

## Linkside and Others v Minister of Basic Education and Others (Linkside II) (High Court; 2015 )

### Case at a glance

#### Full citation

[Linkside and Others v Minister of Basic Education and Others \(3844/2013\) \[2015\] ZAECGHC 36 \(26 January 2015\)](#)

**Forum / Country** High Court (Eastern Cape Division, Grahamstown) South Africa

**Date of decision** 25 June 2015

#### Summary of decision

In this decision, the High Court held that, by failing to appoint educators in vacant substantive posts at applicant schools and to remunerate the educators appointed by the schools, the National Department of Basic Education ('DBE') was in breach of its constitutional and statutory responsibilities in respect of the provision of basic education and the administration and funding of public schools.

By agreeing with the applicants on all counts, Robertson J ordered the DBE to reimburse applicant schools for payments made to school-appointed educators and to temporarily appoint school educators serving in vacant posts. The Court directed the DBE to appoint a claims administrator to oversee the payments.

#### Significance to the right to education

This decision underscores the significance that courts attach to protecting the constitutional right to basic education. It emphasises that the violation of the constitutional right to education, through the repeated failure of the state to appoint teaching staff to vacant school posts and to remunerate them, constitutes exceptional circumstances empowering the courts to substitute their own plans of action for that of the government's functionaries.

This decision also demonstrates South African courts' willingness to bolster the effectiveness of judicial interventions in the constitutional right to education by allowing innovative litigation strategies and remedies. The decision is the first case in South Africa that recognises an opt-in class action (i.e. a claim action where claimants can opt in to join the claim and if they do so that are able to take advantage of the relief ordered by the court with respect to similar cases). The case is also ground-breaking in directing the DBE to appoint a 'claims administrator' to monitor the disbursement of payments to claimant schools.

#### Issues & keywords

Teachers; Claims administrator; Opt-in class action; Right to basic education; Appointment of educators;

# Context & Facts

The case has arisen from a process known in the South African education sector as ‘post provisioning’ where the DBE determines annually how many teaching posts each public school in each province is entitled to and then permanently appoints and pays teachers to fill those posts, as a mechanism to deploy educators (the court’s order in *Linkside II* refers to teaching staff as educators) from overstaffed schools to understaffed schools. The DBE has in general timeously declared educator post establishments but has repeatedly failed to appoint educators in vacant substantive posts during the years 2011 to 2014 or has regularly failed to pay the appointed educators.

As a result schools have themselves been appointing and paying educators in unfilled educator posts. The salaries paid by schools are not included in school budgets and their payment reduces schools’ financial resources needed for schools’ other activities. Schools, especially those in the economically poorest areas that do not have funds to pay educators suffer a shortage of educators.

In 2014, the DBE and the education sector trade unions entered into a settlement agreement (the ‘EEA’) which was designed to facilitate the management of the process of appointment of temporary educators to vacant positions and the transfer of serving educators to vacant posts. However, the EEA did not improve the implementation of that process at most schools.

Consequently, 32 schools in the East Cape Province applied to court for an order to require the DBE to reimburse the applicant schools for the amounts paid to temporarily employed educators and to appoint suitably qualified educators to vacant school posts. The applicant schools were represented by the Legal Resources Centre (‘LRC’), which describes itself as frequently making use of amicus curiae briefs to shape the trajectory of judicial decisions on the right to basic education in South Africa. On 20 March 2014, Alkema J, sitting as the High Court, East Cape Province, granted the order in favour of the applicant schools (*Linkside I*). The Court also certified that an opt-in class action claim can be brought by other schools on the same basis.

However, *Linkside I* faced significant enforcement challenges and the DBE failed to meet most deadlines imposed by the order. As a result, the LRC filed a contempt application against the DBE on behalf of some 90 schools in the province (*Linkside II*, being the subject case).

## Issue

Similarly to *Linkside I*, the main issues in *Linkside II* were:

- The reimbursement of the applicant schools for the salaries that the schools had to pay to school appointed educators and the recognition of the reimbursement claims as debt owed by the state.
- The permanent appointment of educators serving at applicant schools.

In addition, *Linkside II* raised the issue of effective administration of the reimbursement payments.

## Relevant legal instruments:

### Legal provisions cited:

- Section 29 (1) (a) of the Constitution of the Republic of South Africa (setting out that everyone has the right to basic education, including adult basic education)
- Section 172 (1) (b) of the Constitution of the Republic of South Africa (regarding courts' power to declare, in the context of deciding on a constitutional matter, any law or conduct which is inconsistent with the Constitution as invalid to the extent of that inconsistency and in that context to make an order which is just and equitable)
- Section 3 of State Liability Act 20 of 1977 (regarding the liability of the state to reimburse schools for salaries paid to school appointed educators)
- Sections 5 (1) (b) and 6 of the Employment of Educators Act 76 of 1998 (regarding the responsibility of the DBE to appoint permanent educators)
- Regulation 16 A 6.4 of the Treasury Regulations of March 2005 issued under the Public Finance Management Act 1 of 1999 (regarding the requirement to conduct a competitive procurement process in respect of provision of services paid for by the state)

### Case law cited:

- *Centre for Child Law and Others v The Minister of Basic Education and Others* [2012] 4 All SA 35 (ECG) (regarding failure of the DBE to make permanent appointment of educators)
- *Linkside and Others v Minister of Basic Education* (March 2014) (referred to above)
- *Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another* [2014] ZASCA 209 (regarding remedies that courts may and are obliged by the Constitution to consider)
- *Joubert Galpin Searle and Others v The Road Accident Fund and Others* [2014] 2 All SA 604 (regarding permitted deviations from the requirement for a competitive procurement process in case of urgency or emergency)
- *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC) (regarding the significance of the right to basic education in particular to the socio-economic development of poorer and black sections of the South African society)
- *Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* 2010 (2) SA 415 (CC) (regarding remedial powers of the court under Section 172 (1) (b) of the Constitution)

### International law and cases cited

- *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (in the above cited *Meadow Glen Home Owners* case the Court referred to this US case in an effort to make use of the court supervised process of enforcing court orders in the South African judiciary system).

# Decision

Robertson J, sitting as the High Court, held in favour of the applicants on all issues.

With respect to the first issue, the respondents argued that Alkema J's order was limited to the reimbursement of salary amounts paid to educators in 2014 and that this order should be limited accordingly. The High Court disagreed that the order was or should be so restricted.

With respect to the second issue, the respondents argued that the deemed appointment of educators ordered by the Court would undermine the EEA and its management by the East Cape Labour Relations Counsel; in particular, that the requirement to appoint a suitably qualified educator could be weakened. The Court decided that the order would in fact serve to remove the impediments facing the implementation of the process envisaged by the EEA and that the court had the power to substitute its own plan for the plan of the DBE in exceptional circumstances (a serious violation of the right to basic education constituting such circumstances). The Court reasoned that the order did not eliminate the requirement for the appointees to be suitably qualified and that the DBE did not raise any objections against educators serving (without appointment) in vacant posts on the basis of being unsuitably qualified.

As regards the issue of overseeing the payments due by the DBE, the respondents argued that the requirement to appoint a claims administrator was a costly solution and that a slow procurement process would need to be applied. The Court disagreed on the basis that the cost would not make a significant inroad into the budget of the DBE and that the procurement process can be dispensed with in this case due to urgency and emergency of the situation.

# Impact

The judgment of the High Court paves the way to bolstering the effectiveness of judicial interventions in the constitutional right to basic education. By directing the appointment of a claims administrator, the decision is designed to address one of the main challenges for court decisions in this area, that is, their implementation by the state.

It and the preceding decision of Alkema J are also innovative in allowing the claims to proceed as an opt-in class action claim. Class action remedy is increasingly seen in South Africa as an important tool in bringing relief to large numbers of claimants in a relatively efficient manner which would be prohibitive from the cost perspective on an individual basis.

# Commentary

The decision is consistent with earlier decisions of domestic courts cited by Robertson J (*Centre for Child Law and Others v The Minister of Basic Education and Others* [2012]). However, it is groundbreaking in terms of strategies that it allows to strengthen the implementation of the right to basic education.

The idea of the claims administrator in a class action, one of the most innovative reliefs requested in *Linkside II*, has been borrowed from the US' class action settlement model and it may prove highly useful in pursuing claims in the area of the right to basic education owing to the possible cost efficiency.

The decision demonstrates that, in their desire to improve the effectiveness of judicial interventions, the courts have become willing to apply measures which are designed to effectively replace the acts of the governmental authorities or reduce the discretion of the governmental authorities (e.g. the deemed appointment of educators in *Linkside II*). It reaffirms that, as far as the right to basic education is concerned, the courts have the power to do so under the Constitution.

However, other than as highlighted above, we have not researched whether the case has resulted in any structural (legal or practical) changes and whether the court order was actually enforced. We are not aware if the case is being appealed.

## Related cases

Please refer to *Linkside I* referred to above.

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