

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: J5108/2000

In the matter between:

First Applicant

PROVINCIAL BARGAINING COUNCIL

Second Applicant

and

PUBLIC SERVICE COORDINATING

Respondent

REASONS FOR JUDGMENT

FRANCIS AJ

Introduction

1. On the 28th February 2001, an urgent application was argued before me in terms of which the applicants had applied to set aside a resolution that adopted by the respondent. After arguments were heard, I reserved judgment until the 2nd March 2001. On that day I reviewed and set aside the resolution that was adopted by the respondent and ordered the respondent to pay the second applicant's costs, including that of senior counsel. These are the reasons for that order.

Background facts

2. On the 18th April 2000 the respondent adopted resolution 3 of 2000 which is as follows:

"Noting that

* *Schedule 7, Part D, item 14(2) and item 20(b), of the Labour Relations Act, No 66 of 1995 ("the LRA") read with Schedule 1, item 3(1) of the LRA, creates formal bargaining council structured in the provincial administrations and the national departments that are not cost effective, or necessary*

* *Item 20(b)(i) and (ii) of Schedule 7 states that the provincial and national chambers created in terms of the Public Service Labour Relations Act Proclamation No 105 of 1994 ("the PSLRA") shall be deemed to be the bargaining councils established in terms of section 37(3)(a) of the LRA. They have, therefore, been*

deemed to be created by a collective agreement of the PSCBC.

* *Section 37(3)(a) states that the Public Service Co-ordinating Bargaining Council (“the PSCBC”) may designate any sector in the public service for the establishment of a bargaining council, and*

* *The PSCBC may amend any collective agreements that it has entered into.*

The parties hereby resolve that:

1. *The decision to designate bargaining councils in terms of the LRA (1995) in provincial administration and national departments is withdrawn, subject to the following:*
 - (a) *The withdrawal of the decisions does not affect the establishment of the Education Labour Relations Council, Safety and Security Sectoral Bargaining Council, Public Health & Welfare Sectoral Bargaining Council and the General Public Service Sectoral Bargaining Council.*
 - (b) *Departmental and provincial bargaining councils in existence at the time of the coming effect of this resolution shall continue to exist for a period of not longer than six months from such date.*
 - (c) *All agreements concluded in departmental and provincial bargaining councils and still valid at the expiry of the period referred to in subparagraphs (b) above, will remain in force until amended or replaced by an agreement concluded in the relevant sectoral bargaining council.*
- (2) *Any dispute that arose in a departmental or provincial bargaining council before the expiry of the period referred to in subparagraph (b) above, must be concluded in terms of the dispute resolution mechanism that applied to such council at the time.*
- (3) *The sectoral bargaining council designated by the PSCBC will, if necessary and in accordance with their constitutions, establish chambers and/or committees in national and provincial administrations.*
- (4) *The PSCBC may consider the establishment of provincial committees to facilitate and co-ordinate the implementation of agreements reached at PSCBC and other sectoral bargaining councils.*
- (5) *The agreement binds*
 - (a) *the employer;*
 - (b) *the employees of the employer who are members of the trade unions parties to this agreement; and*
 - (c) *the employees of the employer who are not members of any trade union parties to this agreement, but who fall within the registered scope of council.*
6. *This agreement will come into effect from the date of signing.*
7. *If there is a dispute about the interpretation or application of this agreement any party may refer the matter to the Council for resolution in terms of the dispute resolution procedure of the Council. Any dispute arising concerning jurisdiction of the Chamber and/or other bargaining forums shall be dealt with in terms of the provisions of the LRA.*
8. *The Council will monitor the implementation of this agreement.”*

3. The effect of the withdrawal of the designation of Bargaining Councils meant that Bargaining Councils in the

Provincial Administrations (like the second applicant) and National Departments would therefore be dis-established and cease to exist.

4. The respondent passed a further resolution in terms of which the six-month period referred to in clause 1(b) of Resolution 3 of 2000, was extended to 28 February 2001.

5. As a result of Resolution 3 of 2000, several meetings ensued between the applicants and the respondent in an attempt to persuade the respondent to withdraw the said resolution. The respondent refused to do so. This prompted the first applicant to launch this application.

6. On 24 November 2000, the second applicant gave notice that it intended to apply to be joined as a second applicant in the above matter. The joinder application was granted on 5 January 2001.

Preliminary Issues

7. When the matter came before me, the respondent raised the issue of urgency. After the issue was argued, I ruled that the matter was urgent. Whilst it is true that the respondent had passed its resolution on 18 April 2000, the applicants had at all material times engaged the respondent in an attempt to persuade it to withdraw the resolution. Several meetings had taken place which could not resolve the dispute. The respondent had extended the six-month period to 28 February 2001 but was not prepared to extend it further.

8. The second preliminary point that was raised by the respondent was that the applicants had failed to comply with the provisions of Rule 7 A of the Rules of the Labour Court.

9. Rule 7A was added to the Rules of the Labour Court to deal with reviews of arbitration awards under section 145 or 158(1)(g) of the LRA. Rule 7A(2)(b) requires an applicant for review to “call upon the person or body under review to despatch to the Registrar, the record of the proceedings sought to be corrected or set aside, together with such reasons as are required by law or desirable to provide”. This rule is similar to Rule

53 of the Uniform Rules of the High Court. Rule 53 bears the same relationship to Rule 6 of the Uniform Rules as Rule 7A has to Rule 7 of the Rules of the Labour Court. It was held in *Jockey Club of South Africa v Forbes* 1993(1) SA 649 (A) at 661F that Rule 53 of the Rules of the High Court is for the benefit of the applicant in review proceedings, and that an applicant's decision to proceed in terms of Rule 6 without calling for the record of the proceedings under review is not fatal to the application.

10. The record contemplated in Rule 7A(2)(b) is clearly the record, either hand written or electronically recorded, of formal proceedings which require such a record. No such record exists in the present matter. The applicants' failure to comply with the provisions of Rule 7A was not fatal and was condoned by me.

11. The applicants had also applied for condonation of the late filing of their replying affidavits. The applications were not opposed. I was satisfied with the reasons provided by the applicants and condoned their applications.

The grounds for review

12. The grounds in support of the applicants prayer for review and setting aside of Resolution 3 of 2000, are that the respondent's actions in adopting the Resolution were *ultra vires* the provisions of the LRA and is therefore void, alternatively voidable; and /or that respondent has contravened and/or infringed certain statutory provision's and/or statutory powers. The respondent did not have the power to take Resolution 3 of 2000.

13. The respondent contended that Resolution 3 of 2000 was *intra vires* for three reasons:

13.1 It is implicit in the provision of section 37(1) of the LRA, read with item 3(1) of Schedule 1, that the respondent has the power to de-establish departmental and provincial bargaining councils.

13.2 The respondent's power to designate a sector for the establishment of a council implies a reciprocal power to reverse such a decision.

13.3 Since the departmental and provincial bargaining councils are deemed to have been established by the

respondent by collective agreement, the respondent could de-establish these councils by a collective agreement.

The Issue

14. The crisp issue that I am required to determine is whether the respondent has the power to withdraw an existing deemed designated bargaining council established in terms of item 3 of Schedule 7 and section 37(1) of the LRA.

Jurisdiction

15. This Court derives its power to review the decision of the respondent from the provisions of section 158(g) of the LRA which provides that the Court may:

“review the performance or purported performance of any function provided for in terms of this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law.”

16. The respondent is a statutory body, created by the LRA. It exercises its power and authority, and performs the functions afforded to it, in terms of the LRA. This review concerns the exercise or purported exercise by the respondent of its functions, powers and authority in terms of the LRA.

17. In considering whether the respondent's decision should be set aside on the ground of illegality or irregularity, the question appears to resolve itself into whether the respondent acted *intra vires* or not. If then the respondent, whether as a consequence of misconstruing its powers or otherwise, does something which it is not empowered to do, or fails to do something which it is obliged to do, it simply acts *ultra vires*.

18. A person or a body which derives its authority from legislation, cannot act validly if it is not granted that authority by a statute, either expressly or implicitly. When considering the express provisions of a statute, the normal rules of interpretation would have to be applied to determine whether the specific powers were not exceeded.

Analysis of the facts and the arguments raised

19. The relief sought by the applicants depends upon a proper construction of certain statutory provisions.

20. It is common cause between the parties that the applicable statutory provisions are silent on the issue about whether the respondent can de-establish a bargaining council or undesignate a sector.

21. Section 213 of the LRA defines a bargaining council and a sector as:

“A Bargaining council referred to in section 27 and includes, in relation to the public service, the bargaining councils referred to in section 35.

A sector means, subject to section 37, an industry or services”.

22. Section 27 of the LRA deals with the establishment of bargaining councils. It reads as follows:

- “(1) One or more registered trade unions and one or more registered employers’ organisations may establish a bargaining council for an area by -*
- (a) adopting a constitution that meets the requirements of section 30; and*
 - (b) obtaining registration of the bargaining council in terms of section 29.*
- (2) The State may be a party to any bargaining council established in terms of this section if it is an employer in the sector and area in respect of which the bargaining council is established.*
- (3) If the State is a party to a bargaining council in terms of sub-section (2), any reference to a registered employer’s organisation includes a reference to the State as a party.*
- (4) A bargaining council may be established for more than one sector.”*

23. Section 28 of the LRA sets out the powers and functions of bargaining councils. Section 29 of the LRA deals with the registration of bargaining councils.

24. Section 30 of the LRA provides what the minimum provisions of a bargaining council’s constitution should have.

25. Neither section 28, nor section 30, provides that a bargaining council can de-establish itself, or any other bargaining council. Section 30(1)(q) requires that the constitution of any bargaining council must at least provide for a procedure by which it may resolve to wind up.
26. Section 30(3) obliges the respondent to include a procedure for establishing a bargaining council in a sector of the public service designated in terms of section 37(1) in its constitution. Again, there is no provision made for the de-establishment of any bargaining council.
27. Part D of chapter III of the LRA deals with bargaining councils in the public service. Section 36 deals with the Public Service Co-ordinating Bargaining Council. Section 36 provides as follows:
- “36 Public Service Co-ordinating Bargaining Council*
- (1) The Public Service Co-ordinating Bargaining Council must be established in accordance with Schedule 1.*
- (2) The Public Service Co-ordinating Bargaining Council may perform all the functions of a bargaining council in respect of those matters that -*
- (a) are regulated by uniform rules, norms and standards that apply across the public service; or*
- (b) apply to terms and conditions of service that apply to two or more sectors; or*
- (c) are assigned to the State as employer in respect of the public service that are not assigned to the State as employer in any sector.*
28. Section 37 deals with bargaining councils in sectors in the public service. It provides as follows:
- “(1) The Public Service Co-ordinating Bargaining Council may designate a sector of the public service for the establishment of a bargaining council.*
- (2) Despite subsection (1), the President, after consulting the Public Service Co-ordinating Bargaining Council, may designate a sector of the public service for the establishment of a bargaining council if the uniform rules, norms and standards applicable to the public service are not appropriate to regulate employment in that sector.*
- (3) A bargaining sector for a sector designated by -*
- (a) the Public Service Co-ordinating Bargaining Council must be established in terms of its constitution;*
- (b) the President must be established in terms of Schedule 1.*

- (4)(a) *The President may designate a sector for the establishment of a bargaining council in respect of employees of the State or organs of the State but who are not employees engaged in the public service.*
- (b) *A bargaining council must be established in respect of a sector designated by the President in terms paragraph (a) and the provisions of item 3(4) to (10) of Schedule 1 apply.*
- (c) *A bargaining council established in terms of paragraph (b) will be deemed to be a bargaining council in the public service for the purposes of this Act.*
- (5) *A bargaining council established in terms of subsection (3) or (4) has exclusive jurisdiction in respect of matters that are specific to that sector and in respect of which the State as employer in that sector has the requisite authority to conclude collective agreements and resolve labour disputes”.*

29. Item 2 of Schedule 1 of the LRA sets out a procedure for the establishment of the Public Service Co-ordinating Bargaining Council.

30. Item 3 of Schedule 1 of the LRA reads as follows:

- “(1) *The departmental and provincial chambers of the Public Service Bargaining Council are deemed to be bargaining councils established in terms of section 37(3)(a) of this Act, subject to any designation in terms of section 37(1) of this Act”.*

31. Item 20 of Schedule 7 of the LRA reads as follows:

“When the Public Service Co-ordinating Council is established in terms of item 2 of Schedule 1 -

- (a) *the Public Service Co-ordinating Bargaining Council and its chamber at central level will cease to exist; and*
- (b) *the following chambers of the former Public Service Bargaining Council will continue to exist as juristic persons, despite paragraph (a), namely -*
 - (i) *the chamber for each department, which will be deemed to be a bargaining council that has been established under section 37(3)(a) of this Act for that department;*
 - (ii) *the chamber for each provincial administration, which will be deemed to be a bargaining council that has been established in terms of section 37(3)(a) for that provincial administration; and*
 - (c) *.....*
 - (d) *.....”.*

32. In terms of item 20 of schedule 7 of the LRA, the departmental and provincial chambers of the previous

public service bargaining councils continued to exist as juristic persons. They are deemed to be bargaining councils that were established under section 37(3)(a) of the LRA for their respective departments or provincial administrations.

33. Section 37(1) confers upon the respondent the authority to designate a sector, but the establishment of the bargaining council must be effected in terms of its constitution as is provided for in section 37(3)(a). In other words all the respondent can do, is to designate a particular sector for the public service for the establishment of a bargaining council. The respondent cannot establish a bargaining council. Once the sector has been designated by the respondent, the parties involved in that sector will establish a bargaining council for that sector in terms of its constitution. The parties will meet in an attempt to reach consensus on the constitution. Provision will be made in its constitution on how the bargaining will cease to exist.

34. Section 37 of the LRA makes a distinction between ‘the designation of a sector for the establishment of a bargaining council’ and ‘the actual establishment of the bargaining council’. The words used in section 37 are ‘designate’ and ‘establish’. The Shorter Oxford English Dictionary defines ‘designate’ and ‘establish’ as follows:

‘designate 1. To point out, indicate; to specify. 2. To point out by a name or description; to name, denominate. 3. To appoint, nominate for duty or office; to destine to a purpose or fate.’

‘establish 1. To render stable or firm; to ratify; to confirm, settle; to restore (health) permanently. 2. To fix, settle, institute or ordain permanently. 3. To set up on a secure basis; to found. 4. To set up in business; to settle in place. 5. To set up or bring about permanently; to create (a precedent). Also to create for oneself (a reputation, a position). 6. To place beyond dispute; to prove. 7. To position (a church or religious body) in the position of a state church.’

35. The words bear different meanings in the ordinary grammatical sense. In keeping with the fundamental principles of interpretation that words must be given their ordinary grammatical meaning and must be construed against the background of the statute as a whole and the jurisprudential context within which the words were used, I am required to determine what the authority to ‘designate’ a sector for the establishment of a council embraces.

36.The Legislature has expressly chosen to make a distinction between the earmarking or designation of a sector and the actual establishment of the bargaining council which is to come into being. This distinction also applies to councils established by the President. The latter have to be established in accordance with Schedule 1 of the LRA which prescribes a detailed procedure for such establishment. Sectors designated by the respondent, do not fall within the ambit of Schedule 1 and a new council is established in accordance with the constitution which its members adopt.

37.There is nothing in section 37(1) which gives the respondent the right to de-establish any bargaining councils. According to the respondent de-establishment amounts to a decision to no longer have these chambers designated as bargaining councils. This is impermissible and contrary to the express provisions of the LRA.

38.New bargaining councils for the public service, i.e. councils which are established in addition to those existing at the time when the LRA was enacted, come into being in the following manner: -

- 38.1 The respondent designated a particular sector for the establishment of such a council;
- 38.2 The employer and employee parties have to meet and reach agreement on the constitution of the council, which constitution must comply with the provisions of section 30(1) as is provided for in section 30(2).
- 38.3 The constitution is adopted by the parties agreeing thereto, whereupon the bargaining council is constituted or comes into existence.
- 38.4 The newly established bargaining council applies to the registrar for registration, the registrar scrutinises its constitution for compliance with section 30 and, if satisfied, enters the name of the council in the register, whereupon the council obtains corporate status in accordance with section 50.

39.The designation by the respondent is therefore only a preliminary step which ultimately may lead to the establishment of a new council. It is not the respondent who establishes new councils, the employer and employees' representatives do so.

40. I do accept that once the respondent has decided to designate a particular sector for the establishment of a bargaining council, it will be entitled to withdraw that decision. It will be able to undesignate that particular sector. The questions which must, however, be asked is at what stage it may do so.

41. The respondent may validly withdraw the designation of a sector prior to the establishment of the bargaining council. Once a bargaining council has been established, however, the existence and affairs of the council are regulated by the LRA. So, for example, such council is the body or party which may decide to dissolve and indeed section 30(1)(q) of the LRA requires that the constitution of each council must provide for a procedure by which it may resolve to be wound up. Once the council has been registered and has obtained corporate status, its winding-up has to be effected in accordance with the provisions of section 59.

42. The LRA does not confer upon the respondent the authority to change existing sectors within the public service whether by abolishing one or other sector, by amalgamating two or more sectors, or otherwise. If the Legislature had so intended, it would have said so, particularly in view of the effect which dissolution holds for third parties, such as creditors. The Legislature has, however, not even conferred upon respondent the authority to establish a council.

43. Once a bargaining council is established, it has an autonomous existence as a separate juristic person. Its existence can only be ended by a decision taken in terms of its own constitution, its winding-up in terms of sections 59 and 60 of the LRA or the cancellation of its registration in terms of section 61 of the LRA. If it was the Legislature's intention that the respondent could take a decision to no longer have certain chambers designated as bargaining councils, the LRA would not have had detailed provisions relating to the forming and winding up of bargaining councils.

44. The respondent has contended that implicit in the power given to the respondent by section 37(1) of the LRA to designate sectors for the establishment of bargaining councils in the public service, read in conjunction with

item 3(1) of schedule 1 to the LRA, is the power to de-establish such councils. I do not agree. It is apparent from section 37 and from Schedule 1 that the provisions of the said Schedule apply to councils established by the President and to the establishment of respondent. It does not apply to existing councils, such as the second applicant, which falls under the umbrella of Schedule 7, nor does it apply to councils established in terms of section 37(3)(a).

45. In order for the respondent to arrive at a power or authority to dissolve or de-establish bodies corporate such as the second applicant in terms of the LRA, the respondent must show that the power to designate can properly be equated with the power to establish, which proposition runs contrary to the express wording of section 37 of the LRA. The respondent must show that it is entitled to appropriate unto itself the power to dissolve an established council, which offends against the express provisions of section 30(1)(q) and/or section 59(1). It must also show that it is entitled to appropriate unto itself the power to apply for the dissolution or winding-up of a registered bargaining council, which is a body corporate, alternatively the power to call upon the bargaining council concerned to do so itself. The express provisions of sections 30(1)(q) and 59 of the LRA militate against the appropriation of the former power. There is no provision in the LRA in terms whereof the respondent has been given the latter power and a construction importing such a power into the language of the LRA would offend against the provisions of section 37(5), and would result in conflict with the cardinal rule of construction.

46. The respondent has contended that it resolved to 'de-establish' provincial bargaining councils, that this resolution is tantamount to '*a decision to no longer have these chambers designated as bargaining councils*' and that '*the practical implementation of this decision is still in the process of discussion with the second applicant.*'

47. The aforementioned allegation should be read against the background of the express wording of resolution 3.

Paragraph two of the preamble to the resolution refers to the provisions of item 20(b) of Schedule 7 and

concludes that, by virtue of such enactment the provincial and departmental councils *‘have, therefore, been deemed to be created by a collective agreement of the PSCBC.’* In accordance with that view, the fourth paragraph of the preamble states that *‘the PSCBC may amend any collective agreements that it has entered into.’*

48. The foregoing clauses in the preamble to the resolution provide the rationale for the decision taken by the respondent and that such rationale is fatally flawed.

49. Item 20 of Schedule 7 has expressly reserved the corporate status of the chambers of the former Public Service Bargaining Councils. Instead of providing that such chambers be dissolved and that new councils for national departments and provincial administrations be formed in accordance with the provisions of section 37(3), the Legislature has elected to preserve the corporate bodies intact. Whilst the provisions of section 37(3) are clearly required for the formation of councils in sectors where none had previously existed, the Legislature has avoided such procedural steps in the case of the departmental and provincial bodies which were already in existence.

50. The argument raised by the respondent that the departmental and provincial councils are deemed to have been created by collective agreement of the respondent can, in any event, also not be sustained. As has been stated above, the respondent does not have the power or authority to create a bargaining council in the sense that it does not have the power to designate a sector for which a council should in its opinion be established. The actual establishment of the council is a separate procedure which is not in the hands of the respondent.

51. The respondent had attempted to draw a distinction between the taking of its decision to de-establish the provincial and departmental councils and the actual implementation of that decision which involves the dissolution of the affected councils. In making such a distinction, respondent has contended that the practical implementation of the resolution is still under discussion, the inference being either that the

continued existence of the affected councils has not yet been and will not be affected by the resolution when it becomes effective on 1 March 2001, or that the councils will cease to exist albeit that they have not been liquidated. Such contentions can similarly not be sustained, given the wording of clause 1 of the resolution which unambiguously states that: -

‘(b) *Departmental and provincial bargaining councils in existence at the time of the coming into effect of this resolution shall continue to exist for a period of not longer than six months from such date.*’

52. The meaning and intent of the said clause (b) is readily apparent. Respondent’s intention is that the said councils shall cease to exist and that their powers will devolve upon the newly established sectoral bargaining councils. The respondent had admitted the allegation to this effect contained in the second applicant’s papers.

53. The provincial or departmental bargaining council as a body corporate can only cease to exist once it has been liquidated in terms of section 59 of the LRA. The adoption of a contrary interpretation would fly in the face of the express provisions of section 59 and would negate the important legal consequences which flow from corporate status. Not only the rights of the members of the councils would be infringed, but the rights of third parties such as creditors would be disregarded.

54. The Legislature was clearly mindful of the rights of members of a council as well as those of third parties. If this were not so, section 59 would not have been enacted. If respondent were to be able to terminate the existence of a council by its decision, the aim and object of section 59 which revolves around the protection of members and creditors, would be circumvented. The Legislature clearly cannot have been taken to have intended such an anomalous result.

55. In support of its contention that it was entitled to adopt Resolution 3 of 2000, respondent alleged *inter alia*, that:

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55.1 The legislation enacted prior to the LRA ‘*created central negotiating structures in line with the centralised*

management authority in the public service’;

55.2 *‘as managerial authority in the public service was centralised, these chambers (provincial and departmental) were vested with very little power in relation to issues that could be bargained over;*

55.3 *‘... the collective bargaining structures are located where managerial authority is vested in the public sector;*

55.4 *‘In real terms, the departmental and the provincial administration bargaining chambers are not sectoral councils as, many straddle different sectors.’*

55.5 *‘The continued existence of the departmental and provincial bargaining councils does not fulfil any meaningful collective bargaining role.’*

56. In making the express provision contained in item 20 of Schedule 7 to the LRA the Legislature has, in full knowledge of the then existing chambers for the departments and provinces in the public service, acknowledged that departments and provinces each have their own specific needs and that each department and Province constitutes a specific sector of operations within the public service. The Legislature had, in addition, safeguarded the autonomy of such sectors and their bargaining councils in terms of section 37(5) and the construction opted by the respondent is clearly in conflict with such express language on the part of the Legislature.

57. Moreover, if the existing departmental and provincial bargaining councils were to be dissolved, a lacuna would be created. The Provinces would have no bargaining structures in place which could negotiate and conclude binding agreements in terms of the LRA between the employer and the employees’ representatives and the provincial employers would be unable to comply with their obligations as aforesaid. If the Legislature had intended to dissolve existing departmental and provincial councils, or to afford respondent the authority to do so, it would no doubt have said so and would, in addition, have provided for certain transitional arrangements so as to ensure a smooth and regulated change to the existing structure of collective bargaining and would have provided protection for the rights of third parties. The Legislature has not done so. On the contrary, it has expressly preserved the existing bargaining structures and has entrenched the

autonomy of each council in section 37(5). Moreover, the Legislature has in section 36(2) expressly defined respondent's role in the collective bargaining process and has confined it to matters which: -

- '(a) are regulated by the uniform rules, norms and standards that apply across the public service; or
- (b) apply to terms and conditions of service that apply to two or more sectors; or
- c) are assigned to the State as employer in respect of the public service which are not assigned to the State as employer in any sector.'

as opposed to matters which fall within the exclusive prerogative of a provincial or departmental council.

58. In pursuing its contention that it has merely decided to withdraw a designation and that such withdrawal is separate from dissolution, the respondent has further alleged that subsequent to its decision to 'de-establish' a council as aforesaid, the winding-up and cancellation of such council falls to be dealt with in terms of the provisions of sections 59 and 61 of the LRA and that the registrar may apply for its winding-up if the council fails to do so.

59. The respondent, however, appeared to have lost sight of the express provisions of section 59(1)(b) of the LRA. The section expressly states that a Court may order the winding-up of a council. Moreover, if a council, such as the second applicant is unable to function because of the respondent's unauthorised decision or conduct in purporting to de-establish or dissolve it, the matter can be remedied. A Court may set aside the unauthorised decision and the Court would be bound in law to do so if it finds that the actions of the respondent were unauthorised and *ultra vires* the provisions of the LRA.

60. The power of the registrar to cancel the registration of a council in terms of section 61, comprises two distinct scenarios. On the one hand, the registrar may effect such a cancellation in terms of sections 61(1) and (2) once the Court has wound up a council. The registrar's power to cancel the registration of a council other than in terms of a Court order, is derived from section 61(3). The latter section provides two grounds upon which the registrar may seek cancellation of registration:

- 60.1 if the council has ceased to perform its functions in terms of the LRA for a period in excess of 90 days prior to notification being given by the registrar that he is considering cancellation (section 61(3)(a)); or
- 60.2 the council has ceased to be representative in terms of the provisions of the relevant Part, for a period in excess of 90 days prior to the date of the registrar's notice (section 61(3)(b)).
61. Absent the unauthorised decision of the respondent to dissolve a council the Court when dealing with cancellation in terms of section 61(5), would have to be satisfied that the council has indeed ceased to perform its functions or has ceased to be representative.
62. The first applicant conceded that it has a continuous relationship with the respondent. Neither of the two parties sought costs against each other in the event that they were successful. Both the second applicant and the respondent sought costs against each other in the event that they were successful. This is a matter where the second applicant should be entitled to its costs.
63. The decision taken by the respondent on 18 April 2000 was *ultra vires*.

FRANCIS AJ

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

: G C PRETORIUS SC INSTRUCTED BY

: M DE SWARDT SC INSTRUCTED BY

: ATTORNEY P MASERUMULE OF MASERUMULE INC

: 28 FEBRUARY 2001

: 2 MARCH 2001

: 26 APRIL 2001