THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 410/09

In the matter between:

CALIBRE CLINICAL CONSULTANTS (PTY) LTD **First Appellant**

THE RIGHT TO CARE CONSORTIUM **Second Appellant**

and

THE NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY **First Respondent**

HIV MANAGED CARE SOLUTIONS (PTY) LTD **Second Respondent**

Neutral citation: *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* (410/09) [2010] ZASCA 94 (19 July 2010)

Coram: NUGENT, LEWIS, PONNAN, CACHALIA and LEACH JJA

Heard: **7 MAY 2010**

Delivered: **19 JULY 2010**

Summary: **Bargaining Council established under Labour Relations Act 66 of 1995 – decisions relating to procurement of services – whether subject to judicial review under the Promotion of**

Administrative Justice Act 3 of 2000 – whether decisions in conflict with that Act.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Willis J sitting as court of first instance).

The appeal is dismissed. The appellants, jointly and severally, are to pay the costs of the appeal, and the reserved costs of the application for interim relief. The costs in each case are to include the costs of two counsel so far as two counsel were employed.

JUDGMENT

NUGENT JA (LEWIS, PONNAN, CACHALIA and LEACH JJA concurring).

[1] The first respondent – the Bargaining Council for the Road Freight Industry – is a bargaining council established under the enabling provisions of s 27 of the Labour Relations Act 66 of 1995 (LRA). Wishing to appoint a service provider to manage one of its projects the council invited interested parties to submit proposals for its consideration. Proposals were submitted by, amongst others, a partnership[1] comprising Thebe Ya Bophela Healthcare Administrators (Pty) Ltd (Thebe) and Calibre Clinical Consultants (Pty) Ltd

[1] It seems that a formal partnership agreement was never produced.

(the latter is the first appellant[2]) to which I shall refer as the partnership, and by a consortium (the second appellant) comprising Right to Care Limited and the remaining appellants, to which I shall refer as the consortium.

[2] After considering the various proposals the council decided not to appoint any of those who had submitted proposals. Instead it asked the auditing firm KPMG to assist it to identify an appropriate service provider. Two candidates were identified, one of which was the second respondent, HIV Managed Care Solutions (Pty) Ltd (it trades under the name Careworks and I will refer to it as such) which the council appointed.

[3] Aggrieved by the decisions of the council the appellants[3] applied to the High Court at Johannesburg to review and set them aside,[4] relying upon the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Their application was dismissed by Willis J. This appeal against his order is before us with the leave of this court.

[4] It is convenient at the outset to outline the nature of a bargaining council. Section 27(1) of the Labour Relations Act 66 of 1995 (LRA) allows for one or more registered trade unions and one or more registered employers' organisations to establish a bargaining council for a particular industry and area. The parties do so by adopting a constitution and having the bargaining council registered. A bargaining council exists primarily as a forum for collective bargaining between the parties. Generally the parties

[2] Thebe was the first applicant in the court below but according to the notice of appeal it is not a party to this appeal.
[3] Together with Thebe.
[4] Interim relief was also sought but that was refused by Jajbhay J, who reserved the costs in relation to that application.

will conclude collective agreements from time to time, which become binding on them and on their members. In certain circumstances the Minister may extend the terms of a collective agreement to third parties in the industry by a declaration to that effect published in the Government Gazette. A bargaining council has various statutory powers to enforce the terms of its collective agreements.

[5] In addition to serving as a forum for collective bargaining a bargaining council might also undertake other functions directed at maintaining industrial harmony and promoting the welfare of employees in the industry. In particular a bargaining council is empowered by the LRA – powers that are replicated in the constitution of the council in this case – to 'promote and establish training and education schemes'[5] and to 'establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the bargaining council or their members.'[6]

[6] The material facts in this case are lucidly set out in the judgment of the court below but some repetition is necessary to explain in more detail how this matter arose. The council's concern for the impact of the HIV/AIDS pandemic on employees in the road freight industry led it to establish an awareness programme that it called 'Trucking Against AIDS'. In about 2007 the parties to the council agreed to extend that programme by establishing what it called a 'wellness fund' that would, amongst other

[5] Section 28(1)(f) and clause 4.6 of the council's constitution.
[6] Section 28(1)(g) and clause 4.8 of the council's constitution.

things, introduce and maintain a programme to provide anti-retroviral treatment to employees in the industry. Their agreement to establish the fund, and the terms upon which it was to function, were recorded in a clause that was inserted into the existing collective agreement. The collective agreement had been extended to the industry generally by declaration of the Minister in the Gazette and the amendment was similarly extended.

[7] The fund was to be financed from compulsory contributions levied upon employers and employees. It was agreed that the fund would be under the control of what was referred to in the evidence as a 'wellness committee' (called an 'AIDS committee' in the agreement) and it was agreed that the committee 'may contract with service providers for the provision of services, facilities, publications, support, training, counseling, presentations and all other forms of services necessary for the implementation and continuance of the plan …'.

[8] The council needed an appropriate service provider to manage and administer the programme. In about July 2007 it invited selected parties to submit proposals for the provision of such a service. The service that was required encompassed the co-ordination of an anti-retroviral management programme, the provision of education and training, the provision of a counseling service, the procurement of pharmaceuticals, and the establishment of a drug distribution service. A poor response to its invitations prompted the council later to advertise the invitation more generally.

[9] Written proposals were submitted by, amongst others, the partnership and the consortium. In September 2007 the various proposers were invited to present their proposals to an interview panel. On 5 October 2007 the council wrote to the consortium, congratulating it on its presentation, and advising that the panel had decided in principle that the consortium should be appointed, but that a due diligence review was still required. It was told that once that had been completed the panel would 'put together a recommendation to the Council for final adjudication'.

[10] The council instructed a firm of auditors, SizweNtsaluba VSP, to perform what was described as a 'limited financial due diligence review' of the various bidders 'for the sole purpose of assisting the [council] in assessing the appropriateness of the bidders as the designated Wellness Program Service Provider'. SizweNtsaluba duly performed the review and submitted a substantial report dated 6 December 2007.

[11] In its report SizweNtsaluba raised certain concerns that it said 'might require further discussion and consideration' before the council selected the bidder concerned. So far as the partnership was concerned it was reported, amongst other things, that Thebe was insolvent (its liabilities exceeded its assets by R130 556). So far as the consortium was concerned two concerns were expressed:

'The [Right to Care] consortium is heavily reliant on a single individual who will be in charge of co-ordinating the project with no clear indication of succession planning regarding the replacement of this person should it prove necessary'

(The person concerned was Dr Grietjie Strydom, who was the sole employee of one of the members of the consortium.)

'[Right to Care] is heavily reliant on income from a single source, namely USAID. The income is reliant on dependencies that are not under the control of [Right to Care].'

[12] After considering the report the council requested SizweNtsaluba to 'engage with the bidders and report back' on the steps taken by the various bidders to address the concerns that had been expressed. SizweNtsaluba raised its concerns with the partnership and with the consortium. The partnership responded in a further presentation that it made to SizweNtsaluba and also submitted further documents, while the consortium responded in writing.

[13] On 18 February 2008 SizweNtsaluba submitted a further report to the council in which it provided a summary of the responses it had received. As far as the insolvency of Thebe was concerned it reported Thebe's response as follows:

'There is a [memorandum of understanding] in place between [Thebe Investment Corporation][7] and [Thebe] whereby [Thebe Investment Corporation] has subordinated its claims against [Thebe] for the benefit of other creditors. In the letter from [Thebe Investment Corporation] to [the council] (dated 6 September 2007) it was stated that [Thebe Investment Corporation] regards the provision of affordable healthcare as a core component of their financial services strategy and are fully committed to establishing [Thebe] as a major player in the healthcare industry. As a result, [Thebe Investment Corporation] will continue to provide full financial backing to [Thebe] to enable [Thebe] to meet its objectives.'

As for the two concerns raised in relation to the consortium the response was reported as follows:

[7] Thebe Investment Corporation was apparently the holding company of Thebe.

'RTC has stated that as the primary partner in the contract with [the council], RTC will take full responsibility for the implementation of the project. Dr Grietjie Strydom will increase her capacity in the organization to meet the needs of [the council].'
'RTC has stated that it is expanding its interventions and programmes into the private sector and is broadening the funding base across the organisation, thereby further diversifying the funding of its revenue.'

[14] On 27 February 2008 the Wellness Committee met to consider the reports. Meanwhile a further concern had arisen. On the previous day the council received a letter from Alexander Forbes Financial Services (Pty) Ltd. The council was informed that Dr Grietjie Strydom had formerly been employed by Alexander Forbes, and was subject to a restraint agreement that precluded her from providing AIDS intervention programmes and from dealing with clients or potential clients of Alexander Forbes, until November 2009. The council sent a copy of the letter to the consortium. Dr Strydom's response was that she had been advised by her attorneys that the restraint was not enforceable. The council also sought the advice of its attorneys, who advised that the risk of the restraint being enforced was slender but that the council would need to weigh that against the material harm that would result if it was indeed enforced.

[15] The committee remained uncomfortable with appointing both the partnership and the consortium and it sought a second opinion from KPMG. KPMG reviewed the information that had been before SizweNtsaluba. It expressed the opinion that 'the issues highlighted by Ntsaluba relating to the appointment of the consortium had been addressed' and recommended that it be awarded the contract.

[16] The wellness committee considered the matter at meetings held on 23 and 26 May 2008. It felt itself unable to agree with the opinion that had been expressed by KPMG. It considered that neither the partnership nor the consortium had adequately addressed the concerns that had been raised by SizweNtsaluba and decided to recommend to the council that neither should be appointed. Instead KPMG should be asked to identify alternative service providers. The council adopted the committee's recommendations on 28 May 2008.

[17] KPMG duly identified Careworks and another organisation as potential service providers. A due diligence review revealed no difficulties with either and KPMG recommended that Careworks be appointed. The committee, and ultimately the council, resolved to appoint Careworks and a formal contract was concluded on 1 December 2008.[8]

[18] In their notice of motion the appellants sought orders setting aside the council's decision not to appoint any of the initial bidders, its decision to exclude the appellants when identifying alternative providers, and its decision to appoint Careworks.

[19] The decisions of the council are susceptible to review at the instance of the appellants only if they constitute 'administrative action' as contemplated by PAJA, which is defined as much by the nature of the decision concerned (or the failure to make a decision) as by its source. In

[8] We were told from the bar that the council's contract with Careworks terminates in December of this year but it is open to renewal.

that respect it constitutes 'administrative action' only if, amongst other things, it was made by

'(a) an organ of state when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision ….'

[20] PAJA provides that an 'organ of state' bears the 'meaning assigned to it in section 239 of the Constitution' – and that section defines the term to mean

'(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution –

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation

….'

[21] It will be readily apparent that once that definition is inserted in PAJA's definition of 'administration action' much of the latter definition is tautologous. Had the term been defined in PAJA to mean 'a decision taken (or any failure to take a decision) by an institution or functionary exercising a public power or performing a public function'[9] it would have covered

[9] When applying the definition of 'administrative action' the distinction between 'legislation' (in subsection (a)(ii)) and an 'empowering provision' (in subsection (b)) will prove to be more apparent than real.

much the same ground. Once the definition is stripped of its superfluity the enquiry in the present case really comes down to whether the council, in making the decisions that are sought to be impugned, was 'exercising a public power or performing a public function'.

[22] The scope of judicial review in the context of the present case[10] has been the subject of enquiry in numerous cases in other jurisdictions. In *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council*[11] Yacoob J observed that in the United States institutions are subject to constitutional review

'if in the final analysis, they can be said to be "an agency or instrumentality of the United States"'.[12]

He observed that in Canada

'[i]t is well established that the Charter applies to all the activities of a government entity whether those activities are described as private, and that the Charter may also apply to non-governmental entities when engaged in activities that are governmental in nature …. When it is alleged that the action of a private entity violates the Charter it must be established that the entity, in performing the function, is part of government within the meaning of s 32(1).'[13]

[23] It would be superfluous to retrace the authorities in those countries that led the learned judge to those conclusions. But very much the same approach has been taken by the courts in England and it is instructive to explore in some detail the leading cases in that regard.

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[10] We are concerned in this case with public law review and not the form of private law review that has been invoked in cases such as *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) and *Theron v Ring van Wellington van die N.G. Sendingkerk in Suid Afrika* 1976 (2) SA 1 (A).
[11] 2007 (1) SA 343 (CC).
[12] Para 33.
[13] Paras 35 and 36.

[24] In determining the scope of judicial review at common law the courts in that country have always looked to whether the conduct in question has features that might be said to be 'governmental' in nature. While at one time the source of the power that was exercised by the body concerned was considered to be determinative the authors of *De Smith's Judicial Review*[14] observe that in more recent times courts have considered that to be too restrictive. They go on to say:

'Since 1987 [the courts] have developed an additional approach to determine susceptibility [to judicial review] based on the type of *function performed* by the decision-maker. The "public function" approach is, since 2000, reflected in the Civil Procedure Rules: CPR. 54.1(2)(a)(ii), defines a claim for judicial review as a claim to the lawfulness of "a decision, action or failure to act in relation to the exercise of a public function"'.

[25] On that extended approach the courts, once more, have consistently taken account of the extent to which the conduct in question might or might not have features that are 'governmental' in nature when determining whether it is reviewable. In the seminal decision that marked the start of that more expansive approach – *Regina v Panel on Take-Overs and Mergers, Ex parte Datafin Plc*[15] – the Master of the Rolls said the following of the Panel on Take-overs and Mergers (an unincorporated association without legal personality, having about twelve members appointed by and representing various financial bodies):

'No one could have been in the least surprised if the panel had been instituted and operated under the direct authority of statute law, since it operates wholly in the public domain. Its jurisdiction extends throughout the United Kingdom. Its code and rulings

[14] De Smith's Judicial Review 6 ed by The Rt Hon The Lord Woolf, Jeffrey Jowell QC and Andrew Le Seur, assisted by Catherine M. Donnelly at paras 3-041 to 3-042..
[15] [1987] 1 QB 815 (CA) at 835G-836B.

apply equally to all who wish to make take-over bids or promote mergers, whether or not they are members of bodies represented on the panel. Its lack of a direct statutory base is a complete anomaly, judged by the experience of other comparable markets world wide. The explanation is that it is a historical "happenstance", to borrow a happy term from across the Atlantic. Prior to the years leading up to the "Big Bang", the City of London prided itself upon being a village community, albeit of a unique kind, which could regulate itself by pressure of professional opinion. As government increasingly accepted the necessity for intervention to prevent fraud, it built on City institutions and mores, supplementing and reinforcing them as appeared necessary. It is a process which is likely to continue, that the position has already been reached in which central government has incorporated the panel into its own regulatory network built up under the Prevention of Fraud (Investments) Act 1958 and allied statutes, such as the Banking Act 1979.'

[26] Later, in *Regina v Disciplinary Committee of the Jockey Club, Ex parte Aga Khan*,[16] which held that conduct of the Jockey Club was not susceptible to public law review, the Master of the Rolls said:

'[The Jockey Club] has not been woven into any system of governmental control of horseracing, perhaps because it has itself controlled horseracing so successfully that there has been no need for any such governmental system and such does not therefore exist. This has the result that while the Jockey Club's powers may be described as, in many ways, public they are in no sense governmental.'

In the same case Lord Justice Hoffman said:[17]

'What one has here [referring to *Regina v Panel on Takeovers and Mergers, ex parte Datafin Plc*[18]] is a privatisation of the business of government itself. The same has been held to be true of the Advertising Standards Authority … and the Investment Management Regulatory Organisation Ltd.… Both are private bodies established by the industry but integrated into a system of statutory regulation. There is in my judgment nothing comparable in the position of the Jockey Club.'

[16] 1993 (1) WLR 909 (CA) at 923H.
[17] At 931H-932A.
[18] See below.

[27] A similar approach is reflected in the decision of Simon Brown J in *Regina v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex parte Wachmann*:[19]

'To say of decisions of a given body that they are public law decisions with public law consequences means something more than that they are decisions which may be of great interest or concern to the public or, indeed, which may have consequences for the public. To attract the court's supervisory jurisdiction there must be not merely a public but potentially a governmental interest in the decision-making power in question.… In other words, where non-governmental bodies have hitherto been held reviewable, they have generally been operating as an integral part of a regulatory system which, although itself non-statutory, is nevertheless supported by statutory powers and penalties clearly indicative of government concern.'

[28] *De Smith's Judicial Review* notes that in applying a 'public functions' test the courts have held decisions taken by the following, amongst others, to be susceptible to judicial review: the Advertising Standards Authority; the Press Complaints Commission; the Code of Practice Committee of the Association of the British Pharmaceutical Industry; the Life Assurance Unit Trust Regulatory Organisation; London Metal Exchange Ltd; the managers of a privately owned psychiatric hospital; and Hampshire Farmers Markets Ltd. On the other hand the courts have not been receptive to exercising those powers over sports governing bodies,[20] religious bodies,[21] and various commercial organisations,[22] notwithstanding the influence they assert in substantial sectors of the community.

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[19] [1992] 1 WLR 1036 (QB) at 1041C-E.
[20] *R v Football Association Ltd ex parte Football League Ltd* [1993] 2 All ER 833.
[21] *Chief Rabbi of the United Hebrew Congregations*, above, *R v Imam of Bury Park Mosque, Luton ex parte Ali (Sulaiman)* [1994] COD 142.
[22] *R v Insurance Ombudsman ex parte Aegon Life Assurance Ltd* [1994] COD 426, *R v Association of British Travel Agents ex parte Sunspell Ltd (t/a Superlative Travel)* [2001] ACD 16, *R v Lloyd's of London ex parte Briggs* [1993] 1 Lloyd's Rep. 176.

[29] More recently the courts in that country have been statutorily empowered to test conduct for compatibility with the European Convention on Human Rights by s 6 of the Human Rights Act 1998, which provides:

'(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

…

(3) In this section "public authority" includes … (b) any person certain of whose functions are functions of a public nature …

…

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection 3(b) if the nature of the act is private.'

[30] In determining whether a function is 'of a public nature' for purposes of that legislation the courts, again, have searched for the presence or absence of features of the conduct in question that are 'governmental' in nature. In *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*[23] Lord Nicholls of Birkenhead approached the question as follows:

'What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.'[24]

[23] [2004] 1 AC 546.
[24] Para 12.

[31] In *YL (by her litigation friend the Official Solicitor) v Birmingham City Council,*[25] the House of Lords was divided on the question whether a private care home exercised 'functions of a public nature' in relation to residents who had been placed by the local authority in fulfilling its statutory obligation to provide such care.[26] Notwithstanding the division the enquiry in each case was conducted with reference to the extent to which the home could be said to be performing governmental functions. Thus Lord Bingham (in the minority) said the following:[27]

'As Lord Nicholls also observed [in *Aston Cantlow*] (at [12]), there is no single test of universal application to determine whether a function is of a public nature. A number of factors may be relevant, but none is likely to be determinative on its own and the weight of different factors will vary from case to case. Tempting as it is to try and formulate a general test applicable to all cases which may arise, I think there are serious dangers in doing so.'

He went on to list as relevant factors

'the role and responsibility of the state in relation to the subject matter in question, ... the nature and extent of any statutory power or duty in relation to the function in question, … the extent to which the state, directly or indirectly, regulates, supervises and inspects the performance of the function in question, and imposes criminal penalties on those who fall below publicly promulgated standards in performing it, … whether the function in question is one for which, whether directly or indirectly, and whether as a matter of course or as a last resort, the state is by one means or another willing to pay, … the extent of the risk, if any, that improper performance of the function might violate an individual's convention right.'[28]

Baroness Hale of Richmond (also in the minority) said the following:[29]

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[25] [2007] 3 All ER 957 (HL).
[26] Lord Scott, Lord Mance and Lord Neuberger in the majority, and Lord Bingham and Baroness Hale in the minority.
[27] Para 5.
[28] Paras 7 to 11.
[29] Paras 65 – 69.

'While there cannot be a single litmus test of what is a function of a public nature, the underlying rationale must be that it is a task for which the public, in the shape of the state, have assumed responsibility, at public expense if need be, and in the public interest…. One important factor is whether the state has assumed responsibility for seeing that this task is performed.… Another important factor is the public interest in having that task undertaken… Another important factor is public funding … Another factor is whether the function involves or may involve the use of statutory coercive powers.'

Reciting with approval extracts from the various speeches in *Aston Cantlow*, Lord Neuberger said:

'Even more to the point, Lord Hope also said (at [49]) that "public functions" in this context is thus clearly linked to the functions and powers, whether centralised or distributed, of government.…. Lord Rodger referred (at [159], [160] and [163]) to entities "exercising governmental power", "carrying out the functions of government" and having the "public function of government". This is very much in line with the broader approach of Lord Nicholls: while stressing that it was "no more than a useful guide", he said (at [10]) that in the light of "the repetition of the description 'public'" in s 6(3)(b), "essentially the contrast being drawn is between functions of a governmental nature and functions, or acts, which are not of that nature". To similar effect, Lord Hobhouse of Woodborough (at [88]) invoked the test of a function which is "governmental in nature" and of entities which are "inherently governmental" (At para [159]).'

[32] In *AAA Investments*[30] Yacoob J, having noted the position in the United States and Canada, said the following:

'Our Constitution ensures, as in Canada and the United States, that government cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity. Our Constitution does not do this, however, by an expanded notion of the concept of Government or the Executive or by relying on concepts of agency or instrumentality. It does so by a relatively broad definition of an organ of State. This definition renders the legality principle and the Bill

[30] Paras 40 and 41.

of Rights applicable to a wider category of function than the Charter does in Canada. … In our constitutional structure, the Council or any other entity does not have to be part of government or the government itself to be bound by the Constitution as a whole.'

[33] To the extent that the learned judge might be taken to have suggested in that passage that the power of review in this country might extend beyond functions that, broadly speaking, might be said to be governmental in nature, the learned judge did not expand upon what those functions might be. But consistent with the approach that is followed in other jurisdictions the basis for the decision in that case was nonetheless that the Micro Finance Regulatory Council indeed performed a 'governmental' function, so far as it was the instrument through which the Minister exercised regulatory control over the industry.[31]

[34] Governmental control over the licensing of the Johannesburg Stock Exchange was determinative of its susceptibility to review in *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange,*[32] decided before the present constitutional dispensation, in which Goldstone J said the following:

'In my judgment, the enquiry posed in the present case is whether the terms of the Act impose a public duty upon the JSE to adhere to its own rules and requirements. In my view such a duty is clearly imposed by the Act. In the first place a stock exchange may only be licensed in the public interest: ... In the second place, the rules of a stock exchange are required to be published in the *Government Gazette.* Thus the whole public is required to be given notice of such rules. .... Thirdly, interested parties, apart from members of the stock exchange, may object to amendments of, or additions to, those

[31] Paras 44 and 45.
[32] 1983 (3) SA 344 (W) at 364B-D and 365A. See Etienne Mureinik 'Discretion and Commitment: The Stock Exchange Case' [1985] SALJ 434.

rules after publication thereof in the *Government Gazette*. ... Then the rules are designed to ensure that the stock exchange is carried on with due regard to the public interest: ... To regard the JSE as a private institution would be to ignore commercial reality and would be to ignore the provisions and intention of the Act itself. It would also be to ignore the very public interest which the Legislature has sought to protect and safeguard in the Act.'

[35] Some recent decisions of the high courts in this country reflect a more expansive approach but they are not always consistent. The question whether the conduct of a political party is susceptible to review[33] evoked varying responses in *Marais v Democratic Alliance,*[34] *Van Zyl v New National Party,*[35] and *Max v Independent Democrats.*[36] In *Cronje v United Cricket Board of South Africa*[37] it was held, consistently with decisions in England,[38] that the United Cricket Board did not perform a public function. Kirk-Cohen J expressed his reasons for that conclusion as follows:

'The respondent is not a public body. It is a voluntary association wholly unconnected to the State. It has its origin in contract and not in statute. It powers are contractual and not statutory. It functions are private and not public. It is privately and not publicly funded. The applicant, indeed, makes the point that it "has no statutory recognition or any "official" responsibility for the game of cricket in South Africa."'[39]

[36] On the other hand, in *Tirfu Raiders Rugby Club v SA Rugby Union*,[40] Yekiso J held that the SA Rugby Union exercised public powers and

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[33] See Lisa Thornton: The Constitutional Right to Just Administrative Action – Are Political Parties Bound? (1999) 15 SAJHR 351.
[34] [2002] 2 All SA 424 (C).
[35] [2003] 3 All SA 737 (C).
[36] 2006 (3) SA 112 (C).
[37] 2001 (4) SA 1361 (T)
[38] See, for example, *R v Football Association Ltd ex parte Football League Ltd* [1993] 2 All ER 833.
[39] At 1375D-E.
[40] [2006] 2 All SA 549 (C).

performed a public function, principally, it seems, because the matters in which it engages are matters of public interest.[41] I have considerable doubt whether a body can be said to exercise 'public powers' or perform a 'public function' only because the public has an interest in the manner in which its powers are exercised or its functions are performed, and I find no support for that approach in other cases in this country or abroad.

[37] In *Mittalsteel South Africa (Ltd) (formerly Iscor Ltd) v Hlatswayo*[42] this court enquired into the meaning of a 'public body' under the Promotion of Access to Information Act 2 of 2000 (which is defined in much the same terms as the definition with which we are concerned) and relied heavily upon the extent to which the body exhibited governmental features.

[38] Thus in cases concerning the scope of public law judicial review in other countries – and most often in this country as well – courts have consistently looked to the presence or absence of features of the conduct concerned that is governmental in nature. What has been considered to be relevant is the extent to which the functions concerned are 'woven into a system of governmental control', or 'integrated into a system of statutory regulation', or the government 'regulates, supervises and inspects the performance of the function', or it is 'a task for which the public, in the shape of the state, have assumed responsibility', or it is 'linked to the functions and powers of government', or it constitutes 'a privatisation of the business of government itself', or it is publicly funded, or there is 'potentially a governmental interest in the decision-making power in

[41] Paras 28 and 29.
[42] 2007 (1) SA 66 (SCA).

question', or the body concerned is 'taking the place of central government or local authorities', and so on.

[39] While curial pronouncements from other jurisdictions are not necessarily transferrable to this country they can nonetheless be instructive. I do not find it surprising that courts both abroad and in this country – including the Constitutional Court in *AAA Investments* – have almost always sought out features that are governmental in kind when interrogating whether conduct is subject to public law review. Powers or functions that are 'public' in nature, in the ordinary meaning of the word, contemplates that they pertain 'to the people as a whole' or that they are exercised or performed 'on behalf of the community as a whole'[43] (or at least a group or class of the public as a whole[44]), which is pre-eminently the terrain of government.

[40] It has been said before that there can be no single test of universal application to determine whether a power or function is of a public nature and I agree. But the extent to which the power or function might or might not be described as 'governmental' in nature, even if it is not definitive, seems to me nonetheless to be a useful enquiry. It directs the enquiry to whether the exercise of the power or the performance of the function might properly be said to entail public accountability and it seems to me that accountability to the public is what judicial review has always been about. It is about accountability to those with whom the functionary or body has no special relationship other than that they are adversely affected by its conduct

[43] Shorter Oxford Dictionary.
[44] See the definition of 'public' in s 1 of PAJA.

and the question in each case will be whether it can properly be said to be accountable notwithstanding the absence of any such special relationship.

[41] A bargaining council, like a trade union and an employers' association, is a voluntary association that is created by agreement, to perform functions in the interests and for the benefit of its members. I have considerable difficulty seeing how a bargaining council can be said to be publicly accountable for the procurement of services for a project that is implemented for the benefit of its members – whether it be a medical aid scheme, or a training scheme, or a pension fund, or, in this case, its wellness programme.

[42] I do not find in the implementation of such a project any of the features that have been identified in the cases as signifying that it is subject to judicial review. When implementing such a project a bargaining council is not performing a function that is 'woven into a system of governmental control' or 'integrated into a system of statutory regulation'. Government does not 'regulate, supervise and inspect the performance of the function', the task is not one for which 'the public has assumed responsibility', it is not 'linked to the functions and powers of government', it is not 'a privatisation of the business of government itself', there is not 'potentially a governmental interest in the decision-making power in question', the council is not 'taking the place of central government or local authorities', and most important, it involves no public money. It is true that a government might itself undertake a similar project on behalf of the public at large – just as it might provide medical services generally and pensions and training schemes to the public at large – but the council is not substituting for government

when it provides such services to employees with whom it is in a special relationship.

[43] Much was sought to be made by counsel for the appellants of the fact that the council's collective agreement – which records the terms upon which the wellness fund was established and is to be administered – has been extended to the industry in general by declaration in the *Government Gazette.* The argument, as I understand it, was that the collective agreement – which has been called in a comparable context, a 'piece of subordinate, domestic legislation'[45] – constitutes a 'public power' that it exercises when it establishes and administers such a fund, but in my view counsel's reliance on the collective agreement is misplaced. The collective agreement is not the source of the council's powers. The powers of the council emanate from its constitution, or the equivalent powers conferred upon it by s 28 of the statute. The collective agreement is no more than the terms upon which the parties have agreed that the council will exercise those powers.

[44] That the procurement of goods and services by the council – for whatever purpose – is not a public function seems to me to find support in the Constitution itself. Government and its agencies are expected to be publicly accountable for the contracts that they conclude because they are spending public money and there are two principal reasons why that should be so. In the first place the public is entitled to be assured that its moneys are properly spent. And secondly, the commercial public is entitled to equal opportunity to benefit from the bounty of the state to which they are

[45] *S v Prefabricated Housing Corporation (Pty) Ltd* 1974 (1) SA 535 (A) at 540A-B, in relation to industrial agreements provided for under the Industrial Conciliation Act 28 of 1956.

themselves contributories.[46] The accountability of government for procurement is expressly provided for in s 217 of the Constitution, which requires that government bodies must contract 'in accordance with a system which is fair, equitable, transparent, competitive and cost effective', but that prescript does not apply to a bargaining council. It is not an 'organ of state' within the narrower definition of that term in s 217, nor is it an 'institution identified in national legislation' to which that procurement policy applies. I also see no principial reason why it should be publicly accountable for the contracts that it concludes. It is not expending public money, but money that emanates from its members and, in some cases, others in the industry, and it is to them, not the public, that it is accountable for the manner in which it does so. More important, for present purposes, I can see no basis upon which the commercial public, who are not contributors to its funds, not even indirectly, might justifiably be entitled to hold the council to account for the manner in which they are spent.

[45] Indeed, a singular feature of this case is that counsel for the appellants conceded, correctly, that the council would have been perfectly entitled to seek out and appoint a service provider without first inviting tenders or proposals at all. If it is not publicly accountable for choosing with whom to contract then I see no reason why it is publicly accountable for choosing with whom not to contract.

[46] While it is true that the council ultimately owes its existence and its powers to its enabling statute that applies as much to every company, which ultimately owes its existence and its powers to company legislation, and is

[46] Cf Sue Arrowsmith: *The Law of Public and Utilities Procurement* (London 2005) paras 1.2 – 1.6.

by no means determinative of whether it is publicly accountable for its conduct through the remedy of judicial review. Whatever the case might be in relation to its other functions in my view the council, when managing its wellness fund and procuring services for that purpose, was performing a quintessentially domestic function in the exercise of its domestic powers, and its decisions that are now in issue are not subject to review at the instance of the appellants.[47] On that ground alone the application should have failed. But even had the decisions of the council been reviewable, which the court below assumed them to be, I do not think the council can be said to have acted unlawfully.

[47] Three decisions of the council were sought to be impugned – its decision not to appoint either of the appellants, its decision to exclude them when it sought alternatives, and its decision to appoint Careworks – but in my view only the first decision is really material. If the council was entitled to reject the proposals that had been submitted by the appellants then it seems to me that it was not obliged to invite them to make proposals once more (particularly as it is conceded that it is under no obligation to invite proposals before it contracts). As to the claim to set aside the decision to appoint Careworks, that claim was not independently founded, but was founded on the alleged invalidity of the earlier decisions.

[48] There were really two grounds upon which the appellants contend that the decision to reject their proposals was unlawful. In the first place it

[47] No doubt it might be held to account for the exercise of its powers by members and others who have been subjected to its collective agreement, according to the principles enunciated in cases like *Turner v Jockey Club of South Africa* and *Theron v Ring van Wellington van die NG Sendingkerk in Suid Afrika,* above, but that is not what we are concerned with in this case.

was submitted that the council's decision was procedurally unfair in that it was obliged to have allowed the appellants an opportunity to be heard before it took the decision. Secondly, it was submitted that the decision was irrational and unreasonable.

[49] As to the first complaint the court below said that while the council might ideally have invited representations from the appellants, nonetheless:

'[it] must be borne in mind that the persons making the decisions on behalf of [the council] are not trained lawyers, they were acting in stressful circumstances: the record shows that they attempted to act with appropriate fairness and they did invite the [appellants] to make representations on the issues of the [first appellant's] solvency and the restraint of trade agreement applicable to Dr Grietjie Strydom – the two issues that led to the decisions of which the [appellants] now complain. Against the background of all the relevant circumstances of this case, it cannot, in my view, be concluded that the court should interfere with the decision of the [council] to award the tender to [Careworks]. The court is averse to taking an armchair view of the matter.'

[50] Even if the council acted unlawfully, the court below went on to say, 'the court retains a judicial discretion as to whether or not to quash that decision' and that '[t]aking everything into account it would not be appropriate to intervene in the tender process in this matter.' Much of the argument advanced in the appellants' heads of argument was directed to whether the court indeed had a discretion to refuse relief but on the view that I take of the matter it is not necessary to revisit that question.[48]

[51] The submissions on behalf of the appellants treated it as self-evident that they were entitled to be afforded a hearing before the council rejected

[48] Cf *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 36; *Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) para 23.

their proposals but that is by no means self-evident to me. In heads of argument presented on their behalf it was asserted that upon responding to the invitation to submit proposals a contract came into being with the council, and that the council 'was not at liberty to depart from the process that had been brought about without at the very least advising the appellants of this fact'. In support of those assertions reliance was placed upon *Logbro Properties CC v Bedderson NO*[49] and *Nextcom (Pty) Ltd v Funde NO*.[50] In *Logbro Properties* Cameron JA pointedly expressed no opinion on whether the invitation to tender in that case created contractual obligations.[51] In *Nextcom* Bertelsmann J said no more than that the awarding of a contract constituted administrative action. No doubt there will be cases in which the terms in which tenders are invited will give rise to contractual obligations upon their acceptance but whether that is so in a particular case will depend upon its facts, as with all cases of contract. In this case there is no factual basis upon which to conclude that the parties came into contractual privity upon submission by the appellants of their proposals.

[52] The second ground upon which it was said that the council was obliged to afford a hearing was an assertion that it has been 'consistently established' in the decided cases that procedural fairness requires it whenever a decision is taken that is 'adverse to the rights or interests of a person affected' and that such a right has been given 'express content in s 3(2)(b) of PAJA'. I think that states the matter too widely.

[53] It is correct that a person is generally entitled to be heard before a decision is taken that adversely affects his or her rights. But that does not

[49] 2003 (2) SA 460 (SCA) paras 7 and 8.
[50] 2000 (4) SA 491 (T) at 504G-505B.
[51] The court below had held that it did.

hold true where the decision is adverse to no more than an 'interest'. In *Administrator, Transvaal v Traub*[52] Corbett CJ pointed out that in its classic formulation at common law the principle *audi alterem partem* required a hearing before a decision was taken that prejudicially affected an individual in his or her 'liberty or property or existing rights'.[53] That case extended the principle to circumstances in which the interest at stake 'falls short of a legal right' but 'rises to the level of a "legitimate expectation"' (in the words of Professor Riggs, which were cited with approval).[54] Nor does a right to be heard when no more than an 'interest' is adversely affected find expression in s 3(2)(b) of PAJA. That subsection affords a right to procedurally fair administrative action (encompassing a right to be heard) where 'rights or legitimate expectations' are affected.

[54] In *President of the Republic of South Africa v South African Rugby Football Union*[55] the Constitutional Court said that the question whether a 'legitimate expectation of a hearing' exists

'is not whether an expectation exists in the mind of a litigant but whether, viewed objectively, such expectation is, in a legal sense, legitimate; that is, whether the duty to act fairly would require a hearing in those circumstances.'

In *National Director of Public Prosecutions v Phillips*[56] Heher J, adopting the views expressed in De Smith, Woolf and Jowell *Judicial Review of Administrative Action*,[57] held that

'[a] legitimate expectation "arises where a person responsible for taking a decision has induced in someone who may be affected by the decision, a reasonable expectation that

[52] 1989 (4) SA 731 (A).
[53] Page 748G-H.
[54] Page 755C-E.
[55] 2000 (1) SA 1 (CC) para 216.
[56] 2002 (4) SA 60 (W) para 27.
[57] 5th ed para 8-037.

he will receive or attain a benefit or that he will be granted a hearing before the decision is taken.'"

And that

'[s]uch an expectation may arise "either from an express promise given on or behalf of a public authority or from the existence of a regular practice which the claimants can reasonably expect to continue"'

The learned judge went on to enumerate 'requirements for legitimacy of the expectation' which were adopted by this court in *South African Veterinary Council v Szymanski.*[58]

[55] In this case there has been no suggestion that the appellants were induced by the council to believe that they would be heard before it took its final decision. Nor was it suggested that it is the regular practice of public bodies to afford a hearing before it rejects tenders or proposals that they have invited. No doubt there are cases in which that should occur – that was held to be the case in *Logbro Properties* – but I would be most hesitant to lay that down as a general rule. Invitations of various kinds are regularly issued by public bodies – whether to take up employment, or to offer to supply goods or services, or to participate in projects of one kind or another – and it would be most expansive to find that whenever a person responds to such an invitation he or she is entitled to be heard before the response is rejected.

[56] But in this case there seems to me to be even less reason to find that the appellants had a legitimate expectation that they would be afforded a hearing before their proposals were rejected. The appellants were made pertinently aware of what the council considered to be their shortcomings

[58] 2003 (4) SA 42 (SCA) para 19.

and were invited to make representations, which they did. The appellants could not have been unaware that their proposals were liable to be rejected if those concerns were not overcome. That they should expect to be afforded yet another hearing before that step was taken seems to me to stretch legitimacy unduly. I do not think the council can be said to have acted unfairly in not inviting yet further representations and on that ground the appellants must fail.

[57] The second leg of the attack was that the rejection of the appellants' proposals was said to have been 'irrational' and 'unreasonable'. PAJA does not express itself in quite those terms. It provides, so far as it is now relevant, that administrative action is reviewable if it is 'not rationally connected to … the purpose for which it was taken, [or] the information before the administrator, or the reasons given for it by the administrator', or if the functionary concerned exercised his or her power or performed his or her function in a manner that is 'so unreasonable that no reasonable person could have so exercised the power or performed the function'.

[58] In the ordinary meaning of the term a decision is 'rationally' connected (to the purpose for which it was taken, etc) if it is connected by reason,[59] as opposed to being arbitrary or capricious. As it was expressed in *Merafong Demarcation Forum v President of the Republic of South Africa*:[60]

[59] Shorter Oxford Dictionary meaning of 'rational': '1. Having the faculty of reasoning; endowed with reason. b. Exercising one's reason in a proper manner; having sound judgment; sensible, sane 2. Of, pertaining or relating to reason. 3. Based on, derived from, reason or reasoning. 4. Agreeable to reason; reasonable, sensible; not foolish, absurd or extravagant.'
[60] 2008 (5) SA 171 (CC) para 63.

'There must merely be a rationally objective basis justifying the [impugned conduct]…. In *Pharmaceutical Manufacturers*[61] Chaskalson P made it clear that the rationality standard does not mean that courts can or should substitute their opinions for the opinions of those in whom the power has been vested. A court cannot interfere with a decision simply because it disagrees with it or considers that the power was exercised inappropriately.'

[59] On the second count – whether the decision was one that was so unreasonable that no reasonable person could have made it – there is considerable scope for two people acting reasonably to arrive at different decisions. I am not sure whether it is possible to devise a more exact test for whether a decision falls within the prohibited category than to ask, as Lord Cooke did in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd*[62] – cited with approval in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[63] – whether in making the decision the functionary concerned 'has struck a balance fairly and reasonably open to him [or her]'

[60] When viewed together it might be that these apparently separate grounds of review will come to the same thing. If a decision is founded upon reason then it is difficult to see how it could be said to be so unreasonable that no reasonable person could come to it and the converse is equally true. Indeed, the court below queried whether *Sidumo v Rustenburg Platinum Mines Ltd*[64] had collapsed the two grounds into a single enquiry, namely, 'is

[61] *Pharmaceutical Manufacturers Association of SA: in re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 90.
[62] [1999] 1 All ER 129 (HL) at 157.
[63] 2004 (4) SA 490 (CC) para 44.
[64] 2008 (2) SA 24 (CC).

the decision reached by the [administrator] one that a reasonable decision-maker could not reach?'[65]

[61] The appointment of either of the appellants would undoubtedly have exposed the council to an element of risk in one form or another and neither of the appellants was able to eliminate that risk. When confronted with the problem each went no further than to advance reasons to the council why the risk should be regarded as minimal. I think it goes without saying that a decision to avoid risk in a long-term contractual relationship is neither arbitrary nor capricious but is one that is founded upon reason – there is 'a rationally objective basis justifying' the decision.[66] Perhaps a more robust decision-maker would have been willing to accept the risk but it is not for a court to direct a contracting party to be robust. I do not think a decision that has a rational basis can be said to be one to which no reasonable person could come. In my view the decision was neither irrational within the meaning of PAJA nor was it one to which a reasonable decision-maker could not come. On the contrary, I find it perfectly understandable that the council chose not to expose itself to the risks that presented themselves when it was able to avoid them, no matter that the risks might have been slight.

[62] The real basis for the complaint seems to me to have been articulated more directly by counsel for the appellants towards the end of his argument. He said that the consortium was the pre-eminent expert in its field and for that reason it was irrational and unreasonable not to appoint it. That does not

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[65] See, for example, *Sidumo* para 110.
[66] *Merafong Demarcation Forum,* above.

seem to me to say that the decision not to do so was irrational or unreasonable but only that it was not the best decision. We are not concerned with the wisdom of the council's decision. It is the council, and not a court, that must bear the consequences for the contracts that it concludes, and in those circumstances, as pointed out in *Logbro Properties*[67] and in *Bato Star,*[68] a measure of deference to the view of the decision-maker is not out of place.

[63] I do not think the council's decision not to appoint the appellants offends the provisions of PAJA, and that being so its consequent decisions are also not liable to be set aside. In my view the order of the court below cannot be faulted and I would dismiss the appeal. As to the costs of the appeal the employment of two counsel was warranted and the appellants ought also to bear the reserved costs of the application for interim relief.

[64] The appeal is dismissed. The appellants, jointly and severally, are to pay the costs of the appeal, and the reserved costs of the application for interim relief. The costs in each case are to include the costs of two counsel so far as two counsel were employed.

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R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

[67] Para 21.
[68] Para 46.

For appellant:	B Leech Instructed by: Werksmans Incorporating Jan S de Villiers, Johannesburg Symington & De Kok, Bloemfontein
For 1st respondent:	P J Pretorius SC H Barnes Instructed by: Moodie & Robertson Attorneys, Johannesburg Claude Reid, Bloemfontein
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