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Date : 04 September 2008

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In the matter between:

**MAKGATO & 2 OTHERS** Applicant

versus

**CYNTHIA NOMEITI WITBOOI** Respondent

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ADVOCATE:

S A COLLETT

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BRIEF:

NOTE JUDGMENT TO BE DELIVERED ON THE  
10<sup>TH</sup> SEPTEMBER 2008 AT 09H30

Won!!

CONTINGENCY (UNEMPLOYED FOR 2 YRS)

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FEES: 5000

Crisp

MEMORANDUM: ~~Coram Dithelo~~ AJ.

Application dismissed with  
costs.

Administrative action 1:to 14(1)  
reviewed & set aside.

Extension 1:to PAJA granted etc

SCOLLETT

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RANDELL - OSWALD INC

33 Bird Street

Central

PORT ELIZABETH

TELEPHONE: 041-5859244

(REF. MR M W RANDELL/WIT 5/0001)

10/09/08.

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BRIEF PREPARED BY: L CLARKE



**Advocate  
SA Collett**

45 Panorama Drive  
King William's Town  
5601

Phone: 043-643 4288  
Fax: 086-680 9464  
Cell: 083 381 8137  
E-mail:  
adv sac@gamdak.co.za

**Randell-Oswald Incorporated**  
33 Bird Street, Central,  
Port Elizabeth

**08/129**

**Attention: Mr. M.W. Randell**

**TAX INVOICE**

**VAT NO. 4620229734**

**RE: MAKGATO & 2 OTHERS v C N WITBOOI (Case no. 940/2007)**

10/09/08 Note judgment

+ 14% vat

R	500.00
R	<u>70.00</u>
R	570.00

(REF. M W RANDELL/WIT 5/0001)

**IN THE HIGH COURT OF SOUTH AFRICA**

**BHISHO**

**CASE NO. 940/2007**

**In the matter between:**

**JOHNY MAKGATO**

**1<sup>ST</sup> APPLICANT**

**NOMLAMLI V. MAHANJANA**

**2<sup>ND</sup> APPLICANT**

**NOSIMO BALINDLELA**

**3<sup>RD</sup> APPLICANT**

**And**

**CYNTHIA NOMEITI WITBOOI**

**RESPONDENT**

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**JUDGEMENT**

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MBANJWA AJ

A. INTRODUCTION

1. The Respondent instituted an application under Case No. 275/2006 of this court against the MEC for Education, Eastern Cape Province. On the 29 June 2006 she obtained an order against the MEC in the following terms:  
“1.1 To consider the applicant’s request for a transfer in terms of section 8 of the Employment of Educators Act, 76 of 1998 to another educator post; and  
1.2. Consider the applicant’s request for special sick – leave as envisaged in paragraph 9 of chapter J of the Personnel Administrative measure promulgated in terms of the Employment of Educators Act, 76 of 1998”

2.

2. There was non-compliance with the afore-mentioned order and accordingly the Respondent hereto brought an application for compliance under Case No 36/2007 against the Premier of the Eastern Cape, the member of the Executive Council of the Department of Education, Eastern Cape Province and the Superintendent General of the Department of Education, Eastern Cape Province. The Respondent obtained an order on the 15 March 2007 in the following terms:

- “2.1 The first to third Respondents are to take all administrative and other step necessary to ensure that the Eastern Cape Government complies with paragraph 3 and 4 of the order of this Honourable Court in Case No. 275/06 granted on 29<sup>th</sup> June 2006 within sixty (60) days of this order;
- 2.2 The first to third Respondents fail to comply with paragraph 1 above the Applicant is given leave to supplement her Notice of Motion and Founding Affidavit and to enroll this application on reasonable Notice to the Respondents for a further hearing on and determination of such further relief as the applicant may seek; and
- 2.3 The First to 3<sup>rd</sup> Respondents are to pay the costs of this application jointly and severally the one paying the other to be absolved ”

3. Because there had as yet been no compliance with the two (2) orders referred to above, the Respondent supplemented her papers on 19<sup>th</sup> July 2007 and

3.

instituted contempt proceedings against the applicants for failure to comply with the said orders.

4. Despite the orders as aforementioned and more particularly the order granted on the 29<sup>th</sup> June 2006, the Second Applicant sought to terminate the service of the Respondent in terms of section 14 (1) (a) of the Employment of Educators Act 1998 instead of complying with the court order. The Respondent on the other side has also brought a counter application requiring that the second applicant's action be judicially reviewed and set aside.

5. The Applicants are now in their main application seeking an order in the following terms:

“ 5.1 Setting aside the orders of this Court dated 29<sup>th</sup> June 2006 and 15<sup>th</sup> March 2007.

5.2 Alternatively, declaring that the said orders are incapable of compliance and that the applicants are, accordingly, absolved from compliance therewith.

5.3 Directing Respondent to pay costs of this application

5.4 Granting applicants such further and / or alternative relief as Court deems fit.”

6. The applicants are Mr Johny Makgato, Nomlamli Mahanjana and Nosimo Balindlela, the first Applicant being a member of the Executive council responsible for the Department of Education in the

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Province of Eastern Cape, also deposes herein on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants.

7. This application relates to the orders of this Court granted in favour of the Respondent on 29<sup>th</sup> June 2006 under Case No. 275/06 and on 15<sup>th</sup> March 2007 under Case No 36/07 that were never complied with by the applicants.
8. The first applicant in his affidavit, in support of the application, avers that the Respondent brought an application out of this Court under Case No.275/2006 against the MEC for Education, Eastern Cape Province:
9. On 29<sup>th</sup> June 2006 the Respondent obtained the order requiring the said MEC to consider:
  - “9.1 The Respondent’s request for a transfer in terms of section 8 of the Employment of Educators Act, 76 of 1998 to another educator post; and
  - 9.2 The Respondent’s request for special sick-leave as envisaged in paragraph 9 of Chapter J of the Personnel Administrative Measure promulgated in terms of the Employment of Educators Act, 76 of 1998.”
10. Again on the 19<sup>th</sup> January 2007 the Respondent brought another application under Case No. 36/2007 against the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Applicants, in this Court

11. The Respondent obtained the order in the following terms:

- “11.1 The first to the third Respondents are to take all administrative and other step necessary to ensure that the Eastern Cape Government complies with paragraph 3 and 4 of the order of this Honourable Court in case no. 275/06 granted on 29 June 2006 within sixty (60) days of this order.
- 11.2 The first to third Respondents fail to comply with paragraph 1 above, the applicant is given leave to supplement her Notice of Motion and Founding Affidavit and to enroll this application on reasonable Notice to the Respondents for a further hearing on and determination of such further relief as the applicant may seek and
- 11.3 The first to 3<sup>rd</sup> Respondents are to pay the costs of this application jointly and severally the one paying the other to be absolved.”

12. There had not been compliance with these two (2) orders and on the 19<sup>th</sup> July 2007 the Respondent instituted contempt proceedings against the applicants for failure to comply with the said orders.
13. These are material facts that have given rise to this application and which are by and large common cause.
14. The first applicant further avers that he only became aware of the events detailed above on the 25<sup>th</sup> July 2007 when he had to depose to an affidavit opposing the contempt proceedings. The first applicant blames the officials of his Department, namely, MNCEDI NXABA, SARAH MKUPA, ANDISWA NTSOMI, LWAZIKAZI DIMBAZA, THABISO M PITYANA and NYAMEKA TOKWE who all have deposed to affidavits herein. The first applicant said that had he become aware of these orders earlier he would have taken the necessary steps to comply with the orders of 29 June 2006 and 15 March 2007. He further said that he was not aware of the history and details of the dispute between the respondent and his Department.
15. According to the first applicant that the two orders have still not been complied with, is not as a result of a useful disregard of this Court's orders His department, on 26 September 2006 invoked the provisions of section 14 (1)(a) of the Employment of Educators Act 76 of 1998 and consequently



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no longer regards the Respondent as its employee. The Respondent is contesting the invoking of the provisions of section 14 (1) of the EEA. The Respondent alleges among others that although she was indeed absent from duty she had in fact submitted sick leave forms to her principal.

16. Section 14 (1) (a) of the Employment of Educators Act 76 of 1998 provides;

“An educator appointed in a permanent capacity who –

(a) is absent from work for a period exceeding 14 consecutive days without permission of the employer

(b).....

(c).....

(d).....

shall unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct ---’

17. The applicant deposed to the effect that since September 2006 the respondent is no longer an employee of the Department whatsoever. The two (2) orders obviously proceeded from the premise that the Respondent was an employee of the department. To him it is surprising that the Respondent brought the application on 19 January 2007 when he was fully aware that she was no longer an employee of the Department. The applicants bring this application

to set aside the two (2) orders by means of either the Rules, the common law, or inherent power.

18. From the affidavits of the following officials it is quite clear that the order of 15 March 2007 was served on the department of the applicants. These officials are MNCEDI NXABA, SARAH MKUPA, ANDISWA NTSOMI, LWAZIKAZI DIMBAZA and THABISO MIRANDA PITYANA. Mr Mncedi Nxaba is attached to the shared legal services section of the Department of Education. He received the order of the 15<sup>th</sup> March 2007 from Ms Tokwe and placed it on Ms Pityana's incoming correspondence tray during the period of the 2<sup>nd</sup> to 7<sup>th</sup> May 2007. He confirmed further that he did not bring the order to the attention of the third Respondent. He had no recollection of receiving the order of the 29<sup>th</sup> June 2006, however he does not deny receiving it. He has no record of it anywhere. He says that upon receipt of it he would have forwarded it to them as legal administration officers, especially Ms Pityana as he is handling the matter. He does not take court orders to the office of the second applicant's office.

19. Sarah Mkupa is the administration officer in the Department of Education attached had to the Shared legal services section of the said Department. She received the court order of the 15<sup>th</sup> March 2007 and brought it to the attention of Ms Pityana in the incoming tray and never brought it to the attention of the

second Respondent. Andiswa Ntsomi is the Administration Clerk in the office of the Superintendent General for the Department of Education

She received the court order of 15<sup>th</sup> March 2007 and passed it to Miss Tokwe as she used to do. She never brought it to the attention of the third Respondent but to her personal assistant.

20. Lwazikazi Dimbaza is the Registry Clerk in the office of the MEC for the Department of Education. She received a copy of the court order of 15<sup>th</sup> March 2007 and passed it to Sarah Mkupa in the legal services section of the said Department and not to the attention of the second Respondent.

Thabiso Miranda Pityana is a legal administration officer in the Department of Education in the Eastern Cape. According to her the afore-mentioned officials, the second and third Respondents did not become aware of the existence of the orders of 29<sup>th</sup> June 2006 and 15<sup>th</sup> March 2007 prior to the institution of the contempt proceedings. Ms Tokwe has not deposed to an affidavit herein. Ms Pityana has been handling this matter from its inception in 2006. Legal services section is handing litigation of the Departments. The legal services section follows up all matters of litigation. The order of 29<sup>th</sup> June 2006 did come to the attention of Miss Pityana.

21. After the order of 29<sup>th</sup> June 2006 was assigned to Miss Pityana, she contacted telephonically the district manager's office and spoke to one Mr Kweyama, the

deputy director of Human Resources Administration. Mr Kweyama undertook to collect the application papers from Miss Pityana's office on 19<sup>th</sup> May 2006, and he did not do it on the said date. On 19<sup>th</sup> May 2006 Miss Pityana sent the application papers to the District office by telefax for the attention of the District manager, who later acknowledged telephonically receipt of the application papers. He asked as to what he should do about the application papers. Miss Pityana told him to gather the necessary information and revert to her so that the state attorney be instructed to handle the matter. In that application it was apparent that the applicant requested transfer from Libode district to East London district and this matter was addressed to the Department in February / March 2005 with no response.

22. On the 9<sup>th</sup> of June 2006, and on seeing that there was no response from Mr Kwayama's district office, and seeing that she was running out of time, she addressed and sent a reminder to that office of Mr Kweyama. On the 29<sup>th</sup> of June 2006 the order was granted without a response from the District office of Mr Kweyama. She advised the District office and indicated that it be complied with as a matter of urgency, failing which contempt of court proceedings and imprisonment of the MEC, would follow. She again on the 13<sup>th</sup> November 2006 sent a reminder to the District office regarding compliance with the order of 29<sup>th</sup> June 2006, and its implementation

thereof.

23. On the 23<sup>rd</sup> April 2007 Ms Pityana sent by telefax to the same district office the application papers in Case No. 36/07. That was the application that sought an order that the three respondents in the instant matter should take steps to ensure compliance with the order of 29<sup>th</sup> June 2006, and she indicated that the application papers were for contempt of court proceedings so as to get the District office to co-operate and to comply urgently. She was not aware at that stage that the order had already been granted in the contempt proceedings on the 15<sup>th</sup> March 2007. She only became aware of this on or during the week of 7 to 11 May 2007, when a copy of this order was forwarded to her by one Mr Juliam M. Kruger of the shared legal services of the office of the Premier. She then sent a copy of the court order of 15<sup>th</sup> March 2007 to the District office by telefax, indicating that the Premier is cited as a Respondent and, that if not complied with, this may cause her imprisonment.

24. On the 9<sup>th</sup> of May 2007 Ms Pityana received a telefax dated 2<sup>nd</sup> May 2007 from Mr Kweyama of the District office to which were attached documents relating to the discharge of the applicant in terms of section 14 of the Employment of Educators Act 76 of 1998. She addressed another letter to the District office expressing surprise at what Mr Kwetyama's telefax had brought to her Notice. She too never brought the orders of 29<sup>th</sup> June 2006 and

12.

15<sup>th</sup> March 2007 to the Notice of the second and / or third Respondents, although this was the responsibility of her and the other officials who had knowledge of those orders.

25. The decision to discharge the Respondent was first taken on the 6<sup>th</sup> September 2006 in terms of section 14(1)(a) of the Employment of Educator's Act 76 of 1998. Therefore the respondent's services was terminated with immediate effect from the 17<sup>th</sup> July 2007 in accordance with section 14(1)(a) of the Employment of Educators Act of 76 of 1998, because it was said she had been away from work without permission to do so, for a period in excess of fourteen (14) days. The order of this court of the 29<sup>th</sup> June 2006 had already been served on the Department when this took place, on grounds that her whereabouts were not known. On the 26<sup>th</sup> September 2006 a letter was addressed to the Respondent discharging her with effect from the 24<sup>th</sup> June 2006.

26. When this came to the knowledge of the legal services, Ms Pityana addressed a letter on the 9<sup>th</sup> May 2007 to the District Director of Libode, expressing the surprise at which the legal services has received their letter informing her about the discharge of the Respondent. The legal services reminded the Department of Education of an application in this court that had been issued under Case No. 275/06 against the Department, which the officials of the

Department for example Mr Kweyama, disregarded till the court order was granted on the 29<sup>th</sup> June 2006 compelling the Department to consider the application request for a transfer; Mr Kweyama kept on promising verbally that the matter was being attended to. Therefore from the legal services point of view Ms Witbooi was being transferred or that her transfer was being considered in compliance with the court order. At no stage were they aware that the Department of Education had no knowledge of the applicant's whereabouts nor were they aware of the disciplinary steps taken against the applicants. To the legal services the matters, according to Ms Pityana, became worse when the Department sat with a contempt of court application which might result in the imprisonment of the MEC she suggested that the officials of the legal services and the officials of the Department of Education urgently convene a meeting to address the issue before it was set down for hearing.

27. Ms Nyameka Tokwe is a personal assistant to the Superintendent General of the Department of Education. She confirms receiving the court order of 15<sup>th</sup> March 2007 which she gave it to Mr Mncedi Nxaba of the legal services section of the Department of Education, for the attention of the relevant officials. But she did not bring it to the attention of the third applicant.

28. The Respondent has deposed to an affidavit in answer and in opposition to the relief sought by the applicants in this matter, setting aside this court's orders

14.

dated 29<sup>th</sup> June 2006 and 15<sup>th</sup> March 2007 in Cases No. 275/06 and 36/07, respectively. The respondent is asking that the application launched by the applicants be dismissed with costs on the scale as between attorney and client.

29. The respondent has also launched a counter application. In her counterclaim the respondent seeks an order in the following terms:

29.1 “Directing that the administrative action of the Department of Education, Eastern Cape Province in writing a letter dated 26 September 2006 to the Respondent, purporting to rely on the provisions of section 14(1)(a) of the Employment of Educator’s Act 1998, be judicially reviewed and be set aside, alternatively declared unlawful. Alternatively to paragraph 1 above :

29.2 Directing that the Department of Education, Eastern Cape Province, consider the Respondent is reinstatement in terms of section 14(2) of the Employment of Educator’s Act 1998.

29.3 Directing that the application of the applicants in this matter seeking the setting aside of this court’s orders dated 29 June 2006 and 15 March 2007 be adjourned pending the process envisaged in section 14(2) of the Employment of Educator’s Act, 1998 considering the Respondent’s reinstatement.



29.4 Directing that the 180 – day - period referred to in section 7 of the Promotion of Administrative Justice Act be extended upon the extension to be in terms of Section 9 of the Promotion of Administrative Justice Act 3 of 2000.

29.5 Granting further and / or alternative relief.

29.6 Directing that the applicants pay the costs of this counter - application.”

30. The Respondent in her defence expresses the concern that the order granted by this court on 29<sup>th</sup> June 2006 has remained unfulfilled for a period of 18 months until the launching by the applicants of this application on 29<sup>th</sup> November 2007. The Respondent further states that the subsequent order granted on 15<sup>th</sup> March 2007 was granted by consent by the applicants who were represented by the State Attorney and their Counsel Advocate Swartbooi. Until this court has set aside the order of the 29<sup>th</sup> June 2006, it stands to be complied with. Presently the applicants have defied this court’s orders in an effort to defeat her every evidences.

31. The Respondent’s counter application relates to a letter dated 26<sup>th</sup> September 2006 written by the second applicant to her. This is a letter in which the Department sought to invoke the provisions of section 14(1)(a) of the Employment of Educator’s Act 1998, by having respondent’s employment

agreement terminated by operation of law. This letter was written after the granting of the order of this court on 29<sup>th</sup> June 2006. The Respondent submits that, the writing of that letter was contemptuous of this court order of the 29<sup>th</sup> June 2006, as the applicants did nothing to comply with that order. Invoking section 14(1)(a) of the Employment of Educators Act, served to undermine the honour of this court and the sanctity of that order and her rights, the Applicants are in violation of their constitutional duties to uphold court orders.

32. The Respondent further states that she had never absented herself to the extent that she could have been considered absconded as envisaged in section 14(1)(a) of the Employment of Educator's Act. At all material times she submitted her sick leave certificates and leave application forms to the principal of her school. She therefore submits that the administrative action in writing the letter dated 26<sup>th</sup> September 2006 falls to be judicially reviewed in terms of the provisions of section 6 of the Promotion of Administrative Justice Act.

33. The specific provisions of section 6 referred to by the Respondent are:

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33.1 The administrator who took the decision to write the letter of the 26<sup>th</sup> September 2006 was not authorized to do so by the empowering provision because the Department at that time had in its possession all her leave application forms and medical certificates.

33.2 The procedure prescribed by the empowering legislation was not complied with as provided for in section 6 (2)(b) of the PAJA. Section 14 of the Employment of Educators Act provides that the section cannot be invoked if she had permission to absent herself. She submits that the permission ought to have been granted because the Department was already aware of her circumstances and her illness.

33.3 In terms of section 6(2)( c ) of PAJA, the action taken in writing the letter was procedurally unfair, because this court had already granted an order which the applicants ought to have had set aside before writing that letter. She was an Educator as defined in the Employment of Educator's Act at all material times when this court granted the original order on 29<sup>th</sup> June 2006, and as from that date the applicants remained in contempt of court when they did not comply wit that order.

33.4 In terms of section 6(2)(e) of PAJA, the action in writing the letter was taken for an ulterior purpose or motive, because a a court order already was in existence. In addition relevant considerations were not considered.

33.5 In terms of section 6(2)(e)(v) and (vi) the administrative

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action in writing the letter was in bad faith or was arbitrary or capricious.

33.6 In terms of section 6(2)(f) of PAJA the administrative action in writing the letter was not rationally connected to the purpose of the empowering provision because, firstly the Department had in its possession her medical certificates and leave applications, and secondly a pre-existing a court order granted on 29<sup>th</sup> June 2006 was in existence.

33.7 In terms of section 6(2)(h) of PAJA the exercise of the power in writing the letter was so unreasonable that no reasonable person could have exercised the power or performed the functions because in the face of the court order granted on 29<sup>th</sup> June 2006, it is inconceivable that a public official could write the letter.

33.8 Finally and in terms of section 6(2)(1) of PAJA, the action in writing the letter was unconstitutional or unlawful because of the pre-existing order granted on 29<sup>th</sup> June 2006.

34. The Respondent submits that it would be appropriate for this court to set aside the administrative action in writing the letter of 26<sup>th</sup> September 2006.

35. The Respondent's attorneys on 4<sup>th</sup> September 2006 wrote to the Department

requesting the Department to consider her reinstatement in terms of section 14(2) of the Employment of Educator's Act. The respondent expressed the view that the Department's conduct be viewed as an administrative action which is unlawful, unreasonable and procedurally unfair and to be considered to be in bad faith, given the terms of the order. She therefore asks relief in terms of prayer one (1) of her Notice of Motion of the Counter application.

36. The Respondent further submits that the entire application is an exercise in bad faith by the applicants because they seek to set aside this court's order dated 29<sup>th</sup> June 2006 in respect of which they had been in contempt. That letter of the 26<sup>th</sup> September 2006 undermined this court's order and the very writing of that letter was contemptuous. The Respondent requests this court to dismiss the application with costs on the scale as between attorney and client.

37. The order of 15<sup>th</sup> March 2007 was granted by consent of the applicants. They cannot now be heard to seek to have it set aside, when they agreed to its issue. The Respondent submits that they ought to be estopped from proceeding in this manner, and that the entire application is bad in law. This order followed as a result of the prior order of 29<sup>th</sup> June 2006 and it was properly granted by consent.

38. Abraham Soyisile Nuru deposed to an affidavit in support of the Second and Third Respondent / Applicants. He said he holds a rank of District

Director for the Libode District of the Department of Education Eastern Cape Province. He is the custodian of a variety of documents, including correspondence pertaining to teachers and teachers' personal files. He said that from about 3<sup>rd</sup> August 2006 it has become impossible to comply with the order of 29<sup>th</sup> June 2006 and that of on 15<sup>th</sup> March 2007 as well.

39. From the information he received from the principal of the applicant's /respondent's school, Ms F.L Nkamisa, as from 17<sup>th</sup> July 2006 when schools opened after the winter holidays, the applicant / respondent never reported for duty at her school. On 29<sup>th</sup> August 2006 the principal received a batch of sick leave forms in respect of the applicant per telefax. These sick leave forms were for the period 18<sup>th</sup> July to 29<sup>th</sup> August 2006.

40. The principal in her letter to the Circuit Manager said that since 2004 the applicant / respondent has been very sick to an extent that she had exhausted all leave credits she had. She even used up all her capped leave as she exceeded her leave credit. The Department even gave her also temporary disability leave for thirty (30) days. She is very sick to the extent that she cannot perform her duties.

41. On 18<sup>th</sup> August 2006 Mr Nuru wrote a letter to the applicant/respondent advising her that she had failed to report for duty in excess of fourteen day (14) consecutive days without the prior permission of the employer and that

therefore she was deemed to have been discharged from service as envisaged in section 14 of the Employment of Educator's Act 76 of 1998. He further requested the applicant / respondent to indicate within seven (7) days why the Department should not take the necessary steps to formulate her discharge, but the date on the date stamp is not legible. There was no response received until after the seven day period had lapsed.

42. Applicant's / Respondent's attorneys replied on 4<sup>th</sup> September 2006 stating that the court order of 29<sup>th</sup> June 2006 had already been served on the Department on 10<sup>th</sup> July 2006 dealing with the applicant / Respondent and the Department of Education regarding this matter, and that the Department of Education must comply. On 26<sup>th</sup> September 2006 the Superintendent General of the Department of Education wrote a letter advising the applicant / respondent of her discharge with effect from the 24<sup>th</sup> June 2006.
43. On the otherhand it is said that the applicant had been away from duty without permission of the employer as at 3<sup>rd</sup> August 2006 for a period in excess of fourteen (14) consecutive days. Therefore with effect from 3<sup>rd</sup> August 2006 the applicant / Respondent was deemed to have been discharged from service on account of misconduct. Again on the otherhand the period of misconduct has been calculated from 17<sup>th</sup> July 2006. Therefore, in view of the fact that

effective from 3<sup>rd</sup> August 2006 the Applicant /Respondent was no longer an employee and it became a legal impossibility to comply with the order of 29<sup>th</sup> June 2006 from that date onwards. This means that even at the time the Applicant /Respondent obtained the order of 15<sup>th</sup> March 2007 compliance with the order of 29<sup>th</sup> June 2006 was no longer possible.

44 It is said that the applicants / respondents were not entitled to simply sit idly in the face of an order of this court. The reasons as to why they did not comply with the orders are set out in Ms Pityana's and Mr J. Kruger's affidavits, for these reasons the application must be dismissed with costs.

45. Nomlamli Veronica Mahanjana, a Superintendant General of the Department of Education in the Eastern Cape, confirms that she has given the 2<sup>nd</sup> applicant authority to depose on her behalf. She confirms that the continued non-compliance with the two (2) orders is as a result of an impossibility to comply as is detailed in the 1<sup>st</sup> Applicant's affidavit and not as a result of a willful disregard of the orders. She was not aware of the dispute between the Respondent and the Department of Education.

46. Nosimo Balindlela, the former Premier of the Province of the Eastern Cape, confirms that she has given the 1<sup>st</sup> Applicant authority to depose on her behalf. She confirms that the continued non-compliance with the two (2) orders is as a result of an impossible to comply as detailed in the 1<sup>st</sup> Applicant's affidavit



and not as result of a wilful disregard of the orders. Should she have become aware of these orders earlier she would have complied with them and was also not aware of the dispute between the respondent and the Department of Education. The orders should be set aside.

47. The affidavit of Alven Mongeni Mkentane is a response both to the answering affidavit and to the founding affidavit in the respondent's counter -application.

It is submitted that the order of the 29<sup>th</sup> June 2006 did not authorize the Respondent to absent herself from work without permission. The applicants were not aware of the order. After they had become aware of it, they realized that it could not be complied with as the respondent was no longer in the Department's employment.

48. Ms Tabiso Miranda Pityana is a legal administration officer in the Department of Education and an official handling the litigation in this matter and all related previous litigation. Mr Julian Micheal Kruger is a Senior Manager in the litigation shared legal services office of the Premier Eastern Cape.

49. The Applicants have contended that the order of 29<sup>th</sup> June 2006 came to their attention on 25<sup>th</sup> July 2007. The Respondent denies this and says that their notice to oppose was served and filed on 7<sup>th</sup> March 2007 by the state attorney. Therefore they are not truthful in saying that they became aware of this order only on 25<sup>th</sup> July 2007. Another notice of opposition on their behalf was

served and filed by attorneys Petse on 19<sup>th</sup> July 2007. Again on 15<sup>th</sup> March 2007 Advocate Swartbooi agreed to the further order being granted by this Court against the applicants. It clearly appears that applicants became aware of the order of 29<sup>th</sup> June 2006 as early as before 7<sup>th</sup> March 2007. The Respondent submits that the applicants were aware of the granting of this order when it was served by the sheriff on 10<sup>th</sup> July 2006. The Respondent further says that the termination could not have been procured because of the existence of this court's order granted prior thereto, and if they were not satisfied with the order they should have applied to have it set aside. Instead they agreed to a subsequent order being granted, that of the 15<sup>th</sup> March 2007.

50. The Respondent says that the original order granted by this court required compliance within 30 days as from the date of service. Such service occurred on 10<sup>th</sup> July 2006. The 30 days period therefore expired on 10<sup>th</sup> August 2006. This would mean that when the termination letter was written in September 2006 they were already in contempt of the order. Ms Pityana states that "This is a contempt of court application for failure to comply with the court order dated 29<sup>th</sup> June 2006, please attend to compliance urgently" She even warned against a possible imprisonment. The order of the 29<sup>th</sup> June 2006 remains unsatisfied with no explanation given.

51. It was contended on behalf of the applicants in the main application that the

orders dated 29<sup>th</sup> June 2006 and 15<sup>th</sup> March 2007 be set aside on grounds that the said orders are no longer capable of compliance or they be permanently stayed. The first applicant contends that the respondent, having been dismissed from the employ of the Department of Education on 3<sup>rd</sup> August 2006, it is no longer possible to consider her transfer or the special leave. To leave the orders standing would invite her to seek enforcement thereof. The applicants were not aware of their existence till after the abscondment by the respondent, as they were not brought to their attention by the officials of the Department, though the 29<sup>th</sup> June 2006 order was served on the Department on 10<sup>th</sup> July 2006. The respondent is said to have absconded as from the 17<sup>th</sup> July 2007 till to date, and as from then there was nothing to stop the officers of the Department from exercising the provision of section 14(1)(a) of the Employment of Educator's Act 76 of 1998 (EEA). The court is referred to the case of MINISTER VAN ONDERWYS EN KULTUUR EN ANDERE V LOUW 1995 (4) SA P383 (A) where weekends and public holidays were excluded to computing abscondment. It was submitted that and where it was said that once days are up it is final. The deeming provision of section 72 (1)(a) comes into operation if an employee, without the consent of the Head of Education, is absent from service for a period of more than 30 consecutive days and there is no room for reliance on AUDI ALTERAM PARTEM RULE.

52. It was further contended on behalf of the applicants that the respondent, after the orders were made, disregarded the law. She took herself out of the system of the Department of Education. After 3<sup>rd</sup> August 2006 the order of the 29<sup>th</sup> June 2006 became to be a non-compliance. Sick leave forms of the Respondent were only received on the 29<sup>th</sup> August 2007. As from the 3<sup>rd</sup> August 2006 the applicants were not aware of the sickness of the respondent till the 29<sup>th</sup> August 2006. The applicants had by 3<sup>rd</sup> August 2006 not become aware of the existence of the court orders. When the orders were brought to their attention, compliance was no longer possible.

53. The applicant's counsel submits that this court, by reason of its power to control its process, has an inherent discretion to suspend the coming into operation of any order or the execution of any writ where real and substantial justice requires such suspension and or stay. Rule 45 (A) of the uniform Rules is to the same effect. All that applicants need to demonstrate in order for the court to exercise its discretion in his or her favour is good cause, which has been held in DUMAH v KLERKSDORP TOWN COUNCIL 1951 (4) SA 519 (T) to mean any fact or circumstance that would make it just or equitable as between the parties that execution be stayed or suspension ordered. In this matter the Plaintiff obtained the judgement against the Defendant in respect of which costs were taxed and allowed. Plaintiff then caused a writ to be issued for

the amount allowed and certain assets of the Defendant were attached. On the otherhand there was another litigation between them in the Supreme Court, in which judgement with costs was given against the Plaintiff. At the time the writ of execution was issued, the costs in respect of the Supreme Court proceedings had not yet been taxed. The Defendant filed an application asking for a stay of execution of the writ issued by the Plaintiff pending the taxation of the costs of the Supreme Court proceedings that when taxed would far exceed the amount allowed in the writ issued and owing to the Plaintiff. The Plaintiff had no visible assets. If the Defendant paid him his costs, the Defendant would be unable to recover anything from him. The Defendant further tendered to give security for payment of the Plaintiff's costs. The magistrate granted the application and stayed the execution of the writ, hence the appeal which was dismissed with costs.

54. In the case of Road Accident Fund v STRYDOM 2001 (1) SA 292 ( C ) the stay of execution of the judgement ordering the applicant to pay the damages to the Respondent was granted pending the taxation and allocation of the applicant's bills of costs for which the Respondent was liable. The reason was that an injustice would be done to the applicant's by way of irreparable harm being caused if execution for the full balance of the judgement plus costs were to take place at the instance of the Respondent who would afterwards probably

be unable to satisfy the costs order in the applicant's favour. Again in the matter of STANDARD BANK OF SA LTD v MALEFANE 2007 (4) SA 461 (TK) the court held that the review of taxation was a good ground to order a stay of execution. The seizure of assets which might be found after the review of taxation to be unnecessarily valuable, would constitute an injustice. An injustice would be done if the warrant of execution is not stayed pending finalization of the review of taxation proceedings.

55. Counsel for the applicants asked that the execution of the orders of this court of the 29<sup>th</sup> June 2006 and 15<sup>th</sup> March 2007 be set aside, or, in the alternative be permanently stayed on grounds that the Respondent is no longer an employee of the Department of Education, since her employment with the said Department of Education ceased to exist by operation of law, that is, when the 14 consecutive- day period elapsed without her reporting for duty. This was on 3<sup>rd</sup> August 2006 at a stage when Applicant's existence of the court orders was in question. When the orders were brought to their attention, compliance was no longer possible. The Respondent was still at large and for that reason compliance with the orders remained impossible. Applicants' counsel submits that this constitutes a good cause for the setting aside of the orders. The termination has to be set aside first. Until and unless that has been done, the orders are incapable of being complied

with. The court is referred to the case of OUDEKRAAL ESTATES (PTY) LTD V CITY OF CAPE TOWN & OTHERS 2004 (6) SA 22 (SCA) where it was held that it was clear that the administrator's permission was unlawful and invalid at the outset. But the question that arose was what consequences flowed from the conclusion that the administrator acted unlawfully. Was the permission that was granted by the administrator simply to be disregarded as if it had never existed? In other words was the Cape Metropolitan Council entitled to disregard the administrator's approval and all its consequences merely because it believed that they were invalid, provided that its belief was correct. It was held that it was not. Until the administrator's approval was set aside by a court in proceedings for judicial review it existed in fact and it had legal consequences that could not simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to.

56. The Respondent opposes this application and has filed a counter application seeking an order declaring the writing of the letter of 26<sup>th</sup> September 2006 by the Department unlawful, alternatively, an order reinstating Respondent to her former post in the Department. The Respondent's counsel contends that the Applicants do not have locus standi because they have brought this application not in their official capacities but in their personal capacities.

This is irregular and the applications should be dismissed with costs.

Secondly, applicants should have, within 20 days after having knowledge of a default judgment, applied to court to set aside such judgement upon good cause shown in term of Rule 31(2)(b). The initial order under Case No 275/06 was granted by default on the 29<sup>th</sup> June 2006. The second order under Case No. 36/07 was granted by consent and at a time when the applicants were represented by Advocate Swartbooi. The officials in the Department who were responsible for implementing these court orders or to rescind them timeously were aware but failed to implement or rescind them timeously. The order granted on 29<sup>th</sup> June 2006 was within the knowledge of the officials of the Department by 25<sup>th</sup> July 2006, if one has regard to the evidence of Ms Pityana. From then the first attempt to rescind the court orders was on the 29<sup>th</sup> November 2007, which is an unreasonable period of time and is not in compliance with the Rules of court. The Department failed to give proper or timeous attention to the court order of the 29<sup>th</sup> June 2006. Regarding the counter application it is respectfully submitted that the Department of Education's behaviour in dismissing Ms Witbooi in terms of section 14(1) should be set aside in view of their conduct regarding the initial court order, and it is submitted that the application be dismissed with costs and an order be granted in terms of the notice of motion in the counter application. On the otherhand the



applicant's counsel submits that the writing of the letter of 26<sup>th</sup> September 2006 by the Department to the Respondent advising of the termination of her employment does not constitute administrative action but has occurred by operation of law and that the termination is not reviewable in terms of the Promotion of Administrative Justice Act No.3 of 2000, if it may be held it did constitute administrative action, it is submitted that the Department did not have the medical certificates and sick leave application forms before the lapse of the 14-day- period referred to in section 14 (1)(a) of the EEA. It is further submitted that section 14(2) is only applicable in respect of a teacher who, after the section 14(1)(a) discharge, has reported for duty.

The section reads;

“If an educator who is deemed to have been discharged under paragraph (a) or (b) of subsection (1) at any time reports for duty, the employer may on good cause shown and notwithstanding anything to the contrary contained in this act approve the reinstatement of the educator in the educator's former post or in any other post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine”.

According to the principal the Respondent was last at school on 23<sup>rd</sup> June 2006 and has never reported for duty ever since, that she cannot invoke section 14(2) and that the application falls to be dismissed with costs including costs

occasioned by the employment of two Counsel.

57. On 29<sup>th</sup> June 2006 the Respondent in the main application obtained an order out of this court against the MEC of the Department of Education ordering the MEC to consider the Respondent's transfer to another Educator's post; to also consider the Respondent's request for a special sick leave. This was by default judgement although application papers were served on the Department of Education on its staff during the month of May 2006. The order of the 29<sup>th</sup> June 2006 was also served on the Department of Education on its administrative and or legal personnel for their attention. Both the application papers and the court order were brought to the attention of one Mr Kweyama stationed at Libode as an authority of the Department to take these up for his attention. For reasons that are not clear to this court, nothing was done by the Department both after receiving the application papers during May 2006 and after receiving the court order of the 29<sup>th</sup> June 2006 till to date.

Again on the 19<sup>th</sup> January 2007 the Respondent brought another application compelling the applicants to comply with the order granted on 29<sup>th</sup> June 2006. The Respondent obtained the order herein by consent. There had not been compliance with this order till to date, despite service of same on the applicant's personnel. Applicants aver that they were not aware of these orders against them.

58. Whilst there was the order of 29<sup>th</sup> June 2006 against the Department of Education, the Respondent was deemed to have been discharged from the service on grounds that she absconded from duty for a period of more than 14 days. This was done despite the evidence tendered by the Respondent's principal that she was sick since 2004, that she had exhausted all her sick leave days and that she be boarded. When the Respondent failed to turn up on 17<sup>th</sup> July 2006 on re-opening after winter holidays, her principal contacted her. The Respondent told the principal of her position and the principal advised the Respondent to send leave forms. The principal waited for the leave forms from the Respondent who faxed it through the number of the fax she received from the principal. These leave forms were received by the principal who in turn submitted them to the Department of Education. All the time the principal was aware of the position and whereabouts of the Respondent and the Department was all along aware of the orders of this court to be complied with. The application is irregular, having been brought in applicants' personal names.

59. Having considered all the evidence placed before me and submissions by Counsel on both sides, I am satisfied that the Applicants have not made a clear case against the Respondent for the order sought.

In the result, I make an order in the following terms :

34.

1. The applicant's application is dismissed with costs
2. The administrative action of the Department of Education, Eastern Cape Province in writing a letter dated 26<sup>th</sup> September 2006 to the Respondent, purporting to rely on the provisions of section 14(1)(a) of the Employment of Educators Act 1998 is hereby judicially reviewed and set aside.
3. The 180 day period referred to in section 7 of the Promotion of Administrative Justice Act is extended upon the basis that the interests of Justice so require, such extension is granted in terms of section 9 of the Promotion of Administrative Justice Act 3 of 2000.
4. The applicants are ordered to pay the costs of this counter application jointly and severally, one paying the other to be absolved.

  
C.Z. MBANJWA

**ACTING JUDGE OF THE HIGH COURT – 28 JULY 2008**

**BHISHO**

HEARD ON : 13 MAY 2008

JUDGEMENT DELIVERED:

COUNSELS FOR APPLICANTS: ADVOCATE M. MADLANGA SC  
ADVOCATE M. JOZANA

ATTORNEYS FOR THE APPLICANTS: X.M. PETSE INCORPORATED  
C/O BULULU NABO & XASO  
180 BUFFALO ROAD  
KING WILLIAM'S TOWN

COUNSEL FOR RESPONDENT : ADV S.A COLLETT

ATTORNEYS FOR RESPONDENT: HUTTON & COOK  
SUTTON SQUARE  
QUEENS ROAD  
KING WILLIAM'S TOWN