

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: J459/2002

In the matter between:

ERS UNION

First Applicant

Second Applicant

and

First Respondent

UNCIL

Second Respondent

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THE DEPUTY DIRECTOR-GENERAL OF THE
Third Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. The applicants (respondents *in the point in limine*) have brought an application to review and set aside an arbitration award handed down by the first respondent on 20 February 2002, in the matter between the first applicant, on behalf of the second applicant, and the Mpumalanga Department of Education (the department) concerning the dismissal of the second applicant.
2. The applicants seek an order that the second respondent be directed to refer the dispute relating to the dismissal of the second applicant to arbitration before the

arbitrator other than the first respondent.

3. The employer party has been cited in these proceedings as the Deputy Director-General of the Department of Education (Mpumalanga) (“the third respondent”).
4. The third respondent has taken a point *in limine* to the effect that the applicants are not entitled to cite the Deputy Director-General, who is an employee of the State and that the Minister of Education or MEC had to be cited.

The third respondent’s contentions

5. The third respondent contended that in terms of Section 2 of the State Liability Act 20 of 1957 (“the State Liability Act”), only the Minister or the MEC of the Department may be cited of any wrong done to any person by the employees of the State. Section (2)(1) of the State Liability Act reads as follows:

“2(1) *In any action or proceedings instituted by virtue of the provisions of Section 1, the Minister of the Department concerned may be cited as nominal Defendant or Respondent.*

(2) *For purposes of sub-section (1) the ‘minister’ shall, where appropriate, be interpreted as referring to a member of the Executive Council of a province.*”

6. The third respondent contended that the Executive Government of a province is vested in the Premier, who in turns assigns his duties to the members of the

Executive Council to administer various departments in his/her province. It was contended that it is the State which bears the liability as represented by the Executive Government and not the servants of the State, who themselves are subject to the control of the Executive Government.

7. It was further contended that it is not permissible to cite an employee of the State, that the Minister or the MEC where appropriate.

Analysis of the facts and arguments raised

8. The third respondent's objection is grounded on section 2 of the State Liability Act. The underlying purpose of the State Liability Act, is to clarify the existence of a remedy against the State in appropriate circumstances and to abolish any prerogative which may have existed and which could have barred State liability in contracts and for delictual wrongs committed by servants of the State.
9. Section 2 of the State Liability Act provides that when bringing an action or proceedings against the State instituted in terms of section 1 of the Act, the relevant Minister or MEC may be cited as the nominal defendant or respondent. It does not require that in all proceedings involving the State as an interested party, either the Minister or MEC must be cited. Thus, for instance, action may be instituted against the Government of the Republic of South Africa or the President of the Republic of South Africa or the Premier of a province. In each case, it is a

matter of identifying the correct party.

10. It is also a matter of identifying the nature of the proceedings and the relief sought.

The review application instituted by the applicants in the present matter is not an action or a proceeding against the State as contemplated by section 1 of the State Liability Act. The purpose of citing the third respondent is not to secure the joinder of the State in an action or a proceeding as contemplated in section 1 of the State Liability Act.

11. The review application seeks no relief against the State or the Mpumalanga Department of Education for a wrong committed by the State, but merely seeks to have the arbitration award of the first respondent, which award was handed down under the auspices of the second respondent, reviewed and set aside. The third respondent is not cited in these proceedings as a respondent to an action for a wrong committed by an employee of the State, but simply as an interested party, being the statutorily designated employer.

12. The decision in *Public Servants Association of SA v Director-General: Northern Provincial Administration* (2000) 21 ILJ 417 (LC) concerned the application of the Public Service Act (Proc 103 of 1994) and, particularly, notices of termination issued by the premier or the MEC. Section 17(1)(a) of the Public Service Act expressly vests the power of discharge in the “relevant executing authority”:

which is in turn defined in section 1 as, in context the Premier or the MEC.

Although section 17(1)(a) contains a provision for delegation, which does not appear to have been relevant. In any event, quite differently from the possibility of such delegation, section 3(1)(b) of the Educators Act vests the provincial Head of Department with original power.

1. 13. The decision in *Dumasi v Commissioner, Venda Police* 1990 (1) SA 1068 (V) was a matter where an action for damages instituted against the police for the death of the plaintiff's husband while in the custody of the police. The action instituted was against the State as contemplated by the State Liability Act and the equivalent enactment applicable in Venda at the relevant time. In such circumstances it was correctly held that an employee of the State could not be cited as the defendant. However, those circumstances bear no analogy with the present case where the third respondent has been cited as an interested party in his capacity as the statutorily defined employer.
14. In an unreported decision in *Mehlo v Free State Education Department* under case number J496/00, it was held that the MEC should be joined as an interested party because the issue fell, at least in part, within the framework of section 3(2) of the Educators Act - being a function expressly placed in the hands of the MEC as distinct from the Head of Department.
15. In the matter of *Simela & Others vs MEC for Education, Eastern Cape & Another*

[2001] 9 BLLR 1085 (LC), it was argued in that case by the respondents that the MEC for Education should not have been cited as a party to the proceedings because he was not the functionary who was responsible for taking the decision that was under attack. I found amongst others that the MEC should have been cited in terms of the State Liability Act and because he had played some role in the disputed decision. That case is not support for the proposition that the MEC must be cited in all matters. That case is clearly distinguishable from the present matter.

16. The third respondent has been cited by virtue of his status as the employer of the second applicant as stipulated in the provisions of the Employment Educators Act 76 of 1998 (“the Educators Act”), read with the Constitution of the Labour Relations Council (“the ERL”).
17. The Legislature has separated the areas of responsibility in relation to the employment of educators. Within that framework, section 3(1)(b) of the Educators Act is a central provision for the purpose of this matter. It is in these terms:

“Save as is otherwise provided in this section - ... the Head of Department 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.”

18. The third respondent is the Head of Department of the Mpumalanga provincial department of education.
19. The Educators Act clearly defines distinct and different functions which are vested in the Minister or a provincial MEC, as the case may be. The Minister's function as employer is limited to that of determining the salaries and conditions of service of educators as well as post creation in the national department, while that of the MEC is limited to post creation in the provincial department. In this regard see section 3(2) and 3(3) of the Educators Act.
20. It follows that it is the third respondent's exclusive responsibility to exercise the function provided for in section 14 of the Educators Act, which is the deeming provision that has purportedly been invoked in the present matter, in terms of which the second applicant has been dismissed. It is precisely the interpretation of section 14(1) of the Educators Act that poses the central question that will fall to be addressed in the review application.
21. The Educators Act has assigned responsibility *vis-a-vis* educators. I am of the view that it would not have been competent to have cited the MEC in the context of the present dispute. In the circumstances, the citation of the third respondent as the head of the department and statutorily responsible officer is in accordance with

the express requirements and wording of the Educators Act.

22. This conclusion is reinforced through examination of the principal governing collective agreement, being the ELRC Constitution. Again, it is unambiguously stipulated that, in a provincial context, it is the third respondent who is the employer of the second applicant. This follows *inter alia* from the terms of the definition of “employer” in clause 23(7) of that constitution, viz.: “means the employer as defined in the Employment of Educators Act, 1998”.
23. The main issue in the present matter has arisen directly and entirely from a dispute as between an “employer” and an “employee” as defined in the ELRC Constitution and, correspondingly, the arbitration that is the subject of the challenge was one conducted under the auspices of the ELRC and in terms of its Constitution and related agreements. It follows that the *persona* to be identified and cited as the employer party in a dispute such as the current one is the third respondent. The present matter has nothing to do with the regulation, vesting and devolution of the executive authority of provincial office-bearers. See for instance section 125 of the Constitution of the Republic of South Africa. This is not a case that deals with political or financial accountability. It concerns only a clearly defined management structure.
24. It follows that the objection *in limine* should be dismissed.

25. Both parties sought costs against the other. The only other question that needs to be raised is whether the applicants should be awarded costs of employing two counsel. As expected, it was contended on behalf of the applicants that the costs of the employment of two counsel should be awarded. It was contended that the issues raised in the application are novel. I agree that the issues are novel but do not believe that the issue was so complex that it warranted the employment of two counsel.

26. In the circumstances the following order is made:

- 1 The objection *in limine* is dismissed.
2. The third respondent to pay the applicants costs which costs do not include the employment of two counsel.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

TS : K S TIP SC WITH J A CASSETTE INSTRUCTED BY
CHEADLE THOMPSON & HAYSOM INC

SPONDENT : B R TOKOTA INSTRUCTED BY THE STATE ATTORNEY

: 24 OCTOBER 2002

: 5 NOVEMBER 2002