

Do legal frameworks direct merger outcomes? A study of the legal origins and consequences of recent higher education mergers

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ABSTRACT

This article traces the legal challenges and contestations embedded in five recent cases of higher education mergers in South Africa. I am aware that there are a number of forms of mergers. For the purposes of this article I use the term as one that is descriptive of a policy decision. Where necessary I make a brief distinction between a merger and incorporation. The article argues that although such mergers are founded in constitutional and legal imperatives, the process of merger is imbued with its own complexities and contests that influence the forms and outcomes of each merger. Legal frameworks and guiding principles are almost always up for dispute when mergers are contemplated, and such disputes can extend the time frames and alter the projected outcomes of a merger significantly. Legal frameworks include the Constitution of the Republic of South Africa Act (No 108 of 1996) and legislation and agreements relating to the merger process. These would include agreements between the merging institutions and collective bargaining agreements. In the two cases where the disputes have prolonged and, in one case, prevented the merger process from being completed, the stakes are high; there are long-term institutional and political relationships that could be decided at this juncture. What emerges in the analysis of these processes and outcomes is that in the context of higher education mergers legal frameworks are inadequate as an instrument to support the merger. Further, the feasibility of legal challenges and the wherewithal to declare them are closely aligned with the conception, distribution and extent of political and institutional

power. Exercising the right to issue a legal challenge is therefore rarely a purely legal matter. The capacity or failure to take legal action is closely intertwined with the power and authority of institutions to contemplate such action in the first place. The five merger cases from which this article is drawn are the voluntary merger between the ML Sultan Technical College (MLS) and the Technikon Natal (TN); the merger of the veterinary science faculties of the University of Pretoria (UP) and the Medical University of South Africa (Medunsa); the merger of the Johannesburg College of Education (JCE) and the University of the Witwatersrand (Wits); the merger of the Giyani College of Education (GCE) and the University of Venda (Univen) and the South African College for Teacher Education (Sacte) and the University of South Africa (Unisa). I draw on material presented in the five case studies published in a book on higher education mergers. Permission to use the material has been obtained from the authors, apart from myself, as contributors to this monograph entitled, Jansen J *et al* (2002). *Mergers in higher education: lessons learned in transitional contexts*. While the article will offer some description of each of the five cases, my central focus will be to illustrate the legal issues that emerged (or did not emerge) in each and offer some analysis of the consequences of such legalities on the merger process.

MERGERS CONCEIVED BEFORE THE HIGHER EDUCATION ACT OF 1997

I begin with the MLS and TN because the case distinguishes itself from the others given that the merger was a *voluntary* merger. In effect this meant

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that there was no legal compulsion and, at the outset, no legal framework within which the merger was set to proceed. The two institutions, one (MLS) historically set up to serve the "Indian" community and the other (TN) created for the white community, which had been built alongside each with literally a fence separating them, volunteered to merge with each other. This merger was unique also because it was the first proposed combination of higher education institutions in South Africa – a proposal that predated the advent of a post apartheid democracy and that was pursued when "massification" was on the agenda of the new government. When South Africa started on the road to democracy in 1990, one of the consequences of "freedom" envisaged by the education sector was a huge influx of students into the higher education system. This expectation was commonly described as the massification of the higher education system.

The first steps towards the merger of MLS and TN can be traced back to 1989 when talk of a "collaborative effort" was broached between the vice chancellors of the three technikons in the province of KwaZulu-Natal. Mangosuthu Technikon was originally involved in the talks on merging the technikons but chose to be excluded from the merger investigations. The Rectors involved at the time were Professors R Soni (MLS), A L du Preez (TN) and A J Vos (Mangosuthu Technikon) (Interview with Chetty 28 June 2001). These deliberations were reflected in a landmark document known as "the Oatsdale Minutes" (October 1990 Oatsdale House). However, given the political climate that existed at the time, one deeply entrenched in the apartheid ideology and which encouraged and enforced segregation along racial lines, these efforts did not amount to any substantive changes except, perhaps, to lay the foundation for the future.

The impetus provided by a change of government in 1994, witnessed a relaunch of the move towards collaboration between the technikons. In May 1996, both councils – together with representatives of Mangosuthu Technikon – met and committed themselves to a merger of the two institutions. This was followed by a period of "start-stop" actions because each of the parties in the merger (the two technikons) was embroiled in a range of highly publicised internal disputes and problems.

On the 19 February 1997, the two councils of the respective institutions held a joint meeting to discuss the possibility of amalgamation and agreed on a vision of a "single institution governed by a single Council" (Ncayiyana 2001., Installation speech. Kendra Hall, Durban, South Africa). Still punctuated by short and long "on again – off again" periods, concrete steps towards the merger of MLS and TN finally got back on track in earnest in 1999,

culminating in the adoption of the Merger Project Charter. A consortium of consultants (including PricewaterhouseCoopers (PwC), Participative Solutions Africa (PSA), and L H Kunene & Associates) was appointed to assist with the process.

The adoption of the Merger Charter by the stakeholders of both technikons signalled the end of Phase I of the merger process and the beginning of Phase II, which led to the establishment of task teams to deal with merger issues and integration in different areas. The Charter defined in detail the work to be undertaken in assessing the feasibility and options for merger, and outlined the terms of reference for the various task teams that would investigate areas such as curriculum, management information systems, student services, financial management and academic administration.

At the beginning of 2001, the process of merging proceeded in earnest with the two councils appointing a Committee of Thirteen persons (referred to as COT) to represent the joint council in all deliberations regarding the merger and in discussions with the national Department of Education (DoE). This signalled a turning point in the merger process and placed it on a serious path towards what the two councils had aimed to achieve. This body was the one that was going to bring the merger process to fruition. The COT, which may be regarded as constituting the major key players in the merger process, was made up of senior members of both councils, representatives of labour and the student body of both institutions. The merger between MLS and TN was officially inaugurated on 1 April 2002, culminating in the birth of a new institution, the Durban Institute of Technology.

A few months prior to the formalisation of the merger, however, a number of events transpired that almost prevented the merger from being implemented. Among other things, rumours of the financial deficit of TN began to surface culminating in the MLS unions writing to the Minister of Education, Professor Asmal, requesting that the merger be suspended "until such time as the financial matters are put right to the satisfaction of all parties concerned" (Letter dated 28 of February 2002 to the Minister of Education, Prof Kader Asmal from the chairpersons of staff unions based at MLS). The basis for such a request was that: "We have been misled into believing that the merger ... would be on an equitable basis as going concerns; we now know that there is a serious financial deficit at Technikon Natal that will negatively impact on us, the staff of ML Sultan Technikon, should the merger proceed in its present form on the 1 April 2002" (Ibid).

It was the latter part of the letter that had important pointers for what was to follow. It threatened that should the merger not be suspended, "we will resort to labour and/or legal action which will be to the

detriment of the learners and the Minister's vision ...". The unions kept true to their promise and brought an application to the Durban High Court in March 2002, just a few days prior to the finalisation of the merger, seeking deferment of the date of merger. Although the unions at TN had decided not to oppose the court interdict that was instituted by MLS's unions, they did not, however, share the belief that it was not in their interest. Also, the Council Exco of MLS decided not to oppose the court interdict on the understanding that, "[T]his should not be a matter that divides the Technikon community and we must uphold the right of any sector to seek the remedies it desires" (MLS Vice-Chancellor's Communiqué 27 March 2002).

This was to become one of the critical incidents in the merger process between the two technikons, resulting in a number of acrimonious confrontations between the different parties. Throughout the court process, the unions at MLS were at pains to emphasise that they were not against the merger, but rather had serious concerns about the timing, given a number of problems that they had with TN – particularly the state of TN's finances, and the lack of a due diligence report, and an audited financial statement for 2001 (which was only going to be available 15 days *after* the merger date).

Within the senior management and governance structures of the two institutions, other kinds of political contests were being played out. Among other things, once questions about the financial health of TN had surfaced there were indications from insiders to the merger process that the MLS Council had decided that the merger should be deferred. At around that time TN also made a blanket revision of their staff salary scales, prompting some in senior management to argue during the interviews that "Technikon Natal has not been negotiating in good faith". One of the senior managers at MLS, in frustration about TN's *modus operandi* regarding matters financial, went so far as to say: "This leads one to wonder what one is merging with You can't trust anybody at Natal Technikon these days" (interview with member of MLS staff March 2002). This sentiment emanated from a memorandum entitled "Revision of Conditions of Employment", addressed to all employees of TN from the Registrar: Human Resources, Mr D Mbatha, sent out on the 28 March 2002, just two days (if one counts 29 March which was a public holiday, and the 30, which was a Saturday) prior to the formalisation of the merger. According to this memorandum, "[T]he salary scales of all grades/ranks have been revised to bring them into line with ML Sultan and the National Market as at 1 July 2002". This issue was to become one of the sore points between the key players in general and employee unions of the two institutions in particular.

At this point the DoE stepped in. In addition to the grant of R3m that government had made available in

the early stages of the merger to facilitate the process, when the process seemed to be under threat, government provided a guarantee to offset the deficits (the bank loan of R30m that TN had incurred). This was not a gesture of goodwill but an *unambiguous message from government to conclude the merger*. What began as a voluntary merger was concluded by the force of the political might of government and the unstated imperative to keep the matter out of court.

Two points about the MLS/TN case need to be made. The first is that although the merger was not driven by a legal requirement, a guiding document, the Merger Charter, was drawn up to provide legal guidance for the process. In other words the merger had to take place within the framework of a mutually agreed, legally binding document. The external consultants functioned as the keepers of such a framework. The power of each institution to act was circumscribed by this legal frame. However, and this is the second point, the power of a legal framework becomes muted and to some extent irrelevant when more compelling political powers hold sway. At the point of crisis, when derailment of the process seemed at hand, government stepped in. The option of a legal route, while technically available, was neutralised. While noting that the legal and the political context prior to 1990 were not conducive to the merger process, the merger became feasible post 1990, not because the legal context had changed significantly, but *because the political will to merge dominated*. When the political will within the two merging parties was threatened by infighting, the dominant political will of government took over and presided over the conclusion of the process. It is at this critical juncture that the legal framework, which had served the process up to this point, became inadequate. What took over then was the supremacy of the most powerful player in the equation. In this instance the power took the form of government authority. In the case that follows power was described in ways more complex than that of hierarchy.

The merger between the veterinary science faculties of Medunsa and UP took root primarily in the government's desire, in this case both the Departments of Education and Agriculture which bore the cost of maintaining the faculties, to reduce the cost of providing veterinary science teaching in the country. The University of Pretoria (UP) is a historically white university with Afrikaans as the medium of instruction. The UP Veterinary Faculty was established in the 1920s and had served mainly the needs of urban pet owners. On the other hand, Medunsa was a relatively young institution (the Veterinary Science Faculty had been established in 1982), for black students and the medium of instruction here was English. Also, the teaching at Medunsa focused on the problems faced by rural livestock owners. The other significant difference was that despite the enormous costs of running a veterinary science faculty, the one at UP

was relatively financially viable because it was possible to cross subsidise at a well-endowed white institution, whereas Medunsa was an economically poor institution with meagre facilities.

Although deliberations on the possibilities of the merger began in the early 1990s, it was only in September 1995 after the DoE had assumed full financial responsibility for veterinary science provision, that merger discussions began in earnest. At this point there was no legal or constitutional imperative to propel the merger. As indicated, in the main the merger was propelled by the DoE's desire to reduce the cost of veterinary science provision. In May 1996, a task group comprising individuals from both institutions was set up to drive the process. By this time the Minister, Professor Bhengu, had also appointed a Select Committee to advise him on the progress of the merger. Three years later on 1 July 1999, the second Minister of Education under the changed political dispensation, Professor Asmal, officially inaugurated the new combined faculty at UP's Onderstepoort campus.

As indicated, there was no legal framework to support mergers when this process began. When the Higher Education Act of 1997 (The relevant sections of the Act (Sections 20, 21, 22 and 23) are attached as Appendix 1.) was promulgated, which provided the legal framework for mergers, most of the issues pertaining to facilities, personnel and finances had already been resolved. The only legal device that the process drew on was the Labour Relations Act of 1995, which was used to ensure that staffing matters were dealt with within the confines of the law. Early on in the process the DoE agreed with both institutions that staff would not lose their jobs. According to the legal advisor at the DoE the agreements made between the two parties were on the basis of consensus (interview with Eben Boshoff, the DoE's legal advisor). That consensus seems to have been achieved relatively smoothly is surprising, given the contextual differences between the two faculties. If it was not a legal framework that facilitated such consensus, then what did? In this case I suggest that the unevenness of the institutional powers of each institution was instrumental in the way in which the process unfolded. The superior facilities of UP, its financial viability (UP is arguably one of the richest universities in the country) and its long historical involvement with veterinary science teaching accorded UP a position of power in the negotiating process. There was no doubt that the Medunsa faculty would move to UP and that the cross subsidisation that UP could offer meant that the Medunsa students and staff would have the necessary means of continued survival. Medunsa's institutional power was further weakened because the faculty had no leadership to speak of and therefore entered the fray from a position of compounded weakness. Further, the eagerness of government to bring closure

to the process meant that there was little sympathy from government for Medunsa's vulnerabilities, despite Medunsa being a historically disadvantaged institution. In effect, it was not consensus, nor the guidance of a legal framework that facilitated the process, but the dominance of the institutional power commanded by UP that pushed the process forward. The semblance of consensus derives from the reality that Medunsa had no real power to speak of and therefore there was little notable articulation of dissatisfaction from Medunsa. On the other hand there was a visible demonstration of the power held by UP. When the first draft of the narrative was presented to the senior management of the UP Faculty of Veterinary Science the researcher who was studying this merger was called to an eight hour meeting in which she had to explain why she had made specific claims. It was only after the intervention of the Dean of the Faculty of Education, who drew attention to the validity of the research process, and after particular changes were made to the narrative, that the narrative was submitted for publication.

MERGERS GOVERNED BY THE HIGHER EDUCATION ACT OF 1997

The legal framework

The following three mergers were driven and legally framed by the Higher Education Act of 1997. One of the purposes of the Act was to restructure (in effect reduce) the size and shape, of the higher education system. Simultaneously, the Constitution of South Africa required that all institutions that provided higher education, that is, beyond Grade 12, were to become part of the higher education sector. This constitutional requirement had direct implications for the college sector, which had hitherto been a provincial competence. Prior to 1996 Higher Education fell under the competence of the national Department of Education. The provincial departments were responsible for general and further education.. In effect, colleges had to move to the higher education sector and the Higher Education Act of 1997 provided the mechanism for this.

The Act provided for three possible "merger" options. According to Section 21 of the Act, a college could be incorporated into a university and become a subdivision of the university. Section 23 provided for a merger between two institutions and the resultant creation of a new institution, as in the merger of MLS and TN. The third option (Section 24) provided for a subdivision of an existing higher education institution to be merged with another higher education institution. This was the route taken in the Medunsa/UP instance, although during the merger process, the Act did not exist. However, the Act was in place by the time this merger was completed. To facilitate the merger process the DoE developed *The incorporation*

of colleges into the higher education sector: a framework for implementation (June 1998). According to this document, Section 21 was interpreted to include the option of autonomy by an existing college. The “framework document” stated: “The incorporation of colleges of education into the higher education system will be undertaken in terms of two options:

- Incorporation into an existing university or technikon
- Establishment of an autonomous college of education, either as a single campus institution or as a multi-campus institution where autonomy will be vested in the institution as a whole and not in individual components or satellites”.

Two of the colleges in the cases identified, JCE and Sacte, initially pursued the option of autonomy. Neither was successful. At a meeting between the Rector of JCE and the DoE, the Rector was told by senior officials in the Higher Education branch of the DoE, “You don’t have an option Graham Hall, you’re going into Wits University” (interview with Graham Hall, Rector of JCE October 2001). After six months of pursuing this option, the college had to give it up. A similar message was delivered to the Rector of Sacte, this time in writing and by the Superintendent General of the provincial Gauteng Department of Education (GDE), when the College Council was told that autonomous colleges were “unsustainable” (letter from the Superintendent-General of the GDE to the Chairperson of the Sacte Council 4 October 1999). Despite the apparent legal space for this option, it was made clear by government that the economic and perhaps even the political space for such an option did not exist.

Another aspect of the Act that is also instructive in examining the power of the legal framework to guide the merger effectively is Section 20. This section of the Act indicated that only public higher education institutions declared under the Act were juristic persons. Theoretically this meant that colleges had no such legal status. According to the legal advisor at the DoE, colleges had “some sort of legal persona” but this could not be equated to a juristic person (interview with Eben Boshoff, legal advisor at the DoE July 2002). In effect colleges had much less legal authority going into a merger than universities or technikons. Furthermore, the term “subdivision” as used in Section 21 indicated that the incorporating entity would be part of the main body, the receiving institution, but would retain some level of authority. The incorporating entity may be likened to a limb of the receiving institution. The problem is that once incorporated, the Act ends its authority and it then becomes the institution’s responsibility to restructure as it sees fit, the institution being a juristic person. It is at this point that the “subdivision” status of the incorporating entity is open to reorganisation and

even obliteration by the receiving institution. In other words, once the college “joins” the university the authority of the Act ends. Technically, the university may then do as it pleases with what remains of the now non-existent college. It is arguable that the legal framework established to guide the process was essentially skewed in favour of universities and technikons and offered limited protection to the colleges. However, in the sections that follow I shall show (section 2.2, 2.3 and 2.4) that it was not the legal framework that advantaged or disadvantaged either the incorporating or the receiving institution. Instead the institutional and political power that surrounded each merger situation was far more instrumental in determining the outcome of the process.

The Act versus institutional authority and leadership

Contrary to intuition, JCE entered the negotiating process with Wits as the stronger entity. The college derived its superior strength essentially from three quarters. The college enjoyed a strong positive reputation as a teacher education provider. Historically, the college and the university had established and maintained significant academic links. The first principal of the college had been given an honorary professorship by the university and this practice had continued through to the present. Secondly, the college was financially well off, could boast excellent facilities and the show case-music auditorium of the country and home of the National Symphony Orchestra, the Linder Auditorium, was part of the college property. Finally, the leadership of the college was strong and went into the process determined to get the best possible deal for the college. The strength of the leadership was enhanced by the unity that developed among the college staff. Although the management led the negotiations, in the early stages there was ongoing consultation with the college community.

Without going into the details of the merger process, some of the critical incidents that illustrated the strength of the college are worth noting. In the early stages of the merger, the university was undergoing its own restructuring process. The college did not want the incorporation to be included in this process and insisted that the merger be treated as separate. A central concern of the college was that “if the university in its restructuring was to face problems of staff excess, that excess should not just be addressed simply through the college” (interview with Hall September 2001). Related to this was the demand that “the primary aim of incorporation ought to be the emergence of an entity focused on teacher education and educational research, and that such an entity be afforded a sufficient degree of authority to enable it to respond, without due encumbrance, to

unique challenges” (document containing concerns relating to the proposed implementation of Section 21 of the Higher Education Act, Johannesburg College of Education 12 June 2000). In short, the college was seeking some level of autonomy within the university. In doing so the college either consciously or unconsciously expressed awareness of the weakness implicit in Section 20 of the Act – once it merged with the receiving institution it could cease to exist, or have any level of autonomy and possibly be simply diffused within the receiving institution. In being proactive and making this demand to retain its identity within the receiving institution, the college sought to protect itself from the power that the Act accorded to the university. It could only take such a daring course of action if it held its own bargaining chips and if the leadership was strong enough to articulate and abide by this demand. The recognition of the implications of the Act was in itself a demonstration of good leadership.

Two other concerns were included in the memorandum sent to the university. These included the “use of the property, plant and educational resources [of the college] for the optimal provision of services to teacher education” and that the agreement between the two institutions should include a transition period (Ibid). At a College Council meeting it was agreed that should these concerns not be addressed to the satisfaction of the college, the college would then invoke, despite a verbal injunction from the DoE to merge with Wits, its right to explore an alternative merger partner. And this was a major bargaining chip that the college deployed. The Act did not and could not prescribe the institution with which the college should merge.

The university subsequently decoupled the restructuring and incorporation process, thereby giving the college more flexibility in negotiating its entry into the university. The decoupling also meant that it was then legally possible for the university to reduce its staff as a consequence of restructuring, while simultaneously incorporating some of the college staff. There was also agreement between the two institutions that the property on which the college resided would be used for teacher education and educational research only. The Memorandum of Understanding signed by the two institutions in January 2001 reflected these agreements pertaining to the use of the property and the transitional period. Other demands, for example, that the college retained its name in the transition period and that the college had its own lines of accountability separate from the university’s School of Education, were also acceded to in the Memorandum of Understanding. Having “won” these two major demands the college was back in the process – this time with a notable psychological advantage.

This psychological advantage became increasingly evident when it was agreed that the School of

Education would move to the college premises. The “home ground” advantage enjoyed by the college staff was poignantly felt by the School staff. They complained that they would be isolated from the main campus, would not have easy access to its facilities, would be marginalized and were concerned about the loss of academic status as persons perceived to be part of a college community as opposed to a university community. While the college staff faced uncertainty about their future employment, their concern with respect to the staff from the School coming to the college centred mainly on having to share office space with the School staff. (Staff concerns will be dealt with in detail in the section 2.4 which looks at the legal frameworks that governed the future of the college staff.)

Ultimately, the college got what it wanted. The Wits School of Education and the Johannesburg College of Education at Wits exist side by side on the college premises. This is the name of the new institution for the period of transition (three years). The college insisted on keeping its name and this was agreed to. The Rector of the college is accountable to the Dean of the Faculty of Humanities and not to the Head of the School. The authority of the college, at least for the three-year transition period has not been seriously affected. Three of the college staff were even awarded professorships at the university. In this case the college was merged with the university, not incorporated. The college functions as a subdivision of the university.

That the college could “take on” an enormous and powerful institution like Wits and that the DoE apart from a initial directive kept out of this merger process, in part bears testimony to the strength of leadership at the college and to the institutional power the college was able to command through its status in the community and the education sector. This is not to say, however, that Wits did not enjoy similar claims to institutional authority and recognition. Although all the college demands were acceded to by Wits, the university sought to win what it may have considered a more significant prize – the property on which the college was situated. I shall return to the issue of property settlements (section on “The Act and the property disputes”) later in this article.

Although the mergers of Sacte/Unisa and GCE/Univen were governed by the same legal framework (Higher Education Act of 1997, Sections 21, 22 and 23), the outcomes in these two cases were vastly different from those of the JCE/Wits case. My contention is that it was the nature of the leadership and the institutional power or lack thereof that determined the course of these two mergers.

The Sacte case was remarkable for one very striking feature – together with a handful of staff, the Rector of the college, Professor Wallace, actively opposed

the incorporation while other members of senior management and the rest of the staff went ahead with the process. In this incorporation there was no authoritative figure to lead the institution through the process. It is not surprising therefore that Sacte entered the incorporation from a position of extreme weakness.

Another distinguishing feature of this incorporation is that the Sacte/Unisa incorporation is probably the only one in modern history to have taken place with no written agreement binding the process. Four years since the merger process began there are only now rumours that an agreement has been signed to merge the institutions. The details of the alleged agreement are currently not available.

A further notable, if not unique feature of this incorporation, was that the incorporating institution, Sacte, had a significant number of students. Yet it did not enjoy any benefit of power or recognition resulting from such large student numbers. On the other hand, the university exercised the benefits of the traditional power and status that a university has over an education college. These three factors – the absence of leadership, the absence of an agreement and the absence of any power that could be ascribed to the college – were fundamental in shaping the outcomes of this incorporation.

On 4 October 1999, at an extraordinary Council meeting, Sacte formed a Council/Staff Task Team for the purpose of identifying a suitable higher education institution into which Sacte could be incorporated. Four months later the Task Team recommended that Sacte be incorporated into Unisa. The Rector officially opposed the motion at the Council meeting of 24 February 2000 and set about making his own representations to the DoE. He chose not to participate in any of the incorporation meetings, leaving this to other members of the senior management. One member of Sacte's senior management said that the first five to ten minutes of planning meetings between themselves and Unisa were inevitably spent on apologising for the Rector's absence. A further complication was that the Rector refused to participate in the Council/Staff Task Team. He wrote a number of letters to them raising his concerns and treated them as external to himself. But the Task Team was also answerable to him as Rector of the institution!

Towards the end of 2000 Professor Wallace made a submission to the Minister saying that meetings to plan the incorporation were not procedural (submission from the Rector and other signatories to The Minister of Education 17 November 2000). The Rector objected to meetings being conducted to facilitate the incorporation process during 2000. His argument was that the period between June 2000 and September 2000 had been set aside for responses

to the Minister's promulgation, in the newspapers, of his intention to incorporate Sacte into Unisa. He also pointed out that the notice of intent had been carried in English newspapers only and that it should have appeared in the Afrikaans newspapers as well. The Minister wrote a lengthy reply in which he showed why the planning meetings were part of the process of determining the feasibility of the incorporation. He also agreed to make the promulgation in the local Afrikaans newspapers and extended the period of response by an additional month. However the Rector was adamant and said that the Minister had "made a decision regarding Sacte's future, which would appear to have been communicated to GDE, Unisa and JET [at the time a non governmental organisation appointed to facilitate the process of the college mergers into universities/technikons], and you [the Minister] are, quite frankly, paying lip service to the consultative process" (Letter from the Rector and other signatories to the Minister of Education November 2000). In the same letter the Rector went on to say:

[w]e have taken legal advice, and we have been advised that against the backdrop of the statutory requirements with which you are obliged to conform, the publication in Afrikaans of the intended incorporation of Sacte into Unisa remains defective in that it does not provide the same period for responses as with the English publication, no reasons were given in the promulgation, and the lack of a participatory process renders your actions *ultra vires* (November 2000).

Nothing seems to have come of the threat of legal action. The DoE seems to have ignored the threat and the Rector did not pursue the issue. He did, however, continue with more threats to legal action, albeit on different "illegalities" with respect to the incorporation. Shortly after the official incorporation of the college, the Rector wrote to Unisa saying that the Sacte cars that were being used by Unisa personnel should be returned immediately. The Rector was politely informed that he was now part of Unisa and that it was not common practice to sue oneself.

Professor Wallace continued to refuse to cooperate with Unisa or with JET and maintained that he had not been officially or legally informed of the incorporation in the period before 31 January 2001. In a letter to the GDE he first granted permission for Unisa to install computer cabling in a Sacte building and subsequently changed his mind a few days later. According to Professor Wallace:

[t]he incorporation of Sacte with Unisa can only be implemented pursuant to the provisions of the Higher Education Act, Section 21, being completed. This is not the case at present. Your instructions may therefore be unlawful in that

they constitute an attempt to effect the implementation of the incorporation of Sacte with Unisa before all provisions of the ACT have been met (4 December 2000).

In the same letter he says that he will pursue legal advice on the matter. Nothing further seems to have come of this either and Unisa was eventually able to lay the necessary cables.

Interestingly this correspondence took place via the GDE and not directly with Unisa. According to officials from the GDE, Unisa and the DoE, Professor Wallace simply did not allow Unisa access to Sacte facilities and Unisa had to make repeated appeals to the Rector via the GDE or the DoE. Officials at both GDE and the DoE expressed frustration at the amount of time they had to spend answering letters from Professor Wallace and trying to mediate between what they saw to be Unisa's efforts to get on with the job and Professor Wallace's attempts at frustrating Unisa's efforts.

Professor Wallace's stance did nothing to improve the historically poor relations that prevailed between Sacte and the GDE. The less than amicable relationship between Sacte and the GDE was noticeable to all parties in the incorporation process. Tessa Welch of the South African Institute for Distance Education (SAIDE) said:

The GDE delayed and delayed and delayed. I mean there was one meeting ... where everybody came together. It was Sacte, SACOL [the South African College for Open Learning was also being simultaneously incorporated into Unisa] and Unisa ... and Nokuzola Moiloa [a senior official from the GDE who was responsible for overseeing the incorporation] came to the meeting. She was supposed to address it and spent the whole meeting saying, we've got a plan, but we are not going to tell you what it is (interview with Tessa Welch 12 February 2002).

In the same interview Welch went on to say: "One person in particular in the GDE made up her mind that Sacte had terrific facilities and had hidden away all kinds of assets, and that really they wanted to get their hands on that" (12 February 2002).

Given that Professor Wallace opposed the incorporation, that he effectively alienated himself from the staff, that his actions exacerbated relations between himself and the government both at national and provincial level, Sacte was ultimately a vulnerable pawn in this incorporation. Although, in the early stages of the incorporation there was a verbal understanding between the DoE and Unisa that aspects of the Sacte curriculum would be incorporated into Unisa, this did not happen. Even if this had been part

of a written agreement, Sacte would still not have had the means to enforce it. Ironically, in the Sacte/Unisa case, a number of threats of legal action were issued. Whether Sacte could function as a juristic person and proceed with such legal action was not tested. Indeed, prior to the incorporation, the Rector, with the support of the Council and the GDE, had instituted legal action against his staff association. The Rector did not act in an individual capacity but on behalf of the Council. This action had been reputed to have cost the college approximately R27 000 (telephone conversation with Dr Danie van Rensburg, a vice-rector of Sacte 22 October 2002). This may have been an expression of the legal persona which, according to the legal advisor at the DoE, some colleges enjoyed. What allowed some colleges to have such legal persona and not others is not clear. What is clear from Sacte's history, however, is that although it may have had the legal capacity to act, it had no institutional power or appropriate leadership to take legal action. Nor was it likely, given the political context, in particular the strained relations between the college and government that such potential legal action would have been allowed to continue. It took almost four years for the Sacte/Unisa incorporation to be finalised. The process was prolonged by the repeated threats of legal action and by the failure of those in authority (the GDE, DoE and Unisa) to reach an agreement. That the government took a back seat in the process even when it was clear that the process was fraught with difficulties; that the identity and culture of the incorporating institution was all but obliterated; and that despite the absence of visible leadership and a merger agreement, the incorporation went ahead, signals a clear message in this incorporation – that the incorporation would happen no matter what. In discussing the "property battles" that emerged in this incorporation, I will show that the Higher Education Act of 1997 effectively fell by the wayside and it was the really the vying for institutional power that determined the outcome.

In contrast with the Sacte/Unisa case, the incorporation of the Giyani College of Education into Univen was perhaps one of the speediest mergers in recent merger history. It took one year from the time that GCE was informed that it was to be incorporated into Univen (January 2000) and the official incorporation of the college into the university (January 2001). This may be attributed to the complete absence of institutional power on the part of the GCE. Unlike JCE, the Giyani College of Education was situated in a rural area of the Limpopo province; it was not financially well off; was a relatively young institution (established in 1989); and had no significant claim to a proud tradition of providing teacher education. Aside from a reputable teacher education programme, credited and overseen by Wits, GCE had no bargaining chips. The small number of students at the college (395 in the year preceding the incorporation) further

weakened the voice of the college. In addition, at the time of the merger the college had no leadership to speak of.

By February 2000, when the Minister of Education published a notice of his intention (as was prescribed by Section 23 of the Act) to declare GCE a subdivision of Univen, there had been no other contact, apart from a single visit from the Vice Chancellor, between the college and the university. The GCE expected to hear from the university regarding its proposals for the merger. Nothing was forthcoming. Nor was there any contact between with the college or the university with the Limpopo Provincial Department of Education (LPDE). Both the LPDE and the university suggested that more clarity was needed from the DoE. Clearly none of the institutions involved in the merger thought it was possible to take the initiative to move the process forward.

The college responded to the Minister's declaration of his intention to merge GCE with Univen, and pointing out that while they were prepared to support the merger process, the conditions that they set were that student and staff interests at the college should be protected. These demands were similar to those made by JCE of Wits. The conditions for the merger prescribed by the college were simply ignored. The Vice Chancellor indicated verbally that there would be vacancies that staff could apply for but this never materialised. The university showed no interest in the college curriculum but finally agreed to second some of the college staff in order help pipeline students complete their programmes. These were students from the college who would now become part of the university but who would still follow the college curriculum until 2003.

The students at the college felt they had much to lose. In the past their qualifications had been accredited by Wits, which was widely recognised as one of the elite institutions in the country. As the result of the merger their qualifications were to be accredited by Univen, an institution without a notable academic reputation. Students sent a letter to the Minister objecting to this change and said that they would refuse to be taught by staff from Univen and even threatened legal action should their diplomas not be endorsed by Wits. The net effect of this was to further sour relations between the university and the college. Not surprisingly, nothing came of the students' threat of legal action and there was never any indication on what legal grounds they would have pursued in this action.

In all their attempts to liaise with the university the college was simply met with silence. The president of the Students Representative Council (SRC) at Univen described the merger as that of "baptising a baby" (interview with SRC member from GCE 19 March 2002). The college staff were deeply insulted.

That the university could simply ignore the college demands meant that from the point of view of the university, the college did not warrant a response, that the college had no means to force the issue on the table and that the university did not feel any obligation to consult the college in the incorporation process. In the GCE/Univen case the merger was negotiated between the university and the LPDE with some intervention from the DoE. The GCE was never a player. The crux of the negotiations between the university and the LPDE was the issue of college property. The LPDE only used the "interests" of the college when it wanted to force the hand of the university on the property issue (see section 2.3).

In the Sacte/Unisa case and the GCE/Univen case, the colleges were effectively obliterated. They were incorporated and not merged. They did not become "subdivisions" of the receiving institution as the Act stipulated. Nothing of the college ethos, their curriculums or their staff assumed any significant space in the receiving institution. The opposite applied to the JCE/Wits merger. Arguably, this was a merger and not an incorporation and the college effectively became a "subdivision" of the receiving institution. Yet all three cases were governed by the same legal framework. I suggest that the differing outcomes in these mergers had everything to do with the strength of leadership in each instance and the institutional power commanded by each institution, and very little to do with the legal framework that was intended to guide each of these mergers. A possible counter to this suggestion is that neither of the two weaker colleges had the economic resources to take any form of legal action and were therefore economically far too weak to hold their own against the universities. However, the economic factor at play here is only part of the reality. It is unlikely given Professor Wallace's stance, that the college Council would have supported any proposed legal action or that he would have been able to act without the support of the Council. The University of Venda and the LDPE simply ignored GCE, not because the college was economically weak, but because neither the university nor the provincial government believed that the matter had much to do with the college. The concern of these two (Univen and Unisa) players (see section 2.3) was about the property on which the college was situated, and since the college did not own the college property, it was not really considered a player in the process.

The institutional power and strength of leadership at JCE was patent. The *absence* of leadership and institutional power at GCE and Sacte was equally patent. It is inevitable that these stark realities would influence the outcomes of these mergers. The legal framework that underpinned all three mergers could not override these realities and so deliver a more uniform outcome. Indeed, a legal framework only has power and effect to the extent that some other form of

authority (government or an institution) calls it into play and this is just what the Rector of JCE did. The Rectors of Sacte and GCE did not have the leadership or a supportive institutional authority to do so.

The Act and the property disputes

According to Section 22 of the Act the "assets, liabilities, rights and obligations of the [merging] education institution devolve upon the public higher education institution" (page 20). This Section further stipulates that the "immovable property devolving upon the public higher education institution ... must subject to the concurrence of the Minister of Finance, be transferred to such institution without payment of transfer duty, stamp duty or other money or costs, but subject to any existing right, encumbrance, duty or trust on or over that property" (page 20).

What the Act does not distinguish is between the *possession* of property and the *ownership* of property. Although the colleges possessed the property on which they were housed, they did not own the property. College property was often owned by the provincial department of education and usually administered by the Department of Public Works. Nor was there any clear understanding of the meaning of "assets" and "rights". In consultation with the DoE, the facilitating agency (JET) set out three possibilities that would guide the property issue in the merger process:

- "the province may transfer ownership of College property to the HEI [the receiving higher education institution];
- the province does not transfer property to the HEI but the HEI takes up its right of use of the College. (In this case the province could remain responsible for maintenance and administration of the property at its cost.) According to JET's guiding manual (8 September 2000:8), the legal opinion defined rights as 'those protected by law such as property rights, rights to leased properties or rights to use of property'. The college plant and property belonged to the province but was used by the college. The DoE's legal opinion emphasised 'the legal right which the colleges have to continue to use the assets' (JET's guiding manual 8 September 2000). Agreement must therefore be reached between the owner of the property (province) and the higher education institution on:
 - those parts of the property which the HEI will use;
 - the period during which the right to utilise the property will be exercised by the HEI;
 - the compensation (if any) for such right.

The province and HEI may agree that the property will not be transferred to or used by the HEI, that is, the HEI does not exercise its right of use option" (*The incorporation of designated colleges of education in*

higher education: a guiding manual. Joint Education Trust, 8 September 2000:8).

A central issue to be drawn from these guidelines, which applied to all three mergers discussed in this section, is that the transfer of plant and property was a matter of negotiation between the province and the receiving higher education institution. The provincial governments, through their respective Departments of Public Works, owned the college plant and property and not the provincial departments of education. For the DoE, it was crucial that the college plant and property be transferred to the receiving institutions where required. This (the plant and property) had been a central "bargaining chip" during the negotiations about incorporation. Legally, however, since the DoE did not own any of the property, it could not force provinces to transfer the plant and property. The prerogative for the transfer remained with the provinces in their negotiations with the specific receiving higher education institutions.

The LPDE, in a context of extreme lack of resources in the province, wanted to retain the plant and property of GCE for use as a centre for professional development. The Superintendent General and his Chief Director of Auxilliary Services had communicated this position to a JET facilitator.

The position was also communicated to the DoE in October 2000. Univen, on the other hand, expected to receive the GCE plant and property as part of the incorporation package. The result was an intense tussle over these resources.

The LPDE, through the Superintendent General, insisted on the retaining the GCE plant and property. The DoE put pressure on the LPDE for it to agree on the transfer. The Minister of Education wrote a letter, dated 10 October 2000, to the MEC of Education in the Limpopo Province, Mr Edgar Mushwana, urging him to act on the matter and asking for a "written approval of the transfer" within six days (16 October 2000). The LPDE, under pressure, agreed to the transfer of the GCE plant and property to Univen ("The incorporation of designated Colleges of Education in Higher Education: First report to the Department of Education" October 2000). But no action followed the agreement – the transfer did not take place.

A year later, in October 2001, the LPDE reopened discussion on the transfer of the college plant and property to the university. The LPDE asserted that the university had not fulfilled two obligations as required by the Minister's declaration notice. These were that the university was expected to have advertised and appointed college staff by June 2001, which had not happened. The second observation was that there were no signs that the college property would be used for teacher education.

A "Draft Memorandum of Understanding between the Northern Province Department of Education [NPDE – at the time of the merger process the Limpopo Province was known as the Northern Province] and the University of Venda [Univen]" on the incorporation of GCE (and Makhado College of Education) into Univen, seems to acknowledge the LPDE's changed position on the transfer of the plant and property (the exact date of the draft is not given but could have been written and discussed by the affected parties in November/December 2000).

The Memorandum states that: "... the University [Univen] will have the use of the facilities from the start of the 2001 academic year and that the plant and property of the Colleges [Makhado and GCE] will be transferred to the University on conditions to be mutually agreed upon by the two parties to this memorandum/on conditions already mutually agreed upon."

The Joint Education Trust drafted the memorandum for discussion by the LPDE and Univen. Although the memorandum was not signed at the time, it is believed that it had the support of both the LPDE and Univen (interview with Mr Matidza, Univen Registrar 22 February 2002).

Support of the draft memorandum notwithstanding, the LPDE and Univen had not agreed on the "conditions" which were "to be mutually agreed upon by the two parties" (see the above quote). Discussions on the conditions did not take place for almost a year. In the meantime, Univen believed that they would get the plant and property.

To date, there has been no agreement on the transfer (or non-transfer) of the plant and property. When discussion around the property issue was reopened in October 2001, the Superintendent General (SG) had the backing of the LPDE cabinet who had directed "the reopening of the negotiations", six months earlier, on 11 April 2001. Following the reopening of the property debate, a meeting between the LPDE and Univen was convened. No agreement was reached on the conditions of the transfer. On 18 January 2002, the SG, in a letter, to Professor Nkondo, Univen's Vice Chancellor, clarified his position on the transfer of plant and property:

It is not correct that the Colleges and assets have been transferred to the University of Venda because transfer of assets can only take place after a memorandum of understanding with the provincial Department of Education has been concluded [and that] Whilst it may be true that the former MEC transferred the assets to you [Univen], there is a provincial cabinet decision that assets cannot and must not transferred.

(The former MEC was replaced amidst serious allegations against him.) The cabinet decision cannot be superseded or reversed by an MEC.

In effect, the authority of the MEC was contested by that of the Provincial cabinet thereby adding further complexity and intrigue to the dispute. On 30 January 2002, the SG appointed Ms Sekgabutla, Chief Director of the Auxiliary Services, as a Task Team Leader and Facilitator in negotiations concerning the transfer. He also constituted a Task Team comprising a team from the LPDE, Univen representatives, a legal advisor and Mr Linden and Mr Madzhie the former Rectors of GCE and Makhado College of Education, respectively.

The establishment of the Task Team did not mean an end to the dispute over the plant and property. Nor did this action resolve the legal issues involved. Univen continued to insist on the transfer of plant and property while the LPDE wanted to retain it, but allow its shared use with Univen.

The former GCE (now Giyani Campus) was a pawn in this game but strongly supported the LPDE's position. It made a submission on 15 February 2002 to the Task Team outlining why the Giyani Campus should be retained for use as a centre for teacher professional development. At the time of writing, the activities of the Task Team had been suspended. Univen representatives had pulled out of the process and were soliciting the intervention of the DoE.

The state of events as described above illustrates the difficulty of reaching an agreement on plant and property in a context of limited resources. It also demonstrates the interactions of institutional power that operates between higher education institutions, government departments and senior political players in contexts of restructuring under severe resource limitations. Neither the university nor the LPDE is prepared to let go of the prize in this merger – the Giyani campus. And it is not the legal framework that will eventually settle the matter of who will occupy the Giyani campus. The legal framework has existed in all this time but has not been fundamental in determining the progress of discussion. Neither the LPDE nor the university have the resources to take the matter to legal arbitration. Eventually, either one of the institutions will probably introduce a factor that could shift the balance of power between the two institutions. Or the DoE may intervene on behalf of either one of the institutions. However, unless the DoE has sufficient force to direct the resolution one way or the other, the problem will remain. Ultimately, the existing legal framework will be used to the extent that it can serve the institution into whose favour power shifts.

In the case of the JCE/Wits merger the matter was resolved differently. While the university may have

proceeded with the merger in the belief that the valuable property of JCE would eventually devolve upon Wits, in the course of the negotiations GDE stepped in to claim the rights to the property. The GDE argued that according to the Act the "assets" did not include the property as this did not belong to JCE and therefore could not be inherited by Wits. One implication of this was that all the costs of transferring the property to Wits would have to be borne by Wits, as the Act would no longer be applicable if property belonging to GDE, and not the college, was given over to Wits. In other words, such a transfer would not be a consequence of the merger but would be a separate and new deal between the university and the GDE. The GDE interpreted the term "assets" to include the staff, students and the curriculum of the college but not the property.

When the JCE property became an obstacle in the incorporation process, political intervention at provincial level in the form of the Premier, and at national level in the form of the Minister, helped to facilitate the transfer of the property to Wits University. In the *Memorandum of Understanding* signed between Wits University and JCE the parties agreed to the following:

- that the GDE will transfer the ownership of the plant and property of the JCE facility primarily for the purposes of teacher education and other educational purposes.
- that the GDE will have full and unfettered utilization of the two top floors in the South West of the McGregor block for the purposes of running the examination function.
- that the GDE will be able to utilize the facility for a period of at least 15 years after which it will be reviewed every 5 years. The GDE will have the first option for the utilization of these facilities after each review (*Memorandum of Understanding* between the GDE and Wits regarding the transfer and the utilisation of the plant and property of the Johannesburg College of Education, 7 December 2000:1–2).

Ownership of the 26 plots that comprised the JCE campus is currently being transferred to Wits. Further, in the *Memorandum of Understanding* signed by the college and the university, two other significant agreements were reached with respect to the college assets.

- On the expiry of the period of transition, the JCE campus facilities and movable stock required for teacher education and educational research shall continue to be utilised for such purpose.
- All funds and reserves of the JCE shall devolve upon the university. The funds and reserves will be allocated to the provision and development of teacher education and the appropriate physical infrastructure. The University will take cognisance

of any recommendations made by the head of the College of Education ... including the intentions of the provision for the development of JCE staff to be employed by the University, the development of specified need in teacher education, the sinking funds, and special projects and equipment replacement required by teacher education.

The property dispute in this case was resolved, to some extent, to the satisfaction of the parties involved. The resources of the college were to be used for education, as the Act had stipulated and as JCE had requested; the GDE had right of use of parts of the property and the University inherited valuable property and assets, albeit for regulated use. However, this was only possible with the assistance and advice of the higher education branch of the DoE to Wits and the intervention of the Premier. Professor Bundy, Vice-Chancellor at Wits managed to secure a meeting with the Premier of the province during which the Premier promised that the property would be transferred to Wits. That the Premier could effectively intervene is instructive. In the JCE/Wits case all the players commanded significant political or educational authority. It was meant to be a showcase merger. Failure in this case would have sent a negative signal to other mergers that were simultaneously taking place. The Rector of the College indicated that according to Badsha, Deputy Director General of Higher Education at the DoE, "if it [the merger] cannot work with JCE and Wits University, it cannot work anywhere". In other words the intervention from the DoE in this case was a strategic political action that was meant to give a positive impression of the merger agenda and to simultaneously encourage other mergers to achieve amicable resolutions.

A more vigorous and perhaps acrimonious battle took place between the GDE and Unisa with regard to the ownership of the Sacte plant. The GDE, at the same time as the incorporation, was undergoing its own transformation and restructuring process. One of the implications of this process was that new sites for offices had to be identified in specific areas of the province. The GDE had earmarked the Sacte buildings as a site that it would use. On 14 September 2000, the then Superintendent General of the GDE, Mr Mallele Petje, informed Professor Melck at Unisa that the "GDE will retain the entire infrastructure of Sacte for use as a district office and tele-teaching resource centre" (4 October 2000). This announcement was obviously not well received. Unisa had read the Higher Education Act of 1997 to mean that the receiving institution would inherit the property of the institution being incorporated. The GDE opposed this interpretation and argued that the University was only entitled to the property that belonged to the College. The same argument as was used in the JCE/Wits case was presented here: Sacte buildings belonged to the GDE and not to the College. The legal interpretation was not put to the test since the GDE was adamant

that it would not let the buildings go and Unisa had decided that it did not really want the buildings because it already owned buildings in Pretoria that were not being fully utilised. Instead, Unisa decided that the vacant land that bordered the Sacte campus and the Unisa property would be far more useful. In order to negotiate effectively for this land Unisa had to meet with the University of Pretoria first. The way in which the University of Pretoria (UP) entered the fracas added a new twist to the property saga.

The UP became part of the picture of the Sacte/Unisa incorporation because it laid claim to parts of the property used by Sacte. The UP had incorporated the *Onderwys Kollege van Pretoria* (OKP), an Afrikaans college of education, in 2001. Both Sacte and the OKP had shared the same physical site. The two colleges had a common entrance to the campus and Sacte had used office space and laboratory facilities in the same building in which OKP had offices. Minutes of a Council meeting (17 March 1988) of the College of Education for Further Training (CEFT) (CEFT became the College of Education of South Africa (CESA) which became Sacte) indicate that in planning the building the third level was done according to CEFT (later called Sacte) specifications. It seems from the minutes that the *intention* was that CEFT (later Sacte) would “own” the specified rooms. It is unclear as to what extent this “ownership” was a legal one. When UP took over OKP the university informed Unisa that the facilities previously occupied by Sacte would be taken over by the University of Pretoria.

Towards the end of 2001 Unisa discovered that some of the buildings occupied by Sacte personnel had been transferred to the University of Pretoria:

Professor Melck (Vice Chancellor at Unisa during the period of incorporation):

Right at the end we discovered ... that the other building that had been used by Sacte was to be transferred to the UP. We didn't know that .

Interviewer:

How did you discover that the buildings had been given to UP?

Professor Melck:

When UP wrote to us and said “right its all been settled now. Can you please move out?” That's when we discovered that (interview with Professor Melck 22 March 2002).

After being informed, out of the blue, that not only would they not inherit the Sacte buildings, but that they would no longer have the space to service the “pipeline students” despite their assumption that they

would have use of the Sacte buildings for as long as there were “pipeline students”, and would have to find office accommodation for about fifty Sacte staff, Professor Melck convened a meeting with Professor De Beer from UP and Dr Mothata and himself from Unisa. The meeting took place on 22 March 2001. They agreed that Unisa would not claim the Sacte buildings, that it would bear the costs of moving staff out of the buildings that now belonged to UP and that as compensation Unisa would receive the vacant land on the border of the College property. The proposal was put to the respective Councils who agreed to the proposal (interview with Professor Melck 22 March 2002).

In an interview with a Deputy Director General at the GDE in December 2001, he said that an agreement about the plant and property had been reached but had yet to be signed. At the time he was not able to reveal the details of the agreement. The Deputy Dean of Unisa confirmed that a verbal agreement had been reached. By the end of August 2002 no agreement was in place. Currently, rumour has it that an agreement has been signed but no details seem to be available.

The failure to reach an agreement with regard to the plant and property used by Sacte was instrumental in making this incorporation the most long drawn out of the five cases discussed. The college had no part in the dispute despite the probability that possession and use of the Sacte buildings may have accorded some rights to the college. However, as at 31 January 2001 Sacte was officially incorporated into Unisa and had no legal standing of its own. In addition, the agreement, in the form of the Council minutes of CEFT (see above), may have implied that Unisa could have had a legitimate claim to the Sacte rooms housed in the UP buildings. This too was not taken up.

Again, the property disputes too were treated differently in each of the three cases. It is common knowledge that the property was used as a bargaining chip by the DoE in mooted the idea of mergers. As is common with “bargaining chip” agreements they are often verbal and hazy. To complicate matters, there was a feeling in the GDE that the DoE had no right to bargain with property that it did not own (interview with GDE official November 2001).

Despite this feeling the GDE behaved differently in the Sacte/Unisa case than in the JCE/Wits. The compulsion, in the form of the Premier and the Deputy Director General of Higher Education in the DoE to make the JCE/Wits merger work, is probably what underpinned the satisfactory resolution of property matters in the JCE/Wits case.

In the Sacte/Unisa case there was no equivalent compulsion. Taking the property dispute to court

would have, in all likelihood, meant exposing and even opposing the “bargaining chip” agreement in public. It would probably have been politically unwise for either the DoE or the GDE to allow such a scenario to unfold. It is not surprising therefore that now, almost two years after the incorporation, all that exists is a rumour of an agreement.

In all of the three cases described in this section what was fundamental in determining the way in which the property matters were dealt with was the political and power relationships that existed between the provincial government and the institutions involved. Such political and power relationships are instrumental in determining the feasibility of legal challenges. In other words, the wherewithal to issue legal challenges is closely aligned with the conception, distribution and extent of political and institutional power.

The Higher Education Act of 1997, the Labour Relations Act of 1995 the Public Service Co-ordinating Bargaining Council (PSCBC) and the college personnel

The future of the personnel employed at the colleges was a sensitive issue in which it became patently clear that legal frameworks may be severely limited. In December 2000, the Public Service Co-ordinating Bargaining Council (PSCBC), the body that debates and determines the employment conditions of public servants, produced an agreement indicating the course of action to be followed with respect to personnel that would be displaced as the result of a merger. The document, *Framework for the Management of Personnel in the Process of Incorporation of Teacher Education into Higher Education: Resolution 12 of December 2000* (PSCBC December 2000), allowed for three possibilities. The first was that personnel employed by the provincial education department could be redeployed within the province; the second was the option of a mutually agreed severance package. The third was that personnel could also be seconded to the higher education institution for a specified period. At the end of this period the redeployment or severance options would become operational. A fourth option that could be made available to personnel was to apply for a post at the receiving institution. This option was to be implemented, not by the provincial government, but by the *receiving institution*. The directive to the receiving institution was that all new posts created as the result of the incorporation had to be first advertised in a closed vacancy list made available to the personnel of the incorporating institution and subsequently in an open vacancy list.

In the main, despite much unhappiness on the part of academic and non-academic personnel, the provincial departments kept to their part of the agreement, albeit

characterised by slowness and inefficiency. It was the last option that caused much controversy.

In only one of the three mergers discussed here and to whom the agreements referred, was any effort made to follow the guidelines set out above. In the JCE/Wits case all the academic personnel were given an option to apply for posts within the university. Of the 85 academic staff at the college, 61 were employed by the university. The remaining 24 were either unsuccessful or had elected to take the other options available to them.

In the other two cases no vacancy lists were made available to the staff of the incorporating institution, although, in both cases, there had been talk of this in the early stages of the process. According to Dr Mothata, a Deputy Dean in the Faculty of Education who was part of the Unisa team responsible for overseeing the incorporation, Unisa was not party to the PSCBC Resolution 12 agreement and therefore not obliged to follow the directives in the agreement. Autonomous higher education institutions, like universities, are not part of the PSCBC. Their staff are employed by the institution and not by the State (interview with Dr Mothata 17 January 2002).

This was indeed an apparent legal loophole which gave Unisa the space to simply ignore the agreement. What the legal framework does not provide is an understanding of who could pursue any breaches in the agreement. One may assume that it is the PSCBC or the employer of the affected personnel. A further argument presented by Unisa was that their unions would not agree to this process of employment and would expect Unisa to adhere to its own internal procedures. In any event, neither Unisa nor Univen made a closed vacancy list available to the personnel of the incorporated institutions. And nobody said a word about it. A GDE official argued that universities are a national competence and that only the national department could deal with matters pertaining to the universities. The DoE said that college staff were the responsibility of the provincial department and it was therefore not the responsibility of the national department to follow up on breaches of the PSCBC Resolution 12 agreement. In short, nobody took responsibility for the implementation of Section 6 the agreement that made provision for higher education institutions to employ college staff. This rested purely on the goodwill of the receiving institution (interview with Colette Clark, senior official in the GDE 19 November 2001).

Given the strength of the leadership at JCE and its determination that the merger should in no way affect the provision of education negatively, it is unlikely that Wits would have attempted to ignore the PSCBC Resolution 12 agreement. It was clear that JCE had the financial resources and the appropriate leadership to take the matter to court if it had to come to that.

Furthermore if Wits had argued the non-applicability of the PSCBC Resolution 12 agreement to the University, then Section 197 of the which deals with mergers and acquisitions may have been drawn on to enforce some form of acceptable action from the university. This Section of the Act refers particularly to conditions and terms of transfer of employees when businesses are merged or transferred. The details herein indicate that the Act does offer substantial protection to employees at such institutions. The college would have been able to seek the protection of this Act should the university have ignored the PSCBC resolution. Enforcement of the Labour Relations Act of 1995 did not arise at JCE and the other two colleges apparently did not even consider seeking the protection of the Act. The PSCBC Resolution 12 came into effect in December 2000. By January 2001 the colleges had ceased to exist as separate entities. This meant that colleges themselves could not act on the higher education institutions' failure to implement Section 6 of the PSCBC Resolution 12 – the colleges were no longer a legal entity.

The analysis of the processes and outcomes of all the

mergers discussed in this article suggest that political contests play a much greater role than the law in determining the outcomes of each merger. This assertion is valid for the pre-1997 mergers as well as those precipitated by the Higher Education Act of 1997. In the MLS/TN and JCE/Wits cases in particular the political might of government was pivotal in shaping the outcomes. Similarly, the *absence* of such political might was notable in determining the outcomes of the Sacte/Unisa and the GCE/Univen cases. That institutional power and the presence of strong leadership can shift the power equation significantly is demonstrated in the differences of outcomes in the comparison between the JCE/Wits and the Sacte/Unisa cases.

Finally, to return to the question posed in the title of this article "Do legal frameworks direct merger outcomes?", the cases discussed in this article suggest that legal frameworks are inadequate as instruments to support mergers. Other factors, like political contests, the distribution of institutional and political power and the nature of prevailing leadership, are far more influential than the law in directing merger outcomes.

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