THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 796/2018

In the matter between:

TERTIARY EDUCATION NATIONAL UNION OF SOUTH AFRICA (TENUSA) **FIRST APPELLANT**

NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION (NEHAWU) **SECOND APPELLANT**

and

DURBAN UNIVERSITY OF TECHNOLOGY (DUT) **RESPONDENT**

Neutral citation: *Tertiary Education National Union and Another v Durban University of Technology* (796/2018) 2019 ZASCA 151 (22 November 2019)

Coram: Leach, Wallis, Saldulker and Nicholls JJA and Dolamo AJA

Heard: 6 November 2019

Delivered: 22 November 2019

Summary: Merger of technikons in terms of Higher Education Act 101 of 1997 – council of merged institution to determine conditions of service – post retirement medical aid subsidy – harmonisation – whether Council of merged institution approved the payment of subsidy to employees of one former technikon who had not previously enjoyed such a subsidy.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Olsen J, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Wallis JA (Leach, Saldulker and Nicholls JJA and Dolamo AJA concurring)

[1] On 1 April 2002 the Natal Technikon and the ML Sultan Technikon (ML Sultan) merged to create the Durban Institute of Technology (DIT). Under its present name of the Durban University of Technology (DUT), it is the respondent in this appeal. The appellants are two trade unions, the Tertiary Education National Union of South Africa (TENUSA) and the National Education Health and Allied Workers Union (NEHAWU). After the merger they, together with a third union, the National Union of Tertiary Employees of South Africa (NUTESA), entered into negotiations with the management of the DIT with a view to harmonising the conditions of employment of the employees of the new merged institution. These negotiations were known as the harmonisation process. The question in this appeal is whether and, if so, on what terms, they arrived at a legally binding agreement to afford to certain former employees of ML Sultan a post-retirement medical aid (PRMA) subsidy.

[2] The unions' pleaded case was that an agreement to provide the PRMA subsidy was embodied in a document (Version 7) signed on 4 November 2005 by the then Principal and Vice-Chancellor of the DIT, Professor Bonganjalo Goba, and representatives of the three unions. They contended that on a proper interpretation of clause 3.7 of Version 7, especially clauses 3.7.2 and 3.7.3, thereof, the DIT agreed to extend a PRMA subsidy to former employees of ML Sultan, with the form and manner of the subsidy to be the subject of further negotiation. On this basis they claimed declaratory relief and an order that the DUT engage in bona fide negotiations to resolve the issue of the manner and form of providing the subsidy.

[3] The DUT agreed that, in the course of the harmonisation process the topic of medical aid and the possible extension of the PRMA subsidy to employees of ML Sultan was discussed. It denied that an agreement to grant a PRMA subsidy to those employees was reached or embodied in Version 7. Furthermore, s 34(3) of the Higher Education Act 101 of 1997 (the Act) provides that:

'The council must determine the conditions of service, disciplinary provisions, privileges and functions of the employees of the public higher education institution, subject to the applicable labour law.'

It followed that no binding agreement could be reached on conditions of service without the approval of the Council of DIT (the Council). The DUT contended that, when the Council considered Version 7, it was aware of the need for further negotiations concerning medical aid and the PRMA subsidy and its approval of the other conditions of service in Version 7 was qualified to ensure that these matters and three other issues would be the subject of further negotiations.

[4] The case was originally pleaded as a purely contractual claim, but the parties recognised at the outset of the trial that the issue of the Council's approval was crucial to whether there was a binding agreement in relation to the PRMA subsidy. Although there was no formal amendment of the pleadings, this became the focus of the trial. Olsen J dismissed the claim with costs. This appeal is with his leave.

The facts

[5] Prior to the merger, employees of the Natal Technikon whose employment commenced before 31 December 1999 were entitled to a PRMA subsidy. The latter was discontinued with effect from 1 January 2000. Employees were entitled to join one of several medical aid schemes and the PRMA subsidy was 60 per cent of their contributions, subject to a maximum based on the membership contributions of Discovery Health's Classic Comprehensive option. This benefit extended to some 200 employees, who remained in service with DIT after the merger. By contrast former employees of ML Sultan, a number of whom had been in employment before 1 January 2000, enjoyed subsidised medical aid and a slightly higher level of subsidy than the employees of the Natal Technikon, but no PRMA subsidy.

[6] After the merger, discussions ensued between executive management and the three trade unions with a view to harmonising the conditions of service of employees of the new institution. In addition the DIT instituted a Special Voluntary Exit Policy to reduce excessive staff numbers. We have been given very little material concerning the course of these discussions, but it suffices to pick up the story as it emerges from transcripts of proceedings at meetings of various bodies, including the Council, as well as the minutes of those meetings, from the latter part of

2004 early in 2005. The parties accepted the accuracy of these transcripts and minutes.

[7] The starting point is that from an early stage management had concerns about the affordability of inter alia a PRMA subsidy. At a meeting of the Institutional Forum on 1 November 2004, management indicated that it was not willing to subsidise PRMA.

[8] Around this time there appear to have been various iterations of the conditions of service of the new institution. On 17 March 2005 the Council agreed that the Human Resources Committee meet within one month to deliberate on the Conditions of Service document. It is unclear whether this was Version 7 or 8 of the conditions of service, but most of the later minutes refer to Version 7. On 31 May 2005 Council noted that 'the Conditions of Service document' had been approved on 3 March 2005 at a joint meeting of the Human Resources and Finance Committees.[1] This document, which appears to have been Version 7, was awaiting input from a statutory body called the Institutional Forum, which drew its membership from all sectors of the DIT community. Ms Jappie, a member of the task team engaged in the discussions, reported to Council that the trade unions were insisting that Version 7 had been signed and was the document that should be submitted to Council.

[9] Ms Jappie said that Version 7 had been submitted to the Human Resources Committee, which had identified four issues arising from it, namely, group life insurance, medical aid, accumulative leave and housing allowance. The last of these had been resolved and the Deputy Vice-Chancellor (Resources and Planning) and the unions would deal

[1] These committees were established by the Council and reported to it.

with the issues of group life insurance and medical aid. The meeting concluded with Council resolving to accept Version 7 ‘except for medical aid, group life, leave and voluntary severance package’ all of which were to be left for discussion at the next Council meeting on 15 September after discussion with the unions.

[10] It is apparent that the broad item of medical aid included the PRMA subsidy and counsel did not suggest otherwise. On 20 July 2005 at the Labour Consultative Forum it was reported that work was being done to resolve the group life issue, after which attention would turn to medical aid and PRMA subsidy. There was no clear agreement on how medical aid and PRMA should be resolved and it was accepted that a working group would need to be established to resolve this. This is significant because by this stage Version 7 existed, including clause 3.7, yet no-one suggested that any binding agreement had been concluded in the negotiations in regard to an extension of the PRMA subsidy or medical aid generally.

[11] The next relevant meeting was that of the Institutional Forum on 6 September 2005. It noted that Version 7 of the Conditions of Service document had been approved with ‘the 4 issues outstanding viz Medical aid, Group Life, Post retirement medical aid and Accumulative Leave’. It also noted that, contrary to the intention at the Council meeting on 31 May 2005, the four issues would not serve before the Council at its meeting on 15 September 2005. Some concern was expressed over the fact that Version 7 had been approved by Council without having a hard copy before it and the Forum agreed that the correct version of Version 7 be identified by the Vice-Chancellor’s office and signed with every page

initialled by all interested stakeholders. Professor Goba was present at this meeting.

[12] Nine days later, when the Council met on 15 September 2005, Professor Goba reported that the outstanding issues concerning conditions of service, namely, medical aid, group life, leave and voluntary severance package would be discussed between executive management and the unions via the labour consultative forum. The following resolution was taken at this meeting:

'(i) unanimously to rescind its previous decision that approved version 7 of the conditions of service document because of the irregular signing thereof;

(ii) to request Executive Management and the Unions to fully sign the version which they previously approved;

(iii) that the said documents per (ii) above is not to be re/further negotiated except for the 4 issues still to be agreed upon namely medical aid, group life, leave and voluntary severance package;

(iv) that the duly fully signed document must be headed "Final Agreed Conditions of Service between Executive Management and Unions" without any version reference and serve before the next Council meeting for approval.'

[13] The Human Resources Committee met on 13 October 2005. It was agreed that the four outstanding items pertaining to the conditions of service would be dealt with by the Vice-Chancellor, Professor Goba, and if there was a need for mediation he should attend to this. It resolved that the issues agreed upon should be signed off by both parties and that there should be a declaration of issues in respect of which there was no agreement. Professor Goba was to report this to the Council at its next meeting.

[14] Six days later and pursuant to this decision Professor Goba addressed the following letter to the members of Council and the Human Resources Committee of Council.

'DULY SIGNED DOCUMENT: FINAL AGREED CONDITIONS OF SERVICE BETWEEN EXECUTIVE MANAGEMENT AND UNIONS

Background

Council, at its last meeting on 15 September 2005 requested that the Conditions of Service be fully signed by Executive Management and the Unions, except for the four issues (Medical Aid, Group Life, Accumulative Leave and Voluntary Severance Package) which are still subject to further negotiations.

Steps Taken

(1) The Conditions of Service document has been checked, verified and amended for editorial corrections by all parties in the Labour Consultative Forum.

(2) The Unions and Executive Management have signed the Conditions of Service Document, which Council had approved previously on 31 May 2005 (known as Version 7).[2]

(3) While we are mindful that Council raised four issues for further negotiations, these will form the basis for further discussions together with issues that either parties (sic) may raise. When these discussions are completed, the Conditions of Service will be duly amended to reflect such agreement between Management and the Unions.

(4) Therefore in order to ensure that we have a working Conditions of Service document in place, Council is requested to approve the document circulated to all Council members.'

[15] The Institutional Forum met again on 14 November 2005. Professor Goba was not present and it is not clear whether the members of the Forum had sight of his letter to Council. The minute is slightly contradictory. It recorded that there was a difference of view between the unions and executive management over the status of Version 7. The unions regarded it as a binding document, while management was of the

[2] This could not refer to the document before Council on 23 November 2005 as that was only signed on 4 November 2005.

view that the four issues of accumulative leave, medical aid, post retirement medical aid and group life required further discussion. The contradiction arose because, in the following paragraph of the minute, the Forum noted that 'Post retirement Medical Aid had been agreed to with a cut-off date of 1 January 2000'. The two seem incompatible. The latter statement was also inconsistent with the resolution taken at the meeting, which dealt with the issue as if it were unresolved and still subject to negotiation.

[16] After much discussion the Forum resolved to support in principle the re-signing of Version 7 and directed its executive officer to draft a letter to Professor Goba asking that the Conditions of Service document serve before the Forum prior to being submitted to Council. He was to be informed that the Forum wished to be apprised of progress on the 'outstanding issues of medical aid, PRMA, Group Life and Leave'. Furthermore, the Forum wished to convey its view that PRMA should be applicable to all staff employed at DIT at the date of the merger. The latter demand would have involved a substantial extension of the limited existing PRMA and went further than the debate over a PRMA subsidy in this case, which was confined to only certain former employees of ML Sultan Technikon.

[17] Those meetings formed the background to the critical meeting of Council on 23 November 2005. Among those attending were Professor Goba and both his deputies; Messrs Ncengwa and Ori, who were respectively the signatories of Version 7 on behalf of NEHAWU and TENUSA; and Ms Jappie, the task team member who had reported to the Council at its earlier meeting on 31 May 2005. Accordingly there were people present who had been intimately involved on behalf of executive

management and the unions in the negotiations leading up to the signature of Version 7. That had taken place three weeks earlier on 4 November 2005.

[18] Professor Goba reported that both executive management and the trade unions had signed the conditions of service document 'with the exception of four outstanding issues'. The minute records that:

'COUNCIL APPROVED the final agreed Conditions of Service document as signed by Executive Management and the Unions on 2005-11-04, copies of which have been circulated previously with the Agenda and noted,

Council noted that there are four outstanding issues (therefore not contained in the aforesaid Conditions of Service document) still to be dealt with by the Vice-Chancellor.'

No objections were noted to this resolution.

The issue

[19] The unions contend that this resolution approved the Conditions of Service in Version 7, including the provisions on which they rely in these proceedings, and that these provisions obliged the DIT as it then was, and the DUT now, to provide a PRMA subsidy to all former employees of ML Sultan employed by DIT after the merger, who had commenced their employment at ML Sultan prior to 1 January 2000. Its case was that DIT had agreed to provide the subsidy and that the form and manner in which it was to be implemented was to be the subject of further negotiations.

[20] The DUT for its part pleaded that the council approved the Conditions of Service Document (Version 7), subject to the rider that the provisions relating to medical aid, group life, accumulative leave and voluntary severance packages had not been agreed and would be the subject of further negotiation. If and when agreement was reached on

these issues, the document would be amended accordingly to reflect that agreement. It otherwise denied the unions' allegations. This placed in dispute whether the Conditions of Service document included on its terms an agreement to provide a PRMA subsidy to the former ML Sultan employees. If the Conditions of Service document included a provision relating to payment of a PRMA subsidy to the former ML Sultan employees, it placed in dispute whether the Council approved that provision. In other words, was the Council's approval qualified to exclude any obligation to provide such a subsidy?

[21] It will be recalled that the pleaded claim was based upon contract alone. Where a plaintiff alleges that the parties contracted on certain terms and the defendant denies one of the alleged terms, whether or not in conjunction with an allegation of one or more additional terms, it is for the plaintiff to prove the contract on which it relies. That is so even if it requires proof that an additional term alleged by the defendant did not form part of the contract.[3] It was therefore for the unions to prove that the agreed conditions of service included an undertaking to provide a PRMA subsidy and that Council approved conditions of service including an obligation to provide such a subsidy.

The conditions of service document

[22] The document annexed to the particulars of claim is described on the front page thereof as:

'DURBAN INSTITUTE OF TECHNOLOGY
CONDITIONS OF SERVICE OF EMPLOYEES
HIGHER EDUCATION ACT

[3] *Kriegler v Minitzer* 1949 (4) SA 821 (AD) at 826-828; *Topaz Kitchens (Pty) Ltd v Naboom SPA (Edms) Bpk* 1976 (3) SA 470 (AD); *Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) at 767C.

(Act No 101 of 1997)
CONDITIONS OF SERVICE OF THE
DURBAN INSTITUTE OF TECHNOLOGY'

The signatures appear on the last page but, other than identifying the capacity of the signatories, this page said nothing about the status of Version 7. The document made no reference to an agreement and was not couched in language appropriate to a contract. The preamble made it plain that the critical issue was the approval of Council and its adoption of the conditions of service in the performance of its statutory duties.

[23] The unions based their claim on clause 3.7, which dealt with medical aid, but before that can be considered it is necessary to note certain issues concerning the document placed before the court as an annexure to the particulars of claim.

[24] Apart from medical aid, three other issues, namely, group life insurance, accumulative leave and voluntary severance packages had been referred to in Professor Goba's report to Council dated 19 October 2005 and in the minutes of the Council meeting of 23 November 2005. All of these, together with medical aid, were described as outstanding issues. However, a feature of the document annexed to the particulars of claim was that it contained in clauses 3.3 (Group Life), 6.15 to 6.17 (Accumulative leave) and Section 10 (Voluntary Exit Policy), detailed provisions in relation to all three matters. That immediately evoked the suspicion that this could not have been the document that served before the Council at its meeting on 23 November 2005. Instead it appeared to be a later iteration of that document, amended to give effect to agreements subsequently reached (as was common cause) in relation to these three issues. The suspicion that this was the case was reinforced by,

for example, a minute reflecting that group life was resolved by 4 April 2007, some eighteen months later. Accumulative leave was still the subject of negotiations in 2009.

[25] A closer examination of the annexure to the particulars of claim revealed that this must have been the case. A number of discrepancies emerged when it was examined closely. Counsel could proffer no other explanation than that the document before the court was an amended version of the document that had served before Council on 23 November 2005. Among the discrepancies were that:

(a) although the document purported to contain 69 pages, the second page containing the index was unnumbered and pages 32 and 68 were blank and noted not to be on file;

(b) the clauses from 6.22.1 to 6.24 were missing and should have appeared on page 32;

(c) there was no apparent content for the missing page 68 and no reason why the signature page (page 69) was separated from page 67;

(d) pages 3, 23, 25, 40 and 53 of the annexure were typed in a different-sized font to the rest of the document and, although incomplete, the text did not always follow on directly from the previous page or to the following page. This was the case with page 40, the wording of which did not follow on from the foot of page 39 and the numbered sub-clauses on which did not match the numbering on the following page.

(e) The sentence at the foot of page 52 is incomprehensible when read with the words at the top of page 53. As it stood it gives an employee who has been sanctioned and appeals an opportunity ‘to address the chairperson of an Appeal as to why the chairperson of the Disciplinary Hearing made a correct decision’. That is manifestly absurd, so something has gone wrong with the document.

[26] Counsel for DUT accepted that clause 3.7 was part of the document placed before the Council. However, the fact that the document annexed to the pleadings was not the original document meant that, in the process of construing the Conditions of Service, we were unable to see how the original document dealt with the other three issues. There is reference in some of the documents to Version 8 having deleted certain items from Version 7 in relation to some of the disputed issues. If that were the case it would reinforce the contention by DUT that the parties had not reached agreement on these issues. It would also raise the possibility that Version 7 was a mixture of agreed matter and union demands on outstanding issues. We cannot now tell.

[27] That background would have been highly relevant to the process of interpretation of the clause relied on by the union. It was common cause that when the Council passed the resolution of 23 November 2005 no agreement had been reached on these three issues. If therefore there were no clauses dealing with these three matters, or a note that they were left over for later agreement, that would have influenced the construction to be given to clause 3.7. If there were detailed provisions, such as those that appeared in the annexed document, it would have been apparent that they merely represented the unions' demands without any agreement having been concluded.

[28] These deficiencies in the document significantly complicated the task of construing both the relevant clauses and the minutes setting out the history of Version 7. DUT did not, however, ask that the appeal be dismissed on the grounds that, because of their reliance on a manifestly unreliable document, the unions had failed to prove the first element of

their case. I accordingly turn to deal with the next issue being the meaning to be attached to the clause on which the unions relied.

The meaning of clause 3.7

[29] There is nothing in the record to indicate that any attention was paid to this at the trial. It was, however, a highly relevant issue because the unions' case was that properly interpreted clause 3.7 afforded the former ML Sultan employees a right to receive a PRMA subsidy, subject only to the manner and form of the subsidy being negotiated. Was that correct? To answer that question it was necessary to follow a conventional process of interpretation to determine the meaning of the clause.

[30] Clause 3.7 reads:

'MEDICAL AID

3.7.1 All permanent and contract (more than one year) employees have the option to become members of the medical aid schemes approved and subsidised by DIT.

3.7.2 Current DIT employees who were employees of the former Natal Technikon or ML Sultan Technikon would enjoy similar medical aid benefits as agreed in the harmonisation process.

3.7.3 In respect of post-retirement medical aid subsidy this would be applicable (as part of the harmonisation process) to staff who are currently employees of DIT, provided that they were employed by either institution prior to 31 December 1999. And further, post-retirement medical aid subsidy, are subject to prevailing rules.'

[31] The pleadings relied on the clause as a whole. Sub-clause 3.7.1, which provided that all employees would have the option of joining one of the medical aid schemes approved and subsidised by DIT, was unrelated to the issue of the PRMA subsidy. It was concerned with the position of all employees, both permanent and contract, irrespective of

whether they were previously employed by ML Sultan or Natal Technikon. They were all to be given the option to become members on a subsidised basis of one of the medical aid schemes approved by DIT. These were not identified and there was nothing to say that all the schemes previously approved by the merging parties would be approved by DIT, or whether new schemes would be identified for that purpose. The provision was therefore indeterminate so far as its enforceable content was concerned. The approved schemes needed to be identified presumably through negotiation between executive management and the unions. From an administrative perspective DIT would want to limit the number of approved schemes and would also be concerned at the costs that would be incurred in subsidising membership of those schemes. The level of subsidy would also have to be determined.

[32] Sub-clause 3.7.2 likewise did not bear directly on the PRMA issue. It was concerned with the relative position of former employees of either ML Sultan or Natal Technikon. They were to enjoy similar, but not necessarily identical, benefits. This would have been couched in that way because there would be a number of reasons why employees would be reluctant to move from their existing medical aid funds. Those that spring to mind would be the range of benefits offered, the cost and the fact that this would cause administrative upheaval. In cases where medical practitioners, pharmacies and the like lodged claims directly with the medical aid fund a change of scheme would require members to change details with those practitioners, often at considerable inconvenience. Inertia would also play a role. But for so long as employees had different options it would be impossible for DIT to ensure that everyone received exactly the same medical aid benefits.

[33] Two points emerged from this clause. The first was that new employees after the merger were not necessarily to be treated in the same way as those who had previously been employed by the merging parties. This suggested that executive management may have contemplated that new employees might receive fewer benefits than existing employees. The second arose from the reference to the former employees enjoying similar benefits 'as agreed in the harmonisation process'. Linguistically this is an ambiguous phrase. It could refer to an agreement that had resolved the way in which similar benefits were to be afforded to former employees. Alternatively, it could refer to an agreement on the principle of similar benefits, the terms of which remained to be worked out in the course of the harmonisation process. Further alternatively, it could simply identify an issue that the parties were looking to reach agreement on in the course of the harmonisation process.

[34] The first possibility is improbable for two reasons. The minutes throughout the relevant period reflected that medical aid was a topic on which further negotiations needed to take place. If the entire issue, leaving aside the question of the PRMA subsidy, had been resolved, there is no apparent reason why the terms of that agreement would not have been incorporated in Version 7. As to which of the other two is correct, they both required agreement to be reached through the harmonisation process. It could make little difference whether there was agreement in principle that the former employees would receive similar medical aid benefits or whether that was merely the purpose of the harmonisation process. In both cases that could only be achieved by further negotiations. On either basis the clause was evidence of the absence of agreement rather than of agreement having been reached.

[35] Clause 3.7.3 dealt specifically with the PRMA subsidy. It said that this would be applicable 'as part of the harmonisation process' to current staff previously employed by either ML Sultan or Natal Technikon before 31 December 1999. The significance of that date was that it was the cut-off date after which the PRMA subsidy was withdrawn from Natal Technikon employees. Essentially the unions relied upon this clause for their primary contention that clause 3.7 embodied an agreement to provide a PRMA subsidy to former ML Sultan staff who had been employed prior to the cut-off date.

[36] While that might have been a possible interpretation of clause 3.7.3 had it not contained the words 'as part of the harmonisation process', it contained those words and some meaning must be given to them. The obvious meaning, given that the clause was in any event couched in language dealing with the future situation ('would be applicable'), was that any entitlement to a PRMA subsidy would only arise when the harmonisation process had proceeded to a stage where agreement had been reached to provide such a subsidy and on the terms thereof.

[37] Had the position been as contended by the unions one would have expected the clause to have been couched in far more definite terms. If an agreement to pay the subsidy to the additional employees had been reached, why say 'in respect of post-retirement medical aid subsidy this would be applicable', when what was intended was 'A post-retirement medical aid subsidy will be provided'? Why add the reference to the harmonisation process? To distil from the words used a definite obligation to provide a PRMA subsidy to a group of current employees of DIT, subject only to negotiating the form and manner of the subsidy,

stretches the language beyond reasonable limits. In any event what is meant by the 'form and manner of the subsidy'? This language is not apt to refer to the amount of the subsidy, which was necessarily the central issue confronting the DIT in any decision to afford such a subsidy to employees who had not previously enjoyed it. When in later years attempts were made to assess the cost of extending a PRMA subsidy to these employees it was calculated at anywhere between R78 million and over R100 million. As early as November 2004 the DIT had said that it would not provide a PRMA subsidy. Where in all the documents was there any indication of their agreeing to depart from this stance? The answer is, nowhere.

[38] Lastly there is the curiously worded sentence at the end of that clause reading: 'And further, post-retirement medical aid subsidy, are subject to prevailing rules.' This could only refer to the rules governing the subsidy already receivable, but that subsidy was confined to former employees of Natal Technikon. Those rules would necessarily deal with the entitlement to subsidy, the amount of the subsidy and how it was to be calculated and paid. Even on the most optimistic version of the unions' case, none of this can have been agreed when Version 7 was before Council on 23 November 2005.

[39] The only meaning that comes to mind is that the words 'And further' introducing this sentence were intended to convey that there was an existing situation that was not the subject of debate as part of the harmonisation process and was to remain unaltered. This was the situation involving the former Natal Technikon employees who, the record shows, were firmly resistant to any endeavour to deprive them of the PRMA subsidy. Leaving the first sentence of clause 3.7.3 standing

alone might have been thought to introduce uncertainty in regard to their position in the future discussions of this issue as part of the harmonisation process, because it referred to all employees of either institution prior to 31 December 1999. It was natural then to say that, further to the earlier sentence, the existing position in relation to Natal Technikon employees would continue in terms of the existing rules.

[40] For those reasons I am satisfied that clause 3.7 is not reasonably capable of bearing the meaning that the unions wish to attribute to it. In my view it goes no further than recording that issues of medical aid generally, and PRMA subsidy specifically, were still to be resolved in the harmonisation process. The only caveat to that was the recordal in the final sentence of clause 3.7.3 that the existing position in relation to the PRMA subsidy for former Natal Technikon employees, whose right to such subsidy was protected by labour legislation, remained unaltered. That conclusion on its own would suffice to cause the appeal to fail, but it is desirable, in view of the fact that the argument and the judgment in the high court largely centred around the resolution by Council on 23 November 2005, to deal with the effect of that resolution.

Did the Council approve payment of a PRMA subsidy to former ML Sultan employees?

[41] The minute of Council's meeting of 23 November 2005 records that Professor Goba reported that executive management and the unions had signed the Conditions of Service 'with the exception of four outstanding issues'. There can be no doubt that these were the four issues that were recorded in his report to Council of 19 October 2005, namely, medical aid, group life, accumulative leave and voluntary severance package. Medical aid included, but was more extensive than, the PRMA

subsidy. Unlike the remaining conditions of service these issues had not been resolved in the course of the negotiations constituting the harmonisation process.

[42] The four issues are reflected in the minutes of all the meetings of Council and other committees and bodies during 2005 as being unresolved. Ms Jappie reported to Council on 31 May 2005 that the four issues had been raised in the Human Resources Committee and the Deputy Vice-Chancellor had been mandated to engage with the unions on two of them, namely, group life and medical aid. Council's resolution on 31 May 2005 recorded that Version 7 was approved except for group life, medical aid, leave and voluntary severance package. There is nothing in the record to indicate that any further progress was made in respect of these matters before the November meeting of Council.

[43] When the Institutional Forum met on 6 September 2005 it recorded that the four issues were outstanding, with specific mention of the PRMA subsidy. The subsequent signature of a consolidated version of the Conditions of Service (Version 7) flowed from a resolution by the Forum. They required that this be done at a stage when the members of the Forum were well aware that the four issues remained outstanding. They cannot therefore have regarded the consolidation and signature of Version 7 as bringing about agreement on the outstanding issues. That would have to arise from subsequent negotiations. As noted above Version 7 included clause 3.7 before this meeting took place. The Forum's minute is incompatible with it having been of the view that an agreement had been reached in clause 3.7 to extend the PRMA subsidy to the former ML Sultan employees.

[44] Council met again on 15 September 2005 where Professor Goba reported that the outstanding issues of medical aid, group life, leave and voluntary severance package were to be discussed between executive management and the unions at the Labour Consultative Forum. Clearly therefore no agreement had been reached on these issues by that date. Thereafter he wrote his report to Council saying that the four issues remained the subject of further negotiation. Executive management recorded that as the position at the meeting of the Institutional Forum on 4 November 2005. That appears to have been accepted by the members of the Forum, including the unions, as they instructed the executive officer of the Forum to write to Professor Goba asking for a report on progress on these issues.

[45] That is how matters stood when Council met on 23 November 2005. For at least six months prior to that meeting the relevant bodies within DIT said that medical aid had not been resolved and needed further negotiation between management and the unions. At that meeting they were presented with a report saying that there were four outstanding items that had not been agreed. Professor Goba and the three union representatives signed the conditions of service in the knowledge that these items were unresolved. Not surprisingly the resolution of Council in regard to the approval of the conditions of service recorded that there were four outstanding issues still to be dealt with. In regard to these issues the minutes said that they were therefore not contained in the final agreed conditions of service.

[46] It is significant that at all these meetings, whether of Council or the Institutional Forum, the unions were represented. Yet there is not a word in the minutes to suggest that they did not agree with the repeated

statements that the issue of medical aid and PRMA had not been resolved and was awaiting resolution through further negotiation. This is entirely in accordance with the evidence of Mr Ori, who was at the time the chair of TENUSA and represented it in the negotiations, as well as being a member of Council. He explained under cross-examination that clause 3.7 in the signed document had not changed at all during this period. Although there had been discussions about it 'we hadn't concluded on those clauses'. He confirmed that those clauses were still subject to further negotiations.

[47] Mr Ori's evidence went no further than to say that the issue of PRMA was to be harmonised, but this was never done. There is a difficulty with his evidence. By and large he did not testify on these issues from memory, but was led by reference to two documents to which he was not a party, composed in 2009 and 2013 respectively. People who were not themselves participants in the negotiations and meetings compiled them. Leading a witness in this fashion is merely an indirect way of asking leading questions and little weight can be attached to evidence obtained in this manner. When taken to other documents such as the minutes of the Council meeting on 31 May 2005 he agreed that the resolution taken at that meeting approved Version 7 except for medical aid, group life, leave and voluntary severance package. This was inconsistent with any suggestion that the extension of the PRMA subsidy had been agreed and was a far cry from suggesting that Council approved it. Most importantly he pointed to nothing that occurred in the intervening six months to alter the position that this issue remained outstanding and was not approved by Council. He was also a member of the Human Resources Committee that on 13 October 2005 resolved that the four

outstanding issues be resolved by the Vice-Chancellor and, if need be, he could establish a mediation process to resolve the issue.

[48] Against this background it is impossible to conclude that when Council passed its resolution concerning conditions of service on 23 November 2005 it was approving the extension of the PRMA subsidy to a group of former ML Sultan employees.

[49] That conclusion is reinforced if one looks at subsequent events. A little over three months later, at a meeting of the Institutional Forum on 6 March 2006, a query was raised as to the status and cut-off date for the PRMA scheme. The response by the NEHAWU representative at the meeting was to say that the Labour Consultative Forum had agreed that this would be applicable to staff employed prior to 1 January 2000. Had there been approval by Council of an agreement that the subsidy would be paid to all former ML Sultan employees employed prior to 1 January 2000 one would have expected the union representative to have known this and to have said so. Instead the Forum considered that a different date – the date of the merger – was more appropriate and two union representatives were mandated to raise this at the next meeting of the Labour Consultative Forum.

[50] The next minute in the record is of the Labour Consultative Forum dated 24 August 2007. In regard to PRMA subsidy it was noted that as a result of the merger some staff enjoyed this benefit and others did not although parity had been reached on other issues. It was agreed that the matter would remain on the agenda and needed to be addressed. Again this was inconsistent with Council having approved the extension of the PRMA subsidy to the group of former ML Sultan employees.

[51] By February 2008 the Human Resources Committee were resolved that there should be no extension of the PRMA subsidy and that endeavours should be made to extract DUT from its obligations in that regard to former Natal Technikon employees. Later meetings of that committee endorsed this stance. While the fairness of this approach was questioned at a meeting of Council on 13 March 2010, there was no suggestion that the Council had already approved the extension of the PRMA subsidy to former ML Sultan employees. At subsequent meetings where the matter of the PRMA subsidy was discussed if anything the parties' approaches grew further apart. The unions continued to press for various categories of employees to be afforded a PRMA subsidy, while management steadfastly resisted any such extension and instead sought a way to extract DUT from its existing commitments in that regard.

[52] The inevitable conclusion is that the unions did not prove the agreement on which they relied and did not prove that the Council of DUT approved that agreement or approved the Conditions of Service document on terms that included an obligation to extend the PRMA subsidy to former employees of ML Sultan. That was the conclusion reached by Olsen J and in my view he was correct.

[53] The appeal is dismissed with costs.

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	K J Kemp SC (with him H S Gani SC)
Instructed by:	Shepstone & Wylie, Durban;
	Claude Reid Inc, Bloemfontein.
For respondent:	Maurice Pillemer SC
Instructed by:	Mathew Francis Inc, Pietermaritzburg
	Rossouws Attorneys, Bloemfontein.