

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 3304/2022

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED
DATE 25/10/2022 SIGNATURE [REDACTED]	

In the matter between:

**THE SCHOOL GOVERNING BODY OF
BOTLOKWA SPECIAL SCHOOL**

APPLICANT

And

**DISTRICT DIRECTOR: LIMPOPO DEPARTMENT
OF EDUCATION, CAPRICORN NORTH
HEAD OF DEPARTMENT OF EDUCATION, LIMPOPO
MEC FOR EDUCATION LIMPOPO PROVINCE
LETLADI JOHN MABITSELA**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT**

JUDGEMENT

KGANYAGO J

- [1] The fourth respondent is an educator, and during the beginning of 2021 he was declared in excess at the school he was working at. Botlokwa Special School was identified as the school where he was supposed to be transferred to occupy the post number 15 of deputy principal in terms of the rationalisation and redeployment process (R & R). The fourth respondent also showed interest to be transferred to Botlokwa Special School, and also met the requirements for the post number 15 deputy principal. However, the principal of Botlokwa Special School rejected the transfer of the fourth respondent to his school on the ground that the transfer did not meet the operational requirements of the school due to the nature of their establishment and its unique needs.
- [2] That led to the second respondent advertising the post of deputy principal at Botlokwa Special School on 1st September 2021. The applications were received by the applicant and shortlisting were done. The fourth respondent did not apply for the position of deputy principal Botlokwa Special School. Interviews were held and the applicant made recommendations for the appointment of deputy principal, which recommendations they submitted to the second respondent to either confirm or decline the appointment.
- [3] According to the first to third respondents (respondents), before the successful candidate could be appointed, on 12th December 2021 the fourth respondent lodged a grievance dissatisfied with his rejection in terms of the R & R process. The respondents instituted their investigations and found that the fourth respondent was prejudiced by not being placed to the post of deputy principal through the R & R process as he had met all the requirements. Based on the

outcome of the investigation, the first respondent notified the circuit manager that the post of deputy principal Botlokwa Special School has been nullified and that the process of R & R must continue with the placement of the fourth respondent. The applicant was duly notified of the process which the respondents were now taking.

- [4] That led to the applicant on 5th April 2022 instituting the urgent review application against the respondents. The fourth respondent did not file any opposing papers. The applicant in their review application are seeking orders (i) that the first respondent's decision to nullify the deputy principal's post no 15 at Botlokwa Special School be declared unlawful and invalid and be reviewed and set aside; (ii) and that the third respondent be ordered to consider the applicant's recommendations *de novo* and make the appointment of deputy principal at Botlokwa Special School *de novo* within 10 days from the date of the order.
- [5] The applicant has submitted that after submitting the recommendations to the second respondent for appointment to be made by the second respondent, the applicant expected the second respondent to act in terms of section 6 of the Employment of Educators Act¹ (Educators Act) to confirm or decline the appointment. The respondents conceded that after the recommendations were received by the second respondent, the second respondent was supposed to have acted in terms of section 6 of the Educators Act. However, the respondents have submitted that the first respondent had nullified the process of the interviews as result of the grievance that they have received from the fourth respondent. Further that the wording in their letter which stated that the

¹ 76 of 1998

post of the deputy principal was “nullified” has not been correctly captured, as their intention was to nullify the process of the interviews, and continue with the R & R process.

- [6] The applicant has brought its review application in terms of the *Promotion of Administrative Justice Act*² (PAJA). The applicant’s grounds for review are (i) that the respondents’ action is unlawful; (ii) the action was taken for a reason not authorised by empowering provision; (iii) the action contravenes a law or is not authorised by empowering provision; (iv) the decision was procedurally unfair; and (v) non-compliance with section 3(2)(b)(v) of PAJA. What this court is called upon to determine is whether the first respondent had the powers to nullify the post of the deputy principal and/or the interviews which were properly held and completed; and also whether the second respondent was compelled to act in terms of section 6 of the Educators Act once he/she had received the recommendations from the applicant.
- [7] As per the wording of the letter of the 17th February 2022 from the first respondent to the Circuit Manager Sekgosese, the district had taken a decision to nullify the deputy principal post no 15 of Botlokwa Special School, and further that they were continuing with the placement of the fourth respondent at the school that he had identified as per R & R cluster vacancy. However, the respondents in their answering affidavit have stated that the wording of the letter had not been correctly captured, as their intention was to state “nullify the process of the interviews” and not the post.

² 3 of 2000

[8] Whether the nullification was for the post or the interviewing process, it is not in dispute that when the first respondent was taking that decision, it was exercising public authority which amounted to an administrative action, which the affected party may review in terms of PAJA. In terms of section 33(1) and (2) of the Constitution, everyone has a right to administrative action that is lawful, reasonable and procedurally fair, and further that everyone whose rights have been adversely affected by an administrative action, has the right to be given written reasons.

[9] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*³ O'Regan J said:

"What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interest involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."

[10] The process of nullification of the post and placement of the fourth respondent in terms of the R & R process was initiated and finalised by the first respondent. Section 6(3)(a) of the *Employment of Educators Act*⁴ (EEA) provides as follows:

³ 2004 (4) SA 490 (CC) at 513B-D

⁴ 76 of 1998

“Any appointment, promotion or transfer to any post on the educator establishment of a public school or a further education and training institution, may only be made on the recommendation of the school governing body of the public school or council of the further education and training institution, as the case may be, and if there are provincial department of education concerned who are in excess of the educator establishment of a public school or further education and training institution due to operational requirements, that recommendation may only be made from candidates identified by the Head of Department, who are so in excess and suitable for the post concerned.”

- [11] The fourth respondent was placed to the post of deputy principal Botlokwa Special School as he was regarded to be in excess at his previous school. As per section 6(3)(a) of the EEA, it is the second respondent who was supposed to have identified the fourth respondent and the suitable placement for him, and not the first respondent. Counsel for the respondents has submitted that the second respondent had verbally delegated the first respondent carry out those duties sometime during December 2021. He could not give the exact date as to when the alleged delegation of powers was allegedly given to the first respondent by the second respondent.
- [12] In terms of section 7A(6)(a) of the Public Service Act, 1994 (PSA), the head of the principal department had the power to delegate some of his/her powers. Section 7A(8)(b) of the PSA provides that any of the delegation of powers or authorisation to perform a duty shall be in writing. The onus is on the respondents to show that the alleged delegation by the second respondent to the first respondent was properly made. (See *Chairman, Board on Tariffs and Trade v Teltron (Pty) Ltd*⁵). The respondents have no full details of when the alleged delegation of power was allegedly verbally given to the first respondent,

⁵ 1997 (2) SA 25 (A) 31F-G

except to say that it was during December 2021. Even if the respondents had a date as when the alleged delegation was verbally given, it would still have been invalid as section 7A(8)(b) of the PSA has expressly stated that the delegation of power or authority shall be in writing. Therefore, the decision by the first respondent to nullify the post and/or the process of the interviews was unlawful.

- [13] It is common cause that the interviews for the vacant post of deputy principal Botlokwa Special School were conducted by the applicant, and thereafter the applicant's submitted their recommendations to the second respondent for his/her consideration. The respondents are not challenging anything in relation to the process which the applicant has followed in interviewing the candidates for the vacant post of deputy principal Botlokwa Special School. The only conclusion to be reached is that the interviews conducted by the applicant regarding the vacant post of the deputy principal Botlokwa Special School was conducted in fair manner.
- [14] In terms of section 6(3)(a) of the EEA the appointment of an educator to any post may only be made on the recommendation of the governing body of the public school. In the case at hand it will be the applicant who will made a recommendation to the second respondent as to who should be appointed to the vacant post of the deputy principal Botlokwa Special School. The applicant had indeed submitted their recommendations to the second respondent. On receipt of the recommendations, the second respondent may either confirm or decline the recommendations.

[15] Section 6(3)(b) of the EEA has limited the circumstances under which the second respondent may decline the recommendations by the applicant, and has listed five grounds. Those grounds are:

- (i) where any procedure collectively agreed upon or determined by the Minister for appointment, promotion or transfer has not been followed;
- (ii) the candidate does not comply with any requirement collectively agreed upon or determined by the Minister for the appointment, promotion or transfer;
- (iii) the candidate is not registered, or does not qualify for registration, as an educator with the South African Council for Educators;
- (iv) sufficient proof exist that the recommendation of the said governing body or council, as the case may be, was based on undue influence; or
- (v) the recommendation of the said governing body or council, as the case may be, did not have regard to the democratic values and principles referred to in section 7(1).

[16] The second respondent in the case at hand did not even consider the recommendations of the applicant, but instead the first applicant had nullified the post. The EEA does not make any provision for the nullification of the process of interviews after the interviews have been properly held. Even if it does I have already found that the first respondent was not properly delegated to nullify the post and/or the process of the interviews, and the action taken by the first respondent was a nullity, and of no force and effect. The reasons given by the first respondent to nullify the post was that the fourth respondent had lodged a grievance, which after their investigations, they found it to have merit. However, there is no provision provided for that in the EEA for the procedure

followed by the first respondent. The first respondent had nullified the post of the deputy principal for a reason not authorised by any empowering provision.

[17] The second respondent was bound to have acted in terms of the EEA on receipt of the recommendations from the applicant, which was to either confirm or decline. If the second respondent was to decline, it was supposed be on the grounds listed in section 6(3)(b) of the EEA, and not to nullify the post. What the respondents could have done was to invite the applicant for their input before they took that decision, since the procedure they were following was not authorised by any empowering provision. By inviting the applicant after a decision was taken and already communicated to the applicant and the fourth respondent did not solve or mitigate the problem, the damage was already done. It is trite that once an administrative decision has been taken, it will remain valid until set aside by a court of competent authority. Therefore, the procedure which the first respondent has followed in nullifying the post of the deputy principal was unfair.

[18] Under the circumstances, the decision of the first respondent to nullify the deputy principal's post no 15 at Botlokwa Special School was unlawful and invalid, and stands to be reviewed and set aside. Since the second respondent did not consider the recommendations of the applicant before the post was nullified, it will be in the interest of justice if the matter is referred back to the second respondent to consider the recommendations *de novo*.

[19] In the result I make the following order:

19.1 The applicant succeeds with its review application, and the decision of the first respondent to nullify the deputy principal's post no 15 at

Botlowa Special School is declared unlawful and invalid, and therefore reviewed and set aside.

19.2 The matter is remitted back to the second respondent for her/him to consider the applicant's recommendations *de novo* and either confirm or decline the recommendations within 30 days from date of this order.

19.3 The first, second and third respondents to pay the costs of this application on party and party scale.



KGANYAGO, J

JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLOKWANE

APPEARANCES:

Counsel for the applicant	: Adv Tebeila
Instructed by	: Israel Maenetja Attorneys
Counsel for the respondent	: Adv ZS Mothupi
Instructed by	: State Attorney Polokwane
Date heard	: 13th October 2022
Electronically circulated on	: 25th October 2022