

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NUMBER: J604-2011

In the matter between:

SERVICES SECTOR EDUCATION AND

TRAINING AUTHORITY

First Applicant

IVOR BLUMENTHAL

Second Applicant

UASA THE UNION (“UASA”)

Third Applicant

FEDERATION OF UNIONS

OF SOUTH AFRICA (“FEDUSA”)

Fourth Applicant

CONFEDERATION OF ASSOCIATIONS

IN THE PRIVATE EMPLOYMENT

SECTOR (“CAPES”)

Fifth Applicant

ASSOCIATION OF PERSONNEL

SERVICE ORGANISATIONS OF

SOUTH AFRICA (“APSO”)

Sixth Applicant

BEVERLY ANN JACK

Seventh Applicant

LEON GROBLER

Eighth Applicant

and

THE MINISTER OF HIGHER EDUCATION

AND TRAINING

First Respondent

SIHLE MOON

Second Respondent

SHAKEEL ORI

Third Respondent

NOLWANDE MANTASHE

Fourth Respondent

MZWAMADODA WISEMAN DINWA

Fifth Respondent

CLIVE EDWARD WICKS

Sixth Respondent

ASHLEIGH CLAIRE VAN GREUNEN

Seventh Respondent

KIM VELTMAN

Eighth Respondent

PATRICK MAKHUBELA

Ninth Respondent

PAM SNYMAN

Tenth Respondent

ADENE PRINGLE

Eleventh Respondent

SHADRACK MOTLOUNG

Twelfth Respondent

FEROZA FAKIR

Thirteenth Respondent

JOYCE MHLONGO

Fourteenth Respondent

JOYCE DIMAKATSO SEEMA

Fifteenth Respondent

JUDGMENT

AC BASSON, J

- 1] This is an urgent application in terms of which the applicants challenge the validity of various actions taken by the Minister of Higher Education and Training (hereinafter referred to as “the Minister”) as well as actions taken by the second respondent (Mr. Sihle Moon (hereinafter referred to as “Moon”)). The applicants also specifically challenge the appointment by the Minister of Moon as the new chairperson of the first applicant – the Services Sector Education and Training Authority (hereinafter referred to as “the Services SETA”) as well as the suspension of the second applicant (Mr. Ivor Blumenthal (hereinafter referred to as “Blumenthal”).
- 2] The following order is sought in terms of the Notice of Motion:
- “1. Permitting this application to be heard as a matter of urgency and dispensing with the ordinary periods and notice requirements.*
 - 2. Reviewing and setting aside the purported appointment by the First Respondent of the Second Respondent as the chairperson of the First Applicant’s accounting authority, being its Council.*

3. *Reviewing and setting aside the purported appointment by the First Respondent of the Second to Fifteenth Respondents as members of the First Applicant's Council.*
4. *Reviewing and setting aside the First Respondent's decision to publish Gazette Notice No 316 in Gazette No 342023 of 8 April 2011, and setting aside such notice as being invalid and of no lawful force and effect, in so far as such decision and such Gazette notice relate to the First Applicant.*
5. *Reviewing and setting aside the First Respondent's purported approval, on or about 8 April, of a new constitution in respect of the First Applicant.*
6. *Declaring that the Constitution of the First Applicant as published in Government Notice R1421 in Government Gazette 24036 of 22 November 2002 is the currently applicable and valid Constitution which governs the affairs of the First Applicant and inter alia the election or appointment and removal of the members of the Council of the First Applicant, its Chairperson, Deputy Chairperson and Chief Executive Officer.*
7. *Declaring the action of the First Respondent in seeking to compel the First Applicant to accept the draft "model" constitution for Sector Education and Training Authorities as the First Applicant's new Constitution is unlawful and that the contents of the First Respondent's draft "model" Constitution*

(appearing as Annexure “H2” to the Founding Affidavit) are in conflict with the relevant provisions of the Skills Development Act No.97 of 1998, as amended, in particular in relation to the election or appointment and removal of the First Applicant’s Council and its Chairperson, Deputy Chairperson and Chief Executive Officer.

- 8. Declaring that the current validly appointed members of the First Applicant’s Council are the persons listed in Annexure “Y” to the Founding Affidavit, that the Seventh Applicant is its validly appointment Chairperson and that the Eighth Applicant is its validly appointed Deputy Chairperson.*
- 9. Reviewing and setting aside, and declaring unlawful and unfair, the purported suspension by the Second Respondent of the Second Applicant as the First Applicant’s Chief Executive Officer.*
- 10. Interdicting the Second and other Respondents from taking any action aimed at or having the effect of precluding the Second Applicant from- or interfering with the Second Applicant in relation to- his resuming and fulfilling the functions of the Chief Executive Officer of the First Applicant.*
- 11. Interdicting the Second to Fifteenth Respondents from taking*

any other action in relation to any of the First Applicant's functions, personnel or affairs on the strength of their purported appointment by the First Respondent as members of the First Applicant's Council.

12. Ordering the First Respondent and, to the extent that any of them may oppose this application, the Second and Further respondents, to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

13. Granting further or alternative relief."

3] The applicants are the following: The first applicant is the Services SETA (referred to above). The Services SETA is established in terms of section 9¹ of the Skills Development Act 97 of 1998 (hereinafter referred to as the "SDA"). The second applicant – Mr.

¹ "9. Establishment of SETA.—(1) The Minister may, in the prescribed manner, establish a sector education and training authority with a constitution for any national economic sector.

(2) The Minister must determine a discrete sector for the purposes of subsection (1) by reference to categories of employers and for the purposes of that determination take into account—

(a) the education and training needs of employers and employees that—

(i) use similar materials, processes and technologies;

(ii) make similar products; or

(iii) render similar services;

(b) the potential of the proposed sector for coherent occupational structures and career pathing;

(c) the scope of any national strategies for economic growth and development;

(d) the organisational structures of the trade unions, employer organisations and government in closely related sectors;

(e) any consensus that there may be between organised labour, organised employers and relevant government departments as to the definition of any sector; and

(f) the financial and organisational ability of the proposed sector to support a SETA.

(3) On the establishment of a SETA, the Minister may provide assistance to the SETA to enable it to perform its functions.

(4) The Minister may, after consulting the National Skills Authority and the SETAs in question and subject to subsection (2), change the sector of a SETA and must publish a notice in the Gazette reflecting such change."

Blumenthal (hereinafter referred to as “Blumenthal”) is employed by the Services SETA as the Chief Executive Officer. The third respondent is UASA. UASA is affiliated to the Fourth respondent (the Federation of Unions of South Africa – hereinafter referred to as “FEDUSA”). UASA also has recognition as the representative union of the majority of staff employed by the Services SETA. As such it has an interest in the application. UASA is also one of the employee representative members sitting on the Services SETA. FEDUSA – the fourth applicant– is one of the largest union federations in this country (second in size to COSATU) and is not only a member of NEDLAC but also holds a seat on the National Skills Authority. The fifth applicant is the Confederation of Associations in the Private Employment Sector (referred to as “CAPES”). CAPES is a representative body of employers in the private employment sector. The sixth applicant is the Association of Personnel Services Organisations of South Africa (referred to as “APSO”). APSO is an association representing the major personnel service organisations in this country. APSO is also a member of the Services SETA and a member of CAPES. APSO also holds a seat on the National Skills Authority. The seventh applicant - Ms. Beverly Ann Jack (hereinafter referred to as “Jack”) is the Vice President (Education) of APSO.

Jack was elected by the members of the Services SETA as the Chairperson of its Council. Jack was also elected by the Minister as a member to the council established by him (the Minister)

Mr. Grobler (hereinafter referred to as “Grobler”) the eighth applicant is the Chief Operating Officer of UASA and a Management Committee member of FEDUSA. He was also recently elected by the members of the Services SETA as the Vice Chairperson of the Services SETA's council.

- 4] The respondents are the following. The first respondent is the Minister of Higher Education and Training. The second respondent is Mr. Sihle Moon. Moon was appointed by the Minister as the Chairperson of the Council of the Services SETA. His appointment as Chairperson is, *inter alia*, challenged by the applicants. The remainder of the applicants (the third – fifteenth respondents) were appointed by the Minister to the Council in April 2011. The applicants submit that the appointment of these individual respondents to the Council established by the Minister is unlawful. Not all of these respondents are opposing this application. Counsel for the respondents has indicated that it only acts on behalf of some of the respondents.

Two councils and two chairpersons

- 5] In April 2011, the Minister has, in addition to the appointment of

Moon (the second respondent) as the chairperson of the Council of the Services SETA (the first applicant) appointed a further 14 individuals as members to the Council. The seventh applicant – Jack - is one of the individuals that were appointed by the Minister to the Council of the SETA in April 2011. The remainder of the individuals that was appointed by the Minister to the Council are listed as respondents to this application. However, as already indicated not all of the respondents (referring to those individuals who were appointed by the Minister to the Council of the Services SETA) are opposing this application. For convenience sake, I will refer to the Council established by the Minister (and to which he has appointed Moon as the Chairperson and 14 other individuals as members to the Council) as *“the Minister’s Council”*.

- 6] As will be pointed out in the subsequent paragraphs, the applicants (and more specifically the “members”² of the Services SETA) have appointed through a separate process individuals to its Council. For convenience sake I will refer to this Council as *“the Members’ Council”* to distinguish it from the Council appointed by the Minister. The applicants submit in their papers that their appointed Council (namely the one appointed by the “members” of the Services SETA)

2 The “members” of the Services SETA is organized labour and organized business. See section 11 of the SDA.

is the lawful Council and not the Council appointed by the *Minister*. (I will return to the applicants' submissions in support of this contention hereinbelow.) Some of the members of the Council (appointed by the "members" of the Services SETA) were also appointed by the Minister as members to his Council (the Minister's Council). The individuals appointed to the Member's Council are: Mr. Dinwa (the fifth respondent), Mr Wicks (the sixth respondent), Ms van Greunen (the seventh respondent), Ms. Veltman (the eighth respondent), Ms. Snyman (the tenth respondent), Ms. Pringle (the eleventh respondent), Mr. Fakir (the thirteenth respondent), Ms. Mhlongo (the fourteenth respondent) and Ms. Seema (the fifteenth respondent). According to the papers many of these respondents have indicated to Blumenthal that they also dispute the validity of their purported appointment to the Minister's Council. Instead they recognise their appointment to the Members' Council. Most of the respondents (apart from the first, second, third and fourth respondent) consequently are not opposing this application.

Urgency and locus standi of the applicants

- 7] The respondents have disputed the *locus standi* of the applicants to launch this application and have also disputed the urgency of this application. I am of the view that this application is urgent and that the various applicants all have the necessary *locus standi* to bring this application. I will deal with the reasons for arriving at this

conclusion hereinbelow after I have set out the relevant facts.

The nature of this application

8] The following actions of the Minister and of Moon (the second respondent) are challenged in these proceedings:

1. The Minister's appointment of Moon as a member of and the Chairperson of the Council for the Services SETA.
2. The Minister's appointment of the third and further respondents as other members of the Services SETA's Council.
3. The Minister's attempt to induce the Services SETA to accept or to subject it to a new model constitution which the applicants contend is unlawful *inter alia* because it contravenes the requirements of the SDA.
4. The Minister's approval of the new constitution for the Services SETA.
5. Moon's actions to suspend Blumenthal as the Chief Executive Officer (the "CEO") from the office of the Services SETA.
6. Moon's actions in giving instructions and making

various threats to other employees of the Services SETA.

- 9] In brief it was submitted that these actions taken by the Minister and Moon, are not only unlawful but also adversely affect the governance of the Services SETA and that of various other SETAs.

Jurisdiction

- 10] In light of the fact that the actions taken by the Minister in respect of the Services SETA as set out above are actions taken in connection with the provisions of the SDA, the Labour Court has jurisdiction³ to entertain the present application. The Labour Court also has jurisdiction in respect of the suspension of Blumenthal.

Statutory and legal framework

- 11] Section 9 of the SDA provides for the establishment of a SETA. In terms of this section the Minister may in the prescribed manner establish a Sector Education and Training Authority *with a constitution* for any national economic sector. Before a SETA can be established or operate, the Minister “*must*” approve its constitution. See also regulation 2(2)(c) of the Regulations Regarding the Establishment of Sector Education and Training Authorities.⁴ This regulation specifically states that the constitution of the proposed SETA must specify the matters referred to in section 13(3)(a)(i) to (xii) of the PDA. In the regulations 3(3) of the

³ See section 31 of the SDA.

⁴ Published in Government Gazette 20442 on 7 September 1999.

said Regulations, the establishment of the SETA is valid for a period of 60 months from the date on which it was issued with a certificate. In terms of regulation 4 a SETA may apply to the Minister for renewal of its certificate of establishment at least 12 months before the expiry of the certificate of the establishment.

- 12] The various functions of the SETA are listed in section 10 of the SDA. What is important to note is the fact that section 10(3) provides that the SETA must perform its functions in accordance with the SDA, the Skills Development Levies Act and the Constitution of the relevant SETA.
- 13] Section 11⁵ of the SDA prescribes the composition of the SETA and provides for an equal number of members representing employers and employees. It is important for purposes of this application to note the prescription in respect of the composition of the SETA. Section 11 of the SDA states that a SETA may consist only of members representing organised labour, organised employers (including small businesses) and relevant government departments. If the Minister, after consultation with the members

⁵ “11. *Composition of SETA.*—A SETA may consist only of members representing—
(a) *organised labour;*
(b) *organised employers, including small business;*
(c) *relevant government departments; and*
(d) *if the Minister, after consultation with the members referred to in paragraph (a), (b) and (c), considers it appropriate for the sector—*
 (i) *any interested professional body;*
 (ii) *any bargaining council with jurisdiction in the sector.*”

referred to in paragraph (a), (b) and (c) of this section, consider it appropriate for the sector, it may also appoint any interested professional body and any Bargaining Council with jurisdiction in the sector.

14] I have already referred to the fact that the Constitution of the relevant SETA must comply with section 13(3)(a)(i) to (xii) ⁶ of the

⁶ “13. Constitution of SETA.—(1) For the purpose of the establishment of a SETA, the Minister must approve the constitution of the SETA.

(2) The Minister may, after consultation with the SETA, amend its constitution in the prescribed manner.

(3) Subject to this Act, the constitution of a SETA—

(a) must specify—

(i) the trade unions, employer organisations and relevant government departments in the sector;

(ii) the circumstances and manner in which a member of SETA may be replaced;

(iii) the number of members to be appointed to the SETA, provided that the SETA must consist of an equal number of members representing employees and employers;

(iv) the procedure for the replacement of a member of the SETA by the organisation that nominated that member;

(v) the circumstances and manner in which a member may be replaced by the SETA;

(vi) the election of office-bearers by the members of the SETA and of persons to act during their absence or incapacity, their term of office and functions and the circumstances and manner in which they may be replaced;

(vii) the establishment and functioning of committees, including an executive committee;

(viii) the rules for convening and conducting of meetings of the SETA and its chambers and committees, including the quorum required for and the minutes to be kept of those meetings;

(ix) the voting rights of the different members and the manner in which decisions are to be taken by the SETA and its chambers and committees;

(x) a code of conduct for members of the SETA and its chambers;

(xi) the appointment of an executive officer, and such other employees necessary for the effective performance of the functions of the SETA, by its members, including the determination of their terms and conditions of employment; and

(xii) the determination through arbitration of any dispute concerning the interpretation or application of the constitution; and

(b) may provide for—

(i) the delegation of powers and duties of the SETA to its members, chambers, committees and employees, provided that the SETA may impose conditions for the delegation, may not be divested of any power or duty by virtue of the delegation and may vary or set aside any decision made under any delegation; and

(ii) any other matter necessary for the performance of the functions of the SETA.

(4) In order to ensure that its membership is representative of designated groups, every SETA must—

(a) provide in its constitution that each constituency contemplated in section 11

SDA. The Minister may in terms of section 13(2) of the SDA *after* consultation with the SETA amend the constitution in the prescribed manner. For purposes of this application, the following provisions are of particular importance:

- (i) The SETA's constitution must specify the number of members to be appointed by SETA. The SETA must consist of an equal number of members representing employers and employees.
- (ii) The constitution must provide for the election of *office bearers by the members of the SETA* and for those persons to act during their absence or incapacity. The members appoint the Executive Officer and such other employees necessary for the effective performance of the functions of the SETA (including the determination of the terms and conditions of employment). Members of the SETA and specifically its Council and also the office bearers which include the Chairperson (of the Council – also referred to as the Accounting Authority) must therefore be appointed in terms of the relevant provisions

represented on the SETA in question is represented by members who are sufficiently representative of such designated groups; and
(b) take the necessary steps to ensure that the constituencies in question comply with the provision in the SETA's constitution contemplated in paragraph (a)."

of the SETA's Constitution which in turn must comply with the relevant provisions of the SDA. The only additional appointments that may be made to the Council are those by the Minister in terms of section 11 of the SDA.

Relevant Facts

Establishment of the Services SETA

- 15] The Minister of Labour (who was assigned the function at the time) published a notice listing various SETA's including the Services SETA indicating the scope of coverage of the various SETA's in Government Notice 1083 in Government Gazette 6626 of 7 September 1999. The Minister approved the Services SETA's constitution on 20 March 2000 (Government Gazette 24036 of 22 November 2002). (For convenience sake I will refer to this constitution as "the 2002 Constitution" to distinguish it from the constitution later imposed by the Minister on the Services SETA).
- 16] The Minister subsequently approved an application by the Services SETA for the renewal of its certificate of establishment before the expiry thereof on 21 March 2010 (Government Gazette Notice 52 in Government Gazette 32916 of 5 February 2010). In terms of this Notice the period of establishment of the various SETA's - including the Services SETA - was extended from 31 March 2010 to 31 March 2011.

The 22 November 2002 Constitution of the Services SETA

17] The applicants submitted that the 2002 Constitution remained in place after the re-establishment of the Services SETA (in terms of the Government Gazette of 11 November 2010). The respondents' case was that a new constitution was adopted by the Minister in April 2011 and that this constitution is the one that governs the Services SETA. (I will refer to this (second) constitution as the "2011 Constitution" to distinguish it from the "2002 Constitution"). Before I turn to some of the provisions of the 2011 Constitution, it is necessary to briefly refer to some of the salient provisions of the 2002 Constitution:

- (i) In terms of clause 8(a) of the constitution the Services SETA's Council is its governing body. The Executive Committee is responsible for the day to day affairs of the SETA. Dedicated Chambers are responsible for the detailed implementation of SETA strategy in each of the defined sub-sectors. Functional Committees may also be appointed by the Council.
- (ii) The powers and duties of the Council are set out in the clause 8 of the Constitution.
- (iii) The Members of the Services SETA consist of organised labour, organised business (including small business) and, where the Minister considers it appropriate for the sector, the State, any interested professional body or Bargaining Council with

jurisdiction in the sector. The members (organised labour, business and those appointed by the Minister) elect the representatives to serve on the Council (clause 10(c) of the Constitution). It is important for purposes of this application to note that it is *the members* who elect the representatives of organised labour and organised business and *not* the Minister. In terms of clause 14(b)(iii) of the constitution the Minister - if he considers it appropriate - may *after consultation with the Council*, appoint two representatives of interested professional bodies.

(iv) In terms of clause 13 of the Constitution it is the representatives of the SETA (in other words the representatives who were elected by the members to serve on the Council) who appoint the chairperson and deputy chairperson (the office bearers). Once a new chairperson and deputy chairperson are appointed, the current chairperson and deputy chairperson's duties terminate. It is again important to note that it is the representatives of the members (organised labour and organised business) who appoint the chairperson and the deputy chairperson and *not* the Minister.

(v) The control and governance of the affairs of the SETA vest in the Council which shall be accountable to the Minister (clause 14 of the Constitution). As already pointed out, it is the *members* (in terms of clause 10(c) of the Constitution) who select the representatives to serve on the Council and who appoint the

chairperson and deputy-chairperson to the Council and *not* the Minister.

- (vi) Clause 14(b) of the Constitution prescribes how the Council is to be constituted:

“(i) Voting Members (24)

Two employer representatives from each of the Chambers;

Two employee representatives representing each of the Chambers;

(This number will vary pro-rata to the number of chambers that the SETA is constituted of, as reflected by this constitution, as amended from time to time.)

(ii) Non-voting Members (7)

The Chief Executive Officer of the SETA;

The Managers of each of the designated Chambers;

and

Any others party as agreed to by the SETA.

(iii) Discretionary Non-voting appointments (6)

If the Minister considers it appropriate for the sector, he may, after due consultation with the Council appoint up to two representatives of interested professional bodies; and

(iv) By Council invitation (non-voting)

A representative from any Government Department that has an active interest in the SETA;

Any stakeholders or individuals who have an active interest in the SETA.”

The re-establishment of the SETA

- 18] I have already pointed out that the Minister re-established a number of SETA's including the Services SETA from 1 April 2011 to 31 March 2016 (on 11 November 2010).
- 19] After the establishment the Minister communicated with various SETA's and informed them that he would shortly provide them with a model constitution with which they would be all be required to comply. A number of versions of the new model constitution were subsequently distributed by the Minister each with different principles and approaches in relation to the governance of SETA's.
- 20] The Minister required all the SETA's to submit a signed copy of the model constitution on or before 28 February 2011. The SETAs were also required to forward nominations to SETA Councils received from stakeholders in the sectors and forward same to the Minister for consideration.
- 21] According to the applicants' papers, the Services SETA initially engaged in this process with the Minister as it believed that the Minister had the power to re-establish the SETA in the manner in which he did. However, subsequent to this, the applicants have

obtained legal advice in terms of which it was advised that the Minister was acting beyond the scope of its powers. As a result of the legal advice obtained, the present application was launched.

22] On 4 March 2011, the Services SETA submitted nominations for the Council to the Minister. At a meeting of the Forum for SETAs, the SETAs were advised that notwithstanding the fact that they have already submitted a model constitution to the Minister in terms of his earlier draft by 28 February 2011, they were now required to consider a further different model of the Constitution.

23] On 22 March 2011 a further version of the model constitution was sent to the SETAs by the Minister. At this stage this version of the model Constitution was referred to as "*the standard constitution for SETAs*". According to the applicants, it appeared that this "*standard constitution*" differed substantially from an earlier draft of the model constitution which the Minister had sent to the Services SETAs previously and which the applicants in their ignorance signed. This new model constitution (referred to as the standard constitution for SETAs) was attached to an e-mail dated 22 March 2011. A copy of the Constitution to be signed is attached to the founding affidavit marked "Annexure H2".

24] The applicants engaged with the Minister and the Department of

Higher Education and Training (hereinafter referred to as the “DHET”). The DHET, *inter alia*, informed the applicants that the nominations by the SETA for appointment to the Council were not compliant with the requirements listed in a letter from the DHET dated 17 February 2011. The applicants also, *inter alia*, informed the DHET that the SETA did not agree that its nominations for the Council did not comply with the requirements as listed by the DHET.

- 25] On 28 March 2011 the applicants received a further letter from the DHET requesting that the SETA forward the revised constitution as a matter of urgency.
- 26] On 5 April 2011, the DHET published a notice on the official website of the government stating that effective as from 1 April 2011 the Minister of Higher Education and Training has approved the Constitutions of almost all of the SETAs and has finalised the appointments to the new SETA Accounting Authorities including new independent chairpersons. The notice further states that all SETA's are now certified to function for the next five years as from 1 April 2011. In terms of this notice - Moon (the second respondent) is appointed as the new Chairperson of the Services SETA. As already pointed out, 14 others were also appointed as members to the Council (referred to in this judgment as “the Minister’s Council”).

- 27] On 7 April 2011 the applicants wrote a letter to the DHET objecting to the attempt of the Minister to impose the 2011 Constitution on the SETA without proper consultation. However, despite this objection the Minister published Gazette Notice no 316 in Government Gazette 34202 stating that the Constitutions of the respective SETAs were approved. Although this notice did not refer to a specific constitution, the applicants assumed that it was the same as the one attached to the applicants' papers as "Annexure H2". This is in fact admitted by the respondents in the answering affidavit. At this junction I must point out that there was some debate during argument whether or not the constitution attached the applicants' founding papers as "Annexure H2" was in fact that one that was approved and imposed by the Minister. If regard is, however, had to the papers and especially the answering affidavit, it is clear that the constitution (referred to in this judgment as "the 2011 Constitution") approved and imposed by the Minister is the one attached to the founding affidavit as "Annexure H2".
- 28] As already pointed out, the Minister, in the same Gazette, appointed not only Moon as the Chairperson, but also fourteen others as ordinary members of the Services SETA's Council (also referred to as the Accounting Authority).

The suspension of Blumenthal

- 29] I have already pointed out that the applicants, *inter alia*, contest the validity of the appointment of Moon as the chairperson of the Council. If the applicant's argument is accepted that the Minister did not have the power to appoint Moon as the chairperson, it will, of course follow that Moon did not have the legal authority to suspend Blumenthal as the CEO. I am of the view that the Minister had not, despite the respondents' contention that the Minister did in fact have the necessary power to do this, have the necessary authority to appoint Moon as the Chairperson of the Council. In light of this fact I am of the view that Moon could therefore not have validly suspended Blumenthal. I will in due course return to the validity of the appointment of Moon in greater detail and to the reasons for finding that Moon was not validly appointed. I will also later in the judgment point out that, even if it is accepted that Moon was validly appointed and even if it is accepted that the Minister could impose and adopt the 2011 Constitution, Moon, in any event, acted outside of the 2011 Constitution in suspending Blumenthal.
- 30] Apart from the submission that Moon could validly suspend Blumenthal, it was also argued on behalf of the respondents that Blumenthal did not satisfy the Court that his rights have been adversely affected by the decision to suspend him particularly in light of the fact that he was suspended with pay. I do not agree: In fact, I

am of the view that Moon (purporting to act on behalf of the Council of the Services SETA in suspending Blumenthal) had no valid and fair reason to suspend him. In addition, Moon (purportedly acting on behalf of the Council of the Services SETA) acted procedurally unfairly in suspending Blumenthal:

- (i) Firstly, I have already indicated that I am in agreement with the applicants' submission that the Minister did not have the necessary power to appoint Moon. Consequently, Moon did not have the legal authority to suspend Blumenthal as the CEO. Blumenthal's rights were therefore in my view adversely affected.
- (ii) Secondly, even if it is accepted that Moon was validly appointed, he could not, acting on his own, suspend the CEO. In terms of the Minister's own constitution (the 2011 Constitution), the decision to suspend rests with either the Council or the Executive Committee of the SETA.⁷ Moon even admits in the answering affidavit that at that stage the newly constituted Accounting Authority (the Council) was yet to convene its first meeting. Moon in fact admits that he had not yet had any meeting with any of the members of the Services SETA's Council. In fact at that stage Moon did not

⁷ Clause 10(3) of the Ministers Constitution.

even have the contact details of the appointment members of the Council. Moon's decision to suspend Blumenthal was, however, ratified on 16 April 2011 at the first meeting of the Council.

- (iii) The Court also has serious difficulties with the undue haste with which Moon – in fact within a few hours of confirmation of his (Moon's) appointment - felt it necessary to suspend Blumenthal. This is not, in my view properly explained on the papers Moon states in his letter dated 8 April 2011 suspending Blumenthal that Blumenthal is guilty of misconduct. I find it difficult to accept how Blumenthal's actions for which he was suspended can constitute misconduct. Blumenthal was suspended for communicating with the media, taking legal action against the DHET without the express authorisation of the Chairperson of the Services SETA or the Board. I am not persuaded that Moon had a valid and fair reason to suspend Blumenthal for these reasons. It is clear that Blumenthal was suspended for challenging the authority of Moon and indicating that he and other member of the Council intended to challenge the validity of Moon's appointment (and the other actions by the Minister) in legal proceedings. In terms of section 34 of the Constitution Act 108 of 1996 Blumenthal was exercising his

fundamental constitutional right.⁸ He is, in my view, entitled to challenge the appointment of the Chairperson to the Services SETA if he (and others) have reason to believe that the appointment of the Chairperson and of other members to the board has not been done in accordance with the enabling legislation and the constitution of the SETA. It is apparent from the papers that, as a result of the actions of the Minister and Moon, serious confusion has arisen in the Services SETA in respect of which of the two Councils have been validly appointed and who the validly appointed chairperson of the Council is. Is it Moon or is it Jack? Moreover, there appears to also exist serious confusion in respect of which constitution governs the affairs of the Services SETA. The Court was informed that the SETA controls approximately one billion rand which is to be used for, *inter alia*, education and training.⁹ It is thus manifestly important for the role players in the industry (who are also the applicants in this application) to obtain clarity in respect of matters which affect the governance of the SETA. It is

⁸ “ 34 Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

⁹ See section 10 of the SDA where the various functions of the SETA are listed.

therefore, in my view, manifestly unfair to suspend an employee (especially one in the position of Blumenthal) who challenges the actions of a Minister through proper legal challenges.

- (v) In respect of the process that was followed in suspending Blumenthal, I am equally of the view that his suspension was unfair. Blumenthal was initially afforded an opportunity to make representations in respect of his suspension in the letter dated 8 April 2011. According to this letter he had to make such representations by 15 April 2011. However, before he could do so he was summarily marched out of his office. Why it was necessary to have two attorneys present and an armed guard when Blumenthal was marched out, is not properly explained on the papers. Moreover, it is also not explained why Blumenthal was not afforded an opportunity to even collect his personal belongings.
- (vi) Lastly, new allegations were added when Blumenthal was suspended on 12 April 2011. In respect of these allegations Blumenthal was not even afforded the right to make any representations.

31] In the light of the foregoing I have no hesitation to conclude that the suspension of Blumenthal was both unlawful and procedurally unfair. I should also point out that I am of the view that the fact that he was

suspended with pay does not mitigate the actions of Moon nor does it diminish the prejudice suffered by Blumenthal. I am also not persuaded that Blumenthal has an adequate alternative remedy at his disposal given the urgency of this application.

Urgency

32] The applicants submitted that the present application should be resolved without delay. It was submitted that the Minister's actions in appointing the respondents as chairpersons or members of the Council as well as his attempts to impose upon the Services SETA a new constitution as well as the decision to suspend its CEO, create enormous difficulties, uncertainty and prejudice for the SETAs and all its members. It was further submitted that there also exists confusion as to who is lawfully entitled to hold the positions and exercise the powers relating to the governance of the Services SETA. This confusion especially extends to the financial control of the SETA and its activities as set out in section 10 of the SDA. The confusion as to who the new chairperson is and who therefore may issue orders further compounds the uncertainty that exists amongst the personnel of the Services SETA. According to the papers staff are being issued with instructions, warnings and threats from Moon and the person he has purportedly appointed to act as CEO.

- 33] The respondents disputed the urgency of this application and submitted that the grounds relied upon by the applicants for urgency are vague. More specifically, it was argued that the Minister had informed all the SETA's that the period for extension of the SETA would not be extend beyond 31 March 2011. If the applicants wished to challenge the decision of the Minister, it should have done so before 31 March 2011.
- 34] I am not persuaded that this application is not urgent. In fact, I am of the view that it is in the interests of justice that this application be decided on an urgent basis. It is clear from the papers that there now exist two competing constitutions for the Services SETA and two competing Councils with competing chairpersons. This confusion will undoubtedly hamper the service delivery of the SETA. This is simply untenable and cannot be allowed to remain in uncertainty until such time a Court in the normal course has an opportunity to consider this application. The Court also cannot lose sight of the fact that there are interested parties involved in this application representing a large number of stakeholders. One of the stakeholders – FEDUSA – is the second largest union federation in this country. Moreover, it is these stakeholders that contribute to the one billion rand controlled by the SETA for its activities which is to enhance the skills of the workforce. These applicants, in my view, have a right to gain clarity in respect of not only the constitution of the SETA, but also the composition of the

Council who controls the activities of the SETA and the chairperson on an urgent basis. At this juncture I must also point out that according to section 13(3)(vi) and (xi) it is the *members* of the Council who appoint the chairperson and the members to the Council. The Minister has now, however, taken it upon himself to not only appoint the chairperson of the Council but also the other members to the Council. This, as will be pointed out hereinbelow, is in breach of not only the enabling statute (the SDA) but the enabling regulations and the 2002 Constitution. It is furthermore also clear from the papers that the governance of the SETA and its administration are hamstrung by the dispute. This problem is compounded by the fact that the CEO was not only invalidly but also unfairly suspended. I am therefore, despite the strong objections on behalf of the respondents, of the view that the matter is urgent. I am also not persuaded that the applicants could have brought the application at an earlier date. I am in agreement that the applicants could not have brought the application prior to the events of 8 April 2011. It was only then that the Minister has taken a final decision in respect of the constitution and the council members.

Locus Standi

35] The respondents argued that the various applicants do not have

locus standi in this matter and that the Minister had the necessary powers to appoint the Council and approve the 2011 Constitution.

36] I am not in agreement with this submission. Firstly, the issue of *locus standi* should be decided without having regard to the merits of the application. Clearly the applicants all have *locus standi* in bringing this application. Whether or not they will be successful with this application is entirely a different matter and can only be decided once the merits of the application have been considered and decided.

37] Briefly, the first applicant has *locus standi* as it, according to the applicants, continues to exist. As such it has the necessary *locus standi* to contest the validity of the Minister's decision to appoint another Council and a chairperson. Both Grobler and Jack (the deputy chairperson and the chairperson of the Members' Council) have the necessarily *locus standi* to seek an order from this Court clarifying the legal position regarding their appointment. Blumenthal has the *locus standi* to challenge his suspension as the CEO of the Services SETA. Lastly, the third, fourth, fifth and sixth applicants all have *locus standi* by virtue of the fact that they are either members of the Services SETA or members of organisations which are represented on the Services SETA whether it is on the old SETA or the recently re-established SETA. UASA has further *locus standi* on the basis that it represents Blumenthal. Lastly, the Court is faced

with the extraordinary situation where significant representatives of labour and representatives of organised labour have united as applicants in an application to contest the validity of various actions by the Minister and by the newly appointed chairperson to the Council. These representatives are statutorily recognised as members of the SETA.¹⁰ To suggest that they do not have *locus standi* is in my view simply ludicrous.

Merits

38] It is a fundamental requirement of not only the constitutional rule of law¹¹ but of administrative law¹² that a Minister can only take specific action if he or she has the necessary authority to do so. It is against the background of these fundamental principles that the Minister's actions in adopting and imposing a new constitution and establishing a new Council for the Services SETA will be evaluated.

39] I have already dealt with the suspension of Blumenthal and will now deal with the Minister's actions of 8 April 2011¹³ in terms of which he approved the constitution of various SETAs (including that of the

¹⁰ Section 11 of the SDA.

¹¹ *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the RSA* 2000 (2) SA 674 (CC).

¹² Section 33 of the Constitution of the Republic of South Africa, 108 of 1996 and sections 6(2)(a)(i) and (b), (c), (d), (e)(i) and (f)(i) of the Promotion of Administrative Justice Act 3 of 2000.

¹³ Government Notice 316 in Government Gazette 34202 of 8 April 2011.

Services SETA). (I have already indicated that it is common cause between the parties that the constitution that was approved is the one attached to the founding affidavit as “Annexure H”) and the appointment of the chairperson (Moon) and members of the Council (as set out in Schedule 1 to the aforementioned Gazette Notice.) If this schedule is perused it appears that Moon is one of three ministerial appointees. The third and fourth respondents are the other two ministerial appointees. The remaining 12 appointments are purportedly appointed from the interested parties namely organised labour and organised business. The list purports to appoint an equal number from labour and business. However, it is clear from the papers that the list is in fact defective: Pam Snyman (nr 9 on the list); Shadrach Motoung (nr 11 on the list) and Beverly Jack (nr 12 on the list) are indicated as organised business whereas they are in fact representatives from organised labour. If the list is then viewed *after* the necessary corrections have been affected, it appears that labour then has 7 representatives and business only 5. This in itself is in contravention of the provisions of section 13(3)(a)(iii) of the SDA which requires that the number of members to be appointed to the SETA must consist of an equal number of members representing employees and employers. (I will return to this aspect hereinbelow.)

The Minister’s action in imposing the 2011 constitution

40] The applicants contend that the Services SETA is still governed by

the 2002 Constitution. They therefore contest the validity of the Minister to have imposed the 2011 Constitution on the SETA.

41] In terms of the 2002 constitution (as already pointed out) the voting members of the councils are to be elected in equal numbers by the members (the representatives constituencies) of the council (and as required by section 13(3)(a)(iii) of the SDA and in terms of clause 13(c) of the 2002 Constitution). In terms of section 13(3)(a)(vi) of the SDA (and in terms of clause 13 of the 2002 Constitution) the office bearers must be elected by the representative *members* of the SETA who have voting rights.

42] It was submitted on behalf of the applicants that the Minister may only amend the constitution of a SETA after consultation with the SETA. This process of consultation has not been followed. Furthermore, the Minister is only empowered to *approve* the new constitution and cannot therefore unilaterally impose the constitution on the SETA. In this regard section 13 of the SDA clearly states that the Minister may only “*approve*” the constitution. Moreover, in terms of Regulation 2(2) (c) an application for the establishment of a SETA must include a constitution that specifies the matters referred to in section 13(3)(a)(i) to (xii) of the SDA.

43] I am in agreement with the submission that when the Minister

established the SETA for the period 1 April 2011 to 31 March 2016 he did so on the basis of the 2002 Constitution (approved in March 2000 and Gazetted in November 2002).¹⁴ If the Government Gazette of 11 November 2010 is perused it is clear that the Minister, when he established the Services SETA (in terms of section 9(1) of the SDA and Government notice R 1082 of 7 September 1999) that he (the Minister) made no reference to any constitution for the Services SETA. It is not explicitly nor impliedly stated in the Government Gazette of 11 November 2011 that, in establishing the new Services SETA, the Minister relied on another constitution when establishing the SETA. It is further common cause on the papers that there was no new constitution in existence at the stage when the Minister established the Services SETA (for a further five years). In this regard it is also not the respondents' case that any other constitution existed at the time of the re-establishment of the SETA. Consequently, when the Minister established the (new) SETA in terms of the Government Gazette dated 11 November 2010, he must therefore have done so on the basis of the 2002 Constitution which was in place for the existing Services SETA. In coming to this conclusion it is important to re-emphasise what has already been stated, which is that the Minister may only lawfully establish a SETA in terms of section 9(1) of the SDA *with* a constitution. The

¹⁴ Attached to the founding affidavit as "Annexure C2".

constitution of a SETA is its founding document. The Minister clearly must have been aware of this and must therefore have intended to establish the SETA on the basis of the 2002 Constitution (being the only constitution that was in existence at the time). This much is clear from the clearly stated words in the Government Gazette dated 11 November 2010 that the Minister, in establishing the SETA (for a further period), did so in terms of section 9(1) of the SDA. To recap: Section 9(1) of the SDA unequivocally states that “[t]he Minister may, in the prescribed manner, establish a sector education and training authority **with a constitution**¹⁵ for any national economic sector”. Moreover, a SETA, which is a juristic body cannot exist or perform its functions in terms of the SDA without a constitution.

44] Moreover, when the Minister previously extended the life of the Services SETA’s by a year to March 2011,¹⁶ the DHET confirmed in a letter that the constitution of the SETA was automatically extended.

45] It was only on 17 February 2011 that Mr. Moleke (the Deputy Director General: Skills Development) called upon the different SETAs (including the Services SETA) to amend or align their constitutions in terms of the DHET’s proposed model constitution. It is significant to note that this letter specifically states that SETAs (including the

15 The Court’s emphasis.

16 In terms of the Government Gazette Notice of 6 February 2010.

Services SETA) must *amend or align their constitutions*. In light of the fact that the 2002 Constitution was the only constitution in existence at that stage, Moleke must therefore have referred to amendments and alignments to be affected to the constitution that was in existence at the time, which was the 2002 Constitution.

- 46] In the letter from Mr. Qonde (the Acting Director General's) dated 25 March 2011 Blumenthal was informed that the Services SETA's constitution was found not to be in compliance with the Model Constitution. Qonde also called upon the Services SETA to consider for acceptance the standard constitution that was sent to the SETA on 22 March 2011. In light of the fact that no other constitution existed other than the 2002 Constitution, Qonde must also have intended to refer to the 2002 Constitution.
- 47] In conclusion: In light of the fact that the Minister cannot in terms of section 9(1) of the ADA establish a SETA without a constitution and in light of the fact that no other constitution existed at the time (as at 11 November 2010 when the SETA was re-established) and in light of the fact that the life of the SETA was previously extended on the basis of the 2002 Constitution and in light of the fact that the SETAs (including the Services SETA) were only called upon early in 2011 to "*amend/align*"¹⁷ their constitutions, the Minister clearly established the Services SETA from 1 April 2011 to 31 March 2011 on the basis of

¹⁷ Letter from Moleke dated 17 February 2011).

the 2002 Constitution.

- 48] I should in passing point out that it is not the case of the Minister that Government Gazette Notice of 11 November 2010 is invalid. In fact, if regard is had to the papers the Minister relies on this Gazette as the legal basis for the establishment of the current Services SETA.
- 49] In light of the Court's conclusion that the 2002 Constitution remains in place for the reasons as set out above, it must therefore logically follow that the 2002 Constitution continued to apply to the new SETA (established by the Minister in terms of the Government Gazette dated 11 November 2010). It also follows that the 2002 Constitution will apply to the governance of the Services SETA including but not limited to the assets and liabilities of the previous SETA. The provisions of the 2002 Constitution in respect of the election of members to the Council (in terms of clause 10(c) of the 2002 constitution which is compliant with section 13(3)(a)(iii) of the SDA); the election of office bearers by the members of the SETA (in terms of clause 13 of the 2002 constitution which is compliant with section 13(3)(a)(vi) of the SDA) and the appointment of an executive officer (and other employees necessary for the effective performance of the functions of the SETA) by its members (in terms of section 13)(a)(xi) of the SDA) therefore continue to apply.

- 50] Furthermore, as already pointed out, the Minister does not have the power to impose unilaterally a new constitution on the SETA – his powers are limited to *approving* a constitution (section 13(1) of the SDA).
- 51] I therefore do not accept the submission on behalf of the respondents that the Minister was entitled to unilaterally impose a new constitution when the Services SETA was re-established. The 2002 constitution, for the reasons set out above, survived the re-establishment of the new Services SETA. In the event it is concluded that the Minister's unilateral act of imposing a constitution on the SETA (in accordance with the Government Gazette Notice of 8 April 2011) is invalid and unlawful.

Proper consultation?

- 52] In the alternative it was submitted on behalf of the applicants that even if it is accepted that the Minister had the necessary power to impose a new constitution, the procedural requirement of proper consultation was not adhered to.
- 53] On behalf of the respondents it was argued that the Minister, in establishing a SETA with a constitution, has no legal duty to consult any entity or persons. The respondents do, however, concede that the duty to consult arises only when the Minister intends to amend a constitution.
- 54] I am not persuaded on the papers that the Minister engaged in any

meaningful consultation. If the letters from the DHET to the SETA are perused it is clear that the SETAs were instructed to align their constitutions with the constitution proposed by the Minister.

The 2011 Constitution.

55] Further in the alternative it was submitted that, even if the Minister had the necessary power to impose a new constitution, this constitution (which was purportedly approved by the Minister on 8 April 2011) is invalid because it contains various provisions which are in conflict with the enabling provisions in section 13(3)(a) of the SDA.

56] I have already referred to the fact that section 13(3)(a) requires that a constitution of a SETA “*must specify*” the matters listed in this section which includes, *inter alia*, the election of office bearers “*by the members of the SETA*” (and of persons to act during their absence or incapacity, their term of office and functions and the circumstances and manner in which they may be replaced)¹⁸ and the appointment of an executive officer (and such other employees necessary for the effective performance of the functions of the SETA) again “*by its members*”.¹⁹

57] If the salient provisions of the 2011 Constitution is perused, it appears that this constitution contains various provisions which are in breach

¹⁸ Section 13(3)(a)(vi) of the SDA.

¹⁹ Section 13(3)(a)(xi) of the SDA.

of various provisions contained in the SDA. For example:

- (i) In terms of clause 8(4)(a) and (b) of the 2011 Constitution the Council (referred to as the Accounting Authority) may not exceed fifteen members). This maximum number includes any appointments made by the Minister. If regard is had to the appointments listed in Schedule 1 attached to the Government Gazette dated 8 April 2011, it appears that the Minister made three additional ministerial appointments namely Moon (the second respondent), Ori (the third respondent) and Mantashe (the third respondent)). I am in agreement with the submission that this clause breaches section 13(3)(a)(vi) of the SDA which requires that the “*members of the SETA*” elect the office bearers. The Minister may therefore not appoint the members serving on the council. Clause 2(1)(e) and (f) of Schedule 4 to the 2011 Constitution which provides for two ministerial appointees to the Council and for the Minister’s

appointment of the chairperson is therefore
likewise in contravention with the SDA.

- ii) In terms of clause 8(6) the various constituents (namely organised labour, organised employers and relevant government departments within the sector) merely nominate members to the council. These nominations must thereafter be submitted to the Minister for his consideration who will thereafter recommend these to Cabinet for approval (clause 6(b)(c) of the 2011 Constitution). I am in agreement that this clause is likewise in breach of section 13(3)(a)(vi) of the SDA which clearly provides that it is the *members* of the SETA who elect the office bearers. The Minister therefore does *not* have the power to elect office bearers on behalf of the members of the SETA.
- (iii) In terms of clause 8(6)(d) and (e) of the Constitution of the three persons appointed by the Minister (the so-called ministerial appointees) which includes the chairperson, only the chairperson will have no voting rights. The two other ministerial

appointees will therefore have full voting rights. This is again in contravention with section 13(3)(a)(vi) of the SDA which clearly states that it is the members of the SETA that elect their own office bearers. Not only is the Minister not empowered to appoint members to the Council of the Services SETA, he may not appoint persons to the council with voting rights. The Minister's powers to appoint persons as "*members*" to the SETA are further limited by the provisions of section 11(d) of the SDA in terms of which the Minister may only appoint as members additional persons "*after consultation with the members referred to in paragraph (a) and (b) [organised labour and organised employers]*". Section 11(d) places a further restriction on the Minister to only appoint persons to represent any interested professional body or any Bargaining Council with jurisdiction in the SETA.

- (vi) In terms of clause 8(13)(b) of the 2011 constitution, the Minister, on the recommendation of the council may remove a member from the council (the accounting authority). This is again in contravention with section 13(3)(a)(vi) of the SDA which provides that it is the *members* of the

council who may replace a member.

- v) In terms of clause 9(1) of the 2011 Constitution the Council must establish an Executive Committee “*with the approval of the Minister*”. This is in breach of section 13(3)(a)(vii) which provides that the *members* appoint office bearers. Section 13(3)(vii) also does not contain a provision that the *Minister* approves the appointment of the Executive Committee.
- vi) In terms of clause 10(1) of the 2011 Constitution only the Minister is authorised to appoint the Chairperson of the Council. This is clearly in breach of section 13(3)(a)(vi) and (xi) of the SDA which specifically states that it is the *members* who appoint the office bearers; the Executive Officer and other employees to the council.
- (vii) In terms of clause 12(1) of the 2011 Constitution the Minister has the power to appoint the Chief Executive Officer of a SETA from amongst three nominations received from the council whereafter the Cabinet will approve the appointment. This clause is clearly in contravention with section 13(3)(a)(xi) of the SDA which specifically provides for the appointment of an Executive Officer and other employees by the *members* of the SETA;

58] I am accordingly, in light of the foregoing, of the view that the content of the 2011 Constitution contravenes various provisions of the SDA. Consequently the constitution purportedly approved by the Minister on 8 April 2011 is, in any event, invalid.

Summary

59] In light of the foregoing it is accordingly concluded as follows:

- (i) The 2002 Constitution survived the re-establishment of the Services SETA and as such therefore continues to serve as the founding document of the Services SETA.
- (ii) The Minister did not have the power to impose the 2011 Constitution.
- (iii) In the alternative, even if it is accepted that the Minister had the power to impose the 2011 Constitution, the constitution is invalid in view of the fact that various provisions of the Minister's constitution contravenes various provisions of the enabling statute namely the SDA.

60] I am further in agreement with Mr. Kennedy that the effect of this conclusion is either that the 2002 Constitution remains valid or that the Services SETA has no valid constitution at all. I am not inclined to accept that the Services SETA has no constitution for the reasons set

out in the preceding paragraphs. The Minister clearly re-established the new Services SETA on the basis of the 2002 Constitution for the reasons set out hereinabove. The Minister did not have the necessary power to impose a new constitution and even if he had, the new constitution is in breach of the SDA. Consequently, until a new constitution has been lawfully adopted, the 2002 Constitution continues to govern the functions and affairs of the Services SETA.

61] As far as the appointments to the Minister's Council is concerned, I am in agreement with the submission that the Minister's appointment of the various members (including the chairperson - Moon) to the Council is invalid. The validly established Council is therefore the one that was established by the members of the Council in terms of the provisions of the 2002 Constitution. Jack's appointment as the chairperson to the Council and Grobler's appointment as vice-chairperson to the Council (established by the *members*) are therefore valid. It therefore follows that because Moon was not validly appointed as the chairperson to the Council, he therefore did not have the power to suspend Blumenthal. Apart from the fact that Blumenthal's suspension was unfair, Moon's action of suspending Blumenthal was unlawful.

62] However, even if the Minister was empowered to elect a new council,

the Council established by the Minister does not comply with the requirement in section 13(3)(a)(iii) of the SDA which requires that the number of members appointed to the council “*must consists of an equal number of members representing Organised Employers and Organised Labour in the Sector*”. In this regard I have already pointed out that it is evident from the list of members appointed by the Minister to the Council of the Services SETA that the composition of the (Minister’s) Council is in breach of Schedule 4 of his own constitution. Lastly, according to clause 8(6)(c) of the 2011 constitution, Cabinet must approve the ministerial appointments. Despite the fact that this issue was pertinently raised in the founding papers and despite the fact that the applicants challenged the respondents to prove that the Cabinet has indeed approved the ministerial appointments, the answering affidavit is completely silent on this issue.

- 63] Although I have already dealt with the suspension of Blumenthal *supra*, it is reiterated here that in light of the fact that Moon was not validly appointed as chairperson, he had no legal authority to suspend Blumenthal as the CEO. Even if Moon was validly appointed, he was not able, in terms of the 2011 constitution, to act on his own in suspending Blumenthal. This much is clear from clause 10(3) of the 2011 Constitution which provides that the chairperson of the accounting authority (council) merely “*preside at meetings of both the*

Accounting Authority and the Executive Committee.” Also, Moon does not have voting rights in terms of the 2011 Constitution, yet he suspended Blumenthal and unceremoniously escorted Blumenthal out of the building. Lastly, on his own version, Moon did not even consult with any of the members of the (Minister’s) Council when he suspended Blumenthal: He did not even have the contact details of the other members.

64] It is therefore concluded that the actions of the Minister (the first respondent) and that of Moon (the second respondent) were unlawful and unfair and therefore fall to be reviewed and set aside. I can find no reason why costs should not follow the result. In light of the submissions contained in the applicants’ heads of argument the order as to costs are only made against the Minister and the second respondent by virtue of his opposition.

65] In the event the following order is made:

1. The order is granted in terms of prayers 2 to 11 of the Notice of Motion.
2. The First and Second Respondents are ordered to pay the costs, jointly and severally, the one paying the other to be absolved.

AC BASSON, J

Date of the application: 20 April 2011

Date of the judgment: 3 May 2011

FOR THE APPLICANTS:

Paul Kennedy SC

Instructed by Edward Nathan Sonnenbergs Inc

FOR THE RESPONDENTS:

Nceba Dukada SC; Adv PG Malindi, Adv M Zulu

Instructed by the State Attorney