally decided on 15 June 2007 to revoke or ignore its (the CUT's) existing and valid retrenchment policy (the impugned policy) in the calculation of their retrenchment packages.

[7] In terms of the impugned policy, the appellants would have been entitled to severance pay equivalent to 3 years remuneration, far in excess of the severance pay calculated in terms of the Basic Conditions of Employment Act[3] (the BCEA) which the CUT applied. The appellants alleged that the impugned policy constituted part of the terms and conditions of their employment with the CUT and that they were, therefore, contractually entitled to have their severance pay determined in terms thereof. The amount of the severance package, on the basis of the BCEA formula, was equal to one week's remuneration for every completed year of service with the employer. However, in the present instance the CUT, on its own volition, multiplied by two the amount calculated in terms of the BCEA formula. The appellants were offered and paid the following severance packages, which they received, but claimed to have done so under protest:

[3] Section 41 of Act 75 of 1997.

First appellant = R17 892,00

Second appellant = R383 687,00

Third appellant = R383 687,00

Fourth appellant = R146 493,41.

[8] The appellants had then referred their dispute (which was characterised in the referral as "severance pay – s 41") to the Commission for Conciliation, Mediation and Arbitration (the CCMA) on 13 December 2007 in respect of the first, second and fourth appellants and on 29 November 2007 in respect of the third appellant. The CCMA failed to resolve the dispute through conciliation and issued the certificates of outcome to that effect on 10 January 2008 (in respect of the first, second and fourth appellants) and on 29 December 2007 (in respect of the third appellant).

[9] Although both certificates of outcome aforesaid reflected that the disputes could thenceforth be referred to arbitration, the appellants elected not to pursue that route. Instead, they elected to refer the matter to the Labour Court by way of a review in terms of section 77 of the BCEA, section 158(1)(h) of the Labour Relations Act[4] (the LRA) and sections 3 and 6 of the Promotion of Administrative Justice Act[5] (PAJA).

The Background Facts

[10] During or about 1996, a collective agreement was concluded between the Technikon Free State (as the CUT was then known) and the registered trade union, the National Union of Technikon Employees of South Africa (NUTESA), representing certain categories of employees of the CUT (the 1996 collective agreement). In terms of the 1996 collective agreement, a formula was agreed upon on how severance packages would be paid out to the employees falling within those

[4] Act 66 of 1995.
[5] Act 3 of 2000.

categories in the event of termination of their employment with the CUT through, amongst others, retrenchment. These categories involved employees in Groups A, B and C4 to C8 as contemplated in the institutional rules. The identification of employees in these categories is an issue not necessary to elaborate upon. Suffice it to say that those were employees who fell below the management level.

[11] On 20 November 1995 the CUT, by virtue of section 19(1) of the Technikons Act,[6] adopted a body of institutional rules for the CUT (the 1995 rules).[7] On 16 September 1996, the 1995 rules were amended by the addition thereto of rule 64(1) which had the heading 'Termination of Service Package'. Rule 64(1) was a virtual direct English translation of the 1996 collective agreement.[8]

[12] Some eight years after the conclusion of the 1996 collective agreement, the vice-chancellor's executive team drafted a policy document which was titled 'Policy B/11.5 Retrenchment of Employees at the Central University of Technology, Free State',[9] purporting to set out, amongst others, the retrenchment policy of the CUT (the impugned policy). At the top front page of the document, it reflected its "approval date" as 1 November 2004, the "approval authority" being the "executive director: human resources and principal and vice-chancellor; and the "date of next review" being I November 2005.

[13] The impugned policy was embodied in clause 11.5.1.2 of the document referred to as 'Retrenchment Policy'. In turn, clause 11.5.1.2 had a sub-heading 'Benefits of voluntary retrenchment where a job becomes redundant'. On the last page thereof, it reflected that the impugned policy was endorsed by the executive director: human resources on 1 December 2004 and by the principal and vice-chancellor on 24 January 2005. Nothing purporting to be signatures or names of the endorsing officials appeared anywhere on the document.

[6] Act 125 of 1993.
[7] See annexure D, at 38 of the indexed papers.
[8] The original version of the 1995 rules was issued in Afrikaans.
[9] See annexure E, at 67 of the indexed papers.

[14] Significantly, the 1996 collective agreement, the 1995 rules and the impugned policy contained virtually the same information, save that whilst the 1996 collective agreement and the 1995 rules excluded, by non-reference, the category of employees in the executive management (including the appellants) in their application, the impugned policy was of general application to all employees alike, including the appellants.

[15] The three instruments referred to above are of pivotal importance in this matter and I propose to refer thereto. However, given their being virtually identically the same in content, subject to what I have alluded to in the preceding paragraph, it would seem reasonable, for the sake of brevity, to refer hereunder only to rule 64(1) of the 1995 rules, which will then serve to mirror the content of the other two documents.

Section 64(1) of the 1995 Rules:

> 'Termination of Service Package (*Added : September 16, 1996)*
>
> 64(1) If a full-time employee of the Technikon Free State falling in categories A, B and C4 and C8, is discharged on the initiative of the employer due to industrial requirements such as affirmative action, re-organisation or inability of an employee to execute his/her duties, as contained in Government Gazette No. 16005 of 7 October 1994, the Technikon Free State will be responsible for the payment of additional remuneration to such employees, calculated according to the following formula:
>
> *1. Employees with less than five years Technikon service*:
>
> Such employees will receive one year's bruto earnings as immediate single amount payment. By bruto earnings it is referred to all earnings and benefits an employee would have received for one year, namely:
>
> - Basic salary
> - Full contribution to Medical Aid Scheme (if any)

- Employee's contribution to Retirement Fund
- Accumulative leave for one year
- Holiday leave for one year
- Service bonus
- Car allowance (if any)
- Study advantages of employee and dependants (if they are busy with further studies)
- Housing allowance for one year (if any)

2. *Employees with five years, but less than eight years Technikon service:*

The benefits payable to such employees are calculated on the same basis as category 1, but the bruto payment and other benefits are based on two years bruto earnings, instead of one year. Furthermore, a *pro rata* calculation is done with regard to those persons with less than (eight) years Technikon service. For example, the earnings of an employee with six years' service, or a part thereof, will be adjusted by multiplying it with seven and dividing it by eight.

3. *Employees with eight years but less than 10 years' service at the Technikon:*

The advantages payable to such employees are calculated on the same basis as in category 1, but the bruto payment and other benefits are based on two years and six months' bruto earnings, instead of one year. Furthermore, a *pro rata* calculation is done with regard to those employees having less than ten years' service at the Technikon.

For example, the earnings of an employee with eight years' service, or a part thereof, will be adjusted by multiplying it with nine and dividing it by ten.

4. *Employees with more than ten years service at Technikon Free State:*

   Such employees will receive a payment as in category 1, but the remuneration will be based on three years' bruto earnings instead of one year's bruto salary.

5. This additional remuneration is a termination of service ("severance") package that is payable apart from the payment of advantages that the employee will receive from the National Technikon Retirement Fund.'

[16] As stated, the only difference with the impugned policy was that in terms thereof the benefits referred to above were not restricted to those retrenched employees falling in the specified categories, but to all CUT employees, including the appellants.

The Reasons why the CUT rejected the Impugned Retrenchment Policy

[17] The events which led to the restructuring of the CUT's executive management and eventual retrenchment of the appellants started shortly after the appointment of Professor Thandwa Mthembu at the beginning of 2007, as the CUT's principal and vice-chancellor.

[18] On 16 March 2007 Prof Mthembu approached the Council and advised that under his delegated authority he was to follow a restructuring exercise as far as the internal workings of the CUT were concerned. The implementation of his restructuring philosophy would affect the executive management team (which at that stage reported to him) commonly known as the vice-chancellor executive team (the VCET). The VCET comprised the appellants plus the registrar of the CUT. These officials were also members of the CUT's management committee (the MANCOM).

[19] Prof Mthembu submitted his recommendations to the Council in a document titled 'Framework for Institutional Restructuring (Rightsizing of the Staff Establishment)' dated 8 March 2007 marked annexure "O"

to the founding affidavit (the restructuring report). The restructuring report proposed a wide-ranging institutional restructuring process that would consist of three stages 'to be implemented almost in succession, for which background work should proceed in parallel'[10] and which included a proposal to restructure the CUT's staff at the executive management level. This particular aspect of the restructuring process was described in the document as one of urgency to the extent that its implementation was to be expedited before 30 June 2007. The main objectives of the restructuring exercise were stated as follows:[11]

> '(a) Overall cost efficiency in the proportion of the salary budget used at the executive level –
>
> - Reduction of the number of executives and senior managers
> - Reduction of the number of people who report to the vice-chancellor
> - Reduction of the number of post levels P2 – P4.
>
> (b) Establishing a lean, cohesive, strong, strategically focussed, goal-and task-orientated, efficient and productive leadership at executive team level.'

[20] In his analysis of the situation, Prof Mthembu sought to demonstrate, by way of a comparative schedule with reference to some other South African universities, that the executive management staff at the CUT was unduly larger than what it reasonably ought to be. He pointed out that there were currently 14 individuals employed by the CUT at management level which cost the CUT an annual expenditure of some R10 million. The post levels of the 14 staff members in the management positions were broken down as follows:

P2 = 5

[10] Clause 2 of the restructuring report, at 105 of the indexed papers.
[11] Clause 3 of the restructuring report, at 106 of the indexed papers.

P3 = 5

P4 = 2

P6 = 2

14

[21] Consequently, Prof Mthembu submitted his report recommending drastic reduction of executive management staff. On 16 March 2007, the Council accepted his recommendations. On 19 March 2007, he addressed letters to all the appellants and the copy of one such letter served on Mr Gardner was included in the founding papers as annexure "Q". It read as follows:

> '**TOP MANAGEMENT RESTRUCTURING: Notice of an imminent S189 LRA Process**
>
> You are aware of CUT's attempts at restructuring top management (and the rest of the University) due to various reasons, amongst which are: a need to reduce the number of people who report to the Vice-Chancellor; cost-effectiveness at top management levels; a leaner top management structure.
>
> Council, in its meeting of 16 March 2007, agreed to some broad parameters of CUT's restructuring process, including that of top management. I am, therefore, giving you notice that in due course – when a restructuring proposal has been produced, together with its implications on your current position – I will engage with you and others who may be affected by this process. I envisage that I will be ready with a proposal by 31 May 2007 or earlier. You will be informed accordingly.
>
> In restructuring processes the potential for retrenchments always looms large; and Council confirmed that retrenchments are an option in this and other cases that will follow at CUT. But, as you know, many other alternatives are pursued before that option is exercised; and I will not deviate from this accepted practice.

> You are a very experienced manager and you should be familiar with these processes. I just want to assure you that at this stage, there is no cause to panic about what may happen to you as an individual because there is no specific proposal at this stage.
>
> I hope that you will continue to support me and deliver on your tasks as we move this institution forward to greatness.
>
> Yours sincerely
>
> Prof Thandwa Mthembu
>
> Vice-Chancellor and Principal'

[22] Mr Gardner testified, on affidavit, that he felt that as the HR executive director of the CUT it was his duty to assist Prof Mthembu in the proposed restructuring process and the possible retrenchment of the CUT's employees. He then held a personal discussion with Prof Mthembu over the matter during which he pointed out the existence of the impugned policy. He said Prof Mthembu requested to see the document, which reaction indicated to him that Prof Mthembu had not, up to that stage, even been aware of the existence of the impugned policy. A copy of the document was duly furnished to Prof Mthembu.

[23] Prof Mthembu submitted a further written proposal, dated 27 April 2007, to the Council headed 'The Restructuring of Executive Management', which was marked annexure "S" to the founding affidavit. This document contained proposals and recommendations which would obviously have far-reaching implications to the appellants and which were in line with the objectives contemplated in the restructuring report.

[24] On 7 May 2007, Prof Mthembu issued a communiqué in which he reiterated his view that, given its size, the CUT could manage with four executive managers at a cost of about R3.4m annually, down from R7m. However, he assured everyone concerned that he would be engaging in consultations with all those likely to be affected.

[25] Mr Gardner then did a calculation on how much, in terms of the impugned policy, each executive manager (including the appellants) would be entitled to receive as severance packages and he furnished Prof Mthembu with this information, which is contained in annexure "U" to the founding affidavit, as shown hereunder. (The amount of the severance package calculated on the basis of the impugned policy is reflected within bracket under the column '*Current Cost to Company*').

Name	Job Title	Date of appointment in current post	Current Cost-to-Company Package	Date of Appointment at CUT
Dr MJ du Plooy (11689)	Registrar	17 November 1999	R843 624 (R2 530 872)	1 January 1997
Prof MS Mandew (11672)	DVC: Student Services	1 December 2001	R843 528 (R2 530 584)	1 January 1997
Prof SM Thulare (11657)	DVC: Advancement & Marketing	1 December 2001	R843 5 6 (R2 530 578)	1 January 1997
Mr RFS Stone (12194)	Executive Director: Fin Management & Operations	1 October 2003	R697 875 (R1 395 750)	1 October 2003
Mr CI Gardner (12044)	Executive Director: Human Resources	1 January 2003	R697 875 (R1 395 750)	1 November 2001
Prof PG Le Roux	Executive Dean: Management Sciences	1 January 2004	R709 161 (R2 127 483)	1 January 1988
Prof BJ Frey	Executive Dean: Health and Environmental Sciences	1 January 2004	R705 963 (R2 117 889)	1 July 1987

Prof GD Jordaan	Executive Dean: Engineering, Information and Communication Sciences	1 January 2004	R704 258 (R2 112 774)	1 January 1983
TOTAL			R16 189 732	

[26] On 5 June 2007, Prof Mthembu issued his final report titled 'Report to Council on Consultations and Implications of Executive Management Restructuring' which was also included in the appellants' founding papers as annexure "V" (the final report). This was a comprehensive report in which Prof Mthembu sought to illustrate the extent that he had covered in terms of consultations and negotiations with the relevant stake holders on the restructuring process of the executive management, in particular. He severely criticised the impugned policy. At this stage, he had obtained legal opinion on the question of the legal force and effect of both the impugned policy and the collateral re-deployment policy (the latter not being at issue in this case) from a Bloemfontein attorney Mr CM Dell (the Dell opinion), in terms of which the following was advised:

> '1. The then Vice Chancellor had the necessary delegated authority for the approval of an Institutional HR Management Plans and Strategies.
>
> 2. The 2 policies concerned, however were disguised to form part of a Management Plan, whilst, in actual fact, specifically relating to Service Benefits and Employment Conditions of employees.
>
> 3. In terms of Section 76 of the Institutional Statute Conditions of Service Benefits and Leave Privileges of employees, as defined therein, are to be determined by the Council and Council only, without there being a reference to delegation.
>
> 4. The implementation of the policies concerned herein has an enormous financial potential burden for the Institution, who is

accountable to the Minister of Education and which accountability does remain that of the Council.

5. Lastly, the policies, then, were never at any stage approved by Council as for what they are and, thus, as only Council could approve them, these policies could never have come into operation and are, therefore, null and void.'

[27] Prof Mthembu also set out a comparative outline indicating how much it would probably cost the CUT to pay out severance packages in respect of the eight executive managers, including the four appellants, applying the relevant labour law provision (being the BCEA, in particular) on the one hand, and applying the impugned policy, (which he termed the '*unapproved policy*'), on the other. In this regard, he concluded that only about R1 million would cost the CUT when applying the labour legislation compared to some R8.3 million it would cost when applying the impugned policy.

[28] The Council had then on 15 June 2007 resolved to approve Prof Mthembu's recommendations as contained in the final report, which included the rejection by the CUT of the impugned policy.

[29] On 25 July 2007, Mr Gardner addressed an email to Prof Mthembu in which Mr Gardner referred to the Council's recent step of approving the final report. This time Mr Gardner referred not only to delegation 50 but also to delegations 15 and 36 in respect of which powers on matters related to "changes to conditions of employment as approved by council and the employment rules of council", and powers on matters related to "employment benefits and privileges" were, respectively, delegated from Council to the vice-chancellor. In this email Mr Gardner sought to offer advice to Prof Mthembu, an initiative which Mr Gardner, as the CUT's HR executive director, had felt he was obliged to do. Significantly, though, he also stated the following:[12]

[12] See Annexure X, at 149 of the indexed papers.

> 'It is not clear whether or not council scrapped the mentioned policies (referring to the retrenchment and redeployment policies) or whether the policies are still applicable to the rest (non-executive) of the staff. It seems that these policies must now be reviewed and that the LRA takes effect in the meantime. The mere fact that this institution had signed a collective agreement with NUTESA is, in my view, a binding arrangement until there is agreement on the termination thereof. Whether this is applicable to executives is not for me to debate now. My concern is how it will affect staff at levels lower down.' (My underlining for emphasis.)

The significance of this email, particularly the emphasized portions thereof will be discussed later in this judgment.

[30] In or about September 2007, Prof Ralekhetho Mojalefa, the acting executive director in the office of the vice-chancellor, took over from Prof Mthembu the task of dealing with the implementation process of restructuring the CUT's executive team. He engaged in further discussions and consultations with the affected executive members, including the appellants. As to how the discussions progressed was demonstrated in the letters and emails which were exchanged between Prof Mojalefa (on behalf of the CUT) and Mr Gardner (on behalf of the appellants) some of which correspondence was carried in annexures "AA", "BB" and "CC" to the founding papers. However, all attempts to resolve the impasse proved unsuccessfiul.

Brief outline of the parties' submissions

[31] The appellants alleged that the 1996 collective agreement, which according to the appellants was still valid and binding on the CUT, was incorporated in the institutional rules of the CUT which formed part of its institutional statutes. They submitted that their appointments by the CUT were subject to the policies and statutes of the CUT. The statutes made provision for severance packages to be paid out to employees in terms of the CUT's retrenchment policy (meaning the impugned policy) in the event of their involuntary retrenchment. On this basis, the

appellants had accrued contractual rights to the severance packages as contained in the impugned policy and the statutes of the CUT.

[32] In any event, the appellants also alleged that the CUT had already in the past paid out retrenchment packages calculated in terms of the impugned policy. In other words, they alleged an act of inconsistency on the part of the CUT. They furnished examples of the CUT's former employees whom they alleged were paid retrenchment packages calculated on the basis of the impugned policy. This issue will be dealt with in due course.

[33] Furthermore, according to the appellants, the existence of the impugned policy and the CUT's past practices aforesaid, had given them a legitimate expectation that they would be afforded proper procedural rights before any decision on the matter was taken. However, this did not happen because the CUT unfairly and unilaterally changed the "existing retrenchment policy" and decreed that it was not bound by it.

[34] It was reiterated on behalf of the CUT that the 1996 collective agreement never applied to any of the CUT's employees in the category of the appellants. In any event, the institutional rules and statutes which had adopted the 1996 collective agreement had been repealed prior to the acceptance by the appellants of their appointments to the executive management positions.

[35] The Council adopted the institutional regulatory code in respect of conditions of employment rules' for the CUT which came into operation on 19 September 2001. The institutional regulatory code effectively replaced the statute and rules of the Technikon Council of 1996. The CUT further stressed that the regulatory code aforesaid did not make any provision for, or mention of, any retrenchment or severance packages. That being the case, the severance packages would have to be calculated in terms of section 41(2) of the BCEA.

[36] It was further submitted, on behalf of the CUT, that there was an irresolvable dispute of fact on the question of whether the impugned policy was validly adopted and authorised, as a matter of fact.

The proceedings in the Labour Court

[37] The appellants' case was pleaded on the averments made by the first appellant (Mr Gardner) who deposed to both the founding and replying affidavits on behalf of the appellants. Mr Gardner sought to demonstrate that, by virtue of his position as the CUT's HR executive director, he had personal knowledge and insight into the CUT's internal HR operations and dynamics, which included the circumstances that informed the appellants' challenge of the CUT's decision under review in the Court *a quo*.

[38] Prof Mthembu deposed to the answering affidavit on behalf of the CUT opposing the review application on several grounds including the submission that Prof Koorts did not have the authority to approve the retrenchment policy and that such approval fell within the exclusive competence of the Council. Therefore, since there was no existing retrenchment policy at the time, the CUT was left with no option but to resort to the provisions of section 41(2) of the BCEA.

[39] After setting out a comprehensive and useful analysis of the applicable legislation and other authorities in relation to the pertinent facts, the Court *a quo* made its findings, including the following:

1. There was a genuine dispute of fact on whether Prof Koorts actually endorsed or adopted the retrenchment policy and that the appellants failed to show that Prof Koorts did so.

2. The CUT's delegations in terms of its delegations register were only meant to give effect to the day-to-day application of the CUT's institutional statues and institutional rules and not to give the principal and vice-chancellor the power to determine any new or different conditions of service or benefits (in respect of

any category of employees) not already determined by the Council.

3. The contextual consideration and restrictive interpretation of the delegations evidently showed that the principal and vice-chancellor did not have the power to approve any CUT's governance policy, including one under consideration.

4. The decision in *Oudekraal Estates(Pty) Ltd v City of Cape Town and Others*,[13] on which the appellants had sought to rely, was no authority for the proposition that every unlawful and invalid administrative act remained binding until such time that it was set aside in judicial proceedings.

5. On the facts of the case, the CUT was entitled to ignore and treat as invalid the purported endorsement or adoption of the impugned policy by the then CUT's principal and vice-chancellor, Prof Koorts.

Hence, the Court *a quo* dismissed the appellants' review application with costs, including the costs of two counsel.

The Appeal

[40] In their grounds of appeal, the appellants submitted that the Court *a quo* erred in a number of respects, including the following:

1. In its factual finding that it was *bona fide* disputed that Prof Koorts had in fact adopted the policy and that the appellants had failed to prove that Prof Koorts did so.

2. In disregarding that, when it made the decision to reject the retrenchment policy, the CUT acted unilaterally without consulting with the appellants as the affected employees.

[13] 2004 (6) SA 222 (SCA).

3. In disregarding the fact that, subsequent to the approval of the policy, the CUT acted upon its terms in paying out severance packages to employees retrenched at the CUT.

4. In holding that the Council's power to adopt the impugned policy could not have been delegated to anyone, including the then vice-chancellor.

5. In holding that the effect of the delegation of the Council's powers to the then vice-chancellor amounted to no more than the confirmation of authority on the vice-chancellor to execute upon a decision of the Council.

6. In holding that the applicable delegations were meant to give effect to the day-to-day application of the institutional statues and institutional rules only. In particular, in holding that delegation 15 prohibited the adoption of the policy by Prof Koorts.

The Issues

[41] The issues which arise from the pleadings and grounds of appeal are discussed in the course of my analysis and evaluation of the appeal hereunder.

Analysis and Evaluation

[42] It is common cause that the CUT is an organ of state[14] and a public higher education institution.[15] As such, it is an institution whose establishment was funded by, and whose continued operational existence ultimately depended on, public moneys appropriated by Parliament for such purpose.[16] The Act provides that the Minister[17] 'must … allocate public funds to public higher education (and,

[14] Section 239(b) of the Constitution (See footnote 2, above).
[15] Section 21 of the Act (See footnote 1, above).
[16] Section 20 read with section 40(1)(a) of the Act.
[17] The Minister of Education (presumably now the Minister of Higher Education), in terms of section 1 of the Act.

therefore, to public higher education institutions) on a fair and transparent basis.'[18] This provision is in line with the Constitutional imperative that '[w]hen an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.'[19] Therefore, it seems to follow, in my view, bearing in mind this imperative, that every rand and cent acquired from public coffers for the purpose of promoting and advancing education at all public institutions, including public higher education institutions, must be utilised and expended in a manner that is responsible, fair, equitable and cost-effective. I now turn to deal with the issues and facts in this case.

Whether a genuine and material dispute of fact arises from the papers

[43] There is the question whether or not the impugned policy was, as a matter of fact, adopted or approved by Prof AS Koorts regardless, for the moment, whether he had the requisite authority to do so or not.

[44] The CUT submitted that the appellants failed to present proof that, as a matter of fact, Prof Koorts endorsed or approved the impugned policy. However, Mr Kemp SC, for the appellants, submitted that when the review application was launched there was not even a suggestion made on behalf of the CUT that there was a real factual denial of this allegation. However, he conceded that this issue was indeed raised by the CUT in its answering affidavit. He sought to explain that what he meant was that when the appellants filed their founding papers (in the review application) such factual dispute was not anticipated.

[45] With respect, I am unable to agree with counsel's suggestion that the CUT's factual denial of Prof Koorts' approval should be disregarded on the ground that the denial was never raised prior to the launch of the

[18] Section 39(2) of the Act.
[19] Section 217(1) of the Constitution.

litigation and therefore not anticipated by the appellants when they instituted the review application. A party initiating application proceedings does not have to be apprised of potential defences by the opposing party. It is common and elementary knowledge that in motion proceedings a defence is normally formally announced in the answering affidavit, be it a defence *in limine* or on the merits of the application. In other words, the CUT was under no obligation to make known to the appellants every detail of its defence strategy beforehand. For the CUT to have raised this defence for the first time in its answering affidavit was, in my view, neither irregular nor unfair to the appellants, nor was it a bare denial in content.

[46] There was no direct evidence by Mr Gardner to the effect that he personally saw (or even heard) Prof Koorts approving the impugned policy. It was significant that the impugned policy was embodied in a typed and, more importantly, unsigned document. It did not even bear the name of Prof Koorts in any form. Therefore, apart from the say so of the appellants, there was nothing else of probative value that linked Prof Koorts to the impugned policy document. Most significantly, notwithstanding the CUT's persistent factual denial of the alleged approval, no evidence was tendered by Prof Koorts, on affidavit or otherwise, confirming that he indeed endorsed, adopted or approved the impugned policy. Nor was there any explanatory evidence adduced by anyone, including the appellants, as to why Prof Koorts was not secured to confirm the appellants' allegation related to him. I will return to this aspect shortly.

[47] Mr Kemp referred to certain passages in the CUT's answering affidavit which, in his submission, only amounted to either an admission on the part of the CUT or simply a bare denial which did not constitute a genuine dispute of fact. I do not agree with this submission for the reasons that follow.

[48] The appellants alleged that in the following passage (which is extracted from the CUT's answering affidavit) Prof Mthembu (on behalf of the

CUT) admitted, after all, that Prof Koorts did in fact endorse the impugned policy:[20]

> '80. As is clear from the contents of page 7 of the said document, the policy was also approved by …… Principal and Vice-Chancellor (Prof AS Koorts) on the 24th January 2005.'

[49] To the extent relevant, page 7 of the document provides for what is termed "Source of Approval" under which heading appears three CUT's official designations in this form: (1) VCET (2) Executive Director: Human Resources (3) Principal and Vice-Chancellor. Significantly, no names of incumbents are reflected, let alone their signatures. The same is true with the "Endorsement" columns which appear on page eight which also bear neither the names nor signatures of the alleged endorsing officials.

[50] Therefore, taken in its proper context it appears to me that Prof Mthembu's statement (above) did not amount to an admission. The opening phrase 'As is clear from the contents of page 7 of the said document' could not, in my view, have lent any other meaning to the sentence than merely to say "On the face of the said document the policy was approved by Prof Koorts." All that Prof Mthembu was saying was that the document purported to be endorsed by Prof Koorts. Indeed, the proper context of what he actually meant clearly appears in the next paragraph, where Prof Mthembu states:[21]

> '81. The erstwhile principal and vice-chancellor purported to endorse the policy by virtue of his authority to endorse managerial policy principles and directives whereas the retrenchment and termination of service of employees clearly falls within the exclusive jurisdiction of the council of the university as a governance policy and procedure.' (Underlined for emphasis.)

[51] Mr Kemp further submitted that the CUT's response at paragraphs 96 and 97 of its answering affidavit amounted to a bare denial in relation

[20] See Answering affidavit, at para 80, at 346 of the indexed papers.
[21] See Answering affidavit, at para 81, at 34 of the indexed papers.

to the appellants' allegation in this regard. The exchange on the record appears as follows:

(Founding affidavit)[22] at paragraph 16.13

> '16.13 It is necessary to indicate that the Vice-Chancellor at that stage, Prof AS Koorts, had adopted the policy…'

(Answering affidavit)[23] Ad paragraph 16.13 thereof:

> '96. There is no proof that the vice-chancellor at that stage, Prof AS Koorts, had in fact adopted and approved the two policies.
>
> 97. The allegations contained in this paragraph are therefore denied.'

[52] The appellants alleged that Prof Koorts approved the impugned policy, which is denied by the CUT. On this basis, the appellants bore the *onus* to demonstrate to the Court on a balance of probabilities that indeed, as a matter of fact, things happened as they alleged. In the present instance, the CUT did not have to amplify or elaborate more than it did on its response that there was 'no proof that … Prof AS Koorts had in fact adopted and approved the two policies'. In this way, the appellants were put to the proof of this allegation. Therefore the appellants were specifically required to furnish proof that Prof Koorts did, as a matter of fact, approve the impugned policy and they had the opportunity to do so in reply, if there was such proof. They failed to furnish the required proof.

[53] The appellants replied as follows to paragraph 96 of the CUT's answering affidavit, above:

> 'Ad Paragraph 96
>
> 37.1 This averment is not understood. The respondent has not disputed the authenticity of the documents attached to the founding affidavit as annexure "E". This on its face reflects the

[22] See: Founding affidavit, at para 16.13, at p.13 of the indexed papers.
[23] See Answering affidavit, at paras 96 and 97, at 349 of the indexed papers.

> adoption by Prof Koorts pursuant to his delegated authority. It follows that this paragraph is denied.' (Underlined for emphasis.)

[54] The averment referred to is, in my view, quite comprehensible. It is not clear on what basis the appellants are alleging that the CUT did not deny the authenticity of the document concerned. On the appellants' own version, what appears in the impugned policy is only 'on its face' (*prima facie*) a reflection of approval by Prof Koorts. Besides anything else, this was a demonstration that the authenticity of the impugned policy document was not conclusively proven. There was simply no admissible evidence submitted by the appellants in response to the CUT's factual denial of the appellants' allegation that the impugned policy was actually endorsed by Prof Koorts.

[55] Significantly, as pointed out already, *ex facie* the impugned policy document no signatures by both the HR executive director (Mr Gardner) and the then principal and vice-chancellor, Prof Koorts. Whilst Mr Gardner deposed to an affidavit and positively verified his endorsement of the document, there was no similar verification by or on behalf of Prof Koorts. Nor was there any explanation furnished by the appellants as to why (1) the document was not signed at all, (2) Prof Koorts was not used as a witness or (3) no verification or confirmation was presented of Prof Koorts' endorsement of the policy. On the probabilities, an adverse inference on the credibility of the appellants' case was, in the circumstances, justified.[24]

[56] The impugned policy was drafted by the members of the VCET who included all the appellants; endorsed by Mr Gardner, in his capacity as the HR executive director; and purportedly approved by the then vice-chancellor Prof Koorts. Despite their executive management positions all these officials remained the employees of the CUT. Ironically and strangely indeed, save for the then vice-chancellor, the impugned policy was clearly aimed at benefiting the very same employees who

[24] Compare: *Lombaard v Droprop CC and Others* 2010 (5) SA 1 (SCA) at para 24

were responsible for its existence. This situation alone tends to lend some degree of doubt and suspicion on the genuineness of the alleged approval of the impugned policy by Prof Koorts, particularly in the absence of his signature (or some form of his identification) on the document, as well as the appellants' failure to get him to confirm their allegations in the proper manner.

[57] As pointed out earlier, on the front page of the impugned policy document is reflected that the "approval date" of the policy was 1 November 2004 and that its "date of next review" was 1 November 2005. This implied that the "policy" would operate for one year whereafter it would be reviewed. There was no evidence or suggestion that the impugned policy was indeed reviewed on 1 November 2005 or any date thereafter prior to 30 November 2007 when the appellants were retrenched. The conclusion which readily comes to mind is that the impugned policy had, on its own terms, lapsed or expired when the appellants were retrenched. Indeed, Mr Gardner appeared to concede this apparent fact in his email dated 25 July 2007 addressed to Prof Mthembu, which I have referred to earlier in this judgment.[25] For the sake of convenience, I refer again to the relevant passage in the email:

> 'It is not clear whether or not council scrapped the mentioned policies (referring to the retrenchment and redeployment policies) or whether the policies are still applicable to the rest (non-executive) of the staff. It seems that these policies must now be reviewed and that the LRA takes effect in the meantime. The mere fact that this institution had signed a collective agreement with NUTESA is, in my view, a binding arrangement until there is agreement on the termination thereof. Whether this is applicable to executives is not for me to debate now. My concern is how it will affect staff at levels lower down.'

[58] In the email aforesaid, Mr Gardner was seemingly of the view that, since the policies were past their review dates they could not be applied and that the provisions of the LRA should then be applicable. It

[25] See para 29 above.

is unclear why Mr Gardner suddenly had a change of mind in the matter. In any event, he does not appear to present valid grounds in support of his changed attitude. This apparent contradiction on the part of Mr Gardner was not explained.

[59] In my view, this factual challenge of Prof Koorts' approval of the impugned policy had all the hallmarks and ingredients of a real and genuine dispute of fact. That being the case and given that the appellants sought an order for final relief, the *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* principle[26] would have to apply. In that event, the appellants could only succeed if the facts as stated by the CUT, together with those facts in the appellants' affidavit which were admitted by the CUT, justified the order sought.[27] However, it seems to be in the interests of justice that 'a robust, common-sense approach'[28] be applied in this case, which the Court *a quo* apparently did. I now proceed to deal with the other issues in the matter.

Whether the then principal and vice-chancellor, Prof Koorts, possessed the delegated authority entitling him to approve or adopt the impugned policy.

[60] Mr Gardner contended that when Prof Koorts approved the impugned policy he did so by virtue of the powers delegated to him by the Council in terms of the CUT's delegations register. In this regard, he referred specifically to delegation numbers 15, 30, 36 and 50 in terms of which certain powers specified therein were delegated from the Council to the Vice-Chancellor. These delegated powers concerned the following matters:

Delegation15 – "Changes to conditions of employment as approved by council and the employment rules of council"

[26] 1984 (3) SA 623 (A).
[27] *Id* at 634H-I.
[28] *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G-H; See also *Reed v Wittrup* 1962 (4) SA 437 (D) at 443G; *Jonker v Ackerman and Others* 1979 (3) SA 575 (O) at 599D-E; *Wiese v Joubert* and Others 1983 (4) SA 182 (O) at 202G; *Minister of Health v Drums and Pails Reconditioning CC t/a Village Drums and Pails* 1997 (3) SA 867 (N) at 872C-J; *Truth Verification Testing Centre v PSE Truth Detection CC and Others* 1998 (2) SA 689 (W) at 698H-I.

Delegation 30 – "Redundancy and Retrenchment"

Delegation 36 – "Employment benefits and privileges"

Delegation 50 – "Approval of institutional HR management plans and strategies"[29]

[61] On the concept of delegation of power, Baxter[30] points out that the power of an official to delegate authority does not exist automatically, and must be provided for either expressly or impliedly.[31] The learned author further submits:

> 'While a practical need for delegation must be recognised, there is a danger that power which the Legislature has chosen to be exercised by a specific officer, 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 only once the delegee (is) unable to delegate the powers still further. …
>
> When power is conferred upon an office of statutory body it is intended that the power should be exercised by that office of body and not someone else. The recipient of the power has presumably been chosen for a purpose – for his accountability, expertise, seniority or advantaged position in exercising the power. Should he allow the power to be exercised by someone who was not chosen he will effectively have abdicated his own power and will not have complied with the legislation.'[32]

[62] The approval of employment benefits and retrenchment packages is clearly a matter which, in a work environment, involves governance function and power on the part of the employer. Therefore, ordinarily any decision-making on matters pertaining to governance policy is the

[29] See Annexure G (Record of Proceedings) at 241-243 of the indexed papers.
[30] Baxter, *Administrative Law,* Juta, 2nd Ed (1994).
[31] Id at 432.
[32] *Id* at 433-434.

sole preserve of the employer. In the present instance, the employer is the CUT which exercised its powers and performed its functions on the governance and control of the CUT through the Council. Indeed, in terms of the Act the Council 'must govern the public higher education institutions, subject to this Act, and the institutional statute.'[33]

[63] By its nature and purpose, an institutional statute (together with the institutional rules) is both supplementary and complementary to the Act in constituting the foundational pillars on which the governance function of every public higher education institution, such as the CUT, is laid. On this basis, an institutional statute has the status of the Act itself in terms of its legal consequences. As indicated, institutional statutes and institutional rules are made by the Council, which is the highest decision-making body of the public higher education institution concerned.

[64] Besides section 27(1), the importance and significance of the Council, the institutional statutes and institutional rules in the governance of a public higher education institution is also apparent from sections 32 and 33 of the Act.

Section 32 (1) provides:

> '(1) The council of a public higher education institution may make –
>
> (a) An institutional statute, subject to section 33, to give effect to any matter not expressly prescribed by this Act; and
>
> (b) Institutional rules to give effect to the institutional statute.'[34]

Section 33 provides:

> '(1) Any institutional statute must be submitted to the Minister for approval, and if so approved must be published by notice in

[33] Section 27(1) of the Act.
[34] Section 32(1) of the Act.

the *Gazette* and comes into operation on the date mentioned in such notice.

(2) The Minister must table any institutional statute made under section 32 in Parliament as soon as reasonably practicable after it has been published as contemplated in sub-section (1).

(3) The Minister must make a standard institutional statute, which applies to every public higher education institution that has not made an institutional statute until such time as the council of such public higher education institution makes its own institutional statute under section 32.[35]

[65] Therefore, in the light of its statutory mandate in terms of the Act, it could never, in my view, have been the intention of the Council, as the repository and delegator of power, that any delegation of power from it to the vice-chancellor, in terms of the delegations register, would include the delegation of its governance powers, including the power to approve the policies of the CUT, such as the impugned policy in this case. Approval of any policy was an integral part of the CUT's governance function. Hence, it seems to me, any deviation from this position would, from the perspective of the vice-chancellor, amount to usurping the Council's powers whilst, from the perspective of the Council, constitute an abdication of its statutory duty and responsibility under section 27(1) of the Act.

[66] During 1999, the Council issued an institutional statute (the 1999 statute) which took effect on 6 June 1999.[36] As the then principal and Vice-Chancellor, Prof Koorts was, in terms of the Act and the 1999 statute, the chief executive and accounting officer of the CUT,[37] responsible for the general management, administration and control of the CUT.[38] In terms of the 1999 statute, he was thus –

[35] Section 33 of the Act.
[36] Published in Government Notice No. 715 dated 6 June 1999.
[37] Section 1 of the Act. See also section 6(2) of the 1999 statute.
[38] Section 30 of the Act and section 6(2) of the 1999 statute.

'(3) (assigned with the duty), in accordance with subparagraph (2) (to) execute all actions on behalf of the CUT and ha(d) the power to –

(a) … …

(b) restructure and reorganise the institution for purposes of effective management and development of the CUT; and

(c) give instructions to any employee, student or managerial committee of the council, which instructions must be executed promptly and fully.

(4) directly responsible to council

(5) by virtue of his office, a member of all committees of the council and all managerial committees.'[39] (Underlined for emphasis)

[67] The underlying principle in section 6(3) of the 1999 statute, above, was that the vice-chancellor was vested with the power to execute all actions on behalf of the CUT as approved by the Council. His were only executive powers in relation to implementation of policies adopted by the Council. It does not appear to me that any of the delegations relied upon by the appellants purported to delegate the approval of the CUT's governance policies to the vice-chancellor. In my view, these delegations were only enacted to capacitate the vice-chancellor, as the CUT's chief executive and accounting officer, in his day-to-day implementation and execution of the governance policies as approved by the Council. In other words, the delegations were not intended to bestow upon the vice-chancellor 'policy legislative powers', so to speak, but simply to strengthen the executive powers already conferred on the office of the vice-chancellor who, by the way, at all times remained directly responsible to the Council.[40] Had the Council

[39] Section 6 (3), (4) and (5) of the 1999 statute.
[40] Section 6(4) of the 1999 statute.

intended to do otherwise, it would clearly have done so, given the critical nature and importance of the issue.

Whether, in any event, the discretionary power vested in the Council, as the repository of power, could be delegated

[68] Any decision-making on policy, which eventuates in the favourable adjustment of employment benefits, is a matter that almost invariably involves the exercise of a discretionary power on the part of the employer. In the present case, therefore, the appellants' contention amounts to saying that the then vice-chancellor was, by virtue of the powers delegated to him by the Council, bestowed with the discretionary power to approve the impugned policy which provided huge retrenchment benefits for its drafters, the appellants. The question arises whether, if such be the case, the Council would not have abdicated its statutory obligation in terms of the Act to govern the CUT.

[69] In *Hofmeyr v Minister of Justice and Another,*[41] it was held that when a discretionary power is vested in an official it generally must be exercised by that official (or his lawful delegate) and although it may be appropriate to consult and take advice from others, the official must exercise the discretion and not abdicate this in favour of someone else.

[70] The position was re-iterated in *Minister of Enviromental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd*:[42]

> 'A functionary in whom a discretionary power is vested must himself exercise that power in the absence of the right to delegate ... . [I]t does not follow that a functionary ... would have to read every word of every application and may not rely on the assistance of others ...What the functionary may not do, of course, is adopt the role of a rubber stamp and so rely on the advice of others that it cannot be said that it was he who exercised the power. If in making a decision he were simply to

[41] 1992 (3) SA 108 (C) at 117F-G.
[42] 2005 (6) SA 182 (SCA) at para 20.

rely on the advice of another without knowing the grounds on which that advice was given the decision would clearly not be his.'

[71] Whether or not there has been an abdication of a discretionary power vested in a functionary is, of course, a question that must be decided on the facts of each case.[43] On the facts of this case, it is clear to me that the Council never intended to delegate its discretionary power which it exercised on matters of governance policy, such as approval of policies of the nature of the impugned policy.

The appellants' terms and conditions of employment in the executive management positions

[72] The letters of the appellants' appointments to the executive management positions clearly and comprehensively set out the terms and conditions of their employment in those positions[44] and, in my view, no support to the appellants' claim can be gleaned therefrom either. In particular, clause 1 of the appointment letters reads as follows:

'1. This agreement will be subject to the following, as amended from time to time:

1.1 The Labour relations Act, 66 of 1995;

1.2 The Occupational health and Safety Act;

1.3 The Higher Education Act, 1997;

1.4 Any applicable legislation regulating the minimum conditions of employment;

1.5 The Rules of the Technikon Free State, as well as the statute, as approved by the Minister and published in the government gazette, as well as the terms and conditions as set out in this agreement;

[43] *Id* at para 21.
[44] See Annexures G, H, and I, at 82-98 of the indexed papers.

1.6 The Conditions of Employment Rules, attached as Appendix A, and the disciplinary rules and Procedures, attached as Appendix B; and

1.7 The Code of Ethics for employees of the Technikon Free State, attached as Appendix C.'

[73] The CUT alleged that the rules referred to in Appendix A and which were attached to the letters of appointment were not the 1995 rules but the new institutional *"*conditions of employment rules*"* which were issued by the Council and became effective on 19 September 2001 (the 2001 rules).[45] This allegation was not disputed by the appellants.[46] As stated already, the appellants were appointed to their respective executive management positions after 19 September 2001, and when the 2001 rules were already in place and operative.[47] It follows, therefore, that the appellants' appointments were subject not to the 1995 rules, but the 2001 rules, copies of which, as stated above, were attached to each one of the appellants' letters of appointment as Appendix A.

[74] The explanatory note on the front page of the 2001 rules reflected that these rules replaced, amongst other things, the 'rules of CUT Council as resoluted (sic) by the CUT Council on 16 September 1996 …*'*[48]*.* It is clear that this was reference to rule 64(1) which was 'added' to the 1995 rules on 16 September 1996[49] and whereby a retrenchment policy, very similar to the policy under debate, was introduced. Therefore, the 2001 rules did not just effectively replace the 1995 rules, as the CUT suggested,[50] but they actually and expressly did so. It is noted that the 2001 rules made no provision for a retrenchment policy of the CUT providing a formula for the calculation of severance

[45] See Annexure J (Record of Proceedings) at p. 276-299 and Answering affidavit at paras 126-128 at 355 of the indexed papers.
[46] See Replying affidavit, at para 51 at 393 of the indexed papers.
[47] 1st appellant appointed on 1/11/01; 2nd and 3rd appellants (1/12/01) and 4th appellant (1/10/03).
[48] Indexed papers at 276.
[49] Indexed papers at 65.
[50] See Answering affidavit, para 126 at 355 of the indexed papers.

packages. Hence this would have to be calculated in terms of the relevant provisions of the BCEA,[51] which prescribed that an employee dismissed for operational requirements must be paid severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer.

Whether the retrenchment benefits envisaged in the 1995 rules and the 1996 collective agreement applied to the appellants

[75] The appellants conceded that the 1996 collective agreement did not apply to them since, given the executive management positions they held, they did not fall in the categories of employees referred to in the said agreement. Further, they were not part of the bargaining unit represented by NUTESA during the conclusion of the 1996 collective agreement. However, they contended that the institutional rules had the status of the CUT's institutional statute and that for this reason rule 64(1), in particular, was applicable to them as well. I am unable to comprehend this contention since rule 64(1) – in the same way as the 1996 collective agreement – expressly stipulated the categories of employees who qualified for the entitlement under this rule; and the appellants were excluded. Therefore, it is inconceivable to fathom on what basis the appellants relied on the provisions of rule 64 (1) of the 1995 rules[52] in seeking to prove their case.

[76] Significantly, whilst in terms of rule 64(1) of the 1995 rules provision was made for a retrenchment policy (which incorporated the payment formula of severance packages in the event of involuntary retrenchment) no such provision was made in the 2001 rules to which the appellants' appointments were subject. It cannot be said that this omission was accidental but, in my view, it was clearly intended. Nor was there any provision made, in relation to retrenchment policy, in the institutional statute issued by the Council on 4 June 1999 (the 1999

[51] Section 41(2) of the Basic Conditions of Employment Act 75 of 1997.
[52] See Founding affidavit, para 16.9 at 13 of the indexed papers.

statute).[53] The rules of statutory interpretation generally do not allow the insertion or addition into any legislative instrument what has been omitted therein, a *casus omissus*, for it is the function and mandate of the responsible legislative authority concerned to do so, unless without such insertion or addition the legislative instrument becomes meaningless or results in absurdity.[54] In this regard, Kellaway[55] makes the following submission, with which I respectfully agree:

> 'Although the omission of certain words in a provision in an amending statute, which were there before, may well appear to be an oversight, a court should *not*, it is submitted, construe the provision as if the words were still there, particularly if the inclusion would clearly conflict with the intention or purpose of the amending Act.'

[77] The only provision in the 1999 statute that is somewhat relevant for the present purpose is section 76 thereof, with the heading *'*Conditions of service, service benefits, and leave privileges of employees*'* which reads as follows:

> 'The conditions of service of terms or employment (sic) of CUT employees relating to hours of work, leave privilege, holidays, benefits, allowances, grievances, achievement,, performance appraisal, termination of service, promotion, working conditions and others <u>are as determined by the council, subject to the applicable labour law</u>.'[56] (Underlined for emphasis)

[78] In my view, section 76 of the 1999 statute, above, simply lends emphasis to the overriding role of the Council as the structure with the sole power to determine and approve any policy relating to governance matters of the CUT. Notably, nothing in section 76 purports to deal with

[53] See Annexure E, at pages 189-227 of the indexed papers.
[54] See *Union Government (Minister of Mines) v Thompson* 1919 AD 404 at 425; *Osaka Mercantile Steamship Co Ltd v South African Railways and Harbours* 1938 AD 146 at 180; *Walker v Carlton Hotels (SA) Ltd* 1946 AD 321 at 330; *Minister van Waterwese v Von During* 1971 (1) SA 858 (A) at 876E-F*; Joint Liquidators of Glen Anil Development Corporation Ltd (in Liquidation) v Hill Samuel (SA) Ltd* 1982 (1) SA 103 (A) at 112F-G; *Stafford v Special Investigating Unit* 1999 (2) SA 130 (E) at 140F-I.
[55] Kellaway, *Principles of Legal Interpretation: Statutes, Contracts and Wills,* at 144.
[56] Section 76 of the 1999 statute, at 224 of the indexed papers.

the issue of delegation of any power to the vice-chancellor. Therefore this section does not, in any way, assist the appellants in their claim.

Whether there was inconsistency in the CUT's conduct to the extent that previously certain retrenched employees were preferentially treated

[79] It was submitted that the CUT had previously applied the impugned policy when it paid out severance packages to some of its employees and examples, which were relied upon in this regard are briefly discussed hereunder. I am satisfied that reasonable explanations were furnished by the CUT in respect of those instances. I now refer to these cases hereunder.

[80] Prof Gerhard Hechter, the CUT's former vice rector, was retrenched on 31 December 2003 which was prior to the alleged approval of the impugned policy on 1 November 2004. He had 10 years of service with the CUT. According to the CUT (through the affidavit of Prof Mthembu), whilst the CUT acknowledged that Prof Hechter was paid severance package on the equivalent basis as formulated in the 1996 collective agreement, his case was different because it was considered on its merits by the Council which then gave its approval for the payment to be made accordingly. The appellants might have to prove that Prof Hechter's severance package was determined and paid out without the Council's express approval but only with the delegated approval of the Vice-Chancellor, which is essentially what they claim should happen to their cases. They have not done so.

[81] It is common cause that Messrs MS Thateng and D Martin were formerly employed by the CUT as general assistant and senior committee officer, respectively. They were both retrenched during or about 2006. Whilst the CUT admitted that their severance packages were calculated in terms of the impugned policy, it is to be borne in mind that these were, after all, employees falling within the categories of employees referred to in the 1996 collective agreement, the terms of which were essentially the same as the impugned policy. Clearly,

therefore, it would make no difference in their cases whether the calculation of their severance packages was labelled as done in terms of the 1996 collective agreement or the impugned policy, as the outcome, in either way, would have been precisely the same. The appellants confirmed that the 1996 collective agreement "was still valid and binding".[57] Therefore, on the appellants' own version, these employees would, in any event, have qualified for calculation and payment of their severance packages in terms of the 1996 collective agreement.

[82] Indeed, it is also common cause that Messrs SM van Wyk, HSM Jacobs and MH Benson were employed in the food services division of the CUT and were retrenched on 31 December 2002, which was also prior to the alleged coming into effect of the impugned policy. They were paid severance packages in terms of the collective agreement as they belonged to the category of employees referred to therein.

[83] It is also to be recalled that the CUT did not shy away from the fact that prior to the detection of its impropriety and invalidity, the impugned policy was applied in certain instances. However, save for Prof Hechter, those were instances which would, in any event, have qualified under the 1996 collective agreement, as illustrated above.

[84] Hence, I find no substance in the appellants' claim that past practices demonstrated that the CUT treated certain retrenched employees preferentially.

[85] I agree with the Court *a quo* that the decision in *Oudekraal Estates,* above, was no authority for the proposition that every unlawful and invalid administrative act remained binding until such time that it was set aside in judicial proceedings. However, given the reasons that I have furnished already justifying the dismissal of this appeal, it seems to me unnecessary to elaborate further on this point.

[57] See Founding affidavit, at para 16.10, at 13 of the indexed papers.

Findings

[86] I am satisfied, on the facts of this case, that the following findings are justified:

1. The approval of the impugned policy was an integral part of the CUT's governance function which, in terms of section 27(1) of the Act, was exclusively assigned to the Council.

2. The impugned policy was never authorised or approved by the Council.

3. The then principal and vice-chancellor, Prof Koorts, did not have the authority and the power to adopt or approve the impugned policy.

4. In any event, there was no evidence that Prof Koorts did, as a matter of fact, purport to adopt or approve the impugned policy.

5. In terms of section 27(1) of the Act the Council had the duty to govern the CUT and, in terms of section 217(1) of the Constitution, the Council was to do so in a manner which was fair, equitable, transparent and cost-effective. In the present context, this obligation also meant ensuring that public funds appropriated by Parliament for the purpose of promoting and advancing public higher education, was expended responsibly and cost-effectively.

6. The CUT was justified in its decision to reject the impugned policy as being null and void *ab initio*.

7. In the circumstances, there was no need for the CUT to have consulted with the appellants before formally taking its decision to reject the impugned policy.

[87] In the circumstances the appeal must fail. There is no reason, in my view, why the costs should not follow the result, including the costs of the employment of two counsel. I also see no reason to grant costs jointly and severally.

Order

[88] In the result I make the following order:

The appeal is dismissed with costs including the costs of the employment of two counsel.

_____

NDLOVU, JA

Judge of the Labour Appeal Court

I agree

_____

WAGLAY, DJP

Deputy Judge President of the Labour Appeal Court

I agree

_____

MOLEMELA, AJA

Acting Judge of the Labour Appeal Court

Appearances:

For the Appellants	:	Adv KJ Kemp SC, with him Adv S Grobler
Instructed by	:	Horn & Van Rensburg Attorneys, Bloemfontein
For the Respondent	:	Adv L Halgryn SC, with him Adv L Malan
Instructed by	:	Lovius Block Attorneys, Bloemfontein