**IN THE HIGH COURT OF SOUTH AFRICA**
**EASTERN CAPE DIVISION, GRAHAMSTOWN**

**Case no. 173/2018**
**Date heard: 29/11/18**
**Date delivered: 8/1/19**
**Reportable**

**In the matter between:**

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| **ARTHUR FRANS GROOTBOOM** | **First Applicant** |
| **MUHAMMED RAMLAN** | **Second Applicant** |
| **CHERE BOUW** | **Third Applicant** |
| **JOY WILLIAMS** | **Fourth Applicant** |
| **JESINTHA COLTMAN** | **Fifth Applicant** |
| **CANDACE STEYL** | **Sixth Applicant** |
| **ELANA HUGHES** | **Seventh Applicant** |

**and**

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| **MEC: DEPARTMENT OF EDUCATION, EASTERN CAPE PROVINCE** | **First Respondent** |
| **SUPERINTENDENT-GENERAL: DEPARTMENT OF EDUCATION, EASTERN CAPE PROVINCE** | **Second Respondent** |

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**JUDGMENT**

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**Plasket J:**

[1] The applicants were, at various times, employed by School Governing Bodies (SGBs) as teachers. They were employed by the SGBs because the respondents had not appointed teachers to posts on the teaching establishment of public schools as they should have done. The applicants allege that they were paid a great deal less than they would have been paid if they had been employed by the second respondent, the Superintendent-General of the Department of Education in the provincial government.

[2] In paragraph 2 of Part A of the notice of motion, the applicants seek an order directing the respondents to pay them 'the amount that they would have been paid for the period during which they occupied a substantive post on the establishment, had they been appointed by the Eastern Cape Department of Education ("the Department") and remunerated in terms of the Department's salary scales for temporary teachers (i.e. the remuneration that would have been paid to an educator appointed to temporarily fill a substantive vacancy at the Applicant's school) and been afforded the benefits granted to temporarily appointed educators'.

[3] The applicants did not quantify their claims. Instead, an order was sought to direct the respondents to appoint and pay a firm of chartered accountants to 'verify each Applicant's claim and determine the amount that is owed by the Department to each Applicant'. An order to prescribe the method of determining each applicant's entitlement is also sought in the notice of motion.

[4] In Part B of the notice of motion, the applicants apply for orders certifying an opt-in class action in which the class is defined, the method of notifying members of the class about the proceedings is specified, the method of opting-in is provided for and the means of initiating the class proceedings are provided for.

[5] It is common cause that the applicants have no claims against the respondents in terms of the common law – whether in contract, delict or unjust enrichment – and no statutory basis either. They base their claims on the Constitution, seeking the payment of constitutional damages to them by the respondents.[1]

[6] The respondents did not file answering papers. Instead, they filed a notice in terms of rule 6(5)(*d*)(iii) of the uniform rules in which they raised a number of points

[1] On constitutional damages, see *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

of law as defences to Part A. Their opposition to the granting of the relief claimed in Part B was abandoned at the hearing of the matter.

[7] One of the points taken was that the applicants had 'not pleaded that the notice requirements contained in the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 have not been complied with'. (I shall refer to this Act as the Legal Proceedings Act.)

[8] The applicants later gave notice in terms of the Legal Proceedings Act and have applied for condonation for having failed to give their notice timeously. It is to this application for condonation that I now turn.

**The Legal Proceedings Act**

[9] Because of the size, bureaucratic complexity, number of personnel and relatively high staff turn-over of many organs of State, including, as in this case, provincial Departments, a special procedural dispensation has been enacted to cater for claims against them.[2]

[10] Prior to 1994, many organs of state were shielded from claims against them by draconian limitation of action legislation.[3] Typically, this type of legislation provided for a short period – usually six months – within which summons had to be issued, preceded by the giving of notice. If the notice was late, there was not a clear month between the giving of notice and the issue of summons or the summons was late, the claim was unenforceable. No possibility existed for condonation.[4] The only exception that was recognised by the courts was impossibility of compliance.[5] After 1994, this harsh regime was at first ameliorated by piece meal legislation. Later, uniform legislation was enacted dealing with legal proceedings against organs of state generally that sought to balance the fundamental rights of the people and the legitimate interests of organs of state. That legislation was the Legal Proceedings Act.[6]

[11] The long title of the Legal Proceedings Act provides that its purpose is '[t]o regulate the prescription and to harmonise the periods of prescription of debts for

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[2] *Minister of Agriculture and Land Affairs v C J Rance (Pty) Ltd* 2010 (4) SA 109 (SCA) paras 13-14.
[3] See for example, s 32 of the Police Act 7 of 1958 and s 113 of the Defence Act 44 of 1957.
[4] See *Hartman v Minister van Polisie* 1983 (2) SA 489 (A).
[5] See *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A); *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 14, fn 14.
[6] See generally on the purpose of the Legal Proceedings Act, *Minister of Safety and Security v De Witt* 2009 (1) SA 457 (SCA) paras 1-4.

which certain organs of state are liable; to make provision for notice requirements in connection with the institution of legal proceedings against certain organs of state in respect of the recovery of debt; to repeal or amend certain laws; and to provide for matters connected therewith'.

[12] Section 3 is the heart of the Legal Proceedings Act. It deals with the giving of notice of claims for the recovery of debts against organs of state. A debt is defined in s 1 to mean 'any debt arising from any cause of action' whether on the basis of delict, contract 'or any other liability', including a cause of action related to or arising from any 'act performed under or in terms of any law' or 'omission to do anything which should have been done under or in terms of any law' and 'for which an organ of state is liable for payment of damages'.

[13] Section 3(1) provides:

'No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

(a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

(b) the organ of state in question has consented in writing to the institution of that legal proceedings-

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).'

[14] Section 3(2) is concerned with the giving of notice. It states:

'A notice must-

(a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4 (1); and

(b) briefly set out-

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor.'

[15] Section 3(3) ameliorates the terms of s 3(2)(*a*) by providing that a debt is not regarded as being due 'until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by

exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge'.

[16] Section 3(4) makes provision for the granting of condonation in the event of non-compliance with s 3(2). It states:

'(*a*) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2) (a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(*b*) The court may grant an application referred to in paragraph (a) if it is satisfied that-

(i) the debt has not been extinguished by prescription;

(ii) good cause exists for the failure by the creditor; and

(iii) the organ of state was not unreasonably prejudiced by the failure.

(*c*) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate.'

**The application for condonation**

[17] No notice was given by the applicants in terms of the Legal Proceedings Act prior to the initiation of the application. The debts that are claimed appear to have arisen a few years ago, on the applicants' versions. The founding papers were issued on 26 January 2018. On 12 March 2018, the respondents served and filed their rule 6(5)(*d*)(iii) notice. Notice was given in terms of s 3 of the Legal Proceedings Act on 14 June 2018 and the application for condonation was served and filed on 24 July 2018.

***The notice***

[18] In the notice, the applicants' attorney identified their cause of action as arising from the Department's failure 'to appoint educators in substantive posts at public schools in and around the Eastern Cape' which left some schools without teachers while other schools could only pay teachers less than they would have been paid had the Department employed them.

[19] The notice proceeded to state that the applicants had, from as early as 2004 in one case, occupied substantive teaching posts but were paid by SGBs rather than the Department. The crux of their case was described as follows in the notice:

'This matter particularly seeks to address the concerns around the underpayment of educators by the School Governing Bodies and to direct the Department to pay educators

the difference between the amount paid to each educator by the school and the amount that the educator was entitled to in terms of the Department's salary scale.'

[20] The notice stated that the applicants had, in consequence of the Deparment's failure to employ them, 'suffered a loss, yet this loss cannot be quantified until the class action has been certified, a claims administrator appointed and documentary evidence of the loss suffered by each educator is produced and verified'. The notice continued:

'Due to the fact that the class action is as yet not certified and the loss not quantified we are not in a position to make demand of a specific sum of money. It is for this same reason that we did not give you notice of the intended action prior to instituting the application for certification of the class as we believed it would be more prudent to await certification of the class and then give notice to you once members had opted in to the class action. In this manner we would be in possession of sufficient information to quantify the claim against you.'

[21] The notice concluded with a request that the respondents condone the late notice. In response, the Department's legal advisor informed the applicants' attorney that the respondents were not willing to condone the late notice. The result was the application for condonation, which was opposed by the respondents.

[22] In order to be granted condonation, the applicants are required to establish (a) that their claims have not prescribed, (b) that good cause exists for the delay in giving notice and (c) that the respondents have not been unduly prejudiced by the failure to give them proper notice.[7] The respondents argued that not one of these requirements had been established.

***Prescription***

[23] The applicants' attorney, in his replying affidavit in the condonation application, with reference to *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape*,[8] submitted that the respondents had not established good grounds for taking the prescription point. This is misplaced. It may have had relevance to the main application, but the respondents conceded that they could not raise prescription by way of a rule 6(5)(*d*)(iii) notice. It has no bearing on the

[7] Legal Proceedings Act, s 3(2).

[8] *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC).

condonation application. In this application, the prescription point was not taken by the respondents. The Legal Proceedings Act requires that an applicant for condonation must satisfy a court that 'the debt has not been extinguished by prescription'.[9] It requires, in other words, that the court be satisfied that an applicant for condonation 'relies on an extant cause of action'.[10]

[24] In the founding affidavit in the condonation application, the issue of prescription is dealt with in three paragraphs as follows:

'[21] I submit that the claim has not been extinguished by prescription. Although the applicants' claims arise from as early as 2010, each applicant only became aware of his or her right to claim following the *Linkside* judgment in January 2015. The application was issued in January 2018 (within 3 years) and as such the claim has not prescribed.

[22] The issue of prescription is one of the issues raised by the respondent in its Rule 6(5) notice and as such will be dealt with extensively in argument which will be heard on the same day as this application.

[23] I respectfully submit that in the event that the Court hearing the main application decides in favour of the respondent and rules that the applicants' claim has prescribed this will be the end of the matter. I accordingly submit that that issue of prescription will appropriately be decided by the court hearing the application.'

[25] The judgment referred to by the applicants' attorney is *Linkside & others v Minister of Basic Education & others*,[11] which was an opt-in class action involving 90 public schools. Roberson J had made an order on 17 December 2014, with her reasons following on 26 January 2015, in which, inter alia, she directed the Department to reimburse SGBs what they had paid to teachers that they had employed in vacant substantive posts. The relief she granted was premised on the fact that the Department had been under a duty to fill vacant posts and its failure to do so had violated the rights of children attending those schools to basic education in terms of s 29 of the Constitution.

[26] Section 12 of the Prescription Act 68 of 1969, to the extent relevant to this case, provides:

'(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

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[9] Legal Proceedings Act, s 3(4)(*b*)(i).
[10] *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) para 9.
[11] *Linkside & others v Minister of Basic Education & others* ECG 26 January 2015 (case no. 3844/13) unreported.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.
(4) . . . '

[27] Reliance appears to have been placed by the applicants on s 12(3) of the Prescription Act: the applicants' attorney asserted that 'each applicant only became aware of his or her right to claim following the *Linkside* judgment in January 2015', and that 'the application was issued in January 2018 (within 3 years) of that event'.

[28] I have a number of difficulties with the applicants' reliance on s 12(3).

[29] First, the applicants themselves have not deposed to affidavits in which they say that they only became aware of their rights when the *Linkside* judgment was delivered or, indeed, when they acquired knowledge of the identity of the debtor and of the facts from which the debts arose. These are facts that lie within the personal knowledge of each applicant. Their knowledge of the relevant facts, in order to establish that their claims have not prescribed, have thus not been established by admissible evidence. Their attorney's assertion that they only became aware of their rights when the *Linkside* judgment was delivered is inadmissible hearsay evidence. That being so, on the assumption that the delivery of the *Linkside* judgment is indeed the trigger-moment for the running of prescription to commence, the applicants have not established that 26 January 2015 is the day on which they acquired knowledge of the identity of the debtor and the facts from which the debts arose.

[30] Secondly, during argument, I queried with Ms Rajab-Budlender (who appeared with Ms Sephton and Ms Finn for the applicants) why she argued that the delivery of the *Linkside* judgment, rather than the order issued on 17 December 2014, was the trigger-moment for purposes of s 12(3). She conceded, and I think fairly so, that, on her argument, the issuing of the order would have been the trigger-moment. As the order was issued on 17 December 2014 and the application was issued on 26 January 2018 the applicants' claims, on their own version, would have prescribed on 16 December 2017.

[31] Thirdly, I am in any event not satisfied that either the issuing of the order or the delivery of the judgment is the date on which prescription began to run. In *Fluxman Inc v Leveson*,[12] Leveson had entered into a contingency fee agreement with Fluxman Inc, a firm of attorneys, which represented him in a delictual claim against the Road Accident Fund. In 2008, the claim succeeded, damages were paid to Leveson and Fluxman Inc took a large percentage of the award as its fee. In 2014, when the Constitutional Court delivered a judgment that held that a contingency fee agreement that does not comply with the Contingency Fees Act 66 of 1997 is invalid, Leveson brought an application in which he sought the setting aside of the contingency fee agreement. He also sought to recover what he had overpaid. Fluxman Inc raised a prescription defence.

[32] Writing for the majority, Zondi JA followed a line of well-established case law on the point[13] and held that prescription begins to run when a litigant has the basic facts for his or her cause of action, and that knowledge that a contingency fee agreement in conflict with the Act is invalid is not such a fact, but a legal conclusion.[14] He held:[15]

'Knowledge that the relevant agreement did not comply with the provisions of the Act is not a fact which the respondent needed to acquire to complete a cause of action and was therefore not relevant to the running of prescription. This court stated in *Gore NO* para 17 that the period of prescription begins to run against the creditor when it has minimum facts that are necessary to institute action. The running of prescription is not postponed until it becomes aware of the full extent of its rights nor until it has evidence that would prove a case "comfortably". The "fact" on which the respondent relies for the contention that the period of prescription began to run in February 2014, is knowledge about the legal status of the agreement, which is irrelevant to the commencement of prescription. It may be that before February 2014 the respondent did not appreciate the legal consequences which flowed from the facts, but his failure to do so did not delay the date on which the prescription began to run. Knowledge of invalidity of the contingency fees agreement or knowledge of its non-compliance with the provision of the Act is one and the same thing otherwise stated or expressed differently. That the contingency fees agreements such as the present one, which do not comply with the Act, are invalid is a legal position that obtained since the decision of

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[12] *Fluxman Inc v Leveson* 2017 (2) SA 520 (SCA).
[13] *Truter & another v Deysel* 2006 (4) SA 168 (SCA) para 16; *Minister of Finance & others v Gore NO* 2007 (1) SA 111 (SCA) para 17; *Claasen v Bester* 2012 (2) SA 404 (SCA) paras 12-16.
[14] Paras 34 and 41.
[15] Para 42.

this court in *Price Waterhouse Coopers Inc* and is therefore not a fact which the respondent had to establish in order to complete his cause of action. Section 12(3) of the Prescription Act requires knowledge only of the material facts from which the prescriptive period begins to run — it does not require knowledge of the legal conclusion (that the known facts constitute invalidity).'

[33] It seems to me that *Fluxman Inc* is directly in point. In this matter, as in that, the applicants allege that prescription only began to run when they acquired knowledge that they had a claim against the respondents. In other words, they say their cause of action was only completed when they learned, from the *Linkside* case, that the respondents' failure to employ them in substantive posts was unconstitutional. But that cannot avail them as that is a legal conclusion and not a fact that forms part of their causes of action.

[34] The first applicant's ostensible lack of knowledge of his legal position, asserted by his attorney, is, in any event, undermined by what he said in the founding affidavit in the main application. He said that prior to 2014, when he left the employ of the SGB at the school at which he taught, he had gone to the Department's offices five times 'to assert my right to be appointed and remunerated by the Department'. This indicates that, prior to the end of 2014 at the latest, he certainly was aware of the facts upon which his cause of action relied and the identity of the debtor.

[35] From the confirming affidavits in the main application of the remaining applicants, it is likewise clear that by 2014 at the latest, but probably earlier, each of these applicants knew that they were employed by SGBs in substantive vacant posts, that the Department had failed to appoint them and that they were paid less than teachers employed by the Department. They therefore also had, prior to the end of 2014, knowledge of the identity of their debtor and of the facts from which the debts owed to them arose. That being so, their claims would, like that of the first applicant, have prescribed before the end of 2017.

[36] The applicants have failed to satisfy me that their claims have not been extinguished by prescription. On this basis alone, their application for condonation cannot succeed. I shall, however, say something of the explanation that was given, although given the disputes of fact that arise in relation to the question of prejudice, there is no need to say anything of that ground.

***Good cause***

[37] The reason why the notice in terms of the Legal Proceedings Act was not given until after the commencement of the proceedings was explained as follows in the affidavit deposed to by the applicants' attorney:

'24 The reason why the applicants failed to give notice in terms of the Act prior to the institution of legal proceedings has been alluded to above and explained in the letter.

25 It is primarily that as the class action is not yet certified and the loss not quantified it is impossible to make demand of a specific amount of money. The applicants' legal team deemed it more prudent to await certification of the class, and give notice to the respondents once members had opted in.

26 A further reason is that the applicants are not in a position to quantify their claims without access to information which the Department has in terms of salary scales and benefits payable to temporary educators as well as their appropriate level of appointment in terms of qualifications and experience.'

[38] This explanation is perhaps a bit more cryptic than the explanation given in the notice itself – that it was 'prudent' to wait until the class action had been certified, and because it was not possible to quantify the claims, notice could not be given until the claims administrator referred to in the notice of motion had been appointed 'and documentary evidence of the loss suffered by each educator is produced and verified'.

[39] From this explanation, it is clear that there was never any intention on the part of the applicants' attorneys to give notice prior to the institution of these proceedings. Indeed, on the version I have quoted, notice would only be given when Part A and Part B of the notice of motion had been granted, a claims administrator appointed and the claim of the applicants and each person who had opted in to the class action had been quantified. There are a number of difficulties with this explanation for the delay.

[40] First, it commences from the premise that notice of the quantum claimed must be given. That is not correct. Section 3(2) of the Legal Proceedings Act merely requires the notice to set out briefly 'the facts giving rise to the debt' and 'such particulars of such debt as are within the knowledge of the creditor'. But the only reason the claims were not quantified was because the applicants decided not to

quantify them (by appointing an actuary to do so). Instead, they chose to proceed on a basis that would require the respondents to quantify the applicants' claims for them, with the help of a claims administrator paid by the respondents. The effect of this was that they sought to relieve themselves of the obligation that rests on everyone claiming damages to prove their damages, and to shift the onus to the respondents to prove the applicants' damages for them.

[41] Secondly, the applicants, on the explanation given, were not going to give notice at all until the claims had been quantified. In other words, they only intended giving notice when the case had been concluded and all that remained was for the respondents to pay the amounts the claims administrator had verified as the amounts due to the applicants and all those who opted in to the class action. There would have been no purpose in giving notice at that stage and to do so would make a mockery of the purpose of the Legal Proceedings Act.

[42] Thirdly, the notice covers a very short period of time. It deals with only the period from the initiation of the proceedings until the giving of notice some two weeks after the respondents' rule 6(5)(*d*)(iii) notice had been served on the applicants' attorneys. Section 3(2)(*a*) of the Legal Proceedings Act requires notice to be given 'within six months from the date on which the debt became due'. One of the requirements for condonation is that the entire period of delay must be explained. The application for condonation is silent as to when the debts became due and what the applicants did between acquiring knowledge of the debt being due and the giving of notice.

[43] The result is that all that is before me is a rather messy, contradictory explanation for the late notice – that the applicants attorneys believed that it was not necessary to give notice, on the one hand, and that they intended giving notice, but that they were going to do so after the claims of the applicants and anyone who opted in to the class action had been quantified by the respondents and the claims administrator.

[44] In my view, these explanations leave a lot to be desired. Apart from the contradictory nature of the two legs of the explanation, the idea of giving notice only after the claims had been quantified is indeed, as the respondents suggested, bizarre. In the result, I am of the view that the explanation is not a *bona fide* explanation and the applicants have not established the second leg of the condonation enquiry – that good cause exists for the defective notice.

**The Result**

[45] The application for condonation must be dismissed. The result is that the relief sought in Part A of the notice of motion cannot be considered and the application must, to that extent, be dismissed. I shall make the appropriate orders at the end of this judgment. On the basis of the *Biowatch* principle,[16] I do not intend making a costs order in respect of either the application for condonation or Part A of the notice of motion.

**Part B of the Notice of Motion**

[46] The relief claimed in Part B of the notice of motion concerns the certification of a class action and the management of that process. Paragraph 15 of the notice of motion is the crux of this aspect of the application. It provides for the certification of the class action and it also defines the class.

[47] The remaining paragraphs of Part B seek orders authorising the Legal Resources Centre in Grahamstown to act as the legal representative of the class; making provision for the giving of notice to prospective members of the class; providing for the procedure to be followed by those members of the class who wish to opt-in; providing for the initiation of proceedings by the Legal Resources Centre; providing for the award of costs; and for leave to approach the court for directions for the further conduct of the proceedings when necessary.

[48] The respondents have withdrawn their opposition to the certification of the class and the further relief sought in Part B of the notice of motion. In the light of this concession, I intend making an order in the terms sought by the applicants. In my view, the costs of only two counsel are merited.

**The order**

[49] I make the following order.

(a) The application for condonation for the late giving of notice of the applicants' claims, as required by the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2000, is dismissed.

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[16] *Biowatch Trust v Registrar Genetic Resources & others* 2009 (6) SA 232 (CC).

(b) The application for the relief claimed in Part A of the applicants' notice of motion is dismissed.

(c) The relief claimed in Part B of the applicants' notice of motion is granted in the following terms:

1 An opt-in class is certified of all educators in the Eastern Cape Province who, between January 2010 and the date of this order:

1.1 occupied a substantive educator post allocated to a public school in terms of the Eastern Cape Department of Education's annual post establishment;

1.2 were remunerated by the School Governing Body of the public school, rather than the Eastern Cape Department of Education ("the Department");

1.3 were paid an amount less than that specified in the Department's salary scales for an educator with similar qualifications and experience in a similar post (an amount to which they would have been entitled had they been appointed and paid by the Department);

1.4 seek payment from the Department of the difference between the amount that they would have been remunerated if appointed by the Department (basic salary plus an amount in lieu of benefits) minus the amount that they were paid by their respective School Governing Bodies.

2 It is directed that the Legal Resources Centre: Grahamstown (the LRC) is authorised to act as the legal representative of the class for the purpose of seeking appropriate relief regarding the payment of the amounts owed to the class members by the Department.

3 It is directed that notice shall be given to prospective members of the class in the following manner:

3.1 The LRC is directed to publish the notice attached hereto as Annexure A on one occasion in English in the *Daily Despatch*, *The Sun* and *EP Herald* and in Afrikaans in *Die Burger*; and to do so by not later than 8 February 2019

3.2 The LRC is directed to cause Annexure A to be broadcast in isiXhosa on one occasion on an appropriate radio station, and to do so by not later than 8 February 2019; and

3.3 The respondents are directed, by not later than 8 February 2019, to circulate Annexure A to all districts and schools in the Eastern Cape province and to place it in a prominent position on the Department's website for a period of three months.

4 All educators who opt-in to the class action proceedings are directed to submit an affidavit to the LRC by not later than 8 April 2019 which sets out:

4.1 details of the educator post in which they were employed, including whether the post was listed as a substantive post on the provincial educator post establishment for that year;

4.2 the dates of their employment in that post;

4.3 their qualifications and experience as an educator;

4.4 the amount that they were paid by the public school or School Governing Body for each month of their employment in that post.

5 Upon receipt of the affidavits from those educators who wish to opt in to the class action, the LRC is directed, by not later than 8 May 2019, to file a notice of motion seeking substantive relief on behalf of the class, as well as any further affidavit or affidavits that may be necessary.

6 The respondents are directed to pay the applicants' costs in relation to Part B of the notice of motion, including the costs of two counsel and the costs of the advertisements referred to in paragraph 3 above.

7 The parties are granted leave to approach the court for directions regarding the further conduct of the class action as and when necessary.

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C Plasket
Judge of the High Court

APPEARANCES

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| For the applicants: | N Rajab-Budlender<br>S Sephton<br>M Finn<br>Instructed by<br>Legal Resources Centre, Grahamstown |
| For the respondents: | J De Waal SC<br>C Morgan |

B Brown
Instructed by:
State Attorney, East London
N N Dullabh & Co, Grahamstown

**ANNEXURE A**

**NOTICE TO CLASS**

**TAKE NOTICE THAT:**

1. A class action has been certified in the Eastern Cape High Court, Grahamstown, against the MEC, Department of Education in the Eastern Cape Province and the Superintendent-General of the Department of Education in the Eastern Cape Province in which an order will be sought directing them to pay the applicant educators who seek to recover salary owed to them. The Legal Resources Centre: Grahamstown (the LRC) of 116 High Street, Grahamstown has been authorised by the court to represent the class.
2. The class action will be brought on behalf of educators who meet the following requirements:
    2.1 The educator was appointed to a vacant substantive post by a School Governing Body (SGB). The vacant substantive post should have been filled by the Department. The salary for this post should have been paid

by the Department but was in fact paid by a public school registered as such in the Eastern Cape or by such or a school's SGB; and

2.2 the educator has suffered a reduction in his or her salary on account of SGBs being financially ill equipped to pay the same salary the educator would have received had he or she been appointed as a temporary educator by the Department.

2.3. seeks to recover the difference owed to them had they been appointed by the Department to a vacant substantive post on a temporary basis.

3. Educators who meet the requirements set out in paragraph 2 above and who wish to opt-in to the class proceedings are directed to deliver a written notice to the LRC by not later than 8 April 2019 which sets out:

3.1 the details of their employment in a vacant substantive post; and

3.2 details of qualifications to aid in an assessment of the salary to which they were entitled; and

3.3 the amounts in fact paid to them by the public school or SGB.

4. Educators who do not opt-in to the class action will not be bound by the outcome of the case, whether successful or not. An educator will not automatically form part of the class action unless they actively opt-in by sending a written notice to the LRC in accordance with paragraph 3 above.

5. Should you require more information the attorneys for the class can be contacted via telephone (046 622 9230) or email (valencia@lrc.org.za).

6. Should you choose to opt in to the class action deliver your notice to Valencia Morrison as follows:

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| Fax | 04-622 3933 |
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