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IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – BHISHO

Case no: 573/12
Date Heard: 7/12/12
Date Delivered: 18/02/13

In the matter between:

SOUTH AFRICAN DEMOCRATIC TEACHERS' UNION (SADTU)	**1st APPLICANT**
FEDERATION OF GOVERNING BODIES OF SOUTH AFRICAN SCHOOLS (FEDSAS)	**2nd APPLICANT**
SUID-AFRIKAANSE ONDERWYSERSUNIE (SAOU)	**3rd APPLICANT**
NATIONAL PROFESSIONAL TEACHERS' ORGANISATION OF SOUTH AFRICA (NAPTOSA)	**4th APPLICANT**

AND

THE MEMBER OF THE EXECUTIVE COUNCIL DEPARTMENT OF BASIC EDUCATION EASTERN CAPE PROVINCE	**1st RESPONDENT**
THE HEAD OF DEPARTMENT DEPARTMENT OF BASIC EDUCATION EASTERN CAPE PROVINCE	**2nd RESPONDENT**
THE MINISTER OF BASIC EDUCATION	**3rd RESPONDENT**
THE DIRECTOR-GENERAL DEPARTMENT OF BASIC EDUCATION	**4th RESPONDENT**
THE PREMIER EASTERN CAPE PROVINCE	**5th RESPONDENT**
THE MEMBER OF THE EXECUTIVE COUNCIL DEPARTMENT OF TREASURY EASTERN CAPE PROVINCE	**6th RESPONDENT**

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CENTRE FOR CHILD LAW **INTERVENING PARTY**

REASONS FOR ORDER

SMITH J:

Introduction

[1] On 7 December 2012 I granted an order dismissing the application and ordered the Applicants to pay the Respondents' costs. I indicated at the time that the reasons for my decision would follow. I adopted this approach because of the urgency of the matter and at the behest of counsel. Here follow my reasons for the order.

[2] The Applicants seek an order reviewing and setting aside the educator post establishment for the 2013 school year declared by the Member of the Executive Council for Education, Eastern Cape Province ("the MEC") in terms of section 5(1)(b) of the Employment of Educators Act, 76 of 1998 ("the Act"), as well as the 2013 educator post establishment for public schools declared by the head of the Eastern Cape Education Department ("the HOD") in term of section 5(2) of the Act.

[3] The Applicants initially relied on the following review grounds:

(a) the MEC purported to reduce the 2013 post establishments for public schools on the basis of an "illusory" budget reduction of R1.6 billion, which did in fact not exist;

(b) the MEC failed to adequately consult with trade unions and school governing bodies in determining the 2013 post establishment;

(c) the MEC failed to comply with the Memorandum of Agreement entered into by the Respondents and other trade unions on 8 February 2012;

(d) the HOD had failed to convey the post establishment to public schools in the province prior to 30 September 2012 as required in terms of the law; and

(e) to the extent that the post establishments are at variance with the previous establishments, they are irrational, in that they are not linked to the relevant number of learners at the relevant schools.

[4] At the hearing of the matter, however, counsel for the Applicants, Mr *Smuts SC,* indicated that they would only persist with the review grounds mentioned in paragraphs (d) and (e) above. His submissions therefore related to those review grounds only. In my view the abandoned review grounds were clearly without any merit and the Respondents were well advised not to proceed with them.

The Parties

[5] The First, Third and Fourth Applicants are teachers' organisations, and the Second Applicant represents the governing bodies of schools recognised in terms of the South African Schools Act, 84 of 1996 ("the Schools Act").

[6] The Respondents are: the Member of Executive Council for the Department of Basic Education Eastern Cape; the Head of the Department of Basic Education; the Minister of Basic Education; the Director- General of Basic Education; the

Premier of the Province of the Eastern Cape; and the Member of the Executive Council for the Department of Treasury of the Eastern Cape. The Centre for Child Law ("the Intervening Party"), a Law Clinic established by the University of Pretoria, was granted leave to intervene in the proceedings. The main objectives of the Intervening Party are the establishment and promotion of Child Law and to uphold the rights of children in South Africa.

Statutory framework

[7] Section 5(1)(b) of the Act provides that the educator establishment of a provincial department of education shall consist of posts created by the MEC. In terms of section 5(2) of the Act the educator establishment of, *inter alia,* any public school shall "*subject to the norms prescribed for the provisioning of posts"*, consist of the posts allocated to a school, by the HOD from the educator establishment of the department.

[8] The prescribed norms are contained in the regulations published in Government Gazette R1676 (dated 18 December 1998). In terms of these Regulations the MEC is enjoined to consult with unions in the province, who are members of the Education Labour Relations Council, as well as organisations representing governing bodies who are active in the province. The MEC must thereafter determine a post establishment having regard to, *inter alia,* the following criteria:

(a) the budget of the department;

(b) the effect that the post establishment will have upon the employment security of educators;

(c) the need to redress the implementation and promotion of curriculum policy in keeping with the basic values and principles set out in section 195 of the Constitution;

(d) the fact that the division between expenditure on personnel and non-personnel costs in the budget should be educationally and financially justifiable in accordance with national policy that may exist;

(e) 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.

[9] Regulation 2 requires the HOD to determine post establishments for individual schools by applying the post distribution model set out in Annexure 1 thereto, by taking into account the post establishment declared by the MEC, and the need to redress the implementation and promotion of curriculum policy. Clause 8 of the distribution model provides that where a school's post establishment is likely to change in any school year, the adjusted post establishment should be communicated to the relevant school "*as far as possible"* on or before 30 September of the preceding school year.

[10] Section 58C(6) of the Schools Act provides that the HOD must determine the minimum and maximum capacity of a public school in accordance with the norms and standards contemplated in section 5A: (a)"*in relation to the availability of classrooms and educators as well as the curriculum programmes of such schools",* 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" (my underlining).

[11] Section 29(1) of the Constitution guarantees the right to basic and further education. The Government's statutory obligations to determine the educator needs of schools must therefore be exercised with due regard to this right and the provisions of section 7(2) which enjoins the state to "*respect, protect, promote and fulfil the rights in the Bill of Rights".*

Has Clause 8 of the distribution model been repealed?

[12] It was contended on behalf of the Applicants that the provisions of the Regulations, in so far as they prescribe a flexible date for the communication of adjusted post establishments to public schools, have been "overtaken" and impliedly repealed by section 58C of the Schools Act, which was introduced in 2007. The latter section now prescribes the 30th of September as an inflexible and mandatory deadline – or so the argument went.

[13] Mr *Smuts* submitted that it is significant that the 30th of September is not set as a target date in some policy document or regulation. It is rather stipulated by statute and "*the system breaks down"* if the MEC does not complete the prescribed function by the stipulated date. He argued that governing bodies have various statutory responsibilities, including preparation of the budget and appointment of additional teachers, which they can only perform once they know the educator establishment of the school. The statutory structure of the system for the organisation, governing and funding of schools can therefore only be achieved if the MEC complies with the statutory function by the 30th of September of each year.

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[14] Mr *Smuts* has put heavy reliance for his submissions in this regard on the unreported judgment of Eksteen J in respect of an urgent interim interdict in *Federation of Governing Bodies of Southern African School and 3 others v MEC for Department of Basic Education and another.*[1] In that matter Eksteen J had found that[2]:

> "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 s. 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."

[15] And in regard to the provisions of clause 8 of the distribution model he held as follows[3] :

> "These regulations were promulgated in 1998. Section 58 C of the Schools Act was introduced in the Schools Act by section 11 of Act 31 of 2007. I am accordingly of the view that the target date set out in the post distribution model annexed to the regulations promulgated in 1998 as amended in November 2002 has been overtaken by provisions of the Schools Act which prescribe 30 September of the preceding year as an inflexible deadline. This, as shown above, is essential if the system for the organisation, governance and funding of schools is to work."

[16] Mr *Gauntlett SC,* appearing on behalf of the Respondents, has in my view correctly submitted that in our law, in construing a statute, the existing law is not presumed to have been altered unless the language used clearly evinces such an intention*. (Johannesburg Municipality v Cohen's Trustees*[4]*)*

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[1] (case no: 60/2011)
[2] At par. 24
[3] At par. 29
[4] 1909 TS 811 at 818

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[17] In *Kent NO v South African Railways and Harbours*[5], Watermeyer CJ said the folowing:

> "…it is necessary to bear in mind a well-known principle of statutory construction, *viz.,* that Statutes must be read together and the later one must not be so construed so as to repeal the provisions of an earlier one, or to take away rights conferred by an earlier one unless the later statute expressly alters the provisions of the earlier one in that respect or such alteration is a necessary inference from the terms of the later Statute. The inference must be a necessary one and not merely a possible one."

[18] It is only where the provisions of a later statute are so inconsistent with, or repugnant to, those of the earlier statute that the two cannot stand together, that the earlier statute stands impliedly repealed. (Kent *supra)*[6]

[19] This principle has again recently been applied by the Supreme Court of Appeal in *Nedbank Ltd v National Credit Regulator,*[7] where Malan JA said the following:

> "The rule of interpretation is that a statutory provision should not be interpreted so at to alter the common law more that is necessary unless the intention to do is clearly reflected in the enactment, whether expressly or by necessary implication."

[20] In my view it is significant that section 58C of the Schools Act is concerned with compliance with norms and standards promulgated under section 5A, while clause 8 of the distribution model sets a flexible date (being "*as far as possible by the 30 September*") for the communication of adjusted post establishments to schools. Section 58C (6)(a) requires the HOD to determine the maximum and minimum capacity of a public school "*in relation to the availability of classrooms and educators",* as well as the curriculum of each school. In terms of subsection

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[5] 1946 AD 405
[6] At 405
[7] [2011] 4 ALL SA 131 (SCA) at par.38

6(b) that determination must be communicated to the chairperson of the governing body and the principal *"in writing by not later than 30 September of each year".* This must be done in accordance with the norms and standards contemplated in section 5A. It is common cause that these have not yet been promulgated.

[21] Mr *Ngcukaitobi,* who appeared for the Intervening Party, has in my view correctly submitted that the process contemplated by section 58C of the Schools Act is distinct from the determination of the post establishment made in terms of section 5 of the Act. The former process entails the application of national norms and standards while the latter regulates the communication of post establishments to schools. He argued that until such time as these norms and standards had been promulgated, it is in any event not possible for the HOD to comply with the section and the only applicable time limit is that which is set in terms of clause 8 of the post distribution model.

[22] There are in my view several insurmountable difficulties with the argument that the provisions of clause 8 of the distribution model had been impliedly repealed by section 58C of the Schools Act.

[23] First, as Mr *Gauntlett* has argued, such an approach presumes that the legislature intended to interfere with the Minister's and MEC's statutory powers to formulate policy in terms of norms and standards, and the determination of the model which governs the distribution for allocation of educator posts. Second, if it had indeed been the purpose of the statutory scheme to divest the MEC and HOD of their powers at midnight, on 30 September, the Regulations would not have stipulated that the post establishment should be distributed "*as far as possible by 30 September".* Third, if indeed the intention of the legislature

was to divest the MEC and HOD of their powers by 30 September in a different statute it would have said so explicitly. Fourth, the deadline of 30 September, which is stipulated in the Schools Act, is not only in a different statute but also refers to a different statutory obligation, *viz* the communication of a determination relating to the minimum and maximum capacities of a public school. It is in my view improbable that the legislature would have intended a repeal of a different statute through such an oblique and circuitous route.

Are the provisions of section 58C of the Schools Act peremptory?

[24] The Applicants' contention that the provisions of s. 58C of the Schools Act must be interpreted to require the declaration of the educator post establishment, and communicate them to public schools before 30 September of the preceding year, rests on the following rather fragile hypotheses:

(a) section 58C was introduced into the Schools Act in 2007, while the regulations were promulgated in 1998;

(b) section 58C enjoins the HOD to determine the minimum and maximum capacities of public schools, having regard, *inter alia,* to the educator post establishment, before 30 September of each year;

(c) the HOD can only comply with this statutory obligations if the educator post establishment is declared and communicated to the schools before the 30th September;

(d) school governing bodies can also only comply with their statutory obligations if the HOD communicates the post establishment to schools by the aforesaid date; and

(e) the statutory structure of the system for the organization, governance and funding of schools can therefore not be achieved unless the HOD complies with his obligations in terms of section 58C (6) of the Schools Act by the stipulated date.

[25] This argument is in my view premised on the erroneous assumption that in our law all powers exercised outside the period prescribed by the empowering provision of a statute are invalid. There is however a plethora of earlier and more recent authorities in support of the proposition that in our law non-compliance with prescribed time limits does not automatically lead to invalidity. In *Gokal v Moti,*[8] Centlivres JA interpreted a provision in an ordinance which provided that:

> "The local authority or the board, as the case may be shall, not later than two months after the receipt of any application as aforesaid grant or refuse a certificate under the provisions of section seven hereof."

to be merely directory notwithstanding the use of the word "shall" because:

> "If one were to hold that the sub-section is imperative, the extraordinary result would follow that the Council could, by the simple expedient of refusing to consider an application within the prescribed period of two months, deprive an applicant for a certificate of the right given him by the Ordinance to require the Council to consider and decide on the application. Such an intention could never have been intended by the Legislature."

See also *Hercules Town Council v Dalla.*[9]

[26] Similarly In *Motorvoertuigassuransiefonds v Mavundla*[10], Van Dyk J quoted, with approval, the following dictum of Malan J in *Volschenk v Volschenk*[11] :

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[8] 1941 AD 304 at 314
[9] 1936 TPD 229
[10] 1989 (1) SA 558 (T) at 564
[11] TPD 486 at 490

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> "I am not aware of any decision laying down a general rule that all provisions in respect of time are necessarily obligatory and that failure to comply strictly therewith results in nullifying all acts done pursuant thereto. The real intention of the Legislature should in all cases be enquired into and the reasons ascertained why the Legislature should have wished to create a nullity. An important consideration would be whether by failure to adhere to strict compliance with the time provisions substantial prejudice will result to the persons or classes intended to be protected and if prejudice may result, whether it is irremediable or whether it may be cured by allowing an extension of time."

[27] And in Baxter: Administrative Law[12], the learned author states that:

> "Administrative action based on formal or procedural defects is not always invalid. Technicality in the law is not an end in itself. Legal validity is concerned not merely with technical but also with substantial correctness. Substance should not always be sacrificed to form; in special circumstances greater good might be achieved by overlooking technical defects."

[28] Statutory provisions cannot be categorized as either peremptory or directory merely by reference to the use of words such as "shall" or "may", or what may appear, upon first consideration, to be inflexible time-limits. In *Leibbrandt v South Africa Railways*[13], De Wet CJ, quoting Lord Penzance in *Howard v Bodington*[14], stated that the approach of courts should rather be in each case to look at the subject matter, consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect, decide whether the matter is what is called "imperative" or only directory.[15]

[29] In any event in our law the imperative nature of a statutory provision is not necessarily decisive. (*Bezuidenhout v AA Mutual Assurance Association Lt*[16]*).*

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[12] At 446
[13] 1940 AD 9 at 12
[14] 2 P.D. 203
[15] At 13
[16] 1978(1) SA 703 (A) at 710A

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Even a peremptory statutory provision may be renounced by a person for whose benefit it has been introduced. And in *Nkisimane and Others v Santam Insurance Company*[17], Trollip JA held that the clear cut distinction between "peremptory" and "directory" statutory provisions has become somewhat blurred and that*"[c]are must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what are the consequences of non- or defective compliance."*

He further held that consequently:[18]

> "In between those two kinds of statutory requirements it seems that there may now be another kind which, while it is regarded as peremptory, nevertheless only requires substantial compliance in order to be legally effective." (…cf Maharaj and others v Rampersad 1964 (4) SA 638 (A) 646C – E)"

[30] In *Leibrandt* (supra) De Wet CJ held that it is impossible to lay down any conclusive test as to when a legislative provision is directory and when it is peremptory. He quoted with approval the following *dictum* by Lord Campbell in *Liverpool Bank v Turner*[19]

> "No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."

[31] At page 13 of the judgment, quoting Voet, he concludes that where a law prohibits certain acts and does not nullify what is done contrary thereto nor fix a

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[17]1978(2) SA 430 (A) at 434H-444A
[18]Nkisimane (supra) at 444C
[19] 30 L.J., Ch. 379

penalty, the maxim "*that many things are prohibited in law which yet hold good"* came "*into vogue"* because:

> "The reason of all this I take to be that in these and the like cases greater inconveniences and greater impropriety would result from the rescission of what was done than would follow the act itself which has been done against the law." (Voet 3.1.16)

[32] The test to be applied in order to determine the real intention of the legislature has been summarised as follows by Herbstein J in *Pio v Franklin NO and another.*[20]

(a) The word "shall" when used in a statute is rather to be considered as peremptory, unless there are other circumstances which negative this construction;

(b) If a provision is couched in a negative form, it is to be regarded as a peremptory rather than a directory mandate;

(c) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favor of an intention to make the provision only directory; and

(d) If upon consideration of the scope and objects of a provision, it is found that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory. The history of the legislation will also afford a clue in some cases.

[20] 1948 CPD 442 at 451

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[33] Eksteen J's ruling that the provisions of section 58C of the Schools Act are mandatory was based on his finding that "*the system would break down*" if the post establishment for the department and for individual schools are not declared and communicated to schools by 30 September of each year. While this finding was clearly justified within the context of the facts before him, I cannot agree with the line of reasoning adopted by Mr *Smuts* that, as a general proposition, all instances of non-compliance, regardless of the degree thereof, would vitiate the determinations by the MEC and HOD. In the case before Eksteen J, the HOD had only commenced the process to determine the post establishment in November, the MEC and HOD had undertaken to announce the final post establishment only by March of the following year and would have provided post establishments to the individual schools only by April. There was therefore a justifiable factual context for the finding that the system would break down if the department were allowed to implement the post establishment under those circumstances.

[34] To hold, however, that in all cases of non-compliance "*the guillotine falls*" at midnight, 30 September, and that whatever happens thereafter becomes invalid, would result in absurd consequences which could never have been foreseen or intended by the Legislature. This line of reasoning would have it that a post establishment communicated to schools on the 1st of October would still be invalid simply because the "*magic hour*" of midnight on 30 September had come and gone. That the consequences of such an approach could have far-reaching financial ramifications for the department is not difficult to conceive. It may conceivably, in effect, be compelled to implement the post establishment of the previous year regardless of budgetary constraints. In this case the post

establishment for 2012 was 64 752 educators while that for the 2013 school year is 60 820. In order to avoid retrenchments the department had to budget for a deficit of some R800 million rand.

[35] There is in my view also no legal basis for considering the statutory deadline of 30 September as the "tipping point" beyond which the system would break down, without considering the degree of non-compliance. When schedule 1 to the regulations was amended in 2002 a deadline of 1 January was imposed for post provisioning. Schools were nevertheless able to function properly even when post establishments were communicated to them as late as 1 January.

[36] In summary therefore:

(a) I am of the view that there is no legal or factual basis for a conclusion that the legislature had intended to impliedly repeal the provisions of clause 8 of the post distribution model contained in the regulations when it introduced s. 58C into the Schools Act during 2007;

(b) in any event the provisions of s. 58C of the Schools Act cannot be interpreted to be mandatory in the sense that any post establishment declared and communicated to schools after 30 September of the preceding year would automatically be a nullity;

(c) substantial compliance with the provisions of section 58C would therefore be sufficient, and each case must be considered on its merits; and that

(d) both the MEC and HOD have substantially complied with the provisions of section 58C. The MEC announced the post establishment for 2013 on 28 September 2012. On 16 October 2013 the HOD issued 'pre-trial post

establishments" for schools and requested their input for the final post allocation. The final post allocations were communicated to District Directors on 1 November and to schools the following day. Their non-compliance was in my view therefore not so egregious that it had made it impossible for schools to function optimally.

Rationality

[37] Mr *Smuts* furthermore argued that the MEC's determination of the post establishment was, by his own admission, based on the number of "*warm bodies",* being the number of educators currently within the department system. He submitted that the MEC has therefore ignored other relevant factors to which he was compelled to have regard in terms of the law. He relies in this regard on the following statement in the MEC's answering affidavit:

> "Furthermore the option selected for the 2013 post declaration was favourable in terms of job security. This was indicated to me in the consultation meeting of 27 September 2012 (page 311 of the review record) when I specifically mentioned that the 60 820 post establishment represented the current "*warm bodies*" in the system including protected temporary educators."

[38] In my view however the MEC's statement was clearly made in reply to an allegation contained in the Applicants' founding papers to the effect that the 2013 post establishment will result in retrenchments. The MEC's reference to *"warm bodies"* was therefore primarily intended to gainsay that allegation.

[39] The MEC pertinently states in his answering affidavit that he has considered all relevant factors such as, *inter alia*: the learner numbers; curriculum needs; budget allocation and job security of educators. The record is also replete with documents which demonstrate that these factors were indeed given due consideration. There is therefore in my view no factual basis for the

submission that the MEC had been solely motivated by the desire to preserve "*warm bodies".*

[40] It is trite law that the court cannot set aside administrative acts of a public functionary simply because it does not agree with the decision. In *Bato Star Fishing (Pty) Lt v Minister of Environmental Affairs*[21] O'Regan J said the following:

> "Although the review functions of the Court now have a substantive as well as procedural ingredient, the distinction between appeals and review continue to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."

[41] Annexure N to the Applicant's founding papers, which is a memorandum from the HOD to the MEC motivating and recommending the post provisioning for the 2013 school year, is a comprehensive document which details all the relevant factors which had been taken into account for the recommendation that the post establishment for the 2013 school year consist of 60 820 posts. These were, *inter alia*, the legal provisions, budgetary implications, learner numbers, educator job security and curriculum requirements. In my view that comprehensive motivation established a rational basis for the recommendation, and accordingly, also for the resultant determination by the MEC.

[42] These are in any event considerations which are peculiarly within the knowledge of the relevant functionaries and where there is a clear, logical and rational link between the reasons provided and the administrative decision (as is the case here), the courts are called upon to show:

> "…judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy - laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by

[21] 2004(4) SA 490 (CC) at par. 45

administrative bodies and the practical and financial constraints under which they operate. [22]"

[43] I am therefore of the view that this review ground can also not be upheld.

Just and Equitable order

[44] Both Mr *Gauntlett* and Mr *Ngcukaitobi* have argued that even if I were to find that the "*temporal target*" prescribed in terms of section 58C of the Schools Act is peremptory, I still retain a discretion in terms of section 8(1) of the Promotion of Administrative Justice Act 3 of 2000 not to set aside the 2013 post establishment.

[45] In terms of the latter provision a court is empowered, *inter alia*¸ to grant any order "*that is just and equitable"* and may *"in exceptional cases",* substitute or vary the administrative action or correct a defect resulting from the administrative action.

[46] In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources*[23], the Constitutional Court held that the enquiry as to whether factual certainty requires "*the amelioration of legality, and if so to what extent"* will depend on the interests involved in each case and the extent or materiality of the breach of the constitutional right to just administrative action.

[47] Similarly in *Oudekraal Estates (Pty) Ltd v City of Cape Town*[24], the Supreme Court of Appeal held that the discretion whether or not to set aside irregular

[22] C. Hoexter: The future of Judicial Review in South-African Administrative Law, (2000) 117 SALJ 484 at 501-502, cited with approval by O' Regan J in Bato Star (supra) at par. 46
[23]2011 (4) SA 133 (CC) at par. 85
[24]2004 (6) SA 222 (SCA) at par.36

administrative action must be exercised where considerations of certainty and practicality override the interests of legality. Also in *Chief Executive Officer, South African Social Security Agency and Others v Cash Paymaster Services (Pty) Ltd*[25], the court held that in deciding whether or not to set aside irregular administrative action courts should be guided by considerations of public interests, pragmatism and practicality.

[48] In my view the facts of this case present compelling reasons for not setting aside the impugned administrative action, even if I had found it to be irregular. First, the extent of the non-compliance by the Respondents was not so egregious as to make it impossible for schools to comply with their statutory obligation, in respect of the 2013 school year. Under these circumstances there was in my view no reason why schools would not be able to comply with their statutory obligations before the commencements of the new school year.

[49] Second, the ramifications for the Department, if it were to be compelled to implement the 2012 post establishment, would be far-reaching and perhaps even catastrophic. In their attempts to avoid retrenchments the Respondents had to budget for a shortfall of some R800 m. The order sought by the Applicant will therefore undoubtedly have serious prejudicial budgetary implications for the Department.

[50] Third, and more importantly, the order sought by the Applicants will effectively preclude the Respondents from implementing post provisioning based on prevailing circumstances and budgetary constraints, and the need to address the continuing problem of inequitable distribution of teachers throughout the

[25] 2012 (1) SA SA 216 (SCA)

province, which may cause many schools to be left with critical educator vacancies.

[51] And finally, the respondents have already commenced implementing the 2013 post establishments in accordance with an order granted by Plasket J in *Centre for Child Law and others v Minister of Basic Education and others*[26] which will result in the filling of educator and non-educator vacancies by February 2013.

[52] There can be little doubt therefore that the setting aside of the 2013 educator post establishment will indeed result in "*greater inconvenience and impropriety"* than would follow the implementation thereof. Moreover, I am satisfied that there are compelling reasons why the consideration of certainty and practicality would have inclined me to exercise my discretion in favour of the Respondents.

Plasket J's order

[53] But there is yet another reason why the application cannot succeed.

[54] Both Mr *Gauntlett* and Mr *Ngcukaitobi* submitted that the order granted by Plasket J on 3 August 2012 (and amended by agreement on 8 November 2012) impels the Respondents to implement the 2013 post establishment.

[55] The Intervening Party brought those proceedings in June 2012, and sought an order to compel the Respondents to implement the 2012 post establishments

[26] [2012] 4 ALL SA 35 (ECG)

in the Eastern Cape. On 3 August 2012 Plasket J gave a judgment upholding the application. The amendment to the order, which was effected by consent, compelled the Respondents to fill all vacant substantive posts on the 2012 post establishment with permanent appointments by 20 December 2012, "*insofar as they do not conflict with and/or exceed posts declared in terms of the 2013 post establishment.*"

[56] The Applicants were given notice of the application but have failed to intervene, and have not brought an application to have it rescinded or set aside.

[57] Counsel for the Respondents and the Intervening Party submitted that the order sought by the Applicants in this matter would render Plasket J's order nugatory. They submitted that Plasket J's un-appealed order trumps this application because even if the Respondents had forfeited their statutory authority after 30 September, they had been authorised (and indeed impelled) by Plasket J's order to implement the 2013 educator post establishment despite the non-compliance with the prescribed time limit. It is clear that the amendment to the order, granted during November 2012, was intended to allow the Respondents to implement the 2013 post establishment. It thus seems to me that the effect of Plasket J's order is to compel the Respondents to implement the 2013 post establishment. That order is still valid and binding on the Respondents and I am not at liberty to grant any relief which would have the effect of rendering it nugatory. I was therefore of the view that the application must fail for this reason also.

[58] The Intervening Party did not ask for costs and I accordingly ordered the Applicants to pay the Respondents' costs only.

REPORTABLE

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SMITH J
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicants	:	Advocate Smuts SC
Attorney for the Applicant	:	Hutton & Cook Attorneys King Williams Town
Counsel for the Respondents	:	Advocate Gauntlett SC, Advocate Collett, Advocate Pelser
Attorney for the Respondents	:	State Attorney, King William's Town
Counsel for the intervening party	:	Advocate Ngcukaitobi, Advocate Bleazard
Attorney for the Intervening Party	:	Legal Resource Center, GHT
Date Heard	:	7 December 2012
Date Delivered	:	18 February 2013