

REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C820/00
DATE: 28-11-2000

In the matter between:

THE SOUTH AFRICAN DEMOCRATIC Applicant
TEACHERS UNION

and

THE PREMIER: PROVINCE OF THE First and Further
WESTERN CAPE & 2 OTHERS Applicants

J U D G M E N T

PILLAY, J:

1. This is an urgent application in which the applicant seeks a final order interdicting the respondents from making appointments to 15 new posts created either by the Department of Provincial Education or the Department of Provincial Administration. The applicant further seeks an order directing the respondents to consult with it in terms of sections 13(2)(a), 16 and 17 of the Employment Equity Act, 1998 (Act No. 55 of 1998) ("the Employment Equity Act"), and certain alternative relief.
2. The first issue to be determined is whether the applicant has locus standi to institute these proceedings.
3. The applicant is a registered and representative trade union for the purposes of the Employment Equity Act. The first respondent is the Premier of the Province of the Western Cape. The second respondent is the Minister of Education, Province of the Western Cape.

4. The first enquiry is to establish by what authority the appointments are to be made and accordingly, who the employer is.
5. It is common cause that the appointments are to be made in terms of the Public Service Act No 103 of 1994 (the "Public Service Act") and not the Employment of Educators Act No 76 of 1998 ("Employment of Educators Act"). However, the applicant contends that in terms of section 7(2) and 9(1) of the Public Service Act read with the definitions of "department", "executing authority", "provincial administration" and "provincial departments" in section 1(1), the posts can only be established in the Western Cape Education Department and not the Provincial Administration Western Cape. As such, the second respondent or her delegee was responsible for making the appointments. Whilst acknowledging that educators are employed in terms of the Employment of Educators Act and administrative staff and managers in the Western Cape Education Department are employed in terms of the Public Service Act, the applicant maintains that they were all employees of the Western Cape Education Department.
6. In order to appreciate the demarcation of authority between provincial administrations and departments, it is necessary to outline briefly the provincial structure of the public service following the amendments introduced by Act No. 86 of 1998. Pursuant to section 197(1) of the Constitution, the public service at provincial level is made up of inter alia a provincial administration and provincial departments.¹ A provincial administration is, by definition, a department (section

¹ Section 7 of the Public Service Act :

"(1) The public service established by section 197 (1) of the Constitution shall be structured and organised as provided for in this Act.

(2) For the purposes of the administration of the public service there shall be national departments and provincial administrations mentioned in the first column of Schedule 1, provincial departments mentioned in the first column of Schedule 2 and the organisational components mentioned in the first column of Schedule 3.

(3)...."

1(1)) of the Public Service Act. The head of a provincial administration is the Director-General: Office of the Premier. The head of a provincial department, such as the Western Cape Education Department, is the Head: Education (section 7(3)(a) of the Public Service Act)².

7. Section 7(3)(c) prescribes the powers of the Director-General. However, section 7(3)(d) proscribes the powers thus:

i. "The head of the provincial administration shall, in respect of a provincial department, exercise no power or perform no duty which is entrusted or assigned by or under this Act or any other law to the head of the provincial department."

8. The powers and duties of the executing authority are prescribed in section 3(5) of the Public Service Act³ and include the power to create posts and make appointments. However, such powers have to be entrusted to the executing authority under the Public Service Act and must be executed in terms of the Public Service Act.

²Section 7(3)(a) of the Public Service Act : *"Each department shall have a head of department who as an officer shall be the incumbent of the post on the fixed establishment bearing the designation mentioned in the second column of Schedule 1 or 2 opposite the name of the relevant department, or the officer who is acting in that post."*

³ Section 3(5) of the Public Service Act : *"Subject to the provisions of this Act, an executing authority shall have those powers and duties-*

(a) regarding the internal organisation of the office or department concerned, including the organisational structure and the transfer of functions within that office or department;

(b) regarding the post establishment of that office or department, including the creation, grading and abolition of posts and the provision for the employment of persons additional to the fixed establishment where the class of work is of a temporary nature;

(c) regarding the recruitment, appointment, performance management, promotion, transfer, discharge and other career incidents of officers and employees of that office or department, including any other matter which relates to such officers and employees in their individual capacities,

which are entrusted to the executing authority by or under this Act, and such powers and duties shall be exercised or performed by the executing authority in accordance with the provisions of this Act."

9. The executing authority also has the power to, inter alia, appoint persons for employment in terms of the Public Service Act in the department over which it has authority (section 9(1) of the Public Service Act)⁴.

10. The executing authority in relation to the Premier of the Province is the Premier. The executing authority in relation to a department is the Minister responsible for the particular portfolio which, in this case, is education (section 1(1) of the Public Service Act).

11. The Public Service Act contemplates that educators, i.e. persons employed at state educational institutions, may also be covered by the provisions of the Public Service Act (section 2(2)⁵ and section 8(1)(a) (iv) ⁶ read with the definitions of "state educational institution"⁷ and "public service"⁸).

12. Against this legislative background it will be permissible for either the first or the second respondent to create and fill the posts in the

4 Section 9 of the Public Service Act:

"Powers of executing authority

1) *The appointment of any person or the promotion or transfer of any officer or employee in the employ of a department shall be made by the relevant executing authority or by an officer or officers to whom the said authority has delegated his or her power of appointment, promotion or transfer."*

5 Section 2(2) : *"Where persons employed in the services or state educational institutions are not excluded from the provisions of this Act, those provisions shall apply only in so far as they are not contrary to the laws governing their employment."*

6 Section 8 : *"Composition of public service*

(1) The public service shall consist of persons who-

(a) hold posts on the fixed establishment-

*....
iv) in state educational institutions;"*

7 *'state educational institution' means an institution (including an office controlling such institution), other than a university or technikon, which is wholly or partially funded by the State and in regard to which the remuneration and service conditions of educators are determined by law;"*

8 *'public service' means the public service contemplated in section 8;*

Western Cape Education Department, provided it is the executing authority that is firstly entrusted with the powers and duties to do so and secondly, it exercises or performs such powers and duties in accordance with the provisions of the Public Service Act.

13. In order to determine who the executing authority is of the appointees in this case, the facts need to be examined.

14. The posts were created pursuant to the adoption of a project referred to as "Transformation 2000" by the Provincial Administration, Western Cape in order to enhance managerial capacity.

15. The Provincial Administration, Western Cape designed and implemented the project. Although the appointments were to be made in terms of the Public Service Act, the posts were located in the Western Cape Education Department. In response to a letter from the applicant's attorney enquiring about which department would be responsible for the remuneration of appointees and who the employer would be, Mr B P O'Connell, the Head: Education, referred the attorneys to the Public Service Act, thereby implying that it would be the Provincial Administration, Western Cape.

16. The posts are not funded by the Western Cape Education Department but by a special Cabinet allocation.

17. The second respondent and the Head : Education "signed off" the short list. However, it cannot without more be inferred from this that the second respondent was entrusted with the power to make the appointment in terms of section 3(5) of the Public Service Act. Nor can it necessarily be inferred that the powers of the Director-General were thereby proscribed in terms of section 7(3)(d) of the Public Service

Act. The only reasonable conclusion that can be drawn from signing off on the short list is that the Second Respondent and the Head of Department authorised the short list and thereby played a role in the selection and appointment process.

18. The respondents state categorically that the appointments will be made by the Premier. This the applicant cannot refute. In the circumstances, although it is permissible for the second respondent to make appointments in terms of the Public Service Act to posts in the fixed establishment of the Western Cape Education Department, she has neither elected to do so, nor has she been entrusted with the authority to do so in this instance. The appointments are, therefore, to be made in terms of the Public Service Act, by the Premier or through his Office. The propriety or otherwise of such appointments falls outside the scope of this application.

19. It also follows from the foregoing that the first respondent and not the second respondent, will be the employer.

20. Furthermore, the bargaining council having jurisdiction in respect of the appointees will be the Western Cape Chamber of the Public Service Bargaining Council and not the Western Cape Education Labour Relations Council. The applicant, who represents mainly educators, is a party to the Western Cape Chamber of the Education Labour Relations Council. Although it also represents non-educator personnel in the public service, it is not sufficiently representative for participating in the Western Cape Chamber of the Public Service Bargaining Council. It was therefore not entitled to be consulted.

21. It is common cause that the appointments in terms of Transformation 2000 are an "ad hoc once-off exercise for the 2000 calendar year and

aimed at expanding management capacity and enhancing race and gender representivity at management level." As such, it was submitted for the applicant, it was an affirmative action measure as contemplated in section 15 of the Employment Equity Act. It manifested elements of an analysis and a plan in terms of sections 19 and 20 of the Employment Equity Act, respectively. The second respondent therefore had a duty to consult with the applicant in terms of sections 13(2)(a), 16 and 17 of the Employment Equity Act. So the argument for the applicant went.

22. It is common cause that the appointments are not being made pursuant to compliance with the Employment Equity Act. Transformation 2000 may have elements of affirmative action measures as defined in section 15 of the Employment Equity Act. It could never have been the intention underlying the Employment Equity Act that no appointments in terms of any other law could ever be made, if such appointments are made with some or all the objectives of the Employment Equity Act. If this were so, then employers in the private and the public sectors could be paralysed by inaction and held to ransom if employees withhold cooperation in implementing affirmative action.

23. Transformation 2000 is clearly an extraordinary measure to enhance the management capacity of the respondents. The respondents have a duty to manage⁹ and may make such appointments to enable them to carry out their obligations.

24. The appointments were also referred to the Western Cape Chamber of the Public Service Bargaining Council for consultation. Accordingly, the mere fact that the appointments had elements of compliance with the

⁹ Section 7(3)(b) of the Public Service Act : *"Subject to the provisions of paragraphs (c) and (d), a head of department shall be responsible for the efficient management and administration of his or her department, including the effective utilisation and training of staff, the maintenance of discipline, the promotion of sound labour relations and the proper use and care of State property, and he or she shall perform the functions that may be prescribed."*

Employment Equity Act, does not invoke for the applicants the right to be consulted. To the extent that the respondent had an obligation to consult, it did so via the Western Cape Chamber of the Public Service Bargaining Council.

25. Section 16(1)(a) prescribes that a designated employer must consult:

"With a representative trade union representing members at the workplace, and its employees or representatives nominated by them."

26. It was submitted by counsel for the respondents that the provisions of section 58 of the Employment Equity Act will determine whether it was a designated employer. Section 58 provides:

"The President must within six months after the commencement of this Act and after consultation with the Minister responsible for the Public Service and Administration, publish a notice in the Gazette listing every designated employer within any organised state."

27. "Designated Employer" is defined in the Employment Equity Act to include:

"An organ of State as defined in section 2(3)(9) of the Constitution", with certain exclusions.

28. It is common cause that the respondents are organs of State. Publication in terms of section 58 is not a pre-condition for compliance with the provisions of the Employment Equity Act.

29. Counsel for the applicant submitted that "workplace" in section 16(1)(a)) should be interpreted to mean "workforce" in view of the reference in sections 15, 19 and 20 to "workforce". There is no basis to depart from the general rule of construing a statute, namely to assume that the legislature meant what it says. (S v Thole 1962 (2) SA 90 D)

Conceptually, “workforce” and “workplace” differ significantly. As the legislature elected to use the word “workplace” instead of “workforce” in section 16(1)(a) of the Employment Equity Act, it must be assumed that it intended to make the conceptual distinction.

30. The Employment Equity Act does not define “workplace”. However, it could not have been the intention of the legislature to give it a meaning different from the Labour Relations Act (LRA). G E Devenish in The Interpretation of Statutes Juta 1992 at pages 133 and 134 states:

"The general principles in regard to the interpretation of statutes in pari materia was explained by Lord Mansfield in R v Loxsdale as follows: 'Where there are different statutes in pari materia, though made at different times or even expired and not referring to each other, they shall be taken and construed together as one system and as explanatory to each other.'"

31. Examples of statutes in pari materia cited by Devenish include:

"Acts which deal the same subject matter on the same lines."

32. The LRA defines “workplace” in the public service to mean:

"(a) in relation to a sector in the public service in respect of which a bargaining council has been established in terms of section 37 has the meaning that the responsible Minister determines, after having consulted the bargaining council.

(b) in relation to the remainder of the public service has the meaning that the Minister for the Public Service and Administration determines, after having consulted the Public Service Coordinating Bargaining Council."

33. “Workplace” in the public service therefore means more than the place where people work. It is implicit from the definition that the responsible Minister must act within the scope of his or her

authority. (Baxter at page 209-312) "Workplace" therefore, must also take its meaning from the scope of authority of the employer.

34.The scope of authority of the second respondent is the Western Cape Education Department and the persons it employs. As the second respondent is not entrusted with authority over the appointees, she cannot determine the workplace in a way that includes them, at least not without the concurrence of the Premier, who is responsible for them.

35.The appointees are not employed in the same workplace where the applicant is representative, i.e. in the Western Cape Education Department. The respondents, therefore, have no duty to consult with the applicants about the appointees for this reason.

36.If the second respondent does not have the authority in respect of the appointees, consultation about them with the applicants would also be meaningless.

37.Furthermore, the second respondent is obliged to consult only with "its employees" (section 16). It may consult with employees of another department if it is entrusted with the authority to do so.

38.The next issue is whether the applicants have a direct and substantial interest in the appointments in terms of the common law. The applicants state that issues about which it wishes to consult are:

- *"Whether the creation of these senior managerial posts with the consequent additional recurrent cost of R16 899 030 million would impact on learner educator ratios, class sizes and the area of delivery in respect of things such as the building of schools, the funding of schools*

and the provisioning of textbooks.

- *Criteria for the filling of advertised posts."*

39. Insofar as the applicant's concern is a financial one, the second respondent is not being burdened with the costs of the new appointments.

40. In Dalrymple & Others v Colonial Treasurer (TS) 1910 at 372 Wessels J observed:

"If applicants are entitled to sue because monies have been wrongly paid to legislators, they would be entitled to come to the Courts in every case in which they conceived that money had been paid or an act had been done in violation of a statute. The Courts might therefore be constantly engaged in enquiries as to alleged grievances against the public acts of Ministers at the instance of enthusiastic or hostile politicians. Moreover, the Government might be constantly hampered in the execution of the duties of their office. It is for this reason that the popularis actio has disappeared and that courts of law have required the applicant to show some direct interest in the subject matter of the litigation or some grievance, special to himself."

41. The applicant's general interest and commitment to quality education and training and the transformation of the education sector does not confer on it a direct and material interest. If it did, then representative trade unions will have to be consulted whenever the President or Premiers appoint Directors-General and heads of department or, indeed, whenever any appointment is made. Conferring a general common law right to consultation in such circumstances could seriously impair the management and functioning of the public service. Nothing precludes trade unions from acquiring such rights through collective

agreements. As collective agreements are flexible instruments of self regulation, the ambit of such right can be tailor made for each service, sector, industry or establishment.

42.The last point on the issue of locus standi is whether the applicant has a right to be consulted in relation to seven of the newly-created posts as a result of an agreement with the Western Cape Education Department. The applicant alleged that the Department had agreed to consult with it about a programme referred to as "Systematic Transformation for Educational Development Support" referred to as "STEDS".

43.It is common cause that the respondent gave such an undertaking in relation to STEDS. However, STEDS is not the same programme as Transformation 2000. Mr O'Connell had recognised that it was not the same programme when he stated:

"The Province, in its wisdom, had another process going and a process they call 'Transformation 2000'."

44.In any event, as there is a dispute of fact as to whether the appointments will be in terms of STEDS, the respondents' evidence in this regard has to be accepted (see Plascon Evans Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A).) The respondents deny that the appointment will be made in terms of STEDS.

45.In the circumstances the applicants have no locus standi and the application is dismissed, with costs.