

REPUBLIC OF SOUTH AFRICA

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# EDUCATION LAWS AMENDMENT BILL

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*(As introduced in the National Assembly as a section 76 Bill; explanatory summary  
of Bill published in Government Gazette No 25226 of 21 July 2003)  
(The English text is the official text of the Bill)*

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(MINISTER OF EDUCATION)

[B 38—2003]

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REPUBLIEK VAN SUID-AFRIKA

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# WYSIGINGSWETSONTWERP OP ONDERWYSWETTE

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*(Soos ingedien by die Nasionale Vergadering as 'n artikel 76-wetsontwerp; verduidelikende  
opsomming van Wetsontwerp gepubliseer in Staatskoerant No. 25226 van 21 Julie 2003)  
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(MINISTER VAN ONDERWYS)

[W 38—2003]

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**“Prohibition of payment of unauthorised remuneration, or giving of financial benefit or benefit in kind to certain employees**

- 38A.** (1) Subject to subsection (2), a governing body may not pay or give to a state employee employed in terms of the Employment of Educators Act, 1998 (Act No. 76 of 1998), or the Public Service Act, 1994 (Proclamation No. 103 of 1994), any unauthorised— 5
- (a) remuneration;
  - (b) other financial benefit; or
  - (c) benefit in kind.
- (2) A governing body may apply to the employer for approval to pay a state employee any payment contemplated in subsection (1). 10
- (3) Such application must be lodged in the office of the employer and must state—
- (a) full details of the nature and extent of the payment;
  - (b) the process and resources that will be used to compensate or remunerate the state employee; and 15
  - (c) the extent of compliance with section 20(5) to (9).
- (4) The governing body must make the application contemplated in subsection (2) at least four months prior to the finalisation of the governing body’s budget. 20
- (5) Despite subsection (1), a governing body may pay travel and subsistence expenses relating to official school activities but such expenses may not be greater than those that would be payable to a public servant in similar circumstances.
- (6) An employer must not unreasonably refuse an application contemplated in subsection (2). 25
- (7) In considering the application, the employer must take into account—
- (a) the implications for the employer in terms of the employment contract and labour law;
  - (b) whether the service concerned in the application will interfere with the normal service delivery of the employee; 30
  - (c) whether the service concerned in the application has already been paid for by the employer; and
  - (d) whether the additional remuneration, other benefits or benefits in kind support the core activities and functions of the school. 35
- (8) The payment contemplated in subsection (1) must be reflected in the school’s budget, as presented to the general meeting of parents as contemplated in section 38(2).
- (9) If a governing body pays remuneration or gives any financial benefit or benefit in kind contemplated in subsection (1) to an employee without prior approval of the employer, the amount of money paid or benefit given must be recovered by the employer on behalf of the school from members of the governing body who took that decision, excluding a member of the governing body who is a minor. 40
- (10) A governing body may appeal to the Member of the Executive Council against— 45
- (a) the refusal by the employer of an application contemplated in subsection (2); or
  - (b) the failure of the employer to provide a decision on an application contemplated in subsection (2) within three months after the lodging of the application in the office of the employer.” 50

**Amendment of section 8 of Act 76 of 1998, as amended by section 16 of Act 48 of 1999 and section 11 of Act 50 of 2002**

3. Section 8 of the Employment of Educators Act, 1998 (hereinafter referred to as the “Educators Act”), is hereby amended by the substitution for subsection (7) of the following subsection: 55

“(7) Despite section 6(3)(a) and subsection (2), in the case of an educator who has been awarded a bursary by the employer to follow a course approved by the employer, the employer may transfer such an educator, with his or her consent, to any suitable post on the educator establishment of a public school, a further education and training institution or an adult basic education and training centre.”. 5

**Amendment of section 25 of Act 76 of 1998, as substituted by section 12 of Act 53 of 2000**

4. Section 25 of the Educators Act, 1998, is hereby amended by the substitution for subsections (2) and (3) of the following subsections:

“(2) An educator or an employer has a right to appeal to the Minister or the Member of the Executive Council, as the case may be, against the finding by the presiding officer of a disciplinary hearing [**that the educator has committed misconduct, as contemplated in section 17 or 18**], and against the sanction imposed in terms of section 18(3)(e) to (i). 10

(3) In lodging an appeal, the educator or employer must comply with the procedure laid down in Schedule 2.”. 15

**Amendment of section 34 of Act 76 of 1998**

5. The following section is hereby substituted for section 34 of the Educators Act, 1998:

**“Offences and penalties” 20**

**34.** Any person who—

- (a) has been duly summoned under [section 21(3)(a)] item 7(12) of Schedule 2 and who fails without sufficient cause—
    - (i) to attend at the time and place specified in the summons; or
    - (ii) to remain in attendance until excused by the disciplinary tribunal from further attendance; 25
  - (b) has been called upon in terms of [section 21(3)(b)] item 7(12) of Schedule 2 and who refuses to be sworn or to affirm as a witness; or
  - (c) fails without sufficient cause—
    - (i) to answer fully and satisfactorily any question lawfully put to that person under [section 21(3)(c)] item 7(12) of Schedule 2; or 30
    - (ii) to produce any book, document or object in that person’s possession or custody or under that person’s control which that person was required to produce in terms of the said [section 21(3)(c)] item 7(12) of Schedule 2, 35
- shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months or both [such] a fine and such imprisonment.”.

**Amendment of item 9 of Schedule 2 to Act 76 of 1998**

6. Item 9 of Schedule 2 to the Educators Act, 1998, is hereby amended by the substitution for sub-items (1), (2) and (4) of the following sub-items respectively: 40

“(1) An educator or an employer may appeal against a finding or sanction by making an application in accordance with Form E attached to this Schedule.

(2) The educator or the employer must, within five working days of receiving notice of the final outcome of a disciplinary hearing, submit the appeal form to the Member of the Executive Council or the Minister, as the case may be. 45

(4) If the Member of the Executive Council or the Minister, as the case may be, chooses to allow further representations by the educator, [or] his or her representative or an employer, he or she must notify the educator or employer respectively of the date, time and place where such representations must be made.”. 50

**Substitution of Form E of Schedule 2 to Act 76 of 1998**

7. Schedule 2 to the Educators Act, 1998, is hereby amended by the substitution for Form E of the following form:

**“FORM E**

**NOTICE OF APPEAL**

5

[DATE]

[NAME OF APPEAL AUTHORITY]

I, ....., [NAME OF EMPLOYEE OR EMPLOYER] hereby appeal against the FINDINGS and/or SANCTION that have been imposed in terms of the Disciplinary Code and Procedure on ..... [DATE] at ..... [PLACE]. 10

I attach a copy of the final outcome of the disciplinary enquiry. [THE APPEAL REQUEST IS NOT VALID UNLESS THIS DOCUMENT IS ATTACHED]

My reasons for appeal are: 15

The desired outcome of the appeal is:

I wish/do not wish [CHOOSE ONE] to provide additional evidence not available at the time of the disciplinary proceedings.

SIGNATURE OF EMPLOYEE OR EMPLOYER 20

DATE

[PERSAL NO.]

[PERSONAL DETAILS OF THE EMPLOYEE]

NB: Educators or employers may only appeal against the finding or sanction or both the finding and resultant sanction of— 25

1. suspension without pay for a period not exceeding three months;
2. demotion;
3. a fine;
4. a combination of the above sanctions together with warnings; or
5. dismissal.”. 30

**Amendment of section 1 of Act 58 of 2001**

8. Section 1 of the General and Further Education and Training Quality Assurance Act, 2001 (hereinafter referred to as the “Quality Assurance Act”), is hereby amended by the substitution for the definition of “Council” of the following definition:

“ ‘Council’ means Umalusi, the Council for General and Further Education and Training Quality Assurance [Council], established by section 4;” 35

**Amendment of section 4 of Act 58 of 2001**

9. The following section is hereby substituted for section 4 of the Quality Assurance Act, 2001:

**“Establishment of Council**

4. A juristic person to be known as Umalusi, the Council for General and Further Education and Training Quality Assurance [**Council**] is hereby established.”. 5

**Transitional arrangements**

10. (1) The employer of a state employee may not for a period of one year after the commencement of this Act— 10

(a) institute proceedings to recover unauthorised remuneration, financial benefit or benefit in kind as contemplated in section 38A(9) of the South African Schools Act, 1996, if such unauthorised remuneration, financial benefit or benefit in kind was paid or given or committed to be paid or given before the commencement of this Act; or 15

(b) take disciplinary steps against any state employee who received any unauthorised remuneration, financial benefit or benefit in kind from a governing body.

(2) If a recurring payment or giving of remuneration, financial benefit or benefit in kind has come into existence between a state employee and a governing body prior to the commencement of this Act, such remuneration or benefits must be deemed to have been authorised by the employer for a period of one year after the commencement of this Act. 20

**Short title**

11. This Act is called the Education Laws Amendment Act, 2003.

## MEMORANDUM ON THE OBJECTS OF THE EDUCATION LAWS AMENDMENT BILL, 2003

### 1. INTRODUCTION

The Bill seeks to provide for the amendment of the following—

- (a) South African Qualifications Authority Act, 1995 (Act No. 58 of 1995);
- (b) South African Schools Act, 1996 (Act No. 84 of 1996);
- (c) Employment of Educators Act, 1998 (Act No. 76 of 1998); and
- (d) General and Further Education and Training Quality Assurance Act, 2001 (Act No. 58 of 2001).

### 2. BACKGROUND

The Bill seeks to amend the Acts so as to make certain technical adjustments to clarify matters and to insert certain provisions to cover matters which are not provided for by the existing provisions of the Acts.

### 3. DISCUSSION

#### 3.1 The South African Qualifications Authority Act

3.1.1 The executive officer of the Authority is appointed in terms of subsection (8) of section 4 of the Act and not subsection (7). It is therefore necessary to effect such textual correction.

3.1.2 Given that there are three main teacher unions, section 4(3)(n) of the Act is amended so as to increase the number of the representatives of educators in the Authority from two to three.

3.1.3 Section 4(6) of the Act determines that a member of the Authority may be re-appointed only once. However, it is sometimes necessary to keep a member due to his or her expertise and experience in matters relating to the functions of the Authority. To make room for such a member, section 4 is amended to enable the Minister to extend the term of office of a member of the Authority.

#### 3.2 The South African Schools Act

During the investigation into the cost of education in public schools, requests were made to the Minister to regulate the additional remuneration to state-employed educators by governing bodies. The school fund in most public schools consists mainly of compulsory contributions by parents of learners, but in some schools, parents are kept uninformed about amounts paid to such educators and of the reasons for such additional remuneration.

In principle, all educators employed by the provincial departments, that is state-employed educators, must be compensated within the same salary ranges and on the same salary level for the same or similar duties. It is unfair and inappropriate for any state official, including educators who are being paid by their employer, to receive any additional remuneration or benefits in kind for work done in an official capacity, unless the employer gave prior approval to the official to receive such benefits.

The governing body of a school is not the employer of educators, except for those educators employed by the governing body in terms of section 20(4) of the South African Schools Act. If the school requires an educator to perform duties which do not fall within the educator's job description and working hours, such activities will require the governing body to create a specific post. The creation of a post by a governing body requires it to reflect the number of, and sufficient details of, the posts when presenting its budget in accordance with section 38 of the Act. The budget must reflect the cost relating to the employment of staff in such posts, and the manner in which such costs will be met. Once a post is created by a governing body, it must be filled in an open and transparent manner and any person may compete for such a post, as prescribed by labour laws. If a

state-employed educator is the most suitable person for the job and it does not interfere with his or her normal duties or working hours at the school, prior approval must be obtained from his or her employer by the governing body, and if approval is obtained, such an educator will be appointed to the post.

The main aim of the amendment is not to ban extra remuneration for educators employed by the state completely, but to curb the irresponsible manner in which it is done. The proper way of paying such remuneration is first and foremost to seek the approval of the Head of Department and, secondly, the remuneration must be reflected in the annual budget of the school as contemplated in section 38 of the Act.

The current position is that educators who receive such remuneration are subject to disciplinary measures in terms of sections 18(1)(h) and 33 of the Employment of Educators Act, 1998 (Act No. 76 of 1998). These provisions of the Act prohibit any educator employed by the Head of Department from receiving any remuneration or any compensation in cash without the written approval of the Head of Department. Many educators are therefore subject to disciplinary action but this is not desirable, since the additional remuneration is offered to them. This amendment seeks to address the situation in a systemic manner, by prohibiting governing bodies from making such tempting illegal offers to educators, and not necessarily by prosecuting educators for receiving such illegal donations.

The Department has observed from the comments on the Bill that the unauthorised remuneration assumes, amongst others, the following forms:

- \* topping up of salaries of state employees who are perceived as hard workers or who perform duties outside their normal working hours;
- \* in some cases, promoting a state employee who is appointed at post level one to level three in terms of the so-called “internal promotion”. The governing body pays such a state employee the difference between the salary of a level one and level three employee; or
- \* providing conditions of service which are not in line with the state employee’s conditions of service by providing cars, personal loans, home loans, entertainment allowances and similar benefits.

In terms of the Employment of Educators Act, 1998, and the Public Service Act, 1994 (Proclamation No. 103 of 1994), the state is the employer who will be responsible to the employee for all unfair labour practices if any of the employee’s remuneration or benefits are not paid over to the employee. It would be an unhealthy principle to allow an unauthorised person to determine additional remuneration or services to a state employee without the approval of the employer and may have severe financial implications for the state as employer, for the following reasons:

- \* In the recent court case of *Botha and Another v MEC: Northern Province and Others*, Case no.: J3797/98 (*unreported*), the governing body of an agricultural school topped up the salaries of state employees. The employer of the state employees refused to grant permission for the unauthorised topping up of salaries. The unauthorised topping up of salaries was paid for a specific period, whereafter a new governing body was elected. The new governing body refused to continue with the topping up of salaries and the province and the school was taken to court. The province won the case purely on the basis that right from the beginning, no approval was given for the topping up of salaries of those employees employed by the state and that it was therefore an illegal practice by the previous governing body. It is evident from the case that if there was any approval, either directly or indirectly by the employer, the province would have been liable to pay such additional remuneration on the basis of fairness and it would have meant that such persons were promoted by a person other than the employer, but that ultimately, the financial consequence would still have been with the employer. To the same effect is *Association of Professional Teachers & Another v Minister of Education and Others* (1995) 161 LJ 1048 (LC) at 1067 — 1068A,



where it was held that promotions are subject to the approval of the State. It was also held that governing bodies are not empowered to negotiate terms and conditions of employment with state employees.

- \* There is evidence that the “promotion” of state employees by governing bodies creates labour tension within institutions, as it is not based on approved criteria measures used by the employer for the promotion of employees. It is once again the employer who is held responsible for such unfair labour practices and who has to resolve such disputes.
- \* There is no uniform measure or instrument amongst schools for the awarding of additional remuneration, bonuses etc., which implies that the principle of fair and equal payment for work done is not applied consistently across the system.
- \* The election of new governing bodies is currently in process in all the provinces. There is no guarantee that governing bodies will keep to the commitments of their predecessors, which creates a huge risk to financial budgets if such commitments by governing bodies are breached.

### 3.3 The Employment of Educators Act

3.3.1 There was an omission when section 8 of the Act was amended by section 11 of the Education Laws Amendment Act, 2002 (Act No. 50 of 2002). Reference was made only to section 6(3)(a) and not to section 8(2) of the Act as well, since both sections deal with recommendations for appointment of an educator by the governing body to the Head of Department.

3.3.2 The amendment of section 25 of the Act is designed to allow the employer to appeal either to the MEC or to the Minister, as the case may be, against the finding of the presiding officer. This is helpful in cases where the presiding officer did not apply his or her mind properly to all the evidence before him or her and set the accused free despite the fact that evidence suggested otherwise. This applies to instances where the presiding officer decided on a sanction that does not match the misconduct committed by the accused.

3.3.3 Section 34 is amended so as to effect correct crossreferencing in the Act.

### 3.4 General and Further Education and Training Quality Assurance Act

The amendment of section 4 of the Act is proposed as a result of a request from the Council. The General and Further Education and Training Quality Assurance Council and its staff found it difficult to work with an institution with such a long and cumbersome name. The acronym, namely GENFETQAC, was also not satisfactory.

The Council has, with the help of professional word-smiths in the advertising world, adopted the name “Umalusi” to be used to refer to the General and Further Education and Training Quality Assurance Council. The name is derived from the Nguni “uMalusi” meaning “shepherd” or, in the African context, “guardian of the family assets”. Umalusi is to take care of some of the nation’s most valued possessions — general and further education and training. It will encourage and support, but also be firm on growth in quality through powerful and effective learning.

## **4. FINANCIAL IMPLICATIONS FOR STATE**

No additional costs are foreseen as a result of the amendments.

## **5. CONSULTATION**

The Bill was published to obtain comments from all role players.

**6. PARLIAMENTARY PROCEDURE**

The Department of Education and the State Law Advisers are of the opinion that the procedure contemplated in section 76 of the Constitution should be followed since the Bill falls within a functional area listed in Schedule 4 to the Constitution, namely "Education at all levels, excluding tertiary education".