IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE, BHISHO

Case No.: 60/2011
Date Heard: 17 February 2011
Order Made: 22 February 2011
Made Available: 2 March 2011

In the matter between:

FEDERATION OF GOVERNMENT BODIES OF SOUTH AFRICAN SCHOOLS AND THREE OTHERS Applicants

and

MEC FOR THE DEPARTMENT OF BASIC EDUCATION AND ANOTHER Respondents

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REASONS FOR JUDGMENT

EKSTEEN J:

[1] This is an application for an urgent interim interdict to operate *pendente lite*. The application was fully argued before me on 17 February 2011. Subsequent to argument further heads were filed on behalf of each of the parties. By virtue of the urgency attached to the matter I made an order on 22 February 2011 and indicated that I would provide my reasons for the order at a later stage. These are my reasons.

[2] The applicants have instituted review proceedings in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). In the review proceedings the applicants seek the following order:

"1. That the Administrative action of the Department of Basic Education, Eastern Cape Province in its decision not to fill the aforementioned vacant substantive posts in public schools in the Eastern Cape Province or alternatively, in its failure to take a decision to fill such posts, be judicially reviewed and set aside in terms of section 6 of the PAJA; and

2. That the respondents be ordered to unconditionally take appropriate steps to fill the aforementioned vacant substantive posts by due process, described in paragraph 3.1 of the Personnel Administration Measures promulgated in terms of the Employment of Educators Act, 76 of 1998, such steps to be taken by advertising the relevant posts, within 10 days as from the date of service of the order granted herein; and

3. That the respondents be ordered to pay the costs of the application."

[3] The "aforementioned vacant substantive posts" to which reference is made in prayers 1 and 2 set out above refers to "educator posts which in 2010 were occupied by educators on a temporary basis in public schools in the Eastern Cape". The applicants allege that there were 6 282 such posts.

[4] The applicants further sought an interim interdict *pendente lite* which seeks to restore and to preserve the *status quo ante* as it was in 2010 pending the finalisation of the review proceedings instituted in this Court under case no. 60/2011.

[5] The relief in issue is an interim interdict. The courts would ordinarily grant an interim interdict if: (a) the right which forms the subject matter of the main application (the review application) and which the applicant seeks to protect is *prima facie* established, even though open to some doubt; (b) there

is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing the right; (c) the balance of convenience favours the granting of the interim relief; and (d) the applicant has no other satisfactory remedy. See for example ***Setlogelo v Setlogelo*** 1914 AD 221 at 227; and ***Gool v Minister of Justice*** 1955 (2) SA 682 (C) at 688.

[6] The applicants are required to establish on a balance of probabilities the facts and evidence which show the right relied upon. The right which the applicant must establish is a right which may be protected and which exists in law.

[7] The issue in the application is the substantive educator posts at public schools which in 2010 were filled on a temporary basis. The applicants allege that vacancies arise from time to time where an educator in a substantive educator's post at a public school resigns, retires, dies, gains promotion or is declared incapacitated due to ill health. The post is substantive because it falls within the approved post establishment and therefore, so the applicant contends, the school is entitled and indeed obliged to fill that post by due process because it has been considered essential for the proper functioning of the school.

[8] The applicants allege that the State has a duty to publish regular bulletins advising of such substantive posts as are vacant. The appointment process is then initiated and governing bodies conduct short listing and

interviews with prospective candidates and ultimately make recommendations to the second respondent who must then procure the appointment. The applicants content that the respondents have failed to perform these functions and accordingly with time some 6 282 substantive educator posts were filled on a temporary basis. In December 2010, so it is alleged, the respondents resolved not to renew any of these temporary contracts and accordingly not to fill these vacant educator posts in the Eastern Cape which had been occupied by educators on a temporary basis. In the circumstances, at the commencement of the 2011 school year some 6 282 educator posts were vacant. Hence, the application.

[9] The statutory framework

Section 29 of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution) provides that everyone has a right to basic education. This guaranteed right is a right to education which avails all learners as against the State. It is not a right which avails learners as against an individual school. The State accordingly has a corresponding constitutional obligation to provide such education. Education takes place by means of educators and accordingly the State has a constitutional obligation to provide educators so as to facilitate education.

[10] The legislature has enacted a number of statutes in order to give affect to this obligation. The South African Schools Act, 84 of 1996 (the Schools Act) was promulgated to provide a uniform system "for the organisation, governance and funding" of schools. It is immediately apparent from the

preamble to the Schools Act that the Act envisages a system for schools which will, *inter alia*, promote the acceptance by learners, parents and educators of responsibility for the governance and funding of schools in partnership with the State.

[11] In terms of section 16 (1) of the Schools Act the governance of every public school is vested in its governing body which may perform only such functions and obligations and exercise only such rights as are prescribed by the Schools Act. Section 16 (2) of the Schools Act provides that a governing body of a public school stands in a position of trust towards the school. The governing body must accordingly at all times act in the school's best interest. It must promote the best interests of the school and strive to ensure its development through the provisions of quality education for all learner's at the school. (Compare section 20(1)(a) of the Schools Act.)

[12] The primary obligation to provide educators rests upon the State. Section 20(4) of the Schools Act empowers a public school, pursuant to the obligations set out above, to establish posts for educators and employ educators additional to the establishment determined by the Member of the Executive Council (MEC) in terms of section 3(1) of the Employment of Educators Act (the Educators Act), 1994 to which I shall revert below.

[13] The structure of the Schools Act, as read in conjunction with the Educators Act sets out a number of obligations with which the State is required to comply in order to enable governing bodies to fulfil their functions

and discharge the duties imposed upon them in terms of, *inter alia*, section 20 and 16 of the Schools Act.

[14] In terms of section 5A of the Schools Act, the Minister may, after consultation with the Council of Education Ministers, by regulation prescribe minimum uniform norms and standards for school infrastructure, capacity and provision of learning and teaching support material. In respect of the capacity of public schools, with particular reference to the number of learners a school may admit, section 5A(2) of the Schools Act provides that the norms and standards must provide for, *inter alia*, the number of teachers and class size, the quality of performance of a school and the curriculum and extra curricula choices.

[15] Section 20(11) of the Schools Act authorises the Minister to determine norms and standards relating to the employment of, *inter alia*, educators additional to the establishment determined by the MEC, by public schools as envisaged in section 20(4).

[16] Section 34 of the Schools Act places upon the State an obligation to fund public schools from public revenue on an equitable basis in order to ensure, *inter alia*, the proper exercise of the rights of learners to education. Section 34(2) proceeds to place upon the State an express obligation to provide sufficient information to public schools regarding the funding referred to in sub-section (1) on an annual basis in order to enable public schools to

prepare their budgets for the next financial year. Advance notice is a pre-requisite for such preparation.

[17] Section 35 then proceeds to authorise the Minister to lay down norms and standards in respect of such funding.

[18] In terms of section 36 a governing body of a public school must take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners at the school. Governing bodies are accordingly obliged to take steps to improve the quality of education which they provides and to raise funds for this purpose.

[19] Section 58C of the Schools Act provides for measures to ensure compliance with these norms and standards. It places an obligation on the MEC in accordance with the implementation protocol contemplated by section 35 of the Intergovernmental Regulations Framework Act, 2005 to ensure compliance with the norms and standards determined, *inter alia*, in terms of section 5A, 20(11) and 35 of the Act (section 58C(1)). Section 58C(5) provides for the Head of the Department (HOD) to comply with all norms and standards contemplated in subsection (1) in a specific public school year by: "(a) identifying resources with which to comply with such norms and standards; (b) identifying the risk areas for compliance; (c) developing a compliance plan for the province, in which all norms and standards and the extent of compliance must be reflected; (d) developing

protocols with the schools on how to comply with norms and standards and manage the risk areas; and (e) reporting to the MEC on the state of compliance and on the measures contemplated in paragraphs (a)-(d), before 30 September of each year". This section therefore places upon the HOD a vital obligation to plan measures in advance which will ensure compliance. Of particular significance is that this section lays down in statute the deadline by which this function must be completed.

[20] Section 58C(6) of the Schools Act further provides that the HOD must:

> "(a) in accordance with the norms and standards contemplated in 5A determine the minimum and maximum capacity of a public school in relation to the availability of classrooms and educators, as well as the curriculum programme of such school; and
>
> (b) in respect of each public school in the province, communicate such determination to the chairperson of the governing body and the principal, in writing, by not later than 30 September of each year".

The availability of classrooms and the availability of educators is, of course, fundamental to the individual school's planning.

[21] The structure of the Schools Act accordingly provides for the Minister to lay down norms and standards in respect of various issues relating to public schools, including the number of teachers and class sizes (section 5A(2)(b)(i)), the appointment of teachers by the governing bodies of public schools (section 20(4)) and the funding of public schools (section 35). In addition to the obligation of the State, as set out in the Act, the governing bodies of public schools have an obligation to take all reasonable measures

within its means to supplement the resources supplied by the State in order to improve the qualify of education provided by the school to all learners at the school. The means by which it is empowered to give effect to this obligation placed upon it is by the appointment of additional educators pursuant to the provisions of section 20(4) of the Act. The decision of a governing body to employ educators may have a huge impact on school fees. For this reason section 20(9) of the Schools Act requires of a governing body, when presenting an annual budget to provide sufficient details of any posts envisaged in terms of section 20(4), including the estimated costs relating to the employment of staff in such posts and the manner in which it is proposed that such costs will be met.

[22] The budget must be prepared annually. According to prescriptions determined by the MEC it must show estimated income and expenditure at the school for the following financial year (see section 38(1)). Before such a budget is approved by the governing body it must be presented to a general meeting of parents convened at least 30 days notice for consideration and approval of a majority of parents present and voting (see section 38(2)).

[23] Clearly the need and desirability for the appointment of additional educators over and above the establishment determined by the MEC can only be considered once the establishment determined by the MEC is known. Once this is conveyed to each public school it is in a position to commence with the planning of its budgets, the raising of funds, the advertising of educator posts by the governing body, interviewing of candidates and the

recommendations for the appointments to the HOD as envisaged in section 20(1)(i) of the Schools Act.

[24] It is readily apparent that the structure of the system provided by the legislature for the organisation, governance and funding of schools in the Schools Act cannot be achieved unless the head of the department complies with his obligations in terms of section 58C(6) by advising each school of a maximum and minimum capacity in relation to the availability of, *inter alia*, educators, by no later than 30 September 2007. It is significant that the date of 30 September is not set as a target date in some policy document or regulation, rather it is stipulated by statute as the latest date by which the HOD must complete that function. If he does not do so the system breaks down.

[25] As I have indicated above education is provided through educators. The Educators Act ought therefore to be considered in conjunction with the Schools Act. The Educators Act provides for certain educators to be employed by the National Government and others by the Provincial Government. Section 3(1)(b) provides that the HOD shall be the employer of educators in the service of the provincial department of education in posts on the educator establishment of that department for purposes of employment. Section 5 provides for the educator establishment of a provincial department of education to consist of the posts created by the MEC (see section 5(1)(b)). The educator establishment of any individual public school under the control of the Provincial Department of Education shall, subject to the norms

prescribed for the provisioning of posts, consist of the posts allocated to the said school from the educator establishment of the department. It is this allocation which determines the availability of educators which is referred to in section 58C of the Schools Act and which must be conveyed to the schools in terms of section 58C(6) by no later than 30 September of the year preceding any school year.

[26] The norms and standards are set out in regulations published in Government Gazette R1676 and published on 18 December 1998 (as amended on 15 November 2002). Regulation 1 prescribes the manner for the determination of the educator post establishments of the Provincial Department of Education. Regulation 1(c) provides for the MEC to consult with unions in that province which are members of the Education Labour Relations Council and governing body organisations which are active in that Province and then to determine the Provincial post establishment having regard to the following:

(1) The budget of the Provincial Department of Education;

(2) The effect that the post establishment will have the employment security of educators;

(3) The need to redress the implementation and promotion of curriculum policy in keeping with the basic values and principles set out in section 195 of the Constitution;

(4) The fact that the division between expenditure on personnel and non-personnel costs in the budget should be educationally and financially

justifiable in accordance with national policy that may exist in this regard;

(5) The fact that the division between expenditure on educator and non-educator personnel costs in the budget should be educationally, administratively and financially justifiable and in accordance with national policy that may exist in this regard.

[27] It is immediately evident that the post establishment determined by the MEC is dependent first and foremost upon the budget and the number of posts which the budget is able to carry in the year of determination. On a proper consideration of section 5 of the Educators Act and the regulation it seems to me that it is not open to the MEC to create more posts than that which the budget can carry. The posts created are accordingly those budgeted for.

[28] Regulation 2 deals with the determination of educator post establishments of individual schools in terms of section 5(2) of the Educators Act. It requires of the HOD to determine the educator post establishment of each public school by:

(1) applying the post distribution model set out in Annexure A to the regulations; and

(2) by taking into account:

(a) the post establishment of the Provincial Department of Education as contemplated in regulation 1; and

(b) the need to redress the implementation and promotion of curriculum policy. The head of a provincial department of education must determine an annual programme in this regard after consultation with trade union parties to the LRC and the governing body organisations that are active in that province.

[29] The distribution model set out in Annexure 1 to the regulation provides for a large number of considerations to which the MEC is required to have regard to. Clause 8 of the distribution model provides further that where a school's establishment is likely to change in any school year, the adjusted post establishment should, as far as possible be communicated to the school on or before 30 September of preceding the school year. These regulations were promulgated in 1998. Section 58C of the Schools Act was introduced in the Schools Act by section 11 of Act 31 of 2007. I am accordingly of the view that the target date set out in the post distribution model annexed to the regulations promulgated in 1998 as amended in November 2002 has been overtaken by provisions of the Schools Act which prescribe 30 September of the preceding year as an inflexible deadline. This, as shown above, is essential if the system for the organisation, governance and funding of schools is to work

[30] In all the circumstances on a proper interpretation of the Schools Act and the Educator's Act in conjunction with one another the first respondent has an obligation to determine the provincial post establishment in accordance with the budgetary restraints. The second respondent has a

statutory obligation to determine the post establishment of each individual school and to convey such information to such school by no later than 30 September of the preceding year.

[31] The applicants' *prima facie* right

The applicants contend that they are entitled to review and set aside the administrative action of the Department of Basic Education in its decision not to fill the 6 282 vacant substantive posts in public schools in the Eastern Cape alternatively its failure to take a decision to fill such posts.

[32] The provision of the official post establishment for each individual school enables such a school to determine exactly how many educators have been allocated to the school and who will be financed in terms of their monthly remuneration and benefits, by the department. It will also enable the schools to determine which additional posts to create by way of "governing body posts" which educators will be employed by the schools as opposed to the department. The creation of the post establishment is a vital component of the administration of each school because it enables the school to determine its curriculum requirements and the manner in which those curriculum requirements can be met. Subject choices are also indicated by the post provisioning provided by the department in the form of post establishments.

[33] The facts which emerge from the papers viewed against the legislative background set out above do not bode well for education in the Eastern Cape.

[34] It is not in dispute that a large number of educators who occupied substantive posts declared in 2010 were appointed on a temporary basis. This occurred in consequence of the circumstances set out at para [7] above. All these educators occupied substantive posts on the post establishment within the system.

[35] It is further common cause that the first respondent did not determine a 2011 post establishment for the Eastern Cape prior to 30 September 2010. The second respondent too did not determine the educator post establishment for each individual school, nor did he advise schools of the availability of educators for 2011 before 30 September 2010 as he is required to do in terms of the regulations under the Educators Act and section 58C(6) of the Schools Act. Applicants allege that no schools throughout the entire province have received a post establishment for 2011. This they contend is a failure of the respondents' statutory duty with immense consequences for education in the province.

[36] I consider that by virtue of the provisions of clause 8 of the post distribution model to which I have referred in para [29] above which the second respondent is required to take into consideration in the distribution of posts, as read with section 58C(6) of the Schools Act, public schools were entitled to assume in their planning of additional educator appointments for 2011 and of their budgets that there would be no change in their post establishment in 2011.

[37] The second respondent denies that they were entitled to make this assumption. He refers to a letter addressed to the schools governing bodies on 13 September 2010. The letter reads as follows:

> "According to the school based educator post provisioning regulations the Executing Authority should by 30 September of every year declare a post establishment for school based educators for the following school year. This means that the MEC for Education is expected to have declared the 2011 educator post establishment by 30 September 2010.
>
> Due to circumstances beyond its control, for example, the strike action the Department has not been able to commence in time with the 2011 post provision consultation processes. As a result the Department will not be able to finalise the consultation process prior to the 30 September 2010. It is for this reason that the Department regretfully anticipates a delay in the issuing of the 2011 post establishments for schools.
>
> The Department is doing its best to ensure that schools receive their 2011 post establishments before the end of the current school year. Any inconveniences emanating from the delay are sincerely apologised for."

[38] The second respondent contends that it would have been abundantly clear to all governing bodies from the content of this letter that there was going to be a change in their post establishment for 2011. I do not agree. There is no indication at all in the letter of such an anticipation. To announce a significant change in the post establishment "at the end of the school year" would in any event, in my view, be in contravention of the provisions of section 58C(6) of the Schools Act. Schools are entitled to have such information prior to 30 September of the preceding year. The educational system as structured in the Schools Act fails if the respondents do not comply with their statutory

obligations in accordance with section 58C. This is so because of the considerations which the applicants have raised and which are set out in para [32] above.

[39] I pause to mention, however, that this letter contains an undertaking to ensure that the schools receive their 2011 post establishment before the end of the 2010 school year. This undertaking too was dishonoured.

[40] Against this background the temporary contracts of all those educators who occupied substantive posts on the official establishment of public schools in the Eastern Cape lapsed on 31 December 2010. The respondent did not renew these contracts nor have other educators been appointed in their stead. There is some dispute on the papers regarding the number of such educators. The applicant contends that there are 6 282 whilst the respondent contends that there are 4 471. The figure is not decisive. Either way it is manifest that an enormous vacuum was left in that many educators who had formed an important part of the planning of the delivery of education in the Eastern Cape public schools for 2011 would simply not be present when the school year commenced.

[41] On 31 January 2011 the Department of Education in the Eastern Cape convened a meeting of the unions and governing body organisations which was held in Bhisho. At this meeting it was announced that the first respondent had declared 69 390 educator posts for 2011 of which only 64 252 would be distributed. The applicants have no major quarrel with the declaration of

69 390 posts. This, as they were entitled to anticipate, appears to be the same figure as had been declared in the previous year.

[42] Two difficulties arise, however, from the announcement on 31 January 2011. Firstly, by virtue of the decision not to renew the temporary contracts of a vast number of educators and the failure to appoint other educators in their stead schools now simply do not have those educators and accordingly learners are, of necessity, prejudiced. By virtue of the manner in which these temporary educators came to be appointed the vacuum left by their departure is not evenly spread throughout the province and some schools, and therefore some learners, are harder hit than others. In the case of the second applicant more than 25% of its teaching establishment at the conclusion of the 2010 school year were employed on a temporary basis. At the reopening of the 2011 school year the second applicant has, *de facto*, simply been deprived of those posts on its establishment. The position of the third applicant is even more precarious. It had 11 out of 31 positions on its post establishment filled by temporary teachers. I am advised from the bar, by Mr ***Mbenenge*** on behalf of the respondents, that to fill such vacancies in accordance with the statutory and regulatory requirements would take three to four months. It follows that even if the second respondent were now to declare a post establishment for the second and third applicants, and indeed all other schools, which is identical to that which they had in 2010 they would still be without educators in those posts until at least the end of April 2011, after more than a third of the school year has already run its course.

[43] The second difficulty that arises is that the respondents resolved and have indicated that it is not intended to distribute all the posts which have been declared by the first respondent in terms of section 5 of the Educators Act and the regulations thereunder. This the respondents say is necessary as the budget cannot fund the distribution of all these posts. The implication hereof is self-evident – it will have a material impact on the post establishment of individual schools with, of necessity, in most cases a reduction in the substantive posts paid for from the departmental coffers. This announcement comes at a time where law abiding governing bodies have already determined their needs and complied with their obligations under the Schools Act in accordance with their post establishments as they existed in 2010.

[44] In these circumstances, without having given any notice to any of the public schools in respect of the post establishment for the schools for 2011, as the second respondent was obliged to do in September 2010, the department chose not to renew the contracts of those educators who were employed on a temporary basis in substantive educator posts at various schools throughout the province. The *de facto* effect thereof is that those positions were all vacant at the commencement of the 2011 school year and will remain vacant until the end of April, at best. The difficulty is compounded by the fact that second respondent is still unable to advise schools how he intends to distribute these posts. Schools therefore still do not know how many positions will be filled on their establishment in April.

[45] At best for the respondents 4 471 such positions have been lost. The disruptive effect of this decision which has the effect of removing those educators from the school system at the commencement of the 2011 school year is self-evident. It has a material impact on the right of learners to basic education guaranteed under the Constitution.

[46] The statutory structure provided for the delivery of education cannot succeed unless the respondents comply with the obligations set out therein. In order for schools to be able to perform their statutory obligations in terms of the Schools Act the information must be provided to them by no later than 30 September of the preceding year in order for them to proceed with their planning and preparation. It is not in dispute that as at the date of argument before me of this application no school in the Eastern Cape had received its post establishment for 2011. The post establishment forms the very basis from which their planning for the following year is to be determined.

[47] I turn to consider the respondents' response. The second respondent states in his answering affidavit that in order to avoid over-expenditure in 2010/2011 financial year and in line with the departmental financial turnaround plan it became incumbent upon the department not to fill all of the 69 390 educator posts which had been declared in respect of the province. The respondents contend that the challenge which the department faced in the preparation for the 2011 post provisioning/declaration was whether to retain the basket of 69 390 posts declared by the MEC, which could not be afforded, or to reduce the post basket to one which could be afforded. The

2011/2012 budget figures reflect, so it is alleged, that the department can afford 64 252 posts. The second respondent states that it has been determined that an establishment of 64 252 educator posts could accommodate 61 923 (who, as on 22 November 2010 were permanent educators) educators and protected temporary educators i.e. those who, in terms of the Provincial Education Labour Relations Chamber Collective Agreement 1 of 2008 (as amended) could not be appointed permanently but would be retained in the system until they obtain their qualifications. In these circumstances it is alleged that the department cannot reinstate or appoint the 6 282 educators whose cause is been championed in this case. To do so, it is alleged, would be contrary to the provisions of section 39 of the Public Finance Management Act, 1 of 1999 (the PFMA).

[48] The response avoids the real issues. In the first instance this argument ignores the fact that the MEC is required, in terms of the norms set out in the regulations when fixing the provincial post establishment to have regard first and foremost to the budgetary constraints. The provincial post declaration provides accordingly for that number of posts which the budget can carry. In the circumstances it is the number of posts provided for in the budget. The first respondent has declared 69 390 such posts. There is thus no possibility of infringing the PFMA.

[49] In any event to the extent that the financial predicament may justify a reduction of posts this may have been a cogent argument prior to 30 September 2010. It is the respondents' failure to comply with their

statutory obligations and the consequences thereof which is in issue. By 30 September 2010 the second respondent was required to advise all individual schools of the post establishment which would be available to them. This, as I have emphasised, is an essential communication in order to enable schools to discharge their statutory obligations under the Schools Act and to commence their planning in respect of curriculum, subject choices, additional educator appointments and budgets. The respondents explanation does not seem to me to be an argument which is open to the respondents in February 2011.

[50] Second respondent contends that the process to determine the post establishment commenced with the stakeholder budget workshop targeting educator labour unions and school governing bodies in East London during November 2010. This is some 6 weeks after the final date upon which the entire process ought to have been completed.

[51] Second respondents continues to suggest that the final post establishment would be made known on 2 March 2011, more than a month after the 2011 school year has already commenced. He records that the issuing of vacancy lists depends on the post establishment. In the circumstances it is alleged that the criticism that there has not been an issuing of a bulletin or circular advertising of vacancies which currently exist is premature. He offers this consolation that by April 2011, when a third of the year has already lapsed, the schools will have been provided with a 2011 post establishment and corresponding human resources. Costs which may be

incurred as a result of delays, the second respondent says, may be addressed by other mechanisms "the principle of these is the offering of extra classes, extension of school terms (reduction of school holidays) the transfer and/or secondment of educators to disadvantaged schools".

[52] The approach is cause for very considerable concern for the well-being of learners in the Eastern Cape. I consider that on the respondents own version a lamentable breach of their statutory duties has occurred. It is a breach which does indeed have immense consequences for education in the Eastern Cape.

[53] I consider that the applicants have established a strong *prima facie* right. The termination of the employment of such a vast number of educators prior to any educator post establishment for each school being considered and without reference to the post distribution model is in my view unlawful. It has not occurred in accordance with the empowering legislation and it lacks rationality.

[54] Mr ***Mbenenge***, on behalf of the respondents has urged upon me that the decision which the applicants seek to review does not constitute administrative action because it does not have an adverse effect on the applicants. This argument proceeds on the following passage in the affidavit of the second respondent:

> "I place on record that the distribution of 64 252 to public schools in the Eastern Cape will not result in learner's at schools being without educators. Nor will such distribution result in the applicable educator-learner ratio being compromised. The proclaimed average national educator-learner ratio is 1:35. Given the number of learners the Province over there is no indication that the distribution of 64 252 posts will result in a Provincial average of more than 1:35. On the contrary, indications based on the preliminary distribution, point to an educator-learner ratio of 1:30."

[55] The first feature of this explanation which is tendered after the commencement of the 2011 school year is that it is all cast in the future. The argument may have been worthy of consideration prior to 30 September 2010. It may also justify the reduction of the provincial establishment for 2012. Provided that each school is advised of its post establishment prior to 30 September 2011 this argument may be a cogent justification for a reduction in the school year for 2012. If this were conveyed timeously schools would then be in a position to plan their 2012 school year to meet their obligations accordingly. It does not at this stage assist the respondents.

[56] Apprehension of harm

As a fact schools in the Eastern Cape currently have an extraordinarily large number of vacancies on their post establishment. Their full establishment was legitimately used for the planning of the current educational year. On the respondents version there are 4 471 such vacancies whilst the applicants content that there are 6 282. As a fact there are a large number of learners who do no have educators at their disposal in certain areas of the planned curriculum.

[57] The current educational year is already well under way and as yet, on the respondents own version the respondent has not determined which of those vacancies it intends to fill. Once a decision is taken to fill a particular position it would be required to be advertised. At best, the respondent suggests that educators may be available in April of 2011 in respect of the 2011 school year. Counsel on behalf of the respondent advise from the bar that I should understand the allegation as referring to the end of April.

[58] Respondents proceed to state as follows:

> "29.2 With 64 252 educator posts, there should, following an equitable distribution, be no school or learners that are at the risk in not having the benefit of teaching from educators."

[59] The equitable distribution will not occur before the end of April 2011. Learners are currently being deprived of their right to basic education and the respondents appear to hold the view that this may be addressed at the end of April. This somewhat callous response is reaffirmed where second respondent reacts to the plight of second applicant with the cold comfort of an assurance that "second applicant's situation will be addressed at an appropriate stage".

[60] The test as to whether as reasonable apprehension of harm exists is an objective one. The question is whether a reasonable man, confronted with the facts, would apprehend the probability of harm. Actual harm need not be established. See for example ***Minister of Law and Order and Others v***

Nordien 1987 (2) SA 894 (A). I consider that the facts set out above clearly establishes not only an apprehension of harm but actual harm in that the entire scheme of educational planning for 2011 has been subverted by the respondents failure to discharge their statutory duties.

[61] I pause to mention that the respondents seek to justify this failure. They point out that there has been a change of management from one acting HOD to another. That may be, however, the Department can hardly seek refuge in its own disorganisation to justify its failures.

[62] They refer to labour unrest which respondents contend meant that the "atmosphere was not conducive to meaningful consultations" with the unions who must be consulted in the determination of the post establishment. Conspicuous by its absence is any allegation by respondents of any attempt to consult. There is no suggestion of any union having been unwilling nor of any invitation extended to them. I am not persuaded by his explanation.

[63] Balance of convenience

The third requirement for the granting of an interim interdict is that the balance of convenience must favour the granting of the order. This involves an exercise of weighing up the prejudice which the applicant will suffer if the interim interdict is not granted against the prejudice which the respondent will suffer if it is. The exercise of the court's discretion will usually resolve itself into a consideration of the prospects of success. The stronger the prospects of success in the main application, the less the need for such a balance to

favour the applicant; the weaker the prospects of success the greater the need for it to favour him. See for example ***Olympic Passenger Service (Pty) Limited v Ramlagan*** 1957 (2) SA 382 (D); ***Beechman Group Limited v B-M Group (Pty) Ltd*** 1977 (1) SA 50 (T) at 54.

[64] The consideration of the applicants *prima facie* rights which is set out above finds application to this debate. Clearly I am not at this stage in a position to prejudge the outcome of the main application, however, on the papers before me I am of the view that the applicants have good prospects of success in the main application. The harm which respondents allege it will suffer is financial in nature. I have indicated above that in fixing the provincial post establishment in terms of section 5(1)(b) of the Educators Act the first respondent is required to consider the financial restraints of the budget prior to determining the number of posts. I must accept that he did so and this consideration has therefore already found expression in the declaration of a number posts. I find no provision in the Act or the Regulations which entitles the first respondent or the second respondent not to distribute all the posts which the first respondent has created. The financial difficulties should accordingly not be attributed to the extent of the post establishment. In all the circumstances I am satisfied that the balance of convenience favours the applicants.

[65] No alternative remedy

The respondents have raised as a point *in limine* the provisions of section 41 of the Constitution. It is convenient to discuss this point under the

consideration of alternative remedies. Section 41 of the Constitution provides principles for co-operative government and inter governmental relations. Section 41(1) provides for all spheres of government and all organs of State within each sphere of government to, *inter alia*, co-operate with one another in mutual trust and good faith by, *inter alia*, informing one another of and consulting one another on matters of common interest, adhering to agreed procedures and avoiding legal proceedings against one another. Section 41(3) requires of such organs of State to make every reasonable effort to settle a dispute by means of mechanisms and procedures provided for that purpose and must exhaust all other remedies before it approaches a court to resolve the dispute. In terms of the provisions of section 41(4) a court may, if it is not satisfied that the requirements of subsection (3) have been met, to refer the dispute back to the organs of State involved. Mr ***Mbenenge***, on behalf of the respondents has urged me to refer the matter back in order to enable the parties to settle the dispute through co-operative measures.

[66] Section 41(2) requires an act of Parliament to be passed to establish and to provide for structures and institutions to promote and facilitate inter governmental relations and to provide for appropriate mechanisms and procedures to facilitate settlement of inter governmental disputes. Subsection (3), to which reference is made in subsection (4), deals with organs of State involved in an "inter governmental dispute". In the case of an inter governmental dispute such organs are bound to make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for

that purpose and must exhaust all other remedies before it approaches a court.

[67] Pursuant to the provisions of section 41(2) Parliament has enacted "the Inter Governmental Relations Framework Act 13 of 2005 (Framework Act). It is apparent from section 2(1) of the Framework Act that the Framework Act applies only to those "organs of State" listed in section 239(a) of the Constitution. Those listed in section 239(b) are therefore excluded. Section 239(a) defines an organ of State as being "any Department of State or administration in the National, Provincial and Local sphere of Government". It is in my view clear that the Framework Act finds no application to governing bodies of schools. The provisions of section 41(3) and (4) are aimed only at binding all departments of State and administrations in the National, Provincial or Local spheres of Government. Compare ***Ex parte Speaker of the National Assembly: in re Dispute concerning the constitutionality of certain provisions of the National Education Policy Bill 83 of 1995*** 1996 (3) SA 289 (CC) at para [34]; ***In re certification of the Constitution of the RSA*** 1996 (4) SA 744 at 858 para [291]. In these circumstances I do not consider that section 241 offers an internal remedy which ought first to be pursued.

[68] To the extent that section 241 may be considered to be an alternative remedy available to the applicants, as envisaged in section 7(2) of PAJA Mr ***Euijen*** on behalf the applicants has urged upon me to hold that exceptional

circumstances exist and I should therefore exempt the applicants from exhausting such internal remedy.

[69] The Schools Act aims to provide a national system for schools which will promote the acceptance of all learners, parents and educators of responsibility for the organisation, governance and funding of schools in partnership with the State (see preamble to the Schools Act). I have set out above the legal framework which underlies this national system. The current urgent situation which has arisen has arisen exclusively as a result of respondents' failure to comply with their statutory obligations under the Schools Act and the Educators Act. This failure has resulted therein that as at 17 February 2011 when the application was argued, the second respondent had still not determined the post establishment for any public school for the school year 2011, which commenced in January 2011. I consider that any material change to an individual schools post establishment as known on 30 September 2010 which may now occur would render it impossible for the governing bodies of such schools in the Eastern Cape to comply with their statutory obligations which I have set out above. The learners are currently being prejudiced through the absence of numerous educators and in these circumstances, even if section 41 of the Constitution is to be considered an internal remedy, I do not consider that it offers an alternative remedy which would adequately address the prejudice suffered by the applicants. In the circumstances I would exempt the applicants from compliance with such remedy to the extent that it might be necessary in terms of the provisions of section 7(2)(c) of PAJA.

[70] In all the circumstances I am satisfied that the applicants have indeed made out a case for an interim interdict pending the finalisation of prayer 1 in the review proceedings.

[71] *Locus standi* of fourth applicant

The respondents argue that the fourth applicant was party to an agreement in respect both of the fixing of the provincial post establishment and the decision to distribute the 64 252 posts of the total number of the establishment. For this reason is argued that the fourth applicant has no *locus standi* to participate in these proceedings.

[72] The fourth applicant contends that a significant number of its members are affected by the decisions of the respondents. The fourth applicant then continues to state in its founding affidavit as follows:

> "The implications of the Department failing to furnish post establishment for schools is significant. For example, many schools employ educators in addition to their post establishments. They do so with the view to providing quality education in terms of their duties enshrined in the South African Schools Act, 4 of 1996. Without the official post establishment, however, schools are unable to determine how many additional educators will be required. They are obliged to make these determinations on pre-existing post establishments, for example in respect of the year 2009. This means that schools whose learner numbers have escalated since 2009 become prejudiced because their parent bodies are obliged by way of school fees to pay for additional educators which ordinarily ought to be supplied by the Department ..."

[73] It is readily apparent from the affidavit that the fourth applicant does not approach the court to attack the decision to distribute fewer posts than the total number declared. The major concern of the fourth applicant is the failure by the second respondent to comply with the statutory obligations which require him to convey to each individual school the post establishment for 2011 so as to enable the schools to discharge their obligations. It approaches the court, in terms of section 38 of the Constitution, *inter alia*, on behalf of its members. It appears to me that members of the fourth applicant have a material interest in, amongst others, employment opportunities which may arise from "additional posts" which numerous schools in the province may be required to create from their own funds to supplement the declared post establishment. In the circumstances I do not consider that there is any merit in the attack upon the *locus standi* of fourth applicant.

[74] The form of the relief

The application is aimed at restoring and preserving the *status quo ante* as it was prior to the decision which the applicants seeks to review, namely, the decision not to renew the temporary contracts of educators who were employed in substantive educator posts. The application is aimed therefore at ensuring the continuation and preservation of tuition in public schools in accordance with the planned strategy set out in the Schools Act pending the finalisation of the review proceedings. Mr ***Mbenenge*** on behalf of the respondent, has urged upon me that the order in the form in which it is sought cannot be granted as the 6 282 educators who were employed on a temporary basis are not before court. He argued that such educators have a

direct and substantial interest in the issues involved and the order in which the court might make.

[75] In this case, the relief is of an interim nature which serves merely to protect the *status quo ante* pending the finalisation of the main application. Mr ***Euijen,*** on behalf of the applicants, has argued that the individual educators have no direct and substantial interests in the relief sought. The order which is sought, and which has been granted, does not seek to compel the individual educator to take up its position, what it does do is to compel the respondents to extend the contracts which existed prior to the 31 December 2010. Any individual educator is at liberty to decline to enter into the contract or to resign in precisely the same manner as each individual educator would have been entitled prior to 31 December 2010. It is argued that it is required on behalf of the respondents is to make such contracts available to educators previously employed on a temporary basis in substantive posts.

[76] The argument on behalf of the respondents, in my view, overlooks the nature of the application. The first applicant declares in its founding affidavit that it approaches the court in terms of section 38 of the Constitution as a person entitled to "appropriate relief" in a competent court alleging the infringement or threatened infringements of rights enshrined in the Bill of Rights and which entitles it to "appropriate relief". The affidavit continues to record that the first applicant is a person entitled to represent the interests of others (in the form of its members) as also acting in the public interest.

[77] The fourth applicant is similarly cited as a person entitled to represent the interests of others (in the form of its members) as also acting in the public interest. It too approaches the court in terms of section 38 of the Constitution. The fourth applicant's members are educators.

[78] The report on the recognition of class actions and public interest actions in South African Law (Project 88 published in August 1998 para 2.2.1) is instructive. It defines public interest action as follows:

> "A public interest action is one brought by a plaintiff who, in claiming the relief he or she seeks, is moved by the desire to benefit the public at large or a segment of the public. The intention of the plaintiff is to vindicate or protect the public interest, not his or her own interest, although he or she may incidentally achieve that as well."

[79] In ***Ngxuza and Others v The Permanent Secretary, Department of Welfare, Eastern Cape*** 2001 (2) SA 609 Froneman J noted that the introduction of section 38 of the Constitution introduced far reaching changes to the common law of standing. There was no justification, he held, particularly in relation to so-called public litigation, for a restrictive interpretation of the section: a wide range of persons might be affected by the litigation and the emphasis would often not only be on redressing past wrongs but also on ensuring that the future exercise of public power was in accordance with the principle of legality. See ***Ngxuza and Others v The Permanent Secretary*** (*supra*) at 618I-J; 619D. Clearly, all persons who are

affected by the litigation cannot always be parties to the litigation. That is the very nature of public interest litigation.

[80] Froneman J went on to hold as follows:

> "Mention has already been made that the Constitution provides that the courts have a policing role to ensure that public power is executed in accordance with the principle of legality. It also declares ours to be democratic state (section 1). One of the foundations of democracy is that those who are chosen to rule must be accountable to those they govern. The Constitution recognises that as a founding value of our democracy (section (1)(d)). It also recognises that modern societies need to be run by persons other than those directly elected by the people. Those in public administration must accordingly also be subject to foundational values of democracy, otherwise the promise of democracy may become an illusion. ... The fundamental importance of accountable public power is emphasised in the Bill of Rights Chapter of the Constitution by providing that everyone has the right to administrative action that is lawful, reasonable and fair (section 33). And the courts are the final instruments to ensure the accountability of the exercise of public power (section 34 and 165). In this way the courts become an indispensible instrument of democracy as far as public administration of the country is concerned."

See ***Ngxuza and Others*** (*supra*) p. 620F-G to 621A.

[81] Finally Froneman J states in the same judgment at p. 626:

> "What cannot be allowed, however, is the unlawful deprivation of these rights by way of administrative stealth. The Constitution forbids that and has made the courts the democratic guardians to prevent that from happening."

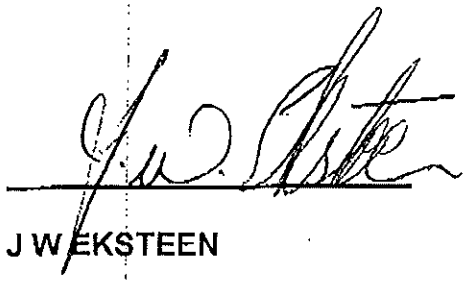
[82] Mr ***Mbenenge*** argues that the relief sought cannot be granted because the 6 282 educators are not before court. On the other hand he has

submitted that substitute educators cannot be appointed in these positions at short notice as positions would have to be advertised, applications sifted, candidates interviewed and recommendations made by governing bodies. This I am advised would take 3 to 4 months. It seems to me that the cautionary note sounded by Froneman J in respect to administrative stealth, to which I have referred, is of application.

[83] All things considered I think that there is considerable force in the submissions made by Mr ***Eulljen*** in this regard. The order which was sought and in particular the order which I have made, does not bind any of the educators. They are not ordered to perform any act in consequence of the order. They remain at liberty, as they were prior to 31 December 2010, to decline to accept an extended contract or resign if they so please. The order merely restores the *status quo ante* and requires of the respondents to extend the contracts of the incumbent educators as they were in December 2010. In the circumstances I consider that the applicants have made a case for the order sought.

[84] Conclusion

For the reasons set out above I made the order which was delivered on 22 February 2011.



J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicants: Adv Euijen instructed by Messrs Michael Randall Attorneys, Port Elizabeth

For Respondents: Adv Mbenenge, SC instructed by State Attorney, East London