IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case number: 24526/2010

In the matter between:

Northlink FET College	**Applicant**
and	
The Western Cape Provincial Minister of Education	**First Respondent**
The Head: Education of the Western Cape Province	**Second Respondent**
The Western Cape Provincial Minister of Transport and Public Works	**Third Respondent**
The Head: Transport and Public Works of the Western Cape Province	**Fourth Respondent**
The Western Cape Provincial Minister of Finance	**Fifth Respondent**
The National Minister of Higher Education and Training	**Sixth Respondent**
The Director-General of Higher Education and Training	**Seventh Respondent**
The National Minister of Finance	**Eighth Respondent**
Seaman's Property Investment (Pty) Ltd	**Ninth Respondent**

JUDGEMENT DELIVERED ON 14 DECEMBER 2010

Baartman J

[1] Northlink FET College (**the applicant**) approached this court on an urgent basis claiming payment of the following sums of money:

(a) R1 902 745.45 in respect of rental paid by the applicant on behalf of the Western Cape Education Department (WCED).

(b) R6 091 817.21 in respect of municipal rates and taxes paid by the applicant on behalf of the WCED.

(c) R15 623 388.00 in respect of a non/personnel non/capital subsidy due to the applicant by the WCED.

THE PARTIES

[2] The applicant is a public FET college established initially in terms of the Further Education and Training Act 98 of 1998 (**the 1998 Act**) and subsequently upon the repeal of the 1998 Act, in terms of the Further Education and Training Colleges Act 16 of 2006 (**the FET Colleges Act**), which commenced on 11 December 2006 and which repealed the 1998 Act. In terms of both acts, a public FET college is a juristic entity whose assets, liabilities, rights and obligations vest in the public college itself and any agreement lawfully entered into by it or on its behalf is regarded as having been concluded by the public college itself. The reason for this was to grant public FET colleges autonomy with regard to the affairs of the institution. The Public FET Colleges are responsible for administering their own financial and other affairs through college councils that are responsible for governing the colleges.

[3] The first respondent is the Minister of Education of the Western Cape Province. In that capacity, the first respondent is a member of the executive council who is responsible for education in the Western Cape Province. The first respondent is also "executive authority" as defined in the Public Services Act 1994 Act 103 of 1994 and as such is the executive authority in relation to the Provincial Department of Education (**the WCED**). The first respondent, from money appropriated for this purpose by the provincial legislature, funds public colleges such as the applicant on a fair, equitable and transparent basis. The first respondent may, subject to the norms and standards determined in terms of section 22 of the FET Colleges Act, impose any condition in respect of an allocation of funding contemplated in sub-section (1) as provided for in Section 22(2)(a) of that Act.

[4] The second respondent is the head of education in the Western Cape Province and is responsible for the efficient management and administration of the department. The second respondent also holds the position of Superintendent General of the WCED. The third respondent is the Provincial Minister of Transport and Public Works, who is also an executive authority and as such the executive authority in relation to the Provincial Department of Transport and Public Works. The fourth respondent is the Head of Transport and Public Works in the Western Cape Province.

[5] The fifth respondent is the Western Cape Provincial Minister of Finance and was cited in these proceedings, in terms of a practice directive of the Constitutional Court, because he/she will ultimately be responsible for payment of any amount awarded to the applicant. The sixth respondent is the National Minister of Higher Education and Training, who is also an executive authority as defined in the Public Services Act. Previously, there was only one National Department of Education with a single Minister of Education and

Director General. Currently, the position is that there are two departments responsible for education at National Level, the Department of Basic Education and the Department of Higher Education and Training who is responsible for tertiary education including colleges. The seventh respondent is the Director General of Higher Education and Training.

[6] The sixth and seventh respondents were cited merely because of the fact that they had an interest in this matter. No relief was sought against them. Similarly, the applicant claimed no relief against the National Minister of Finance, the eighth respondent, who was cited because he has an interest in the outcome of this application.

[7] Seamans Property Investment (Pty) Ltd (**the ninth respondent**) is the owner of the premises from which the applicant conducts its Table Bay Campus (**the Table Bay Campus**). The applicant sought no relief against the ninth respondent. The lease agreement in terms of which the applicant occupied the Table Bay Campus is relevant to this judgment. I deal with the dispute in respect of the lease below.

[8] Only the first and the second respondents opposed the application, and therefore all references herein to the respondents refer to the first and second respondents only.

Basis for applicant's claim

[9] The applicant had paid the rent and municipal taxes due in respect of its Table Bay campus. It is the applicant's case that the Western Cape Education Department (**the WCED**) had entered into a lease agreement with the ninth respondent in respect of the Table Bay campus and therefore the rental and municipal rate payments due in terms of the lease were for the WCED's account. The applicant alleged that it had an agreement with the WCED in terms of which the applicant would make payments due to the ninth respondent in respect of the Table Bay campus lease and that the applicant would

claim the amounts so paid from the WCED. In these proceedings, the applicant claimed a refund of the amounts already paid in respect of rental and municipal rates, i.e. R1 902 745.45 (rental) and R6 091 817.21 (municipal rates).

[10] The first and second respondents have denied the existence of a lease agreement between the WCED and the ninth respondent and have instead alleged that the lease was between the applicant and the ninth respondent. Therefore, the respondents denied liability to refund the applicant for amounts paid in respect of rental and municipal rates.

[11] The applicant further alleged that the WCED had allocated to it a subsidy of R15 623 388, but had failed to pay the amount over to the applicant. In these proceedings, the applicant claimed payment of the amount. It was common cause that the WCED had allocated the subsidy to the applicant and that instead of paying the amount over to applicant, the WCED had utilised the amount as part payment of salaries due to the applicant's staff.

[12] In these proceedings, the applicant alleged that the salary bill was for the WCED's account and the WCED in turn alleged that the salary bill was for the applicant's account.

Disputes of fact

[13] The first and second respondents alleged that there existed several disputes of fact that could not be resolved without referral to oral evidence. Adv Potgieter SC, who appeared for the first and the second respondents, submitted that I should dismiss the applicant's claim.

[14] Adv Oliver, who appeared for the applicant, submitted that there were no *bona fide* disputes of fact and that I should not refer the matter to oral evidence but instead find for the applicant on the

papers. Counsel submitted that the applicant needed relief urgently and requested me to make an order with reasons to follow.

[15] To the extent that there is a dispute of fact on papers, the circumstances of this matter are such that it would not be appropriate for me to exercise my discretion to refer the matter to oral evidence. (See ***Joh-Air (Pty) Ltd v Rudman*** 1980 (2) SA 420 (T) and ***Miloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd and Others*** 2008(4) SA 325 (SCA).)

[16] It follows that the matter stands to be decided on the papers. Deciding the matter on the affidavits filed on record has the following implications. A court will only grant final relief if the facts stated by the respondents together with the facts alleged by the applicant that are admitted by the respondent justify such an order. (See ***Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd*** 1957(4) SA 234(C) and ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 623(A).)

BACKGROUND

The parties to the Table Bay campus lease

[17] The facts that gave rise to this application are mainly common cause. In its founding papers, the applicant alleged that its establishment coincided with the amalgamation of 4 colleges in the Western Cape approximately 8 years ago. The applicant has various campuses, one of which is the Table Bay Campus, which is accommodated in the ninth respondent's premises in Table Bay Harbour. The campus offers maritime studies and other vocational educational programmes. Approximately 15 staff members are employed at the campus and currently 400 students attend the campus.

[18] On 30 October 1990, Transnet Ltd (as the lessor) and the Republic of South Africa represented by the Department of Local Government, Housing and Agriculture in the House of Representatives (as the lessee) concluded a lease agreement in respect of the Table Bay Campus (**the 1990 lease agreement**). The now Provincial Department of Transport and Public Works succeeded the Department of Local Government, Housing and Agriculture as the lessee in terms of the 1990 lease agreement.

[19] In terms of Clause 6.1 of annexure A to the 1990 lease agreement, the lessee was liable for the payment of rates and taxes in respect of the Table Bay Campus over and above the rental in respect thereof. Prior to the merger that culminated in the establishment of the applicant, institutions submitted their rates and taxes accounts to their respective education departments for refunds.

[20] When the 1990 lease agreement expired, the WCED indicated to the applicant that it should conclude a long-term lease with the ninth respondent. Negotiations aimed at concluding a lease commenced. In the course of those negotiations, the applicant received a letter, dated 20 December 2006, from Keith Loynes (**Loynes**), the chief planner of the colleges who at the time was the head of the WCED. The relevant portion of the letter stated as follows:

"Kindly be informed that the lease agreement has been concluded in respect of the Table Bay Campus of Northlink College. The period of the agreement of lease, is 1 September 2006 to 31 August 2011 (5 years). In terms of this lease, the WCED will refund Northlink College for payments made against this lease. An amount of R668 000.00 is available to be claimed for the period 1 November 2006 to 31 March 2007, in the current financial year 2006/7. It is recommended that such claims be submitted at the end of each 6/month cycle, but at least 1/month before the end of the State's financial year, namely 31 March. Claims received after the end of

February cannot be considered. You are requested to furnish this office with the necessary documentation that includes the lessee's invoices and proof of payments made against the invoices by Northlink College. This arrangement will continue for the duration of the lease and is subject to the availability of funds."

[21] The applicant in its founding papers alleged that it had been submitting claims in respect of rental, rates and taxes in respect of the Table Bay Campus to the WCED since March 2007 at least every 6 months and had been duly reimbursed by the WCED in respect of such payments.

[22] It was common cause in these proceedings that the lease referred to by Loynes was never concluded. Loynes was mistaken. In these proceedings, the applicant relied on Loynes's letter for its claim in respect of rental payments made, in respect of the Table Bay campus, to the ninth respondent.

[23] In a letter dated 27 May 2008, Mr Beech (**Beech**), the applicant's director, indicated to Loynes that:

"Rental/lease agreement: Table Bay Campus. The attached proposed rental/lease agreement has reference.

1. *The lease/rental agreement for the Table Bay Campus expired during 2007. In the interim, occupation is maintained on a monthly basis. (**my emphasis**) The building requires remedial maintenance and up/grade of facilities. The current landlord will undertake to do all the required remedial work and facilities upgrade if a new lease agreement is signed. The proposed new lease agreement will commence at R221 445.00 (VAT included) per month and escalate annually. See attached document.*

2 *The proposed schedule of remedial work and up/grade details are included in the attached document/annexure "B". The proposed*

lease agreement has been scrutinized by PAWC/Legal Services … Shawn Richter …

3. *In terms of the SETC Act 16 of 2006 … herewith … the college herewith requires the approval to accept the lease agreement.* (**my emphasis**) *The funding of the lease has always been maintained by the Department of Public Works. The college will require that the funding of the lease be maintained by WCED as the college itself cannot afford the upkeep of such a lease/rental payment. Kindly consider the attached request in terms of the agreement."*

[24] Beech attested to the applicant's founding papers and said that:

"Subsequent to the expiry of the 1999 agreement and prior to 15 December 2009, I was informed by Mr Loynes that the Provincial Department of Public Works had informed the WCED that it had to budget and take responsibility for the lease amount, which it subsequently did. …

It was part of the agreement that came into being between the applicant and the WCED that the arrangement whereby the WCED would re-imburse the applicant in respect of the rental as aforesaid, would continue for the duration of the lease and be subject to the availability of funds."

[25] On 15 December 2009, the applicant received a letter from the WCED stating that:

"It is with pleasure that we inform you of the all inclusive financial assistance that is available to your college for the 2010/11 financial year … based on the funding norms of FET colleges and the available budget. Note that no provision has been made for Municipal Taxes, Rentals or Transport allowances. These expenses are the responsibility of the FET college concerned."

[26] In its founding papers, the applicant said the following about that letter: (record pg 25 para 64)

"The letter dated 15 December 2009 from Ms Vinjevold referred to above, constitutes a unilateral variation of the agreement concluded between the applicant and the second respondent in 2006 in that the second respondent purported to repudiate the WCED obligation in terms of the 2006 agreement to reimburse the applicant for rental, rates and taxes. The applicant did not accept this repudiation and chose to abide by the 2006 agreement in terms whereof it was entitled to submit claims in respect of rentals, rates and taxes to the WCED every 6 months at least 1 month before the end of the WCED's financial year and in terms whereof the WCED reimbursed it for payment of such rentals, rates and taxes."

[27] According to Beech, on 25 May 2010, the second respondent recommended that the applicant should reduce its staff component and close a campus or campuses as a measure to relieve its financial problems.

The respondents' version

[28] It was common cause that with effect from 1 April 2010, the funding of FET colleges was regulated by the national norms and standards for funding further education and training colleges as envisaged in Section 23 of the FET Colleges Act promulgated in Government Gazette No. 32010 dated 16 March 2009. Prior thereto, the funds were allocated by the state to FET colleges mainly in terms of the National Department of Education Policy Report 191.

[29] It is the respondents' case that the lease of the applicant's Table Bay premises was concluded on 1 September 1999 by the state on behalf of the college in terms of the then applicable regime, which made provision for the state to take primary responsibility in respect of the affairs of the institution in question. As lessee, the state, represented

by the then Department of Local Government Housing and Agricultural Administration, House of Representatives, was liable for all obligations arising from the lease, which included the payment of rental as well as rates and taxes. However, in 1994, the Western Cape Department of Transport and Public Works was substituted as a lessee under the lease agreement, which expired on 31 August 2006.

[30] The respondents alleged that negotiations for the conclusion of a new lease commenced but were never concluded. In May 2006, there were negotiations between D Fourie (**Fourie**) of the Department of Transport and Public Works and Mr Bouwer (**Bouwer**) representing the ninth respondent as lessor concerning the possible extension of the lease for a further 5-year period. Fourie, so the respondents alleged, merely facilitated the negotiations but the conclusion of any contract was subject to approval by Fourie's superiors, the Provincial Cabinet of the Western Cape Government. However, prior to finalisation of an agreement, Fourie was advised that the applicant itself had to enter into the lease agreement with the ninth respondent, Seamans, since the assets, liabilities, rights and obligations in respect of the college had been transferred to the applicant in terms of the FET College Act.

[31] Fourie advised Bouwer and the then head of the Table Bay Campus, Mr Van Wyk, accordingly. Mr Ely, the chief financial officer of the Department of Education of the Western Cape Province, who attested to the respondents' answering affidavit, said the following:

"I can confirm that at our monthly coordinating meetings with the Department of Transport and Public Works, it was reaffirmed that due to the fact that all tertiary institutions in the Western Cape were responsible for providing their accommodation, the functions in respect of the leasing of premises vested in the applicant and not the education department. The leasing funding budget for FET colleges

was accordingly shifted from the Department of Transport and Public Works to the Education Department in accordance with the necessary approval."

[32] Ely further says that the Department of Transport and Public Works budgeted R668 049.12 for the period of 1 September 2006 to 31 March 2007 and a further R2 672 196.48 for the 2007/08 and 2008/09 financial years as its contribution towards the applicant's lease payment. These amounts were transferred to the Department of Education and made available to the applicant.

[33] The respondents further conceded that Loynes' letter dated December 2006, referred to above, was incorrect. However, the respondents alleged that on 16 August 2006, they had corrected any misrepresentation made to the applicant. The respondents relied on email correspondence circulated among Mr Nat Kaschula (**Kaschula**), a WCED official, Beech and Bouwer. In the email, Kaschula informed both Beech and Bouwer that the lease agreement in respect of the Table Bay Campus had to be concluded between the applicant and ninth respondent.

"Mr Kaschula's email to Mr Bouwer at 2:01pm, I refer to the need for a lease to be concluded between the owner of the building and Northlink College. The signatories to the lease agreement must be the owner of the building and the CEO of Northlink College, Mr Leon Beech. His mobile no. is 082 557 2993. A draft copy of the lease should be submitted to me at your earliest convenience because the clauses have to be checked and approved by the Western Cape Education Department's lawyers. Please do not sign the lease agreement before I inform you to do so."

[34] In an email to Beech at 14h28:43 on 16 August, Kaschula said the following to Mr Beech:

"Leon, Mr Menno Bouwer, will make contact with you soon over a lease agreement between yourself as the CEO of Northlink College and the owner of the building. Please meet with him and contribute to the drafting of the lease agreement. (Be weary of lease agreements in excess of 5 years, be very clear about who is responsible for structural defects (normally owner), who is responsible for maintaining the building (interior/usually the tenant, exterior/usually the owner), annual escalation clause (stick with an annual inflation rate of around 6% (not compounded interest).

The owner must also pay property rates and taxes and the insurance on the structure of the building. You pay municipal utilities (water, electricity, refuge removal) and the insurance of movable items inside the building like computers, etc. The big question is whether the owner will be prepared to repair the building because it is literally sinking into the sea. It is estimated that it will cost approximately 6 million rand to repair the structural damage and to stabilize the foot stripping foundation.

The swimming pool on the first floor also need sealing. Mr Andy Sheldon of the WCED's finance branch confirmed today that an agreement will be reached, and a memorandum of understanding signed between the head of the Department of Transport (Mr Tami Manyathi) and the CG (Mr Ron Swart) to the effect that the DTPW will transfer the funds within an MTEF year to the WCED to finance the lease amount. The WCED, in turn, will transfer monthly lease amount to your college in order for you to be able to pay the owner. This payment process will continue for as long as the lease agreement is valid. Please do not sign the lease agreement before the WCED's lawyers approve it. I have requested Mr Menno Bouwer to let me have a draft copy of the lease agreement as soon as possible so that it can be checked by our legal people before both parties sign the documents. Thanks Nat."

[35] The respondents relied on the Kaschula emails to submit that Beech could not reasonably have believed that the WCED had entered into a further 5-year lease in respect of the Table Bay campus.

[36] The respondents further alleged that the applicant paid amounts equal to a rental increase of 9% and that this escalation was in access of the 6% suggested in the Kaschula correspondence. The applicant made monthly rental payments of R146 940.30 including VAT to the ninth respondent; according to the respondents this was more than the amount Loynes indicated the WCED had available for rental. It is so that Loynes indicated that R668 000 was available for rental and this translated into R133 600 per month. The payments, so the respondents argued, suggested that a lease had been concluded between the applicant and the ninth respondent and that the WCED was not a party thereto.

[37] In their answering affidavit, the respondents said:

> *"The Department of Transport and Public Works could not have agreed to a monthly rental of R128 895, excluding VAT (146 940.30 including VAT) since the department only had budgeted monthly amount of R133 600 available to contribute to lease payments. In any event the department did not agree to extend the lease in question. The respondents therefore allege that no lease agreement was entered into between it and the owner"*

[38] The respondents further alleged that from applicant's papers, it appeared that the applicant had paid the rates and taxes as well as the insurance premiums in respect of the Table Bay campus. Those payments were, on the respondents' version, never their responsibility in terms of any contract with the ninth respondent.

[39] The respondents have further relied on the draft lease agreement, which appears to have been drafted on 1 January 2007, for its contention that the applicant knew it had to conclude a lease in

respect of the Table Bay campus and that pending the conclusion of the lease, the applicant and the ninth respondent entered into a month-to-month lease. The preamble to that agreement appears from the papers to be the following:

"Preamble: The lessee has been in occupation of the premises since 1 September 2006 on a monthly notice basis in terms of a separate agreement at rental of R128 895 p/m plus VAT. The parties herewith agree that this rental will continue to 30 April 2008 from which date the rental as set out in 6.0 below will apply in terms of this agreement."

[40] The respondents have further relied on the content of a legal opinion that was compiled at the instance of Beech for their submission that the applicant knew it had to conclude a lease agreement with the ninth respondent. The following appears from the opinion:

"1. Consultant is Mr Leon Beech, CEO of Northlink College, a further education and training (FET) college as envisaged by the Further Education and Training Colleges Act 16 of 2006.

2. Consultant requested a legal opinion and recommendation with regard to the memorandum of agreement of lease between Seamans Property Investment (Pty) Ltd and itself with regard to property situated in Table Bay Harbour.

3. Consultant furthermore requested that the legal opinion concentrate on those areas highlighted by the consultant. ..."

[41] The respondents admit that they made various contributions to the applicant in respect of the lease agreement for the Table Bay Campus.; however, they emphasised that the contributions were expressly subject to availability of funds. The WCED on the above basis denied liability for the rental and municipal rates in respect of the Table Bay campus.

[42] Mr Oliver further, with reference to the Law of Contract in South Africa 5th Edition by Christie (see pages 88–89) submitted that a tacit month-to-month lease agreement came into effect when the 1990 lease agreement expired. That tacit lease agreement, he submitted, was between the WCED and the ninth respondent. The passages referred to are authority for the submission that a tacit lease agreement comes into existence in circumstances where at the expiry of a written lease the parties to that lease agreement continue as if the lease was still in existence.

[43] However, the circumstances of the matter are distinguishable. I am persuaded on the facts of this matter that there existed no tacit lease agreement, month to month, between the respondents and the ninth respondent. I am further satisfied that as early as 25 September 2007, when Beech sought the legal opinion, he was aware that the applicant would, as lessee, have to take responsibility for any lease agreement between itself and the ninth respondent. This was also in line with the legislative intent:

[44] Section 3(2) of the FET College Act provides that:

"Every public college is a juristic person."

[45] The applicant was such a juristic person and consequently the applicant was capable of entering into agreements and to own property. Sections 5(1)(b) and (c) provide that:

*"...**5 Consequences of declaration as public college –***

...(b) the assets, liabilities, rights and obligations of the institution vest in the public college; and

...(c) any agreement lawfully entered into by or on behalf of the institution must be regarded as having been concluded by the public college."

[46] Mr Oliver alleged that the respondents failed to put up evidence in support of their allegation. I disagree. In my view, having regard to the approach in motion proceedings, discussed in paragraph 16 above, the respondents have put up evidence to justify a finding in their favour.

THE NONE PERSONNEL/NONE CAPITAL SUBSIDY ARREARS

[47] On 16 March 2009, the National Minister of Education promulgated the norms in terms of Section 23 of the FED Colleges Act (**the Norms**). In terms of the Norms, tertiary education institutions such as the applicant would receive funding based on a particular formula. In terms of paragraph 28 of the Norms, formal funding of programmes was intended to cover the recurrent costs of delivering FET programmes as well as certain capital costs associated with those programmes, specifically costs relating to the replacement of facilities and equipment used.

[48] Moreover, the formula funding of programmes was intended to cover college overhead costs, specifically those related to administration and student support. The funding format has 3 key components:

(a) The first is a government subsidy that covers 80% of the programme cost.

(b) The second is student fees, which were capped at 20% of programme costs. This measure was to ensure that poor students also have an opportunity to undergo higher education.

(c) The third is the establishment of a national bursary scheme to ensure that academically capable but poor students are assisted to pay the college fees.

[49] The applicant submitted its strategic plan to the department for funding in terms of the new formula. In a letter dated 15 December

2009, the respondents indicated that the applicant's proposal had been approved. The respondents alleged that in October 2009, the National Department of Higher Education and Training awarded the applicant an indicative budget of R41 275 308 in terms of the funding norms. In essence, this meant that in terms of the funding norms, the 41.2 million was the only state funding available to the applicant from the programmes FET colleges budget through which the education department funds FET colleges. Mr Potgieter submitted that:

"1. The effect of this was that the applicant would not have had sufficient funding to service its salary bill of approximately 67 million, which is being administered on the state's Persal system by the education department as agent on the applicant's behalf. The education department, in an effort to ensure that the applicant would be able to meet its salary commitments, advised the applicants that the education department was able to secure additional funding of R23 774 763 to make up for the short fall in the applicant's salary bill.

2. Hence the applicant was informed on 15 December 2009 … that it was being allocated total funding of R68 050 071.00 for the 2010/11 financial year. … Applicant pursuant to an agreement that the education department as agent will pay the salaries of the applicant's personnel and supporting staff via the state Persal salary payment facility pending the applicant being able and having the necessary infrastructure to deliver this service itself.

3. The net effect of this decision was that the applicant was able to meet its salary commitments, but could not be paid directly any portion of its funding allocation, including the amount of R15 623 388 in respect of the none/personnel none/capital component, included in the indicative budget of R41.2 million and which is being claimed in these proceedings. …

> 4. *Put differently, if the education department had paid out the subsidy funding allocation to the applicant, the latter would have had a shortfall of R23 774 763 on its salary bill, which it in any event would have had to source from income, other than the programme 5 FET colleges budget. … Accordingly even if the applicant were entitled to receive payment of the amount of R15 623 880 claimed this would be set off against the amount of R23 774 763.00 leaving a balance of R8 151 375 owing by the applicant."*

[50] The respondents alleged that the WCED funded only the salaries of staff who taught the NC(V) related syllabus. The syllabus takes into account the government's assessment of the country's training needs. Higher education institutions, such as the applicant, are at liberty to offer non-NC(V) related courses but not to receive government funding for them. The respondents have in their answering affidavit and in submissions alleged that:

> *"…the students on the NC(V) programs only represented approximately 8% of the applicant's total student population. At some other FET colleges the ratio is reversed, namely approximately 90% of the student population is on the NC(V) programmes, which significantly increases the funding allocation for those entities. The applicant, so the argument went, appears to have taken a deliberate policy decision not to convert significantly to the NC (V) programs and to rely on its traditional funding sources instead of the NC (V) funding allocation."*

[51] It was common cause that the applicant's staff was paid by the WCED through the latter's Persal system – all government employees are paid through that system. However, on 31 December 2007, the applicant's entire staff establishment as reflected on the Persal system was transferred to the applicant's employ. The WCED nevertheless continued to administer the payment conditions of these

staff members with the appropriate funding within the WCED to the value of approximately R40 million.

[52] Section 20 of the FET College Act provides that:

> *"20(1)...The college is the employer of all lecturers and support staff."*

[53] I am persuaded that it was competent for the respondents to have applied the subsidy allocated to the applicant to remunerate the applicant's staff. Section 20(3) of the FED College Act provides that:

> *"...20(3) The council must appoint and remunerate staff from the funds allocated in accordance with the norms and standards contemplated in section 23 and other income received by the college from other sources."*

ORDER

[54] I, for the reasons stated above, make the following order.

(a) The application is dismissed with costs such costs to include the costs occasioned by the employment of two counsel.

Baartman J