IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA70/16

In the matter between:

THE MINISTER OF HIGHER EDUCATION

AND TRAINING **First Appellant**

THE NATIONAL SKILLS FUND **Second Appellant**

and

BUSINESS UNITY SOUTH AFRICA **First Respondent**

NATIONAL SKILLS AUTHORITY **Second Respondent**

Heard: **31 May 2017**

Delivered: **01 November 2017**

Summary: Regulations 3(12) and 4(4) of the Sector Education and Training Authorities (SETAs) Grant Regulations Regarding Monies Received by a SETA and Related Matters promulgated in terms of s 36 of the Skills Development Act, 97 of 1998 – Business Unity South Africa contending that Minister never consulted with National Skill Authority in terms of section 36 of the SDA – Issue for determination is whether in making and promulgating the 2012 Grant Regulations the Minister complied with his obligation to consult the National Skill Authority – Minister consulting with three members of the Authority in different fora – Held that the requirements to be met by the Minister before promulgating the Regulations are unambiguously set out in the SDA. The Statutorily created Authority, which the Minister is required to consult before

he makes and promulgates the Grant Regulations, should not be obfuscated with the constituencies from which its members are elected. Further that the Authority is a separate legal person and distinct statutory body from NEDLAC. The Authority cannot be substituted with discussions at NEDLAC, a different body established in terms of the National Economic Development and Labour Council Act, 34 of 1994, which serves a different purpose to that of the Authority. Neither can consultation in NEDLAC be used to usurp the statutory function of the Authority. To hold otherwise would render the SDA nugatory. Labour Court's judgment upheld – appeal dismissed with costs.

Coram: Tlaletsi AJP, Kathree-Setiloane AJA and Phatshoane AJA

JUDGMENT

PHATSHOANE AJA

[1] This is an appeal by the Minister of Higher Education and Training ("the Minister") and the National Skills Fund ("the Fund"), the first and second appellants, against parts of the judgment and order of the Labour Court (Coetzee AJ) dated 07 August 2015 in which he declared invalid and set aside Regulations 3(12) and 4(4) of the Sector Education and Training Authorities (SETAs) Grant Regulations Regarding Monies Received by a SETA and Related Matters promulgated in terms of s 36 of the Skills Development Act, 97 of 1998 ("SDA"), in Government Notice R.990 of 03 December 2012 ("the 2012 Grant Regulations").

[2] The appeal is with leave of the Court *a quo*. In granting leave the Labour Court confined it to its finding in respect of Regulation 3(12) and 4(4) of the 2012 Grant Regulations. However, the present appeal concerns the review and the setting aside of Regulation 3(12) styled in this litigation: "the sweeping mechanism." On 13 January 2016 the Minister published Government Notice. 239592 in which he, after consultation with the Skills Development Authority ("the Authority"), the second respondent, re-promulgated Regulation 4(4),[1]

[1] See GN 23 in *GG* 39592 of 13 January 2016.

which effectively rendered emasculate argument on the rationality or reasonableness of Regulation 4(4).

[4] There is also before us a prolix application to reinstate the lapsed appeal; the condonation of the late filing of the record of the appeal and heads of argument by the appellants. The principles applicable to applications for condonation are well known. Factors which are generally taken into account are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case.[2]

[5] Leave to appeal was granted on 15 September 2015. Thereafter the parties agreed on a timetable for the future conduct of the matter. In terms of this timetable the appellants had to file the record and their heads of argument on 12 and 23 November 2015, respectively.

[6] In terms of Rule 5(17) of the Rules Regulating the Conduct of Proceedings in this Court[3] if an appellant fails to lodge the record within the prescribed period he/she will be deemed to have withdrawn the appeal. The appellants failed to file the record on the agreed date and the further extended date of 18 November 2015. Consequently, the appeal lapsed.

[7] In his explanation of the delay, the appellants' deponent, Mr Reginald Shabangu, an Assistant State Attorney, says that Business Unity South Africa's (BUSA's) attorneys of record, Bowman Gilfillan, brought it to his attention on 04 November 2015 that the index to the record, as received from the transcription service, did not reflect a number of documents. On 17 November 2016 Bowman Gilfillan granted an indulgence to the State Attorney to file the record on 18 November 2015 and that the heads of argument be filed on 23 November 2015. As already alluded to, the appellants defaulted. On 26 November 2015 Bowman Gilfillan informed the State attorney that the appeal was deemed to have been withdrawn. On 03 December 2015 the compilation of the record was completed. Upon enquiring on the whereabouts of the record, the State Attorney was informed on 15 December 2015 that the

[2] *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A).
[3] Published under GN 1666 in *GG* 17495 of 14 October 1996.

record was dispatched to iAfrica Transcription Services in Johannesburg. What turned out to be an incomplete record was collected by the State Attorney from the Labour Court on 23 December 2015 and filed in January 2016.

[8] Apparent from the founding affidavit is that the matter had been handled by few of the employees of the Office of the State Attorney who left its service. At some stage, on Mr Shabangu's own admission, "the matter lay fallow within the office of the department for a few months". On 07 March 2016 the officials of the State Attorney directed an e-mail to their erstwhile counsel to approach the Court for the reinstatement of the appeal. A barrage of e-mails was exchanged between the officials of the State Attorney with regard to the unavailability of counsel to settle the papers.

[9] On 20 April 2016 the present counsel was briefed. He informed the State Attorney that he needed to be afforded an opportunity to peruse the bulky record. The application for reinstatement was finalised on 06 May 2016. Before the founding affidavit in respect of the application to reinstate the appeal was filed it emerged that the filed record was incomplete. A flurry of e-mails between the transcription services, the State Attorney and counsel, regarding the filing of the record, was exchanged. The application to reinstate the appeal was eventually lodged on 08 August 2016, almost 09 months after the agreed date.

[10] It is so that the parties initially agreed that the appeal be disposed of on an expedited basis. The delay in prosecuting the appeal is extremely substantial and founders in the face of that agreement. The explanation proffered for the delay is completely unacceptable with various intervening periods left unexplained. It is no excuse, as the State Attorney sought to argue, that its office was understaffed and snowed under a workload.

[11] Mr Franklin SC, for BUSA, the first respondent, contended that the Minister's prospects of success were fatally diminished by the fact that his right of appeal has been perempted in that he separately, after the appeal had lapsed, purported to comply with the terms of the order of the Court *a quo* in

one respect, by introducing a fresh Regulation to substitute Regulation 4(4), one of the impugned Regulations. The doctrine of peremption was eloquently reaffirmed as follows in *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration and Others*:[4]

> '[26] Peremption is a waiver of one's constitutional right to appeal in a way that leaves no shred of reasonable doubt about the losing party's self-resignation to the unfavourable order that could otherwise be appealed against. *Dabner* [*Dabner v SA Railways & Harbours* 1920 AD 583] articulates principles that govern peremption very well in these terms:
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> 'The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the *onus* of establishing that position is upon the party alleging it.'
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> The onus to establish peremption would be discharged only when the conduct or communication relied on does 'point indubitably and necessarily to the conclusion' that there has been an abandonment of the right to appeal and a resignation to the unfavourable judgment or order.'

[12] I am not swayed that this is a case where it could be said that the appellants unequivocally acquiesced in the judgment of the Court *a quo* and later on decided to appeal. In my view, as I shall demonstrate, the prospects of success are weak for other reasons.

[13] Undoubtedly, the matter is important to the parties and to a wide range of other stakeholders. The parties were *ad idem*, when they approached the Judge President on 23 September 2015 in terms of Rule 5(22),[5] that "*the matter has very significant implications for the system under which workplace skills development is funded in the country, and is of major significance to*

[4] (2017) 38 ILJ 97 (CC) at 109-110 para 26.
[5] Rule 5(22) provides that: "A party may on notice to all other parties apply orally or in writing to the Judge President for an appeal to be heard urgently. If the application is successful, the Judge President must give directions as to the future conduct of the appeal.

employers, employees, SETAs, and related stakeholders." In my view, in a matter such as the present, the overriding consideration should be the question of public interest, the interest of justice, and the importance of the need for legal certainty on the questions of law raised. These interests warrant consideration of the merits of the appeal by this Court. It is on this basis that the application for the reinstatement of the appeal and condonation for the late lodging of the record of the appeal should succeed.

The statutory framework

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

[15] Section 9 of the SDA establishes the SETAs each of which is aimed at training and skills development in a specific national economic sector: for example construction, education, etc.[6] In terms of s14 of the SDA 80% of the skills development levies, interest and penalties collected in respect of the SETAs, through the compulsory levy scheme, must be paid to the SETAs. The remaining 20% of the levies, interest and penalties collected in respect of every SETA must, in terms of s27 of the SDA, be paid to the Fund.

[16] In terms of the SETAs Grant Regulations Regarding Monies Received by a SETA and related matters as published in Government Notice R.713 of 18 July 2005, as amended by GN R.88 of 02 February 2007 ("the 2005 Grant Regulations"),[7] an employer who paid skills development levies could claim 50% of those levies back in the form of a mandatory grant if it complied with the eligibility criteria.

[6] The functions of the SETAs are set out in s10 of the SDA.
[7] Record: Vol 2, annexure NM5 to the Founding Affidavit, at 121-136.

[17] The 2005 Grant Regulations were repealed by the 2012 Grant Regulations.[8] It is the 2012 Grant Regulations that formed the subject matter of the review application before the Labour Court.

[18] Regulation 4(4) of the 2012 Grant Regulation reduced the mandatory grant that an employer could claim back from 50% to 20% of the total levies paid by the employer. It provides as follows:

> '20% of the total levies paid by the employer in terms of s 3(1) read with section 6 of the Skills Development Levies Act during each financial year will be paid to the employer who submits a [Workplace Skills Plan] and [Annual Training Report] as a mandatory grant.'[9]

[19] The 2012 Grant Regulations also introduced "the sweeping mechanism" as follows:

19.1 Regulation 3(11) provides that:

> '(11) At the end of each financial year it is expected that a SETA must have spent or committed (through actual contractual obligations) at least 95% of discretionary funds available to it by the 31 March of each year and a maximum of 5% of uncommitted funds may be carried over to the next financial year.'

19.2 Regulation 3(12) provides that:

> '(12) The remaining surplus of discretionary funds must be paid by the SETA by 1 October of each year into the National Skills Fund (NSF).'

[20] The upshot is that if a SETA has not spent at least 95 % of its discretionary funds, the surplus will be "swept" into the Fund on 01 October of each year. This sweeping mechanism is a completely new concept which was not contained in the 2005 Grant Regulations.

<u>A synopsis of the salient chronology of events</u>

[8] Section 10 of the 2012 Grant Regulations repealed "The Sector Education and Training Authorities (SETAs) Grant Regulations regarding monies received by a SETA and related matters, published in Government Notice R713 in *Government Gazette* 27801 of 18 July 2005, as amended by Government Notice R88 and published in *Government Gazette* 29584 of 02 February 2007.
[9] Regulation 4(4) of the 2012 Grant Regulations.

[21] The engagement between the Minister and the Authority concerning the introduction of the new Grant Regulations commenced at a joint workshop between their representatives held on 17 and 18 November 2011. During the workshop the Department of Higher Education and Training (DHET) ("the department") representatives proposed, *inter alia*, that the mandatory grant in the 2005 Grant Regulations be reduced from 50% to 40 % of the total levies paid by the employer. The department's representatives also distributed a draft of the proposed Grant Regulations. The minutes of the workshop recorded that the draft Regulations would be submitted to the Minister for his consideration; issued for public comment for a period of 21 days; and presented to the Authority after the public comment process.

[22] On 12 January 2012 the Minister published a set of draft Regulations ("the draft Regulations") and invited public comment within 21 days. They differed in material respects from the 2012 Grant Regulations as finally promulgated; in particular, they did not contain the sweeping mechanism provision in Regulation 3(12); and provided for a reduction in mandatory grants from 50% of the total levies paid by an employer to 40% (not 20%).

[23] The draft Regulations were discussed at a meeting of the Authority on 06 February 2012. At a special meeting of the Authority held on 17 February 2012, on the table of inputs and recommendations, business and the SETAs made representations that the mandatory grant should remain at 50%. Labour did not comment on the percentage allocation of mandatory grants in the draft Regulations.

[24] In March 2012 a Ministerial Task Team (subcommittee on planning and delivery) circulated the final report[10] recommending that the 2005 Grant Regulations be changed, *inter alia*, to make provision for the mandatory grant to be reduced from 50% to 20% of the total levies paid by the employer.[11]

[25] On 18 April 2012 the department made a presentation to the National Economic Development and Labour Council ("NEDLAC") persisting that the

[10] Record: Vol 3, annexure NM15 to the Founding Affidavit, p 289- 329.
[11] Record: Vol 4, annexure NM16 to the Founding Affidavit, p 330- 346, slide 7(336).

mandatory grant be reduced to 40% as opposed to 20%, as reflected in the draft Regulations. Instead of the sweeping mechanism, which would transfer unclaimed funds into the Fund, the presentation proposed that unclaimed mandatory grants be transferred into the Pivotal Grant.[12]

[26] A sub-committee of the Authority reported to the Authority on 15 May 2012 that the draft Regulations had been tabled for discussion at NEDLAC on 18 April 2012. Other meetings of the Authority were subsequently held during 2012 but the proposal by the Ministerial Task Team that the mandatory grant be reduced from 50% to 20% was not raised for discussion. Its report had not been provided to the Authority and the Minister did not consult the Authority on the proposal.

[27] The Minister signed the 2012 Grant Regulations on 15 November 2012 on the strength of a memorandum prepared by the department to the Minister on 06 November 2012. BUSA and the Authority were not aware that the Minister signed the 2012 Grant Regulations.

[28] On 28 November 2012, before the promulgation of the 2012 Grant Regulations, the department held an information sharing meeting concerning the draft Regulations with representatives of various social partners represented in NEDLAC which included BUSA. At this meeting the Director-General of Higher Education and Training, for the first time, referred to the proposal that the mandatory grant be reduced to 20%. He also highlighted the introduction of the sweeping mechanism. At that stage the 2012 Grant Regulations had already been finalised and signed by the Minister some two weeks earlier, on 15 November 2012.

[29] There is a dispute of fact on whether the meeting referred to in the preceding paragraph proceeded on the basis that the Regulations had not been finalised and that the department was willing to consider further submissions on the draft Regulations. According to BUSA the Director-General professed to invite discussions on the draft Regulations. Ms Stella Carthy, one of BUSA's

[12] PIVOTAL Grants are described in the Minister's answering affidavit as (Professional, Vocational, technical, and Academic learning) Grants.

representatives at this meeting, took contemporaneous notes which reflected that the Director-General "*invited members to forward comments in writing by 14 December 2012 on the revised draft SETA Grant Regulations which were distributed at the meeting*". According to the Minister the discussions centred on what was contained in the final set of the 2012 Grant Regulations which he was likely to approve and promulgate in the next few days. The implications and measures for the implementation of those Regulations were also scrutinised.

[30] At the strategic planning meeting of the Authority held on 29 and 30 November 2012 a revised set of draft Grant Regulations was presented. These incorporated the impugned Regulation 4(4) and 3(12) which were placed before the Authority for the first time. The Authority had not yet been informed that these were the final set of the 2012 Grant Regulations which had been signed by the Minister. These Regulations were published in the Government Gazette on 03 December 2012 and came into effect on 01 April 2013.

BUSA's contention on review before the Court *a quo*

[31] BUSA advanced two review grounds as follows:

31.1 The first ground is predicated on the process that was followed leading to the promulgation of the 2012 Grant Regulations. BUSA contended that the Minister failed to consult with the Authority as required in terms of s 36 of the SDA before he made the 2012 Grant Regulations. This irregularity, it was argued, vitiated the 2012 Grant Regulations in their entirety.

31.2 The second ground is premised on the substance of the 2012 Grant Regulations. BUSA argued that Regulation 3(12) was reviewable in light of its content as the introduction of the sweeping mechanism was irrational and unreasonable. It further contended that the sweeping mechanism was *ultra vires* the SDA.

The Judgment of the Court *a quo*

[32] On the failure to consult, the Court *a quo* held that:

32.1 The argument that there had been substantial compliance with the requirement to consult as contemplated in s36 of the SDA was unconvincing. The obligation to consult was statutory and the function of the Authority was to advise the Minister. It further held that it was insufficient to consult NEDLAC, the individual representatives of the Authority, or a proxy to advise the Minister. The Authority is a separate legal *persona* distinct from NEDLAC. The constituent membership of the Authority was much broader than that of NEDLAC. The latter had three main constituencies, notably; business, labour and government whereas the Authority was more broadly constituted and included subject-matter experts. Apart from organised labour and business the Authority included representatives appointed to represent: community and development interest; the interest of the State and those of education; and skills development providers. Only three of the individuals on the Authority out of the 30 representatives were part of the consultation process in NEDLAC.

32.2 The appellants' argument that the Authority could never have formulated a unified view because it could not reach consensus is unsubstantiated and mere conjecture because the Minister had not sought the Authority's advice. The Authority must formulate its advice to the Minister on the Regulations with a two-thirds vote of members which was attainable for a unified point of view. The Minister was required to have regard to the position of the Authority even if it was to provide the Minister with a divided view.

32.3 The Minister had failed to consult the Authority on the two impugned Regulations, a factor which renders the Regulations reviewable.

[33] Concerning the sweeping provision (Regulation 3(12)) the Court *a quo* held that it was not rationally connected to the purpose for which it was taken or to the information before the Minister and was so unreasonable that "no reasonable person could have exercised the power or performed that

function." The scheme devised by Regulation 3(12) that the SETAs spend or commit at least 95% of their discretionary funds by 31 March of each year was irrational in that the Ministerial Task Team had already found that the SETAs were unable to deal adequately with the funds. This was likely to result in substantial unspent discretionary grant funds at the end of the financial year which will then be swept into the Fund.

[34] The Court further found that the sweeping mechanism was *ultra vires* because on the one hand s14(3) of the SDA provides that the monies received by a SETA may be used only in a prescribed manner and in accordance with any prescribed standards to "fund the performance of its function; and pay for its administration within the prescribed limits" but on the other, Regulation 3(12), required the SETAs to pay the surplus money to the Fund. This was not the purpose authorised by s 14(3) of the SDA. The Minister had no competence in law to require the SETA to use the money for an unauthorised purpose.

[35] Section 27(2) of the SDA provides that the Fund must be credited with (a) 20% of the skills development levies, interest and penalties collected in respect of every SETA:

> '(c) money appropriated by parliament for the Fund;
>
> (f) money received from any other source.'

[36] The Court *a quo* held that Parliament provided that the Fund be credited with 20% of the Skills Development Levies while remaining 80% would be allocated to the SETA. The sweeping mechanism has the effect that the Fund may receive more than 20% of the Skills Development Levies allocated to it by s27(2). The money received from "*any other source*" cannot be money received from the SETAs as they receive their allocation in terms of the SDA and no provision is made in the SDA or any other legislation to transfer part thereof to the Fund. Only parliament has the power to appropriate more funds to the Fund and it is not competent for the Minister, as a delegated lawmaker, to do so by Regulation.

[37] As already alluded to, the Court *a quo* declared invalid and set aside Regulations 3(12) and 4(4) of the 2012 Grant Regulations. The order was suspended until 31 March 2016 to afford the Minister the opportunity to correct the impugned Regulations.

The grounds of appeal

[38] As their ground of appeal to this Court the appellants contended that the Court *a quo* erred:

38.1 in finding that there was no substantial compliance with the requirements relating to consultation with the Authority;

38.2 in failing to find that the circumstances were such that there was no coherent position adopted or capable of being adopted by the Authority and that the consultation with the individual constituent members of the Authority, including BUSA, constituted adequate consultation;

38.3 in finding that Regulation 3(12), the sweeping mechanism, was not rationally connected to the purpose for which it was taken or to the information before the Minister and that it is so unreasonable that no reasonable functionary could have exercised the power or perform the function;

38.4 in finding that Regulation 3(12) is *ultra vires* ss14(3) and 27(2) of the SDA.

The evaluation

[39] The crux of this appeal is whether in making and promulgating the 2012 Grant Regulations the Minister complied with his obligation to consult the Authority as contemplated in s36 of the SDA. The second issue is whether the sweeping mechanism, Regulation 3(12) was rationally connected to the purpose for which it was taken or to the information before the Minister. Lastly, it should also be determined whether the said Regulation is *ultra vires* the provisions of s 14(3) and 27(2) of the SDA.

The requirement of consultation:

[40] It is important to commence this enquiry with reference to few authorities on the meaning of the word "*consultation*" as referred to in various statutory provisions. In *Hayes v Minister of Housing, Planning and Administration, Western Cape,*[13] the Court considered the meaning of "*consultation*" within the context of s44(2) of the Land Use Planning Ordinance, 15 of 1985, which required the Minister of Housing, Planning and Administration to determine an appeal "after consultation with the council concerned." Having referred to the definition of the word in various dictionaries, the South African and English authorities on the subject, the Court pronounced that:

> 'In ordinary legal parlance, a consultation would usually be understood as a meeting or conference at which discussions take place, ideas are exchanged and advice or guidance is sought or tendered. The parties or their representatives could be physically present at such meeting or conference, but not necessarily so. In these times of advanced communications technology, persons or parties can consult with one another in a variety of ways, such as by fax or e-mail or, in a somewhat less sophisticated way, by correspondence. Circumstances will dictate in what form the consultation should take place. As long as the lines of communication are open and the parties are afforded a reasonable opportunity to put their cases or points of view to one another, the form of consultation will usually not be of great import.'

[41] In *Scalabrini Centre and Others v Minister of Home Affairs and Others,*[14] the Court lucidly dealt with the requirement of consultation as follows:

> '[72] …First, a substantive level consultation entails a genuine invitation to give advice and a genuine receipt of that advice (see *R v Secretary of State for Social Services, Ex parte Association of Metropolitan Authorities* [1986] 1 WLR 1 (QB) ([1986] 1 All ER 164) at 167*g – h* (All ER) G *Hayes and Another v Minister of Housing, Planning and Administration, Western Cape, and Others* 1999 (4) SA 1229 (C) at 1242C – F). Consultation is not to be treated perfunctorily or as a mere formality (*Port Louis Corporation v Attorney-*

[13] 1999 (4) SA 1229 (C) at 1242-1243.
[14] 2013 (3) SA 531 (WCC) at para 72 at 553F-J.

> *General of Mauritius* [1965] AC 1111 (PC) at 1124*d* – *f*). This means, *inter alia*, that engagement after the decision-maker has already reached his decision or once his mind has already become 'unduly fixed' is not compatible with true consultation (*Sinfield v London Transport Executive* [1970] 2 All ER 264 (CA) at 269*c* – *e*). Secondly, at the procedural level, consultation may be conducted in any appropriate way determined by the decision-maker, unless a procedure is laid down in the legislation. However, the procedure must be one which enables consultation in the substantive sense to occur. This means that sufficient information must be supplied to the consulted party to enable it to tender helpful advice; sufficient time must be given to the consulted party to enable it to provide such advice; and sufficient time must be available to allow the advice to be considered (*Association of Metropolitan Authorities* supra at 167*h* – *j*; *Hayes* supra at 1242C – 1243B).'

[42] More pertinently, *R v Secretary of State for Social Services, Ex parte Association of Metropolitan Authorities*,[15] concerned judicial review where the Association of Metropolitan Authorities applied to quash the Housing Benefits Amendment (No 4) Regulations 1984, SI 1984/1965, made by the Secretary of State for Social Services on the ground that the Secretary failed to consult the applicant association properly or at all with regard to the making of the regulations before making them. In that case the Court pronounced:

> 'There is no general principle to be extracted from the case law as to what kind or amount of consultation is required before delegated legislation, of which consultation is a precondition, can validly be made. But in any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party. Sufficient, in that context, does not mean ample, but at least enough to enable the relevant purpose to be fulfilled. By helpful advice, in this context, I mean sufficiently informed and considered information or advice about aspects of the form or substance of

[15] [1986] 1 All ER 164 at 167.

the proposals, or their implications for the consulted party, being aspects material to the implementation of the proposal as to which the Secretary of State might not be fully informed or advised and as to which the party consulted might have relevant information or advice to offer.'

[43] Section 4 of the SDA establishes the Authority while s6(1)(2) provides for its composition as follows:

'(1) The National Skills Authority consists of-

(a) a voting chairperson appointed by the Minister;

(b) 4 voting and six non-voting members appointed by the Minister; and

(c) its non-voting executive officer appointed in terms of section 8 (2) *(a)*.

(2) The members referred to in subsection (1) *(b)* are-

(a) five voting members nominated by NEDLAC and appointed by the Minister to represent organised labour;

(b) five voting members nominated by NEDLAC and appointed by the Minister to represent organised business;

(c) five voting members nominated by NEDLAC and appointed by the Minister to represent organisations of community and development interests, which must include-

(i) a woman who represents the interests of women;

(ii) a person who represents the interests of the youth; and

(iii) a disabled person who represents the interests of people with disabilities;

(d) five voting members appointed by the Minister to represent the interests of the State;

(e) four voting members appointed by the Minister to represent the interests of education and skills development providers;

*(e*A*)* two non-voting members, who have expertise in skills development, appointed by the Minister after consultation with the National Skills Authority;

(f) two non-voting members, who have expertise in the provision of employment services, appointed by the Minister;

(g) a non-voting member nominated by the South African Qualifications Authority and appointed by the Minister; and

(h) a non-voting member nominated by the QCTO and appointed by the Minister.'

[44] In terms of s5(1)(i)-(v) of the SDA the Authority must advise the Minister on, amongst others, national skills development policy, strategy and Regulation to be made. This should be read in conjunction with s7(5) which provides that a supporting vote of at least two-thirds of the Authority's members is required for purposes of advising the Minister on the Regulations to be made. In terms of s36 of the SDA the Minister may, after consultation with the Authority, by notice in the *Gazette*, make Regulations in respect of the number of issues listed in s36, *inter alia*, any procedure, period, criterion or standard for SETAs to perform any function in terms of s10 (1); on categories and amounts of grants that may be allocated in terms of s10 (1) *(b)* (iii); on the criteria or conditions that may be attached to grants allocated in terms of s10 (1) *(b)* (iii) and so forth.

[45] The general drift of Mr Hulley SC's argument, for the appellants, is that the Minister substantially complied with the requirement to consult because he considered the views of certain of the Authority's constituent members separately and in different *fora*. He argued that, while there may not have been consultation with the Authority, its member's views were considered during the consultation process in NEDLAC. There was therefore substantial compliance with the obligation to consult in terms of the SDA.

[46] In his answering affidavit the Minister says that the individuals who represented each constituency in the Authority were to a significant degree the same individuals as those that represented that same constituency in

NEDLAC. He mentioned Ms Bev Jack, whom he says was the leader of the organised business constituency on the Authority and one of its deputy chairpersons. He also referred to Ms Janet Lopes, another BUSA's representative on the Authority. As he puts it "*BUSA's delegates would act in concert and simply articulate and promote a particular united, coherent mandate they had received from their organisation and affiliates/members*". He further says that the labour constituency was represented by Mr Babhali ka Mamphikela Nhlapo. Clearly, only three members of the 30 members of Authority were part of the consultation process in the Labour Market Chamber of NEDLAC.

[47] According to the Minister there was also an overlap in relation to some members of the State's delegation to the Authority and the NEDLAC Task Team. He went on to explain that the participants from each of the constituencies, business, labour, and government were at all times actively involved in the different structures. This, he says, gave them the opportunity to engage at great length and in depth with each other. In any event, he intimated, the constituent bodies represented in the Authority were also represented in NEDLAC, where the matter was debated in detail in the presence and with the participation of the department officials.

[48] The Minister further explained that he could not consult with the Authority because of the disagreements between business and labour constituency which were manifest in two NEDLAC task team meetings held on 18 April and 02 May 2012. He expatiated:

> '261. In the April meeting, labour constituency raised the proposal that the mandatory grant allocation to employers be reduced from 50% to 20%. They raised serious concerns about the inadequacies and the effectiveness of much of the training provided by employers using this allocation, and the dire need for better skills provision through more formal education and training using learnership, scholarship and the like through universities, FET colleges etc.
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> 262. The labour constituency also proposed a sweeping mechanism for major portion of funds unspent by the SETAs to be transferred to the NSF

(the Fund). It raised arguments about the under-utilization of significant amounts, which exacerbated the ineffectiveness of the skills levy system and the problems with urgently needed education and training.

263. At this meeting in April 2012, BUSA delegates argued against the labour delegation's proposal and contentions. They argued for retention of 50 % allocation system (which at that stage applied, under the 2005 Regulations). They were opposed to any reduction, even 40%.

265. The next meeting of NEDLAC Task Team was held on 02 May 2012. BUSA's delegates indicated that they might be willing to move to the level of 40% for the mandatory grant to employers, which had been the original proposal from DHET (Department of Higher Education and Training). The labour delegation were opposed to this, and moved their demand to a greater reduction, to the 10% level. BUSA's delegates stated that they could not move below 40 % without further mandate.

267. Subsequently, the business and labour constituencies did not reach consensus. Their respective positions were taken into account both by the DHET's officials, including those who sat on the Departmental Task Team, and by me when I took the decision to promulgate the 2012 Regulations.

268. Ultimately, the arguments raised by labour were found to be compelling both in relation to the 20% mandatory grant allocation to employers and the sweeping mechanism.'

[49] On the Minister's own version, it was unrealistic and artificial for BUSA to argue that he should have obtained the advice of or consulted with the Authority before making and promulgating the 2012 Grant Regulations. He says that the parties had reached a stalemate on the mandatory allocation to the employers and the sweeping mechanism in NEDLAC and had exhausted the process for meaningful consultation. In the Minister's view, nothing of any consequence turns on the fact that the impasse had been reached in the deliberations of the NEDLAC's Task Team and not those of the Authority. His argument is that it is artificial to suggest that the Authority could adopt a consensus view to formulate and convey to him.

[50] The requirements to be met by the Minister before promulgating the Regulations are unambiguously set out in the SDA. The Statutorily created Authority, which the Minister is required to consult before he makes and promulgates the Grant Regulations, should not be obfuscated with the "constituencies" from which its members are elected. As correctly found by the Court *a quo* the Authority is a separate legal person and distinct statutory body from NEDLAC. It has several constituencies[16] which are not limited to business and labour with experts on skills development and provision of employment services to advise the Minister. A reading of the Minister's affidavit suggests that he only consulted with business and labour at NEDLAC.

[51] I am of the view that, on a plain reading of the language used in s36 *"The Minister may, after consultation with the National Skills Authority, by notice in the Gazette, make regulation"*, the consultation with the Authority is mandatory. It cannot be substituted with discussions at NEDLAC, a different body established in terms of the National Economic Development and Labour Council Act, 34 of 1994, which serves a different purpose to that of the Authority[17]. Neither can consultation in NEDLAC be used to usurp the statutory function of the Authority. To hold otherwise would render the SDA nugatory.

[52] Section 5 of the SDA makes it clear that the statutory mandate of the Authority is to advise the Minister on matters relating to, *inter alia* the making of the Regulations. Section 7(3) prescribes the manner in which the Authority is to advise the Minister on the Regulations to be made as follows:

> '(3) At least 30 days' notice must be given for a meeting of the Authority at which an amendment of the constitution or a regulation to be made is to be considered.'

Section 7(5) further provides:

[16] See s 6 of the SDA.
[17] The purpose of NEDLAC is set out in s 5(1)(a) to (e) of the National Economic Development and Labour Council Act, 34 of 1994.

> '(5) A supporting vote of at least two-thirds of the Authority's members is required for advising the Minister on regulations to be made.'

[53] A decision-maker is required to consider the views of interested parties before taking a decision.[18] In *Joseph and Others v City of Johannesburg and Others*,[19] the Court, citing Hoexter *Administrative Law in South Africa* (Juta, Cape Town 2007), the Court held:

> 'Procedural fairness…is concerned with giving people an opportunity to participate in the decisions that will affect them, and - crucially - a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.'

[54] No meeting of the Authority was held with the required 30 days' prior Notice. The 2012 Grant Regulations, in particular, the reduction of the mandatory grant from 50% to 20% of the total levies paid by the employer and the introduction of the sweeping provision were never subjected to a vote as required in terms of the SDA to determine if they met the required two-thirds support from the Authority's members necessary to advise the Minister. In light of this, the Minister's view that the Authority would never have been able to reach an agreement for purposes of advising him on the Regulations amounts to mere conjecture and speculation.

[55] Apparent from the factual matrix sketched, the Minister did not consult the Authority on the material changes to the 2012 Grant Regulations. He did not afford the Authority an opportunity to comment on these material aspects of the Regulations. In addition, no information regarding these aspects was placed before the Authority until two weeks after the Minister had already signed the Regulations in final form.

[56] The argument that it would serve no purpose for a formal consultation process to be pursued with the Authority where its house was irretrievably divided

[18] *Premier, Western Cape v President of the Republic of South Africa and Another* 1999 (3) SA 657 (CC) at 685 para 85.
[19] 2010 (4) SA 55 (CC) at para 42.

between the dominant schools of thought, being business and labour constituencies, is unmeritorious. The Minister is wrong in law and in fact in averring that the Authority had no advice to give when he had not even attempted to obtain the advice from the Authority itself. A Minister is constrained to make decisions in accordance with the statutory prescripts. The exercise of public power is subject to constitutional control and constrained by the principle of legality. A repository of power may not exercise any power or perform any function beyond that conferred upon it by law and must not misconstrue the nature and ambit of the power.[20]

[57] The purported consultation with the Authority on 29 and 30 November 2012 could hardly constitute adequate or genuine consultation because the Minister had already signed the final 2012 Grant Regulations on 15 November 2012. Although in certain exceptional circumstances it may be possible for an administrator to justify affording a hearing after taking a decision,[21] s36 of the SDA makes it plain that the Minister may make Regulations "*after* consultation with the National Skills Authority" while s5(1)(a)(v) provides that the Authority's function is "to advise the Minister on … any Regulations *to be made.*" The phrase *"after consultation with"* is well known in our law. It requires the decision to be taken in good faith with due regard to the advice given.[22] The Minister should give serious consideration to the views of the Authority but would leave him free to disagree with them.[23] In any event, according to the Minister, the purpose of the meeting of 29 and 30 November 2012 was not to consult the parties and receive their input for possible inclusion in the draft Regulations. That process was done and dusted. The meeting was convened to, *inter alia*, inform the delegates of what was contained in the Regulations that had been sent to the Minister for approval and promulgation.

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[20] *South African National Roads Agency Ltd v Cape Town City* 2017 (1) SA 468 (SCA) at 495A-B para 75.
[21] *Nortje v Minister van Korrektiewe Dienste* 2001 (3) SA 472 (SCA) at 480G – I para 19. In this case, it was held that, as a rule, a hearing after the decision will suffice only if an earlier hearing was not possible.
[22] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa,* 1996 (4) SA 744 (CC) at 816E para 131.
[23] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) at 413C para 285.

[58] To sum up, the Court *a quo* correctly rejected the Minister's argument that he sufficiently complied with the statutory requirement of consultation because:

58.1 Firstly, the constituent membership of the Authority was much broader than that of NEDLAC. Only three of the Authority's members out of 30 representatives were part of the consultation process at NEDLAC.

58.2 Secondly, the Minister's submission that the Authority could not have formulated a unified view was mere conjecture;

58.3 Thirdly, there was no reason that the Authority could not have achieved a two-thirds majority vote in favour of a unified view.

[59] The cases referred to by Mr Hulley in support of the argument that there had been substantial compliance[24] are distinguishable. They concern compliance by the municipalities with certain statutory provisions before imposing property rates. None of these cases deals with failure by the Minister to properly consult before making and promulgating subordinate legislation. I am not persuaded that the process followed by the Minister in making and promulgating the 2012 Grant Regulations achieved the legislature's objective of the requirement that the Minister should consult the Authority. The mandatory statutory requirement to consult cannot be confined or reduced to a mere sufficiency of compliance. There had been, in this case, no compliance by the Minister with the statutorily enjoined obligation to consult.

[60] The appellants' further contention concerns BUSA's standing to bring the review application. BUSA launched the review in its own interest; in the interest of its members; and in the public interest in terms of s38(d) of the Constitution.[25] It submitted, in the founding affidavit, that the 2012 Grant

[24] *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA), *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association and others* [2011] 2 All SA 46 (SCA); *Liebenberg NO and Others v Bergrivier Municipality* 2013 (5) SA 246 (CC).

[25] Section 38 provides that "Anyone listed in this section- has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are — (a) anyone acting in their own interest; (*b*) anyone acting on behalf of another person who cannot act in their own name; (*c*) anyone acting as a member of, or in the interest of, a group or class of persons;(*d*) anyone acting in the public interest; and (*e*) an association acting in the interest of its members.

Regulations have a significant impact on the South African business and it is in the public interest that business should not be required to comply with the Regulations that are unlawful.

[61] The appellant's argument is that the obligation to consult is owed to the Authority and not to BUSA which cannot mount a legal challenge to enforce a right that inheres in the Authority. Put differently, BUSA has no standing to raise a failure to consult in circumstances where the Authority has not raised that complaint itself. In support of this contention Mr Hulley relied on *Doctors for Life International v Speaker of the National Assembly and Others (Doctors for Life).*[26] He contended that only a party who has made attempts to be heard or to be consulted and has been rebuffed can launch a legal challenge that its procedural right has been violated.

[62] *Doctors for Life* is distinguishable and is not authority for the proposition that a party cannot review the Minister's decision where he had failed to comply with a legislative requirement, as in the circumstances of this case. In that case the applicant applied directly to the Constitutional Court for an order declaring that the National Council of Provinces (the NCOP) and the nine provincial legislatures had failed to comply with the constitutional obligations in terms of s72(1)*(a)* and s 118(1)*(a)* of the Constitution to facilitate public involvement in their legislative processes in enacting certain statutes. Both ss 72(1)*(a)* and 118(1)*(a)* of the Constitution of the Republic of South Africa, 1996 (Constitution) provides that the NCOP and the provincial legislatures, respectively, "must facilitate public involvement in [its] legislative and other processes and (those of) its committees". The application raised five issues that required determination by the Court. One of this related to the nature and the scope of the duty to facilitate public involvement comprehended in ss 72(1)*(a)* and 118(1)*(a)* of the Constitution.

[63] In respect of the applicant's standing to approach the Court for relief, the Constitutional Court held that the applicant had actively sought to obtain an opportunity to be heard on the Bills both at the NCOP and in the provincial legislatures, but the attempts, though repeated and persistent, had been in

[26] 2006 (6) SA 416 (CC) at paras 216 – 221.

vain. It further held that the Court will consider an application to declare legislation invalid on the grounds set out in its judgment only in circumstances where the applicant has sought and been denied an opportunity to be heard on the Bills and where the applicant has launched his or her application for relief in the Constitutional Court as soon as practicable after the Bills had been promulgated. Only those applicants who have made diligent and proper attempts to be heard by the NCOP should be entitled to rely on any failure to observe s72 of the Constitution. Similarly, applicants who have not pursued their cause timeously in the Court might well be denied relief.

[64] BUSA represent organised business, one of the major constituent member represented in the Authority. At the time he deposed to the answering affidavit the Minister explained that the Authority, which had not taken any active part in this litigation, was not constituted. Be that as it may, it remained his responsibility to appoint members of the Authority in terms of s6 of the SDA.

[65] Where the exercise of statutory power depends on the existence of jurisdictional facts, the repository of the power may not exercise it in the absence of such jurisdictional facts. A jurisdictional fact was defined as follows in *South African Defence and Aid Fund and Another v Minister of Justice:*[27]

> 'It is a fact the existence of which is contemplated by the Legislature as a necessary pre-requisite to the exercise of the statutory power. The power itself is a discretionary one. Even though the jurisdictional fact exists, the authority in whom the power resides is not bound to exercise it. On the other hand, if the jurisdictional fact does not exist, then the power may not be exercised and any purported exercise of the power would be invalid.'

The legal position as articulated in *South African Defence and Aid Fund* was re-affirmed by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others.*[28] In my view, BUSA had sufficient interest and the right to challenge the unlawful exercise of public power and to rely on the lack of consultation of the Authority

[27] 1967 (1) SA 31 (C) 34G – H.
[28] 2000 (1) SA 1 (CC) para 168 fn132.

by the Minister. The presence or absence of consultation is a jurisdictional fact the presence or absence of which is objectively justiciable by a Court.[29]

Conclusion

[66] Minister's engagement with some of the constituent members of the Authority at NEDLAC before he made and promulgated the 2012 Grant Regulations was insufficient compliance for purposes s36 read with s 5(1)(a)(v) of the SDA. The Court *a quo* correctly set aside the 2012 Grant Regulations because a mandatory and material procedure or condition prescribed by an empowering provision was not complied with, as contemplated by s6(2)(b) of PAJA. No cogent criticism of the Court *a quo*'s findings can be sustained. It is not necessary to traverse the remaining grounds of appeal as the lack of consultation of the Authority by the Minister, in my view, disposes of the appeal. The ineluctable conclusion is that the appeal must fail.

The issue of costs

[67] In accordance with the requirements of law and fairness, I am of the view that, the costs of this appeal should follow the results. I can conceive of no reason not to order the appellants, who made common cause in relation to all the issues in this case, to share the costs burden jointly and severally.

Order

1. The application for reinstatement of the appeal is upheld;
2. The application for condonation of the late filing of the record of appeal is upheld;
3. The appeal is dismissed;
4. The Minister of Higher Education and Training and the National Skills Fund, first and second appellants, are to pay the costs of this appeal

[29] This view as expressed in *Hospital Association of SA Ltd v Minister of Health and Another; ER24 EMS (Pty) Ltd and Another v Minister of Health and another; SA Private Practitioners Forum and others v Director-General of Health and others* [2011] 1 All SA 47 (GNP) at 54 para 17. I fully agree with it.

jointly and severally, the one paying the other to be absolved. Such costs are to include the costs consequent upon the employment of two counsel.

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MV Phatshoane

Acting Judge of the Labour Appeal Court

Tlaletsi AJP and Kathree-Setiloane AJA concur in the judgment of Phatshoane AJA

APPEARANCES:

FOR THE APPELLANTS:	Adv M Hulley SC assisted by Adv Seneke
	Instructed by the State Attorney, Pretoria
FOR THE RESPONDENT:	Adv A Franklin SC assisted by Adv M Seape
	Instructed by Bowman Gilfillan