

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Application: 2776/2012

In the matter between:-

**MINISTER OF HIGHER EDUCATION
AND TRAINING**

First Applicant

**DIRECTOR GENERAL: DEPARTMENT OF
HIGHER EDUCATION AND TRAINING**

Second Applicant

PROF STANLEY RIDGE N.O.

Third Applicant

and

THANDWA Z MTHEMBU

First Respondent

**CENTRAL UNIVERSITY OF
TECHNOLOGY, FREE STATE**

Second Respondent

SYLVAN M SEANE

Third Respondent

AMOS RADEBE

Fourth Respondent

Application: 2786/2012

In the matter between:

**THE COUNCIL OF CENTRAL UNIVERSITY
OF TECHNOLOGY, FREE STATE**

Applicant

and

**THE MINISTER OF HIGHER EDUCATION AND
TRAINING**

First Respondent

**THE DIRECTOR GENERAL OF THE
DEPARTMENT OF EDUCATION AND
TRAINING**

Second Respondent

PROF JULIAN SMITH N.O.

Third respondent

PROF STANLEY RIDGE N.O.

Fourth Respondent

HEARD ON: 19 & 20 JULY 2012

JUDGMENT BY: DAFFUE, J

DELIVERED: 13 AUGUST 2012

INTRODUCTION

[1] The disputes to be adjudicated by me have been fuelled by the decision of the Minister of Higher Education and Training (“the Minister”) dated 18 June 2012 in terms whereof he exercised the powers afforded to him by section 41A(1) of the Higher Education Act 101 of 1997, as amended, (“the Act”).

[2] On 4 July 2012 two applications were issued on an urgent basis: one by the Minister and the other by the Council of the Central University of Technology, Free State. I shall refer herein to the university as CUT and to its council as the Council.

[3] As duty judge during the recent recess, I granted leave that both applications be enrolled for hearing on 19 and 20 July 2012. The parties considered the matter as urgent and as

agreed they filed answering and replying affidavits in the applications and the matter was ripe for hearing. As requested, I ruled in terms of Rule 11 of the Uniform Rules of Court that the applications be heard simultaneously and that one judgment only be handed down.

THE PARTIES AND THE RELIEF SOUGHT

[4] The Minister issued his application under application number 2776/2012. The following relief is sought:

- “1. Permitting this application to be heard as one of urgency, and dispensing with the ordinary provisions for time periods and notices prescribed under the rules, to the extent necessary.
2. Declaring that the decision of the first applicant to appoint the third applicant as Administrator of the Central University of Technology (second respondent), in terms of s 41A of the Higher Education Act 101 of 1997, as published in Government Notice 476 in Government Gazette 35457 of 20 June 2012, is lawful and valid.
3. Declaring that the third applicant is lawfully charged with the duty, responsibility and power:
 - 3.1 to take over the authority of the Council of the second

respondent for a period not exceeding twelve months;

3.2 to take over the authority of the management and administration of the second respondent; and

3.3 to discharge the other functions, duties and terms of reference as set out in the Minister's gazette notice as published on 20 June 2012.

4. Declaring that the persons previously appointed to the Council of the second respondent have, upon coming into force of the Minister's notice of 20 June 2012, ceased to hold office as members appointed to the Council of the second respondent and have accordingly ceased to hold any authority, powers, functions and duties associated with the office of members of the said Council.

5. Declaring that the first, third and fourth respondents acted unlawfully in:

5.1 refusing to recognise the lawful authority of the third applicant as the duly appointed Administrator of the second respondent;

5.2 refusing to recognise and, where applicable, implement the actions and instructions of the third applicant as the duly appointed Administrator of the second respondent;

5.3. (in the case of the first and third respondents) taking actions, decisions and steps in their purported capacity as members of the Council of the second

respondent;

- 5.4 barring physical access to the third applicant to the premises of the second respondent;
- 5.5 preventing the third applicant from discharging his authority, powers, functions and duties as the duly appointed Administrator of the second respondent and obstructing his efforts to do so;
- 5.6 communicating with members of staff, students and other members of the University community of the second respondent, to the effect that the third applicant lacked the legal authority to function as the duly appointed Administrator of the second respondent;
- 5.7 instructing or encouraging members of staff of the second respondent to refuse to cooperate with, respect and accept the lawful authority of the third applicant as duly appointed Administrator of the second respondent, and instructing or encouraging them to obstruct him in his efforts to discharge such authority; and
- 5.8 utilising funds and other resources of the second respondent in efforts to challenge, undermine or obstruct the lawful authority of the third respondent as the duly appointed Administrator of the second respondent.

6. Interdicting the respondents from taking any further action which amounts to or is calculated to:
 - 6.1 undermine the lawful authority of the third applicant in his capacity as the duly appointed Administrator of the second respondent;
 - 6.2 interfere with or obstruct any actions, decisions and steps taken and any instructions issued by the third applicant in his capacity as Administrator of the second respondent;
 - 6.3 issue any communications to staff of the second respondent or any other person, to the effect that the third applicant does not have the authority of the Administrator with the powers, functions and duties as set out in the first applicant's Gazette Notice of 20 June 2012;
 - 6.4 instruct, advise or urge any staff member or other person to defy or obstruct the third applicant in his capacity as the duly appointed Administrator of the second respondent;
 - 6.5 bar access to the premises and other resources and facilities of the second respondent, to the third applicant in the course of his exercising his authority, powers, functions and duties as the Administrator of the second respondent;
 - 6.6 spend any money or otherwise utilise any financial or

other resources and facilities of the second respondent in any efforts to challenge, undermine or obstruct the authority of the third respondent in his capacity as the Administrator of the second respondent.

7. Directing the respondents to make full and proper disclosure to the third applicant, in his capacity as Administrator of the second respondent, of all relevant information, documentation and records relating to any steps taken by them to challenge, resist or obstruct the third applicant in his efforts to discharge his authority as Administrator of the second respondent, and steps taken by them to prevent access to the third applicant, in such capacity, to the premises, facilities and resources of the second respondent.
8. Alternatively, and in the event that final relief is not determined immediately in terms of paragraphs 2 to 7 above, granting an interim order, in terms of paragraphs 8.1 and 8.2 below, which interim order shall operate pending the final determination of this application of an application to be brought by the respondents for the review of the first applicant's decision to appoint the third applicant as Administrator of the second respondent, as published in the Gazette Notice of 20 June 2012;
 - 8.1 the first and third respondents and the other members of the second respondent's Council which has been

dissolved are interdicted from taking any action or steps in their purported capacity as members of the Council of the second respondent;

8.2 the respondents and the other members of the dissolved Council are interdicted from acting in any manner as set out in paragraphs 6.2 to 6.6 above.

9. Ordering that the costs of this application shall be paid, jointly and severally (the one paying, the other to be absolved) by:

9.1 the first and third respondents in their personal capacities and out of their own resources (and they shall not be entitled to seek payment by or reimbursement from the second respondent, subject to 9.2 below);

9.2 the second and fourth respondents only to the extent that they may elect to oppose this application.

10. Granting the applicants further or alternative relief.”

[5] The applicants in the Minister’s application are the Minister, the Director-General: Department of Higher Education and Training (herein later referred to as “the DG”) and Prof Stanley Ridge in his capacity as the Administrator appointed by the Minister. The respondents are cited as Thandwa Z Mthembu, the Vice-Chancellor and Principal of CUT (herein later referred to as

“Prof Mthembu” or “the Vice-Chancellor”), Sylvan M Seane, the Chairperson of the CUT Council (“Dr Seane”) and Amos Radebe, the CUT’s Head of Security.

[6] The Council brought its application under application number 2786/2012. The Minister, the DG, Prof Julian Smith in his official capacity as the independent assessor appointed by the Minister and Prof Stanley Ridge in his official capacity as the Administrator of CUT appointed by the Minister are cited as the four respondents in this application.

[7] The Council seeks the following relief:

- “(a) Condoning any non-compliance with the Rules of this Honourable Court in terms of Rule 6(12).
- (b) Reviewing, correcting and setting aside the report by the third respondent dated 13 April 2012, published in the Government Gazette of 11 May 2012 (under GN No. 366), following on his investigation into the affairs of the Central University of Technology.
- (c) Reviewing, correcting and setting aside the decision by the first respondent on 18 June 2012, published in the Government Gazette of 20 June 2012 (under GN No. 476),

to appoint the fourth respondent as administrator to the Central University of Technology, following a report of the third respondent into the affairs of the University.

- (d) In the alternative to (c) above, declaring unlawful and invalid the decision by the first respondent on 18 June 2012, published in the Government Gazette of 20 June 2012 (under GN No. 476), to appoint the fourth respondent as administrator to the Central University of Technology, following a report of the third respondent into the affairs of the University.
- (e) Interdicting and restraining the fourth respondent from implementing the above-mentioned decision, any of the terms of reference issued pursuant thereto or to involve himself in any way in the affairs of the Central University of Technology, its Council, management, employees or students.
- (f) Directing any such respondent as may oppose the application to pay the applicant's costs (including the costs of two counsel), jointly and severally, the one paying the other to be absolved.
- (g) Granting further or alternative relief."

THE HIGHER EDUCATION ACT 101 OF 1997 AS AMENDED ("the Act")

[8] Prior to dealing with the factual background and the events that

led to these applications, it is apposite to briefly highlight some of the relevant provisions in the Act:

8.1 The purpose of the Act is clearly to regulate higher education, but in doing so, it is recognised by the legislature as set out in the preable of the Act that

“it is desirable for higher education institutions to enjoy freedom and autonomy in their relationship with the State within the context of public accountability and the national need for advanced skills and scientific knowledge”.

8.2 The Minister may, after consulting the Council on Higher Education established under section 4 of the Act, by notice in the Government Gazette, and from money appropriated for this purpose by Parliament, establish a university, technikon or college in terms of section 20 of the Act and he may also, after consulting the same Council and by notice in the Gazette, close a public higher education institution in accordance with section 25 of the Act.

8.3 Section 27(1) of the Act stipulates that the Council of a

public higher education institution must govern such institution subject to the Act and its institutional statute.

8.4 In terms of section 30 of the Act the Principal and Vice-Chancellor is responsible for the management and administration of the public higher education institution.

8.5 The Council of a public higher education institution may prepare an institutional statute to give effect to any manner not expressly prescribed by the Act, but such statute must be submitted to the Minister for approval. See sections 32 and 33 of the Act.

8.6 In terms of section 34 the Council must appoint the employees of the public higher education institution and determine their conditions of service, disciplinary provisions, privileges and functions.

8.7 Section 41(A), dealing with the appointment of an administrator, is the crucial section *in casu* and pivotal to the central issue, being the decision of the Minister. Therefore, it is quoted fully. It reads as follows:

“Section 41A Appointment of administrator

- (1) If an audit of the financial records of a public higher education institution, or an investigation by an independent assessor as contemplated in section 47, reveals financial or other maladministration of a serious nature at a public higher education institution or the serious undermining of the effective functioning of a public higher education institution, the Minister may, after consultation with the council of the public higher education institution concerned, if practicable, and notwithstanding any other provision of this Act, appoint a person as administrator to take over the authority of the council or the management of the institution and perform the functions relating to governance or management on behalf of the institution for a period determined by the Minister, and such period may not exceed two years.
- (2) The Minister may extend the period referred to in subsection (1) once for a further period not exceeding six months.
- (3) Notwithstanding subsection (1), if a council is deemed to have resigned as contemplated in section 27 (8), the Minister must appoint a person for a period of not longer than six months as an administrator on behalf of the institution to-
 - (a) take over the authority of the council;
 - (b) perform the council’s functions relating to governance;

and

- (c) ensure that a new council is constituted.” (emphasis added)

8.8 The present subsection 41A(1) was substituted by section 15 of Act 23 of 2001. The phrase

“... to take over the authority of the council or the management of the institution and ...”

has been inserted and the period of administration was extended from six months to two years.

8.9 If the council of a public higher education institution fails to comply with any provisions of the Act under which an allocation from money appropriated by Parliament is paid to the institution, or with any conditions applicable, the Minister may call upon such council to comply with the provision or condition within a specified period and if such council fails to comply, the Minister may withhold payment of any commensurate portion of any allocation appropriated by Parliament. The Minister must, before

taking such action, allow such council a reasonable opportunity to make representations. See section 42.

8.10 Chapter 6 of the Act deals with the appointment of an independent assessor from an independent assessment panel appointed by the Council on Higher Education. Section 45 deals with situations where an independent assessor may be appointed by the Minister. It reads as follows:

“An independent assessor may be appointed under section 44 if-

- (a) the council of a public higher education institution requests the appointment; or
- (b) circumstances arise at a public higher education institution that-
 - (i) involve financial or other maladministration of a serious nature; or
 - (ii) seriously undermine the effective functioning of the public higher education institution; or
- (c) the council of the public higher education institution has failed to resolve such circumstances; and
- (d) the appointment is in the interests of higher education in an open and democratic society.” (emphasis added)

THE CUT STATUTE

[9] The Council has adopted a statute which was approved by the Minister. Clause 4 thereof deals with all aspects relating to the Council. The numerous functions of the Council are set out in clause 4.1. It is *inter alia* directly responsible for the appointment of the executive management of the CUT and it may in a manner set out in the disciplinary rules suspend or dismiss any executive employee. It may also order an executive employee whom it has suspended to refrain from being on any premises under the control of the CUT and to refrain from participating in any of the CUT's activities, or issue such other conditions as it may deem necessary.

RELEVANT CONTRAST BETWEEN THE ACT ON THE ONE HAND AND THE SOUTH AFRICAN SCHOOLS ACT 84 OF 1996 AND THE EMPLOYMENT OF EDUCATORS ACT 76 OF 1998 ON THE OTHER.

[10] As indicated above the Council of a public higher education institution is the entity responsible for the appointment of the employees of such institution. It, and not the Minister or his

Department, is the employer of the Vice-Chancellor and other employees. The Council is the entity solely responsible for governance at such an institution.

- [11] The school governing body of a public school is the entity that must govern the school in terms of section 16 of the SA Schools Act. In terms of section 16A of this Act the principal of a public school, he being an employee of the relevant provincial government, represents the Head of Department of Education in the school governing body. Section 3 of the Employment of Educators Act stipulates that the Director-General of the Department of Basic Education is the employer of educators in the service of the department in posts on the educator establishment of the department and the Head of Department shall be the employer of educators in the service of the provincial department of education in posts on the educator establishment of that department for all purposes of employment. The termination of educators' services and disciplinary steps to be taken against them in the case of misconduct are set out in Chapters 4 and 5 of the last-mentioned Act and the employer's duties and functions are

clearly spelt out in these chapters.

- [12] Unlike the position of educators employed in terms of the Employment of Educators Act, neither the Minister nor any other official of the Department of Higher Education and Training has any authority over and the right to discipline employees of a public higher education institution appointed by its Council. That is the function and prerogative of the particular Council.

RELEVANT UNDISPUTED FACTUAL BACKGROUND

- [13] The following facts, which are common cause, are recorded in order to serve as the necessary background:

13.1 The CUT is a new generation university which is in existence for about 30 years.

13.2 Dr Seane has been a member of the CUT Council since 2004 and as Chairman of the Planning, Finance and Resources Committee thereof. In March 2010 he was elected Chairman of the Council, a position that he has held since then.

13.3 Prof Mthembu is the Vice-Chancellor of CUT. His turn of office ended in December 2011, but he was re-elected by the Council for a further term.

13.4 Prof T Schultz is the Deputy Vice-Chancellor for Institutional Planning and Marketing at CUT. It does not appear from the application papers when he was appointed in that position.

13.5 During February 2011 an anonymous letter was sent to the office of the Minister by “a group of concerned staff members”. Allegations of longstanding financial, labour law and human rights violations at CUT were made. The “primary perpetrator” of these violations was alleged to be Prof Schultz. The alleged violations included verbal abuse, racism and sexism, failure to comply with CUT policies, victimisation, wasting of public funds to name a few. Prof Mthembu was attacked insofar as he protected Prof Schultz and victimised those employees who had complained to Council. Prof Mthembu was also accused of being an autocrat who handpicked favourite staff for

certain positions and engaged in personal vendettas against staff who dared to question him. In conclusion a full forensic audit of the CUT leadership was requested as well as a full investigation into alleged financial mismanagement and illegal HR practices. It needs to be pointed out that *ex facie* the letter the complainants were not only unidentified, but there is no indication as to their numbers. Furthermore the allegations were not only vague, but no supporting evidential material was presented.

13.6 On 24 February 2011 Prof Mthembu was requested in an e-mail from the Minister's Department to indicate what action would be taken to address the concerns raised in the letter.

13.7 The Council instructed the auditing firm KPMG to investigate the allegations raised in the letter and to submit a report to it.

13.8 KPMG *inter alia* consulted with Prof Mthembu during June 2011, but at the Council meeting of 2 September 2011, its

report was still outstanding. Consequently Council resolved to terminate KPMG's mandate at this meeting. During this meeting (and after the resolution was taken) a letter from KPMG was received indicating that their report would be finalised by 16 September 2011. The aforesaid resolution was not rescinded. Adv J Lubbe SC was appointed with the mandate to substitute KPMG and to finalise the required report.

13.9 Adv Lubbe submitted two reports, the first on 20 October 2011 and a supplementary report on 23 January 2012. In between these reports he *inter alia* consulted with Prof Mthembu.

13.10 The Minister requested Dr Seane on 3 November 2011 in writing to submit the KPMG and Lubbe reports to him. Having received no feedback, the Minister wrote to Dr Seane on 17 January 2012, indicating his intention to appoint an independent assessor to investigate the various allegations. It is only hereafter that Dr Seane provided the Minister with a copy of Adv Lubbe's first report, but not the KPMG report.

13.11 At the request of Dr Seane a meeting was set up, attended by the DG, Dr Seane and other Council members on 17 February 2012. Council proposed at that stage that a commission of enquiry be appointed by them to continue the process of investigation previously handled by KPMG and Adv Lubbe.

13.12 The Minister found the proposal unacceptable and appointed Prof Julian Smith as independent assessor in terms of the powers granted to him in section 44(1) of the Act.

13.13 Prof Smith conducted further investigations and eventually submitted a report to the Minister on 13 April 2012, which report was published in the Government Gazette of 11 May 2012. Concerns relating to governance, financial control management and administration of the affairs of the CUT as well as the leadership of the University, including Prof Mthembu, were raised. He *inter alia* recommended that the Council be dissolved, Prof Mthembu be placed on special leave,

an administrator be appointed and an investigation be undertaken into the alleged misconduct of Prof Schultz. He furthermore recommended that further investigations be conducted which would include a forensic audit pertaining to the alleged irregularities.

13.14 Following correspondence exchanged between Council's attorneys and the Minister, Council and Prof Mthembu were given an opportunity to respond. An initial written submission was made on 26 May 2012 and the final revised version thereof dated 31 May 2012 was eventually forwarded to the Minister.

13.15 On 28 May 2012 a meeting was held between some Council members and the DG, duly delegated by the Minister.

13.16 The Minister eventually resolved to appoint Prof Ridge as administrator in accordance with section 41A of the Act. This took place on 18 June 2012 and the Minister's decision was duly recorded in the Government Gazette of

20 June 2012. On 18 June 2012 Dr Seane, Prof Mthembu and Prof Ridge were informed of the Minister's decision in writing.

13.17 Dr Seane immediately responded on 20 June 2012, disputing the correctness of the findings and the recommendations of the assessor as well as the validity of the Minister's decision to appoint Prof Ridge. Further correspondence ensued, but it became clear that Prof Ridge would not be allowed on campus to carry out his duties in accordance with the Minister's decision. These events caused the Minister to launch the present application and the Council to institute its application for the review and setting aside of the Minister's decision.

THE PLASCON-EVANS RULE

[14] Both Adv Gauntlett SC, appearing for the Council with Adv Pelser, and Adv Kennedy SC, appearing for the Minister with Adv Mahlangu, argued that the **PLASCON-EVANS** rule should be applied in adjudicating the two applications. In terms hereof the undisputed allegations in the founding affidavits, taken with the allegations in the answering affidavits that are not clearly

untenable, have to be taken into consideration in order to find whether a proper case has been made out by the respective applicants. See **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (AD) at 634 H – 635 C. *In casu* this is a difficult exercise insofar as the allegations contained in the founding affidavit of the Minister's application are also relied upon by the Minister in his answering affidavit in the Council application and *vice versa*.

THE ISSUES IN DISPUTE

[15] The true question for determination, or put otherwise, the central issue in these two applications is whether the Minister exercised his powers afforded by section 41A of the Act validly and/or in a manner that could have been expected of the reasonable decision-maker. However several other disputes appear from the papers and have been argued before me. For the sake of convenience I shall deal with the following disputes in that order:

15.1 Whether Council has *locus standi* in the review application, bearing in mind the decision to appoint an administrator and the Minister's viewpoint that this

effectively meant the dissolution of Council.

15.2 The interpretation of section 41A(1) and whether or not “or” should be construed to mean “and/or”.

15.3 The attack on the Minister’s decision based on procedural grounds.

15.4 The attack on the Minister’s decision based on substantive grounds.

15.5 Whether or not a proper case has been made out by the Minister for declaratory orders, bearing in mind the requisites applicable with reference to section 19(1)(a)(iii) of the Supreme Court Act, 59 of 1959.

15.6 Whether the Minister has made out a proper case for the interdicts sought.

LOCUS STANDI OF COUNCIL

[16] The Minister contests Council’s standing to bring its own review application. The authority of Council members, such as Dr Seane, to litigate in the name of Council and using funds of the

CUT is challenged. It is the Minister's stance that the individuals who were formerly members of Council were entitled to litigate in their own name and using their own resources in order to apply for the review and setting aside of the Minister's decision, if so advised.

[17] In the Minister's application Dr Seane was cited as respondent, both in his personal capacity and on behalf of the other members of Council. This was done in terms of a specific agreement reached between the parties.

[18] In the Council's application Dr Seane placed on record that he was duly authorised by the Council to institute the application on its behalf. There is no indication in the founding affidavit when he was so authorised, particularly insofar as the application is brought to challenge the decision by the Minister "to dissolve the Council and to appoint in its place an administrator to exercise all the Council's governance functions". The DG, on behalf of the Minister, responded that Council had been dissolved and that it, not being a corporate body or legal *persona* with capacity to bring legal proceedings

in its own name, did not have *locus standi*. Furthermore it was pleaded that the founding affidavit did not refer to the existence of a resolution of Council members authorising Dr Seane to act on their behalf or on Council's behalf. In this regard it was stated that "various former Council members have expressed serious disagreement with other former Council members, in particular Dr Seane and Prof Mthembu" and in this regard e-mails of Council members such as *inter alia* Me Elsabe Rockman and Judge of Appeal Ponnann were attached.

- [19] In the replying affidavit Dr Seane stated that at its meeting of 23 May 2012 (prior to the Minister's decision) Council noted that its Executive Committee (Exco) would deal with any urgent situation such as a legal challenge and in terms of Exco's constitution, it had the power to exercise all powers granted by Council from time to time and to deal with urgent matters. At its meeting of 6 June 2012 Exco unanimously resolved that Council should retain its status until the expiry of its natural term and should the Minister decide to dissolve or suspend Council, CUT would bring an urgent application for appropriate relief including judicial review and Council through its Chairman and Vice-Chancellor would take all necessary steps to give effect to

the above resolution, including the appointment of attorneys and legal counsel. On 22 June 2012 (after the Minister's decision) Exco gave effect to its resolution taken on 6 June 2012 by authorising the Chairperson and the Vice-Chancellor to bring a review application.

- [20] Mr Gauntlett submitted that *locus* goes to function, i.e. to keep people out of court that has nothing to do with the case. He also submitted that one should not conflate the merits of the matter with standing and the doors of the court should not be shut *in casu*. He submitted that Council was the only body that could bring the application insofar as it is CUT's governing body responsible for protecting all legal interests of CUT. He *inter alia* relied on **JACOB AND ANOTHER V COUNCIL OF UNIVERSITY OF DURBAN-WESTVILLE AND ANOTHER** 1974 (3) SA 552 (AD). However this case is not relevant, firstly, as no point has been raised about the Council's standing and secondly, because it was not doubted that the Council was the appropriate body to act on behalf of the university.
- [21] Mr Gauntlett also referred to the position of a dismissed employee and such employee's right to take steps to have the

dismissal reviewed and set aside. In my view the example is not apposite insofar as the Labour Relations Act 66 of 1995 specifically provides for the rights of unfairly dismissed employees. Mr Gauntlett referred to **DESPATCH HIGH SCHOOL v HEAD, DEPARTMENT OF EDUCATION, EASTERN CAPE, AND OTHERS** 2003 (1) SA 246 (CkH) at para [15] p 251F in support of his argument. I have already referred to the SA Schools Act and it is merely confirmed in this paragraph that a school's governing body has *locus standi* to bring an application on behalf of the school. A similar finding was made in several other judgments and also in **IQHAYIYA TECHNICAL COLLEGE v MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, EASTERN CAPE PROVINCE, AND ANOTHER** 1998 (4) SA 502 (CK HC), a matter also referred to me by Mr Gauntlett in terms whereof it is clear that the governing council of the technical college was the correct and proper body to act on its behalf. See paras [26] to [29] p 510 J – 511 H. The above two judgments confirm the fairly obvious legal position. However they are not authority for the argument that the Council, being emasculated to the extent that it is even argued on behalf of the Minister that it has been dissolved, has standing to apply for an order that the decision of

the Minister be reviewed and set aside.

- [22] The Minister's viewpoint that the councillors should have brought review proceedings as individual applicants in their own names does have merit. The question is whether that is the only way in which the Minister's decision could be challenged. Mr Gauntlett warned against a circularity of thought and argued that as a matter of principle Council should have had the right to attack the Minister's decision. Finally he relied on **OUDEKRAAL ESTATES (PTY) LTD v CITY OF CAPE TOWN AND OTHERS** 2004 (6) SA 222 (SCA) para [32] and the reference to collateral challenge in the English case of **BODDINGTON v BRITISH TRANSPORT POLICE** as well as **BIO ENERGY AFRIKA FREE STATE (EDMS) BPK v FREEDOM FRONT PLUS** 2012 (2) SA 88 (FB). In the last-mentioned judgment the court adopted a liberal approach to standing in matters concerning constitutional rights which would include the right to just administrative action and education and the principle of legality. *In casu* it cannot be found that no action is taken on behalf of or for the benefit of CUT, but solely in order to ensure that the Minister's decision to take away all

authority of Council is set aside. It is not only Council's functions and its authority to act that is at issue, but also the interest of CUT in particular.

- [23] Insofar as the Minister's decision had the effect of rendering the CUT entirely impotent to protect its interests and that of its governing body, the Council, I find that the Council has *locus standi* to challenge the Minister's decision, the merits which will be considered and adjudicated later herein. It is also clear as indicated in the replying affidavit in the Council's application that the required resolutions were taken and also on this basis the Minister's attack on Council's lack of *locus standi* cannot succeed. Mr Gauntlett filed, without objection from Mr Kennedy, a conditional application in terms of Rule 15 for Dr Seane to be substituted as applicant in the Council's application only in the event of a finding that the Council did not have *locus standi*. Mr Gauntlett did not move his application and Mr Kennedy responded in submitting that he had to move it for him to consider how to address the matter. In the light of my finding it is unnecessary to consider this aspect any further.

CONSTRUED TO MEAN “AND/OR”.

[24] Sitting as a judge having to interpret a section in a statute, I am cautioned by the maxim *iudicis est ius dicere sed non dare/facere*, or put otherwise, it is the duty of the judge to expound, interpret or explain the law, but not to make it. The following warning of Lourens du Plessis should also be adhered to:

“At any rate, tampering with the *ipsissima. verba* of a statute, though not precluded, should be an exercise in circumspection and restraint with due deference to one of the cornerstones of constitutional democracy, namely the horizontal division of powers in the state. The wording of a legislative text bounds state authority for *trias politica* purposes. The interpreter-judge is no legislator and must constantly remind him-/herself of that. Adaptive interpretation is meant to make sense of the legislature’s law as it stands and not to substitute the judge’s law for it.”

See Du Plessis L, **Re-interpretation of Statutes**, 2002 ed, p 229.

[25] Our judiciary’s approach to statutory interpretation has undergone certain changes over several decades. Linguistic

formalism has taken a back seat a long time ago when the so-called golden rule of statutory interpretation was adopted. In terms hereof adherence must be given to the plain words of a statute, unless it would lead to an absurdity or a result contrary to the intention of the legislature. It is now accepted that theories such as contextualism and purposiveness may be considered in statutory interpretation. Schreiner JA's minority judgment in **JAGA v DÖNGES NO AND ANOTHER; BHANA v DÖNGES, NO AND ANOTHER** 1950 (4) SA 653 (AD) at 664 H has found wide recognition in several subsequent judgments. The learned judge stated his views as follows:

“But the legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene.”

In **HOBAN v ABSA BANK LTD t/a UNITED BANK AND OTHERS** 1999 (2) SA 1036 (SCA) at 1044 I – 1045A it was made clear that there is no justification for the distinction between linguistic context and legislative intention and stated:

“The moment one has to analyse context in order to determine

whether a meaning is to be given which differs from the defined meaning one is immediately engaged in ascertaining legislative intention.”

The purposiveness theory is widely recognised and utilised in order to interpret statutes. I accept however that the interpreter should not read a purpose or object into a provision in an arbitrary manner, but the purpose or object has to be established through interpretation. The so-called mischief rule should be seen as an integral part of the purposiveness theory. In applying this rule the real meaning of a statutory provision can be arrived at when the following are considered:

- (a) what was the law before the measure was passed; (b) what was the mischief for which the law had not provided;
- (c) what remedy was provided by the legislature and (d) the reason for the remedy.

See **HLEKA v JOHANNESBURG CITY COUNCIL** 1949 (1) SA 842 (A) at 852 - 853.

In **OLITZKI PROPERTY HOLDINGS v STATE TENDER BOARD AND ANOTHER** 2001 (3) SA 1247 (SCA) at par [12] p

1257 C Cameron JA expressed his viewpoint on statutory interpretation as follows:

“The factual question remains one of statutory interpretation.....The process requires a consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent.”

In **MINISTER OF DEFENCE v POTSANE; LEGAL SOLDIER (PTY) LTD** 2002 (1) SA 1 CC Kriegler J gave a compelling example as to how section 179 of the Constitution should be interpreted. He had due regard to the background and history pertaining to military prosecutions and simultaneously made use of contextual and purposiveness theories in order to come to his conclusion. See paras [26] to [42] of the judgment.

[26] Section 41A(1) should be interpreted to adjudicate the dispute between the parties. It is the Council’s case that section 41A(1) does not provide for the simultaneous takeover of governance and management powers. Mr Gauntlett argued that the wording of section 41A(1) is clear. It provides for the appointment of an “administrator to take over the authority of

the council or the management of the institution” and to “perform the functions relating to governance or management” (emphasis added). He argued that the Minister purported to appoint an administrator to take over the authority of the council and the management and to perform functions relating to governance and management which is unauthorised by the empowering provision. He submitted correctly that a word-changing interpretation whereby “or” is read as “and” is only competent in extremely limited circumstances where the inconsistency between the word used and Parliament’s intention is unmistakable. He submitted that there should be a compelling reason why “and” should replace “or” or *vice versa*. Both counsel referred me to **NGCOBO AND OTHERS v SALIMBA CC; NGCOBO v VAN RENSBURG** 1999 (2) SA 1057 (SCA) para [8] in support of their respective arguments. In **NGCOBO** *loc cit* Olivier JA convincingly argued that, pertaining to the definition of labour tenant, the word “and” at the end of paragraph (b) of the definition was intended to be used in its usual conjunctive or cumulative sense and in so doing the result would not be unreasonable, inconsistent or unjust for the reasons advanced. However there are case law

indicating that the words “and” and “or” are inaccurately used by the legislature. The one has been found to be the equivalent of the other. See the remarks of Innes CJ in **BARLIN v LICENSING COURT FOR THE CAPE** 1924 AD 472 at 478.

[27] In summary Mr Gauntlett submitted that the word “or” in section 41A(1) should not be construed to mean “and” or “and/or”, the reasons being

27.1 the plain wording that the legislature used should be given effect to;

27.2 the ordinary meaning of “or” is disjunctive whilst that of “and” is conjunctive;

27.3 the purpose of section 41A(1) and the Act in general supports an interpretation whereby the governance powers of council and the management powers of a university cannot be vested in the same body; also that proper corporate governance requires that managerial and oversight functions be separated and to concentrate these separate powers in one individual for a period of up to two years at a time is not supported by the Act's

purpose;

27.4 the legislature used the word “or” consistently throughout section 41A(1) whereas in subsection (3) the word “and” is used and it is submitted that the legislature’s choice of words was clearly deliberate.

[28] Mr Kennedy argued the contrary and submitted that the use of the word “or” in section 41A(1) was not intended to indicate that the two terms are mutually exclusive. He submitted that this is a case where it is appropriate to interpret the word “or” to mean “and/or”. He submitted that the clear intention of the legislature is to deal with the situation where an independent assessor’s investigation has revealed financial or other maladministration of a serious nature or the serious undermining of the effective functioning of a university, whether the problem may be in the governance by the Council or in the management of the university or both. It is appropriate to appoint an administrator for the period specified in the appointment to take over either the governance, or the management, or both. In conclusion he argued that the fact that the Act provides that ordinarily

governance should vest in Council and management should vest in other structures and functionaries does not mean that both functions cannot be taken over by a single administrator. This is particularly so in the light of the fact that the appointment of an administrator arises where there is effectively a crisis within the university and it is appropriate to appoint an independent outsider for a specified period to take over all functions which are problematic or have been undermined, such as is the factual situation at the CUT.

[29] I have considered the arguments of both counsel and the case law referred to. I am convinced that, with particular reference to the jurisdictional facts set out in section 41A(1), the legislature did not intend that the Minister could only act if one of the following is shown to exist:

- (a) financial or other maladministration of a serious nature;
- (b) the serious undermining of the effective functioning of a public higher education institution.

Surely it is not unforeseeable that where financial or other maladministration is found to exist, there may also be proof of a serious undermining of the effective functioning of the

institution. These may even tend to go hand in hand. I have no doubt that the Minister may act in either case, or in the event of both situations being shown to exist. It is incomprehensible that the Minister would be unable to act where a university is totally dysfunctional, its governance and management seriously undermined and fraud and other financial maladministration are rife. Such an interpretation would have the effect that the more serious the situation at a university, the less (or no) power is granted to the Minister to act. Such interpretation will lead to an absurdity and could never have been the intention of the legislature.

- [30] Furthermore and although it is laudable that governance and management should be kept separate, it is clear that the legislature intended the Minister to appoint a person as administrator, if practicable, to take over the authority of the Council as well as the management of the institution to enable him or her to perform the functions relating to governance and management for a period not exceeding two years. If it was intended to, in such circumstances, to keep governance and management separate, the legislature would have provided for

the appointment of two administrators, one to deal with governance and the other to deal with management in the event where both have been shown to be in disarray. In the event of a finding that the jurisdictional facts set out in section 41A(1) have been met, the Minister's appointment of one administrator could not be regarded *ultra vires* or contrary to the principle of legality. I deal with those issues *infra*.

THE ATTACK ON THE MINISTER'S DECISION BASED ON PROCEDURAL GROUNDS

[31] The Minister has admitted that the requirements of procedural fairness and the principles of the Promotion of Administrative Justice Act 3 of 2000 should apply as his conduct constitutes administrative action. Therefore, and insofar as the parties are *ad idem* in this regard, I shall accept for purposes hereof that the Council is entitled to attack the Minister's decision on the procedural grounds contained in the founding affidavit of its application. I must point out that the Council is of the view that the Minister's decision can also be reviewed and set aside based on the principle of legality.

[32] It is the Council's case that there are three main grounds or

procedural flaws necessitating the Minister's decision to be reviewed and set aside. These relate to

- (a) the assessor's report;
- (b) the consultative process required in section in 41A(1) of the Act;
- (c) the Minister's decision to appoint the administrator.

The alleged flaws relating to the assessor's report are in essence that the report is vague insofar as no findings were made pertaining to the current Council, the report was sent to Council without the essential annexures thereto, the report was published prior to Council being provided with a copy thereof and insufficient time was provided to it to prepare a response thereto. It is also stated as part of this attack that the Minister prejudged the stability of CUT. Referring to the consultative process it is Council's case that it was not provided a fair and adequate opportunity to present a response to the DG, that there was no basis for constructive debate insofar as the DG had, prior to the meeting with Council, already come to a conclusion that the assessor's findings and recommendations were correct. Council also complains that it did not have sufficient time to prepare for the meeting and that the fatal

difficulty for the Minister is that the required consultative process with Council “clearly did not mesh with the decision-making process.” There was, according to the record of decision, no communication or memorandum as to what transpired at the meeting with Council which was passed between the DG and the Minister. The alleged flaws relating to the Minister’s decision to appoint an administrator are that he failed to take the decision himself, that he failed to provide reasons for his decision and that the record of decision demonstrates that no attention was given to any less drastic means of intervention. Council’s factual allegations pertaining to procedural unfairness have been dealt with by the DG in the answering affidavit. The Minister’s supporting affidavit was not attached to the answering affidavit in the Council’s application and an issue was made thereof in Mr Gauntlett’s heads of argument. However, during argument it appeared that the affidavit was by reason of oversight not attached and it was then handed up with the consent of Mr Gauntlett. Having in mind the **PLASCON-EVANS**-rule and insofar as material factual disputes appear from the papers, the Minister’s version should be accepted, unless it can be found to be untenable or far-fetched.

[33] There is no express requirement that the Minister had to provide the report of Prof Smith to Council before publication thereof although such requirement may be inferred from a reading of section 47(2) of the Act. The main thrust of the report is not so vague that it was not reasonably possible to respond thereto. The Minister duly delegated the DG to attend the consultation with the Council as he was entitled to do. Council's attack on the consultation process might have held water if the Minister made his decision directly after the meeting. *In casu* Council was given much more opportunity than could have been achieved by any meaningful consultation of several hours. It provided the Minister with a 71 page written response and three bundles with supporting documents which contained over 1000 pages. This also confirms that although a relatively short time was given to respond, this cannot be a bone of contention anymore. The Minister took the decision to appoint an administrator and although he did not provide any independent reasons at the time his decision was made it is apparent from the decision that he accepted the reasoning, findings and recommendations of Prof Smith. It is a fact that

the Minister did not consider, *ex facie* the record of decision, less drastic means of intervention.

[34] In support of his attack that the Minister failed to provide reasons for his decision reliance was placed on the full bench judgment in **WESSELS v MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS** 2010 (1) SA 128 (GNP) at 135 F – 139 C. That judgment is distinguishable from the situation *in casu*. In that case the Minister failed to provide reasons for the appointment of a Regional Court President. She resisted the review application on the basis that her decision did not constitute administrative action for purposes of PAJA and that no reasons were required as she exercised her executive power in the appointment. In an attempt to justify the Minister's failure to provide reasons, her counsel submitted that the Magistrates Commission's recommendation qualified as the reasons for her decision. This submission was not persisted with during oral argument and the court correctly found that it was devoid of any substance. *In casu* the Minister stated that he considered the report of Prof Smith, the Council's response thereto and an internal memorandum and confirmed that he was satisfied with the

findings and recommendations of Prof Smith. Those should be seen as his reasons as confirmed under oath. Whether the decision should stand shall be considered later. In conclusion therefore, I find that no procedural unfairness, as alleged, was proven.

- [35] Even if I am wrong in my finding that there was no procedural unfairness, it is apparent from the papers that the Council was not prejudiced as a result of the process followed. The decision-maker who opposes an application for the review of his decision must show that the failure to comply with procedural fairness caused no prejudice. See GROVE PRIMARY SCHOOL v MINISTER OF EDUCATION AND OTHERS 1997 (4) SA 982 (CPD) at 996 G – 997 H and the following quotation from RAJAH & RAJAH (PTY) LTD AND OTHERS v VENTERSDORP MUNICIPALITY AND OTHERS 1961 (4) SA 402 (A):

“(t)he Court will not interfere on review with the decision of a *quasi-judicial* tribunal where there has been an irregularity, if satisfied that the complaining party has suffered no prejudice.” (from the headnote)

See also J R de Ville: **Judicial Review of Administrative Action in South Africa**, Revised 1st ed, p 317 and further.

ATTACK ON THE MINISTER'S DECISION BASED ON SUBSTANTIVE GROUNDS

[36] The Council's challenge is based on four independent reasons indicating that the decision was *ultra vires* section 41A(1), i.e.

- (a) the Minister had no power to dissolve the Council;
- (b) the Minister was not empowered to appoint an administrator to simultaneously take over the governance function of the Council and management of the CUT;
- (c) section 41A(1) does not authorise the rewriting of institutional statutes by an administrator appointed in terms of the section;
- (d) the jurisdictional facts contained in section 41A(1) have not be met.

In essence a fifth reason is also relied upon as it is again emphasised that no reasons were provided by the Minister for his decision.

[37] The Constitutional Court has recognised the need to show an appropriate level of judicial deference to administrative decisions where the power to take such decisions have been vested in the executive and where officials such as the Minister *in casu* have not only the function, but also the responsibility and the knowledge of the relevant field, to undertake those functions. The courts can and will intervene only if there has been a transgression of the applicable legal requirements. It is apposite to quote the following dictum of O'Regan J, writing for the full court in **BATO STAR FISHING (PTY) LTD v MINISTER OF ENVIRONMENTAL AFFAIRS AND OTHERS** 2004 (4) SA 490 (CC) at para [45] p 513:

“What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the

Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”

In the following paragraph [para 46] the Constitutional Court agreed with the remarks of Schutz JA in the court *a quo* (the SCA) that judicial deference is called for in reviewing the decisions of administrative agencies.

- [38] Mr Gauntlett has made a serious issue of the fact that the DG has on numerous occasions referred to the fact that the Council was dissolved. Mr Kennedy, on behalf of the Minister, also contended that insofar as the Minister had validly appointed the administrator to take over the authority of the Council it necessarily followed that Council had been dissolved. As submitted, once the Council was deprived of its authority, there was no basis or purpose for its continued existence. This submission appears to be debatable especially insofar as the administrator has been appointed for a limited period to take over the Council’s governance functions temporarily only.

Section 41A(1) does not provide for the dissolution of a university council. The Minister in his decision as published in the Government Gazette did not expressly dissolve Council, but the Administrator was authorised to manage “the appointment of new Council members, including the review and establishment of the necessary Council sub-committees.” It is apparent that he is of the view that he could validly dissolve the Council. The Minister has no power to dissolve. If the subsection is compared with sub-section 41A(3), a stark contrast is apparent. When a council is deemed to have resigned, an administrator may be appointed to *inter alia* ensure that a new council is constituted. This is not the situation *in casu*. Mr Kennedy argued that insofar as the consequences of the Minister’s decision were construed incorrectly by the Minister, the DG and even by him, it should not follow that the Minister’s decision to appoint an administrator as set out in the published Gazette necessarily had to be set aside on review. As mentioned the decision provides for the appointment of councillors by the administrator and this lends support for a viewpoint that the Minister had Council’s dissolution in mind. He does not possess such authority and he has exceeded his

powers.

[39] The next substantive ground relied upon by the Council is that no simultaneous take-over of governance and management powers is allowed. I accept that if the Act in its entirety is considered there might be sufficient reason to conclude that governance and management powers should not be merged in the hands of one entity indefinitely. I have dealt with section 41A(1) *supra* and indicated how I interpret the section. It must also be taken into consideration, which I do, that the appointment of an administrator is for a limited period only in order to apply the required remedial measures. If it was the intention of the legislature that the Minister was empowered to appoint two administrators, the one for taking over the governance powers of council and the other to deal with management, it would have been stated clearly. In my view it is unnecessary to provide for the appointment of two administrators even if problems were detected pertaining to both governance and management. Surely an administrator taking over governance should be fully equipped to ensure that management functions are improved if and when so required by making use of those senior managers within a university that

are willing and able to co-operate. As submitted by Mr Kennedy, in the event of a crisis within a university it is appropriate to appoint an independent outsider for a specified period to take over all the functions which are problematic or have been undermined.

- [40] The next point raised on behalf of the Council is that neither section 41A(1), nor any other provision of the Act authorises the Minister to rewrite the institutional statute of a university. That power is vested in the council of the university in terms of section 32 of the Act. The statute has to be approved by the Minister, but he is not entitled to make a statute on an *ad hoc* or *ad hominem* basis as he purports to do by granting such authority to the administrator. Mr Kennedy argued that the administrator who is given all Council's powers can exercise its authority, *inter alia* to rewrite the institutional statute. He also argued that should it be found that the Minister exceeded his power to authorise the administrator to adopt or to draft a new statute, this cannot be a knockout blow for the remainder of the Minister's decision and at best for the Council the fourth decision could be set aside. However, he argued that there is

no basis to find that the Minister had exceeded his powers in this regard, specifically referring to the council's authority in section 32 which has now been taken over by the administrator in terms of the Minister's decision. It is on record that the Minister as recently as 2010 approved the statute adopted by the Council. There might be reasons for amending the statute with reference to the findings of Prof Smith and I am prepared to accept that the express authority granted to the administrator cannot be faulted if I ultimately find in favour of the Minister.

[41] Universities in our country have a significant role to play and it is desirable that they enjoy freedom and autonomy in their relationship with the State within the context of public accountability. The Minister and his department must accept the autonomy of universities and should not be allowed to intervene in the affairs of a university unless the jurisdictional facts set out in section 41A(1) have been shown to exist. There is no doubt that the step taken by the Minister is a drastic one.

[42] No similar application has been considered to the best of my knowledge. However there is close resemblance with the factual situation in **MNQUMA LOCAL MUNICIPALITY AND**

ANOTHER v PREMIER OF THE EASTERN CAPE AND

OTHERS [2012] JOL 28311 (ECB), a judgment by Van Zyl J

dated 5 August 2009. In that case the municipal council was dissolved as a result of alleged maladministration within the local municipality. The court found that the jurisdictional facts applicable to the exercise of a provincial executive's power were absent and as a consequence it acted *ultra vires* in dissolving the municipal council. Relying on Corbett J (as he then was) for authority – see **SOUTH AFRICAN DEFENCE**

AND AID FUND AND ANOTHER v MINISTER OF JUSTICE

1967 (1) SA 31 (C) at 34 A – 35 D, the court found that the existence of the jurisdictional facts in the subsection to be applied, was not left to the discretion of the provincial executive, but was an objective fact which was independently triable by the court.

- [43] Harms JA stated the difference between the pre-constitutional era and the present era pertaining to the adjudication of decisions by functionaries as follows:

“In this regard there is a clear break from the approach adopted in

matters such as security legislation during the pre-Constitutional era. There, the jurisdictional fact was quite often the opinion of one or other functionary and, provided the functionary held the opinion, courts were rather hamstrung. Here the jurisdictional fact is not someone's opinion but an objective fact,..... Whether it is appropriate can be tested judicially. If the fee does not pass this threshold requirement, the regulation is *pro tanto* void because it has no legal basis or justification. (emphasis added)

See **PHARMACEUTICAL SOCIETY OF SOUTH AFRICA AND OTHERS v TSHABALALA-MSIMANG AND ANOTHER NNO; NEW CLICKS SOUTH AFRICA (PTY) LTD v MINISTER OF HEALTH AND ANOTHER** 2005 (3) SA 238 (SCA) para [75].

[44] It is now trite that every exercise of public power is expected to be justified. See **DEMOCRATIC ALLIANCE v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS** 2012 (1) SA 417 (SCA) and the following dictum at para [67] by Navsa JA, writing for the full bench:

“Professor Mureinik explained (in the context of the interim Constitution) the fundamental change brought about because of a shift from a 'culture of authority' to a 'culture of justification'. He

described it as —

'a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command'."

See also **KOYABE AND OTHERS v MINISTER FOR HOME AFFAIRS AND OTHERS (LAWYERS FOR HUMAN RIGHTS AS AMICUS CURIAE)** 2010 (4) SA 327 (CC) at paras [63] and [64] p 350. It is expected of the decisionmaker to explain his decision in such a way that the aggrieved person would be able to understand why the decision went against him although he might not agree therewith. See **MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM AND OTHERS v PHAMBILI FISHERIES (PTY) LTD; MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM AND OTHERS v BATO STAR FISHING (PTY) LTD** 2003 (6) SA 407 (SCA) at par [40] p 428. It cannot be gainsaid that the Minister could have spelt out the reasons for his decision in detail. Although in a different context, it is apposite to refer to **INDEPENDENT NEWSPAPERS (PTY) LTD v MINISTER FOR INTELLIGENCE SERVICES: IN RE MASETLHA v**

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND

ANOTHER 2008 (5) SA 31 (CC) at par [54] **PRESIDENT OF**

THE REPUBLIC OF SOUTH AFRICA AND OTHERS v M & G

MEDIA LTD 2012 (2) SA 50 (CC) at par [24] p 60. The mere

ipse dixit of the functionary that he or she has duly applied his or her mind in order to come to a decision is not sufficient.

The Constitutional Court in **SIDUMO AND ANOTHER v**

RUSTENBURG PLATINUM MINES LTD AND OTHERS 2008

(2) SA 24 (CC) at p 59 dealt with the standard of review and

indicated that the review for reasonableness as explained by

Prof. Hoexter tend to blur the distinction between appeal and

review. The court took cognisance of Hoexter's statement that

the danger lies not in careful scrutiny, but in "judicial

overzealousness in setting aside administrative decisions that

do not coincide with the judge's own opinions". In accepting the

standard adopted in **BATO STAR** *loc cit* to be correct, it found

that the test is to be applied to administrative action as well.

Moseneke DCJ stated the following pertaining to the power of

an HOD in accordance with the SA Schools Act:

“The power to intervene and revoke a function of a school governing body is authorised by the statute itself, provided it is done on reasonable grounds and in order to pursue a legitimate purpose.”

See HEAD OF DEPARTMENT, MPUMALANGA DEPARTMENT OF EDUCATION AND ANOTHER v HOËRSKOOL ERMELO AND ANOTHER 2010 (2) SA 415 (CC) at para [68] p 440. Confirming that the School’s Act devolves power and decision-making on the school’s medium of instruction to a school governing body, the court found that it would

“be wrong to construe the devolution of power as absolute and impervious to executive intervention when the governing body exercises that power unreasonably and at odds with the constitutional warranties to receive basic education and to be taught in a language of choice.”

See para [78] p 443.

[45] Prof Smith’s report was accepted by the Minister and it is recorded as follows in the Minister’s appointment of Prof Ridge

as gazetted in the Government Gazette of 20 June 2012

“The Minister has received and considered the report of the Independent Assessor. It is evident in the report that there are serious problems in the governance and management of the University, which are undermining the effective functioning of the university.”

This appears to be a recitation of section 41A(1). The Council filed a 71 page report and three lever arch files of documents consisting of over a 1000 pages in support of its submissions in reply to Prof Smith’s report. Neither in coming to his conclusion, nor in any of the affidavits before me were the factual averments made on behalf of the CUT challenged in any manner, save for the issues that I shall deal with *infra*. In fact, an impressive response was tendered to the assessor’s report and I would have expected the Minister to deal with these allegations and documentary proof provided prior to making his decision or at the very least in his opposition of the Council’s application. The only reference to a consideration and analysis of the Council’s representations appears in a document compiled by Pearl Whittle, an employee in the Minister’s

Department and I quote the following

“11 The document submitted by Council and its annexures submitted on 1 June 2012, have been analysed by the University Branch. The response of Council to the Assessor’s report does not address the substance of the key findings of the Independent Assessor. These include the lack of evidence and/or reasons as to why the KPMG report could not be availed to the Minister of Higher Education and Training, human resource issues including high staff turnover and disciplinary processes, alleged abuse of power and victimisation by the Vice-Chancellor and Deputy Vice-Chancellor (Institutional Planning, Partnerships and Communication) and non-adherence to procurement and finance policies (annexure “D”).”

The main theme of the Minister as set out in the affidavits before me is that the anonymous letter and the allegations contained therein were responded to inadequately by the Council and that leaving the matter to be dealt with by Council was not productive and it would not achieve within a reasonable time and at an adequate level an acceptable and meaningful solution. As a direct consequence of the vagueness in the

Minister's affidavits, Mr Kennedy in his written heads of argument as well as in oral argument was equally vague in this regard.

- [46] The issues raised by Prof Smith that merit closer attention are firstly, the manner in which the anonymous letter was dealt with, the obtaining of the KPMG and Lubbe reports and the responses thereto, secondly, the manner in which the Vice-Chancellor was re-appointed in circumstances where he was accused of *inter alia* maladministration and improper management and thirdly the financial policies and *inter alia* the decrease in reserves. It appears that the KPMG report was available in the CUT offices when Prof Smith did his investigation. I accept that Me Moss, an employee in the office of the CUT Registrar and Secretary of the Council provided a copy thereof to Me De Klerk of the Department who assisted Prof Smith. I take cognisance of Prof Smith's version that he was informed in writing by Adv Lubbe that both the KPMG report as well as his first report were delivered personally to the office of the Registrar in November 2011. This report was neither sent to the Minister prior to May 2012, nor tabled at a Council meeting before then. Certain individuals might be

accused of trying to conceal the contents thereof, but to blame Council of misleading the Minister or for improper governance is taking it too far. Prof Smith's finding that the anonymous letter was handled "extremely inadequately and unsatisfactorily" was duly dealt with by the Council. KPMG could not complete its mandate notwithstanding pressure from Council and empty promises to file a report. Adv Lubbe was specifically mandated to take over from KPMG and it is clear from his first report that he was in possession of the KPMG report which was finalised after its mandate was terminated. He reported that he considered that report. Immediately after the second Lubbe report of 21 January 2012 the Minister intervened. When the Council was approached by the Minister it offered to appoint a commission of inquiry headed by a retired Judge to do a proper investigation. The Minister declined. In his first report of 20 October 2011 Adv Lubbe also confirmed that Me Snyders of KPMG reported to him that there was merit in the majority of the allegations contained in the anonymous letter. This was based on consultations with unidentified people and in some instances on documentary proof. I am of the view that too much was made of the failure to present the Minister with the KPMG report

earlier. What is stated therein is confirmed in Adv Lubbe's report and when the second Lubbe report was submitted the Minister started to intervene. Although Adv Lubbe confirmed that there was clear documentary proof consisting of official CUT documentation supporting most of the merit findings, he significantly also stated as follows:

"It must however immediately be pointed out that the findings that were made are not final, not necessarily based on *prima facie* evidence and the evidence relied upon have not been tested to establish the truth thereof. Also the persons implicated have not had the opportunity to respond thereto."

The "clear documentary proof" was not placed before me and it is specifically not contained in Prof Smith's report to the Minister.

[47] I have referred to the fact that the Vice-Chancellor was appointed by the Council for a further term as his previous term expired at the end of 2011. I have considered the Council and its EXCO minutes, as well as the quarterly reports of 2011. I noticed that the terms and conditions of the Vice-Chancellor's

further appointment and in particular the remuneration to be offered to him were discussed several times. I could not find any discussion by council or its EXCO to the effect that the re-appointment of the Vice-Chancellor should be put on hold pending finalisation of the investigations. That may be significant, but *ex post facto* we now know that nothing came from the allegations of fraud and serious maladministration and the alleged documentary proof thereof. The Vice-Chancellor may be regarded as having an autocratic management style, too assertive and even arrogant if some of his remarks in the documentation before me are considered. His written presentation to Adv Lubbe is one example. However the Minister has high regard for the person of the Vice-Chancellor and it is apparent that the CUT is a university that is held in high esteem, not only in this country, but also overseas. The Minister's complaint in respect of the re-appointment of the Vice-Chancellor has nothing to do with him as a suitable person, but the process followed. His reliance on Prof Smith's so-called finding is misplaced. A proper approach in line with the CUT statute was followed and the professor merely mentioned that he would have expected Council to refer the

issue to *inter alia* the Senate before a decision was taken.

One will always find in big institutions, especially where a restructuring process was or is being undertaken, that some employees or ex-employees are dissatisfied with the way they are treated or have been treated in the past. It appears from both the KPMG and Lubbe reports, as well as Prof Smith's report, that some of the people interviewed feared retribution and/or victimisation and Prof Smith even referred to a "culture of fear" at the CUT. This should be addressed by Council and this judgment should not be seen as encouragement that a solution does not have to be found to reduce or eliminate such fear, but there was no justification for intervention in this regard.

[48] Contrary to the tentative findings and even less than *prima facie* evidence by faceless complainants set out in the KPMG, Lubbe and Prof Smith's reports (the last relying on Mr Bold's analysis), the Council dealt comprehensibly with the allegations. Prof Smith used words such as "seems" and "seemingly" several times in order to come to his conclusions. This is indicative of uncertainty and perception rather than reality. No positive and clear finding was made, save that the KPMG report was in

possession of the CUT. Pertaining to financial matters the CUT reserves have trebled recently and its reserves have not decreased as alleged. It has received clean audits for several years in a row. The Human Resource issues, specifically pertaining to disciplinary hearings and high staff turnover have been explained satisfactorily by the Council such as is the case in respect of all other perceptions raised. Even if it is accepted that there are problems that need to be ironed out, the jurisdictional facts of section 41A(1) have not been met and those can be solved without the Minister's intervention in terms of the section. One does not need a sledgehammer to kill a mosquito. The reasonable decision-maker would have expected clear evidence of financial or other maladministration of a serious nature and/or serious undermining of the effective functioning of the CUT before a drastic decision such as *in casu* is taken. No such proof was placed before the Minister. I find therefore that no reasonable decision-maker could have come to the decision arrived at by the Minister. The jurisdictional facts of section 41A(1) have not been met. In my view he pre-judged the issue as he made it clear, even before the Council's response was received, that the CUT should be

stabilised. Also, when the Council's response was eventually considered during the afternoon of 18 June 2012 as alleged, he did not indicate why and on what basis he accepted Prof Smith's version notwithstanding the conflicting reports. When he was asked to deal with the issue on the 18th June, he was handed pre-printed letters to Dr Seane, the Vice-Chancellor and Prof Ridge informing them of his decision as well as the pre-printed decision to be published in the Government Gazette. He signed these on that day. This may be indicative of either a preconceived opinion, or his rubberstamping of someone else's decision. However it is not necessary to base my judgment on such foundation.

[49] Consequently, I am of the view that the Council's application, seeking the review and setting aside of the Minister's decision, gazetted in the Government Gazette of 20 June 2012, should succeed. No sufficient justification exists to set aside Prof Smith's report or to grant an interdict as contained in prayer (e) and I do not intend to grant such orders.

THE MINISTER'S APPLICATION

[50] As a result of my conclusion *supra* the declaratory orders

sought by the Minister in prayers 2, 3 and 4 of his Notice of Motion cannot be granted.

[51] The following is applicable to prayer 5. It is the Council's case that funds were transferred to the account of its attorneys to provide for legal costs prior to the Minister's decision. No funds were transferred after the Minister's decision. It is also clear from a reading of the papers that the Minister was fully aware of the fact that the Council intended to bring an urgent application to have his decision set aside on review. Bearing in mind the university recess there was really no urgency to ensure that Prof Ridge takes over control pending institution of urgent court proceedings. I do not condone the tactics employed to prevent Prof Ridge from taking over control at the CUT. It would be the proper approach to bring an urgent application to interdict Prof Ridge from taking over pending the review application to be instituted. However that would incur further costs. Both parties are to be blamed for the inconvenience caused to Prof Ridge, but in the light of the decision to which I have arrived in respect of the review application, I am not prepared to grant any order in this regard. In the light of the outcome of the review

application prayers 6, 7 and 8 of the Minister's application should also fail.

COSTS

[52] There is no reason why costs should not follow the event. Both parties have employed two counsel and the novelty of the matter warranted the employment of two counsel.

ORDERS

[53] The following orders are made:

In respect of application 2786/2012:

53.1 The decision of the Minister of Higher Education and Training dated 18 June 2012 published in the Government Gazette of 20 June 2012 under GN No 476 appointing fourth respondent as administrator to the Central University of Technology is set aside.

53.2 First respondent is ordered to pay applicant's costs, including the costs of two counsel.

In respect of application number 2776/2012:

53.3 The application is dismissed with costs, including the costs of two counsel.

J.P. DAFFUE, J

On behalf of:

Applicants in case no 2776/12: Adv P Kennedy SC

Respondents in case no 2786/12: Adv N Mahlangu

Instructed by:

State Attorney

BLOEMFONTEIN

On behalf of:

Respondent in case no 2776/12: Adv J J Gauntlett SC

Applicant in case no 2786/12: Adv F B Pelser

Instructed by:

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/sp