IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)
CASE NO: 4842/99
REPORTABLE

In the matter between:

NAPTOSA	First Applicant
B.M. CARROLL	Second Applicant
R.G. HORN-BOTHA	Third Applicant
D.N. YEO	Fourth Applicant
E. RYNHOUD	Fifth Applicant
S.W. ALEXANDER	Sixth Applicant
C.E. WILLIAMS	Seventh Applicant

And

THE MINISTER OF EDUCATION, WESTERN GOVERNMENT	First Respondent
THE MINISTER OF EDUCATION, NATIONAL GOVERNMENT	Second Respondent
THE MINISTER OF TRADE AND FINANCE, NATIONAL GOVERNMENT	Third Respondent
GOVERNMENT EMPLOYEES PENSION FUND	Fourth Respondent

JUDGMENT DELIVERED ON FRIDAY 20TH OCTOBER 2000

CONRADIE, J:

The first applicant is a federation of trade unions representing the interests of educators employed by the first respondent. The other applicants, whom I shall call 'the Teachers', are educators who were

at all relevant times employed by the first respondent. I shall refer to the latter as 'the Department'.

The applicants in their notice of motion seek orders which, in their amended form, read as follows:

"1. A declaratory order that Clause 3 of Annexure "E" is void, in respect of fixed term contracts for temporary educators for 1998 and 1999.

2. A declaratory order that second to seventh applicants are entitled for 1998 and 1999 to all benefits afforded to educators in terms of the Regulations promulgated in Government Gazette, no. 1684 dated 13 November 1995, Notice no. 1743 and in terms of PAM promulgated in the Government Gazette, no. 16814 dated 11 November 1997 Gazette, no. 19767 dated 18 February 1999 including but not limited to pension benefits of the Government Employees Pension Fund constituted in terms of the Government Service Pension Law of 1973.

3. A declaratory order that the unilateral change of service benefits of temporary educators in 1998 and 1999 constitutes an unfair labour practice in terms of section 23(1) of the Constitution of the Republic of South Africa, Act no. 186 of 1996.

4. The costs of this application."

Impelled by serious budgetary shortfalls, the Department at the end of 1997 embarked upon a rationalization scheme in terms of which it proposed dismissing all temporary educators who had entered its employ after 30 June 1996. The reason for choosing this group, numbering some 3 500, is that temporary educators employed before that date were protected from dismissal by a collective agreement between the Department and educational sector trade unions. The Department entered into consultations in terms of section 189 of the

Labour Relations Act 66 of 1995. All temporary educators in the affected group were dismissed. One of the matters which had to be discussed was, of course, ways in which the impact of the retrenchments could be reduced. It was decided by the Department

that this could best be done by offering dismissed temporary educators employment under fixed term contracts on the basis of a salary without any accompanying benefits.

Clause three of the standard re-employment contract is in issue. It reads as follows –

"You will not be entitled to receive any other benefits or payments of any kind from the WCED (the Department) and no payment other than the salary referred to in this preceding paragraph will be payable to you by the WCED"

The 'other benefits' were membership of the government employees' pension fund, home owners' allowances, medical aid premium subsidization, service bonuses and paid sick leave.

What the Teachers call their 'statutory rights' to these benefits are found in the regulations under notice 1743 in Government Gazette 11684 dated 13 November 1995 ('the Regulations'). Chapter 4 sets out the entitlement of educators to medical assistance, state housing, the house owner allowance, a service bonus, long service recognition and so forth.

The Regulations were promulgated pursuant to powers given to the second respondent in terms of the Educators' Employment Act (Proclamation 138 of 1944). That Act ('the 1994 Act') which has now been repealed by the Employment of Educators Act 76 of 1998 ('the 1998 Act'), broadly speaking, provided in section 5(1), that salaries and allowances of educators were to be determined by the Minister subject to the provisions of sub-section (2). Section 5(2)(h) provided that 'where a power or function of the Minister relates to a matter of mutual interest as defined in section 1 of the Education Labour Relations Act, he shall in respect of such a matter exercise such power or perform such function only in terms of an agreement negotiated on such a matter by the Education Labour Relations Council or the relevant provincial chamber thereof'.

Since terms and conditions of employment (defined to include remuneration, compensation and service

benefits) were matters of mutual interest as described in section 1 of the Education Labour Relations Act no. 146 of 1993 ('the ELRA') it meant that the minister was not empowered to make a determination except in terms of an agreement reached in the Education Labour Relations Council by virtue of section 12 of the ELRA.

This labour relations scheme was continued by the 1998 Act which came into operation on 2 October 1998. Section 4(1) provides that 'notwithstanding anything to the contrary contained in any law but subject to the provisions of this section, the Labour Relations Act or any collective agreement concluded by the Education Labour Relations Council, the Minister shall determine the salaries and other conditions of service of educators'.

Mr. Arendse for the first respondent argued that the high court had no jurisdiction to grant the relief sought in the notice of motion; the application should have been brought in the labour court.

In this context there was a debate about whether or not the Regulations could be regarded as a collective agreement. By virtue of their paid employment in the Department, the Teachers were employees in terms of the Labour Relations Act no. 66 of 1995 ('the LRA'). A 'collective agreement' is defined in section 213 of the LRA as 'a written agreement concerning terms and conditions of employment or any other matters of mutual interest' concluded between, inter alios, an employer and one or more trade unions. Although the minister was given power to 'determine' salaries, salary scales and allowances, in reality he did not determine any aspect of the agreement. He had no discretion. He was empowered to incorporate the agreement in regulations, but not to add to or subtract anything from it.

I was persuaded by Mr du Plessis for the applicants that the definition of 'collective agreement' in the LRA is not wide enough to encompass regulations promulgated under section 28 of the 1994 Act, even though such regulations might have been entirely the product of negotiations between the educators and their employer. If I should be wrong on this, it must be noted that the Regulations were supplemented by what are called Personnel Administration Measures. These were promulgated by the minister as notice 1531 on 11 November 1997 in Government Gazette no. 16814. The Personnel Administration Measures are not expressed to incorporate the product of negotiations and Mr Arendse did not argue that they were to be so understood. Salary scales and post levels are determined by the minister. They profoundly impact upon the earlier, more general, Regulations with which they are inseparably linked. The regulatory framework - the Regulations and the Personnel Administration Measures read together - can thus not be regarded as a collective agreement.

Mr du Plessis's argument was that the Teachers - and, of course, other educators in the same position - could not, by subscribing to their contracts of temporary employment, have lawfully relinquished the rights given to them by the Regulations read with the Personnel Administration Measures. The latter document states in its opening paragraph that 'as regards matters that are regulated in this PAM only those measures contained therein shall apply, and there may, in respect of the matters regulated herein, be no deviation from the prescribed measures ...' There then follows a proviso which has no importance here. This provision clearly prohibits the Department from contracting out of obligations imposed by the Personnel Administration Measures which make no distinction between permanent and temporary educators. Whether or not the Teachers could be said to have lawfully renounced their rights was, Mr du Plessis suggested, a matter which could be decided by this court.

The labour court is not in the LRA given jurisdiction in labour matters generally, except where under section 157(2) it exercises a concurrent jurisdiction with the high court in respect of any alleged or threatened violation of any fundamental right entrenched in chapter 2 of the Constitution and arising from –

"(a) employment and from labour relations;

(b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer;

(c) the application of any law for the administration of which the Minister is responsible."

Save for this, the labour court's jurisdiction is specific. Unless, in terms of section 157(1), it has been given jurisdiction by the LRA or any other law, it has none. As far as the subject matter of a dispute is concerned, the labour court, broadly speaking, in the field of individual labour relations, has jurisdiction over the areas of security of employment (unfair dismissal, unfair suspension and the failure to re-employ or re-instate) and unfair treatment in relation to work opportunities (promotion, demotion, training and benefits). The present dispute does not fall within any of these categories. It involves the validity of a clause in the Teachers' re-employment contracts. And although the parties to the dispute are persons over whom the labour court would have jurisdiction (see sub-section 209 and 213 of the LRA), I must conclude that this court has jurisdiction to deal with the subject matter of the dispute. Before doing so, however, I shall discuss the objection to the court's jurisdiction to grant the relief requested in the third claim.

In regard to prayer three Mr du Plessis argued that the Constitution of the Republic of South Africa 108 of 1996 ('the Constitution') in section 23(1) elevates the entitlement to fair labour practices to a fundamental right. The Constitution of the Republic of South Africa Act 200 of 1993 ('the Interim Constitution') in section 27(1) did the same. In reliance on this constitutionalization of labour rights, Mr du Plessis contended that an employee whose fundamental right to fair labour practices had been violated might, instead of relying on the provisions of the LRA, rely directly on the Constitution. If the employee chose to do this, he or she would be entitled to approach the high court instead of the labour court to resolve a dispute which, by the formulation of the claim, would have been turned into a fundamental rights dispute.

S 23 (1) of the Constitution provides that 'everyone has the right to fair labour practices.' For the purpose of deciding the jurisdictional issue I shall, in favour of the applicants, assume that, by concluding a contract with the Teachers in terms which financially discriminated against them, the Department committed an unfair labour practice. If this is so, and since the Bill of Rights binds the legislature, the executive, the judiciary and all organs of state. (Sections 8 (1) and (2).) the Department as part of the provincial administration (which is an organ of state (see: s 239 of the Constitution)) violated the Teachers' constitutional right to fair labour practices.

S 157(2) of the LRA gives the labour court concurrent jurisdiction
with the high court in respect of any alleged or threatened violation of a fundamental right in the employment sphere. The high court has the primary responsibility for the enforcement of fundamental rights. It has jurisdiction to pronounce upon all violations of fundamental rights. This is plain from section 169 of the Constitution. The qualification in section 157 (2) of the LRA is intended to restrict the competence of the labour court to fundamental rights issues in the employment sphere. The applicants have 'alleged' a violation of their fundamental right to fair labour practices. It does not matter whether the claim is good or bad. That goes to the merits. If it appears from supporting information that the allegation is without substance a court may already at the stage of the jurisdictional enquiry decide that the case cannot concern a violation of a fundamental right and decline to exercise jurisdiction. This is not such a case. In this case and, I would think generally, once the allegation has been made, the high court would have jurisdiction. In my opinion, therefore, we are obliged to pronounce upon the third claim as well. I deal with it immediately.

One of the provisions dealing with a remedy for a breach of the rights in chapter 3 of the Constitution is found in section 36 which reads:

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

The complexities of remedies for a violation of a fundamental right were, in the context of a claim for 'constitutional damages', discussed in Fose v Minister of Safety and Security 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC).

It is clear from this decision of the constitutional court that there may be circumstances where a litigant against the State would be entitled to rely directly on a breach of a fundamental right. Whether this would be permissible would depend, however, on the availability of 'appropriate relief'. The majority judgment written by Ackermann J explains that 'appropriate relief' will in essence be relief that is required to protect and enforce the Constitution. In deciding what is appropriate relief, the interests not only of the complainant but of society as a whole, he holds, ought to be served.

In Fose's case the plaintiff claimed, in addition to common law damages for having been assaulted by the police, damages of a punitive kind for the invasion of his fundamental right not to be subjected to torture. At para [67] Ackermann J says this:

"In the present case there can, in my view, be no place for further constitutional damages in order to vindicate the rights in question. Should the plaintiff succeed in proving the allegations pleaded he will no doubt, in addition to a judgment finding that he was indeed assaulted by members of the police force in the manner alleged, be awarded substantial damages. This, in itself, will be a powerful vindication of the constitutional rights in question, requiring no further vindication by way of an additional award of constitutional damages."

Kriegler J gives what he characterises as 'my narrow reasons' for concurring with the order proposed by Ackermann J. He agrees that constitutional rights have complementary remedies and that they should be of a kind which vindicate the Constitution. He also agrees that statutory and common law remedies may be sufficient for this purpose.

At paragraphs [99] and [100] he writes –

"[99] There are powerful reasons for not excluding common-law and statutory relief from the ambit of s 7(4)(a). Many recent statutes such as the Labour Relations Act seek to codify constitutional rights, and are expressly designed to provide suitable relief for the infringement of constitutional rights. It would undermine the best efforts of the Legislature to exclude these remedies from a court's arsenal of remedial options. In the case of the final Constitution, the indications are more compelling, and I would have thought conclusive, that the drafters had no intention of excluding common law and statutory remedies from the remedial scheme.

[100] A court has a wide range of remedies in exercising its s 7(4)(a) powers. These remedies include common-law relief (developed if necessary by s 35(3)), statutory relief, declaratory relief (expressly mentioned in s 7(4)(a) and a number of potential remedies under ss 98 and 101(4). There is no reason, at the outset, to imagine that any remedy is excluded. Provided the remedy serves to vindicate the Constitution and deter its further infringement, it may be 'appropriate relief" under s 7(4)(a)'.

It is now time to examine the policy considerations underlying the LRA to determine whether the relief claimed by the applicants under s 23 of the Constitution would be appropriate.

Section 1 of the LRA declares that one of the primary objects of the Act is 'to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution.' Section 27(1) of the interim constitution was almost identical to the present section 23(1). Another primary object of the LRA is 'the effective resolution of labour disputes' (section1(d)). One would expect the LRA, if it were true to its stated objectives, to marry the enforcement of fundamental rights with the effective resolution of labour disputes. This is exactly what it seeks to do. It provides mechanisms for the enforcement of such labour practices as the legislature considers to be fair and the suppression of any labour practice considered to be unfair. If an employer adopts a labour practice which is thought to be unfair, an aggrieved employee would in the first instance be obliged to seek a remedy under the LRA. If he or she finds no remedy under that Act, the LRA might come under constitutional scrutiny for not giving adequate protection to a constitutional right. If a labour practice permitted by the LRA is not fair, a court might be persuaded to strike down the impugned provision. But it would, I think, need a good deal of persuasion. The reason for this is articulated by Martin Brassey in an article in the S A Journal of Human Rights (1994 SAJHR at 179) entitled 'Labour Relations under the New Constitution'. He writes about the Interim Constitution, but the position is no different under the Constitution. At page 206 he states:

"For seventy years our legislature has been modernizing our system of labour law, and for the last twenty years the labour courts have been doing the same under the aegis of the unfair labour practice. As a result, labour law already has a kind of charter of fundamental rights of its own. I accept that much still has to be done, but I am not sure that the Constitutional Court is the best place to do it in. I tend to share the view that was expressed by McIntyre J in Re Public Service Employee Relations Act, the leading case on whether the (Canadian) Charter gives workers a right to strike:

'Labour law...is a fundamentally important as well as extremely sensitive subject. It is based upon a political and economic compromise between organised labour - a very powerful socio-economic force - on the one hand, and the employers of labour - an equally powerful socio-economic force - on the other. The balance between the two forces is delicate... Our experience with labour relations has shown that the courts, as a general rule, are not the best arbiters of disputes which arise from time to time...Judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems.'

The words of Mc Intyre J (reported at (1987) 38 DLR (4^{th}) 161 at 232) are peculiarly apt in the case of judicial interference with matters which in labour law are regarded as matters of mutual interest; but they are also true, I think, where a court is, in a highly regulated environment ,asked to fashion a remedy which the legislature has not seen fit to provide.

Mr du Plessis candidly admitted that the unfair labour practice regime which the courts would, on his argument, have to apply under section 23 of the Constitution would resemble that developed by the industrial court. To grant relief which would encourage the development of two parallel systems would in my view be singularly inappropriate. Taking into account the right to fair labour practices and the duties imposed thereby on employers and employees alike, it is not a right which can, without an intervening regulatory framework, be applied directly in the workplace. The social and policy issues are too complex for that. The consequences of adopting Mr du Plessis's argument would be dramatic. For example, an unfair dismissal, which is undoubtedly an unfair labour practice, would become justiciable in the high court without having been aired before the CCMA.

Mcosini v Mancotywa and another 1998 (2) Volume 19 ILJ 1413, a case in the high court of Transkei, points out at 1417 B-E that, although the suspension of an employee might violate various fundamental rights of the employee, the latter's cause of action, his suspension, remains a labour matter. The jurisdiction of the labour

court, it was held, could not be evaded by alleging the breach of some other fundamental right.

In Imatu v Northern Pretoria Metropolitan Substructure 1999 (2) SA 234 (T) at 239 E-F van Dijkhorst J held that the LRA creates a two stream labour dispute resolution system which leaves no room for intervention by another court. At 242 F-G he commented that the whole, or virtually the whole, spectrum of labour relations disputes is covered by the two procedures set out in the LRA – that of concilliation and arbitration, and that which leads to the labour court.

Martin Brassey and Carole Cooper writing in Constitutional Law of South Africa, Chaskalson et al state at p 30-13 –

"Yet, in the labour field, the issue of the horizontal application of the labour relations rights to private citizens will be mainly academic. This is because existing labour legislation already regulates, to a large degree, private conduct between employers and employees. The horizontal reach of the labour rights will therefore extend to those matters falling within the scope of the rights but not covered by existing legislation. The exact extent of this reach is particularly unclear with regard to the right to fair labour practices because of its open-textured nature. Depending on the scope given to this right, potential areas for its application to private conduct relate to the duty to bargain (which has been deliberately excluded from labour legislation), employment issues beyond the confines of the employer-employee relationship, and employer-employee issues which may be regarded as fair labour practices but are not covered by legislation"

We are not, of course, here concerned with a case of horizontal application of the Constitution. Yet I cannot conceive that it is permissible for an applicant, save by attacking the constitutionality of the LRA, to go beyond the regulatory framework which it establishes.

Mr du Plessis, appreciating the difficulties thrown up by the notion of parallel dispute resolution systems, then sought to rely on the residual unfair labour practice in item 2 of part B of schedule 7 to the LRA. This deals with the unfair conduct of an employer relating to the provision of benefits to an employee. I would have thought that the rights in part B of schedule 7 were, in terms of section 157(1) of the LRA, matters to be exclusively determined by the labour court. Mr du Plessis, however, contended that since the exclusive jurisdiction conferred on the labour court was in section 157(1) made 'subject to the Constitution', the enactment of part B of schedule 7 could not have been intended to limit the concurrent jurisdiction of the high

court provided for in section 157(2). I do not agree with this submission. The expression 'subject to the Constitution' does no more than ensure that it cannot be thought that the constitutional court has no jurisdiction in labour matters involving fundamental rights issues. Moreover, the argument takes no account of the provisions of item 3 of part B which direct parties to take their disuptes in the first place to a bargaining council or to the Commission for Conciliation, Mediation and Arbitration, and if they remain unresolved, depending on the nature of the dispute, to either the labour court or arbitration.

Prayers 1 and 2, as we have seen, seek relief on the footing of the illegality of clause 3 of the Teachers' temporary employment contracts. In my discussion of the jurisdictional issue, I expressed the view that the clause (which excludes temporary educators from the benefits enjoyed by permanent educators) was contrary to the Regulations and the Personnel Administration Measures. The Teachers should have been employed on the terms prescribed by law and on no others.

One must suppose that those representing the educators at the retrenchment negotiations would have known that the offer of temporary employment made to their members did not comply with the Regulations and the Personnel Administration Measures. It was not a difficult thing to discover. Yet, apart from the applicants, no one has sought to challenge the fixed term contracts. It seems overwhelmingly probable that it was decided not to challenge them because the compromise was thought to be the best solution to a very difficult problem.

The relief sought in paragraphs 1 and 2 of the notice of motion is a declaratory order that -

(a) clause 3 of the fixed term of employment contract is void; and

(b) the Teachers are entitled to all benefits afforded to educators.

Section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959 gives the high court jurisdiction 'in its discretion, and at the instance of any interested person, to enquire into, and determine any existing, future or contingent right, notwithstanding that such person cannot claim any relief consequential upon the determination'. (See J T Publishing (Pty) Ltd v Minister of Safety and Security 1997 (3) SA 514 (CC) at 525 para 15.)

A court, having at the first stage of the enquiry decided that the claimant is a person interested in an existing, future or contingent right or obligation, would at the second stage enquire whether or not the dispute is a proper

one for the exercise of its discretionary power. As to this '…it must be borne in mind that, though it may be competent for a court to make a declaratory order in any particular case, the grant thereof is dependent on the judicial exercise by that Court of its discretion with due regard to the circumstances of the matter before it.' (per Wessels JA in Reinecke v Incorporated General Insurances Limited 1974 (2) 84 (AD) at 95C.) What the discretion entails is explained by Williamson J (as he then was) in Adbro Investment Company Limited v Minister of the Interior 1961 (3) 283 (T) at 285B-D :

'…the Court in each case must … carefully determine whether or not the particular case in question is a proper case for the exercise of its discretion. For a case to be a proper case, in my view, generally speaking it should require to be shown that despite the fact that no consequential relief is being claimed or perhaps could be claimed in the proceedings, yet justice or convenience demands that a declaration be made…'

A declaratory order is an order by which a dispute over the existence of some legal right or entitlement is resolved. The right can be existing, prospective or contingent (SA Onderlinge Brand en Algemene Versekeringsmaatskappy Beperk v Van den Berg en 'n Ander, 1976 (1) 602 (AD).) A declaratory order need have no claim for specific relief attached to it, but it would not ordinarily be appropriate where one is dealing with events which occurred in the past. Such events, if they gave rise to a cause of action, would entitle the litigant to an appropriate remedy.

The second applicant is no longer employed by the Department. The other Teachers have been appointed to permanent positions. Their claims for benefits lie in the past. Instead of bringing claims sounding in money for benefits which they should have received, but did not receive, the applicants claim a declaratory order that they are for 1998 and 1999 entitled to all benefits afforded to educators. This is not, in the circumstances, an appropriate remedy. The claim need not have been brought by way of action. It could, like the claim for the declaratory order, have been brought on motion. It would have been the better course to take. It is artificial to declare that a litigant has certain rights when what he really wants is a judgment sounding in money. The availability of an alternative remedy is an element to be considered in deciding whether or not to grant a declaratory order. (Baxter, Administrative Law p 710.)

The applicants have shown that clause 3 of the fixed term employment contract conflicts with the Regulations and the Personnel Administration Measures. I shall therefore assume that it is void. If clause 3 is void, the Teachers would in principle, and depending on their individual circumstances, have become entitled to certain

benefits. The applicants claim, in effect, a declaratory order that each of the Teachers qualifies for such benefits as he or she might prove to be entitled to. An order in these terms is one of the kind deprecated as being abstract, hypothetical or of academic interest only. It does not settle the rights of anyone in a fashion which is sufficiently precise. The Teachers cannot in a legal sense be said to be 'interested' in an outcome which leaves their rights so vague and undetermined. Moreover, an order in the terms sought would, in the circumstances of this case, offend against the rule that a litigant is obliged to claim all available relief in the same action. (Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) 462 (AD) at 472A.)

The Teachers content themselves with alleging what benefits they received prior to their dismissal. The second applicant appears to have received the most extensive benefits. He says that before his dismissal he was entitled to a service bonus, a home owner allowance as well as pension fund and medical fund benefits. There is no indication on the papers that the second applicant, even if he had received a service bonus in 1997, would have been entitled to one in 1998. The Regulations dealing with home ownership provide that in order to participate in the scheme an educator should comply with all the provisions of the regulations dealing with the scheme. So, for one thing, an educator who wishes to participate in the scheme must be a contributing member of a statutorily instituted pension or provident fund. But section 5 of the Government Employees' Pension Law (Proclamation 21 of 1996) denies membership of the pension fund to any person who is employed under a contract of service which excludes him or her from membership of the fund. That is what the Teachers' employment contract does. In order to qualify for a medical aid contribution, the second applicant had to provide the first respondent with written proof of membership of the medical scheme of which he was a member. He does not testify that he did this. The same difficulties arise in the case of the other Teachers. None of them establishes his or her entitlement to a particular benefit.

I consider that the substantial delay in bringing these proceedings is another reason for exercising our discretion against the grant of a declaratory order. It is well established law that undue delay may be taken into account in exercising a discretion as to whether to grant an interdict or a mandamus, or to grant relief in review proceedings. The declaratory order, being as flexible as it is, can be used to obtain much the same relief as would be vouchsafed by an interdict or a mandamus. Where it is not necessary that a record of proceedings be put before the court, a declaratory order could serve as a review. A court, in exercising its discretion whether to grant a declaratory order should, accordingly, in an appropriate case, weigh the same considerations of 'justice or convenience' as it might do in the case of an interdict or a review.

Prejudice features large in deciding what is just or convenient. In the present case there is to my mind considerable prejudice to the Department. Most of the educators in the Department, through their representative unions, accepted at the retrenchment discussions albeit reluctantly, the way out of what was, for the Department and for them, an enormous dilemma. The fixed term contracts of the educators were for three months. If an application for the relief now sought had been brought within a matter of weeks, the Department would have realised that the settlement was being challenged and might have declined to renew the contracts of those who were dissatisfied with the absence of benefits. It might have terminated the contracts of all fixed term educators. Having regard to the gravity of the situation, it might even have requested and obtained an amendment of the subordinate legislation promulgated by the minister. Fifteen months later, when the applicants launched their application, the time for remedial steps had passed. The Department found itself exposed to an expenditure for which it had not budgeted and which it could not afford without seriously compromising educational funding for the years 1999 and 2000. I do not say that any one of the above considerations by itself would have been decisive. Taken together, they constitute in my opinion a formidable hurdle in the way of the exercise of a discretion favourable to the applicants.

The application is dismissed with costs which are to include the costs occasioned by the employment of two counsel.

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J.H. CONRADIE

I agree: …….

T.S.B. JALI