



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

CASE NO.: 2026-135411

In the matter between:

MKHUSELI ALPHA FAKU

Applicant

and

THE SOUTH AFRICAN COUNCIL FOR EDUCATORS

1st Respondent

MADIMETJA CHARLES LAMOLA N.O

2nd

Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR

EDUCATION, EASTERN CAPE PROVINCE

3rd Respondent

HEAD OF DEPARTMENT: DEPARTMENT OF

EDUCATION EASTERN CAPE PROVINCE

4th Respondent

JUDGMENT

MHAMBI AJ

INTRODUCTION

[1] The applicant, Mr Mkhuseli Alpha Faku, asks this court to restrain the implementation of the decision of the first respondent (SACE) by the third and the fourth respondents (the Department) pending the review application instituted as part B in this application. The applicant seeks the restraining relief on an urgent basis with part B instituted on long form, with rules relating to forms and service applicable as determined by Uniform Rule 6 of the rules of this court.

[2] On 25 June 2026, this matter appeared before my sister Justice Stretch J, in which the opposing respondents, third and fourth, undertook not to implement the decision taken by the first respondent pending the finalisation of this application. The decision of the first respondent is hereinafter referred to as “the impugned decision”.

[3] The impugned decision, first, removes the name of the applicant from the register of educators, secondly, mandates the Department of Social Development to include the name of the applicant on the list of people who are declared unfit to work with children.

[4] It is relevant to describe the parties as follows: the applicant is an educator at Steve Special School for the deaf, “the school”, having been

employed in March 2018. The applicant regards the third and the fourth respondents as its employer, correctly so.

[5] The first respondent is the South African Council of Educators, “SACE”. SACE is a juristic person established in terms of the South African Council of Educators Act,¹ SACEA. The objects of the Act are to provide for the registration of educators, to promote the professional development of educators and to set, maintain and protect ethical and professional standards of educators, by means of the functioning of SACE. It is SACE's decision that is the subject of these proceedings. SACE has not opposed the restraining relief sought by the applicant; it is only opposed by the Department.

[6] This court has to determine whether the applicant has made out a case for the grant of the interim restraining relief he seeks.

[7] It is a legal requirement that all teachers in South Africa must be registered with SACE. It is *de facto* that upon registration with SACE the teacher and/or educator is subject to the standard of ethics embodied within the Code of Ethics of SACE.²

¹ South African Council of Educators Act, 31 of 2000.

² The code of conduct of SACE, Section 21(1) of the SACEA.

[8] It is a default legal position that a teacher or educator not registered with SACE is disqualified from being a teacher. Clearly, no person may be employed as an educator unless registered with SACE.³

[9] The crux of this application is that the impugned decision renders the applicant not suitable to be employed as an educator. Therefore, if the Department implements the impugned decision, the applicant loses his profession as an educator or teacher.

[10] To implement the impugned decision, the Department relies on the provisions of the Employment of Educators Act.⁴ The relevant provisions provide:-

“15(2) If the name of an educator is struck off the register of educators kept by the South African Council of Educators, the educator shall, notwithstanding anything to the contrary contained in this Act, be claimed to have resigned with effect from the day following immediately after the day on which the educator’s name was so struck off.”

[11] As the precursor to the impugned decision, the following facts are worth noting:

During 2021, the Department received reports of allegations of misconduct against the applicant. The Department viewed those

³ Employment of Educators Act, 76 of 1998.

⁴ Employment of Educators Act, 76 of 1998

allegations as serious, taking into account that the applicant was employed as an educator at a school with pupils with special needs. The Department later withdrew the charges against the applicant, it appears, due to insufficient evidence. The sanction imposed by the Department against the applicant was uplifted.

[12] It appears, *ex facie* the papers, SACE became aware of the misconduct allegations against the applicant, and it undertook its own investigation. The applicant was subjected to a disciplinary process by SACE, ultimately on 30 July 2025 SACE decided to implement a sanction against the applicant. The sanction was a recommendation of the disciplinary process having been issued on 13 May 2025.

[13] SACE communicated its sanction to the Department on 18 May 2026. SACE, in its letter of 18 May 2026, asked the Department to invoke the provisions of section 15(2) of the Employment of Educators Act. I have already stated what that provision entails above.

[14] As soon as the Department implements the impugned decision, the applicant is relieved from his duties as the teacher or educator on the basis of deemed resignation. In actual fact, the implementation of the impugned decision terminates the contract of employment entered into and between the Department and the applicant.

[15] The background facts above are largely common cause between both parties.

[16] The applicant contends that the circumstances of this case are extraordinary, in that he is confronted with losing his profession based on unsubstantiated allegations. He relied on the fact that the Department held disciplinary proceedings against him during 2021, and he was exonerated from those charges. In the criminal case, the proceedings were *nolle prosequi* due to lack of evidence.

[17] Applicant contends that, while he takes no issue with SACE's duty to investigate his professional conduct and uphold its code of conduct, he alleges SACE has failed to discharge its duties in a lawful manner.

[18] Applicant further contends that the charges by SACE are vague and ambiguous; he alleges insufficient particulars to the sexual harassment allegations complained of; lastly, he contends that the guilty verdict was pronounced on allegations of grabbing and kissing in circumstances where the charges were not substantiated.

[19] The applicant argues that SACE charging him with vague and invalid charges is procedurally irrational and cannot be connected to the objects of PAJA.

[20] The Department contends that it cannot employ the applicant as a teacher if the applicant is struck off the roll of educators by SACE. The Department supports this contention by reliance on the provisions of section 21(2) of the SACEA. On that basis, the Department contends the applicant lacks entitlement to remain employed as a teacher.

[21] The Department further relies on Section 15(2) of the Employment of Educators Act, to contend that, on deregistration by SACE, the applicant is declared to have resigned from his employment a day after his removal from the SACE register.

[22] The Department contends lastly that, in view of the deeming provision which becomes applicable by operation of law, in effect removing the applicant from the system, it had no alternative but to effect the deeming provision, and inform the applicant of the consequences thereof.

[23] I now turn to deal with the relief the applicant seeks and the applicable test.

The requirements for an interim interdict are well settled. The applicant must show a right, clear right or *prima facie*, though open to some doubt, a well-grounded apprehension of irresponsible harm if the interdict is refused and the

final relief is later granted, that the balance of convince favors the interdict, and the absence of another satisfactory remedy.⁵

[24] This matter has to be approached on the basis that the Department derives powers to implement the impugned decision from the statutory deeming provision, and that the SACE has statutory powers derived from SACEA to maintain and promote professional ethics for educators. The disciplinary committee of SACE (council) derives powers to sanction the applicant from SACEA section 14(2) (e), which provides:-

“(2) The disciplinary committee [of the council] must –

.....

(e) on the basis of a recommended action of the relevant panel, recommend a finding and appropriate action, if any, to the council.”

[25] In circumstances where the exercise of statutory power is the subject of the restraining relief sought, the court needs to be cautious in its enquiry into the right not to intrude into a legal body’s exercise of its own statutory powers. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*,⁶ the court held that a temporary restraint on the exercise of statutory power ahead of the final hearing may be granted only in the clearest of cases.

⁵ Setlogelo v Setlogelo 1914 AD 221 at 227, Webster v Mitchell 1948 (1) SA 1186 (W) and see also Gool v Minister of Justice 1955 (2) SA 682 (C).

⁶ National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC) at 44-47

[26] It seems clearly from *Economic Freedom Fighters v Gordhan and Others, Public Protector and Another v Gordhan and Others*,⁷ that OUTA applies to interim restraints on the exercise of public power generally, and the court hearing the interdict must examine the grounds of the pending review and whether it is likely to succeed. In determining this matter, I am therefore entitled to peek into the review, part B, itself.

PRIMA FACIE RIGHT

[27] The applicant asserts he has a *prima facie* right; he based this assertion on the fact that the impugned decision has profound implications for his right to profession (as an educator) in a manner that affects his livelihood and range of socio-economic rights.⁸

[28] Ms Ndlazi, counsel for the applicant, submitted that the Department has not opposed the reliefs sought in part B; SACE, on the other hand, has not challenged or opposed the grant of the interim restraining relief sought in this application. He maintains that the conduct SACE committed or breached is against its constitutional obligations and is a reviewable irregularity.

[29] Contrary to the applicant's arguments on his *prima facie* right, Mr Maswazi, counsel for the Department, has submitted that, even though the

⁷ *Economic Freedom Fighters v Gordhan and Others, Public Protector and Another v Gordhan and Others* 2020 (6) 325 (CC)

⁸ The applicant relies on a Section 28 right to trade freely as an educator. The applicant further argues that the impugned decision affects the employment contract he has with the Department.

applicant has couched the relief he seeks, it is final in nature. The applicant has to establish a clear right. Mr Maswazi submitted that the clear right which the applicant must establish is not the right to access court; it is rather a right or entitlement to continue as a teacher despite deregistration by SACE. He submitted that the applicant lacks that right.

[30] It is common cause to both parties that the impugned decision stands and must be given effect until a court sets it aside. This is a clear principle accentuated in *Oudekraal Estates (Pty) Ltd v City of Cape Town*,⁹ affirmed by the Constitutional Court in *Member of the Executive Council for Health, Eastern Cape v Kirkland Investments (Pty) Ltd*.¹⁰ As a matter of law and fact, the impugned decision is valid and effective; the Department is legally obliged to implement the impugned decision, therefore to invoke the deeming provision as I stated above. The mere institution of the review proceedings does not suspend its operation nor does it stay it.

[31] With that in mind, the applicant's claimed right must be a right threatened by imminent and irreparable harm, and its strength cannot be divorced from the prospects of the review on which it wholly depends.

[32] In the review, the crux of the applicant's grounds for review is that the charges preferred against him are vague with no substantive evidence to

⁹ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (b) SA 222 (SCA)

¹⁰ *MEC for Health, Eastern Cape v Kirkland Investments (Pty) Ltd* 2014 (3) SA 481 (CC)

substantiate those charges. The applicant substantiates his assertion about frivolous charges on the fact that in the criminal proceedings, instituted on the same allegations, the Public Prosecutor declines to prosecute due to insufficient evidence. The disciplinary proceedings by the Department were struck off the roll, as the counsel for the Department advised the presiding officer of the disciplinary hearing that the complainants no longer pursued the matter. Lastly, the applicant asserts that one of the complainants whom the applicant alleged had sexual intercourse with in breach of the SACE code of ethics was proved to be a virgin in the criminal investigations. That nullified the allegation, if that assertion is correct.

[33] The applicant further alleges that he never received on time the sanction by SACE. He later received the sanction on 11 February 2026. By that time five day period for the appeal had already lapsed. The applicant later applied for condonation for late filing of its appeal, which was declined by SACE; instead, SACE confirmed the sanction and enforced the impugned decision. The applicant submitted that the procedure followed to conclude the impugned decision was unfair, hence subject to review.

[34] In my assessment, there are prospects of success in the review of the applicant. I have already stated that in *Economic Freedom Fighters v Gordhan*,¹¹ the court holds a view that a court asked to restrain the exercise of

¹¹ *Economic Freedom Fighters v Gordon*, Ibid footnote 10.

public power pending a review must peek into the grounds of review, assess the strength, and grant the interdict where it is convinced that the review is likely to succeed. This was also affirmed in *Eskom Holdings SOC. Ltd v Vaal River Development Association (Pty) Ltd and Others*,¹² (Eskom).

[35] Having considered the applicant's prospects of success on the pending review, I am satisfied that the applicant has established a *prima facie* right deserving of protection.

IRREPARABLE HARM

[36] The applicant apprehends the harm to the implementation of the deemed resignation clause, consequent to the implementation of the impugned decision by the Department. The effect of which is termination of his employment contract. That affects his ability to earn income, and his ability to socio economic life affordability and the effect the implementation of the impugned decision would cause to his family and children.

[37] Authorities are clear as to what constitutes irreparable harm for the purposes of granting or not of interim interdict. In *City of Tswane Metropolitan Municipality v Afriforum and Another*,¹³ the court held that the harm must be a discernible disadvantage capable of legal protection. The court goes on to say, for the purposes of an interim interdict, ‘harm’ means ‘the tangible or intangible

¹² Eskom Holdings SOC Ltd v Vaal River Development Association, (Pty) Ltd and Others, 2023 (4) SA 325 (CC).

¹³ In City of Tshwane Metropolitan Municipality v Afri Forum and Another 2016 (6) SA 279 (CC).

effect of the deprivation or adverse action taken against someone’ and that *‘irreparable harm is an irreversible or permanent harm which the review court, setting aside the objectionable conduct, is not able effectively to undo if the interim interdict is not granted’*¹⁴.

[38] It is clear that the loss of employment by the applicant, and his listing as someone unfit to work with children, will have drastic effects on him. Given the fact that the review application may take some time to be finalised, his daily livelihood, and that of his family, will obviously be jeopardised by the implementation of the impugned decision. Most importantly, his reputational harm will be affected in the event he is relinquished from his employment on the allegations and sanction as it stands. In the event the review succeeds.

BALANCE OF CONVENIENCE

[39] In OUTA, the court affirms that a court must be satisfied that the balance of convenience favours the granting of temporary interdict. The court must first weigh the harm to be endured by an applicant if the interim relief is not granted as against the harm the respondent will bear if the interdict is granted. Thus a court must assess all relevant factors carefully in order to describe where the balance of convenience rests.¹⁵

¹⁴ Fn 16 Ibid at paras [56] and [59].

¹⁵ OUTA, Supra at para 55.

[40] In *Eskom*,¹⁶ the Constitutional Court affirms that the courts must not lose sight of the fact that this remains a balancing exercise. Affected fundamental rights must always play a critical role in that balance, and in some cases the affected rights may be of such a nature, and their breach so egregious, that they may influence the decision in favour of the victim of the rights violation, even in the face of a high policy-laden and policy-centric executive decision. The ultimate question is: what is the outcome dictated by the balancing exercise.¹⁷

[41] In this matter, echoing from its facts, it is not a matter of a highly policy-laden or polycentric decision as it was suggested in *Eskom*, in which case, I would be influenced not to grant the interim relief. Even if I am wrong on that, *Eskom* stressed that the affected fundamental rights must play a critical role or part in the balance of convenience enquiry.

[42] In this matter, the balance of convenience favours the grant of the interim restraining relief sought. I have considered the applicants' fundamental rights to be affected by not granting the interim restraining order sought against the facts argued by the Department. In the event the review fails, the harm to be suffered by the Department if this interdict succeeds may be repaired by a reduction of the average amount from the applicant's pension payout, as compensation for the salaries paid after the date on which the deemed resignation took effect. At

¹⁶ *Eskom supra*.

¹⁷ *Eskom* at para 303.

this stage the harm to be suffered by the Department if the interdict sought is granted is repairable.

NO OTHER ALTERNATIVE RELIEF

[43] This requirement can be dealt with briefly as follows: - Regard had been to the reasoning I have provided relating to the harm to be suffered by the applicant, if an interim interdict is not granted, and what I alluded to above relating to balance of convenience, I see no other alternative relief for the applicant.

[44] As soon as the Department implements the impugned decision, the genie will have been let out of the bottle for the applicant. The contract of employment he has with the Department will be terminated, causing drastic consequences, which are not repairable if the restraining order is not granted should the review succeed.

[45] Therefore, I am persuaded that the applicant has no other alternative relief except for the grant of the restraining order sought.

[46] Consequently, I am satisfied that the applicant has satisfied all the requirements for the grant of the interim restraining order as prayed.

[47] The last issue relates to costs. Both parties have sought for a costs order. As a matter of principle, the award of costs is discretionally to the court. I have

assessed the crux of the Department's opposition, its reliance on implementation of the decision based on a deeming provision in the statute. I see nothing frivolous and meritless at that point. The Department was within its rights to bring that point to the attention of the court; it did so, in my evaluation, *bona fide*. I find no basis to penalise the Department with a cost order, despite its loss in this Part A application.

ORDER

[48] In the result, I make the following order:

1. Pending the determination by this court of the applicant's review, Part B of this application, the third and fourth respondents are interdicted and restrained from implementing, in any manner, the decision of the first respondent contained in a letter dated 25 November 2025.
2. The costs of the application shall stand over for determination by the court which hears the review.

M MHAMBI
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant : Ms Mathe-Ndlazi

Instructed by : T.L. Luzipho Attorneys
Mthatha

Counsel for the Respondents : Mr B. Maswazi

Instructed by : Office of the State Attorney
East London

Heard on : 07 July 2026

Judgment Delivered on : 30 July 2026