



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1255/2010

In the matter between:

THE INDEPENDENT MUNICIPAL

AND ALLIED TRADE UNION

First Applicant

DALE FORBES N.O AND NINE OTHERS

**Second to Eleventh
Applicants**

and

SOUTH AFRICAN LOCAL GOVERNMENT

ASSOCIATION

First Respondent

SOUTH AFRICAN MUNICIPAL

WORKERS UNION

Second Respondent

THE SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Third Respondent

GERHARD JOHAN GREVELING N.O

AND ELEVEN OTHERS

**Fourth to Fifteenth
Respondents**

Heard : 15, 16, 17, 18 and 19 November 2010

24, 26 November 2010, 24 June 2011

Delivered : 22 June 2012

Summary : Rectification of a Wage Curve Collective Agreement signed on 21 April 2010 to give effect to the agreement reached between the parties on 20 April 2010 and the agreement reached in respect of the amendment of one clause immediately prior to the signing of the Wage Curve Collective Agreement.

JUDGMENT

AC BASSON, J

The parties

- 1] The applicant in this matter is the Independent Municipal and Allied Trade Union (hereinafter referred to as 'IMATU'). The second to eleventh applicants are Mr. Dale Forbes (the Collective Bargaining Officer of SAMWU), Mr. Ndhlovu (SAMWU), Mr. Kennedy Nkosi (SAMWU), Mr. Andre Adams (SAMWU), Mr. Phasoane Molohe (President of SAMWU),

- Mr. Ntokoza Nzuza (SAMWU), Mr. Barend Koen (General Secretary of IMATU), Mr. Danie Carstens (IMATU), Mr. Stanley Khoza (IMATU) and Ms Helen Duminy (IMATU) (hereinafter referred to as the 'individual applicants'). The application to join the individual applicants was not opposed and was granted at the commencement of the proceedings.
- 2] The first respondent is the South African Local Government Association (hereinafter referred to as 'SALGA'). The second respondent is the South African Municipal Workers Union (hereinafter referred to as 'SAMWU'). The second respondent, although it did not file any papers, made common cause with the applicants in these proceedings. For purposes of this application Mr. Van der Riet SC appeared on behalf of both IMATU (the first applicant) and SAMWU (the second respondent). (Where reference is made to 'the Unions' reference is made to both SAMWU and IMATU. I will refer to the unions and the second to eleventh applicants collectively as 'the applicants').
 - 3] The third respondent is the South African Local Government Bargaining Council ('the SALGBC'). Although cited as a respondent, the SALGBC took no steps to oppose the application or to intervene in the proceedings. Mr. Brassey SC and his junior appeared on behalf of the first respondent. The fourth and further respondents are members of the caucus of the first respondent's Bargaining Committee representatives.
 - 4] At the close of the applicants' case, SALGA moved for absolution from the instance. The application was dismissed.

The urgent application

- 5] The dispute about the validity of the Categorisation and Job Evaluation Wage Curves Collective Agreement first came before this Court by way of an urgent application for a temporary interdict against the SALGBC for a

declaratory order that the 21 April 2010 agreement is void *ab initio*. The order sought to prevent the SALGBC from implementing the Wage Curve Collective Agreement signed on 21 April 2010, until the dispute between the parties regarding the validity of the said Collective Agreement could be resolved. On the day of the hearing, the Court indicated to the parties that the factual disputes could not be resolved without hearing oral evidence. By agreement it was ruled that the application be referred to oral evidence so that the dispute regarding the validity of the Categorisation and Job Evaluation Wage Curve Collective Agreement signed on 21 April 2010 could be resolved. IMATU did not file any affidavits in the urgent application but aligned itself with the urgent application brought by SAMWU.

The dispute

- 6] The dispute between the parties relates to the validity of 'the Categorisation and Job Evaluation Wage Curves Collective Agreement' signed on 21 April 2010 at a signing ceremony by IMATU, SAMWU (the unions) and SALGA under the auspices of the SALGBC. (I will refer to this collective agreement generally as the 'Wage Curve Agreement'.) The Wage Curve Agreement was the result of negotiations on 19 and 20 April 2010 and led to the signing of a Wage Curve Agreement on 21 April 2010. It is fundamentally in dispute whether the applicants had intended to sign the version of the Wage Curve Agreement that was actually signed on 21 April 2010 or whether they had intended to sign the Wage Curve Agreement that emerged from the deliberations of the Drafting Committee (representing the respective bargaining counterparts) that concluded their deliberations on 20 April 2010. What is, however, common cause is the fact that a Wage Curve Agreement was signed on 21 April 2010.
- 7] The applicants allege that the Wage Curve Agreement that was concluded on 20 April 2010 is the collective agreement that is binding on IMATU,

SAMWU and SALGA (the collective bargaining parties). (I will refer to the Wage Curve Agreement which the applicants say came into existence on 20 April 2010 and therefore binding on the parties (although unsigned), as the '20 April Agreement'.) SALGA allege that the Wage Curve Agreement that is binding on the collective bargaining parties is the one that was signed on the following day namely 21 April 2010. (I will refer to the Wage Curve Agreement which SALGA says came into existence as the '21 April Agreement').

- 8] The contents of the 20 April Agreement and the 21 April Agreement are exactly the same but differ fundamentally in respect of the implementation date of the salary scales referred to in the Annexures to the Wage Curve Agreement. Both of these agreements (the one of 20 April and the one of 21 April) therefore intend to deal with the same issues one of which is the wage curves for the different categories of municipalities. Apart from the date of implementation of the wage curve agreement (and one or two minor issues not material to this dispute) the 20 April agreement is therefore identical to the 21 April agreement. (I will return in more detail to the crucial difference between the two agreements hereinbelow).
- 9] It is common cause that the 21 April agreement was signed at a signing ceremony under the auspices of the SALGBC. It is further common cause that the parties under the auspices of SALGA were involved in negotiations in the Bargaining Committee established in terms of SALGA's constitution. (I will return to the said constitution and the effect thereof hereinbelow).
- 10] It is further also common cause that the Wage Curve Agreement was signed on 21 April 2010 in the context of a strike in support of, *inter alia*, the conclusion of the Wage Curve Agreement. The strike was also in support of the Disciplinary Code Collective Agreement. (I will refer to this collective agreement as 'the Disciplinary Agreement'). This

agreement was also signed on 21 April 2010. The Disciplinary Agreement is however not in dispute in these proceedings although reference will be made to this collective agreement.

- 11] The negotiations to settle the strike took place over two days namely on 19 and 20 April 2010 and ultimately culminated in the signing of the 21 April Wage Curve Agreement. The parties also took part in other bilaterals on other dates between the different role players.

SAMWU's Statement of Claim

- 12] In essence what SAMWU and IMATU are seeking is an order from this Court confirming that the Wage Curve Collective Agreement signed on 21 April 2010 does not reflect the agreement reached during their prior negotiations with SALGA on 20 April 2010. Consequently, the applicants seek the following relief:

12.1 An order declaring that the 20 April Wage Curve Agreement¹ constitutes a binding collective agreement between IMATU, SAMWU and SALGA.

12.2 Alternatively to (i) above, rectification of the Wage Curve Agreement signed on 21 April 2010² by deleting clause 8.2 thereof and inserting clauses 8.2 and 8.3 of the 20 April Wage Curve Collective Agreement.³

1 Appearing on pages 42 to 53 of Bundle C.

2 Annexure 'BJK3' to the Founding Affidavit in the Urgent Application. At pages 61 -89 of Bundle B.

3 Referred to in footnote 1 *supra*.

12.3 If the order in 12.1 is granted, then an order is also sought declaring that the Wage Curve Agreement signed on 21 April 2010 does not constitute a valid agreement.

13] In order to decide the dispute this Court has to decide the following:

13.1 Firstly, whether the parties did in fact reach an agreement on the contents of the document referred to as the 20 April Wage Curve Agreement.

13.2 Secondly, did the trade union parties sign the document referred to as the 21 April Wage Curve Agreement on the understanding that this document in fact reflected the agreement reached on 20 April 2010, subject to the amendment to clause 7.2.3 agreed to just before signature?

13.3 Thirdly, did the Unions form the understanding that what they signed on 21 April 2010 was the 20 April 2010 Agreement on the basis of the representation made by Mr. Yawa (hereinafter referred to as 'Yawa') that only clause 7.2.3 had been amended?

13.4 Fourthly, did SALGA also sign the 21 April Wage Curve Agreement on the understanding that they signed the agreement reached on 20 April 2010 subject to the amendment of clause 7.2.3 agreed to just before signing?

Background facts

14] Some of the background facts are common cause. The parties, however, materially differ in respect of the events that culminated in the signing of the 21 April agreement.

Events prior to 20 April 2010

- 15] In 2003 IMATU, SALGA and SAMWU concluded a Wage Curve Collective Agreement to give effect to the Job Evaluation Collective Agreement.⁴ This agreement was concluded in an attempt to regulate and consolidate jobs in municipalities by classifying jobs and providing for job descriptions. In brief, it was the purpose of this agreement to provide for a mechanism for this process. Although this process had started already in 2003, it was only on 27 January 2009 that SAMWU referred a dispute concerning its proposals for the development of a wage curve to the SALGBC for conciliation. SAMWU demanded that a collective agreement be concluded to create a formalised wage curve for all the different jobs in municipalities.
- 16] On 26 March 2010, SAMWU issued a strike notice and its members embarked on a nation-wide protected strike in support of the Wage Curve Agreement and the conclusion of a new Disciplinary Code Collective Agreement.
- 17] Negotiations took place between the different parties during the strike.⁵ SAMWU and SALGA also held bilateral meetings at which it was agreed that the wage curve scale in the local government sector would be based on the 50th percentile market position as determined by Deloitte and Touche in its salary survey of September 2009. IMATU was in agreement with this determination.
- 18] Prior to the commencement of the Bargaining Committee⁶ negotiations,

4 After 1994 municipalities were dramatically restructured in line with the new political dispensation. The SALCBC came into existence in the late 1990's as a merger of all the Industrial Councils under the previous LRA.

5 The strike was called off on 21 April 2010 after the signing of the two collective agreements.

6 Clause 7.2 of the constitution provides for the establishment of a Bargaining Committee that will have the power to conclude Collective Agreements relating to terms and conditions of service and any other matter referred to it

the parties have therefore already settled the basis for the wage curve scale agreement. The negotiations of the Bargaining Committee focused on the draft collective agreements on the wage curve and the disciplinary procedure. SALGA had 10 representatives, SAMWU had six representatives (in light of the fact that it enjoys more representation than IMATU) and IMATU had four representatives on the Bargaining Committee. Counselor Mashilo of SALGA was the chairperson of the Bargaining Committee and also acted as the facilitator.

Negotiations of the Bargaining Committee on 19 and 20 April 2010

- 19] When the Bargaining Committee convened drafts of the two collective agreements were projected on a big screen directly from Forbes' laptop. The Bargaining Committee then proceeded to consider the draft collective agreements clause by clause.
- 20] The Bargaining Committee continued its deliberations until the early hours of 20 April 2010. The two major issues at that stage were the issue of back pay and pay progression. The back pay issue was about whether the employees ought to get the benefits of the wage curve agreement retrospectively. SAMWU's position was that the employees should get 24 months' back pay whereas SALGA's position was that they should get no back pay at all. The pay progression issue was whether employees' movement up the wage curve notches ought to be automatic or whether it should be merit based.
- 21] During the negotiations (on 19 April 2010) Mashilo advised the Unions that SALGA had a special meeting scheduled for the following morning (20 April 2010) and that SALGA would seek a further mandate from its National Executive Committee to resolve the issue. That meeting was held and the negotiations continued thereafter on 20 April 2010. The parties concluded their negotiations on two important issues:

21.1 In respect of the back pay issue, the parties agreed that employees who are entitled to benefits in the wage curve collective agreement would receive nine months' back pay. As it will become clear later in this judgment, the parties had not reached an agreement on the period over which the back pay would be paid. It appears from the evidence that this issue was first raised during the deliberations of the Drafting Committee.

21.2 In respect of pay progression, the parties agreed that this issue would not be dealt with in the present collective agreement, but that it would stand over for deliberation at another time.

Deliberations of the Drafting/Refining Committee

22] It is common cause that when the deliberations of the Bargaining Committee were finalised, a Drafting/Refining Committee was appointed by the members of the Bargaining Committee to refine the two draft collective agreements. It appears from the evidence that the parties at the Bargaining Committee had finally reached agreement on a set of principles that they considered sufficient to form the basis for the signing of the two collective agreements. The Drafting Committee was then tasked to draft the collective agreements. The Drafting Committee commenced its deliberations in a smaller room at approximately 16H00 on 20 April 2010. Forbes had the draft substantive agreements concluded in the Bargaining Committee on his laptop. He then acted as the typist and proceeded to type whilst the Drafting Committee refined the clauses one by one. Koen's undisputed evidence was that none of the Drafting Committee members had a hardcopy of the two collective agreements and that they relied on the copies on Forbes' laptop. Yawa (who is employed by SALGA as the Executive Director Municipality Institutional Development) gave evidence

that he had a hard copy and that he was looking at the hard copy and not at the computer screen of Forbes. (I will return to his evidence in more detail hereinbelow.)

- 23] The Drafting Committee consisted of Mr. Koen (obo IMATU – General Secretary); Mr. Forbes (obo SAMWU – the Collective Bargaining Officer) and Messrs Yawa (SALGA's chief negotiator), Lebelo (member of SALGA's negotiating team and Director of Labour Relations of the City of Johannesburg) and Van Zyl (a member of SALGA's negotiating team). The parties disagree as to the precise function this team was supposed to perform. This dispute is formulated as follows in the pre-trial minutes:

23.1 SALGA alleges that the team was appointed to refine the agreement on all other issues initially agreed upon and formulate the agreement in terms of back pay as agreed by the principals in the properly constituted Bargaining Committee and then to place it before the Bargaining Committee for ultimate acceptance.

23.2 The Unions contend that the team was appointed to formulate a draft collective agreement on, *inter alia*, the wage curve issue for approval by their principals. The evidence on behalf of the applicants was that all the principals were there when the Drafting Committee was refining the two collective agreements and that they had approved the final drafts of the two collective agreements which emanated from the deliberations. (I will return to the dealings of the drafting committee in more detail hereinbelow).

- 24] At the outset, it must be pointed out that it is common cause that the Bargaining Committee never reconvened or held another meeting before the signing ceremony on 21 April 2010. It is further common cause that all the principal role players were present whilst the Drafting Committee was deliberating. Forbes testified that Mr. George (the CEO of SALGA) was

there throughout the deliberations and so were Yawa, Van Zyl and Lebelo for SALGA. Koen was also there on behalf of IMATU.

25] Forbes testified that a dispute arose during the deliberations of the Drafting Committee about the timing or period of the back pay that was to be paid. It is common cause that Mashilo was called into IMATU's caucus delegation to assist in settling the issue. Mashilo informed them that SALGA had proposed that the nine month back pay would be paid over a period of nine months. The parties then settled the issue of back pay on this basis during the refinement process. Molohe testified that although he was not involved in the Drafting Committee, he and the other representatives waited around in the event their members on the Drafting Committee needed a mandate to settle an issue. He also could recall the issue of the timing of the back pay and that that issue was settled during the deliberations of the Drafting Committee. This issue was therefore settled whilst the Drafting Committee was deliberating on the final draft and without referring the matter back to the Bargaining Committee for a voting process as required in terms of the Constitution of the SALGBC. Forbes' evidence that the practice was to conclude collective agreements without referring the final collective agreements again to the Bargaining Committee was confirmed by Koen. (I will return to the evidence of Koen hereinbelow where I consider the submissions made on behalf of SALGA in respect of the validity of the 20 April 2010 agreement.)

26] Forbes testified that it was therefore the task of the Drafting Committee to take the substantive agreement reached in the Bargaining Committee and to translate that into wording. Forbes (and Koen) was adamant that the negotiating parties would then consider the agreements and settle any disputes that may arise during the deliberations. As already pointed out, one of the disputes that was in fact settled (the extent of the (nine months) back pay) was settled after

- the members of the Drafting Committee had obtained mandates from their respective principals who were all waiting in the event they were required to give a to their representatives on the Drafting Committee.
- 27] As regards the seating arrangements in the room where the Drafting Committee deliberated, Forbes' evidence was that he set up his computer and acted as the typist. Yawa and Koen were seated next to him. Koen confirmed in his evidence that Yawa sat to the right of Forbes and that he (Koen) was seated on Forbes' left. Van Zyl sat on the other side of the table and could not see the laptop screen. Lebelo stood behind them and was therefore also able to look at the laptop screen.
- 28] Forbes then went through the agreements that the Bargaining Committee had ended with clause by clause until it was finalised. The other members of the team looked at the wording on his laptop screen. He specifically disputed that everyone could not see what was going on on his computer. He further testified that everyone was involved in the wording and that everyone made suggestions. Koen also confirmed that they went through the draft agreement clause by clause agreeing on the wording as they went along. Van Zyl was, according to Koen, the only one who did not say much during the deliberations.
- 29] SALGA's version is that Lebelo and Yawa never saw what Forbes was typing in on his laptop. The laptop was not linked to a screen (similar to the one that was used during deliberations of the Bargaining Committee). Yawa testified that he and Forbes were seated on the one end of the table. Koen was seated on the other side of the table straight opposite him and Lebelo was seated next to him almost opposite of Forbes. According to Yawa, he was not able to see what Forbes was typing on his laptop and that no one in fact looked at what Forbes was doing. He testified that he had a hard copy of the agreements that had

emerged from the Bargaining Committee plenary and that he was looking at the hard copies. Yawa however conceded that Forbes read each clause out loud.

30] During the deliberations, a crucial issue arose regarding the date on which the wage curve scales would be increased. The representatives discussed the issue. The Union's stance was that the wage curve scales ought to be increased on 1 July 2010 by the same percentage as the salary increase that was due on the same date. The Unions initially proposed that the wage curve scales set out in Annexures B1 – B2 to the Wage Curve Collective Agreement be adjusted by the percentage of the inflationary linked salary increase that was due on 1 July 2010. SALGA pointed out to the Committee that the percentage figures had not yet been determined. The union parties then proposed the formulation of clauses 8.2 and 8.3 (as contained in the 20 April 2010 agreement) with the implementation date of the wage curve as 1 July 2010. Forbes was adamant that they had agreed to the implementation date being 1 July 2010 and that SAMWU would never have agreed to the implementation date being 1 July 2011. Koen also confirmed that the date of the increase was discussed and that it was discussed that it would happen on 1 July 2010. Koen further testified that he had explained to the meeting why it had to happen on that day. According to him, the date of 2011 was not tabled.

31] Yawa could not remember whether clause 8 had been read out. Yawa, however, accepted that the Unions took the position during the deliberations of the Drafting Committee that the wage curve scales ought to be adjusted from 1 July 2010. Yawa further accepted that when the trade unions realised that the wage curve scales could not be physically adjusted because the percentage of the inflationary salary increase had not yet been determined, that they proposed the formulation of clause 8.2 and 8.3 (as reflected in the 20 April agreement). Yawa, however,

maintained that the agreement was then reached in the Drafting Committee that the wage curve scales would be increased on 1 July 2011. According to him, if they (SALGBC) had agreed on 1 July 2010 as the implementation date, this would have amounted to an impermissible tampering with the agreement reached in the Bargaining Committee. SALGA's version, therefore, is that they had agreed that the implementation date of the wage curve agreement would be 1 July 2011. Yawa further testified that he was not that concerned about what was in the agreement as it was clear that the signing was not going to happen.⁷ As will be pointed out below, this version can clearly not be accepted in light of the fact that Yawa, at that time, could not have known that the agreements would not be signed that evening. Mr. George was adamant during an interview on E-TV that the collective agreements would be signed that evening. (I will return to this interview in detail hereinbelow).

- 32] The Drafting Committee concluded their deliberations after 18H00 on the evening of 20 April 2010. Koen asked Mr. Craig Adams (the Deputy General Secretary for legal matters of IMTATU) to print the hard copies. Adams copied four documents from the laptop of Forbes. One document was the Wage Curve Collective Agreement and the other was the Disciplinary Code Collective Agreement (both these two documents were in Microsoft Word format). Two further documents in Microsoft Excel format were printed out namely Annexure A and Annexure B to the Wage Curve Collective Agreement. Adams then stapled the Disciplinary Code

⁷ Yawa testified as follows: 'I did not have a concern as in my ordinary understanding of concern, but I had a desire that what would be contained in the ultimate final document should be reflective of what we had discussed and refined the agreement by. To that end and when it was clear that signing was not to happen as I initially said M'Lady, that earlier on Mr Koen did indicate that his president was not around and nobody else can sign in terms of their own protocols and whatever they were going through. I then, because I was concerned and I was desirous that what would be in that document, should be free of defect. I then together with Mr Lebelo asked Mr Forbes where this computer and the 3G, to then email that document to us so that then in the carrying of this desire of mine and ours, that it was must be reflective of what we know ourselves as what was agreed to, I can then have an opportunity to know that whatever he typed in as our resolution so to speak, were in fact as we know them. Before then you know, would ask our principals to endorse and then sign when the time is appropriate.'

Agreement together and the Wage Curve Collective Agreement together with the two annexures (Annexure A and B).

- 33] Adams testified that he handed Yawa a hard copy of the two agreements and handed another to Forbes (who was in another room). At that stage, Koen had already left. Adams was clear that the copy of the agreement that he handed to Yawa and Forbes on the evening of 20 April 2010 was the one referred to in this judgment as the 20 April 2010 agreement. Later, in the evening, Adams met Yawa in the foyer of the Hotel and he again gave Yawa a copy of the two Annexures that he had 'cleaned up'.
- 34] Despite Adams' evidence, Yawa denied that he had received hard copies of the collective agreements on the evening of 20 April 2010. According to him the wage curve collective agreement was not even ready on 20 April 2010. Koen also confirmed that Adams had told him that he had given a copy to Yawa.
- 35] Forbes testified that he took the two agreements to his principals and indicated to them the contents of the documents and indicated the areas where there had been changes. The SAMWU mandating structure was complicated. They had 15 people there - one from every province and six senior national office bearers. He, however, testified that his principals were happy with the changes and that they were prepared to sign. Molope confirmed that he had received a copy of the agreements and that Forbes briefed SAMWU delegates. He confirmed that the agreements that were given to him were the ones that would have been signed that evening (20 April 2010). Molope also confirmed that those were the agreements he was told to take to the signing ceremony.
- 36] Forbes testified that he took the agreements to IMATU and Mashilo (on behalf of SALGA). Both indicated to him that they were satisfied with the agreements and that they were prepared to sign.

- 37] According to Forbes, all the parties were therefore willing to sign the two agreements. However, as already pointed out the signing did not go ahead because George was not there for SALGA. Mr. Carstens (the President of IMATU) was also not available to sign the agreements on the evening of 20 April 2010. Koen made agreements for Mr. Stanley Khoza (the Deputy President of IMATU) to sign the agreements on behalf of IMATU. Koen testified that the Drafting Committee could not reach a final agreement because they had to run the final agreement past their principals before it was an agreement. He, however, confirmed that at the end of the deliberations on the evening of 20 April 2010 the final collective agreements were taken to their principals for ratification and that the principals did ratify the agreements. According to him, the only issue that was outstanding was the signatures. He also confirmed that the SAMWU principals had ratified the agreement.
- 38] A further reason why the agreement could not be signed on 20 April 2010 was the fact that some people from SAMWU's Johannesburg branch were unhappy with the agreement. However, despite all of these obstacles, the Unions are adamant that there was a conclusive agreement on the evening of 20 April 2010 in respect of the Wage Curves Agreement (and the Disciplinary Code).

News interview on E-TV on 20 April 2010

- 39] It is common cause that Mr George (the CEO of SALGA) appeared on E-TV's 7 o'clock news (19H13 to 19H19) on the evening of 20 April 2010. During an interview⁸ with Mr. Jeremy Maggs (the presenter of that programme) George stated that the parties have reached an agreement. Maggs asked the following question:

'So where do we stand tonight, Xolile George is with us who speaks for

⁸ The interview was shown to the Court in full.

the South African Local Government Association, welcome, is this any closer to being resolved?’

George replied as follows:

‘We have resolved the matter now. We have a deal on the table that we have worked on this afternoon as a culmination of what was worked off overnight, last...., I mean yesterday at the South African Bargaining Council, so now we have a deal that as, I leave the studio, I will be going back to the bargaining council to formalise the signing of the deal.’

George repeats in the next paragraph:

‘there is a deal Jeremy, that has been accepted by SAMWU, it has been accepted by IMATU, remember there is three parties in the Bargaining Council, SAMWU, SALGA, IMATU, all parties have now accepted the deal on the table.’⁹

Maggs then brings the interview to a conclusion by saying the following:

‘alright, one more time, I want to get this 100 percent on the record. I do not want to report this inaccurately, deal on the table, the two unions involved have agreed, you are off to go and make sure that pen hits paper, that the deal is inked, strike is over.’

George replied as follows:

‘Yes, that is a correct position Jeremy, there is a deal on the table, parties have agreed, I am going back now to the negotiating table to formalise those arrangements.’

40] Forbes testified that on the evening of 20 April 2010 he met George who

⁹ Court’s emphasis.

had just returned from the interview with E-TV. According to Forbes he informed George that the signing ceremony would be the following day. He also indicated to George that the agreements were binding notwithstanding the fact that the parties have not yet signed the agreements. According to Forbes, George tried to persuade him to sign the agreement that evening.

- 41] Yawa, however, testified that he had phoned George during the deliberations of the Drafting Committee and told him not to hurry back to the hotel as the parties were not going to sign the agreements that evening. His evidence therefore directly contradicts that of Forbes.
- 42] Adams testified that he in the meantime tidied up the formatting of the Annexures and that he had printed out the copies of the Annexures. As already pointed out, he testified that he had met Yawa in the foyer of the hotel and handed him the new copies of the Annexures. He was surprised that most of the other had already left. Yawa advised him that the signing ceremony would be the next day.

Reasons why the agreements were not signed on 20 April 2010

- 43] As already pointed out, it common cause that the agreements were not signed that evening as most of the people who had to sign on behalf of their respective constituents had already left. It was then agreed that evening that the two collective agreements would be signed on 21 April 2010 at 14H00 at a signing ceremony. It is also common cause that the Bargaining Committee and Drafting Committee were never reconvened nor was an arrangement to this effect made after the deliberations were concluded on 20 April 2010 and before the agreements were signed at the signing ceremony the next day.
- 44] Forbes, who had to leave for Cape Town, could not attend the signing

ceremony the following day and handed the two collective agreements to Molohe to sign. Forbes confirmed that the Wage Curve Agreement that he gave to Molohe was the one identified in this judgment as the 20 April 2010 agreement.

- 45] In my view, it is clear from the evidence that, at the end of the afternoon (early evening) of 20 April 2010, the parties were ready to sign the two collective agreements. George said so unequivocally on national television. In fact, George stated unequivocally that *all three parties* were in agreement and willing to sign. It was only due to the unavailability of some parties that it was decided that the signing ceremony would be held on 21 April 2010 (the next day).

Events after the closing of the deliberations by the Drafting Committee.

E-mail of Forbes to Yawa at 19H09 on 20 April 2010

- 46] Yawa asked Forbes to e-mail the Wage Curve Agreement and the Disciplinary Code Collective Agreement that were finalised by the Drafting Committee to him. According to Forbes, this request was made after the negotiating parties (the principals) had already looked at the agreements and expressed their satisfaction with the contents thereof. Forbes then e-mailed the two documents to Yawa and Lebello at 19H09 on 20 April 2010. The subject of the e-mail is: '*Final*¹⁰ collective agreements'.
- 47] The Wage Curve Agreement that was e-mailed to Yawa and Lebello was the 20 April 2010 Agreement. Forbes was adamant that the agreement

¹⁰ Court's emphasis.

that he had sent to Yawa contained the 1 July 2010 implementation date (in paragraph 8.3 of the agreement) and not the 1 July 2011 implementation date (and the other amendments to the numbering to clause 8).

- 48] Forbes referred to the attachments in his e-mail as the 'Final' collective agreements which, in my view, support the contention by SAMWU and IMATU that they had considered the agreements which emanated from the Drafting Committee as the final agreements which would be signed the following day.

The e-mail of Yawa on 21 April 2010 at 8H37

- 49] On 21 April 2010 at 08H37 Yawa, on the face of it, forwarded the e-mail sent to him by Forbes (at 19H09 the previous evening) to his colleagues (amongst others George and Van Zyl). The subject of the e-mail is: 'FW: Final¹¹ collective agreements'. Yawa therefore also referred to the attached collective agreements as the 'Final' versions. It further appears from the subject matter of the e-mail that he was forwarding the 'Final' collective agreements sent to him by Forbes to his colleagues. In the e-mail Yawa wrote as follows:

'Morning Colleagues

Herewith the *final*¹² versions of the agreement meant for signature today.

Kindly comb and advise if your sport (sic) something untoward.'

- 50] Yawa testified that he read the Wage Curve Agreement for the first time *after* he had sent it to his colleagues at 08H37 at 21 April 2010. It was only then that he discovered that clause 8.3 of the 20 April Agreement

¹¹ *Ibid.*

¹² *Ibid*

contained according to him, an 'obvious error'. Why he did not immediately and expressly communicate this to his counterparts is suspect.

The e-mail of Yawa on 21 April 2010 at 10H25

51] At 10H25 on 21 April 2010 Yawa sent a further e-mail to some of his colleagues. Not included as recipients in this e-mail is Mashilo, Mr. Sonyo and George. In this e-mail Yawa wrote as follows:

'Quickly tell whether 8.3¹³ (in red) here means when we increase salaries in July, we increase these scales or as I think it should be, we increase the salaries per the wage and salary agreement.'

52] From this e-mail it would appear that Yawa was in possession of the 20 April 2010 Agreement sent to him by Forbes which contained clause 8.3 which reflected the implementation date as 1 July 2010 hence his question about the implementation of the wage scales.

E-mail from Roger Falken to Yawa and others at 12H47

53] At 12H47 Falken responded to the aforementioned e-mail from Yawa as follows:

'Hi there

I must say that I have seriously mad principles because the agreement is outside the mandate.

The agreement in its current form is problematic and the clause referred to by Mzie [Yawa] has its problems. I suggest the following amendments to 7.2.6 and 8.3 as both have to be amended to bring sanity to the

¹³ Clause 8.3 of the 20 April 2010 agreement states that the salary scales will be adjusted with effect from 1 July 2010.

application:

“7.2.6 Eligible employees...nine(9) months retrospective increases based on the difference between the salary as at 30 September 2009 and 1 July 2010(new salary notch) and prior to the application of the annual salary increase, taking into account any adjustment to the basic salary between the dates referred to herein. This retrospective...”

And

“8.3 The salary scales...with effect from 1 July 2010, [prior to] after the annual salary adjustment referred to in the Wage and Salary Collective Agreement, and then annually thereafter by the same percentage as agreed to in the [applicable Wage and Salary Agreement] said Agreement” (note []=deleted words)

Mzie good luck if you can get this right.

Regards

Roger’

Yawa’s e-mail on 21 April 2010 12H48 pm

54] At 12H48 Yawa sent an e-mail to Forbes, Lebelo and Van Zyl. In this email he wrote as follows:

‘Guys,

1. See some improvement in the drafting we did not translate the agreement reached on the Wage Curve. In particular note our removal of the initial clause 8.1 on increase on the R 4000 minimum wage as that is taken care of by the current wage and salary agreement.

2. See the improvement on 7.2.3 where we tried to remove vagueness in the wage curve applicable higher notch by using the applicable Task Grade.'

Shortly thereafter Yawa also sent the e-mail to Koen and Theledi.

55] The Unions argue that Yawa had made certain far reaching changes to the 20 April 2010 agreement during the course of the morning of 21 April 2010: He amended clauses 7.2.3, 7.2.5 and 7.2.6 of the agreement. He deleted cause 8.2 of the 20 April Agreement and amended clause 8.3 which became clause 8.2. Clause 8.2 was also amended to provide that the wage scales would now increase on 1 July 2011 and not as previously stated on 1 July 2010.

56] Yawa attached to this e-mail the Wage Curve Agreement that he had amended as indicated above. What Yawa failed to mention in the e-mail (nor did he draw the attention of the parties thereto) is the fact that he was of the view (if it was so) that the parties have not agreed that the implementation date of the wage curve would be 2010 as opposed to 2011. In other words, despite the fact that this amendment to the implementation date of the Wage Curve Agreement was crucial and was included in a document referred to as the 'final' collective agreement, Yawa simply decided to amend the date and not to inform the other bargaining partners accordingly. He therefore fundamentally amended paragraph 8 without drawing the other bargaining partners' attention thereto. Yawa also did not indicate in the e-mail that he was of the view that there was a 'mistake' or some 'error' nor did he indicate that (if that was so) he did not have a mandate to agree to the implementation date being 1 July 2010. Despite the importance of the amendments to clause 8.3 Yawa deemed it fit to only highlight in red the changes to paragraph 7.2.3 (which is to a large extent not nearly as contentious as clause 8.3) but not to do the same in respect of clause 8 of the 20 April 2010

agreement.

- 57] It is therefore clear from the exchange of e-mails that Yawa did not draw his colleagues' attention to the fact that he had affected crucial changes to clause 8.3. Moreover, Yawa also did not inform the decision makers of SALGA namely George, Mashilo and Somyo before the agreement was signed, that he had changed the agreement finalised by the Drafting Committee the previous night.
- 58] It is important to point out that Yawa sent this e-mail to Forbes, Koen, Lebelo and Van Zyl only shortly before 13H00. The signing ceremony was scheduled for 14H00. Koen's evidence was that he had left for the signing ceremony at approximately 12H30 and that he did not see the e-mail from Yawa until after he had returned to his office. Forbes who was in Cape Town also only saw the e-mail at approximately 13H02 when he responded to the e-mail (see below). To a hypothetical question whether or not it could not have been possible that Yawa later realised that the date had to be 2011 and not 2010, Koen testified that if that was so, at the very least Yawa should have e-mail him and Forbes and said to them; 'Guys, I have overstepped my mandate'. It is common cause that this did not happen.

Forbes' e-mail dated 21 April 2010 at 01.02 pm

- 59] Forbes e-mailed back to Yawa and recorded the following:

'See my revised wording of 7.2.3 below:

4.1.1 Employees whose exiting basic salary is higher than the maximum notch of the Task grade to which he/she is entitled to, must be place in the wage curve applicable to his/her municipality and will retain his/her basic salary.'

We have to retain the old 8.1 to indicate what the starting minimum wage is.'

- 60] It is common cause that Forbes meant to refer to the old 8.2 and not 8.1. It is also common cause that Forbes did not say anything about the other changes to clauses 8.2 and 8.3. Forbes did not attend the signing ceremony as he was already in Cape Town. His evidence was that he looked at the e-mail and that he had responded to what Yawa had suggested in the e-mail in respect of 7.2.3. He also indicated to Yawa that SAMWU was not prepared to accept a change to paragraph 8.2. In essence, it was his evidence that the negotiations were completed the previous evening and that he had no mandate to re-open any negotiations with Yawa. He also testified that he did not look at the rest of the agreement because his attention was not drawn to any other changes and when he did not hear anything from Yawa he accepted that Yawa did not persist with the amendments as suggested in the e-mail. Only later when it was brought to his attention did Forbes realise that Yawa had affected a material change to the agreement.

The signing ceremony on 21 April 2010

- 61] Yawa arrived at the signing ceremony just before 14H00. He testified that he had assumed that the agreements Molohe had with him were the agreements that he had e-mailed to Theledi at 12H49 that morning. He also assumed that Koen had received the email from him at 12H48 and that he (Koen) had the (amended) collective agreements that he had e-mailed to him and Forbes.
- 62] Molohe arrived at the signing ceremony venue sometime before 14H00 with the hard copies of the collective agreements that had been handed to him by Forbes the previous evening. When he arrived at the ceremony Yawa handed him two documents and informed him that those were the

collective agreements for signature. Molope's evidence was that he started to read through the two agreements. He first went through the Disciplinary Code Agreement and just as he was starting to read the Wage Curve Agreement, did Yawa interrupt him. According to him Yawa said: 'Look, there is some changes that I have actually effected to the document, but I did not interfere with the content of that particular agreement'. Yawa then drew Molope's attention to the fact that he had affected certain grammatical changes to clause 7.2.3. They then started to discuss the change. Koen testified that he did not even know that Yawa had effected changes to clause 7.2.3 – he only saw this later on the email when he had returned to his office after the ceremony. Koen also testified that Yawa must have realised by the manner in which he (Koen) approached the changes to clause 7.2.3 that he (Koen) had not seen the e-mail. Yawa, however, did not mention to him (Koen) that he had sent an e-mail to him. It is in fact common cause that Yawa did not inform Koen and Molope that he had sent an e-mail to Forbes nor that Forbes had responded to his e-mail. Koen stated in his evidence that he did not actually look at the Wage Curve Agreement because he took Yawa's word when Yawa told him that he did not change anything apart from the amendment to clause 7.2.3. He further stated that, with hindsight, it was probably the biggest mistake he has ever made in the 14 years that he had worked for IMATU.

- 63] Koen and Ms Grey (the Deputy General Secretary of IMATU) joined Yawa and Molope and the four of them debated the change to clause 7.2.3. Grey wrote down the agreed formulation on a piece of paper and Adams was tasked to insert the agreed formulation into the electronic version of the wage curve agreement.
- 64] After Koen, Yawa, Molope and Grey had agreed on an improved formulation of clause 7.2.3, Koen asked Yawa in the presence of the

others whether he had affected any other changes to the agreement. Yawa answered that he did not. Molope also testified that Yawa confirmed that there were no other changes. He testified that he thereafter did not look at the rest of the agreement after Yawa had assured him that he did not affect any other changes. He testified that he had trusted Yawa's assurance and that he had no reason not to believe Yawa.

- 65] Yawa's evidence about what had happened differs. According to him, Molope had reviewed the entire document and it was only after he had finished reading the Wage Curve Agreement that he drew Molope's attention to the fact that he had made a change to clause 7.2.3. Yawa admitted that Koen asked him whether he had made any other changes to the agreement and admitted that he had replied that he did not. According to Yawa, he referred to the document that they had and that 'in the document we had, there were no other changes, everything else was agreed'.
- 66] The agreement was printed and taken to the signatories for signing. It is common cause that the document that was signed is the one contained at pages 61 – 73 of Bundle D. George signed on behalf of SALGA. Koen signed on behalf of IMATU and Molope on behalf of SAMWU. The signed agreement could, however, not be photocopied as the photocopying machine at the hotel was not working. The original signed copies were handed to a courier to courier to the SALGBC's Head Office. As a result, none of the parties received copies of the signed agreements on 21 April 2010.
- 67] The Unions' case is that they were unaware that Yawa had made changes to paragraph 8 of the final draft concluded on 20 April 2010 and that they had signed the agreement on 21 April 2010 on the basis that the agreement that they had signed was the Wage Curve Agreement that was finalised the night before save for the amendment to clause 7.2.3 on 21

April 2010 when mere grammatical adjustments were made to the clause. According to the Unions, they were under a justified mistake caused by Yawa when they signed the collective agreement on 21 April 2010. Koen also confirmed in his evidence that he was of the view that IMATU was signing the agreement that they had reached the night before save for the grammatical change made to clause 7.2.3. He also confirmed that he had not read the entire document before he signed it because the agreements were ready to be signed the night before and that he had no reason to suspect that any other changes were going to be made to the agreements: The agreements were therefore settled the night before and those were the agreements that Koen was going to sign. Koen confirmed that he had asked Yawa whether he had changed anything else beside clause 7.2.3 and when Yawa assured him that he did not, he signed the Wage Curve Agreement under the impression that he had signed the 20 April Agreement. He confirmed that it was only later when he saw the e-mail that he asked for the signed copy to be faxed to him. It was then that he had discovered that clause 8.3 was removed and the date amended. He confirmed that IMATU would never have signed the agreement if the implementation date was 1 July 2011. Molohe likewise testified that, had he known about the changes, he too would not have signed the agreement.

- 68] SALGA's case is that they had no reason to doubt that the union parties had perused and checked the agreement before they had signed it.

Events after the signing ceremony

- 69] Adams phoned Forbes on 22 April 2010 and informed him that there was a problem with the signed Wage Curve Agreement. Forbes received a copy of the signed Wage Curve Collective Agreement by fax and he also realised that clause 8.2 was deleted and that clause 8.3 became clause 8.2 to provide that the wage curve scales would increase only on 1 July

2011.

70] There was a telephonic conference meeting of the Bargaining Council Executive Committee on 22 April 2010. The meeting was convened after the Unions had written letters indicating that the wrong agreement was signed. During the telephone conference Yawa indicated that he had unilaterally changed the date from 1 July 2010 to 1 July 2011 because Forbes had made an error when he typed in 1 July 2010 instead of 1 July 2011. According to him, this was done to reflect the common intention of the parties during the negotiations.

71] On 23 April 2010, Adams from IMATU wrote as follows in a circular:

‘Regrettably however, it has subsequently emerged that the signature and execution process have been tainted by scandalous and fraudulent behavior on the part of a SALGA official. By all accounts, the aforesaid SALGA official fraudulently altered the documents just prior to the signature thereof and sought to mislead the signatories as to the true nature of the contents of the documents that were presented for signature.’

72] Forbes, on behalf of SAMWU, wrote a letter to George (the Chief Executive Officer of SALGA) on 23 April 2010 to indicate that the changes to the agreement were made without the consultation or agreement of the union parties. He wrote as follows:

‘Furthermore, we wish to advise that during a special SALBC Executive meeting held on 22 instant 2010 via telephone conference, the relevant SALGA official confirmed that he unilaterally amended the agreement as drafted on Tuesday evening. Mr. Yawa tried to explain his despicable conduct by blaming it on a ‘drafting error’.

...

In negotiations trust is of the utmost importance. Sometimes parties have to take unpopular positions back to their constituencies. This requires that the counter-party does the same. Failure to act honestly and ethically means that it become extremely difficult to negotiate in good faith. The actions by your official, Adv. Yawa, effectively destroys this trust relationship.'

[73] Forbes ended the letter by stating the following:

'This leaves us with no effective collective agreement and thus the dispute remains unresolved. Salga is called upon to speedily correct the breach of your official, Adv. Yawa. Should you fail to do so, this will require us to re-engage in industrial action in the forthcoming period. We would also be required to made the actions of Salga public.'

Koen's letter dated 23 April 2010

[74] Koen also wrote a letter stating that IMATU concurred with the views expressed by SAMWU. Koen stated in this letter that Yawa and Lebelo both made substantive input and comments on the precise wording of clauses 8.2 and 8.3. According to Koen, it was now 'downright dishonest' to claim that it was a 'drafting error' by the 'technical team'. Koen ended his letter by stating that IMATU agreed with the legal conclusions as set out by Forbes in his letter (referred to in the previous paragraph). Koen also stated that IMATU would join SAMWU in further anticipated strikes.

[75] A further Executive Meeting was held on 29 April 2010. Molope (on behalf of SAMWU) pointed out to the meeting that the changes were only later discovered and that SAMWU intended to sign the 20 April Agreement.¹⁴

¹⁴ 'In other words, it has the effect of denying the workers a salary increase on 1 July this year. We consider those changes to be of suspension, a serious irregularity and we called upon the General-Secretary not to append his signature to the agreement. We believe that dishonesty and fraud had taken place on behalf of the employer organisation and prior to the agreement being signed by the General-Secretary and circulated, we'd like the changes to be reversed and the original agreement we had concluded on Tuesday be the agreement that was to be signed. So, I think that's what brought the matter to this point, that we believe that- that's the basis of why we

Forbes was also adamant at the meeting that he did not accept the explanations from Yawa and that the agreement concluded between the parties was the one of the previous evening.

[76] On 17 May, George wrote a letter to Mr Nhlapo (General Secretary of SAMWU), Molope, Koen, Carstens, Govender and the Minister stating the following:

‘That clause 7.2.3 refinement having been a typical giving of effect to what was agreed to at negotiations led by principals, must be differentiated from the two new clauses in clause 8.2 and 8.3, which, per your letter, were inserted in the agreement at refinement. SALGA views same as issues of substance that cannot simply be inserted into the agreement in the name of cleaning or refining same. In fact, the 2010 instead of 2011 in the then clause 8.3 was typed in by your Mr Forbes, in error as far as SALGA is concerned. Our SALGA team, on noticing same, corrected it.

That is why our Adv Yawa referred to it as a typing /drafting error in the teleconference on 22 April 2010. For IMATU, in their letter, to refer to that as “downright dishonest” is unfortunate. SALGA however sincerely believes that neither Mr Forbes nor Mr Koen had an intention of materially changing the agreement reached in negotiations led by principals prior to this refinement process.

It is SALGA’s considered view that what was agreed to in negotiations, in essence, remains embodied in the signed agreement. The agreement (wage curve and DC), in the form that was ultimately signed, were equally sent to SAMWU and IMATU’s Deputy General Secretaries sometime before signing thereof. We must state that such was at the verbal request of your Deputy General Secretary, Mr Theledi, to our Adv Yawa.’

believe that no proper agreement has been signed and that the changes effected by SALGA needs to be removed and the original wording needs to be replaced prior to us concluding that agreement.’

[77] On 17 May 2010 SALGA respondent and indicated that the signed agreement (the 21 April Agreement) was in order and therefore valid:

'Having considered the views of SAMWU, IMATU and SALGA expressed at the Special Executive Committee Meetings held on 22 and 29 April 2010 respectively, and the response of SALGA, dated 17 May 2010, detailing the sequence of events prior to the signing of the agreement, I hereby attach my signature to the Agreements, signed by IMATU, SAMWU and SALGA, at Irene in Pretoria on 21 April 2010.'

Summary of the differences between the 20 April agreement and the differ 21 April agreement

[78] The changes between the 20 April agreement and the 21 April agreement relate to the following:

78.1 A change was made to clause 7.2.3. This change is not at issue in these proceedings. Koen, Yawa and Molohe agreed to the changes immediately before the signing of the agreements (on 21 April 2010). These changes were, in any event, purely grammatical and did not change the substance or essence of the clause.

78.2 Clause 7.2.5 was changed in the final draft.

78.3 Clause 8.2 from the 20 April draft was deleted from the 21 April draft.

78.4 An amended clause 8.3 was inserted. This clause became clause 8.2. Apart from the numbering, a crucial change was made to the adjustment date of the salary scales of the wage curve agreement: The 20 April 2010 agreement referred to the adjustment date as 1 July 2010 whereas the 21 April agreement referred to the adjustment date as 1 July 2011.

[79] The disputed clauses of the collective agreement that Forbes sent to Yawa on 20 April 2010 read as follows:

‘8.1 There shall be salary scales from TASK Grade 1 to TASK Grade 26 as follows: [This clause is not in contention.]

8.2 The initial minimum salary on TASK Grade 1 of R 4, 000.00 (four thousand rand) per month shall increase by the same percentage as agreed to in the current Wage and Salary Collective Agreement. [This clause was deleted from the signed agreement.]

8.3 The salary scales referred to in annexures B1 to B8 will be adjusted with effect from 1 July 2010 and ten annually thereafter by the same percentage as agreed to in the applicable Wage and Salary Collective Agreement.’

[80] The disputed clauses of the collective agreement that was signed on 21 April 2010 read as follows:

‘7.2.5 Annual salary adjustments, in terms of 8.3 below, will be applied to the basic salaries of those employees referred to in clause 7.2.3 and 7.2.4 above; and..’

‘8.1 There shall be salary scales from TASK Grade 1 to TASK Grade 26 as follows: [This clause is not in contention.]

8.2 The salary scales referred to in annexures B1 to B8 will be adjusted with effect from 1 July 2011 and then annually thereafter by the same percentage as agreed to in the applicable Wage and Salary Collective Agreement.’ [Clause 8.3 was deleted and replaced by Clause 8.2.]

Crux of the dispute

[81] It is the Unions’ case that the parties have reached an agreement that the

wage curve scales would be increased on 1 July 2010. SALGA dispute this and contend that it was agreed that the wage curve scales would be adjusted with effect 1 July 2011.

Constitution of the SALGBC

[82] As already pointed out, negotiations took place within the context of the SALGBC. It is common cause that SALGA's activities are governed by its Constitution. Clause 7 of this Constitution provides for the establishment of various committees. Clause 7.2 thereof provides for the establishment of Bargaining Committees. Clause 7.2.6 of the Constitution provides that a Bargaining Committee shall have the power to conclude any collective agreement relating to terms and conditions of service or any other matter referred to it for bargaining by the Executive Committee. This clause reads as follows:

'7.2 Bargaining Committee

7.2.1 The bargaining committee shall consist of 20 (twenty) seats divided equally between the Employer Parties and the Trade Union Parties.

7.2.2 The allocation of Representatives amongst the Employer Parties shall be determined mutatis mutandis by the formula in sub-clause 5.4.

7.2.3 The allocation of Representatives among the Trade Union Parties shall be determined by the formula in sub-clause 5.4.

7.2.4 The delegates shall, at the first meeting of the year, appoint a chairperson from who the delegates to the Bargaining Committee. The Bargaining Committee may appoint a chairperson from outside the delegates of the parties' representatives.

7.2.5 The Bargaining Committee shall meet at such a place, date and time it or

the Executive Committee may determine.

7.2.6 The Bargaining Committee shall have the power to conclude any collective agreement relating to terms and conditions of service or any other matter referred to it for bargaining by the Executive Committee.

7.2.7 A dispute that arises in the Bargaining Committee shall be resolved in terms of clause 11.'

[83] Clause 16 provides for the manner in which decisions must be taken and the circumstances under which a decision of (*inter alia*) a committee in respect of a substantive matter will be binding on the parties. This clause reads as follows:

'16. Decisions

All decisions of the Central Council, Division or any Committee concerning substantive matters shall require a two-thirds concurrent majority of the Employer Representatives on the one hand and a two-thirds concurrent majority of the Trade Union Representatives to the Council on the other hand.

No decision of the Central Council, Division or any Committee concerning substantive matters shall be binding on the parties unless-

the subject matter of the decision has been reduced to writing before the decision is taken; or

if not reduced to writing before the decision is taken, the subject matter of the decision is reduced to writing and adopted by subsequent decision of the council.

Decisions of the Central Council, Division and or Committee concerning administrative matters shall require a simple majority of those

Representatives present.

The Central Council shall determine from time to time which matters are substantive and which are administrative in terms of the process as is set out in clause 16.1.'

- [84] Clause 17 lastly provides for the procedures to be adopted for the negotiation of collective agreements. This clause reads as follows:

'16. Procedure for the Negotiation of Collective Agreements

A procedure, forum and level for negotiations shall be determined by the Parties to the Central Council.

Any Party to the Council may introduce proposals for the conclusion of a Collective Agreement on appropriate subject matter and at the appropriate level.

At least two-thirds of the Employer Representatives on the one hand and two-third of the Trade Union Representatives on the other hand must vote in favour of a Collective Agreement for it to be binding on the Parties.¹⁵

In the event of a dispute arising from proposal for the conclusion of a Collective Agreement the parties shall have the rights prescribed in the Act.'

- [85] SALGA, apart from the fact that they disput some of the facts, raised three main defences in their statement of response.

85.1 The first defence is that, upon signing the agreement, the 21 April Agreement became binding on the parties to the SALGBC by operation of its Constitution. As a result, the duly adopted resolution of a corporate entity cannot be treated as void on the

¹⁵ Court's emphasis.

grounds of an operative error. In other words, if a party wants to attack such a resolution, the ordinary contractual principles relating to mistake, or as it is referred to 'an operative error', does not apply. In the alternative, if the ordinary contractual principles do indeed apply, only members of the Bargaining Committee have the *locus standi* to attack that resolution and therefore they have to be joined as parties to the proceedings. It then follows that the union will have to show that at least two thirds of the trade union members laboured under the mistake that we have pleaded.

85.2 In terms of the second defence, it is argued that there exists no basis for the rectification of the agreement of 21 April 2010 in that a duly adopted resolution of a corporate entity (especially a resolution adopting a collective agreement by a Bargaining Council established under its constitution) cannot be rectified on the grounds of operative error.

85.3 In terms of the third defence, it is submitted that by the end of the Bargaining Committee's deliberations on 20 April 2010 consensus had been attained but two outstanding issues still had to be dealt with. The first was the extent to which the increases consequent on the new wage scales would be made retrospective and secondly pay progression. It was therefore argued that the written draft of 20 April 2010 was therefore not an agreement. It is also argued that the draft of 20 April was in any event not adopted by virtue of the fact that it was not signed as was customary to do.

The defences raised on behalf of SALGA were disputed by the applicants.

- [86] Detailed heads of arguments were filed on behalf of SALGA attacking the validity of the 20 April 2010 collective bargaining agreement on the basis that it did not comply with the Constitution of the SALBC. It was argued that the delegates had casually entrusted the finalisation of the agreement to their mandated representatives which they could not do. It was further argued that the agreement upon which the applicants rely emerged from the Drafting Committee that had no power to finalise issues of substance. The Drafting Committee could not change the position regarding the implementation date without the input of the Bargaining Committee. Without the input of the Bargaining Committee the default position therefore remained in place. (See in this regard clause 17 of the Constitution).¹⁶
- [87] Forbes testified that, once parties have agreed on the contents of a collective agreement, the practice was that the agreement would not go back to the Bargaining Committee or the General Council for adoption. The parties will regard the agreement as final. Koen also gave detailed evidence in respect of the process that was followed in reaching an agreement over collective agreements. He testified that it often happened that the Bargaining Committee would complete their deliberations and that the collective agreement would then be referred to a Drafting Committee. Should issues arise during the deliberations of the Drafting Committee the issues will be discussed with the parties' respective principals and the issues would be resolved. Where a mandate was required to settle an issue during the deliberations of the Drafting Committee, the parties would seek a mandate from their respective principals. Once that is completed, the parties would have an agreement irrespective of whether the collective agreement had been referred back to the Bargaining Committee. Koen confirmed this practice with reference to the wage negotiations that took place the

¹⁶ *Supra*.

previous year. A Drafting Committee was also appointed to refine the collective agreement. The principals accepted that agreement. Minutes before signing this agreement SALGA had approached IMATU and informed them that the agreement was too expensive and that the parties had to affect changes to the agreement. At that time the Bargaining Committee had likewise long completed their deliberations. A mandate was solicited from the principals and once the parties had reached an agreement, the (wage) collective agreement was thereafter signed. Koen therefore confirmed the practice that exists namely that not all the negotiations take place on a formal basis in a plenary session of the Bargaining Committee. This, he pointed out, was also what had happened during the deliberations of the Drafting Committee in respect of the Wage Curve Agreement. An issue arose about the period over which the nine month back pay would be paid. The respective parties obtained a mandate from their principals to settle the issue. Forbes deliberated with Malope (the president of SAMWU) and the secretary general of SAMWU. SALGA was consulted by Yawa. Once the parties have reached an agreement, the matter was settled. It is common cause that this issue was never referred back to the Bargaining Committee.

- [88] I am, on the evidence, persuaded that the parties are able (and were able) to reach agreements within the context of the Drafting Committee provided that the principals of the respective parties agree to any changes in respect of the collective agreements on the table or agree to the settlement of any disputes that arise during the deliberations of the Drafting Committee. I am therefore satisfied that by the end of 20 April 2010, the parties had reached an agreement in respect of *both* collective agreements and in particular the contents of the Wage Curve Collective Agreement which reflected the implementation date as 1 July 2010.

Conclusion on the facts

[89] It was common cause that Yawa changed the implementation date from 1 July 2010 to 1 July 2011. The question that must be considered is whether that change was concealed from his bargaining colleagues. The version of SALGA was that Yawa made the change because it was a mistake - a typing error. It was put to Molope that Yawa did not draw anyone's attention to this typing error because he took it for granted that that was not a matter to be drawn to the attention of anybody particularly. Molope refused to accept that any mistake was made. According to Molope, Yawa intentionally made the changes and then tried to hide it from them.

[90] I am of the view that the evidence supports a conclusion that after Yawa had amended the agreement, he deliberately concealed that not only from his own principals but also from his bargaining counterparts. Yawa's e-mails confirm this conclusion. I am further of the view that it is inconceivable that Yawa could not have known that the date of the implementation of the wage curve is a crucial issue. I also cannot accept that Yawa could have accepted that his counterparts would have read the attachments to his e-mail particularly if regard is had to his e-mails in which he failed to draw the other parties' attention to the amendments. Yawa's deception deepened when he deliberately did not inform Koen that he had sent him an e-mail which referred to certain changes to the agreement. When Koen deliberated on clause 7.2.3 during the discussions prior to the signing ceremony, Yawa must have realised that Koen did not receive the e-mail. At the very least, Yawa should have asked Koen whether he had seen the e-mail and whether he was aware of the changes. Yawa's final deception was when he was specifically asked whether he had changed anything else in the agreement and replied 'no'. I do not accept that he could have assumed that the others had the amended collective agreements. At the very least, Yawa should have

raised the issue with his bargaining parties prior to the signing of the agreements. After all, the relationship between bargaining parties should be based on good faith. I also do not accept Yawa's evidence that Malope had read through the entire Wage Curve Agreement before signing it. I can find no reason to doubt Molope and Koen's evidence about what had happened prior to the signing of the agreement. In my view, Yawa had interrupted Molope from reading the entire Wage Curve Agreement because he did not want Molope to realise that he (Yawa) had amended clause 8.3 fundamentally.

The reasons why Mr Yawa's evidence must be rejected

[91] Mr Van der Riet¹⁷ also persuasively argued that the evidence of Yawa must be rejected on the basis that it is an established principle that a witness whose evidence has been shown to be deliberately false on one point is liable to be regarded with suspicion and distrust overall.¹⁸ The Court was referred to at least six instances during the trial where Yawa deliberately gave false, namely:

91.1 Firstly, Yawa's claim that, at the signing ceremony, he told Molope and Koen of Forbes' counter-proposal in relation to the re-formulation of clause 7.2.3 of the Wage Curve Agreement. This is patently false if regard it had to the pleadings: Both IMATU and SAMWU pleaded that Yawa did not disclose to the parties at the signing ceremony Forbes's proposal in relation to the re-formulation of clause 7.2.3 of the wage curve collective agreement. SAMWU also pleaded that Yawa did not disclose that Forbes had responded to his e-mail. In both its pleas, SALGA admitted that Yawa did not inform Koen or Molope that he had sent the above email to Forbes. Moreover, the

¹⁷ I have relied liberally on the heads of argument submitted on behalf of the applicants in setting out the evidence on which the unions relied in support of their argument that this Court should reject the evidence of Yawa.

¹⁸ *S v Oosthuizen* 1982 (3) SA 571 (T) at 577A-B.

allegation that Yawa told Molohe and Koen of Forbes' counter proposal was never put to Molohe or Koen for them to answer to.

91.2 The second deliberate falsehood is Yawa's claim that Forbes' response to his e-mail of 12h48 (on 21 April 2010) to the effect that 'we have to retain the old 8.1 to indicate what the starting minimum is' was a reference not to the agreement that was the subject of the e-mail, but to an old version of clause 8.1 in a previous Bargaining Committee draft of the Wage Curve Collective Agreement. Mr Van der Riet submitted that this was a patently dishonest attempt by Yawa to justify his unilateral deletion of clause 8.2 of the Wage Curve Collective Agreement despite Forbes's objection. This allegation was also never put to Forbes for his comment.

91.3 The third deliberate falsehood is Yawa's claim that he did not receive hard copies of the collective agreements on the evening of 20 April 2010 after they had been finalised by the Drafting Committee. Mr van der Riet submitted that this falsehood is revealed by the discrepancies in Yawa's version on this aspect. It was put to Forbes that Yawa could not remember whether or not he had received hard copies of the agreement. However, when Yawa gave evidence he was adamant that he had not received hard copies. This falsehood was further confirmed by Adam's detailed evidence on this aspect which was left entirely unchallenged.

91.4 The fourth deliberate falsehood is Yawa's claim that he thought the agreements that Molohe had with him at the signing ceremony were the agreements that he had e-mailed to Theledi at 12H49. That claim flies in the face of Yawa's admission in an agreement concluded

between the parties and read into the record that he was unaware of whether Theledi had received his e-mail of 12H49.

91.5The fifth deliberate falsehood is Yawa's claim that he sent what he asserted to be the final collective agreements for signature to Theledi and Koen *after* he received Forbes's response to his e-mail of 12h48. The recorded times at which these e-mails were sent revealed this claim to be incorrect yet Yawa refused to admit that he had made a mistake and maintained his claim in the face of evidence which plainly revealed it to be false.

91.6The sixth deliberate falsehood is Yawa's evidence regarding the seating arrangements in the drafting team. His evidence in this regard was farfetched and was not put to Koen despite the fact that it differed dramatically from Koen's version as to how the members of the drafting team were seated. Moreover, SALGA'S own witness (Van Zyl) corroborated Koen's version in respect of the seating arrangements, thereby confirming the falsity of Yawa's evidence on this score.

[92] I have considered these submissions and I am in agreement that little weight can be attached to the evidence of Yawa. Apart from the fact that Yawa gave deliberate false evidence, his evidence on other aspects also casts serious doubt on his version. Yawa testified that he did not look at the screen during the deliberations of the drafting team but that he was looking at the hard copy of the agreement reached in the Bargaining Committee. It was, however, the uncontested evidence of Koen that nobody in the Drafting Committee had seen a hard copy of the

deliberations of the Drafting Committee. I have also referred to the evidence of Yawa that he had phoned George during the deliberations of the Drafting Committee and informed him that the parties were not going to sign that night. George did not confirm this evidence when he gave evidence. In fact, if the evidence of Yawa is properly considered, it confirms the Unions' evidence that all the parties were in fact prepared to sign the collective agreement that was finalised that night and that it was only when it was realised that not all the parties were there that it was decided to defer the signing ceremony to the next day. Put differently, Yawa could not have known at that stage that the agreement's would not be signed that evening.

[93] I am further also persuaded that Yawa clearly attempted to mislead Theledi with his email of 12h49 on 21 April 2010. In fact, if regard is had to the e-mail it is clear that he sent the e-mail to Theledi's secretary. When asked during the proceedings on 19 November 2010 whether there were any other documents that he wished to place before the court Yawa could not have forgotten about the e-mail since it is apparent that he had e-mailed it to Mr Lebelo's secretary. I am in agreement that the only plausible inference to be drawn from these facts is that Yawa sought to hide the e-mail at that stage.

[94] I am further in agreement that Yawa's version of what had happened in the drafting team as far as the agreed date for the adjustment of the wage curve scales concerned, should be rejected. It was Yawa's evidence that the Unions took the position that the wage curve scales ought to be adjusted on 1 July 2010 and that they formulated clauses 8.2 and 8.3 only when they had established that they could not physically adjust the scales because the percentage for the impending salary increase had not yet been determined by SALGBC. I am in agreement that it is improbable that SALGA would have convinced the Unions to alter their position and agree

to an adjustment of the wage curve scales a year later in circumstances where the Unions' view was that if the scales were not adjusted when the salaries were increased on 1 July 2010, they would no longer reflect the market position the parties chose to base their salary scales on. Moreover, I cannot ignore the fact that George went on national television and declared to the nation that ALL parties have reached an agreement and was ready to sign the agreement. Yawa's evidence was that if they had agreed to an adjustment of the date to 1 July 2010 that would have amounted to the impermissible amendment of the Bargaining Committee agreement. If this was his view, one would have expected that Yawa would have communicated this to the other bargaining partners in his e-mails. I am further in agreement that Yawa's version is implausible particularly in light of Yawa's actions after he had discovered the inclusion of the date of 1 July 2010 as opposed to 1 July 2011. It is also, in my view, clear from the extensive evidence led during this fairly lengthy trial that the date of the adjustment of the wage curve scales was a crucial aspect of the agreement. It was so crucial that the evidence on behalf of the Unions was that they would not have signed the agreement had they known that the adjustment date was a year later (1 July 2011). There is no proper explanation for the fact that Yawa did not expressly deal with this issue in his e-mails that followed the deliberations on 20 of April. This was a crucial aspect, why was it not dealt with in Yawa's e-mails. Moreover, there is not a proper explanation before this Court as to why both Yawa and Lebelo did not notice what Forbes were typing into paragraph 8.3 when the Drafting Committee deliberated. The only conclusion that this Court can come to is that the parties have agreed that the implementation date was 1 July 2010.

- [95] What makes matters worse for Yawa is the fact that he conceded in his own evidence that he did not tell the Unions that he had changed the date in clause 8.3 of the Wage Curve Agreement from 1 July 2010 to 1 July

2011. Furthermore, he conceded that he did not even tell his own principals, George, Mashilo and Somyo that there was, according to him a drafting error.

[96] Mr. Brassey submitted that, on the probabilities, Yawa could not have anticipated that three union representatives namely Koen, Forbes and Theledi would be so sloppy to overlook the change to clause 8 particularly as clause 8 was under review and could have been picked up by means of a file comparison. I am not persuaded by this submission. Firstly, Koen's evidence was that he already was on his way to the venue when the e-mail was sent. He therefore did not see the e-mail until after the signing ceremony. Secondly, Koen pertinently asked Yawa whether he (Yawa) had affected any amendments (other than that to the non-contentious clause) to the Wage Curve Agreement. Yawa said 'no'. Both Molohe and Koen testified that they did not doubt Yawa's word and that is why they did not read the agreement. As already pointed out, Koen stated that this was the biggest mistake he has ever made since he has started to work for IMATU. Thirdly, Forbes was in Cape Town and his evidence was that he merely looked at the e-mail and responded to the e-mail. Fourthly, Molohe's evidence was that Yawa interrupted him when he went through the Wage Curve Agreement and that he therefore did not continue to read through the agreement. He also testified that he had no reason to doubt Yawa assurances.

[97] The timing of Yawa's e-mail containing the new amended version of the Wage Curve Agreement to Koen and Forbes confirms, in my view, the impression that Yawa wanted to conceal the fact that he had changed the implementation date. I am further in agreement that this was a poorly disguised attempt by Yawa to put himself in a position where he could claim that the Unions must have seen his final draft before they signed the agreement. I have already referred to the fact that this e-mail was sent a

little more than an hour before the signing ceremony in circumstances where Yawa and Van Zyl conceded that they must have realised hours before that the implementation date reflected in the agreement was 1 July 2010. At that stage, Koen had already left for the signing ceremony. I am further in agreement that Yawa's failure at the signing ceremony to inform Koen and Molope of the e-mails finally demonstrates his lack of good faith in his dealings with the Unions on this issue. At the very least, it was expected of Yawa to have expressly raised the issue of the adjustment date, if not in the e-mails, but during the final discussions before the signing ceremony. What makes matters worse for Yawa is the fact that he was representing SALGA as the chief negotiator in the negotiations with the Unions. Parties engaged in a bargaining relationship are entitled to accept that their adversaries will bargain and behave in good faith. I am not persuaded that Yawa bargained in good faith. The facts in my view confirm the opposite.

- [98] Van Zyl and Lebelo also did not support the evidence of Yawa. Van Zyl, for example, contradicted Yawa's evidence on the seating arrangements. Lebelo confirmed that the Unions wanted to adjust the wage curve scales on 1 July 2010. He could, however, not explain how they persuaded the Unions to abandon this view. He also could not explain why he did not notice that Forbes typed in clause 8.3. Lebelo also confirmed that when he left the deliberations on the 20 April 2010 he was of the view that the parties would sign the agreements as prepared by the Drafting Committee. George's evidence also did not support Yawa. He did not confirm in his evidence that he had received a call from Yawa to inform him that he need not rush back to sign the agreements. In fact, George went on national television to confirm that *all* the parties have reached an agreement and that they would sign it later that evening (on 20 April 2010). Mashilo also confirmed a crucial aspect of the Unions' case and that is that he (Mashilo) had told Forbes that SALGA was prepared to sign

the agreement on the evening of 20 April 2010.

[99] I am therefore in agreement that little reliance can be placed on the evidence of Yawa. Apart from serious defects in his evidence, Yawa was an evasive and argumentative witness and persistently refused to make simple concession to simple propositions put to him in circumstances where he ought to have made concessions.

[100] On the evidence, I am therefore persuaded of the following:

100.1 When the parties left the hotel in Kempton Park on the evening of 20 April 2010, they were in agreement that they have reached a final agreement and that that agreement included clause 8.3 which reflected the implementation date of the wage curves as 1 July 2010. I do not accept that the parties left the hotel under the assumption that Yawa will still do a 'quality assurance exercise'. George certainly did not hesitate to tell the country on national television that *all* parties have reached an agreement. It is common cause that when the parties dispersed on the evening of 20 April 2010 no further meetings were contemplated between the parties. The only meeting contemplated between the parties was the signing ceremony at 14H00 the next day. Moreover, if it was so that Yawa would still do a 'quality assurance exercise' at the very least it was expected that he would have drawn the parties' attention to the fact that he had fundamentally altered a crucial clause to the Wage Curve Agreement.

100.2 Yawa attempted to conceal the fact that he had made amendments to a crucial clause of the agreement not only to the trade union parties but to his own principals. I am persuaded that none of the SALGA decision makers (George, Sonyo or Mashilo) were aware of the

fact that Yawa had effected changes to clause 8.3 of the agreement. George was prepared to sign the agreement as it was on the evening of 20 April 2010.

100.3 When Yawa e-mailed the amended agreement to Forbes, he (Forbes) did not read the whole document and merely dealt with the issues specifically drawn to his attention by Yawa.

100.4 Molope did not review the whole agreement when it was handed to him immediately prior to the signing of the Wage Curve Agreement. Molope did not read the whole agreement because he was assured by Yawa that he (Yawa) did not affect any other changes to the agreement. The fact that Yawa did not mention to Molope that he had fundamentally altered clause 8.3 of the agreement must have been a deliberate attempt to induce the parties to sign the amended agreement.

100.5 The Unions and SALGA signed the agreement on the basis that the only change to the said agreement was the formulation of clause 7.2.3.

[102] I am therefore persuaded on the evidence is that the Trade Union parties and SALGA signed the document referred to as the 21 April agreement¹⁹ on the basis that this was the agreement reached on 20 April 2010 subject to the amendment to clause 7.2.3 agreed to minutes before the signing of the Wage Curve Agreement (and the Disciplinary Agreement).

The relief sought

[103] The primary relief sought by the applicants is for an order that the agreement concluded on 20 April 2010 constitutes a binding collective agreement between IMATU, SAMWU and SALGA. If this order is granted the applicants further seeks an order declaring that the Wage Curve Agreement signed on 21 April 2010 does not constitute a valid agreement. In the alternative, an order is sought that the signed Wage Curve Agreement of 21 April 2010 be rectified by substituting (the current) clause 8.2 with clauses 8.2 and 8.3 (of the 20 April Agreement).

[104] I am of the view that rectification is the appropriate order in the present circumstances. The parties' intention is embodied in the 20 April 2010 agreement subject to the one clause that was amended immediately prior to the signing of the 21 April Agreement.

Submissions on behalf of SALGA in respect of rectification

[105] It was submitted on behalf of SALGA that there is no basis on which a resolution of a corporate organ can be rectified especially in the case of a statutory Bargaining Council governed by a Constitution. It was further submitted that the proper way to correct a mistake is to re-open the issue and resolve the issue afresh. I do not agree. As already pointed out, I am persuaded that the Unions have made out a case that, on the evening of 20 April 2010, all the negotiating parties were willing to sign the agreement that was refined by the Drafting Committee. I am further persuaded that the agreement that was accepted by all the principals that were present at the proceedings was the one that Adams distributed. I am therefore not persuaded on the evidence that the principals did not know what was contained in the agreements – especially in clause 8.3 thereof. I am further persuaded that the evidence overwhelmingly point to the fact that the Unions did not know that Yawa had amended the Wage Curve Agreement to provide for a completely different date of implementation. The Unions

were adamant: They would not have signed the agreement had they known about the change. I am furthermore satisfied that the evidence supports the conclusion that Yawa was not honest in his dealings with his bargaining counterparts.

[106] I am further persuaded that the parties intended to affix their signatures to the collective agreements. This much is clear from the evidence. However, what is clear from the evidence is that the parties intended to affix their signatures to the 20 April Agreement subject to the agreement reached in respect of the amendment to clause 7.2.3 just prior to signing the agreement.

[107] I accept that the practice of the parties was that collective bargaining agreements could be concluded even after the Bargaining Committee had concluded its deliberations. I accept Koen's evidence that this practice has been followed previously when a wage agreement was concluded and amended immediately before the signing session after the bargaining parties have obtained a mandate from their respective principals.

[108] SALGA contends that there is no basis on which a resolution of corporate organ (errors *in verbis* aside) can be rectified especially in light of the fact that the Bargaining Council is governed by a Constitution. SALGA further submitted that the agreement signed on 21 April 2010 amounted to a resolution 'which the members of the Bargaining Committee duly voted in favour of or otherwise expressed their endorsement of and 'in law, a duly adopted resolution of a corporate entity... cannot be treated as void on the grounds of operative error'. SALGA further contends that such a resolution can also not be rectified on the grounds of operative error and that the proper way to correct a mistake is to re-open the issue and resolve the issue afresh.

[109] I am in agreement with Mr. Van der Riet that SALGA misconceives the

nature of the agreement that was signed on 21 April 2010. The agreement that was signed on 21 April 2010 was not a resolution of the Bargaining Council. It is clear from the evidence that what was signed was a collective agreement concluded by the parties under the auspices of the Bargaining Council. Although the Constitution requires a formal vote by the parties to the Bargaining Committee, the evidence supports the conclusion that this practice was not followed. The fact that the parties have reached an agreement in respect of the back-pay issue during the deliberations of the Drafting Committee after a mandate was obtained from the principals confirms this conclusion. If it was required that this issue had to be subjected to a voting process by the Bargaining Committee surely the parties would have required that the Bargaining Committee meet before the signing ceremony. It is common cause that that did not happen. The Bargaining Committee is used as a mechanism to facilitate negotiations to achieve collective agreements. Those who participate in the activities of the Bargaining Committee are merely agents of the parties they represent. Collective agreements concluded in these circumstances constitute an agreement between the organisations themselves acting through their principal decision makers and not through the individual members of the Bargaining Committee and it is the principal decision makers that must be satisfied that the agreement is acceptable. Once the agreement is concluded by signing the agreement, the signatories sign on behalf of their respective organisations and not on behalf of the members of the caucuses of the Bargaining Committee. Similarly, where the parties conclude an agreement outside of the activities of the Bargaining Committee, the parties to the agreement will likewise bind the respective parties. Nothing in the Constitution of the Bargaining Council prohibits the conclusion of agreements under the auspices of Bargaining Council in these circumstances albeit outside of the activities of the Bargaining Committee.

[110] In the event, the signed agreement is rectified to reflect the intention and agreement of the parties on the evening of 20 April 2010 subject to the amendment to clause 7.2.3. As far as costs are concerned, I am of the view that costs should follow the result and should include the costs of two Council.

Order

1. The Categorisation and Job Evaluation Wage Curves Collective Agreement signed on 21 April 2010 by the First Applicant and the First and Second Respondents is rectified by deleting clause 8.2 thereof and inserting clauses 8.2 and 8.3 of the Categorisation and Job Evaluation Wage Curves Collective Agreement on pages 42 – 53 of Bundle C, subject to the amendment to clause 7.2.3 agreed to just before the signing ceremony.

2. The First Respondent is ordered to pay the costs of the Applicants and the Second Respondent including the costs of two Council.

AC BASSON, J

Judge of the Labour Court

Appearances:

For the Applicants: Advocate H Van der Riet SC with Advocate Barnes

Instructed by: Cheadle Thompson & Haysom Inc Attorneys

For the Respondents: Advocate MSM Brassey SC with Advocate A Cook

Instructed by: Tshiqi Zebedelia Attorneys