

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

CASE NO. 224/2023
NOT REPORTABLE

In the matter between:

TANDISWA NOMSISI MABANDLA

Applicant

and

**MEMBER OF THE EXECUTIVE COUNCIL
FOR THE DEPARTMENT OF EDUCATION –
EASTERN CAPE**

First Respondent

**THE HEAD OF DEPARTMENT FOR THE
DEPARTMENT OF EDUCATION –
EASTERN CAPE**

Second Respondent

**JUDGMENT IN RESPECT OF URGENT APPLICATION FOR INTERIM RELIEF
UNDER PART A**

HARTLE J

[1] The applicant is a displaced educator, for want of a better description. In 2018 she was appointed as a permanent principal at the Gobintsasa Primary School in Ntabankulu. In 2020 the school was closed for operational reasons and the learners moved to the Khetani Primary School, where she too was initially moved. She was

however subsequently deployed at the Bagqozini Primary School, also in Ntabankulu, in a diminished capacity.

[2] She claims that neither she nor the governing body of her disestablished school were afforded an opportunity to make representations as contemplated in the *Guidelines for the Rationalisation of Small or Non-viable Schools* issued by the Directorate Rural Education under the Education Department (“The 2009 Guidelines”). Her real issue with the process that was adopted relating to the school’s unfortunate closure however pertains for present purposes to her own employment interests that were indisputably impacted thereby. The Guidelines, for example, behoved all role players in the rationalisation process to “ensure compliance with all obligations applicable to labour law”, and to give recognition *inter alia* to the position of principals in consequently placing them in suitable posts elsewhere arising from the rationalisation process.

[3] More than two years after the applicant became “displaced” pursuant to the loss of her post for the operational reasons applicable to her disestablished school, she was eventually called to a meeting of circuit managers in the Alfred Nzo West district of the ECDoE (“the department”), under which administrative district Ntabankulu falls, in January 2023, and asked to choose a school amongst five specific schools named and identified by the department itself where she might wish to be placed as a principal *in lieu* of the principal post lost to her by the rationalization process.

[4] She alleges that this meeting was held pursuant to a memorandum issued by the office of the acting DDG: Corporate Services, dated 6th December 2022 (“the Memorandum”) that concerned the filling of “promotional posts” subject to a management plan advertised in a 2022 bulletin that were never filled within the prescribed time frame. The Memorandum *inter alia* (in paragraph 8 thereof) invited the relevant role players in the department to fill principal posts “by placing principals from closed schools.” (This appears to be a reference to schools closed due to operational

requirements). The applicant's preferred choice amongst the five possibilities held up to her was the Khetani Primary School.

[5] Having made her election, the managers raised no objection to her choice or alerted her to any difficulties that pertained thereto, most especially as to her competence to be placed at the Khetani Primary School, and she assumed that it was a *fait accompli*, as it were, that she would consequently be appointed principal there.

[6] On 1 March 23 she learned through a principals' WhatsApp group that Khetani Primary School, her choice of placement to remedy the disadvantage to her by the rationalization process, was being "profiled". In education parlance this apparently means that the school has been identified as one with a vacant post that requires to be filled. Once "profiled," a formal advertising of the identified vacant post ensues which is then followed by the customary open recruitment processes.

[7] Although nothing formal had been communicated to her since the January 2023 meeting after confirming her expressed preference, she claims to have entertained a legitimate expectation that she would be appointed to the vacancy at the Khetani Primary School offered to her at the meeting, which she understood to be on the basis provided for in the Memorandum. When she heard that the post earmarked for her had however been "profiled" this created a concern for her that her expectation of being appointed to the post would be prejudiced.

[8] Cautiously she approached an attorney who invited the Department of Education (within 30 days of 16 March 2023)¹ to clarify her employment status, more particularly in relation to her reasonable expectation that she would be placed at the Khetani Primary School in the principal's post, which now appeared to be under threat according to the information gleaned by her on the principals' WhatsApp group. Even before engaging the services of an attorney however, she also sought to take up her compromised

¹ There was evidently no haste at the time and an expectation that the situation could be resolved informally by the department.

situation with at least two circuit managers who she claims gave her the “run around” rather than any positive affirmation of her placement in the chosen post.

[9] In any event, it was brought to her attention on 6 April 2023 that the Khetani Primary School principal’s post had certainly been included and advertised in the Open Post Bulletin for Principals: Volume 1 of 2023 dated 27 March 2023 (“the Bulletin”), with the closing date for submission of applications for all the advertised posts being on 24 April 2023.

[10] This prompted the present application which was launched on an urgent basis on the pivot, so to speak - at least in respect of the relief claimed under Part A, of the closing date of 24 April 2023, in which the applicant asks this court to interdict the respondents from recruiting and appointing prospective candidates to *the vacant posts* (*sic*) reflected in the Bulletin pending further relief sought under Part B compelling them to comply and adhere to paragraph 8 of the Memorandum dated 6 December 2022 and to give effect to her preference by furnishing her with a letter of appointment as principal of that school.

[11] Notwithstanding the provisions of paragraph 8 of the Memorandum, the applicant’s points out the further obligation on the respondents to follow the provisions of the Personnel Administrative Measures (“the Measures”) promulgated under the Employment of Educators Act, 1988, which, *inter alia*, require that before a post is advertised, all vacancies that arise at educational institutions must be offered to serving educators displaced as a result of operational requirements as a first step. Secondly, every attempt is to be made to accommodate such displaced educators in suitable vacant posts at educational institutions or offices. The Measures provide further that, although all vacancies (required to be filled) are to be advertised, the department may publish a closed vacancy list. In such an event, the procedures contained in the resolution dealing with the rationalisation and deployment of educators in the provisioning of educator posts are to apply. (I digress to emphasise that the respondents accept that these are the necessary processes, as well as the fact that that

was the peculiar deference to have been afforded to the applicant under all the circumstances.)

[12] The applicant articulated the harm that would befall her if the recruitment process with regard to the post earmarked for her is open, rather than closed and if the recruitment process initiated by the publishing of the open principal's bulletin is permitted to take its course. In such event, she will have to compete with other interested applicants and might then not be successful. She claims that worst case scenario, she might ultimately be left without a job and indeed, she will lose the opportunity to be placed at the school of her choice if the vacancy is filled by another incumbent in an open recruitment process. This, so she submitted, will be obviously detrimental to her interests and employment rights, particularly since the 2009 Guidelines and the Measures provide for her to be placed without following the normal recruitment processes. Moreover, as far as she is concerned, the placement at the Khetani Primary School according to the processes indicated by the Memorandum, the Measures and the 2009 Guidelines had "accrued" to her.

[13] In the lead up to the application being heard before me, the respondents gave an undertaking to extend the closing date for the submission of applications in terms of the Bulletin until today,² in effect recognizing in my view that without the court's intervention she would both be in a predicament and would not achieve substantial redress down the line if the matter were to be heard in the ordinary course.³ This concession by the respondents was incorporated in the order made by my colleague who postponed the matter to the opposed roll this week whilst the parties exchanged further papers.

[14] The respondents opposed the application, firstly citing a lack of urgency.

² Which extension they effected by the simple *fiat* of publishing an addendum.

³ In my view, although not invoking the exact phraseology implicated by the provisions of Rule 6 (12) (b), the applicant fully set out the *circumstances* that justified the hearing of the application on an urgent basis as well as the basis on which she contended that she would not obtain substantial redress at a hearing in the ordinary course.

[15] They claim further in answering affidavits filed on their behalf, to have accurately followed all rationalization procedures *vis-à-vis* the applicant's interests implicated thereby, advertent to the very same meeting she says management held with her in January 2023 when she was asked to choose her school. It transpires though, according to the deponents (who Mr. Metu complained do not appear to be properly authorised to depose on behalf of the cited respondents)⁴ that her choice could not be acted upon essentially because she does not qualify for placement at the Khetani Primary School.

[16] In his respect they revealed for the first time in the answering papers that:

“When the circuit managers of the Alfred Nzo West district started the verification and consultation process in line with the applicable protocols of rationalisation it transpired from the Human Resources section of the district that applicant is a level P1 principal and that the school which she has shown interest into is a level 2 in terms of post grading.”

[17] They assert that due to this “predicament”, she could not be placed at the Khetani Primary School as this would have amounted to “a promotion without having followed recruitment processes” and add that “a placement only occurs in respect of posts at the same salary level and it must be horizontal in nature.” They suggest that the solution available to her, forgetting the deference admittedly owing her, is to compete for the post in an open recruitment process.

[18] Assuming there is any merit in this argument (which I do not have to decide for present purposes) they must evidently have known since 6 December 2022 that the Khetani Primary School required a principal at a level 2 grading, this apparent from a Final Post Establishment conducted for the present year for the “Khetani Junior

⁴ The point was raised from the bar by Mr Metu and was not a matter I had to decide under Part A. in any event the respondents were not afforded an opportunity to deal with it.

Secondary School” put up by them as Annexure “LM-1” to their answering papers, yet had no qualms including the school as one of five that she might (on their version) horizontally transfer to.

[19] The respondents have not taken this court into their confidence regarding the nature of the verification and consultation process the department’s officials allege were followed, or when this process was undertaken in relation to the January 2023 meeting. Further no basis appears for the assertion (as a standard) that a placement only occurs in respect of posts and the same salary level or that it is required to be “horizontal in nature”. Indeed, the department still has a lot of explaining to do and the remedying of the applicant’s displacement still hangs starkly in the air. The question begs itself, for example, why the department’s managers offered the school as an option to the applicant in the first place. Further, assuming there to be a valid basis for the current stance adopted by the department, the additional question arises why she was not informed sooner of this supposed dilemma. Indeed, despite the launch of these proceedings and the clear fact that she has been legally represented at least since 16 March 2023, the circuit manager of the district, identified as M Gabela, privately addressed her in a letter dated 21 April 2023 (after the issue of the application) as follows:

“TO: MRS MABANDLA

FROM: CIRCUIT MANAGER

SUBJECT: REJECTION OF YOUR CHOICE

in respect to your choice about the school you preferred to be placed at, which is Khetani Primary School, upon making indepth enquiry from our HR section about the grading of schools, we were reliable informed that your previous closed school (Gobintsasa PS) was graded P1 whilst your school of choice (Khetani P2) is graded P2.

By implication your choice is tantamount to a promotion which by procedure you are supposed to apply and follow all the due process.

We believe the above information and explanation will inform your future steps to take. Our sincere apologies for the late response due to the process of enquiries.” (Sic)

[20] When the matter was argued before me I queried from Mr. Mayekiso who appeared for the respondents whether by their formal response privately addressed to the applicant they had not in fact capitulated to the interim relief sought under part A. He did not argue against such an interpretation but was not in agreement that the respondents should pay the costs of the application under this part. In this respect he submitted that the relief sought by the applicant had been cast too widely in the notice of motion. He lamented the fact that the Bulletin involved hundreds of posts, all of which would (and had) been held hostage so to speak by the applicant’s parochial problem.⁵ As far as he was concerned, if the relief sought in the notice of application had been suitably curtailed, his clients might have agreed to an interim order that isolated out the vacant post at the Khetani School. (Ironically though if his client’s defence is taken at face value the concession is inconsistent with the department’s stance that the applicant must make her application in terms of the Bulletin and openly compete for the post at the Khetani Primary School if she entertains any hope of being placed there.) The simple answer though is that in the same way the department was able to publish an addendum, it could also have *withdrawn* the entire Bulletin and republished a new one, excluding the contentious principal’s post at the Khetani Primary School.

[21] Mr. Mayekiso did not forcibly persist in his argument that the application should flounder for want of urgency, neither am I inclined of the view that any merit exists in the points taken by the respondents on this issue. It is plain that the applicant was backed

⁵ In this regard he raised the fact that the undertaking given by the respondents entailed extending the deadline for submissions pursuant to the Bulletin until 28 April 2023.

into a corner with the date for submissions looming, and that she took reasonable steps to ascertain her position before adopting a litigious approach. She further explained that once it appeared to her that it would be necessary to seek the court's intervention she had to consult with counsel. The distance between Ntabankulu and Mthatha where her counsel operates from, and her peculiar financial imperatives, caused a slight delay in her attorneys preparing the present application, as also the fact that it was Easter. Ultimately the certificate of urgency was presented to the duty judge on 17 April 2023. Against all these exigencies, the respondents couldn't even have been bothered to inform her attorney after asking on her behalf what her official status was of their "decision," obviously taken after the fact and evidently *because of* the urgent litigation.

[22] It seems to me therefore that the applicant has established both urgency and the relevant requirements for the grant of an interim interdict. The *prima facie* right is fairly apparent from the department's manager's handling of the matter and reasonable impression created by them that the principal's post at the Khetani Primary School was able to be reserved for her. The after-the-fact purported justification for why she cannot now be appointed to that post, is to my mind a mere red herring and does not change what was on the horizon for her as of 6 April 2023 when she first learned that the post had been published in the Bulletin.

[23] The harm the applicant will suffer by the open recruitment process has been stated above. The alleged prejudice to the respondent thereby is a fallacy. It can easily exclude the school from its recruitment processes currently underway pursuant to the Bulletin. For the rest, and concerning the processes going forward, the applicant's entitlement to be placed at a school after having become displaced does not now come to an end because of the purported justification thrown up by the respondents. Indeed, the department has a lot to explain and must of necessity still place the applicant, a legal obligation they were required to meet nearly three years ago already.

[24] As I indicated above it is unnecessary for me to decide for present purposes whether the department was entitled to take the "decision" which it has purported to or

the merits of that decision. That is no doubt something that the applicant will call into scrutiny under the part B relief sought given its impact on the question whether the Khetani Primary School should have been “profiled” at all under the circumstances and whether the applicant is entitled to insist that the process commenced by the January 2023 meeting be given effect to. In the meantime, and in order to preserve her rights, it appears to me to be necessary to interdict and restrain the open recruitment process with regard to the still available vacant principal’s post at her desired school from proceeding in the meantime.

[25] The parties did not address me regarding the other four choices held up to the applicant. The thought occurs to me that I should have asked if those schools were also profiled and those principal’s posts mentioned in the Bulletin. Given the change of circumstances by virtue of the respondents’ recent purported “decision” and the supposed elimination of the applicant’s preference, the parties would certainly in my view be entitled to approach the court to amplify the terms of my order granted herein to preserve her position regarding the other four options that she may have to consider depending on the determination of the applicant’s application under Part B.

[26] I take Mr. Mayekiso’s point that the relief as stated in the notice of motion on the face of it potentially causes confusion in the sense that the applicant by the relief she claims purports to persuade this court to interdict and restrain the respondents from proceeding with the recruitment of *all* principal posts across the province advertised in the Bulletin whereas her only concern for present purposes is with the post for the Khetani Primary School. It was clearly never the applicant’s intention to cause havoc or the pandemonium contended for on behalf of the respondents. The matter is easily solvable by simply taking the Khetani School out of the equation for present purposes. I will tailor the relief accordingly under the mantle of prayer 7 for “further and/or alternative relief.”

[27] Mr. Metu who appeared on behalf of the applicant requested me to deal with the issue of costs presently, rather than leaving them for determination under Part B given

the respondents' censorious conduct by keeping the applicant on a string and by paying lip service to their legal obligation (going back more than two years) to have placed her back in the system or at least to have meaningfully addressed the fallout of the rationalisation process concerning her. He further urged upon me to grant costs on the punitive scale and possibly even *de bonis propriis* against the managers concerned who have ridden roughshod over her rights and acted in disregard of her legal entitlement, quite insensitively at that. Whilst I agree with his characterization of their poor handling of the matter and that the applicant ought not to be out of pocket by virtue of the present proceedings that could have been avoided, it is not clear what role each of the circuit managers played, or didn't, in the whole fiasco. For now, I will peg the costs at the attorney and client scale, but I agree that the three managers named in the applicant's founding affidavit should be called upon to show cause why such a punitive costs orders should not be made against any, or all, of them in the peculiar circumstances. I make provision for that in the order below.

[28] In the result, I grant the following order:

1. The respondents are interdicted and restrained, pending the finalisation of the relief sought under Part B, from proceeding with the recruitment process including but not limited to shortlisting, interviewing, selection of prospective incumbents and their placement in the vacant principal's post at the Khetani Junior Secondary School advertised in the Open Post Bulletin for principals: Volume 1 of 2023 dated 27 March 2023.
2. The respondents are directed to pay the costs of the proceedings under Part A, including the reserved costs of 20 April 2023 on the attorney and client scale.
3. The three circuit managers of the Alfred Nzo West District of the Eastern Cape Department of Education, namely Messrs Zondani and Gabhela, and Mrs. Nonkonyana, are called upon to file affidavits within 10 days of the date of this

order to show cause why they should not be ordered to pay costs *de bonis propriis* of the proceedings under Part A.

4. The determination of their possible liability on this basis is to stand over for determination under Part B.

5. The applicant is directed to file her amended Notice of Motion, if so advised, and any supplementary affidavit pertaining to the relief sought under Part B, within 10 days of the date of this order.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF APPLICATION: 26 April 2023

DATE OF JUDGMENT: 27 April 2023

Appearances:

<i>For the Applicant:</i>	<i>Mr. B Metu</i>
<i>instructed by</i>	<i>O Mjuleka Attorneys Inc.,</i>
	<i>care of</i>
	<i>Khaya Dywanisi Attorneys,</i>
	<i>King William's Town</i>
	<i>(ref. Mr. Mjuleka)</i>

<i>For the Respondents:</i>	<i>Mr. M Mayekiso</i>
<i>instructed by</i>	<i>the State Attorney,</i>
	<i>East London</i>
	<i>(ref. Mr. Ngcama)</i>