

## IN THE LABOUR APPEAL COURT OF LESOTHO

In the matter between:

<b>INDEPENDENT DEMOCRATIC UNION OF LESOTHO</b>	<b>1<sup>ST</sup> APPLICANT</b>
<b>NATIONAL CLOTHING TEXTILE AND ALLIED WORKERS UNION</b>	<b>2<sup>ND</sup> APPLICANT</b>
<b>LENTSOE LA SECHABA WORKERS UNION</b>	<b>3<sup>RD</sup> APPLICANT</b>
<b>CONSTRUCTION, MINING AND ALLIED WORKERS UNION</b>	<b>4<sup>TH</sup> APPLICANT</b>
<b>LESOTHO WORKERS ASSOCIATION</b>	<b>5<sup>TH</sup> APPLICANT</b>
<b>TRANSPORT, SECURITY AND ALLIED WORKERS UNION</b>	<b>6<sup>TH</sup> APPLICANT</b>
<b>UNITED TEXTILE WORKERS UNION</b>	<b>7<sup>TH</sup> APPLICANT</b>
<b>‘MATSIETSI TŠOTETSI</b>	<b>8<sup>TH</sup> APPLICANT</b>
<b>MPHENG FAKO</b>	<b>9<sup>TH</sup> APPLICANT</b>
<b>‘MATŠEPO THAELE</b>	<b>10<sup>TH</sup> APPLICANT</b>
<b>MAHAO MAHAO</b>	<b>11<sup>TH</sup> APPLICANT</b>
<b>THABO RAMOLULA</b>	<b>12<sup>TH</sup> APPLICANT</b>
<b>HLOMPHO MOHLOUOA</b>	<b>13<sup>TH</sup> APPLICANT</b>
<b>MOOKHO NTHAKO</b>	<b>14<sup>TH</sup> APPLICANT</b>
<b>PHEKO NKEEANE</b>	<b>15<sup>TH</sup> APPLICANT</b>
<b>TEBOHO SEHLOHO</b>	<b>16<sup>TH</sup> APPLICANT</b>

And

<b>THE MINISTER OF LABOUR &amp; EMPLOYMENT</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>THE LABOUR COMMISSIONER</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>THE ATTORNEY GENERAL</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>THE WAGES ADVISORY BOARD</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>LESOTHO TEXTILE EXPORTERS ASSOCIATION</b>	<b>5<sup>TH</sup> RESPONDENT</b>
<b>ASSOCIATION OF LESOTHO EMPLOYERS AND BUSINESS</b>	<b>6<sup>TH</sup> RESPONDENT</b>

## JUDGMENT

**Coram:** His Honour Justice Keketso Moahloli (a.i.)

**Assessors:** Mrs M Mosehle  
Mr S Kao

**Heard:** 3 August, 5 September, 5 & 26 October and 2 November 2017

**Delivered:** 21 March 2018

*SUMMARY*

*Labour Law – Fixing of minimum wages – Interpretation of section 51 (1) of Labour Code Order 1992 – whether Minimum wage order must be adopted and promulgated to have legal force – Whether Minister bound to accept recommendations and proposals of Wages Advisory Board – Meaning of full consultation and participation of social partners.*

## **ANNOTATIONS**

### **Cases:**

Ismail Amod v Pietersburg Municipality 1904 TS 323

Brown & Others v Deputy Commissioner of Police Natal 1960 (2) SA 809 (N)

Duze v Eastern Cape Administration Board 1981 (1) SA 827 (A)

Joseph & Others v City of Johannesburg 2010 (4) SA 55 (CC)

Kebinye v Clerk of the Maseru Magistrate's Court & Others, LAC (2009-2010) 474

Maqetoane v Minister of Interior & Others, LAC (1985-1989) 71

Matebesi v Director of Immigration & Others, LAC (1995-1999) 616

Ministry of Home Affairs and Local Government v Sakoane, LAC (2000-2004) 332

Mofoka v Lihanela, LAC (1985-1989) 326

South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A)

Van Rooy v Law Society (O.F.S.) & Another 1953 (3) SA 580 (O)

### **Statutes:**

Interpretation Act No.19 of 1977

Labour Code Order No.24 of 1992

Labour Code Wages (Minimum Wages) Notice, 2017

### **ILO standards:**

Minimum Wage-Fixing Machinery Convention 1928 (No.26)

Minimum Wage-Fixing Machinery Convention 1928 (No.30)

Minimum Wage-Fixing Machinery Convention 1970 (No.131)

Minimum Wage-Fixing Machinery Convention 1970 (No.135)

**Books:**

Prof G Carpenter, Ch.13 “Public Law: Administrative Law” in Hosten et al. Introduction to South African Law and Legal Theory. 1995 Butterworths

Christo Botha. Statutory Interpretation. 2012 Juta.

Judge R D Claassen. Dictionary of Legal Words and Phrases, Vol. 3, 2<sup>nd</sup> ed, Service Issue 17, June 2014, LexisNexis

Cora Hoexter. Administrative Law in South Africa. 2<sup>nd</sup> ed, 2012 Juta.

ILO, 1996-2018. Minimum Wage Policy Guide. (available at [www.ilo.org/minimumwage](http://www.ilo.org/minimumwage))

ILO, 2013. National tripartite social dialogue: an ILO guide for improved governance (available at [www.ilo.org/publns](http://www.ilo.org/publns))

Gerald Starr. Minimum Wage Fixing. 1981 ILO

Marinus Wiechers. Administrative Law. 1985 Butterworths

## **Moahloli AJ**

### **INTRODUCTION**

[1] On 21 July 2017, the Minister of Labour and Employment, the Honourable Keketso Rantšo (hereafter “the current/new/incumbent Minister” or “the 1<sup>st</sup> Respondent”) caused the Labour Code Wages (Minimum Wages) Notice 2017<sup>1</sup> to be published in the *Government Gazette* (hereafter it will be referred to as “the 2017 Order”). This ushered in a 7% across the board increase in the basic minimum wages, with effect from 1 April, 2017.

[2] What would ordinarily have been received as good news for the country’s affected private sector workforce was rejected by members of the applicant trade unions for reasons which will become apparent shortly. As a result, on 31 July 2017 the said unions lodged an urgent application with this court in terms of section 38A (1) (b) (iii) of the Labour Code Order No.24 of 1992<sup>2</sup> (hereafter “the Labour Code”) seeking, in the main, (i) the review and setting aside of the 2017 Order; and (ii) the substitution thereof by the draft order the Honourable Minister Thulo Mahlakang (hereafter “the former Minister”) had approved and forwarded to the Chairperson of the Board on 27 April 2017 for gazettment. Respondents opposed the application.

[3] When the parties first appeared before me on 3 August 2017, I agreed to hear the case on an urgent basis. I therefore gave the parties tight time-lines

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<sup>1</sup> Legal Notice No.58 of 2017 published in the Lesotho Government Gazette Extraordinary, Vol. 62, No. 43 of 21<sup>st</sup> July 2017

<sup>2</sup> As amended by the Labour Code (Amendment) Acts Nos. 9 of 1997, 3 of 2000, 5 of 2006 and 1 of 2010

for the filing of a joinder application, answering affidavits, replying affidavits and heads of argument and scheduled the matter for oral argument on 5 September 2017.

[4] The matter could not proceed on 5 September because 1<sup>st</sup> to 4<sup>th</sup> Respondents' legal representative reported that he had failed to file their answering affidavits on time due to being unwell for a long period. I gave the parties fresh dates for filing and rescheduled oral submissions to 5 October 2017.

[5] On 5 October it was Applicants' counsel's turn to default. He reported that he had not been able to file his papers on time because he had had difficulty meeting the former Minister to settle his deposition. The matter was accordingly postponed to 26 October, on which date we once more could not proceed because Applicants' counsel had not been able to file their replying affidavits and heads of argument on time on account of ill-health. He applied for further postponement.

[6] Whereupon Respondents applied for dismissal of the case because in their view it had now become moot, since the impugned wages order had now been operational for almost 7 months since 1 April. Respondents contended that the case had lost its urgency, and it was no longer in the public interest to continue with it, in view of the fact that a new Wages Advisory Board was about to start deliberations for 2018/2019.

Applicants retorted that since pleadings were now closed, it would be unfair to just dismiss the case without hearing the merits, as it raised important

questions of law. They maintained that it was necessary for the court to set a precedent in order to prevent any future recurrence.

[7] On 2 November I delivered a fully reasoned *ex tempore* decision, dismissing the application to dismiss or strike off. Briefly, my reasons were that –

- (i) the case could be regarded as having become moot since the controversy between the parties and the alleged prejudice to the Applicants were still very much alive; and
- (ii) the decision sought by Applicants could not be said to no longer have a practical effect or result.

[8] It was then agreed that for expediency I would decide the matter on the papers, after Respondents filed heads of argument on or before 13 November. However, as had now become customary this was not to be: their heads were only filed on 15 and 16 February 2018, after the summer recess.

## **BACKGROUND TO THE DISPUTE**

### **The Minimum Wage-Fixing Machinery in Lesotho.**

[9] In terms of section 47 of the Labour Code, “wages and conditions of employment may be fixed [*inter alia*] by a wages order issued by the Minister upon the recommendation of the Wages Advisory Board” (hereafter “the Board”). And section 48 (a) empowers the Minister, by order, to establish a Board which shall, upon being required to do so by the Minister, inquire into the wages and conditions of employment of any employees in such part of

Lesotho as may be specified in the order, and any other related matters referred to it by the Minister.

[10] Section 50 of the Code sets out the **functions of the Board**, as follows:

“(1) The Minister, if of the opinion that it is expedient to fix the minimum wages of any employees in any part of Lesotho or to prescribe conditions of employment of any such employees, may require the Board to inquire into the matter and submit recommendations to the Minister as to the minimum wage which should be paid and the conditions of employment which should apply to all or any of the employees coming within its terms of reference.

(2) The Board shall have the power to submit to the Minister wages order proposals (hereafter referred to as proposals) for fixing the minimum wage to be paid, and for prescribing the conditions of employment to be applied by the employers within the Board’s jurisdiction to all or any of the employees in relation to whom the Board operates. In so doing the Board shall, subject to the provisions of subsections (3) and (4), make such investigations as it deems fit.

(3) Before submitting any recommendations or proposals to the Minister under the provisions of subsection (1) and (2), the Board shall publish in the *Government Gazette* a notice of intention to submit recommendations or proposals, stating a place where copies may be obtained and the period, being not less than 30 days, within which written representations with respect to the recommendations or proposals may be sent to the Board.

(4) The Board shall consider any representations made to it in terms of subsection (3) and may make such further inquiries as it considers necessary and then submit the recommendations or proposals to the Minister, either with or without amendment, having regard to such representations.

(5) Where recommendations or proposals have been submitted to the Minister in accordance with subsection (4), the Minister may refer them back to the Board, and the Board shall thereupon consider them, having regard to any observations made by the Minister and, either with or without amendment, resubmit the recommendations or proposals to the Minister.

(6) The Board may of its own initiative make representations to the Minister concerning the wages and conditions of employment of all or any group of employees in Lesotho.”

[11] And section 51 (1) deals with the crucial issue of adoption and promulgation of wage orders. It enacts that “where recommendations or proposals have been submitted or resubmitted, the Minister may, after informing the Board of the decision taken, prescribe the minimum wages to be paid and the conditions of employment to be applied to any employees, and shall cause the order (hereafter referred to as a wages order) to be published in the *Government Gazette*.” [my emphasis]

### **Brief Chronology**

[12] The Board began its task of inquiring into adjustments to the wages and conditions of employment of employees covered by its terms of reference for 2017/2018 in late 2016. At its inaugural plenary session on 6 December 2016, it received reports from the Central Bank of Lesotho (“the CBL”) and the Bureau of Statistics, giving an overview of the country’s economy. The CBL reported, amongst other things, that the inflation rate for 2017/2018 was



projected at 6.3%.<sup>3</sup> It was resolved that bilateral sector meetings would be held from 9 January 2017, culminating in further plenaries.

[13] The Board held follow-up meetings on 16 January, and on 2 and 17 February 2017, but the parties could not agree on the new percentage adjustments. In the Textile and Leather Manufacturing, Wholesale and Retailing, Transport, and Security/service sectors the Employers offered 6% increment while the Employees wanted 10%. In the Construction sector the figures were 6% and 8%, respectively. In the Small Business and Domestic sectors the parties agreed on 6%, and the consensus on the General Minimum wages category was 7%.<sup>4</sup>

[14] Given this impasse, the Government representatives proposed to the Minister that recommendations reflecting a 7% across the board adjustment be published for purposes of seeking public comments.<sup>5</sup> The Minister did not agree. He insisted that the recommendation reflect a 9% increase in all sectors, instead.<sup>6</sup>

[15] The Board Secretary duly communicated the Minister's decision to Employer and Employee representatives by letter on 21 February 2017. But on 10 March 2017 a document entitled "**Agreement reached at a bilateral meeting of the Wages Board**", dated 9<sup>th</sup> March 2017, was submitted to the Board Secretary. It states: "**Agreement:** The parties agreed that the Minimum Wages 2017/18 be increased by 7% across the Board (sic)". It is signed by

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<sup>3</sup> Record: pp124-126

<sup>4</sup> Record: p138

<sup>5</sup> Record: pp 137-138

<sup>6</sup> Record: p 140

board employer members Lindiwe Sephomolo, Nkosana Limema, Thabiso Mamonyane, David Chen, Richy Chen and Motlatsi Shale. And by Board employee representatives Maromaki Thosi (6<sup>th</sup> Applicant's President), Mathebane Matjoa, Robert Mokhahlane (4<sup>th</sup> Applicant's Secretary General), Tilo Letsie, Seabata Likoti (1<sup>st</sup> Applicant's Deputy Secretary) and Monaheng Makaoane (3<sup>rd</sup> Applicant's Secretary General). The last signatory is Monare Monare (whose identity/affiliation is not clear *ex facie* the papers).<sup>7</sup>

[16] The Board Secretary avers that since this agreement/resolution was reached outside the Board, she immediately convened an urgent board meeting on 20 March 2017, whereat it was confirmed that the employee and employer board representatives had indeed agreed that the basic minimum wages be adjusted by 7% across the board for 2017/2018.<sup>8</sup>

[17] The above agreement was duly communicated to the Minister, but he still insisted that recommendations reflecting a 9% increase be issued for public comment. As a result the Labour Code Wages (Notice of Intention to Submit Recommendations or Proposals) Notice 2017 was published on 24 March 2017.<sup>9</sup>

[18] Written comments were received from two employers' associations and two companies, who all recommended a 7% adjustment. The Lesotho Clothing, Textile and Allied Workers Union also made a written representation proposing a 10% increment.<sup>10</sup>

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<sup>7</sup> Record: pp 82-83; also at pp 94-95 and 141-143

<sup>8</sup> Record: p 115. See Board Minutes at Record: pp 144-146

<sup>9</sup> Record: pp 147 & 149-162

<sup>10</sup> Record: pp 163-178

[19] The Board held its last meeting on 25 April 2017 to consider the public comments.<sup>11</sup> Subsequently, the same day, the Board Secretary advised the Minister in writing as follows:

“4. After the public comments were presented before the Board, it held a unanimous view to advise the Hon. Minister to adjust wages by 7% across all sectors for 2017/2018.

The Honourable Minister is advised to make a final determination on the percentage with which Minimum Wages will be adjusted for 2017/2018 pursuant to the Provisions of S51 (1) of the Labour Code Order 1992”<sup>12</sup>

[20] Whereupon the Minister advised the Board Chairperson, by a Memo dated 26/04/2017, captioned “**Final determination of minimum wages 2017/2018**”, that “after having considered the advice of the Wages Advisory Board [he had] resolved to adjust minimum wages by 9% for 2017/2018 for all sectors”, and that he was accordingly requesting the Chairperson” to facilitate gazette of the new minimum wages and inform the Board accordingly”.<sup>13</sup>

[21] The Labour Commissioner deposes that after informing Board members of the Minister’s decision, her legal section proceeded to give instructions to be Parliamentary Counsel to publish the gazette in line with the decision of the Minister, but for reasons not within the ambit of her office the gazette was not published yet when the

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<sup>11</sup> Record: p 117, para 37

<sup>12</sup> Record: p 180

<sup>13</sup> Record: p 181

government was dissolved and a snap general election held on 3 June 2017.<sup>14</sup>

[22] A document marked “Annexure Gazette Instrument”<sup>15</sup>, purporting to be the draft wages order which was submitted for gazettelement is relied upon by Applicants in support their case. The document, dated 27/04/2017 is signed by the former Minister, Hon. Tšoeu Thulo Mahlakang.

[23] It seems, however, that implementation of Minister Mahlakang’s decision was not supported by some of his partners in government. This is evident from the letter he wrote to the Prime Minister on 4 May 2017<sup>16</sup> (copied to the Leaders of the Lesotho Congress of Democracy, Popular Front for Democracy, Marematlou Freedom Party and National Independent Party). It reads as follows:

**“Re: Minimum Wages Gazettelement**

1. I refer you to the above mentioned matter and the decision reached in the meeting of the Coalition Leaders on the 3<sup>rd</sup> May 2017.
2. The Honourable Prime Minister will recall that the meeting decided that the recommendations/proposals submitted by the **Wages Advisory Board** to the Honourable Minister of Labour and Employment be referred back to the Wages Advisory Board in terms of **Section 50 (5) of the Labour Code** as an option and with a view

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<sup>14</sup> Record: p 118, para 44

<sup>15</sup> Record: p 53-67

<sup>16</sup> Record: pp 36-39

to explore ways of addressing LTEA concerns and the apparent legal technicalities.

3. After that meeting I immediately repaired back to the office with a view to execute the decision. On the further reading of Section 50 (5) and with the assistance of some of the legal minds in the Ministry, it became obvious that this option of referring back the recommendations was not as viable as it initially attracted me when we were in the meeting. These were the apparent hurdles:
  - a) The decision that the Honourable Minister of Labour and Employment had taken had already been communicated to the Social Partners: that is, the workers and employers.
  - b) Section 50 (5) envisaged a referral made prior to the taking of a decision on the proposals and a referral made after the taking of a decision would lack a legal basis.
  - c) It would be unprocedural for the Board to consider proposals/recommendations on which a decision has already been taken and published.
4. There is yet another matter/issue that was not sufficiently explained in the meeting due to the fact that when the Minister of Labour and Employment attended the meeting, the Minister did not have the benefit of referring to the records of the written representations received by the Board. The issue of whether some sectors were in the majority could therefore not be properly addressed.
5. The record of the written representations received by the Board within the period stipulated shows that only six (6) written representations were received and were as follows:
  - a) National Clothing Textile and Allied Workers Union
  - b) Wonderful Security
  - c) Lesotho Textile Exporters Association
  - d) Lesotho Federation of Private Security Association
  - e) Highlands Security

f) Workers of New Epoch Knitting, under NACTWU

In a nutshell there were two categories: that is, Workers and Employers, holding two opposed positions. The workers were proposing that the minimum wages be adjusted by 10% while the employers were proposing a 7% adjustment. The issue of who were in the majority could not arise. The Honourable Minister of Labour and Employment saw two opposing viewpoints.

6. A discretion had to be exercised in those circumstances. The decision was to take a middle road or midway position between the two positions. A decision was made on 9% adjustment, and the necessary instrument was taken to the Government Printer on the 28<sup>th</sup> April 2017 for publication.
7. In these circumstances therefore, I have no alternative but to make a special pleas to the Right Honourable Minister that the Government Gazette on the Minimum Wages as determined be published.

I thank you Honourable Prime Minister.

Yours sincerely”

[24] After the new government was installed on 16 June 2017 following the above-mentioned snap elections, the current Minister (1<sup>st</sup> Respondent) replaced former Minister Mahlakeng. On 12 July she held consultations with the Employee Board members to discuss her intention to adjust the minimum wage by 7%. On 13 July the representative of the present 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Applicants wrote to the Minister, rejecting her intended adjustment.<sup>17</sup> Their letter reads-

**“Re: Feedback on our meeting with you on the 12<sup>th</sup> July 2017**

During our meeting with you and the Honourable Minister of Trade and Industry Mr. Tefo Mapesela it was agreed that we will give feedback with regard to the decision to gazette the 7% across the board.

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<sup>17</sup> Record: p 33

We however wish to inform you that we have unanimously agreed to stick on the decision taken by the former Minister of Labour and Employment Mr. Thulo Mahlakeng by adjusting the minimum wage by 9% across the board for 2017/2018.

As we have highlighted in our meeting the process was already completed of fixing wages by the former Minister in our meeting it was clear that the minimum wage gazette was signed for and blocked at the law office. This information was furnished by the Labour Commissioner in our meeting with you yesterday.

Therefore, we humbly request the cabinet to reverse their position of adjusting minimum wage by 7% and implement 9% across the board with immediate effect on the 1<sup>st</sup> April 2017.

Your co-operation and understanding will be highly anticipated.

Yours faithfully”

[25] The Minister also engaged with the employers’ board representatives, who supported the 7% adjustment. After these engagements the incumbent Minister reverted to the 7% adjustment previously recommended by the Board and proceeded to gazette the wages order which is being challenged in this litigation.

## **ANALYSIS OF ARGUMENT**

[26] Applicants submit that the crux of this case is whether it was proper for the present Minister to review her predecessor’s decision to fix the minimum wage at 9% across the board. They contend that her decision to gazette an across the board basic minimum was of 7% amounted to a review because

“the decision by [her] predecessor had already been made and the only outstanding issue was that of publication of the gazette... [T]he mere fact that the decision had not yet been published in a gazette does not in itself communicate the message that the decision has no bearing legal consequences... [T]he gazette merely serves the objective of publishing the decision and does not constitute a decision in itself”.

[27] Before dealing with this contention, I feel constrained to ask whether, from the evidence placed before me, it can be said that there was a final decision of the former Minister which his successor is said to have reviewed. I ask this because the former Minister’s letter to the Prime Minister shows that his ‘decision’ was not final at all, because at the instance of some Coalition Leaders the meeting decided that it be referred back to the Board with the view to exploring ways of addressing LTEA’s concerns and the apparent legal technicalities. That is why the Minister made a special plea to the Prime Minister that his draft gazette be published. And without any evidence that the Prime Minister acceded to this request, the fact that at the time of the change of government the gazette had not been published, leads us to the inevitable conclusion that the former Minister’s decision was not endorsed by the Prime Minister and other Coalition Leaders.

[28] I now return to Applicants main contention. Counsel for Applicants seeks to rely upon certain dicta from the cases of *Mofoka v Lihanela*, *Maqetoane v Minister of Interior* and *Minister of Home Affairs v Sakoane* in support of this argument. However, these cases nowhere suggest that gazettelement is not a prerequisite for the validity of subsidiary legislation such as wage orders. The cases are concerned with the narrow question of whether in terms of the



Chieftainship Act the absence of formal gazetting disqualifies a person from being recognized as a Chief even when there is overwhelming factual evidence that such person holds the office of chief. The purpose of gazettelement in this case is on a totally different footing from what it is under the Chieftainship Act.

[29] The crucial question to ask is when does the legal force of the legislative administrative act of the former Minister commence? The correct law is that both the formal and material legal force of such an act commences on notification. And this notification takes place by means of publication in the Gazette – i.e. by promulgation.<sup>18</sup> The reason why enactment and promulgation are prerequisites for validity is that legislative acts of the administration create, alter or terminate general and not individual relationships<sup>19</sup>.

[30] By formal legal force of an administrative act we mean “the force on the strength of which such an act can resist any attempt to destroy it. [T]his is the capacity of an act to exist independently in law, viz not to be undone by its own author or another administrative organ or government body or even by a subject”<sup>20</sup>

[31] As a general rule a legislative administrative act will acquire legal force vis-a-vis subjects only when it has been promulgated<sup>21</sup>. Promulgation is the process of putting legislation officially and legally into operation.

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<sup>18</sup> Marinus Wiechers 157; section 51 (1) of the Labour Code

<sup>19</sup> Duze v Estern Cape Administration Board 841; Prof Carpenter 1048

<sup>20</sup> Marinus Wiechers 158

<sup>21</sup> Brown v Deputy Commissioner of Police; Prof Carpenter 1052

Promulgation has been defined as the act of making known by public declaration<sup>22</sup>. In *Ismail Amod v Pietersburg Municipality*, Innes CJ explained:

“By Roman-Dutch law, as indeed by any civilized system of jurisprudence, a law before it can take effect requires to be promulgated. The expression of will by the legislative authority does not acquire the force of law unless and until it has been promulgated in due form for the information of those whom it is to affect”.

[32] We must bear in mind that promulgation is a characteristic element of legislative acts. The promulgation of legislation may be classified among the formal elements, but in fact the promulgation of legislative acts is more than a mere formality: it confirms and determines the nature of legislative acts in the same way that the decision, viz the judgment given in open court, confirms and typifies the judicial act.

[33] From the above it is clear that sans gazettelement the administrative act of the former Minister did not acquire any legal force. It never had the capacity to exist independently in law. Consequently it could be undone by its own author or another administrative organ or governmental body. It would be revoked or modified by the new/current Minister without adverse consequence. Moreover, since the former Minister’s purported legislative administrative act was never promulgated it lacked an essential requirement for validity. It is self-evident that this non-compliance with one of the specific requirements for validity (which is contained in the enabling statute, and which is also a requirement determined by the nature of legislative administrative acts) constituted a fatal reviewable irregularity.

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<sup>22</sup> Christo Botha 46

[34] I do not agree with the Applicants' contention that the fixing of minimum wages pursuant to section 51 (1) can be done merely administratively by the Minister. According to the true construction of this provision the determination of the basic minimum wage is to be done legislatively. In which case enactment and promulgation of the new wages as a law would be required for their validity<sup>23</sup>. The adjustments must be duly enacted and promulgated as wage orders for general information and for compliance by affected employers.

[35] So for emphasis, to borrow the words of Horwitz J in *Van Rooy v Law Society (OFS)*<sup>24</sup>, "unless the authorising statute dispenses, expressly or by necessary implication, with the requirement of promulgation or authorizes a mode of notification other than that bid down in [section 51 (1)], the common law requires, and [section 51 (1)] enjoins, promulgation in order to vest the [wages order] with legal force and effect."

[36] Another compelling reason why Applicant's contention that the former Minister's draft wages order has legal consequences even without promulgation in a gazette is unsustainable is that the enabling provision, section 51 (1) enacts that the Minister shall cause a new wages order to be published in the *Government Gazette*. And section 14 of the Interpretation Act<sup>25</sup> provides that the word "shall" in an

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<sup>23</sup> Cf *Duze v Eastern Cape Administration Board* 841C-D

<sup>24</sup> at 585 A

<sup>25</sup> No. 19 of 1977 as amended by the Interpretation (Amendment) Act No.4 of 1993

enactment passed after the commandment of that Act<sup>26</sup>, shall be construed as imperative and “may” as permissive and empowering. All this means that the former Minister’s draft wages order, which was never published in the Government Gazette never acquired any force of law on the ground of its non-promulgation. Gazettement was a condition precedent for its validity. This requirement cannot be regarded as merely directory; it must be construed as peremptory.

[37] Furthermore, according to section 27 (1) of the Interpretation Act, “subsidiary legislation shall be published in the gazette and takes effect on the day of publication or if the subsidiary legislation otherwise provides, as provided”. The former Minister ungazetted draft wages order does not meet these peremptory requirements.

[38] Applicants further contend that the current Minister acted incorrectly and irregularly by reviewing her predecessor’s decision without affording the affected employees a prior hearing, as the former Minister’s decision had already conferred rights and/or raised legitimate expectations of the employees affected by the adjustments. They relied on the cases of *Matebesi v Director of Immigration* and *South African Roads Board v Johannesburg City Council* in support of their argument.

[39] I find this argument factually disingenuous because the Applicants, on their own papers, concede that the incumbent Minister did consult with them about her intention to fix the minimum wage at 7%, but they rejected this.<sup>27</sup>

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<sup>26</sup> i.e. 2-13-1977

<sup>27</sup> See their letter at Record: p 33 and the Labour Commissioner’s deposition at Record: p 118, para 45

And, as I have already intimated above, what the Applicants are characterizing as an immutable decision of the former Minister, on their Applicants' own papers, seems to be his unilateral position which he prematurely communicated to the employer and employee representatives without obtaining the endorsement of his Prime Minister and coalition partners. Furthermore such decision, as I have already demonstrated, did not have the force of law and cannot be regarded as having conferred any legal rights whatsoever without promulgation.

[40] The last issue I wish to address briefly in passing is, on the one hand, Respondents' argument that the former Minister acted arbitrarily and unreasonably by purporting to adjust the minimum wage by 9% despite the Board's recommendation of a 7% adjustment, without providing any reasons whatsoever for his decision. And, on the other hand, the Applicants' insistence that there was nothing wrong with what the former Minister did because he alone had the final say as to the percentage adjustment to implement, and was not bound by the recommendations of the Board. Strictly speaking this is so, but section 51 (5) is clearly indicative that, in terms of our minimum wage-fixing machinery, Board recommendations and proposals cannot be regarded as no more than a procedural formality, having very little influence on the decision ultimately taken. According to our scheme, even though the Minister could ultimately modify or reject the proposed rates, the presumption is that this authority will be used selectively and that decision making will be effectively carried out by the Board.<sup>28</sup> In other words, in international labour law parlance, our Board has powers of effective

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<sup>28</sup> See Starr 65

recommendation. Where the Minister makes modifications, then in the true spirit of tripartism and social dialogue he is expected to provide the social partners with rational reasons for his decision. Since workers and employers are the ones most directly affected, it is considered essential that their views should be taken account of by those with the final responsibility for fixing minimum wages. That is to say, the government determines the minimum wage on the basis of recommendations made by the Board.<sup>29</sup>

[41] The principle that there should be full consultation and participation, on a basis of equality, of social partners is one of the pillars of the ILO Minimum Wage-Fixing Conventions and Recommendations. “The ILO considers that to meet the requirements of [the international labour standards] employers’ and workers’ organisations should be fully consulted. The existence of a formal consultation procedure is not sufficient to meet this requirement. Steps should be taken to ensure that concerns and arguments put forward by social partners are really taken into account”.<sup>30</sup>

## **DISPOSITION**

[42] In view of all the above considerations, this application is dismissed. Costs are reserved.

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**KEKETSO MOAHLOLI, AJ**  
**JUDGE OF THE LABOUR APPEAL COURT**

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<sup>29</sup> ILO “National Tripartite Social Dialogue” 219-20

<sup>30</sup> ILO “Minimum Wage Policy Guide” 25

**Appearances:**

Adv. Ms Rasekoai for Applicants

Adv. L Sephomolo for 6<sup>th</sup> Respondents

Mr T Mosotho for 1<sup>st</sup> to 4<sup>th</sup> Respondents