IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C950/2002

In the matter between:

PAWUSA	First Applicant
JOHAN APPELS	Second Applicant
MOOS PETER THOMAS MOSES	Third Applicant

and

WESTERN CAPE EDUCATION DEPARTMENT	RESPONDENT

JUDGMENT

NEL, AJ

[1] The dispute which the applicants herein referred to the Commission for Conciliation, Mediation and Arbitration for conciliation was identified by the applicants as one of unfair discrimination. In the statement of case filed by the applicants they indicated that they brought these proceedings

in their personal and in the public interest as well as in the interest of a class of persons being social auxiliary workers in the Western Cape who had been employed hitherto as such by the Western Cape Education Department ("the Department") and who were victims of the unfair discrimination detailed in the statement of case of the applicants.

[2] The applicant's contended that after discussions and deliberations between the relevant parties relating to the transformation of schools of industry and reform, this process resulted in these schools being closed and being replaced by youth care and education centres. The applicants allege that this transformation process had included discussions relating to the alteration of the manner in which these schools were to operate and also to the retraining of social auxiliary workers, positions which the second and third applicants ("Appels" and "Moses") had been employed in for many years.

[3] The applicants contended that in or about November 2000 the Department had indicated that henceforth social auxiliary workers would be called youth care workers. At about the same time social auxiliary workers were advised that they would have to reapply for appointment as youth care workers as a result of the mentioned transformation process. The

social auxiliary workers were also advised that in order to be considered for a post as a youth care worker they would need to have a teaching qualification.

[4] The applicants contended in their statement of claim that the need to have a teaching qualification to be considered for a post of youth care worker was not an inherent requirement for such post and that it accordingly operated as an unfairly discriminatory bar to the work opportunities of social auxiliary workers. Appels and Moses alleged that they had suitable work experience to equip them for the position of youth care worker.

[5] In or about October 2000, Appels and Moses applied for positions as youth care workers at Ottery. Both Appels and Moses received letters advising them that their appointments to the posts which they had applied for had been approved. Both appointment letters stated that "*Your appointment is subject to the stipulations of the abovementioned Act and the regulations promulgated in terms thereof and any amendments thereto. Appointment related errors which may occur will be rectified.*"

[6] Both Appels and Moses were later advised in writing by the Department that they were not suitably qualified to fill the

posts which they had in fact been advised the department had approved their appointment to and that, accordingly, the letters advising them of their approval of their appointments to the positions for which they had applied had been cancelled.

[7] It is against this background that Appels and Moses contended in their statement of claim that they had in fact been appointed as youth care workers by the Department. They alleged that the purported withdrawal of their appointments was invalid and unlawful and they sought the setting aside of the withdrawals of their appointments. In addition the applicants contended, as I have mentioned, that the imposition of the requirement of a teaching qualification for appointment as a youth care worker was unfairly discriminatory and accordingly unlawful. Accordingly the applicants sought the following relief:

- A declaration that the requirement of a teaching qualification for the appointment of a youth care worker was unfairly discriminatory and unlawful;
- An order setting aside this requirement;
- An order that the Department should consider the applications of all social auxiliary workers who had applied for such positions;

- A declaration that the unilateral withdrawal of the Appels and Moses appointments was unlawful;
- A declaration that Appels and Moses were and continued to be youth care workers;
- An order that Appels and Moses be remunerated in accordance with the position of youth care worker as from the date of their appointment; and
- Costs of suit only in the event of the matter being opposed.

[8] The Department opposed the application. It in turn in its response to the applicants' statement of claim, *inter alia*, alleged that before the interim constitution of the Republic of South Africa came into force, education in South Africa had been conducted at racially segregated schools managed by different departments of education, namely, the House of Assembly, the House of Delegates, the House of Representatives and the Department of Education and Training. After the interim constitution came into force, the Department was established to take over the responsibility for all schools in the Western Cape Province. The Department inherited schools of industries and reformatory schools in the Western Cape with employees such as Appels and Moses already employed at these schools. The Department contended that the posts to which the department had

appointed Appels and Moses in error, were that of a college and schools educator – a so-called CS educator post. The Department further alleged that the reason for closing the 15 schools of industries and reformatory schools, and replacing them with 6 new youth care and education centres, was because of the fact that these schools were part of an outmoded model and an ineffective system.

[9] With the amalgamation of the departments mentioned above, no uniform policy with regard to the teaching of learners at reformatory schools and schools of industries was in place. In and during 1995, an investigation was conducted by an inter-ministerial committee appointed by the national cabinet into the child and youth care system in South Africa as it was failing to provide effective services to vulnerable children and youth and their families. This investigation, according to the Department, revealed that there existed defects in the management and practices of South Africa's places of safety, schools of industries and reform schools which warranted the urgent transformation of the system. Learners in these schools are children with serious behavioural problems and are referred to these schools by courts and through legislation.

[10] The Department further contended that the intrinsic complexity of the circumstances in which educational therapeutic programs and residential care of learners in these schools were conducted required extraordinary measures and infrastructures. To ensure effective educational therapeutic service delivery, it was imperative that the psychological, emotional, social, religious and moral needs of these learners be properly attended to and satisfied. The Department contended that this responsibility could only be carried out by professional trained educators. Therefore the need arose, according to the Department, for the establishment of an occupational class of professionals whose responsibility it would be for carrying out the development, therapeutic and caring programs in respect of learners with serious behavioural problems. According to the Department, these educators would be responsible for the education and care aspects of hostel life, supervision or monitoring of learners, concerned with life orientation, developmental and therapeutic programs in and outside the class and they would assist learners with extra-curricular programs. The new approach envisaged the child– and youth care system as an integrated one, which emphasized prevention and early intervention and minimised residential care. Learners needed residential care on different levels of restrictiveness and day treatment through multi-disciplinary therapeutic and

educational programs during and after school hours. The Department contended that in educating young people at risk, a developmental and disciplinary approach replaced an approach of control and punishment. According to the Department, these responsibilities were beyond the scope of the social auxiliary worker.

[11] The Department contended that the positions Appels and Moses applied for (the college and schools educator (life orientation and residential care posts – the so-called CS educator posts) were not merely substitutes of the social auxiliary posts occupied by Appels and Moses. The Department further stated that the requirement to be appointed to this post was a minimum qualification of a three year degree and/or teaching qualification, alternatively that the applicant for such post had been employed with the Department as an educator.

[12] The Department further contended that social auxiliary workers were not trained to fulfil the requirements of a college and schools educator post. The minimum qualification requirement for appointment as a social auxiliary worker was a junior certificate and persons appointed as such essentially performed a welfare function under guidance and control of a registered social worker.

[13] In essence, the Department's case was that neither Appels nor Moses were suitably qualified for appointment to these CS educator posts.

[14] The Department also alleged that the appointments of Appels and Moses were made in error and accordingly they were lawfully withdrawn.

[15] In conclusion, as far as the respective stated cases on behalf of the applicants and the Department were concerned, the Department filed a counter claim in which it simply contended that the letters of appointment issued to Appels and Moses respectively had been erroneously issued. The Department further contended that both letters of appointment provided that any appointment related errors which might occur would be rectified and that in terms of the regulations passed under the Employment of Educators Act 76 of 1998, an applicant may only be appointed as a college and schools educator if in possession of the appropriate teaching qualification which in this case was a three year degree or teaching qualification.

[16] Accordingly, in its counterclaim, the Department sought an order from the court declaring the withdrawal of the appointments of the second and third applicants' lawful,

alternatively, declaring the appointment of the second and third applicants as college and schools educators to have been unlawful.

[17] The applicants did not pursue their class action before this court. Likewise, the applicants did not persist in seeking a declaration from this court that the requirement of a teaching qualification for the appointment of a youth care worker was unfairly discriminatory and unlawful. Mr van der Schyff, who appeared before me on behalf of the applicants, in his written submissions, submitted that the applicants contended that the bar on their employment in the current circumstances was unfair, discriminatory and unlawful and that it fell to be set aside. He further argued that the applicants were entitled to an order that the unilateral withdrawal of their letters of appointment was unlawful and that Appels and Moses were to be employed and remunerated as CS educators and costs of suit.

[18] On the other hand Mr de Villiers-Jansen, who appeared on behalf of the Department, did not pursue the Department's counterclaim but instead simply sought that the application be dismissed with costs.

[19] Appels was appointed as a social auxiliary worker in February 1985. Moses has been employed at the Ottery school of industry since November 1976. It is apparent that they have served in their respective positions with dedication and very often beyond the call of duty. Their dedication to their work and responsibilities was perhaps best illustrated by the fact that their present acting principal, Mr Mahadick, without hesitation, testified that if he had children who were faced by the challenges such as these in the youth care and education centres, he most definitely would entrust his own children in the care of Appels and Moses. He further stated that both Appels and Moses were extremely hardworking and committed people but have perhaps not had the opportunity, because of them being historically marginalised, to have access to further education. Mr Mahadick did, however, concede that Appels and Moses did not strictly comply by the letter of the law with all the qualifications required to be appointed to the CS educator posts which the Department contended they had mistakenly been appointed to.

[20] It is apparent that Appels and Moses certainly believed, and contended, that they were suitably qualified to be appointed to the positions in question. It was common cause between the parties that Appels and Moses had at all times been employed with the Department as social auxiliary workers.

When schools of industry and reform schools were closed, and replaced by youth care and education centres, Appels and Moses were declared to be excess to the requirements of the Department. Appels described his functions as having been that of a mother, a father, advocate and priest for the children referred to Porter school, where he was employed. Appels said that when the youth care and education centres were established, his functions were that of assisting with the rehabilitation of children referred to the school in Ottery, where he was then employed by the Department. He confirmed that his functions remained the same before and after his appointment to the post, which the Department said had been done in error.

[21] It was further common cause that Appels did not possess a formal teaching qualification but that he had an N5 certificate. He had passed his technical matric in and around 1989 and 1990.

[22] As far as Moses was concerned, he commenced his employment in 1976 as a caretaker. He, in evidence, described his functions as having included being a mother, a father and a social worker. He said that he was everything for the learners. His post description at some stage changed to that of “versorgingsbeampte”, but his functions remained

the same. In 1980, he was promoted to "senior versorgingsbeampte", and since 1990, he had been employed as a social auxiliary worker. He said that he had been employed as a social auxiliary worker for some 24 years and that his experience was limited to caring for children. He had learnt to care for their children as nobody really cared for them. Moses was in possession of a standard 8 certificate and he had obtained a basic qualification in childcare.

[23] From the evidence adduced on behalf of the Department by Drs Coetzee and Theron, both senior officials in the employ of the Department, it was apparent that after the national cabinet had appointed an inter-ministerial committee to investigate the system of child and youth care in South Africa, it had been found that there were serious management problems and child rights abuses taking place in the schools of industry and the reform schools. A paradigm shift was accordingly recommended. This shift meant that the focus would be on educating and reclaiming learners at risk by adopting a developmental and discipline approach which replaced the approach of control and punishment. It was to ensure this paradigm shift that schools of industry and reform schools were closed and replaced by youth care and education centres.

[24] A special investigation was also conducted into services rendered by social auxiliary workers employed at schools of industry and at reform schools. This investigation found that person employed as “versorgingsbeamptes” could make no contribution insofar as the educational programs of learners were concerned, particularly due to the fact that they were not trained to do so and had essentially fulfilled the role of caretakers. It was found that the kind of person required to be appointed in the new child care system had to be able to effectively promote the educational needs of learners. This investigation further revealed that there was a need to develop a professional staff complement which would be responsible for the caring, development and therapeutic programs of learners. The post description for this professional staff complement was much wider than that which applied to the social worker, teacher, psychologist and social auxiliary worker.

[25] It was as a result of this investigation that it was recommended that the post of social auxiliary worker be abolished and that a new post be created to appoint a CS educator to give effect to the education needs of learners at risk. Dr Theron’s evidence concerning the CS educator post was that it consisted of two parts. First, there was the subject, life orientation. The second part was the practical

application of a subject. Life orientation, according to Dr Theron, is a subject like any other, for example mathematics. The subject life orientation consisted of five areas. These were health, social development, personal development, physical development and orientation in relation to the world and work environment. According to Dr Theron, these areas were specialised and required a professional teacher to teach the curriculum.

[26] Dr Theron testified that learners at care centres were taught numeracy and literacy. Life orientation, like any other subject, was an examinable subject. Dr Theron confirmed that the shift in paradigm was now focused on education. Because of the effectively short period these learners spent at these schools, namely between 18 to 24 months, the emphasis of technical subjects was minimal, according to Dr Theron, as it was not possible to teach these learners a trade within that period in addition to the normal curriculum.

[27] Dr Theron further, during his evidence, explained that the core function of the CS educator was his responsibility for the educational aspects of the learner within the context of the subject life orientation. He also explained that a degree and teaching qualification was required to be appointed as a CS educator. He referred to a BA degree with subjects in

psychology and education as an example. Apart from the degree, the department would also have regard to the experience gained as a teacher in a classroom. Dr Theron testified that both Appels and Moses were not suitably qualified for appointment to the posts in question of CS educator.

[28] It is apparent that Appels and Moses, having considered the requirements for the post as reflected by the Department's documentation, inviting applications for the post of CS educator, considered themselves fit and proper to be appointed as such. It is further clear that the governing body of the Ottery school, where Appels and Moses were employed at the time of their applications, by endorsing their appointment to the posts, also deemed them suitable to be so appointed. It was put to Mr Mahadick by Mr van der Schyff, hypothetically, that Appels qualified to be appointed a CS educator. Mr Mahadick expressed the view that Appels was qualified and based his view on Appels' years of service and his passion and commitment to the children.

[29] However, as I said earlier, Mr Mahadick did confirm that neither Appels nor Moses did comply with the strict qualifications required for appointment to the post.

[30] In this regard it needs simply be mentioned that in terms of Section 4(1) of the Employment of Educators Act 76 of 1998 ("the EEA"), the Minister of Education, *inter alia*, shall determine the conditions of service of educators. Section 6(2) of the EEA provides that appointments in posts shall be made in accordance with such requirements as the Minister may determine. Section 35 of the EEA empowers the Minister to make regulations concerning the conditions of service of educators.

[31] Section 3(4)(f) of the National Education Policy Act 27 of 1996 ("the NEPA") stipulates that the Minister may determine national policy for the professional education and accreditation of educators.

[32] Section 21 of the South African Council for Educators, Act 31 of 2000, deals with the compulsory registration of educators. It provides that a person who qualifies for registration must register with the South African Council for Educators prior to being appointed as an educator. It further determines that no person may be employed as an educator by any employer, unless the person is registered with the council.

[33] In terms of regulation 2 regarding the terms and conditions of employment of educators, promulgated in Government Notice

R1743 (Government Gazette 16814) of 13 November 1995, it *inter alia* provides that no person shall be appointed as an educator, either in a permanent or temporary capacity, unless the person complies with the experience requirements determined by the Minister and is in possession of an approved qualification.

[34] It was contended on behalf of the Department, and I do not believe disputed by the applicants, that the Minister may regulate the terms and conditions of the employment of educators by passing either regulations or in the form of personnel administration measures. Mr de Villiers-Jansen argued on behalf of the Department that a person who was not in possession of an appropriate qualification relevant to a particular post could not be appointed as an educator. He accordingly contended that the Department was compelled by law not to appoint as an educator an applicant who did not possess the appropriate qualification for the post he or she applied for. He further argued that any applicant for a position who qualified for registration with the South African Council for Educators was obliged to register as such and that an applicant for an educator's position could not be employed as such without such registration.

[35] It will be recalled that part of the relief sought by the applicants was a declaration that the requirement of a teaching qualification for the appointment of a youth care worker was unfairly discriminatory and unlawful. This, I believe, is a moot point as it is apparent that the Department at no stage required a teaching qualification for the appointment of a youth care worker. It is apparent that the post in question for which a teaching qualification was required was for that of a CS educator. In any event, the applicants did not pursue this relief any further. Likewise, I do not believe that the applicants in any event attempted to make out a case that the requirement of a teaching qualification for the appointment to the post of a CS educator was unfairly discriminatory or unlawful.

[36] On the evidence before me I am satisfied that neither Appels nor Moses possessed a professional teaching qualification. They were also not registered with the South African Council for Educators. It was a specific requirement that applicants for appointment to the advertised posts had to submit with their applications copies of their registration certificates with the South African Council for Educators.

[36] Although it would appear from the evidence before me that Appels may have the necessary qualifications to be registered

as an educator, he had not done so. It is further clear that Appels may very well qualify as a technical teacher. In this regard a lot of time was spent in evidence relating to the fact that a Mr Ivan Job, had been appointed to one of the posts, although he did not possess formal teaching qualifications. It was explained on behalf of the Department that although both Job and Appels did not possess formal teaching qualifications, Job qualified as a technical teacher because he was in possession of the so-called REQV13 qualification and particularly because he had already been appointed as a teacher prior to him having been declared in excess. I do not believe that I need to be detained further by this issue by reason of the fact that the posts which Appels and Moses applied for were in fact not to be appointed as technical teacher. As I said earlier, their requirements for the posts were the teaching of the subject life orientation and the practical application of this subject. I am accordingly satisfied that neither Appels nor Moses qualified for appointment to the post of CS educator for which they applied. Accordingly, I am of the view that the Department was precluded in terms of the legislative scheme applicable to the Department from appointing Appels or Moses as CS educators.

[37] I turn next to consider whether there is merit in the proposition made on behalf of Appels and Moses that, having been appointed in terms of the respective letters they received, that the unilateral withdrawal of these letters of appointment was unlawful.

[38] In the first instance the Department expressly stated in the letters of appointment on which Appels and Moses rely that their appointment was subject to the stipulations to the EEA and the regulations promulgated in terms thereof and any amendments thereto. In addition, the letters expressly reserved to the Department the right to rectify appointment related errors.

[39] The evidence adduced on behalf of the Department, which was not gainsaid by or on behalf of the applicants, clearly showed the appointment letters in respect of both Appels and Moses were issued by reason of an administrative error which occurred in the offices of the Department.

[40] In light of the fact that I am satisfied that the Department has established that Appels and Moses did not meet the required legislated qualifications to be appointed as CS educators, that in and by itself enabled the Department, in my view, to cancel the appointments of both Appels and Moses.

[41] Even if they possessed the necessary minimum qualifications to have been appointed to the posts in question, and the case before me simply turned on the question whether, in the event of an appointment then having been made in error by the Department, I believe that proof by the Department that an appointment had been made in error would have been sufficient, also in and by itself, to allow the Department to cancel the appointments. It was certainly not the case of the applicants that the Department was estopped from cancelling their appointments. In this regard it should be mentioned that although both Appels and Moses had received their letters of appointment, their remuneration packages did not change at all. In fact, as I understood the evidence adduced by and on behalf of Appels and Moses, after they had received notification by way of their letters of appointment, neither their job content nor their remuneration had changed up till the respective dates on which they were notified by the Department that their appointments were cancelled.

[42] Although the withdrawal of the letters of appointment of Appels and Moses may have been unilateral, I am of the view that such withdrawal was not unlawful. Under these circumstances it follows that the Department was entitled to withdraw the letters of appointment of Appels and Moses and

it follows that such withdrawal of the appointments of these two gentlemen remain valid.

[43] I turn to consider whether there is merit in the proposition put forward by Mr van der Schyff on behalf of Appels and Moses that the bar on their employment was unfair, discriminatory and unlawful and that it fell to be set aside.

[44] I have already found that the Department was justified in cancelling the appointment of Appels and Moses by reason of the fact that both of them did not fulfil the statutory minimum requirements to be classified as a teacher in terms of the EEA. One of the reasons this was so was that Appels and Moses had never been employed as technical teachers.

[45] It was common cause between the parties that the Department could under specific circumstances relax the stipulated statutory requirements. In this regard, and as I have earlier said, a lot was made on behalf of the applicants of the fact that a Mr Job was appointed to a CS educator's post whilst Appels, who was academically more qualified than Job, was said not to qualify to have the minimum requirements for appointment relaxed. The justification for, or reason why, the Department contended that it was unable to relax the statutory requirements in respect of Appels and

Moses was that they had never been employed as technical teachers in the first place.

[46] It was contended on behalf of Appels and Moses that this defence was fallacious as both Appels and Moses had extensive experience in the field of child care and education in this context and that they met the requirements of the job description. It was further argued that both Appels and Moses had been nominated for the posts by the governing body of the school where they were employed and that both were performing the tasks attendant on the post for which they applied both prior to their successful applications for the posts as well as subsequent to the withdrawal of their appointments.

[47] It was further emphasized on behalf of Appels and Moses that the inter-ministerial committee recommendations stipulated that recognition should be given to lifelong education and training and the validation of previous experience. It was therefore argued that it followed that at the very least the Department was compelled to conduct an audit of the ability of Appels and Moses in order to determine their ongoing usefulness after the transformation process. It was confirmed by witnesses who testified on behalf of the Department that

this audit of skills in respect of Appels and Moses had not been done.

[48] In this regard the allegation was made, and evidence adduced, of tensions which existed between Appels and Moses on the one hand and Drs Coetzee and Theron, senior officials employed by the Department. I am however not persuaded that whatever tension may have existed between these parties, this was the reason why Appels and Moses saw their appointments to their respective posts cancelled, or the why the Department had failed to conduct the audit into the skills of Appels and Moses. I have arrived at this conclusion by reason of the fact that the Department made out a very clear case in respect of the transformation which had occurred, resulting in the closure of schools of industry and reform schools and their replacement by youth care and education centres. There is no doubt that a paradigm shift took place with the first focus turning to the education of learners at risk with the adoption of a developmental and disciplined approach which replaced the old approach of control and punishment. In the process, clearly the focus changed to that of education as opposed to the mere caring of learners.

[49] What was further fatal to the case of both Appels and Moses was that the posts for which they applied did not involve the teaching of technical subjects but that of life orientation and the practical application of this subject. I have earlier dealt with this and it is clear to me that whilst the Department could under specific circumstances relax the statutory minimum requirements for the appointment of an individual to a particular post, such relaxation did not apply to Appels and Moses, simply by reason of the fact that, at best, particularly for Appels, such relaxation as the Department may allow in respect of the statutory requirements could only possibly take place in respect of Appels and Moses if they were to be employed as technical teachers. As I have now repeatedly said, the two positions to which Appels and Moses were erroneously appointed, and saw cancelled by the Department, such cancellation was in my view justified. Further, with reference to the bar on the employment of Appels and Moses to being appointed to the two specific CS educators posts in question, it was not unfair, discriminatory or unlawful. I am satisfied that the Department has made out a case simply to the effect that Appels and Moses did not meet the minimum statutory requirements for appointment to the two positions in question. To the extent that extensive evidence was adduced in respect of Mr Job having been appointed to a CS educator position, I am further satisfied that the Department has been

able to provide reasons why Mr Job had been appointed and Appels and Moses not. The essential difference between Mr Job and Messrs Appels and Moses remains that Job had previously been appointed as a technical teacher because he had satisfied the necessary minimum requirements to be so appointed whilst both Appels and Moses had not previously been employed as technical teachers. In this regard it should perhaps be mentioned that it is apparent to me that at least Appels may very well qualify, if certain minimum requirements are met, to be appointed as a technical teacher by the Department. It would appear that Moses will have to still acquire further qualifications before he may be employed as a teacher by the department.

[50] In conclusion, I wish to state that no doubt whatsoever could exist in any objective observer's mind that Messrs Appels and Moses have served the Department with passion, commitment and dedication for a long period of time. Having regard particularly to the evidence of Mr Mahadick, the acting principal of the school where both Appels and Moses are presently employed, one is also left with little doubt that every effort should be made by the Department to give effect to the inter-ministerial recommendation that recognition should be given to lifelong education and training by individuals such as Appels and Moses and that their previous

experience should receive some validation. In this regard the Department was accused of not affording Appels and Moses further learning opportunities. The Department responded to this accusation with the defence that they had to apply the Department's resources first to the employees at the various schools who had been placed and that they could not do so at the time in respect of Appels and Moses as they were strictly speaking excess to requirement. It was also contended on behalf of the Department that both Appels and Moses had refused to be redeployed and that they had not co-operated with the Department by submitting their curriculum vitae to assist in having them appropriately redeployed.

[51] On the other hand it was common cause between the parties that the plight of Appels and Moses had been brought to the attention of Mr Cameron Dugmore, the MEC responsible for the Department. He had requested a detailed report on the Department's interventions regarding the re-skilling and retraining of auxiliary staff. It was submitted by Mr van der Schyff on behalf of Appels and Moses that this request was clearly to ascertain whether there had been compliance with Section 5(1)(b) of the EEA which contemplated, *inter alia*, that the educator establishment of a provincial department of education should consist of posts created by the relevant MEC. Mr van der Schyff drew attention to the fact that

included under the aforementioned power to create posts under this section was the power to "grade, to re-grade, to designate, to re-designate, and to convert a post" as well as the power to allocate the post. Under cross-examination, none of the witnesses of the Department were able to testify that the information sought by the MEC had in fact been made available to him.

[52] I do not believe that there is any merit in the submission on behalf of Appels and Moses that, in the absence of the information sought by the MEC, he could not properly apply his mind to the matter and that he has in fact, on the evidence, still not applied his mind to the matter at all. This, so argued Mr van der Schyff, resulted therein that the Department was not able to withdraw the letters of appointment of Appels and Moses. Apart from the fact that this was not at all the case pleaded by the applicants, I am satisfied that no case whatsoever has been made out that the MEC has improperly exercised a public power or a public function. In any event, in addition to the applicants not having pleaded such a case, they did not join the MEC of the Western Cape Education Department as a party to these proceedings. This part of the applicants' case is therefor also doomed to fail.

[52] I do not believe that sufficient a case has been made out, or clear reasons exist, for the court to direct the papers in this matter to be placed before the MEC in question, Mr Cameron Dugmore. The court, however, expresses the hope that the plight of Messrs Appels and Moses will be considered at the highest level of the Department and that their proper placement in the Department, within the confines of the statutory requirements, may take place to the satisfaction of all the interested parties.

[53] Being satisfied that the application herein should fail, I need to consider the question of costs. In the first instance both opposing parties asked for costs in the event of them being successful. A case was not made out before me why, in the event of the application being dismissed, costs should not follow the result. I have nevertheless considered the fact that the individual applicants have throughout remained employed by the respondent. An ongoing relationship exists between them. That would obviously also be true of the first applicant, the Union, who will continue to be in a relationship with the respondent as the employer party herein. The individual applicants are entitled to turn to their union for assistance under circumstances such as these. They have accordingly throughout been assisted by the first applicant. Having

considered all these factors, I am nevertheless of the view that the costs should follow the result.

[54] Accordingly I make the following order herein:

1) The application is dismissed.

2) The first applicant is ordered to pay the respondent's costs of suit.

DEON NEL

ACTING JUDGE OF THE LABOUR COURT

Date of hearing : 7 to 9 March 2007 and 7 to 10 August 2007

Date of Judgment: _____

Appearances:

For the applicants: Advocate J A van der Schyff instructed by Smith Tabata Buchanan Boyes Attorneys.

For the respondent: Advocate E A de Villiers-Jansen instructed by the State Attorney.