

FORM A**FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION
JUDGMENT****PARTIES:****ED-U-COLLEGE****Plaintiff**

and

**MEMBER OF THE EXECUTIVE COUNCIL
OF THE PROVINCIAL GOVERNMENT
OF THE EASTERN CAPE RESPONSIBLE
FOR EDUCATION****First Defendant****MEMBER OF THE EXECUTIVE COUNCIL
OF THE PROVINCIAL GOVERNMENT
OF THE EASTERN CAPE RESPONSIBLE
FOR FINANCE****Second Defendant****THE NATIONAL MINISTER OF
EDUCATION****Third Defendant**(2) Case Number: **3146/08**(3) High Court: **EASTERN CAPE, PORT ELIZABETH**

(4) DATE HEARD: 09/06/2010....

(5) DATE DELIVERED: **22/06/2010****JUDGE(S): NEPGEN J ...****LEGAL REPRESENTATIVES –*****Appearances:***

12 For the Plaintiff(s): Adv P Ellis SC, Adv G Kairinos

13 for the Defendant(s) (1st and 2nd): N Dukada SC, L A Schubart***Instructing attorneys:***

Plaintiff(s): Mr P Abernethy (Oosthuizen Hazel & Wilmot)

Defendant(s) (1st and 2nd): Mr S P Mnyande (State Attorney)**CASE INFORMATION -*****Nature of proceedings: Civil Matter******Topic:*****Key Words:**

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

Case No: **3146/08**

In the matter between:

ED-U-COLLEGE

Plaintiff

and

**MEMBER OF THE EXECUTIVE COUNCIL
OF THE PROVINCIAL GOVERNMENT
OF THE EASTERN CAPE RESPONSIBLE
FOR EDUCATION**

First Defendant

**MEMBER OF THE EXECUTIVE COUNCIL
OF THE PROVINCIAL GOVERNMENT
OF THE EASTERN CAPE RESPONSIBLE
FOR FINANCE**

Second Defendant

**THE NATIONAL MINISTER OF
EDUCATION**

Third Defendant

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JUDGMENT

NEPGEN, J

[1] The Plaintiff is an association incorporated in terms of Section 21 of the Companies Act, No 61 of 1973. It is registered as an independent school in terms of Section 46 of the South African Schools Act, No 84 of 1996 (the Act). First Defendant is the Member of the Executive Council of the Provincial Government of the Eastern Cape responsible for education. Second Defendant is the Member of the Executive Council of the Provincial Government of the Eastern Cape responsible for finance. Third Defendant is the Minister of Education of the Republic of South Africa. The Plaintiff seeks no relief against third defendant in this action. What it

does claim is payment by first defendant, alternatively second defendant, of the sum of R 2 156 115.12. This amount is alleged to represent the shortfall in subsidies payable to the plaintiff in terms of Section 48 of the Act, which section will be referred to more fully hereafter. Although this is not entirely clear from the allegations made in the particulars of claim, it would appear, from first and second defendants' plea, that the alleged shortfall in subsidies is in respect of the period 1999 until 20 September 2005.

[2] On the pleadings it is common cause that the plaintiff is entitled to and that it has received subsidies from first defendant, alternatively second defendant, in terms of Section 48 of the Act "for a number of years" and that it continues to receive such subsidies. It may very well be that the admission in the plea, insofar as it relates to second defendant, was made *per incuriam* when regard is had to the express disavowment of any obligation on behalf of second defendant to the plaintiff in respect of the plaintiff's claim, but for present purposes that is neither here nor there. It is further common cause that third defendant's predecessors in title have, in terms of the powers conferred by Section 48(1) of the Act, determined norms and minimum standards for the payment of subsidies to independent schools such as the plaintiff, the relevant Government Gazettes in this regard being Government Gazette No 19347 dated 12 October 1998 and Government Gazette No 24245 dated 10 January 2003. Both these Government Gazettes refer to "National Norms And Standards For School Funding". For convenience I shall hereinafter merely refer thereto as norms and standards. These norms and standards have since been amended, but those in the Government Gazettes referred to are those which were applicable during the period over which the plaintiff's claim has been calculated.

[3] Apart from raising a special plea of prescription, most of the allegations made by the plaintiff have been admitted by first and second defendants in their plea. Significantly, it is not disputed that the plaintiff has not received the full subsidy calculated in accordance with the “Allocation table for independent school subsidies”, which is to be found in paragraph 151 of the norms and standards (in this regard the reference in paragraph 10 of Government Gazette No 24245 to paragraph No 152 is clearly an error and should be a reference to paragraph 151). In respect of the allegation that first and/or second defendant failed to pay such subsidy to the plaintiff, the plea reads as follows:

- “12.1 The grant of subsidy to the Plaintiff is the legal duty of the First Defendant in terms of the provisions of sub-section (2) of section 48 of the South African Schools Act (No 84 of 1996);
- 12.2 The Second Defendant has no legal duty to grant any subsidy to the Plaintiff;
- 12.3 In the premises, the relief sought by the Plaintiff against the Second Defendant has no basis in law;
- 12.4 The grant of full subsidy by the First Defendant to the Plaintiff during the period from 1999 to 20 September 2005, as determined by the formula prescribed by the national norms and standards, was dependant on;
 - 12.4.1 the amount of funds appropriated by the Provincial Legislature for the programme relating to Independent Schools; and
 - 12.4.2 The availability of funds in the Department of Education.

- 12.5 During the period 1999 to 20 September 2005 the Provincial Legislature appropriated funds for Independent Schools but such funds were less than the formula prescribed by the national norms and standards;
- 12.6 During the period 1999 to 20 September 2005 no funds were available in the Department of Education to enable the First Defendant to grant the Plaintiff and various other independent schools the full subsidy in terms of the national norms and standards;
- 12.7 Consequently, the First Defendant granted subsidies to the Plaintiff and various independent schools during the period from 1999 to 20 September 2005 based on funds which were available to the Department of Education.”

[4] Prior to the hearing of the matter there had been discussions between the parties regarding the separations of certain issues in terms of Rule 33 (4). Initially no agreement could be reached in this regard, and this resulted in the plaintiff bringing a substantive application for a separation of issues. However, by the date of the hearing the parties had managed to agree on this aspect of the matter. This agreement was that there should be a separation of issues and a document, titled “Separated Issues”, was handed in. The formulation of the issues to be determined initially, in terms of the agreement between the parties, was as follows:

“The aspect to be determined is the following:

- 1.1 Whether the First Defendant is entitled to furnish subsidies in amounts less than that provided for in the Norms and Standards on the grounds

alleged in paragraphs 10.2 read with 12.4 of the Defendant's Amended Plea dated 27 March 2009;

- 1.2 Whether the issue referred to in paragraph 1.1 constitutes a defence in law."

[5] Paragraph 10.2 of the defendants' plea contains a denial of the allegation that "First and Second Defendants" are not entitled to furnish subsidies in amounts less than that provided for in the norms and standards. It is averred that the reasons for such denial "are set out below".

[6] When the matter was called I made an order separating the issues in accordance with the parties' agreement. It was then stated that I should decide this issue as a point *in limine*. Whatever one calls it, it seems to me that the second question raised is dependent on the decision reached on the first. In this regard it would appear, further, that the approach to the question I have now been asked to decide should be the same as if the plaintiff had taken exception to the plea on the ground that it does not disclose a defence.

[7] The contention advanced on behalf of the plaintiff was, as I understand it, that once first defendant decided to grant a subsidy to an independent school he was bound by the formula provided for in the norms and standards and could not deviate therefrom. In this regard I was referred to a number of so-called relevant paragraphs in the norms and standards which, so it was submitted on behalf of the plaintiff, indicated that first defendant could only deviate from these norms and standards in certain circumstances; and as it had not been pleaded that these circumstances existed, the admitted deviation therefrom was unlawful.

[8] I agree with the submission made on behalf of the plaintiff that the defendants' case, as it appears from the pleadings, is (a) that the payment of subsidies in terms of the norms and standards was dependent on the availability of funds appropriated by the provincial legislature and (b) that first defendant was entitled to grant subsidies in amounts less than that provided for in the norms and standards. This meant, so it was contended by the plaintiff, that the Eastern Cape Provincial Government had under-budgeted for the expenses envisaged in the norms and standards. It was further contended that this does not constitute a defence to the plaintiff's claim for payment of the full amount of subsidies determined according to the formula prescribed by the norms and standards. For this contention reliance was placed on what was said by O'Regan, J in Permanent Secretary, Department of Education and Welfare, Eastern Cape, and another vs Edu-College (PE) (Section 21) Inc, 2001 (2) SA 1 (CC) at p16 [23] where it was stated that

“(I)f a court concludes that the Government owes money to a litigant, the fact that the Government has not budgeted for such payment cannot deprive the court of the power to make an appropriate order. Nor will it excuse the Government from an obligation to pay.”

[9] Reliance was also sought to be placed on the unreported decision in Crankshaw and others vs MEC, Education: Eastern Cape Province and others, Bhisho Case no 93/2006 in which Cossie, AJ made a similar statement, which is almost identically worded and based on that in the Edu-College (PE) case, *supra*. It was further submitted that as the Crankshaw case was decided with reference to the same norms and standards in issue the present matter, it effectively disposes of the question

I have to decide in this case. I will deal with this aspect of the matter more fully later, but it should be mentioned at this stage that I was informed that leave to appeal against the judgment of Cossie, AJ was granted to the full bench in Bhisho but that that appeal has not yet been heard.

[10] In order to consider whether or not the defendants' plea discloses a defence, regard must be had to what is provided in section 48 of the Act, which deals with subsidies to registered independent schools. Subsections (1) and (2) provide as follows:

- “(1) The Minister may, by notice in the Government Gazette, determine norms and minimum standards for the granting of subsidies to independent schools after consultation with the Council of Education Ministers and the Financial and Fiscal Commission and with the concurrence of the Minister of Finance.
- (6) The Member of the Executive Council may, out of funds appropriated by the provincial legislature for that purpose, grant a subsidy to an independent school.”

[11] It is clear that Section 48 (2) of the Act confers discretionary powers on first defendant to grant a subsidy to an independent school. However, before that discretion can be exercised, funds have to be appropriated by the provincial legislature “for that purpose”, in other words for the purpose of providing independent schools with subsidies. As I read this sub-section, the discretion conferred is not an unlimited one, but one which is limited to granting subsidies “out of funds appropriated by the provincial legislature for that purpose”. This can be considered to be consistent with what is pleaded in paragraph 12.4.1 of the defendants' plea, although the wording used in the plea is probably somewhat loose.

[12] Based on what I consider to be the clear meaning of section 48 (2) of the Act, the availability of funds in the Department of Education could only have relevance to the questions whether first defendant may grant subsidies to independent schools if such funds were appropriated by the provincial legislature for the purpose of granting subsidies to independent schools. The reference in paragraph 12.4.1 of the plea to the availability of funds in the Department of Education may have been intended to be a reference to funds appropriated for such purpose. If that was not the intention, that averment in the plea is irrelevant.

[13] Paragraph 12.4 of the defendants' plea should not be looked at in isolation in considering the issues I have been asked to decide at this stage. The allegations made in paragraphs 12.5 to 12.7, constituting some of the reasons referred to in paragraph 10.2, can not be ignored. These allegations are capable of the construction that funds were appropriated by the provincial legislature for the purpose of granting subsidies to independent schools, but that such funds were insufficient to enable first defendant to grant full subsidies according to the formula prescribed by the norms and standards. They are further capable of being construed as alleging that first defendant, in granting subsidies to independent schools, utilised the funds that were actually appropriated by the provincial legislature for the purpose of granting subsidies. What the exact position in this regard is, is something that may have to be determined by evidence in due course. However, at this stage it must be assumed that these allegations will be established.

[14] The plaintiff's contention that what the defendants' have pleaded does not constitute a defence appears to be based almost entirely on the passage in the Edu-College (PE) case, *supra*, which I have quoted. I am unable to agree that this passage assists the plaintiff in any way. What the constitutional court had considered, prior to making that statement, was whether the determination of the subsidy formula, which determined the amount of money to be paid to independent schools, constituted a legislative act or other act which was not justiciable under Section 33 of the Constitution (see p 8 [10]). It was held that the exercise of the power granted in terms of Section 48 (2) of the Act constituted administrative action. Thereafter the Constitutional Court dealt with a further argument on behalf of the applicants in that case, namely that because the Department of Education had spent the full amount allocated to independent schools, it would not be competent for a court to make an order sounding in money against the applicants. After stating, in effect, that that argument was unsustainable, the court made the statement referred to. It can thus not be construed as a statement which means that Section 48 (2) of the Act enables a Member of an Executive Council to grant subsidies to independent schools out of funds appropriated by the provincial legislature for a purpose other than the purpose of granting such subsidies.

[15] I am also of the view that the Crankshaw matter, *supra*, does not assist the plaintiff. What had to be considered in that case was whether the decision taken by the Member of the Executive Council constituted unlawful, unreasonable and procedurally unfair administrative action. In the present instance there is no suggestion in the particulars of claim that the actions of first defendant offended the provisions of Section 33 of the Constitution. The reason for this is presumably

because the plaintiff's approach is that the norms and standards are binding and may not be deviated from and that once a decision is taken to grant a subsidy it must be in the full amount, irrespective of what amount may have been appropriated by the provincial legislature for that purpose. For the reasons already mentioned, I cannot agree that this is correct.

[16] In my judgment the point *in limine* must fail. The parties are in agreement that the appropriate order to make in this regard would merely be one dismissing the point *in limine* with costs, such costs to include the costs of two counsel.

[17] In the result I make the following order:

The point *in limine* is dismissed with costs, such costs to include the costs of two counsel.

J J NEPGEN
JUDGE OF THE HIGH COURT

For the plaintiff: Adv. P Ellis SC, Adv G Kairinos instructed by Oosthuizen Hazel & Wilmot

For the defence(1st and 2nd): Adv. N Dukada SC and L A Schubart instructed by State Attorney