

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT: GRAHAMSTOWN)**

CASE NO. 1749/2012

DATE HEARD: 26/07/2012

DATE DELIVERED: 03/07/12

REPORTABLE

In the matter between:

THE CENTRE FOR CHILD LAW **First Applicant**

**THE GOVERNING BODY OATLANDS
PREPARATORY SCHOOL** **Second Applicant**

THE GOVERNING BODY ST MARY'S RC SCHOOL **Third Applicant**

**THE GOVERNING BODY
MARY WATERS HIGH SCHOOL** **Fourth Applicant**

BETHELSDORP SGB UNIT **Fifth Applicant**

**THE GOVERNING BODY
ALPHENDALE HIGH SCHOOL** **Sixth Applicant**

**THE GOVERNING BODY
CAPE RECIFE HIGH SCHOOL** **Seventh Applicant**

**THE GOVERNING BODY
PJ OLIVIER HOËRSKOOL** **Eighth Applicant**

and

THE MINISTER OF BASIC EDUCATION **First Respondent**

**THE DIRECTOR-GENERAL,
DEPARTMENT OF BASIC EDUCATION** **Second Respondent**

**THE MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF BASIC EDUCATION
EASTERN CAPE PROVINCE** **Third Respondent**

**THE HEAD OF DEPARTMENT
DEPARTMENT OF BASIC EDUCATION**

EASTERN CAPE PROVINCE

Fourth Respondent

and

**NATIONAL ASSOCIATION OF SCHOOL
GOVERNING BODIES**

Amicus Curiae

Education – Effect of intervention in terms of s 100(1)(b) of Constitution – whether respondents obliged to declare post establishment of non-educator staff of public schools in the Eastern Cape Province, and to fill such posts

JUDGMENT

PLASKET J

[1] This case concerns the fundamental right of children attending public schools in the Eastern Cape province to a basic education, which is enshrined, without qualification, in s 29(1) (a) of the Constitution, which states that everyone has the right ‘to a basic education, including adult basic education’.¹ It is no exaggeration to say that as a result of what, on the respondents’ own admission, is a crisis of immense and worrying proportions, the right to basic education of those who attend public schools in the Eastern Cape province is affected or threatened. That fact renders the dispute in this matter justiciable and makes the dispute the business of the courts.

[2] This case arose when the six original applicants brought an urgent application in which they (in essence) sought orders to compel the respondents to implement the 2012 educator post establishment, which had already been declared, by making appointments to vacant posts by a specified date; to pay by a specified date the salaries of temporary teachers who had not been paid; to employ and pay teachers appointed by school governing bodies to vacant posts; to declare the 2013 educator post establishment, which would include non-teaching staff, by specific dates; to make appointments to all vacant established posts, in respect of teachers and non-

¹ See *Governing Body of the Juma Masjid Primary School & others v Essay NO & others (Centre for Child Law & another as amici curiae)* 2011 (8) BCLR 761 (CC), para 37.

teaching staff; and to report to the court on progress in the implementation of these orders and to make the reports available for inspection at district offices and to the parties. They also sought costs.

[3] The original applicants are the Centre for Child Law, the governing bodies of Oatlands Preparatory School, Saint Mary's RC Primary School, Mary Waters High School (all in Grahamstown) and Alphenale High School in Port Elizabeth, as well as a body called the Bethelsdorp SGB Unit which represented a number of school governing bodies, mostly in the northern areas of Port Elizabeth. Later, the Cape Recife High School, a special needs school in Port Elizabeth, and the PJ Olivier High School in Grahamstown applied successfully to intervene as applicants. In addition, the National Association of School Governing Bodies, a voluntary association of 7000 school governing bodies, was admitted as an *amicus curiae*. The standing of the applicants, in terms of s 38(a), (b), (c), (d) and (e) of the Constitution, is not challenged.²

[4] The respondents are the Minister of Basic Education and her Director-General, in the national sphere of government, and the MEC for Basic Education and the head of his department, in the provincial sphere. The Minister and her Director-General were cited as respondents because the Minister took a decision to place the Eastern Cape Department of Basic Education under the administration of the national government in terms of s 100(1)(b) of the Constitution, and her Director-General is the functionary responsible for the execution of that administration. The MEC for Basic Education is cited as a nominal respondent on behalf of the Eastern Cape provincial government, as the 'bearer of the constitutional and statutory powers and duties' related to basic education in the province, as the 'administrator' for purposes of the Promotion of Administrative Justice Act 3 of 2000 and as the functionary who 'declared/established the Educator Post Establishments for the

² Section 38 of the Constitution reads:

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.'

Eastern Cape Province in terms of section 5(1)(b) of the Employment of Educators Act 76 of 1998'. The head of the provincial department is cited as a respondent because he bears certain constitutional and statutory powers and obligations by virtue of his office and because he is the employer of all teachers at public schools in the province.

[5] Much was made in the papers and, to an extent in argument, about what the implications of the intervention in terms of s 100(1)(b) were in respect of the powers, functions and duties of the Minister and her Director-General. In view of the fact that there has been a divergence of opinions expressed on this issue, and consequent confusion as to where powers, obligations and responsibilities ultimately lie, it is necessary to deal with the issue briefly.

[6] The Constitution allocates powers to three spheres of government, the national, the provincial and the local sphere. Generally speaking, one sphere of government may not usurp the powers of another sphere. Section 100 of the Constitution, however, allows for the national government to intervene in a provincial administration in certain defined instances. Section 100 (1) reads as follows:

'(1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including-

- (a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
- (b) assuming responsibility for the relevant obligation in that province to the extent necessary to-
 - (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
 - (ii) maintain economic unity;
 - (iii) maintain national security; or
 - (iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.'

[7] The Constitutional Court has given a succinct answer as to the effect of s 100(1)(b). In *Johannesburg Metropolitan Municipality v Gauteng Development*

*Tribunal and others*³ Jafta J said:

‘The scope of intervention by one sphere in the affairs of another is highly circumscribed. The national and provincial spheres are permitted by ss100 and 139 of the Constitution to undertake interventions to assume control over the affairs of another sphere or to perform the functions of another sphere under certain well-defined circumstances, the details of which are set out below. Suffice it to say that the national and provincial spheres are not entitled to usurp the functions of the municipal sphere, except in exceptional circumstances, but then only temporarily and in compliance with strict procedures.’

[8] While the court was dealing with powers assigned to the local sphere of government, the observations that it made apply equally to the situation where, as in this case, the national sphere of government has, in terms of s 100(1)(b) intervened in a province’s administration: when it does so, it assumes the powers of the provincial administration, and it also assumes its obligations. This must be so in the light of what the Constitutional Court said of the purpose of the s 100 power in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*.⁴ It held that s 100 provides that ‘when a province cannot or does not fulfil an executive obligation the national executive may take appropriate steps to ensure fulfilment of that obligation,⁵ and that what is contemplated is ‘either to put the province on terms to carry out its obligations . . . or to assume responsibility for such functions itself to the extent that it is necessary to do so for any of the purposes set out in NT 100(1)(b)’.⁶ Ms Collett, who appeared for the Minister and the Director-General, accepted, correctly in my view, that the position set out above is indeed correct.

[9] The parties have settled all of the issues in dispute save one, which I am required to determine. (The settlement envisages an order similar to that which had been sought in the notice of motion.) The issue that was argued before me and which I am required to decide is whether, for purposes of 2013, the respondents are under a statutory obligation to declare the post establishment on non-teaching staff

³ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC), para 44

⁴ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC).

⁵ Para 263.

⁶ Para 265.

at public schools and to ensure that those posts are filled.

[10] The prayers in which reference to non-teaching staff appear are prayers 8 and 9 of the draft order. They read:

'8. The First and Fourth Respondents are directed to declare the 2013 establishment(s) for public schools in the Eastern Cape in terms of section 5(2) of the EEA or the Public Service Act, Proc 103 of 1994 (as applicable) by not later than 30 September 2012, such establishment(s) to include posts in respect of educators [and non-educator personnel].

9. The First to Fourth Respondents shall ensure that the 2013 educator establishment(s) for public schools declared in terms of paragraph 8 above consist of posts that are fully funded, and to ensure that educators [and non-educator personnel] are appointed to, and assume, these posts, by no later than 31 January 2013.'

[11] The background to the dispute between the parties is set out in detail in the papers. It is, I believe, fair to say that most of it is common cause and that all of the parties acknowledge that a serious problem exists in respect of the administration of basic education in the Eastern Cape.

[12] At the heart of the problem lies the longstanding failure of the provincial Department of Basic Education to attend to post provisioning. This failure has endured for over a decade. The result is that some schools have more teachers than necessary while others have too few teachers, with consequent prejudicial effects on teaching and learning. As the provincial department failed to take steps to transfer surplus teachers to where they were required, the budget spiralled out of control because teachers at under-resourced schools were appointed to fill vacant posts on a temporary basis.

[13] This created its own set of problems when, in order to cut costs, the provincial department dismissed some 4 000 temporary teachers, only to be compelled by the court to re-instate them. Other casualties of this abject lack of management were the school nutrition program, which provided a meal a day for school children, and the school transport scheme, which allowed for scholars to be conveyed to and from school instead of having to walk long distances.

[14] The nature and extent of the crisis was recognised by the national Department of Basic Education. In a document dated 24 February 2011 entitled 'Statement of Intent on the Remediation of the Present Challenges in Basic Education in the Eastern Cape Province' (that strangely and inexplicably has been classified as top secret) the Minister expressed the view that 'the problems being encountered in basic education in the Eastern Cape province are extremely serious' and that the 'consequences of these problems are such that many learners in the province are already being denied their full rights to quality basic education'.

[15] The Minister identified a major cause of the crisis as being 'the weak capacity of the Eastern Cape Education Department to discharge its obligations effectively in respect of policy compliance; effective and efficient budgeting, planning and expenditure; and effective support of the pedagogic and administrative processes in schools . . .'. She concluded that the cumulative effect of the problems that she identified 'have given rise to a situation where many learners are being deprived of their Constitutional right to education'. This document proposed the s 100 intervention that duly came to pass.

[16] This case now only concerns one of the areas of concern identified by the Minister, namely the provincial department's failure to provide effective support for administrative processes in schools in the province. That failure has the same effect as the failure to effect proper post provisioning for teaching staff: without proper administration in schools, the right of scholars to basic education is threatened. I shall illustrate the point with reference to the situation at two schools, Mary Waters High School in Grahamstown and Cape Recife High School in Port Elizabeth.

[17] Mary Waters High School is a non-fee paying school. It is attended by 1087 scholars, most of whom are members of poor families. The school has not received funding from the provincial department for 2012 and so has been unable to fund such programs as the school nutrition program. Its post establishment for teachers in 2012 is 38 but it only has 27 permanently employed teachers plus four teachers who are employed on a temporary basis. As far as non-teaching staff is concerned, Mr Errol Goliath, the chairperson of the governing body, says the following in his affidavit:

'Mary Waters also has a severe lack of non-teaching staff. It was only allotted one cleaner and one security guard for its entire school. It was allotted no administrative posts and the SGB must pay for these positions through its own funds. There has been no secretary or receptionist at the school for 10 years.'

[18] Cape Recife High School caters for scholars with special education needs due to specific learning disabilities, physical disabilities, cerebral palsy, autism, hearing impairment, sight impairment and multiple disabilities. It is, according to Mr John Dakin, the chairperson of its governing body, 'well known for its high educational standards and excellent matric results' and it is regarded as 'one of the leading schools of its kind in the country'.

[19] The school has 385 scholars from grade R to grade 12. The classes are, of necessity, small and the teaching staff is supported by a multidisciplinary team of remedial teachers, physiotherapists, occupational therapists, speech-language therapists, a nursing sister and psychologists. As the school also has a boarding establishment and runs a transport service for scholars still more support staff is needed for these and related activities.

[20] Its educator establishment has been determined to consist of 50 posts but at present 18 posts are vacant. In 2008, the school received a post allocation for non-teaching staff. The provincial department decided that it required 77 such posts but because of what is described as a moratorium on the appointment of non-teaching staff only 22 of those posts are filled. Mr Dakin says that there are vacancies for one administrative officer, one senior housekeeper, eight cleaners, four drivers, 12 therapy aides, 16 teacher aides, three security guards, two social workers, three nurses, two psychologists, one hostel superintendent and one hostel supervisor.

[21] The situation at Mary Waters High School and Cape Recife High School in respect of the shortages of non-teaching staff only has to be stated for the size and nature of the problem to be apparent. If the administration and support functions of a school catering for over 1 000 scholars, as in the case of Mary Waters High School, or of the nature and complexity of Cape Recife High School, cannot perform properly because of staff shortages, not only does this have a knock-on effect on the right to

basic education but it also has the potential to threaten other fundamental rights. Where hostels are understaffed, for instance, or security is lacking, the rights to dignity and to security of the person, as well as children's rights in terms of s 28 of the Constitution, may be implicated. When administrative capacity in a complex institution like a school is non-existent, administration either breaks down or has to be performed by teachers who have to deviate from their core functions to perform tasks that they are not trained or expected to perform.

[22] The importance to the provision of education of non-teaching staff at public schools is recognised in the Amended National Norms and Standards for School Funding (2006) published by the Minister of Education.⁷ They apply, according to s 7, 'uniformly in all provinces, and are intended to prevail in terms of Section 146(2) of the Constitution'. Sections 29 and 30 are of significance. They state:

'29 The allocation of non-teaching staff to schools, including administrative and support staff, is extremely uneven. The provision of such personnel has been severely lacking in historically disadvantaged and small schools. Inequalities in the provision of such staff members is almost certainly associated with major inefficiencies in schools which serve poor communities.

30 The Minister of Education is responsible for determining norms for the provision of non-educator personnel, including non-teaching personnel at school level.'

[23] This brings me to the central issue in this case, namely whether the respondents are under a statutory obligation to declare a post establishment for non-teaching staff at public schools in the province for 2013 and, if so, to fill the posts so declared. Mr Budlender, who appeared together with Mr Brickhill for the applicants, argued that the statutory obligation resting on the respondents is to be gleaned from the applicable legislative scheme as a whole. Mr Mbenenge, who appeared with Mr Benningfield for the MEC and his head of department, and Ms Collett took the view that while teacher post establishments must be declared in terms of the Employment of Educators Act 76 of 1998, no such obligation rested on any of the respondents to declare a post establishment for non-teaching staff.

⁷ Published in Government Notice 869 in Government Gazette 29179 of 31 August 2006, and made in terms of s 39(7) of the South African Schools Act 84 of 1996, and amended from time to time thereafter.

[24] The norms and standards that I referred to above stipulate what are termed policy targets in respect of personnel. Section 20 states that the national department's personnel policy for schools embodies the following principles:

'(a) schools must be supplied with an adequate number of educator and non-educator personnel;

(b) such staff members must be equitably distributed according to the pedagogical requirements of the schools; and

(c) the cost of personnel establishments must also be sustainable within provincial budgets.'

[25] Section 21 sets a policy target which is based on local and international evidence that 'personnel: non-personnel spending in ordinary public schools should be in the order of 80:20' and s 23 provides that within the total personnel allocation in provincial departments 'teaching personnel costs should be targeted at 85%, to allow for the appointment and proper distribution of administrative and support staff'.

[26] Section 5(2) of the Employment of Educators Act provides that the head of a provincial department determines the educator establishment of public schools in a province but it makes no mention of non-teaching staff. Their situation is governed by the Public Service Act, 1994 (Proclamation 103 of 3 June 1994) and it is to this statute that I now turn.

[27] Section 1 contains definitions of three key terms. 'Establishment' is defined as 'the posts which have been created for the normal and regular requirements of a department'. A department is defined to include a provincial department. A post means 'a post on the establishment *for which financial provision exists*'.⁸ Section 8(1) (a) provides that the public service consists of persons who are employed 'in posts on the establishment of departments' and s 8(1)(b) includes posts 'additional to the establishment of departments'.

[28] Section 3(7) provides:

'An executive authority has all those powers and duties necessary for –

(a) the internal organisation of the department concerned, including its organisational structure and establishment, the transfer of functions within that department, human

⁸ Emphasis added.

resources planning, the creation and abolition of posts and provision for the employment of persons additional to the fixed establishment; and

(b) the recruitment, appointment, performance management, transfer, dismissal and other career incidents of employees of that department, including any other matter which relates to such employees in their individual capacities,

and such powers and duties shall be exercised or performed by the executive authority in accordance with this Act.’

The term ‘executive authority’ is defined, in relation to a provincial department, to be ‘the member of the Executive Council responsible for such portfolio’.

[29] Two sections of the South African Schools Act 84 of 1996 clearly contemplate that both establishments for teaching and non-teaching staff must be determined. First, ss 20(1)(i) and (j) empower governing bodies to recommend to the head of the provincial department ‘the appointment of educators at the school, subject to the Employment of Educators Act’ and ‘the appointment of non-educator staff at the school, subject to the Public Service Act’. Secondly, ss 20(4) and (5) empower governing bodies to create posts additional to the establishment for both teachers and non-teaching staff. They state:

‘(4) Subject to this Act, the Labour Relations Act, 1995 (Act 66 of 1995), and any other applicable law, a public school may establish posts for educators and employ educators additional to the establishment determined by the Member of the Executive Council in terms of section 3(1) of the Educators’ Employment Act, 1994.

(5) Subject to this Act, the Labour Relations Act, 1995 (Act 66 of 1995), and any other applicable law, a public school may establish posts for non-educators and employ non-educator staff additional to the establishment determined in terms of the Public Service Act, 1994 (Proclamation 103 of 1994).’

[30] Not surprisingly, the two sets of post establishments are linked. This is clear from the norms and standards and also from regulation 1(c)(ii)(ee) of the regulations made in terms of the Employment of Educators Act.⁹ It states:

‘In determining the post establishment of a provincial department of education, the Member of the Executive Council must –

⁹ Regulations for the Creation of Educator Posts in a Provincial Department of Education and the Distribution of Such Posts to the Educational Institutions of Such a Department, Government Notice R1676, Government Gazette 19627 of 18 December 1998, as amended by Government Notice R1451, Government Gazette 24077 of 15 November 2002.

...

(ii) take into account

...

(ee) the fact that the division between expenditure on educator and non-educator personnel costs in the budget should be educationally, administratively and financially justifiable and in accordance with national policy that may exist in this regard.’

[31] Finally, in order for governing bodies to be able to budget for, and fill, posts additional to the establishments for both teachers and non-teaching staff, they of necessity need to know first what both of those establishments are. In other words, they cannot exercise their powers in terms of ss 20(4) and (5) properly and rationally without knowing how many teachers and non-teaching staff are provided for by the provincial department. This point was made in relation to s 20(4) by Eksteen J in *Federation of Governing Bodies of South African Schools & others v MEC for the Department of Basic Education & another*¹⁰ but his observations apply equally to s 20(5). He stated:¹¹

‘[21] The structure of the Schools Act accordingly provides for the Minister to lay down norms and standards in respect of various issues relating to public schools, including the number of teachers and class sizes (section 5A(2)(b)(i)), the appointment of teachers by the governing bodies of public schools (section 20(4)) and the funding of public schools (section 35). In addition to the obligation of the State, as set out in the Act, the governing bodies of public schools have an obligation to take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners at the school. The means by which it is empowered to give effect to this obligation placed upon it is by the appointment of additional educators pursuant to the provisions of section 20(4) of the Act. The decision of a governing body to employ educators may have a huge impact on school fees. For this reason section 20(9) of the Schools Act requires of a governing body, when presenting an annual budget to provide sufficient details of any posts envisaged in terms of section 20(4), including the estimated

¹⁰ *Federation of Governing Bodies of South African Schools & others v MEC for the Department of Basic Education & another* ECB 2 March 2011 (case no.60/11) unreported.

¹¹ Paras 21-24.

costs relating to the employment of staff in such posts and the manner in which it is proposed that such costs will be met.

[22] The budget must be prepared annually. According to prescriptions determined by the MEC it must show estimated income and expenditure at the school for the following financial year (see section 38(1)). Before such a budget is approved by the governing body it must be presented to a general meeting of parents convened [on] at least 30 days notice for consideration and approval of a majority of parents present and voting (see section 38(2)).

[23] Clearly the need and desirability for the appointment of additional educators over and above the establishment determined by the MEC can only be considered once the establishment determined by the MEC is known. Once this is conveyed to each public school it is in a position to commence with the planning of its budgets, the raising of funds, the advertising of educator posts by the governing body, interviewing of candidates and the recommendations for the appointments to the HOD as envisaged in section 20(1)(i) of the Schools Act.

[24] It is readily apparent that the structure of the system provided by the legislature for the organisation, governance and funding of schools in the Schools Act cannot be achieved unless the head of the department complies with his obligations in terms of section 58C(6) by advising each school of a maximum and minimum capacity in relation to the availability of, *inter alia*, educators, by no later than 30 September 2007. It is significant that the date of 30 September is not set as a target date in some policy document or regulation, rather it is stipulated by statute as the latest date by which the HOD must complete that function. If he does not do so the system breaks down.'

[32] In summary, the Public Service Act empowers the MEC to determine the establishment for non-teaching staff at public schools in the province; the norms and standards that apply to the provincial department postulate an adequate number of both teaching and non-teaching staff to be employed at each school and a correlation between the teaching and non-teaching establishments; and the South

African Schools Act requires both teacher and non-teacher establishments to be known by governing bodies before their budgets can be approved and to allow them to determine how many additional posts are needed at their schools. The only interpretation of the legislation that is consistent with the obligation on the respondents to respect, protect, promote and fulfil the fundamental right to basic education¹² is that the MEC is empowered to and obliged to determine the establishment for both teaching staff and non-teaching staff at public schools in the province. As, in terms of s 1 of the Public Service Act, a post means a post on the establishment for which financial provision exists, any posts which have been determined can, and must, be filled.

[33] As the posts that are part of the establishment have been budgeted for, there can logically be no moratorium on filling them. That can only arise, assuming that some or other functionary has the power to impose a moratorium, if a fiscal crisis befell the provincial department at a later stage. In any event, the imposition of a moratorium in such circumstances would, assuming it could otherwise validly be imposed, place the respondents in breach of their constitutional obligations to respect, protect, promote and fulfil the fundamental right to basic education, in terms of s 7(2) of the Constitution.

[34] My conclusion is consequently that the respondents are obliged to declare post establishments for both teaching staff and non-teaching staff for 2013 for public schools in the province and that they are required to fill those posts which, after all, they would have budgeted to do. The applicants are accordingly entitled to the orders that they sought. I have, with the knowledge and consent of the parties, changed certain of the implementation dates that had been agreed upon in the order to make provision for the delay occasioned by reserving judgment.

[35] The following order is issued:

1. The first to fourth respondents are required forthwith to implement the 2012 educator establishment of the Department of Basic Education, Eastern Cape Province, declared by the third respondent in terms of section 5(1)(b) of the Employment of Educators Act 76 of 1998 (the EEA) (the 2012 provincial

¹² Constitution, s 7(2).

educator establishment) and the educator establishment of public schools in the Eastern Cape declared by the fourth respondent in terms of section 5(2) of the EEA (the 2012 educator establishment for public schools).

2. The first to fourth respondents are directed to implement the 2012 provincial educator establishment and the 2012 educator establishment for public schools, in full, by appointing educators to all vacant substantive posts declared in the 2012 educator establishment for public schools on a permanent basis by 2 November 2012.
3. The first and fourth respondents are directed to appoint educators on a temporary basis pending the permanent appointment of all educators against all vacant substantive posts on the 2012 educator establishment for public schools by 2 September 2012.
4. The first and fourth respondents are directed to pay the salaries of all educators whose appointment on a temporary basis has been approved by the Department of Basic Education, Eastern Cape, which the respondents have failed to pay, by 17 August 2012.
5. Where an educator has
 - 5.1. been duly identified by the School Governing Body concerned, in accordance with the Memorandum of 10 November 2011 or the Circular of 19 April 2012, to fill a vacant substantive post recognised in the 2012 post establishment for public schools; and
 - 5.2. been performing the functions of that post,such educator will be deemed to have been appointed as a temporary educator in terms of the EEA pending the permanent appointment of an educator against that vacant substantive post on the 2012 educator establishment for public schools.
6. The first and fourth respondents are directed to pay the salaries of the educators referred to in paragraph and/or reimburse the school concerned from the date on which the educators assumed duty. In order for such payments to be made:
 - 6.1. by 17 August 2012, the third and fourth respondents will provide the applicants' attorneys with contact details for each district office in the province; and
 - 6.2. by 3 October 2012, the relevant schools will provide the relevant district

office with the following details:

- 6.2.1.the documents demonstrating the approval of the School Governing Body;
- 6.2.2.the name of the educator;
- 6.2.3.the post in respect of which the educator assumed duty;
- 6.2.4.the date and terms on which such educator assumed duty;
- 6.2.5.proof of attendance and/or rendering of service by the educator concerned; and
- 6.2.6.proof of payment by the school, if applicable.

6.3.The payments will be made by the first to fourth respondents within one month of the submission of the information referred to in paragraph above.

- 7. The first and third respondents are directed to declare the 2013 educator establishment of the Department of Basic Education, Eastern Cape, in terms of section 5(1)(b) of the EEA.
- 8. The first and fourth respondents are directed to declare the 2013 establishments for public schools in the Eastern Cape in terms of section 5(2) of the EEA and the Public Service Act, Proc 103 of 1994 (as applicable) by not later than 30 September 2012, such establishments to include posts in respect of educators and non-educator personnel.
- 9. The first to fourth respondents shall ensure that the 2013 educator establishments for public schools declared in terms of paragraph 8 above consist of posts that are fully funded, and shall ensure that educators and non-educator personnel are appointed to, and assume, these posts, by no later than 31 January 2013.
- 10.The first respondent, in consultation with the second to fourth respondents, shall make a report available for inspection at each district office and to the parties on 3 September 2012, 4 December 2012 and 31 January 2013, such reports to contain at least details of:
 - 10.1.the steps taken to appoint educators on a permanent or temporary basis to fill vacant posts against the 2012 educator establishment for public schools in terms of paragraphs Error: Reference source not found and above;
 - 10.2.the steps which have been taken to transfer and/or ensure the movement

of teachers who are additional to the educator establishment of their schools in terms of the 2012 educator establishment for public schools; and

10.3.the steps taken to ensure payment of educators in terms of paragraphs and Error: Reference source not found above;

10.4.the steps taken to declare the 2013 establishments in terms of paragraphs 7 to 8 above, and the steps taken to implement them.

11.Any party may subsequently set the matter down for hearing on reasonable notice on the papers already filed of record, duly supplemented as appropriate.

12.The respondents are ordered, jointly and severally, to pay the applicants' costs, including the costs of two counsel.

13.The respondents are ordered, jointly and severally, to pay the disbursements of the *amicus curiae*.

C Plasket

Judge of the High Court

APPEARANCES

Applicants: S Budlender and J Brickhill

Instructed by:

Legal Resources Centre, Grahamstown

First and second respondents: S Collett

Instructed by:

NN Dullabh and Co, Grahamstown

Third and fourth respondents: SM Mbenenge SC and PG Benningfield

Instructed by:

NN Dullabh and Co, Grahamstown

Amicus curiae: M Chaskalson SC and A Hassim

Instructed by:

Legal Resources Centre, Grahamstown