



IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 1505/2019P

In the matter between:

BHEKAKONKE R XULU

PLAINTIFF

Versus

MEMBER OF THE EXECUTIVE COUNCIL:

DEPARTMENT OF EDUCATION, KWAZULU-NATAL

DEFENDANT

JUDGMENT

P C BEZUIDENHOUT J:

[1] Defendant filed and exception to Plaintiff's particulars of claim. When the hearing commenced Defendant sought condonation for the late filing of its heads of argument and filed a substantive application together with his heads of argument. This was not objected to by Plaintiff and accordingly condonation was granted.

[2] The exception by Defendant concerns one legal issue as submitted by Defendant. It concerns the averment in paragraph 3 and 5 of the particulars of claim where Plaintiff alleges that “he” was employed by Defendant.

[3] The particulars of claim sets out in paragraph 2:

“The defendant is the **MEMBER OF THE EXECUTIVE COUNCIL: DEPARTMENT OF EDUCATION, KWAZULU-NATAL**, who is cited herein in his capacity as the Political head of the KwaZulu-Natal Department of Education with his place of business at office G25 Metropolitan Building, 1[...] P[...] Street, Pietermaritzburg, 3201.”

In paragraph 3 and 5 of the particulars of claim Plaintiff states that he was employed by Defendant.

[4] It is submitted on behalf of Defendant that section 3(1)(b) of the Employment of Educators Act 76 of 1998 provides that the Head of Department shall be the employer of educators in the services of the Provincial Department of Basic Education for all purposes of employment. It is therefore contended that although the citation may be correct that it is incorrect in the particulars of claim to state that Plaintiff was employed by Defendant.

[5] Defendant also relies on a paragraph in a judgment of the Supreme Court of Appeal in MEC for Education KwaZulu-Natal v Singh dated 9 June 2023 where it was held obiter that given the provisions of section 3(1)(b) of the Employment of Educators Act 76 of 1998 the Head of the Provincial Department of Education ought to have been cited as the employer.

[6] The State Liability Act 20 of 1957 section 2 states that in the case of a provincial department it is the responsible member of the Executive Council for that department who is the responsible person.

[7] In the case of *Jayiya v MEC for Welfare Eastern Cape 2024 (2) SA 611 (SCA)* in paragraph 5 it was held:

“A litigant brings a National or Provincial Department before Court by citing the political head of the department in a representative capacity. In the case of the Department of the National Government this would be the responsible Minister. In the case of a Provincial Department it is the responsible member of the Executive Council. That is what section 2 of the State Liability Act 20 of 1957 provides. The first respondent should have been the only one. If this had been borne in mind at the outset of the procedural mishaps might have been avoided.”

[8] On a reading of the particulars of claim paragraph 2 together with what is stated in paragraphs 3 and 5 is in my view clear that what is referred to is the Department of Education which employed Plaintiff. This is also apparent from the documentation which is attached which all refer to the provincial Department of Education KwaZulu-Natal.

[9] Paragraph 3(3)(b) of the Employment of Educators Act number 76 of 1998 states as follows:

“For the purposes of creating posts on the Educator Establishment of a Provincial Department of Basic Education the Member of the Executive Council shall be the employer of educators in the service of that Department.”

[10] It is thus apparent that the MEC is also an employer of the educators.

[11] Even if this is not correct I am satisfied that reading paragraph 2 of the particulars of claim with paragraph 3 and 5 it is apparent that the Department of Education of KwaZulu-Natal of whom the MEC is the nominal head is the employer.

[12] In my view the exception cannot stand. It is apparent from the particulars of claim who Defendant is and the particulars of claim sets out a cause of action.

Accordingly the following order is made:

The exception is dismissed with costs.

P C BEZUIDENHHOUT J.

JUDGMENT RESEVED: 10 FEBRUARY 2026

JUDGMENT HANDED DOWN: 16 FEBRUARY 2026

COUNSEL FOR PLAINTIFF: S K XULU

Instructed by: Nkosi and Associates

Tel: 081 297 6613

Ref: LIT/193/DBN

Maphumulo Mazibuko Attorneys

Durban

Tel: 031 307 1994

Email: mthokozisimazibuko@telkomsa.net

Ref: Mr M A Mazibuko/XU 022-000

c/o: SG Nzimande Attorneys

Pietermaritzburg

COUNSEL FOR DEFENDANT: A PILLAY

Instructed by: State Attorney (KZN)

Durban

Ref: 35/002288/19/X/P23

K Bhagwan/cet

Tel: 031 365 2591

Email: KBhagwan@justice.gov.za