IN THE HIGH COURT OF SOUTH AFRICA

NATAL PROVINCIAL DIVISION

CASE NO: 4143/2003

In the matter between :

NUWE REPUBLIEK SKOOL	**First Applicant**
DIE BEHEERLIGGAAM VAN NUWE REPUBLIEK SKOOL	**Second Applicant**
PIETER JAMES JOHANNES VAN WYK	**Third Applicant**
and	
MPULELO BONGANI MNGUNI	**First Respondent**
DIE DEPARTEMENTSHOOF: DEPARTEMENT VAN ONDERWYS EN KULTUUR VAN DIE KWAZULU-NATAL PROVINSIALE REGERING	**Second Respondent**
DIE LID VAN DIE UITVOERENDE RAAD VIR ONDERWYS EK KULTUUR VAN DIE KWAZULU-NATAL PROVINSIALE REGERING	**Third Respondent**

JUDGMENT 11th May 2004

OLSEN, AJ :

The First Applicant in this matter is Die Nuwe Republiek Skool, a primary school situate in Vryheid, KwaZulu-Natal. The Second Applicant is the First Applicant's governing body and the Third Applicant is the principal of the school.

The Third Applicant is employed by the Department of Education and Culture of the Provincial Government of KwaZulu-Natal. The Head of the Department is the Second Respondent, who is cited in view of the provisions of Section 3(1)(b) of the Employment of Educators Act, No. 76 of 1988. The First Respondent, Mpulelo Bongani Mnguni, chaired a disciplinary enquiry into the conduct of the Third

Applicant, and found him guilty as charged. In consequence of that the First Respondent ruled that the Third Applicant be demoted to a "post level 1 entry level" with effect from 1st April 2002, such demotion to last for a period of 12 months, whereafter the Third Applicant could apply for promotion "without prejudice". In terms of Item 9 of Schedule 2 to the Employment of Educators Act the Third Applicant had the right to appeal against those findings to the Third Respondent, the MEC for Education and Culture of the KwaZulu-Natal Provincial Government. He did so. The appeal was dismissed on 1st August 2003.

Within just over a week of the dismissal of the appeal the Applicants launched this application on an urgent basis. The notice of motion indicated that the Applicants would be seeking two forms of relief which may be summarised as follows:

(a) firstly, an order preventing the implementation of the sanction pending the outcome of this application; and

(b) secondly, an order reviewing and setting aside the findings and decisions of the First Respondent.

As it turned out there was no need to seek interim relief because the Respondents furnished an appropriate undertaking. Accordingly, the issues before me are those relating to the review application. They may be summarised as follows.

(a) Does this Court have jurisdiction to review the decision in issue?

(b) Do the First and Second Applicants have *locus standi* ?

(c) Are there grounds for review?

As the grounds for review, if any, must be identified in order to consider the question of jurisdiction, it seems convenient to deal with the merits of the review application first.

The facts of the matter may be stated as follows. The immovable property upon which the school is situate belongs to the State. However in terms of Section 13(2) of the South African Schools Act, No. 84 of 1996, the school has the right, for the duration of its existence, "to occupy and use the immovable property for the benefit of the school for educational purposes at or in connection with the school". In terms of Section 20(1)(g) of the South African Schools Act the Second Applicant must administer and control the school's property and the buildings and grounds occupied by the school. By notice in the Provincial Gazette the Second Applicant was allocated all of the functions set out in Section 21(1) of the South African Schools Act save those described in subsection 21(1)(dA). This meant that the Second Applicant had the powers *inter alia*

(a) to maintain and improve the school's property and buildings; and

(b) to perform other functions consistent with the South African Schools Act and any applicable Provincial law.

During the year 2000 the Second Applicant caused certain alterations to be made to an unused section of the school premises to accommodate a privately run Grade R bridging or reception class on the school premises. This occurrence came to the attention of the Provincial Education Department with the result that a

letter dated 12th February, 2001 was sent to the Third Applicant (as principal) asking who had permitted the accommodation of such a class at the school, and how improvements to the immovable property had been effected without the consent of the Department. The Third Applicant did not reply to the letter, but referred it to the chairman of the Second Applicant. He replied, defending the establishment of the class, by letter dated 20th February, 2001.

A series of letters followed, the Department addressing the Third Applicant on each occasion, and the chairman of the Second Applicant making the reply. The Department ignored the fact that the communications emanated from the Second Applicant. The Department received no answers from the Third Applicant.

The Second Applicant made appeals, but to no avail. The answer to one came in a letter dated 5th June, 2001 addressed to the Third Applicant, and, quite erroneously, the appeal was referred to as that of the Third Applicant. The "appeal" was dismissed and the Third Applicant was advised that disciplinary steps against him were being considered because of his failure to comply with the lawful instruction given to him to close down the class.

Those disciplinary steps were taken. The Third Applicant received a notice on 1st February 2002 to the effect that a disciplinary hearing would take place on 8th February 2002. After an adjournment the hearing did proceed and the full record of it has been placed before me.

One charge was put to the Third Applicant, namely one of misconduct, in that he

> **"... on or about January 2001 and at or near Nuwe Republiek Skool (NRS), without permission possessed or wrongfully used the property of the State by allowing a Grade R Class to be operated in the school without permission of the employer, thereby contravening Section 18(1)(c) of the Act."**

The relevant section of the Act reads as follows.

> **"18(1) Misconduct refers to a breakdown in the employment relationship and an educator commits misconduct if he or she-**
>
> **...**
>
> **(c) without permission possesses or wrongfully uses the property of the State, a school, a further education and training institution, an adult learning centre, another employee or a visitor."**

It became clear early on in the proceedings before the First Respondent that the Third Applicant's defence to the charge was that it was the governing body, and not he who had opened the Grade R class. The Grade R class was privately run. It was the governing body which had the power to make decisions regarding the use of school property. It exercised that power. If the exercise of the power was wrongful, then that had to be laid at the door of the Second Applicant, and not at the door of the Third Applicant.

The Applicants assert in this application that the conduct of the Respondents, and in particular of the First Respondent, in conducting the hearing and making the decision, involved and was accompanied by breaches of the Third Applicant's fundamental rights entrenched in Chapter 2 of the Constitution, that is to say the Third Applicant's rights to lawful, reasonable and procedurally fair administrative action. It is also stated that the Third Applicant's right to fair labour practices given under Section 23(1) of the Constitution was infringed, but that assertion was not pursued as the basis of the claim for relief.

The Applicants contend that the finding of the First Respondent that the Third Applicant was guilty of misconduct, and the imposition of the sanction, amounted to administrative action as contemplated by the Promotion of Administrative Justice Act, No. 3 of 2000, and that it is accordingly reviewable in terms of Section 6 of that Act. The Respondents accept that the conduct in question is administrative action. The allegation of misconduct against the Third Applicant gave rise to an obligation on the part of the Second Respondent in terms of Section 18(2) of the Employment of Educators Act to institute disciplinary proceedings against the Third Applicant in accordance with the disciplinary code and procedures contained in Schedule 2 to the Act.

Numerous complaints are made by the Applicants concerning the proceedings and the decision. Each complaint is classified in the founding affidavit as falling under one of subsections 6(2)(a)(iii), (b), (c), (d), (e), (f), (h) and (i) of the Promotion of Administrative Justice Act. It is not necessary for the purposes of this judgment to

deal with all of the matters raised by the Applicants. It is sufficient, in my view, to mention and deal with the complaints that:

(a) the action was materially influenced by errors of law with regard to the legal nature of a school and a governing body, and the duties, rights, responsibilities and obligations of a school, a governing body, and a principal, respectively;

(b) the decision was the product of taking into account irrelevant considerations and ignoring relevant ones, with the result that the decision became arbitrary;

(c) the decision was so unreasonable that no reasonable person could have exercised the power or performed the function of the disciplinary authority in the manner in which it was exercised and performed in this case.

On those grounds the Applicants contend that the decision in question falls to be reviewed and set aside under Section 8(1), read with subsections 6(2)(d), (e) and (h) of the Promotion of Administrative Justice Act.

The First Respondent's decision was handed down on the 12th March 2002. He indicated in his opening comments that he found the case difficult, but only because there was only one charge upon which he would have to make his finding. He proceeded immediately to find that because the First Applicant is a school having the powers set out in Section 21 of the South African Schools Act, the Third Applicant could not have been responsible for the operation of the private Grade R class because that matter (i.e. the decision to allow State property to be used for that purpose) did not fall within his "terrain". The First Respondent

thereafter mentioned a number of matters of concern to him. He referred to the fact that the Third Applicant had not responded to the letters which had been addressed to him, and that he ought to have reported the goings on at the school to the Department. The First Respondent found himself compelled to the view that the Third Applicant's behaviour was arrogant and that his failure to respond to the correspondence involved gross insubordination. The First Respondent took the view (which was advanced in argument before me as well) that the Third Applicant should be regarded as his employer's representative on the governing body. The First Respondent expressed the view that the Third Applicant should be regarded as an accounting officer in respect of the State property occupied by the school, notwithstanding the fact that such State property was at all times in the possession and under the control of the Second Applicant (as governing body). The First Respondent took the view that the Third Applicant had compromised a position of trust. The First Respondent's finding is encapsulated in the final passage of his decision.

> **"Therefore, I may conclude by saying that Mr Van Wyk neglected his duty, compromised his position, could not take into cognisance the fact that he's an accounting officer in that establishment. And I may also bring in the element of gross insubordination, where he equally failed to respect his immediate supervisor, to the extent of him failing to respect his district manager. Therefore, on the basis of balance of probability, Mr Van Wyk is guilty."**

I must say that a consideration of the facts in this case leads me to have sympathy for some of the complaints made by the First Respondent concerning the conduct

of the Third Applicant. He should have answered the letters addressed to him. (Likewise, of course, the Department ought to have acknowledged the letters from the Second Applicant.) One doubts that any disciplinary action would have been contemplated if written communications had been handled correctly.

However the opening remark of the First Respondent, that his difficulty was that there was only one charge against the Third Applicant, was entirely apposite. The Third Applicant was not asked to meet charges relating to insubordination, breach of trust, a failure to report to his employer when he ought to have done so, or anything like that. The only question was whether he (the Third Applicant) had wrongfully used State property.

Counsel for the Respondents conceded that it was the Second Applicant which possessed the State property in question, made the decision to allow the property to be used for a private Grade R class, and continued to allow the operation of that class notwithstanding the fact that the Department of Education objected thereto. Counsel conceded that in doing so the Second Applicant exercised powers which it claimed to have, and that the Third Applicant had no power, and did not purport to have exercised a power vesting in him, to operate such a private class. It was also conceded that the Third Applicant did not have the power himself to put an end to the operation of the class.

Counsel for the respondents argued, however, that the Third Applicant's failure to report the occurrence to the Department, and generally to take the lead in diverting the Second Applicant from its course, should be regarded as wrongful use or possession of State property by the Third Applicant himself. Whilst I understand

the argument, in my view there is nothing ambiguous about Section 18(1)(c) of the Employment Educators Act, certainly insofar as it falls to be applied in the present case. It is required that the educator (i.e. the Third Applicant) should himself have wrongfully used the property of the State, or possessed it without permission; or that he should himself have been a co-perpetrator of such wrongful conduct.

Counsel for the Respondents also argued that Section 18(1)(c) of the Employment of Educators Act should be read to convey a prohibition not only against wrongful use of property of the State, but also against "allowing" wrongful use of State property by another. I take the view that it is not permissible so to read the section. Furthermore, and even if it is legitimate to widen the scope of the section in that fashion, the Third Applicant was not asked to answer a charge that he had allowed a third party (that is to say the Second Applicant) wrongfully to use State property.

In my view the opening remarks made by the First Respondent when giving his decision illustrate that he was well aware of these difficulties with the Department's case, stemming from the respective responsibilities of the governing body and the principal. If I am wrong in that, then the complaint that the First Respondent's decision was materially influenced by an error of law must be correct.

If, as I believe, the First Respondent indeed appreciated the nature of the respective obligations and powers of the Second and Third Applicants, then those were relevant considerations which were not taken into account. If they had been taken into account the decision would inevitably have gone the other way.

It is plain that the First Respondent took into account irrelevant considerations (that is to say, misconduct of a different variety to that which was the subject matter of the charge).

In my view no reasonable person could have come to the conclusion reached by the First Respondent. The First Respondent's finding was based on factors and considerations which could not reasonably lead to a finding that the Third Applicant himself used State property in order to conduct a privately run Grade R class. He did not run the class, either personally or in his capacity as principal of the First respondent. It was run by a third party on the authority of the Second Applicant.

In the circumstances I reach the conclusion that the First Respondent's decision falls to be set aside.

I turn to the question of this Court's jurisdiction. The Respondents' counsel indicated, correctly in my view, that there is no need for me to deal with the issue of *locus standi* if I should conclude that the First Respondent's decision falls to be set aside, and that this Court has jurisdiction to make such an order.

The issue of jurisdiction raised by the Respondents turns on the provisions of subsections 157(1) and (2) of the Labour Relations Act, No. 66 of 1995. Those provisions read as follows.

"157 (1) **Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.**

(2) **The Labour Court has 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 of the Republic of South Africa, 1996, 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; and**
(c) **the application of any law for the administration of which the Minister is responsible."**

The Applicants assert in their founding papers that this Court has jurisdiction by reason of the provisions of Section 157(2) of the Labour Relations Act. Counsel for the Applicants argues that the dispute concerns the constitutionality of administrative acts and conduct arising in disciplinary proceedings conducted by the State in its capacity as employer of the Third Applicant.

The Respondents accept that administrative acts and conduct are involved here, and that the actions and conduct complained of are those of the State in its

capacity as an employer. However the Respondents contend that the dispute is not over the constitutionality of administrative acts and conduct, but over the question of whether the acts and conduct are hit by Section 6 of the Promotion of Administrative Justice Act. As I understand the argument, it is that administrative unfairness was a constitutional issue only until the promulgation of the Promotion of Administrative Justice Act. It is argued that because the principles of administrative justice are now encapsulated in that Act, complaints of conduct falling within the provisions of Section 6(2) thereof no longer raise constitutional issues.

Counsel for the Respondent was unable to cite any authority for this proposition. I know of no authority to support it. The preamble to the Promotion of Administrative Justice Act records that the Act is the product of the requirement of Section 33(3) of the Constitution that National legislation be enacted to give effect to the rights to administrative justice provided for in Sections 33(1) and (2) of the Constitution. The Promotion of Administrative Justice Act did not destroy the constitutional foundation upon which it was constructed.

The Applicants in this matter complain that the administrative action in issue was not "lawful, reasonable and procedurally fair", as required by Section 33(1) of the Constitution. The complaints are presented under the Promotion of Administrative Justice Act because that is the legislation which gives effect to Section 33 rights, and provides for the review of administrative action when those rights are breached.

Counsel for the Respondents argues in the alternative that notwithstanding the fact that this may be a dispute over the constitutionality of an administrative act or conduct by the State in its capacity as an employer, this Court lacks jurisdiction because Section 157(2) of the Labour Relations Act, properly construed, confers exclusive jurisdiction in such matters on the Labour Court. It is argued that I should reach this conclusion following the decisions in **Manyahti v MEC for Transport, KwaZulu-Natal, and Another** 2002 (2) SA 262 (N) and **Bensingh v Minister of Education and Culture: Province of KwaZulu-Natal and Others** (2003) 1 All SA 157 (D). Those decisions support the Respondents, but they were made before the judgment of the Constitutional Court in **Fredericks and Others v MEC for Education and Training,** EC 2002 (2) SA 693.

In **Fredericks'** case teachers in the employ of the Department of Education in the Eastern Cape sought to challenge the decision of the Department not to grant their applications for voluntary retrenchment made under an agreement reached at the Education Labour Relations Council, which is referred to and is commonly known as "Resolution 3". The refusal to accept the retrenchments was challenged both as a breach of the Applicants' rights to equality in terms of Section 9 of the Constitution, and as a breach of their rights to administrative justice in terms of Section 33 of the Constitution.

The decision in **Fredericks**, insofar as it is relevant to the present matter, may be summarised as follows.

(a) Section 157(1) of the Labour Relations Acts does not confer a general jurisdiction on the Labour Court to deal with all employment matters.

The import of the section is that the High Court is deprived of jurisdiction in matters which the Labour Court is required to decide, except where the Labour Relations Act provides otherwise. (Paragraph 38.)

(b) Section 169 of the Constitution provides that a High Court may decide any constitutional matter except such as may be decided only by the Constitutional Court, or a matter which has been assigned by an act of Parliament to another Court of a status similar to a High Court. (Paragraph 31.)

(c) A power to review a decision is not to be equated to a power to determine a dispute (paragraph 31).

(d) The High Court's jurisdiction will only be ousted by Section 157(1) of the Labour Relations Act in respect of matters that "are to be determined" by the Labour Court. (Paragraph 40.)

(e) It is only Section 157(2) of the Labour Relations Act which gives the Labour Court any jurisdiction to determine disputes concerning alleged infringements of constitutional rights by the State acting in its capacity as an employer. (Paragraph 41.)

(f) It is expressly provided in Section 157(2) that the jurisdiction thus afforded the Labour Court is concurrent jurisdiction with the High Court. (Paragraph 41.)

(g) In the circumstances Section 157(2) cannot be interpreted as a section which ousts the jurisdiction of the High Court. (Paragraph 41.)

(h) Section 158(1)(h) of the Labour Relations Act gives the Labour Court the power to review any decision taken or any act performed by the State in its capacity as employer on such grounds as are permissible in

law. But it cannot be read expressly to confer upon the Labour Court a jurisdiction to determine disputes arising out of alleged infringements of the Constitution (by the State acting in its capacity as employer) as that jurisdiction is expressly conferred by Section 157(2). (Paragraphs 42 and 43.)

(i) There being no specific provision in the Act, besides Section 157(2), conferring jurisdiction on the Labour Court to deal with such constitutional matters, the jurisdiction of the High Court is maintained. (Paragraph 44.)

In note 29 to the judgment in **Fredericks** (appearing at page 712 of the report) the Court provided a formidable list of earlier cases in which the topic had been discussed. **Manyahti's** case and **Bensingh's** case did not feature in this list. Neither did the judgment of a Full Bench in the matter of **Ampofo v MEC, Arts, Culture, Sports and Recreation, Northern Province, and Another** 2002 (2) SA 215 (T). (The court in **Ampofo** arrived at the same conclusion as was reached in **Manyahti** and **Bensingh**.) The judgments in **Manyahti** and **Ampofo** appear not to have been drawn to the attention of the court in **Fredericks**. Judgement in **Bensingh** was handed down a few days after **Fredericks**, and presumably when the presiding Judge had not yet learnt of the then recent Constitutional Court judgement.

Counsel for the Respondents argues that the decision in **Fredericks** that Section 157(2) of the Labour Relations Act

> **"cannot be interpreted as ousting the jurisdiction of the High Court since it expressly provides for a concurrent jurisdiction"**

was *obiter*, that is to say that the finding was not one necessarily made in order to decide the case. He expanded on this submission, arguing that the Constitutional Court had not considered the alternative meaning of the word "concurrent" offered in **Manyahti's** case, that the word conveys not a sharing of jurisdiction, but the fact that the jurisdiction of the Labour Court under Section 157(2) is to be "equivalent to" that of a High Court. (This understanding of the concept of "concurrent jurisdiction", in the context of Section 157(2) of the Labour Relations Act, was endorsed in **Bensingh.**)

However it seems clear to me that the decision in **Fredericks** that there is no specific provision in the Labour Relations Act

> **"conferring a jurisdiction to determine disputes arising out of constitutional matters upon the Labour Court that could be said to give rise to an exclusive jurisdiction in terms of s157(1) of the Act"**

was crucially dependant on the proposition that the word "concurrent", where it appears in Section 157(2), means "shared".

It is true that the judgment in **Fredericks** does not canvass alternative meanings for the word "concurrent". That may be a product of a view held by the Constitutional Court that there are no other meanings which warrant consideration; on the other hand, it may be a simple matter of alternative meanings not having been raised. I take the view that the decision in **Fredericks** answers the question before this Court. Being bound by that decision, there is no need for me to deal with the conflicting decisions relied upon by counsel for the Respondents.

In the circumstances I conclude that this Court has jurisdiction to determine the matter brought before it by the Applicants. There is accordingly no need for me to deal with the question of the *locus standi* of the First and Second Applicants. Counsel have agreed upon the order as to costs which I should make in these circumstances. I make the following order.

1. The decision of the First Respondent made on 12th March 2002 that the Third Applicant is guilty of misconduct as contemplated by Section 18(1)(c) of the Employment of Educators Act, No. 76 of 1998, and the consequent sanction imposed by the First Respondent, are set aside.

2. The Second Respondent (who is cited *nomine officio* as Head of the Department of Education and Culture of the KwaZulu-Natal Provincial Government) is ordered to pay the costs of this application.