



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 6945/2020

(1)	REPORTABLE ☒ NO ☐ YES
(2)	OF INTEREST TO OTHER JUDGES: ☒ NO ☐ YES
(3)	REVISED.

[Signature]
06/09/2022

In the matter between:

THE SCHOOL GOVERNING BODY OF
TIDIMA SECONDARY SCHOOL

APPLICANT

and

HEAD OF DEPARTMENT OF EDUCATION, LIMPOPO
MEMBER OF EXECUTIVE COUNCIL
FOR EDUCATION, LIMPOPO
SONTI CLARENCE TLOUBATLA

1st RESPONDENT

2nd RESPONDENT

3rd RESPONDENT

JUDGMENT

NAUDÉ-ODENDAAL J:

- [1] This is a review application wherein the Applicant applies that the 1st Respondent's decision to re-advertise the post of the principal at Tidima Secondary School dated 17 August 2020 be declared unlawful and invalid and be reviewed and set aside. The Applicant further applies that the 1st Respondent be ordered to appoint the Applicant's recommended candidate who was interviewed on the 6th of June 2019 within one month.

BACKGROUND FACTS:

- [2] It is common cause that on 11 September 2014, the 1st Respondent advertised a post for a principal to be appointed at Tidima High School. Various applicants applied for the post and a short-listing process took place on 10 April 2015 at the Circuit Manager's Office. The candidates short-listed were as follows:-
- (a) Margaret Thizwilondi Mathivha;

- (b) Sonti Clarence Tloubatla;
- (c) Kgabo Johannes Morifi;
- (d) Nakedi Damaris Mashoene; and
- (e) Koena Martha Letsoalo.

[3] On the evening of the 10th of April 2015 the Circuit Manager phoned the Chairperson of the Applicant and instructed him to stop the interview process. A tussle developed between the Applicant and the functionaries of the Department of Education, Limpopo Province at the district level and Sekgosesse West Circuit. At some point the recruitment function was taken away from the Applicant. This resulted in all the documents relating to the post being submitted to the Circuit office.

[4] Allegations and counter allegations were made by the parties being the Applicant and the Department's functionaries. Ultimately on 30 January 2019, the 1st Respondent sent a letter to the Applicant wherein she directed the Applicant to proceed with the recruitment process in filling the principal's post. The letter stated as follows from paragraph 2 to 4:-

- "2. *The Head of Department has granted approval for the filling of the principal's post of Tidima Secondary School.*
- 3. *The District Director is directed as follow:*

- 3.1 *The applications for the principal's post be handed back to the SGB to finalise the filling of the post;*
- 3.2 *The SGB should continue with the process from where it was when the District took over the process;*
- 3.3 *The Circuit Manager and the District Director should support the SGB in ensuring that the principal's post is filled; and*
- 3.4 *A management plan should be developed for the filling of the post.*
- 4. *The process should be expedited to ensure that the principal is appointed urgently."*

[5] As a result, the District Director for Polokwane district wrote a letter to the Applicant dated the 11th of April 2019, in terms of which the decision of the 1st Respondent was reiterated. The Applicant was informed that due to the over dragged period, the district is unable to trace the applications for the five candidates shortlisted by the Applicant. It was stated that even in the absence of the said applications, the 1st Respondent's decision still needs to be implemented and was the Applicant therefore requested to inform the five shortlisted candidates to fill in new forms and attach documents as per the advert and bring the newly filled in forms with them on the date of the interview process.

- [6] The Applicant convened a meeting on 25 April 2019 and set a date for the interviews being the 9th of May 2019. On the 9th of May 2019, the interview process however collapsed due to some candidates decided not to attend the interviews. The interviews were then rescheduled for 6 June 2019. Invitations together with a Management Plan for the post were prepared and sent out to the Circuit Manager, District Director, members of the panel, NATU, SADTU and the respective candidates. The candidates were also called telephonically and sms's were sent to them in order to ensure that they are aware of the interviews.
- [7] The candidates confirmed receipt of the invitations. Ms. TM Mathivha declined the invitation on the basis that she was appointed in another post and was no longer interested in the position in question. The candidates were given different times in their invitations to attend the interviews. On 6 June 2019 the interviews were conducted as scheduled. Three further short-listed candidates, Mashoene ND, Letsoalo KM and Morifi KJ declined to attend the interviews.
- [8] After the completion of the interview process, the Applicant recommended the 3rd Respondent who was the only interviewed person for the

appointment. It needs to be stated that the 3rd Respondent has been acting in the position for several years.

[9] On the 11th of June 2019 the Applicant submitted its recommendations of appointment of the 3rd Respondent to the Circuit Office. However, despite the fact that the Applicant made recommendations to the 1st Respondent for the appointment of the 3rd Respondent, the 1st Respondent never made the appointment.

[10] It is submitted by the Applicant that the 1st Respondent did not correspond to the recommendation. The 1st Respondent did not make the appointment and further also did not give any explanation as to why the 1st Respondent did not appoint the recommended candidate. It is further submitted that the 1st Respondent ignored the recommendations made by the Applicant and proceeded to re-advertise the post in question on or about 17 August 2020. According to the Applicant, it is this re-advertisement of the post in question that triggered the present application for review and setting aside of the decision to advertise the post in question.

[11] The Applicant's grounds for this application is that the 1st Respondent failed to comply with **Section 3(2)(b)(iii) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA")** in that in order to give effect to procedurally fair administrative action, an administrator, must give a person concerned, a clear statement of the administrative action. It was submitted by the Applicant that the 1st Respondent did not give the Applicant a clear statement of the administrative action before re-advertising the post in question. The 1st Respondent advertised the post in question without informing the Applicant of the decision to have declined a recommendation by the Applicant. In the result, in absence of the clear statement of the administrative action, the 1st Respondent's impugned decision is procedurally unfair and must be reviewed and set aside.

[12] The Applicant further submits as a ground for this review that the 1st Respondent failed to comply with **Section 3(2)(b)(v) of PAJA** in that the 1st Respondent failed to give the Applicant notice of its right to request reasons in terms of **Section 5 of PAJA**. It was submitted that the 1st Respondent never even gave a notice of the decision to decline a recommendation by the Applicant. In the absence of the decision to decline a recommendation by the Applicant and failure to give adequate

notice of the right to request reasons, the 1st Respondent failed to comply with the provisions of **Section 3(2)(b)(v) of PAJA** and therefore the impugned decision was procedurally unfair and it is unlawful and invalid and must be reviewed and set aside.

[13] As a third ground for the present application, the Applicant submitted that the action of the 1st Respondent contravenes a law or is not authorized by the empowering provision, **Section 6(2)(c) of PAJA**.

[14] The Applicant submitted that the appointment of a principal into the post in question is governed by **Section 6 of the Employment of Educators Act 76 of 1998 ("the Act")**. **Section 6(3)(a) – (l)** of the Act provides as follows:-

“(3)

(a) Subject to paragraph (m), any appointment, promotion or transfer to any post on the educator establishment of a public school may only be made on the recommendation of the governing body of the public school and, if there are educators in the provincial department of education concerned who are in excess of the educator establishment of a public school due to operational requirements, that recommendation may only be made from candidates identified by the Head of Department, who are in excess and suitable for the post concerned.

(b) In considering the applications, the governing body or the council, as the case may be must ensure that the principles of equity, redress and representivity are complied with and the governing body or council, as the case may be, must adhere to—

- (i) the democratic values and principles referred to in section 7(1);*
- (ii) any procedure collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators;*
- (iii) any requirement collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators which the candidate must meet;*
- (iv) a procedure whereby it is established that the candidate is registered or qualifies for registration as an educator with the South African Council for Educators; and*
- (v) procedures that would ensure that the recommendation is not obtained through undue influence on the members of the governing body.*

(c) The governing body must submit, in order of preference to the Head of Department, a list of—

- (i) at least three names of recommended candidates: or*
- (ii) fewer than three candidates in consultation with the Head of Department.*

(d) When the Head of Department considers the recommendation contemplated in paragraph (c), he or she must, before making an appointment, ensure that the governing body has met the requirements in paragraph (b).

(e) If the governing body has not met the requirements in paragraph (b), the Head of Department must decline the recommendation.

(f) Despite the order of preference in paragraph (c) and subject to paragraph (d), the Head of Department may appoint any suitable candidate on the list.

(g) If the Head of Department declines a recommendation, he or she must—

- (i) consider all the applications submitted for that post;*
- (ii) apply the requirements in paragraph (b)(i) to (iv); and*
- (iii) despite paragraph (a), appoint a suitable candidate temporarily or re-advertise the post.*

(h) The governing body may appeal to the Member of the Executive Council against the decision of the Head of Department regarding the temporary appointment contemplated in paragraph (g).

(i) The appeal contemplated in paragraph (h) must be lodged within 14 days of receiving the notice of appointment.

(j) The appeal must be finalised by the Member of the Executive Council within 30 days.

(k) If no appeal is lodged within 14 days, the Head of Department may convert the temporary appointment into a permanent appointment as contemplated in section 6B.

(l) A recommendation contemplated in paragraph (a) shall be made within two months from the date on which a governing body was requested to make a recommendation, failing which the Head of Department may, subject to paragraph (g), make an appointment without such recommendation."

[15] The Applicant submitted that the use of the word "must" in **Section 6(3)(g) of the Act** is instructive. This means that where the HOD has declined a recommendation by the SGB, the HOD must consider all the applications submitted for the purpose of the post and apply the requirements in paragraph (b)(i) to (iv) and appoint a suitable candidate temporarily. If after considering all the applications submitted for the post the HOD is of the view that there is no suitable candidate to be appointed temporarily, the HOD has an option to re-advertise.

[16] It was submitted by the Applicant that from the wording of the provisions of **Section 6(3)(g) of the Act**, it is clear that the HOD must before re-

advertising the post, consider all the applications submitted for that post and appoint a suitable candidate temporarily if there is such a suitable candidate. The HOD cannot re-advertise the post before considering all the applications submitted for that post and consider whether there is a suitable candidate to be appointed temporarily. Simply put, the Applicant submits that the 1st Respondent cannot re-advertise the post before complying with the provisions of **Section 6(3)(g) of the Act**.

[17] The 1st and 2nd Respondents submit that the advertisement of the post occurred on 11 September 2014 and because of various challenges, interviews were only held on 6 June 2019 after a period of five years.

[18] It was further submitted by the 1st and 2nd Respondents that the original applications filled and submitted by the shortlisted candidates were lost. The 1st Respondent was unable to comply with **Section 6(3)(g)(i) to (iii) of the Act**. It was an impossibility on the part of the 1st Respondent, as there were no applications to consider as they were lost because of the contestations between the Applicant and the District Office and the Circuit Office. Hence, the shortlisted candidates were requested to fill in new documents, however only the 3rd Respondent who was the only person to be interviewed did that.

- [19] The 1st Respondent submitted that it was barred from making an appointment in terms of the recommendations made by the Applicant based on the reasons provided. Firstly, it was of a concern that the recruitment process remained outstanding for a period of five years. Secondly, the other shortlisted candidates lost interest in the post - some were employed elsewhere and some were dismayed by the request to fill in new documents afresh, five years down the line.
- [20] The 1st Respondent further submitted that the appointment of the 3rd Respondent would not have been rational and procedurally fair. It would have disadvantaged other prospective applicants. According to the 1st Respondent, five years is a long time and a lot can happen, hence for the purpose of fairness to every educator who aspires to hold the post of principal, logic dictates that they must have a fair chance to compete. It would therefore have been irresponsible for the 1st Respondent to simply rubber stamp the recommendations made by the Applicant, even though the process was marred by irregularities.
- [21] It was further submitted by the 1st Respondent that in terms of the collective agreement reached and the relevant pieces of legislation in

particular, **Section 6(3)(c)(i) – (ii) of the Act**, which provides that the Governing Body must submit in the order of preference to the HOD a list of (a) at least three names of recommended candidates; or (b) fewer than three candidates in consultation with the HOD.

- [22] The 1st Respondent submitted that it is common cause that the 3rd Respondent was the only person who was interviewed and ultimately recommended. Such recommendation was not done in consultation with the 1st Respondent as prescribed by **Section 6(3)(c)(ii) of the Act**.
- [23] It was submitted that 1st Respondent acted in terms of **Section 6(3)(c) of the Act** which states that if the Governing Body has not met the requirements in paragraph (b), the Head of Department must decline the recommendation. Consequently, the 1st Respondent declined the recommendations made by the Applicant.
- [24] The 1st Respondent further submitted that in terms of the letter dated the 17th of January 2020, advising the Applicant that the principal's post ought to be re-advertised, the Applicant was indeed informed as the letter was received by the 3rd Respondent. In terms of **Sections 16A(1)(a), 16A(2)(b), 16A(2)(f) and (3) of the South African Schools Act, 84 of**

1996, the School principal, and in this present matter, the 3rd Respondent as an acting principal, forms part of the Applicant representing the Head of Department in the Governing Body. The principal becomes the point of call in matters involving the Governing Body. There is nothing untoward in the 3rd Respondent receiving the letter on behalf of the Applicant.

- [25] The 1st Respondent, pertaining to the process that is followed when an appointment of an educator is made, submitted that it is important to state that the Governing Body embarks on a recruitment process, whereafter it makes recommendations to the 1st Respondent to appoint.
- [26] After the interview process has concluded, the interviewing committee completes a form called "RF-1" which is used to rank the candidates during interviews and also to record a brief motivation for each candidate interviewed. Thereafter, the school governing body fills in a form called "RF-2" in terms of which they recommend candidates to the Head of Department for appointment.
- [27] These forms are then followed by a form called "RF-3" which is completed by the Circuit Manager and is addressed to the District Director. This document is a checklist to see that all the prescribed processes,

procedures and other Departmental directives have been followed before sending the said documents to the District Office. This form was however not completed as the Circuit Manager did not align herself with the recommendations made by the Applicant.

[28] It was submitted that the challenges experienced, objections raised by SADTU, and lack of "package" were recorded. The District Director was also unable to forward the documents to the 1st Respondent and the challenges experienced were outlined. This included the fact that only one candidate was interviewed, candidates declining to attend interviews and letters to that effect were not presented by the Applicant. However, the biggest concern was the lack of documentation that was lost between the Circuit Office and the School.

[29] The 1st and 2nd Respondents submit that with the difficulties as mentioned, the 1st Respondent could not with a clear conscience make the appointment as recommended by the Applicant and that the 1st Respondent in re-advertising the position acted in the best interest of the school and prospective employees. In conclusion, it was submitted that the 1st Respondent could not have acted otherwise as she did not have the documents before her as they were lost.

[30] The reasons provided by the District Director for the re-advertising of the post, dated 17 January 2020, were directed for the Applicant's attention to the Applicant, Tidima Secondary School, Sekgosese West Circuit, but were however received by the 3rd Respondent on the 22nd of January 2020. The reasons provided are as follows:-

- "2. Kindly be informed that the Head of Department has taken a decision to re-advertise the principalship post of your school Tidima Secondary.*
- 3. The decision is taken as a result of the following reasons amongst others:-*
 - 3.1 The filling of the principalship post of Tidima Secondary School has taken an unreasonable long time to fill. It is almost five (5) years since the post was advertised.*
 - 3.2 Given this length of time, the authenticity of the applications and related records is questionable.*
 - 3.3 The filling of the principalship post is very critical to ensure the smooth management and curriculum delivery at the school; and*
 - 3.4 Therefore the selection process should be above board..."*

- [31] In my view, in essence, the 1st Respondent only gave two reasons for the re-advertisement of the post namely, the fact that the filling of the post has taken an unreasonably long time and the fact that the authenticity of the applications and related record is questionable. All the reasons stated by the 1st Respondent now in this application in my view were stated as an after-thought as it did not form part of the reasons provided to the Applicant in the letter dated 17 January 2020.
- [32] None of the two reasons provided by the 1st Respondent in the letter dated 17 January 2020 are however in my view valid reasons. Firstly, it is common cause that the filling of the post took an unreasonably long time. This fact was known when it was confirmed in the 1st Respondent's letter dated the 30th of January 2019 wherein it was stated that the 1st Respondent has approved the filling of the principal's post of Tidima Secondary School and that the District Director is directed to hand back the applications for the principal's post to the Applicant to finalise the filling of the post and further that the Applicant should continue with the process from where it was when the District took over the process.
- [33] The Applicant furthermore wrote a letter to the District Director on 10 April 2019 wherein the Applicant requested the District Director to facilitate the

departmental support due to the Applicant through the circuit, as well as that the Applicant be granted permission to proceed with the interviews under any condition that might avail itself, as long as it does not prejudice the Collective Agreement 01 of 2008.

[34] After the aforementioned letter was sent to the District Director, the District Director wrote the letter dated 11 April 2019 to the Applicant wherein it was stated that following the 1st Respondent's decision on the above matter, due to the over dragged period on filling this post, the district is unable to trace the applications for the five candidates shortlisted by the Applicant. It was stated that even in the absence of the said applications, the 1st Applicant's decision still needs to be implemented and were the Applicant requested to inform the five shortlisted candidates to fill in new forms.

[35] In my view the fact that the candidates documentation were lost, cannot now as an after-thought be used as the main concern for the re-advertisement of the post. None of the grounds provided by the Respondents for the re-advertisement of the post are valid as all these issues and facts were already taken into account prior to the interviews having been conducted.

- [36] The 1st Respondent did not decline the appointment on the basis that the Applicant failed to ensure that the principles of equity, redress and representivity were complied with. The 1st Respondent furthermore did not decline the appointment on the basis that the Applicant submitted fewer than three candidates and in any event if the Applicant submitted fewer than three candidates, such submission may be made in consultation with the Head of Department. Furthermore, the fact that the Applicant submitted only the 3rd Respondent's name without having consulted the 1st Respondent is in any event not one of the grounds upon which the 1st Respondent declined to appoint the 3rd Respondent.
- [37] The 1st Respondent furthermore did not decline the appointment on the basis that the Applicant failed to meet the requirements in **Section 3(b) of the Act**.
- [38] In my view, the 1st Respondent failed to give consideration to **Section 3(f) of the Act** which states that despite the order of preference in paragraph (c) and subject to paragraph (d), the Head of Department may appoint any suitable candidate on the list. It is common cause that the five candidates were shortlisted after due process has been followed. It can be accepted

that all five candidates met the requirements to be appointed in the post. During the interview process, only one candidate remained available and was ultimately interviewed. There is nothing indicative thereof that the 3rd Respondent is not a suitable candidate to be appointed especially in light thereof that he has acted in the position for many years.

[39] The 1st Respondent furthermore failed to give effect to the provisions of **Section 3(g) of the Act** in terms whereof the 1st Respondent, once having declined to make an appointment must consider all the applications submitted for that post, apply the requirements in paragraph (b)(i) to (iv) and despite paragraph (a) appoint a suitable candidate temporarily or re-advertise the post. There is no indication that the 1st Respondent applied the requirements in paragraph b(i) to (iv) before summarily re-advertising the post.

[40] In the result it cannot be found that the 1st and 2nd Respondents acted reasonably and rationally in declining to make an appointment and summarily re-advertising the post. In the result the application for review stands to succeed.

[41] The Applicant however also applied that this court orders the 1st Respondent to appoint the 3rd Respondent, as the Applicant's recommended candidate interviewed on the 6th of June 2019 within one month from the date of this order.

[42] Regarding the Applicant's prayer that the 1st Respondent be directed and ordered to appoint the recommended candidate, **Brand JA** had the following to say in **Kimberley Junior School v Head Northern Cape Educations Department [2009] 4 All SA 135 (SCA) at p144i-145a:-**

"Apart from the principle of separation of powers, which dictates that a court should be hesitant to usurp executive functions, there was in this case not even a proper recommendation by the SGB as contemplated by Section 6(3)(c). In the circumstances, both the SGB and the HOD should, in my view, be afforded the opportunity to perform their respective functions in terms of Section 6(3)(c) in a proper manner."

[43] In my view, although the present matter can be distinguished from the **Kimberley Junior School matter supra**, the 1st Respondent should also be given an opportunity to perform its respective functions properly without the interference of the court.

[44] In **Intertrade Two v MEC Road and Public Works and Another [2008]**

All SA 142 (Ck) at para 46 Plasket J held as follows:-

"These constitutional principles mean that courts, when considering the validity of administrative action, must be wary of intruding, even with the best of motives, without justification into the terrain that is reserved for the administrative branch of government. These restraints on the powers of the courts are universal in democratic societies such as ours and necessarily mean that there are limits on the powers of the courts to repair damage that has been caused by a breakdown in the administrative process."

[45] **Section 8(1)(c) of PAJA** provides:

"Remedies in proceedings for judicial review:

(1) The court or tribunal, in proceedings for judicial review in terms of Section 6(1), may grant any order that is just and equitable, including orders-

...

(c) setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases-

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action..."

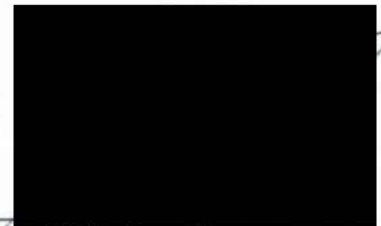
[46] In my view, the present matter should be referred back to the 1st Respondent for reconsideration by the 1st Respondent and a proper application of the provisions of **Section 6(3) of the Employment of Educators Act, 76 of 1998**.

[47] The only issue remaining is the issue of costs. It was submitted by the 1st and 2nd Respondents' counsel that in the event of the 1st and 2nd Respondents being successful in the opposition of the application, the 1st and 2nd Respondents will not seek costs against the Applicant.

[48] The Applicant however persisted and applied for costs against the 1st and 2nd Respondents. In my view, there is no reason why the general rule applicable to costs in that the costs should follow the event, should not be applicable in the present matter.

[49] I therefore make the following order:-

1. The 1st Respondent's decision to re-advertise the post of the principal at Tidima Secondary School dated 17 August 2020 is reviewed and set aside.
2. The matter is remitted back to the 1st Respondent for reconsideration and compliance with Section 6(3) of the Employment of Educators Act, 76 of 1998.
3. The 1st and 2nd Respondents are ordered to pay the Applicant's costs of this Application.



M. NAUDE-ODENDAAL
JUDGE OF THE HIGH COURT,
POLOKWANE

APPEARANCES:

HEARD ON:

18 JULY 2022

JUDGMENT DELIVERED ON:

6 SEPTEMBER 2022

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None