

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 2550/2021P

In the matter between:

**THE GOVERNING BODY OF THUTHUKANI
SPECIAL SCHOOL**

FIRST APPLICANT

THUTHUKANI SPECIAL SCHOOL

SECOND APPLICANT

and

**THE MEC OF THE KWAZULU-NATAL
DEPARTMENT OF EDUCATION**

FIRST RESPONDENT

**THE HEAD OF THE KWAZULU-NATAL
DEPARTMENT OF EDUCATION**

SECOND RESPONDENT

**THE KWAZULU-NATAL DEPARTMENT
EDUCATION**

THIRD RESPONDENT

MP NENE

FOURTH RESPONDENT

ORDER

The following order is granted:

1. The decision of or on behalf of the second and/or third respondents to appoint, alternatively transfer, the fourth respondent to the educator establishment at the second applicant is reviewed and set aside.
2. The second and/or third respondents are hereby directed, within 30 calendar days of this order, to commence with the due process as set out in the Employment of Educators Act 76 of 1998 and the Personnel Administration Measures, as contained and consolidated in GN 170, published in the *Government Gazette* 39684 of 12 February 2016, and to follow due process as set forth in the Act, with regard to the appointment of educators for the vacant posts on the second applicant's educator establishment.
3. The applicants' are given leave to supplement their papers and to approach this court for further relief should the first to third respondents fail to fill all 16 vacant posts at the second applicant.
4. The second and third respondents are ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved, including the costs of the senior counsel, where so employed.

JUDGMENT

Bezuidenhout AJ

[1] The first applicant, the Governing Body of Thuthukani Special School and the second applicant, Thuthukani Special School, brought an application seeking inter alia to review and set aside the decision of or on behalf of the second respondent, the Head of the KwaZulu-Natal Department of Education and/or the third respondent, the KwaZulu-Natal Department of Education, to transfer the fourth respondent, Ms M P Nene to the educator establishment of the second applicant.

[2] The applicants also seek an order directing the first and the second respondents to commence with and to follow the due process as set out in the

Employment of Educators Act 76 of 1998 ('the EEA') for the appointment of educators for the vacant posts on the second applicant's educator establishment.

[3] The application came about as a result of the second and/or the third respondents placing the fourth respondent as an educator in a vacant post at the second applicant. In a letter from the third respondent's human resources section dated 28 January 2021, received by the fourth respondent on 15 February 2021, she was informed of the following:

- (a) The department had her name on its list of excess or additional educators declared in terms of HRM Circular 61 of 2020.
- (b) In line with the EEA, the department was placing her in one of its schools with a vacant post for operational reasons.
- (c) The details of the second applicant were supplied, together with the date of assumption of duty of 1 February 2021.
- (d) The fourth respondent was instructed to report to the school without fail and to fill in and submit the assumption of duty forms within three days.
- (e) The circuit manager would facilitate her placement in the post.

The letter was signed by the District Director, Dr D S Chonco. It also appears from the letter that the fourth respondent was attached to the Mabhensa Primary School.

[4] The third respondent addressed a further letter, also dated 28 January 2021, to the principal and the School Governing Body of Mabhensa Primary School, informing them that the department had received the name of an excess or additional educator (presumably the fourth respondent) declared by them in terms of HRM Circular 61 of 2020. In line with the EEA, the educator had been placed in the second applicant's school. They were furthermore instructed to release the fourth respondent and were informed that the circuit manager will facilitate the actual movement to the indicated school. The letter was likewise signed by the District Director, Dr D S Chonco.

[5] The fourth respondent arrived at the second applicant's school on 17 February 2021 and exhibited the placement letter of 28 January 2021, referred to

above. It was attached to the founding affidavit as annexure 'T6'. There was no indication in the letter as to whether the placement was temporary or permanent. It also did not appear from the letter whether the placement was for a stated period or not. Although reference is made to a vacant post, there is no indication in respect of which vacant post the fourth respondent was placed at the second applicant. The fourth respondent was advised to report to the district office as the placement letter was unlawful and irregular.

[6] It is inter alia the applicants' case that the placement letter is invalid for the following reasons:

- (a) The provisions of section 6(3)(a) of the EEA have not been adhered to;
- (b) No opportunity was afforded to the first applicant, as far as its rights, as set out in section 6(3)(a) and (c) of the EEA, are concerned;
- (c) The provisions of section 6(3)(d), (f), (g), and (l) of the EEA have been disregarded;
- (d) If it was alleged that the transfer was a temporary transfer, the provisions of sections 6B, 7(2)(b), 8(2) and/or 8(5) and 8(6) of the EEA are alleged not to have been followed.

[7] In terms of section 5A(1) of the South African Schools Act 84 of 1996 ('SASA'),

'The *Minister* may, after consultation with the Minister of Finance and the *Council of Education Ministers*, by regulation prescribe minimum uniform norms and standards for—

- (a) . . .
- (b) capacity of a *school* in respect of the number of *learners* a *school* can admit. . .'

These norms and standards contemplated must provide, in respect of the capacity of a school, inter alia for the number of teachers and the class size.¹

[8] Section 58C(6) of SASA provides that:

¹ Section 5A(2)(b) of SASA.

‘The *Head of Department* must—

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

[9] The governing body of a public school is required to ‘promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at the school’.²

[10] The employment and transfer of educators is governed by the EEA. In terms of section 3(1)(b) of the EEA, the second respondent ‘shall be the employer of educators in the service of the provincial department of education in posts on the educator establishment of that department for all purposes of employment’. And for the purposes of creating posts ‘on the educator establishment of a provincial department of education, the Member of the Executive Council shall be the employer of educators in the service of that department’.³

[11] Section 5(2) of the EEA provides that,

‘The educator establishment of any public school, further education and training institution, departmental office or adult basic education centre under the control of a provincial department of education shall, subject to the norms prescribed for the provisioning of posts, consist of the posts allocated to the said school, institution, office or centre by the Head of Department from the educator establishment of that department.’

[12] The relevant provisions of section 6 of the EEA, which deal with the powers of employers, provide as follows:

² Section 20(1)(a) of SASA.

³ Section 3(3)(b) of EEA.

(1) Subject to the provisions of this section, the appointment of any person, or the promotion or transfer of any educator—

(a) . . .

(b) in the service of a provincial department of education shall be made by the Head of Department.

(2) . . .

(3)(a) Subject to paragraph (m), any appointment, promotion or transfer to any post on the educator establishment of a public school may only be made on the recommendation of the governing body of the public school and, if there are educators in the provincial department of education concerned who are in excess of the educator establishment of a public school due to operational requirements, that recommendation may only be made from candidates identified by the Head of Department, who are in excess and suitable for the post concerned.

(b) . . .

(c) The governing body must submit, in order of preference to the Head of Department, a list of—

(i) at least three names of recommended candidates: or

(ii) fewer than three candidates in consultation with the Head of Department.

(d) When the Head of Department considers the recommendation contemplated in paragraph (c), he or she must, before making an appointment, ensure that the governing body has met the requirements in paragraph (b).

(e) . . .

(f) Despite the order of preference in paragraph (c) and subject to paragraph (d), the Head of Department may appoint any suitable candidate on the list.

(g) If the Head of Department declines a recommendation, he or she must—

(i) consider all the applications submitted for that post;

(ii) apply the requirements in paragraph (b) (i) to (iv); and

(iii) despite paragraph (a), appoint a suitable candidate temporarily or re-advertise the post. . .’

[13] In terms of section 6B of the EEA,

‘The Head of Department may, after consultation with the governing body of a public school, convert the temporary appointment of an educator appointed to a post on the educator establishment of the public school into a permanent appointment in that post without the recommendation of the governing body.’

[14] Section 7(2)(b) of the EEA provides that a person may be appointed ‘in a temporary capacity for a fixed period, whether in a full-time, in a part-time or in a shared capacity’.

[15] The relevant provisions of section 8 of the EEA, which deal with the transfer of educators, read as follows:

‘(1) Subject to the provisions of this Chapter—

(a) . . .

(b) . . .

(c) the Head of Department may transfer any educator in the service of the provincial department of education to any other post in that department.

(2) Subject to subsections (4) and (5), no transfer to any post on the educator establishment of a public school shall be made unless the recommendation of the governing body of the public school has been obtained.

(3) . . .

(4) A recommendation contemplated in subsection (2) shall be made within two months from the date on which a governing body or council was requested to make a recommendation, failing which the Head of Department may make a transfer without such recommendation.

(5) The Head of Department may, without a recommendation contemplated in subsection (2), transfer an educator temporarily for a stated period from a post at a public school to a post at another public school.

(6) An educator referred to in subsection (5) shall return to his or her previous post at the end of the period contemplated in that subsection. . .’

[16] The first applicant, in its founding affidavit, also referred to the Personnel Administration Measures ('PAM') which were promulgated by the Minister of Education in GN 222 of 18 February 1999.⁴ PAM determines the terms and conditions of employment of educators. It should be noted that the Minister of Basic Education issued a consolidated PAM on 12 February 2016.⁵ All references in this judgment will be made to the consolidated PAM.⁶ Paragraph B.5 of PAM sets out the requirements for the advertising and filing of educator posts.

[17] Paragraph B.5.1.2 of PAM requires that 'any appointment or transfer to any post on the educator establishment of a public school may only be made on the recommendation of the SGB. . .'.⁷

[18] The requirements for the advertisements of vacant posts of educators is set out in paragraph B.5.2.1 of PAM. In terms of paragraph B.5.2.2, '[a]ll vacancies in public schools are to be advertised in a *gazette*, bulletin or circular, the existence of which must be made public by means of an advertisement in the public media both provincially and nationally'. Paragraph B.6 of PAM, which deals with the 'transfer of serving educators in terms of operational requirements', also sets out the procedure to be followed in filling vacancies in cases where a department had educators in addition to a staff establishment. All vacancies are required to be advertised.⁸

[19] In line with the provisions of section 5(2) of the EEA, the second applicant was issued a post provisioning certificate for the year 2020, in terms of which the second applicant was allocated 34 permanent posts. In 2021, a post provisioning certificate was issued in terms of which the second applicant's permanent posts were increased to 49. At the time of the institution of the current application, on 19 April 2021, the second applicant had 16 vacant substantive educator posts which would increase to 17 from 10 July 2021 due to a resignation.

⁴ Terms and conditions of employment of educators determined in terms of section 4 of the Employment of Educators Act, 1998, GN 222, GG 19767, 18 February 1999. The latest amendment of PAM was contained in GN 948, published in the *Government Gazette* 38249 of 27 November 2014.

⁵ Personnel Administrative Measures, GN 170, GG 39684, 12 February 2016.

⁶ This is also the PAM which was referred to by the applicants.

⁷ This is to be done with reference to section 6(3)(a) and (m) of the EEA.

⁸ Paragraph B.6.5 of PAM.

[20] It is the applicants' case in respect of the relief sought in paragraph 2 of the notice of motion, that the second respondent is aware of the vacant posts at the second applicant, and has failed to address the issue by following the procedures set out in the EEA and PAM.

[21] The second applicant is, as its name indicates, a special school which provides education to learners who are described as 'Severe Profound Intellectually Disabled', with the intellectual development of a person between the age of one and eight years. Learners suffer inter alia from visual impairment, hearing impairment, autism, cerebral palsy, Down Syndrome and some are physically disabled. The applicants stated that as a result of these factors, it is crucial that the vacant educators posts at the second applicant be filled with adequately skilled educators which are in excess in main stream education.

[22] The applicants allege that the second and/or third respondents are obliged to follow the procedures set out in the EEA and PAM when filling vacant posts. It was stressed that it is important to advertise the posts to enable all suitably qualified educators to apply, and to afford the first applicant the opportunity to consider applicants and/or candidates identified by the second respondent who are in excess and suitable for the post, and to submit a list of names of recommended candidates to the second respondent, as provided for in the EEA. Reference was made in particular to sections 6(3)(a) and 8(2) of the EEA.

[23] The first to third respondents (collectively referred to as the respondents) in their combined opposing affidavit denied the allegations. They stated, inter alia, that the second respondent may, in terms of section 8(5) of the EEA, temporarily transfer an educator for a stated period from a post at a public school without the recommendation of the school governing body or without advertising such a post.

[24] The respondents also alleged that the second respondent delegated its authority to identify excess educators due to operational requirements, and to place such excess educators, to its district offices. Importantly, the respondents alleged that the process of the placement of excess educators was governed by the EEA

and Collective Agreement 4 of 2016⁹ ('the Agreement') concluded between the National Department of Education and the recognized trade unions of educators, under the auspices of the Education Labour Relations Council. The Agreement's terms applied to all educators employed by the department, specifically excess educators, and is informed by the EEA. The applicants were not party to the Agreement.

[25] The Agreement formed part of the supplementary record filed by the respondents.

[26] In terms of paragraph 4 of the Agreement, the parties would request the Minister of Education to amend paragraph B.6 of PAM by including what was contained in a document attached as annexure 'A'. Amendments were proposed to paragraph B.6.5, which dealt with the procedure to be followed in filling vacancies where a department has educators in addition to a staff establishment.

[27] In terms of paragraph B6.5.1 of annexure 'A', the employer may transfer an educator in terms of section 6 and/or section 8 of the EEA if the educator 'is in addition to another post in the department that matches his/her skills and experience'. In terms of paragraph B.6.5.2 of annexure 'A' the employer may, in terms of section 6(3) and/or section 8(2) of the EEA 'only transfer an educator permanently to a school on the recommendation of the school governing body of such school'.

[28] Paragraph B.6.5.4 of annexure 'A' provides that an employer reserved a right to make a choice on behalf of the educator, should he/she fail to do so. It is also required that '[t]he employer shall, after receiving the choices of the educators, submit such to the school governing body for consideration and recommendation within 2 months of the request'.¹⁰

⁹ This collective agreement deals with the transfer of serving educators in terms of operational requirements.

¹⁰ Paragraph B.6.5.5 of annexure 'A'.

[29] The changes proposed in annexure 'A' effectively replaces the obligation to advertise vacant posts as set out in paragraph B.6.5.1 of PAM.

[30] Despite the respondents' apparent reliance on the Agreement, the respondents provided no information or proof that the Minister of Basic Education in fact consented to the amendment proposed in annexure 'A' or affected such amendment. Counsel for the applicants referred me to *Federasie van Beheerliggame van SA Limpopo v Departement van Onderwys, Limpopo*¹¹ where the following was held by De Vos J:

'Die Minister van Onderwys kan 'n kollektiewe ooreenkoms se bepalings verhef tot regulasies. Ten spyte daarvan dat die bepalings van 'n kollektiewe ooreenkoms tot regulasies verhef kan word is namens die applikant aan die hand gedoen dat sodanige feit ... nie kan afbreuk doen aan die bepalings van 'n statuut en in hierdie geval spesifiek die [bepalings] van artikels 6(3)(a) en 8(2) van die Indiensnemings Wet waarkragtens die oorplasing van 'n opvoeder na 'n openbare skool slegs gedoen kan word op die aanbeveling van 'n beheerliggaam van 'n bepaalde skool nie. Ek meen dat hierdie argument korrek moet wees, nie alleen omdat die betrokke wet natuurlik hoër rangeer ... as die kollektiewe ooreenkoms nie, maar bloot omdat die partye wat nie betrokke was by die kollektiewe ooreenkoms nie, ook sekere regte verwerf het uit die betrokke wetgewing en geregtig is om daarop te steun.'

The respondents' reliance on the Agreement is clearly misplaced. It is furthermore clear from the papers that the respondents failed to even comply with the requirements set out in annexure 'A', never mind what is set out in PAM and the EEA.¹²

[31] It is however the respondents' case that the fourth respondent's placement with the second applicant was only a temporary placement for a period of three months and that it was the 'general practice' of the second respondent to do so. The

¹¹ *Federasie van Beheerliggame van SA Limpopo v Departement van Onderwys, Limpopo* (TPD) Unreported case no 30801/03 (28 November 2003) at 13.

¹²

respondents denied that the placement of the fourth respondent and the placement letter were invalid.

[32] The respondents, in amplification of their denial, made reference to HRM Circular No 61 of 2020: Procedure Manual for Staffing of Schools ('the Circular') which was issued on 13 October 2020 and which was to be read with the Agreement. The Circular was apparently issued in keeping with the provisions of the KwaZulu-Natal PELRC Collective Agreement 1 of 2017 ('the 2017 Agreement'). The purpose of the Circular was to provide a schedule and/or a plan and framework for the placement of excess educators in a three year cycle. The Circular formed part of the record provided by the respondents.

[33] The 2017 Agreement applied to and bound the third respondent as the employer and all trade unions who were parties to the KZN Chamber of the Education Labour Relations Council. It was inter alia agreed that '[t]he post establishment of each school shall remain constant for the period of each three year cycle. . .'¹³ and that '[t]he number of educator posts distributed to each public school under the control of the KwaZulu-Natal Department of Education shall be fixed for the ensuing three years'.¹⁴ Reference was made to Annexure 'A' attached to the 2017 Agreement, which was the 'procedure directive for the staffing of schools'.

[34] Paragraph 2.1 of annexure 'A' provides that 'The provisions of section 8(5) of the Employment of Educators Act no. 76 of 1998, which are reiterated in clause B. 6.5.6 of the Collective Agreement 4 of 2016, empower the Head of Department to temporarily transfer an educator for a stated period without the recommendation of the School Governing Body.'

It is required in terms of paragraph 2.3 of annexure 'A' that

'In order to effect the temporary transfers, educators will be given a list of vacant posts and will be required to choose 10 schools from within their Circuit, 10 from the CMC and an additional 5 from within the District and 5 from outside their District. . .'. A total of 30 schools had to be selected or as many posts as available, matching their profile.

¹³ Paragraph 4.1 of the 2017 Agreement.

¹⁴ Paragraph 4.2 of the 2017 Agreement.

[35] A school governing body may recommend permanent absorption during the period of temporary transfer.¹⁵ Educators who were not recommended for permanent absorption, would remain in the school for the stated duration.¹⁶

[36] The Circular made reference to the 2017 Agreement, and inter alia drew attention, by emphasizing in bold print, the following as important on page 10:

‘All transfers of additional educators undertaken by the Task Team at the various levels are temporary transfers for a stated period unless the statutory recommendation of the School Governing Body of the receiving school is obtained for the permanent transfer.’

[37] The respondents did not allege in their opposing papers nor did their counsel appearing before me submit on what legal basis the 2017 Agreement or the Circular could amend the provisions of section 58C of SASA or the EEA for that matter. I accordingly do not accept that the respondents can agree with any party referred to in the 2017 Agreement or the Circular to amend an annual determination of capacities, in relation to educators, to becoming a three year cycle.¹⁷

[38] The respondents provided the minutes of the meeting of the Task Team relating to the district of King Cetshwayo. It was at this meeting that the decision was apparently taken to place the fourth respondent as an excess educator on a temporary basis for three months at the second applicant. The meeting was held on 4 February 2021, despite the fact that the placement letter was dated 28 January 2021.

[39] The second applicant was mentioned on page 4 of the minutes when the Umhlathuze CMC was discussed. There were 182 surpluses declared and 79 vacancies. The most vacancies came from special schools such as the second applicant. On page 7 of the minutes, the human resources department was tasked to consolidate the list of, inter alia, total surpluses declared, total placed surpluses and

¹⁵ Paragraph 2.4 of annexure ‘A’

¹⁶ Paragraph 2.5 of annexure ‘A’.

¹⁷ See *Federasie van Beheerliggame van SA Limpopo supra*.

total vacancies. The human resources department further had to issue letters on 8 February 2021 for surpluses to be placed so that they could be released to principal schools. No reference was made to placing the fourth respondent, or anyone else for that matter, as an excess educator on a temporary basis for three months at the second applicant.

[40] The respondents also included in the record a list of remaining vacancies compiled after the placements by the District Task Team on 19 February 2021. There were 14 vacancies remaining at the second applicant. A placement list of the educators placed on 4 February 2021 by the Task Team was also included, where reference was made to the fourth respondent, her current school, the subject she was presumably going to teach, and the name of the school to which she was going, namely the second applicant. No reference is made to a duration or whether it is a temporary placement.

[41] The only other documents contained in the record provided by the respondents which refers to the fourth respondent's placement with the second applicant, are the two letters, one being the placement letter dated 28 January 2021 and the other letter also referred to above, addressed to the principal of Mabhensa Primary School.

[42] There is no reference in the record to any list compiled by the fourth respondent to indicate her choice of schools from the list of vacant posts (as referred to in the 2017 Agreement, assuming that the respondents were adhering to it).

[43] It is clear from the placement letter that no mention is made of the fact that it was to be a temporary placement. No mention was made of the stated period or duration of the placement. No mention is made that the fourth respondent will return to her previous post at the end of the period indicated.

[44] The respondents, in their affidavit, make a positive statement that the fourth respondent's placement with the applicant was to be on a temporary basis of three months, which was to expire on 1 May 2021. There is however not a single

document which contains this information, apart from what is stated in the opposing affidavit.

[45] The respondents made much of the applicants 'unlawful conduct' of refusing to allow the fourth respondent to assume her duties and criticized them for complaining about vacancies not being filled but then refusing the placement of the fourth respondent, whose very placement on a temporary basis was apparently to ameliorate the vacancies. The respondents seem incapable of realising and appreciating that their placement of the fourth respondent and their placement letter did not remotely comply with the requirements of the EEA. The applicants' had no idea why and on what basis the fourth respondent was being placed at the second applicant, apart from what was written in the placement letter. The respondents claimed that it was the general practice of the department that placements of excess educators would only be for a period of three months, despite the fact that this 'general practice' is not referred to in any correspondence provided. Even if it was, the respondents were still obliged to comply with the provisions of the EEA.

[46] As far as the relief sought in paragraph 1 of the notice of motion is concerned, the respondents stated that the issue has become purely academic as the period has expired. The application was therefore also academic and stood to be dismissed. It is in my view clear from the papers that it was only the respondents who knew that it was only a temporary placement for three months. The applicants would not have known and did in fact not know that the placement had expired. There is furthermore nothing academic or moot about the relief being sought in paragraph 2 of the notice of motion.

[47] As far as this issue is concerned, counsel for the applicants, Mr Pretorius SC, referred me to *Oudekraal Estates (Pty) Ltd v City of Cape Town and others*¹⁸ where it was held that an unlawful administrative act, as well as all acts and consequences flowing therefrom, remains in existence until set aside by the court in proceedings for judicial review. It is clear in my view that the respondents' decision has to be dealt with as it stands until set aside.

¹⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA); [2004] 3 All SA 1 (SCA) paras 37 and 49.

[48] As far as the second prayer for relief is concerned, the respondents admitted that they have not taken steps to advertise the vacant posts at the second applicant. The respondents incorrectly assumed that the applicants object to vacant posts at the second applicant being filled with excess educators. This is clearly incorrect. All that the applicants require is for the procedures set out in the EEA and PAM to be followed, with emphasis placed on the importance of the advertising of the posts to enable suitably qualified and experienced educators to apply, and to afford the first applicant the opportunity to identify the educators who are in excess and who are suitable for the posts.

[49] The respondents provided no reason or justification for its failure to advertise the vacant posts. Instead, the respondents state that it was entitled to place the fourth respondent without having advertised such placement as it was a temporary placement. I have already dealt with the issue above, namely that the placement letter made no reference of it being a temporary placement. The applicants are clearly not only referring to the placement of the fourth respondent but to the number of vacant posts at the second applicant.

[50] The respondents stated that the applicants unlawfully encroached on the respondents' statutory functions and duties, and also stated that the applicants have failed to make out a case that challenges the respondents' conduct in respect of their failure to fill the remaining vacancies. In his heads of argument, and before me, counsel for the respondents, Mr Mfeka, submitted that the applicants have not relied on any provisions of the EEA or the Constitution in terms of which they were entitled to compel the respondents to fill the vacant posts. It was argued that it was not for the applicants to tell the respondents how to use their resources.

[51] There are a number of problems with this argument:

- (a) The SASA clearly sets out what the functions of the governing bodies such as the first applicant are. These are inter alia to promote the best interests of the school and to ensure the provision of quality education for all the learners of the school. In bringing the present application, the first applicant clearly fulfils this important function.

(b) The EEA and PAM contain detailed provisions on the powers of the employer when appointing educators, filling posts, and the transfer of educators. In PAM the procedure is set out in detail. It could not have been the intention of the legislature to provide a mechanism by which the second respondent allocates posts to the second applicant, even allocating additional posts, and then simply sitting back without following the prescribed procedures in filling vacant posts.

(c) As mentioned before, the respondents provided no reasons for its admitted failure to advertise the vacant posts. No mention was made of lack of resources or financial challenges. What is furthermore of grave concern is that the Department has declared more than 3 000 educators as being additional. These educators receive their monthly salaries but the respondents have taken no steps to advertise the vacant posts which would enable the applicants to consider and recommend some of these educators to be placed in the vacant posts at the second applicant, should they apply. The second applicant is home to extremely vulnerable and compromised learners, yet the respondents do not fulfil their mandate and statutory obligations to give effect to these children's rights to an education.

[52] The respondents' counsel submitted that the applicants should have brought the application in terms of the Constitution, and failed to do so. He placed reliance on *Soobramoney v Minister of Health, Kwa-Zulu Natal*,¹⁹ which in my view does not assist him. Applicants' counsel submitted that the applicants are entitled to apply for the relief based on what is set out in the legislation. The applicants are not attacking the constitutionality of the legislation. The application is brought on the basis that once the second respondent has issued the second applicant's post provisioning norm certificate, the applicants were entitled to have the vacant post filled.

[53] In *Centre for Child Law and others v Minister of Basic Education and others*,²⁰ Plasket J dealt with a matter where a number of applicants inter alia sought orders to compel the department to implement the 2012 educator post establishment, which

¹⁹ *Soobramoney v Minister of Health (Kwa-Zulu Natal)* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).

²⁰ *Centre for Child Law and others v Minister of Basic Education and others* 2013 (3) SA 183 (ECG).

had already been declared, by making appointments to vacant posts by a specified date. This particular order became settled between the parties, the Department agreeing to an order to implement the educator establishment and to appoint educators to all vacant substantive posts declared. Although Plasket J referred to the matter as concerning the fundamental rights of children attending public schools to a basic education, which is enshrined in in section 29(1)(a) of the Constitution, I could find no indication that the application had been brought or had to be brought in terms of the Constitution.

[54] In *Linkside and others v Minister of Basic Education and others*²¹ the court dealt with an application which concerned the ongoing failure by the Department of Basic Education in the Eastern Cape to appoint educators in vacant posts at various public schools. In para 3 of the order issued by Roberson J, the head of the department was directed to publish an open educator bulletin, the school governing boards were entitled to interview the applicants, and make recommendations, which the respondents had to act on within 15 days. The Department's defence was a strain on the budget and on expenditure. The Department's objection to the order obliging it to publish bulletins was inter alia that the applicants could not dictate to the department how it should perform its administrative duties. Roberson J said the following in response:

'In my view, the Department's conduct in relation to the publication of bulletins can only exacerbate the crisis concerning the appointment of educators in substantive vacant posts and the circumstances equally call for a remedy in the form of a just and equitable order.'²²

[55] In the present matter, the applicants are simply trying to achieve the same in order to protect the rights of the learners attending the second applicant. It is in my view clear from what is set out above that the respondents' decision to place the fourth respondent as an educator with the second applicant was unlawful and should be reviewed and set aside. Even if I accept that it was only a temporary placement, the respondents have clearly failed to comply with section 8(5) of the EEA.

²¹ *Linkside and others v Minister of Basic Education and others* [2015] JOL 327868B (ECG).

²² *Ibid* para 30.

[56] During argument in reply, counsel for the applicants requested an amendment to paragraph 2 of the notice of motion by inserting the word PAM after reference to the EEA. Counsel for the respondents objected to such an amendment on baseless grounds, as it is clear from the applicants' case that the appointment of educators are made with reference to both the EEA as well as PAM.

[57] I am of the view that the applicants have made out a case for the relief sought in paragraph 2 of the notice of motion, duly amended. The respondents have failed to convince me that they are under no obligation to comply with the EEA and PAM, and that they cannot be ordered to fulfil their statutory obligations.

[58] The applicants, in their replying affidavit, sought leave to supplement their papers and approached the court for further relief should the respondents fail to fill all 16 vacant posts at the second applicant. Neither counsel for the applicants nor counsel for the respondents made any submissions in this regard. In my view it would be a salient order to grant.

[59] The issue of costs was only addressed briefly by counsel for the applicants, with reference to his heads of argument, where costs are sought in line with paragraph 3 of the notice of motion but with the addition of costs of senior counsel, where so employed. Counsel for the respondent did not offer any objections. In my view, the matter is of sufficient complexity and importance to the applicants to warrant such an order. No cost order was sought against the first respondent.

[60] The following order is accordingly made:

1. The decision of or on behalf of the second and/or third respondents to appoint, alternatively transfer, the fourth respondent to the educator establishment at the second applicant is reviewed and set aside.
2. The second and/or third respondents are hereby directed, within 30 calendar days of this order, to commence with the due process as set out in the Employment of Educators Act 76 of 1998 and the Personnel Administration Measures, as contained and consolidated in GN 170, published in the *Government Gazette* 39684 of 12 February 2016, and to

follow due process as set forth in the Act, with regard to the appointment of educators for the vacant posts on the second applicant's educator establishment.

3. The applicants' are given leave to supplement their papers and to approach this court for further relief should the first to third respondents fail to fill all 16 vacant posts at the second applicant.

4. The second and third respondents are ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved, including the costs of the senior counsel, where so employed.

BEZUIDENHOUT AJ

Appearances

Date of hearing: 16 May 2022

Date of judgement: 26 August 2022

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