

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: P106/23

In the matter between:

**NATIONAL EDUCATION, HEALTH AND
ALLIED WORKERS UNION**

First Applicant

**MEMBERS OF NEHAWU EMPLOYED BY THE
WALTER SISULU UNIVERSITY (Annexure “X”)**

Second to Further Applicants

and

WALTER SISULU UNIVERSITY

First Respondent

**PROFESSOR RUSHIELLA SONGCA *N.O.*
(FIRST RESPONDENT’S VICE-CHANCELLOR
& PRINCIPAL)**

Second Respondent

**MINISTER OF HIGHER EDUCATION, SCIENCE
AND INNOVATION**

Third Respondent

Heard: 13 December 2023

Delivered: 29 January 2024 (This judgment was handed down electronically by circulation to the parties’ legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 29 January 2024.)

**REASONS FOR AND VARIATION OF ORDER
PHEHANE, J**

Introduction

‘Time travels at different speeds for different people. I can tell you who time strolls for, who it trots for, who it gallops for, and who it stops cold for.’

— William Shakespeare

[1] On 13 December 2023, I issued an order in the following terms:

‘1. The application is dismissed.

2. The applicant is to pay the costs of the first and second respondent, which costs include the cost of employing two counsel.’

Varied order

[2] In terms of Rule 16A(1)(a)(ii)¹, paragraph 2 of the said order is varied to read:

‘The first applicant is to pay the costs of the first and second respondent, which include the cost of employing two counsel.’

[3] The brief reasons for the said order (and variation) appear below.

[4] The case brought to this Court by the first and second to further applicants (applicants) is convoluted. Several causes of action are pleaded, ranging from breach of contract, unilateral change to the terms and conditions of employment, the non-application of a collective agreement and contravention of section 33 read with section 32 of the Higher Education Act² (HEA). The relief sought by the applicants is equally convoluted. It is framed as follows:

PART A:

...

1. The requirements of Rule 7 of the *Rules for the Conduct of Proceedings in the Labour Court* (Rules) are dispensed with and this application is heard as one of urgency in terms of Rule 8 of the above-mentioned Rules;

2. The Respondents are interdicted and restrained from relocating and/or transferring the 2nd to further applicants, as a result of the 1st Respondent’s Rationalisation and Consolidation process, pending:

¹ GN 1665 of 1996 Rules for the conduct of proceedings in the Labour Court.

² Act 101 of 1997.

- 2.1 A full and meaningful consultation process between the Applicants and the 1st Respondent; **and**
- 2.2 The finalisation and disclosure of the applicable Relocation Policy; **and**
- 2.3 Compliance with Sections 33, (*sic*) read with Section 32 of the *Higher Education Act* 101 of 1997; **or**
- 2.4 The finalisation of Part B of this application.
3. The Order in paragraph 2 above does not apply to members of the 1st Applicant (NEHAWU) who have voluntarily agreed to a change of their conditions of employment by consenting to their relocation and/or transfer as a result of the Rationalisation and Consolidation Process;
4. The Applicants are granted leave to file a Supplementary Notice of Motion (part B) and Affidavit, in relation to Part B of the application, within ten (10_ days of the granting of this Order, whereafter and Answering and Replying affidavit in respect thereof may be filed in accordance with the provisions of Rule 7.
5. The 1st Respondent is directed to pay the costs of Part A of this application if opposed, alternatively, the costs of Part A of this application are to be costs in Part B thereof.
6. Further and/or alternative relief.'

[5] Part B is framed as follows:

'PART B

...

1. The 1st Respondent's decision to relocate and/or transfer the 2nd to further Applicants is reviewed and set aside.
2. Subject to compliance with Section 33, read with Section 32 of the *Higher Education Act* 101 of 1997, the 1st Respondent is ordered to engage in full and meaningful consultation with the Applicants as to the Rationalisation and Consolidation Process and the intended to Staff Relocation and Transfers, which consultation should extend to suitable alternatives and must take place within ninety (90) days from the date of the Order granted:
3. That any Respondent opposing this application be ordered to pay the cost thereof;
4. That the further and/or alternative relief that this Honourable Court deems fit and appropriate be granted to the Applicant.'

[6] The application is opposed by the first and second respondents (respondents). The third respondent filed a notice to abide by the decision of this Court.

[7] The application was initially heard on 1 December 2023, on which date, the parties sought an order by the Court by agreement to postpone the hearing of the matter to 13 December 2023. The order was granted by Lallie, J.

Background

[8] The matter has a long background. I summarise it below. Before I do so, a brief history of the formation of the first respondent, Walter Sisulu University (WSU) is necessary for context.³

[9] The WSU was established on 1 July 2005 through a merger of the former Border Technikon, Eastern Cape Technikon and the University of Transkei. It was established by a Government Notice published in terms of the provisions of HEA.

[10] The WSU was subsequently regulated by the Statute of the Walter Sisulu University published in Government Gazette No. 31358 of 26 August 2008. This Statute was replaced by the Institutional Statute: Walter Sisulu University, published in Government Notice 13 dated 17 January 2014 in Government Gazette No. 37235 in accordance with the provisions of section 33 (1) of the HEA.

[11] By 2020, the WSU had approximately 28 968 students spread across four main campuses, being Mthata, Buffalo City, Komani and Butterworth, and with 12 faculties holding 27 distinct fields of study and 56 academic departments.

[12] With the institutions that amalgamated, a duplication of faculties and departments/programs arose at various learning sites which resulted in inefficiencies in the education offering of the WSU.

³ See: paras 6 to 20 of the respondents' heads of argument.

[13] During 2019, WSU embarked on a program known as “Vision 2030” which included a strategic plan for the future. This served as a catalyst for the Rationalisation and Consolidation strategy (R&C Strategy), more of which is set out below.

[14] The objective of the R&C strategy would result in staff being pooled together on fewer sites which would create efficiency and stimulate an academic environment with good practices and the duplication of, and unnecessary qualifications would be eradicated. The long-term benefits of the R&C strategy include more highly qualified and capacitated academic staff, a possibility of higher postgraduate enrolment and high levels of research activity and output.

[15] The guiding principles of the R&C strategy were the consolidation of fields of study, relocation to sites that already offer programs in the relevant fields of study to minimise the cost of providing additional equipment/faculties, cognate disciplines or fields of study to be kept together to ensure overall academic coherence and the appropriate location of faculties in the broader environment.

[16] In January 2021, the Council of the WSU supported the finalisation of the R&C strategy that would see the number of faculties reduced from 12 to 7. In February and March 2021, the WSU Senate, Labour Formations, WSU Institutional Student Representative Council and Convocation Executive were informed of the WSU's major projects for 2021. In April 2021, the new strategic plan incorporated in Vision 2030 was approved by the WSU Council. Among its key objectives was the rationalisation of faculties and consolidation of campuses (R&C strategy).

[17] An extensive consultation process ensued for a period of more than two years (which consultation process began in November 2021) in which the first respondent (NEHAWU) was consulted. NEHAWU formed part of the stakeholders on the Steering Committee where consultation occurred. Over and above the R&C Steering Committee consultations, consultations with NEHAWU took place on 14 March 2022 at 10 October 2022. During these consultation meetings, wide-ranging issues

pertaining to the R&C strategy were canvassed. All submissions made by NEHAWU were considered.

[18] Following the extensive consultation with stakeholders including NEHAWU on 26 May 2023, the WSU's Council adopted the R&C Strategy. The faculties were reduced from 12 to 7. The WSU proceeded to accept student intake for the year 2024 according to the adopted R&C strategy. A communique was distributed to all employees by the WSU Council Chairperson on 29 May 2023, which read:

'Dear University Community,

SUBJECT – APPROVAL OF RATIONALISATION AND CONSOLIDATION STRATEGY BY THE COUNCIL

1. It brings me pleasure to announce that after three years of intense engagements, at the Special Meeting of Council on 26 May 2023, the University Council passed the following resolutions:

1.1 The Rationalisation and Consolidation Strategy Document (R & C Strategy) is adopted as policy of the Walter Sisulu University. The R & C Strategy is premised on these principles:

- pursuit of academic excellence
- rationalisation of faculties
- consolidation of programs
- permitting only necessary duplications
- ensuring no job losses.

1.2 The implications of the adopted R & C Strategy are that henceforth there shall be seven (7) Faculties.

1.3 Council, however, has not endorsed the proposal for the closure of the Engineering Faculty in Butterworth. Management has been mandated to present a fresh proposal which would ensure the consolidation of the Main Engineering Faculty in East London, and that certain Engineering Programmes are offered at the Butterworth campus. The revised proposal will be considered by the Council at its next meeting.

1.4 Management has been mandated to commence the process of implementation of the R & C Strategy, with effect from 1 June 2023. This means when the applications are opened for the 2024 academic year, it will be on the basis of the R & C Strategy.

1.5 The positions for Executive Deans of the Seven New Faculties must be advertised without delay.

1.6 Management has also been mandated to consult with Labour and the internal stakeholders on a new organogram, which will be underpinned by the R & C Strategy.

1.7 Management should advise the University Community on the plan for the implementation of the R & C Strategy and continue the engagements with affected employees.

2. The adoption of the R & C Strategy does not, of course, signal the end of engagements with stakeholders. The decision of [the] Council brings clarity to the goals of the University, to be pursued by Management. Council remains available and open to resolve any areas of significant disagreement on areas of implementation. We emphasise, however, that management retains the primary role in the execution of the Strategy.

3. Council wishes to thank the University Community for the co-operation during the process of developing the R & C Strategy. It is our sincere aspiration that the adoption of the R & C Strategy will significantly enhance the academic standing of WSU to enable it to contribute meaningfully to the developmental objectives of the country and African continent...'

[19] This communique was followed by roadshows across the various campuses, where the WSU engaged with all its employees on the implementation of the R&C strategy. The implementation of the R&C strategy was set for 1 June 2023.

[20] On 16 August 2023, in a meeting with the WSU, NEHAWU proposed a task team be established to facilitate the implementation of the R&S strategy. A follow-up meeting was to take place in September 2023 but did not materialize.

[21] In September 2023, letters were communicated to employees regarding the implementation of the R&C Strategy. One such letter is annexed as "AA37", the

content of which, in essence, communicates to an affected employee that following a commitment by the WSU to notify and consult all affected employees, the employee is notified that the faculty in which she is employed is relocating to Butterworth with effect from 1 January 2024. Information is provided regarding employees who are required to relocate and those who shuttle service will be provided. Mention is made of an R&C Relocation Policy, which at the time, was currently in consultation with stakeholders. Further, the employee is advised that the WSU is open to receiving representations regarding personal circumstances which make relocation impossible and that such representations should reach the University by 11 October 2023 for consideration. The employee is informed that if relocation is not practically possible, alternative positions will be explored and if not found, retrenchment would possibly follow in terms of the WSU Retrenchment Policy. The letter emphasises that the relocation of affected employees must be finalised by the beginning of 2024. The letter further recalled that unjustified refusal to relocate will constitute misconduct and the employee may face disciplinary action (WSU has moved from this position, but maintains that where relocation is impractical, then retrenchment may follow).

[22] It bears mentioning that when this matter was heard, although it appears in the pleadings that the WSU intended to have the R&C Relocation Policy approved by its Council on 8 December 2023, this did not materialise. When this matter was heard, the aforesaid policy had still not been approved by the WSU Council. The approval of the policy is so sore thumb for NEHAWU – the union denies being consulted on this policy and is adamant that no relocation should take place in the absence of this policy.

[23] On receipt of these letters, NEHAWU avers that its members began complaining about, it would seem, relocating. In the result, NEHAWU sent correspondence to WSU on 4 October 2023 and follow-up correspondence on 12 October 2023, essentially, on NEHAWU's version, objecting to the implementation of the R&C Strategy and reiterating that it had proposed, during a meeting on 16 August 2023, that a Task Team be established to facilitate the implementation. NEHAWU avers that its proposal fell on deaf ears and their correspondence went unanswered. The WSU avers that during the meeting on 16 August 2023, NEHAWU lamented on the R&C strategy, but it was informed that the ship had sailed insofar as

the formulation of the policy was concerned and the strategy was now implementation phase.

[24] On 10 November 2023, the employees received “choice forms”⁴ to make three elections by 17 November 2023, on firstly, whether they need three months’ accommodation or a lump sum of R70 000 paid, for, it would seem, accommodation, secondly, whether they require furniture removal or a lump sum of R20 000 paid over to them, and thirdly, whether they choose to relocate in December (2023) or January (2024). Three of the second to further applicants (Lakshmi Jayakrishnan, S. Soha and VJ Momnga) signed the choice form and received an amount of R 90 000.00 (the choice forms commence with confirmation that the employee is aware of the R&S strategy, its benefits, the implications of the strategy and how it affects the employee). NEHAWU does not dispute that three of the applicants signed the choice form, save to state that it was not aware, when this application was launched, that the three individual applicants had acquiesced to the relocation.⁵ NEHAWU states that the completion and submission of the choice forms “*do not translate to an amendment of these three employees’ conditions of service*”. In the first instance, this reply is at odds with prayer 2 in Part A of the applicants’ notice of motion. In the second instance, this reply puts to bed NEHAWU’s contention that the relocation amounts to a change in the terms and conditions of their members’ employment. I deal with this cause of action below.

[25] A further issue to get out of the way at this juncture regarding the individual applicants, is the statement by the WSU that four of the individual applicants (namely, Singisa Mantambo, Peter Boateng, S. Soha and Vusimuzi Mandini) are not members of NEHAWU. NEHAWU deals with this statement by stating that they were its members when this application was launched. They do not, to the satisfaction of this Court, affirm that the four individuals are currently members of NEHAWU.⁶ It appears that NEHAWU is none the wiser as regards S. Soha, who signed the choice form and had agreed to relocate without NEHAWU being aware and there is no

⁴ One such form appears at p 225.

⁵ See: answering affidavit, paras 5.8.3 and 5.8.4 on pp 138 to 139 and para 49 on p 154, and replying affidavit at paras 4.9 on p 468, para 4.49 on p 478 read with paras 3.21 and 3.22 on pp 460 to 461.

⁶ See: answering affidavit at para 51.1 on p 154 and replying affidavit at para 4.50 on p 478.

clarity on whether or not she/he is a member of NEHAWU currently. I deal with the applicants before this Court below.

[26] Returning to the chronological sequence of main events, on 13 November 2023, the employees were served with letters informing them that they must pack their belongings in their offices and removals would take place between 18 and 22 December 2023.⁷

[27] It would appear that the defined tone of the letters and the imminent relocation, in my view, sparked the fuse to launch this urgent application.

[28] On a reading of the founding affidavit, the applicants paint a picture of zero consultations taking place and they seek, in essence, relief stopping the relocation of its members pending full and meaningful consultation and a disclosure of the R&C Relocation Policy and compliance with sections 33 and 32 of the HEA *or*, pending the relief sought in Part B of the notice of motion.

[29] As clarified by Mr. Jooste for the applicants during oral argument, NEHAWU takes no issue with the adoption of the R&S Strategy, but with its *implementation*. He submits that the WSU failed to consult with NEHAWU and its members on the implementation of the strategy, which includes a lack of consultation on the R&C Relocation Policy that would guide the implementation of the strategy.

Urgency

[30] The WSU no longer persists with its contention that the application is not urgent, however, it leaves it up to this Court to determine urgency.

[31] I am not satisfied that the applicants have made out a case for urgency, as they were aware as early as May 2023, and at least since 1 June 2023, that the R&C strategy would be implemented. Roadshows in August/September 2023 sounded alarm bells that implementation in the form of relocation of affected staff was in the

⁷ One such letter appears at p 80.

offing (the time of the road shows is not specified in the pleadings but was confirmed by the parties during oral argument). NEHAWU did not approach this Court at that point and did not approach this Court after letters were issued to its members in September 2023 informing them that they would be relocated and any representations against relocating should reach the WSU by 11 October 2023 (this deadline was later extended to 27 October 2023). In its letter to the WSU dated 12 October 2023, NEHAWU threatened to approach this Court on an urgent basis if its demands, that the letters of September 2023 be retracted and a task team be set up to facilitate the relocation, were not met. Yet, this Court was not approached as early as October 2023.

[32] The choice forms that were issued in early November 2023 were a further ticking time bomb for the applicants. It is only when the last letters were communicated in November 2023 to get “a-packing” as removals would happen in December 2023, that the applicants awoke from their slumber, now, wanting to stop the relocation process pending relief they have not properly clarified.

[33] However, considering the importance of this matter, given that the objective of the strategy is to relocate and consolidate the faculties of the WSU and the 2024 academic year being imminent, I exercise my discretion to hear this matter as urgent.

Argument and analysis

[34] As stated above, when reading the content of the applicant’s founding affidavit, and taking into consideration the relief prayed for by the applicant that the relocation of its members be interdicted pending “full” and meaningful consultation with it, it would appear that the applicant skirts over what was evidently extensive consultation between the WSU and its stakeholders in respect of the R&C strategy, including its implementation.

[35] The WSU painstakingly sets out in its answering affidavit the full extent of the consultations with stakeholders. The WSU further avers that NEHAWU formed part of the Steering Committee where discussions and consultations on the R&C strategy

occurred. Further, the WSU avers that NEHAWU put its full weight behind the R&C strategy and took some credit for its successful formulation following the official communication in May 2023 regarding the adoption of the strategy.

[36] On 16 August 2023, a meeting was held with NEHAWU in which meeting, according to WSU, NEHAWU attempted to reopen talks regarding the formulation of the R&C strategy and it was informed that the proverbial ship had sailed and that the implementation stage of the strategy had been reached. The WSU was not amenable to NEHAWU's proposal of establishing a task team to steer the implementation process, as it already had structures in place for this purpose and did not want a duplication of structures. The WSU readily accepts that a follow-up meeting was to be held in September 2023 to further discuss the implementation of the strategy with NEHAWU, but such meeting did not take place.

[37] With the full extent of the consultation on the strategy placed before the Court by the WSU, NEHAWU confirms in its replying affidavit that its case before this Court is the lack of consultation on the *implementation* of the strategy. NEHAWU complains that there has not been "*formal and structured*" consultations with it and neither have there been one-on-one consultations with each of its members regarding the relocations.

[38] The tone of the letter by NEHAWU dated 12 October 2023 takes issue with the concept of the R&C strategy and not only with its implementation and NEHAWU proposes that the entire process (strategy and implementation) be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) for consultation on the R&C process between October and November 2023. NEHAWU states in the letter that consultations have not happened or have not been concluded. It also laments that the WSU is approaching its members directly. The same letter records that a dispute on the unilateral change to the terms and conditions of employment had been referred to the CCMA by NEHAWU on 6 October 2023, yet, the WSU is disregarding the provisions of section 64(4) of the Labour Relations Act⁸ (LRA).

⁸ Act 66 of 1995, as amended.

[39] Various speculations are put forward by NEHAWU on the harm that would be suffered by its members should the interim interdict not be granted and they relocate, ranging from separation of families, challenges regarding the sale of current homes below market price and great financial loss, and challenges regarding the relocation of children to new schools and the expenses of buying new school uniform. No confirmatory affidavits are placed before this Court by NEHAWU to confirm these statements and the loud fears of detrimental financial loss sounding through such statements. The unsupported statements regarding families being torn apart and children having to live without parents are exaggerated.

[40] I now deal with the applicants' averments (as contained in their various causes of action) in their attempt to persuade this Court that they have demonstrated that they have a *prima facie* right to the relief sought in Part A of the notice of motion. Breach of contract, offending the *audi alteram partem* principle, legality review, breach of section 33 of the HEA, unilateral change to the terms and conditions of employment, breach of a collective agreement

[41] The applicants contend that relocating them without consultation amounts to a breach of contract in circumstances where their contracts of employment specify the location where they are to render their services. In this regard, NEHAWU relies on the decision in *Minister for Public Service and Administration and Another v Gayle Cheryl Kaylor*⁹ (*Kaylor*), to the effect that an employer is obliged to consult with an employee before transferring such employee to a different location.

[42] The WSU contends that firstly, all but one of the applicants' contracts of employment do not specify a location where the particular individual is to render services; secondly, there is no basis in law that curtails an employer from requiring its employee to relocate; thirdly, *Kaylor* is distinguishable.

[43] On the *Plascon-Evans*¹⁰ principle, I find in favour of the WSU that extensive consultation on the R&C strategy occurred with all its stakeholders, including NEHAWU. I agree with Mr Redding's submission for the respondents, that the facts

⁹ [2013] ZALAC 11; (2013) 34 ILJ 3111 (LAC).

¹⁰ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

in *Kaylor* are distinguishable. The affected individual applicants were consulted about the implementation of the strategy in roadshows and correspondence and were afforded an opportunity to make representations against relocating. The WSU did not close the door on consulting with the affected employees. The last letters to the affected employees about the date their personal effects would be moved did not occur in a vacuum – they were well aware that the implication of the strategy meant relocation and they were provided with an opportunity to approach the WSU to resolve any issues with relocation. The facts do not support the applicants' case that the WSU offended the *audi alteram partem* principle. Unlike *Kaylor*, no facts are placed before this Court by the applicants that they made representations and they were ignored.

[44] The applicants do not set out grounds of review other than using terms such as legality review, the WSU acting *ultra vires* in contravening section 33 of the HEA and offending the *audi alteram partem* principle. The applicants seek leave to supplement their papers to give some clarity, it would seem, of the relief they seek in Part B. Mr. Jooste submits that this Court is not to concern itself with the relief sought in Part B. The difficulty with this submission is that it places this Court in no position to consider what the *main case* is that the applicants seek this Court to adjudicate and whether it should issue an interim order effectively, halting the relocation, pending the adjudication of the main case.

[45] In *Economic Freedom Fighters v Gordhan and Others*¹¹ (*EFF*), the Constitutional Court restated that the nature of an interim interdict is relief granted pending litigation. It is intended to protect the rights of an aggrieved party pending litigation to establish the respective rights of the parties. The criteria for the grant of interim interdictory relief as set out in *Setlogelo v Setlogelo*¹² were repeated, being a *prima facie* right, a reasonable apprehension of irreparable harm, the balance of convenience and no other satisfactory remedy. Further, the Constitutional Court in *EFF* stated as follows at paragraph [42]:

‘In addition, before a court may grant an interim interdict, it must be satisfied that the applicant for an interdict has good prospects of success in the main review. The

¹¹ [2020] ZACC 10; 2020 (6) SA 325 (CC).

¹² 1914 AD 221.

claim for review must be based on strong grounds which are likely to succeed. This requires the court adjudicating the interdict application to peek into the grounds of review raised in the main review application and assess their strength. It is only if a court is convinced that the review is likely to succeed that it may appropriately grant the interdict.'

[46] What then, is the main case the applicants bring to this Court? In paragraph 3.5 of the founding affidavit, the applicants state:

'3.5 In terms of Part B, NEHAWU seeks final relief in relation to the implementation of the Rationalisation and Consolidation Process. More especially, NEHAWU seeks to review and set aside the WSU's decision to relocate and/or transferring the affected members on inter alia the basis that:

3.5.1 The intended relocation and/or transfer offends the audi alteram partem rule; and

3.5.2 The decision (including the implementation thereof) is ultra vires, as the jurisdictional requirements of section 33 read with section 32 of the Higher Education Act have not been met.'

[47] At no stage during the extensive consultation process relating to the R&C strategy, nor in any correspondence by NEHAWU relating to the entire process, does NEHAWU inform the WSU that the R&C strategy is an institutional statute. This contention is raised in this application.

[48] Section 1 of the HEA defines an institutional statute as:

'any statute made by the Council of a public higher education institution under section 32.'

[49] Section 32 of the HEA states:

'(1) The council of a public higher education institution may make –

(a) an institutional statute, subject to section 33, to give effect to any matter not expressly prescribed by this Act; and

(b) institutional rules to give effect to the institutional statute.'

[50] Section 33(1) of the HEA provides:

‘Any institutional statute must be submitted to the Minister for approval, and if so approved must be published by notice in the Gazette and comes into operation on the date mentioned in such notice.’

[51] As is evident from a reading of the Institutional Statute: Walter Sisulu University, gazetted on 17 January 2014, referred to above, an institutional statute is a governing instrument. It is aching to subordinate legislation as it is gazetted in terms of a statutory provision. It establishes structures such as the Council of the institution and provides for functionaries such as the Chancellor to perform various functions and the overall management of the institution. The Institutional Statute that regulates the WSU empowers the structures that were created to establish and dis-establish of faculties and also empowers its structures to ensure the efficient governance of the University. In the communiqué by the chairperson of the Council of the WSU, he records in paragraph 1.1 thereof that the R&C strategy is a policy of the WSU.

[52] Therefore, by no stretch of the imagination does the strategy constitute an institutional statute. Sections 32 and 33 of the HEA find no application.

[53] This then leaves the ground of review as offending *audi alteram partem*. I have already found that this maxim has not been offended.

[54] There remains no other grounds of review. It follows that the applicants do not succeed in the grant of an interim interdict.

[55] The applicants have not demonstrated a *prima facie* right to the relief they seek. They are unable to demonstrate a *prima facie* right to consultation in relation to the implementation of the strategy and in circumstances where consultation on implementation has, in any event, occurred. The applicants have not established that relocation of their place of work constitutes a breach of contract.

[56] The applicants have an alternative remedy at the CCMA in relation to their dispute concerning a unilateral change to their terms and conditions of employment. They also have an alternative remedy relating to their claim of a breach of the

provisions of the recognition agreement in the dispute resolution mechanism in clause 15 of the recognition agreement, failing that, they have an alternative remedy in section 24 of the LRA.¹³

[57] As stated above, the applicants have failed to demonstrate a reasonable apprehension of harm. The harm apprehended is speculative.

[58] The balance of convenience favours of the WSU. If the interdict is not granted, the applicants still have an opportunity to approach the WSU to make representations as to why relocating would not be practicable and should the issue not be resolved, the provisions of section 189 of the LRA would be followed. If the interdict is granted and the relocations are halted (if for a moment, one considers this to be in circumstances where the applicants have established a *prima facie* right), the WSU would be placed in a position where students arrive on campus in 2024 and there would be no employees available to attend to them. This would be untenable given that the strategy has been adopted to enhance efficiencies and the faculties have been reduced.

[59] In view of the foregoing, the applicants have not satisfied the three requirements for the grant of an interim interdict.

Costs

[60] The application launched by the applicants is woeful. The conduct of the applicants in proceeding with this application and during the proceedings warrants an order for the payment of costs.¹⁴ The applicants paint a picture of no or inadequate consultation in respect of the R&C strategy in their founding affidavit, whereas the true facts are that extensive consultation on the strategy occurred and consultation with the affected employees on the implementation of the strategy took place. Despite assuring this Court that the applicants do not challenge the adoption of the R & C strategy, prayer 2 of Part B of the notice of motion and paragraph 3.5.2

¹³ See: *Ekurhuleni Metropolitan Municipality v South African Municipal Workers Union* (2015) 36 ILJ 624 (LAC) at paras [23] and [24].

¹⁴ See: section 162 (2)(b) of the LRA.

of the founding affidavit quoted above take issue with the strategy and not only its implementation.

[61] Various causes of action are thrown in the mix in the hope that “*something will stick*”. Belatedly in their replying affidavit, the applicants attempt fit their grounds of review in the purview of section 158(1)(h) of the LRA and raise a further cause of action relating to specific performance as an alternative claim. It is trite that a litigant is to set out his or her case in the founding affidavit.

[62] When confronted with the fact that three of the applicants before this Court signed and submitted choice forms and that four are not NEHAWU members, NEHAWU feigns ignorance. It is for this reason, that the order was varied that NEHAWU pays the costs of the first and second respondents, as it would not be fair to saddle the individual applicants with costs in circumstances where three of the applicants are not challenging the relocations and it is unclear whether NEHAWU represents four of the applicants.

[63] For the above reasons, the aforesaid order was made.

M. T. M. Phehane
Judge of the Labour Court of South Africa