



IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBELEY)

Case No: 308/2018 & 561/2018

Heard On: 14/02/2019

Delivered: 06/09/2019

In the matters between:

**Kathu Primary School
The School Governing Body of
Kathu Primary School
and
The Head of the Department of
Education, Northern Cape
The Member of the Executive
Council for Education in the
Northern Cape
Mr Carl Wilhelmus Du Plessis
Mr John David Wilson
Mr Jasper Martin Venter**

1st Applicant

2nd applicant

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

5th Respondent

AND

**Seodin Primary School
The School Governing Body of Seodin
Primary School
and
The Head of the Department of Education,
Northern Cape
The Member of the Executive Council for
Education in the Northern Cape
Mr Phillip Johannes Van Schalkwyk
Mr MA Van Zyl
Mr Zacharias Petrus Möller
Mr G Els**

1st Applicant

2nd Applicant

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

5th Respondent

6th Respondent

Coram: Williams J et Pakati J

JUDGMENT

PAKATI J

- [1] The two applications concern the legality of the decision taken by the Head of Department to decline the recommendations by the School Governing Bodies. They were argued the same day due to the similarities in the relief sought against the respondent. They involve Kathu Primary School ("Kathu Primary"), and Seodin Primary School ("Seodin Primary"), both public schools for learners from Grade 1 to 7 (Kathu Primary) and Grade R to 7 (Seodin Primary) possessed with juristic personality by virtue of the provisions of section 15 (1) of the South African School Act, 84 of 1996, as amended and both School Governing Bodies duly elected and constituted as envisaged in section 16 (1) of the South African Schools Act¹, the first and second applicants. The first and second respondents in both applications are the Head of the Department of Education, Northern Cape ("HoD"), and the Member of the Executive Council for Education in the Northern Cape ("MEC").
- [2] In the Kathu Primary application Messrs Carl Wilhelmus Du Plessis, John David Wilson and Jasper Martin Venter, are the third to fifth respondents, respectively.
- [3] Regarding the Seodin Primary School application, Messrs Phillip Johannes Van Schalkwyk, MA Van Zyl, Zacharia Petrus Möller and G Els, are third to sixth respondents, respectively.
- [4] In Kathu Primary the HoD declined to appoint Mr Du Plessis as departmental head in post number 20706/0097 and in Seodin Primary, Mr Van Schalkwyk as departmental head in Afrikaans home language, Grade 4 and Social Science Grade 4, post number 201706/0103 and Mr Möller also as departmental head in Afrikaans home language, Grade 7 and Economic and Management Sciences,

¹ 84 of 1996 as amended

also Grade 7, post number 201706/0104. The SGBs contend that the HoD's administrative decision to decline their recommendations for the appointments is unlawful and ought to be reviewed and remedied in terms of section 6(2) of the Promotion of Administrative Justice Act² (PAJA) and seek an order appointing the educators mentioned above in the respective posts within seven days of the Court order. No relief and/or cost order is sought against the second respondent, the MEC for Education in the Northern Cape. The MEC accepts that no costs order is sought against him and will abide the decision of this court. No relief and/or costs order is sought against Messrs Du Plessis, Wilson and Venter (Kathu Primary) and van Zyl and Möller (Seodin Primary). The HoD opposes both applications.

[5] The applicants record the following as grounds of review:

5.1 The action was taken because irrelevant considerations were taken into account or relevant considerations were not considered and/or

5.2. That the action itself is not rationally connected to:-

- (i) The purpose for which it was taken and/or;
- (ii) The purpose of the empowering provision and/or;
- (iii) The reasons given for it by the administrator and

5.3 That the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

² Act 3 of 2000

- [6] The purpose of the Kathu application is that the first respondent be directed and ordered to appoint in his permanent employ, with immediate effect, the third respondent, M Carl Wilhelmus Du Plessis, as the Departmental Head in Mathematics Grade 6-7 & Economic and Management Science Grade 7 (post number 201706/0097), as per the recommendation of the second applicant dated 08 August 2017.
- [7] In the Seodin application the applicants seek the appointment of Mr Phillipus Johannes Van Schalkwyk with immediate effect as the departmental head, Afrikaans home language, Grade 4 and Social Science, Grade 5 (post number 201706/0103), and Mr Zacharias Johannes Möller, as departmental head, Afrikaans home language Grade 7 and Economic and Management Science, Grade 7 (post number 201706/0104), as per the SGB's recommendation dated 21 August 2017.
- [8] When a post of an educator becomes available a certain procedure as provided for in Chapter B of the "Personnel Administrative Measures" (B5 Advertising and filling of educator posts) commonly known as PAM has to be followed. PAM is the consolidation of the terms and conditions of employment of educators determined in accordance with section 4 of the Employment of Educators Act, No 76 of 1998 ("The Educators Act"). The procedure entails:
- "11.3.1 The vacant posts are advertised in a Vacancy List published by the Department in the Government Gazette;
- 11.3.2 The Department receives and acknowledges receipt of applications and conducts an initial sifting process to eliminate applications of those candidates who do not comply with requirements for the post(s) as stated in the advertisement and thereafter hand over the applications to the relevant school's SGB. (It must be stated at this point already that the minimum requirements for a Post Level 2-post such as the HOD-post at the school, as referred to in the applicable in the Vacancy Circular, is an educational qualification of Matric plus at least a 3-year tertiary qualification, as well as registration the South African Council of Educators (SACE);

11.3.3 The SGB of the public school appoints a Shortlisting and Interviewing Committee ("the Shortlist Committee"), which committee shortlists the candidates according to certain criteria set by it, and according to a score sheet, upon which interviews are conducted by the Shortlist Committee with those shortlisted candidates;

11.3.4 The Shortlist Committee grades and scores candidates during the interviews on certain key performance areas and a questionnaire compiled by it, after which it makes its recommendations in order of preference of candidates, ranked from 1 to 3, to the SGB, based on the performance of each candidate during the shortlisting and interview process;

11.3.5 The SGB then considers the Shortlist Committee's recommendations and in turn makes its recommendations in order of preference, also ranked from 1 to 3, also based upon the terms of section 6 (3) (c) (i) of the Educators Act to the HOD who then appoints the suitable candidate in the vacant post in terms of the provisions of section 6 (3) (d) of the Educators Act." My underlining

- [9] The HoD employs educators in the public schools in the Northern Cape. Among others, it is tasked with the implementation of the education law and policy in the province. It also supplies human resources which include the appointment of departmental educators at public schools and appointment of principals, deputy principals and HoD's. The HoD receives applications for advertised positions, a function mostly delegated by the HoD to the applicable district office where the school is situated. Then a sifting process is subsequently done by the Department and the applications. Those which comply with the minimum requirements are handed over to the SGB of the school concerned.
- [10] The HoD is an appropriate functionary for the appointment of all educators employed in the Department. Section 6 (3) of the Educators Act provides that the appointments at a public school can only be made on the recommendation of the SGB of that specific public school as indicated above. My underlining
- [11] The refusal to make the appointments in respect of both schools was conveyed to the applicants in letters dated 23 November 2017, the contents of which are similar and read as follows:

"Re: Recommendation for appointment of a department Head at your school, Post Number[s]: 201706/0097, [201706/0103 and 201706/0104]"

We refer to the abovementioned matter as well as your recommendation for the appointment of a Departmental Head at your school.

After thorough consideration of your recommendation for the appointment at your school, my office hereby declines the recommendation made for such in terms of section 6 (3) (e) of the Employment of Educators Act. It has come to my attention that the available pool and quality of candidates who applied for the post is not satisfactory enough to take the school forward in terms of education outcomes.

My office has further considered all the applications that were received for the vacancy in terms of section 6 (3) (g) of the Act and remains unsatisfied that these applications will address the requirements as mentioned above.

Given this, and acting in terms of section 6 (3) (g) (iii) of the Act, it is my decision that the vacancy will be re-advertised to attract a larger pool of applicants."

[12] The applicants contend that mere reference to section 6(3)(e) was the only reason conveyed to them by the HoD for declining their recommendations without addressing the specific non-compliance with the provisions of section 6(3)(b) of the Educators Act. Instead the HoD in the above letter specifically complains of the available pool and quality of candidates who applied not being suitable to advance the schools in terms of education outcomes. This attitude taken by the HoD is, so the argument goes, incomprehensible in view of the fact that the HoD (or his department) was in charge of the initial sifting process where the applicants without the necessary qualifications were excluded from the process. The candidates recommended by the SGBs therefore all complied with at least the minimum requirements for the posts which is irreconcilable with the stance taken by the HoD in declining the recommendations.

[13] The applicants furthermore allege that the processes of shortlisting and interviewing the qualifying applicants conformed with the relevant legislative prescripts. All the applicable attendees at the shortlisting and interview meetings were given proper notice

thereof. No disputes were declared by any of the Trade Unions on behalf of their members.

- [14] In Kathu Primary School five candidates were interviewed and du Plessis was recommended as the first choice, Wilson, second and Venter, third. In Seodin Primary Van Schalkwyk was the third choice for the Grade 4 head of department post, while Van Zyl and Möller were ranked first and second.

Regarding the Grade 7 head of department post, Möller was ranked first choice with Els and Van Schalkwyk respectively second and third trial.

- [15] The Kathu Primary SGB made its recommendation in order of preference to the HoD on 08 August 2017 and the Seodin Primary SGB, on 24 August 2017.

- [16] After receiving the letter from the HoD declining the recommendations on 23 November 2017, the applicants made numerous representations to the HoD to reconsider his decision, but no responses were forthcoming. Kathu Primary thereafter launched its application on 08 February 2018 where after Seodin Primary's application followed on 12 March 2018.

- [17] In response to an enquiry from the SA Teachers Union (SATU) on 29 November 2017, regarding the non-appointment of their member Mr Du Plessis at Kathu Primary and the reasons therefor, the Director: Legal Services in the Department of Education wrote back on 14 February 2018 stating that:

"Our letter dated 23 November 2017 does not adequately capture the reasons for the department declining the School Governing Body's recommendations. The Head of the Department has applied his mind and subsequently concluded that the provided recommendation does not assist the department in the achievement of a broad representation within the said school. The current profile

at the said school is mainly male and its Senior Management Team only consists of males.

In our pursuit to comply with the democratic values and principles as referred to in section 7(1) of the constitution and section 6(3)(b) in stating that the aforementioned SGB did not consider the equity, redress and representation component. The SGB failed to outline how the only female, who is also qualified and currently holds the position of a departmental head at another school not fit and does not meet their standards."

[18] Thereafter and on 01 March 2018 the HOD himself responded to the SATU enquiry as follows, after outlining the regulatory framework:

"... Now, taking the above into account and the reasons for my office acting in terms of section 6(3) (e) of the Act, the following becomes very clear. The educator establishment of the school consists of 39 educator posts and of these posts 32 are post level 1 posts, 4 Head of Department post (PL2) 2 deputy principal posts and 1 principal post.

The incumbents of the posts are (i.3 PL1) are further broken down as follows;

1. 26 white females,
2. 2 coloured females,
3. 4 white males.

Head of Department posts are as follows;

1. 3 white females,
2. 1 white male

Deputy principal

1. 2 white males

Principal

1. 1 white male

Learner Population

The school comprises of 1569 learners in total as at the time of the interviews. Of the mentioned amount 625 are white learners, 455 African learners, coloured learners 482 and Indian learners are 7.

You must appreciate that your educator component (i.e. PL1) is almost entirely white while there is an under-representation of Africans in the school management team. What compounds the matter is that your school management team is entirely white. Your office must appreciate that it is required of the governing body to adhere to the principles of redress, equity and representivity. The recommendation of the school does not suggest that this has been the case. The school merely states that the fifth ranked candidate was not up to the standard the governing body required.

The letter that was dispatched to the school incorrectly conveys the sentiments of my office. My office considerably holds the view that, since your recommendation does not address the principles as set out in section 7 especially

where it concerns equity and redress. The governing body has not demonstrated a concerted effort to address equity.

My office must concede that the contents of its letter dated 23 November 2017 creates the impression that it is about the quality of candidates when in fact we hold the view that the market has not been adequately tested to throw equity and redress through the window. It is in light of this that my office is unable to provide you with the information and documents as requested since it has never been our view that the current candidates are of poor quality. For that we apologize for the misunderstanding”

[19] The HoD dispatched a similar letter to the principal and chairperson of the SGB, Seodin Primary on 24 April 2018 wherein the current educator component is set out as follows:

“The educator establishment of the school consists of 19 educator posts and of these posts, 16 are post lever 1 posts, 1 head of department post (PL), 1 deputy principal post and 1 head of department post (PL), 1 deputy principal post and 1 principal post.

The incumbents of these posts are (i.e. PL1) are further broken down as follows:

1. 10 White females;
2. 1 African female; and
3. 5 White males.

The head of department post is as follows:

1. 1 White female

The post of deputy principal:

1. 1 White Female

The post of principal:

- 1 White male

Learner population:

The school comprises of 845 learners in total as at the time of the interviews. Of the mentioned number, 419 are White learners, 343 African learners and 83 Coloured learners.

You must appreciate that your educator component is almost entirely white while there is an under representation of Africans in the school management team while a significant number of learners are actually African. What compounds the matter is that your school management team is entirely white. Your office must appreciate that it is required of the SGB to adhere to the principles of redress, equity and representivity. The recommendation of the school does not suggest that this has been the case

The letter that was dispatched to the school incorrectly conveys the sentiments of my office. My office considerably holds the view that, since your recommendations in respect of both posts does not address the principles as set out in section 7, especially where it concerns equity and redress. The SGB has not demonstrated a concerted effort to address equity.

My office must concede that the contents of its letter dated 23 November 2017 creates the impression that it is about the quality of candidates when in fact we hold the view that the market has not been adequately tested to throw equity and redress through the window."

[20] The applicants dispute that the reasons relating to representivity, equity and redress as contained in the letters of 14 February 2018, 01 March 2018 and 24 April 2018, had informed the HoD's decision to decline their recommendations. Had that been the case the HoD, who took 3 months to consider the recommendations, would have stated so specifically in these letters declining the recommendations. These reasons as well as the points *in limine* taken by the HoD (which will be elaborated upon herein), so it is contended, are merely afterthoughts in an attempt to justify the clearly irrational decision of the HoD.

[21] According to the applicants, they are entitled to the relief sought. They submit that the HoD's decision to decline the SGBs' recommendations and to re-advertise the posts constitutes an administrative action as defined in section 1(a)(ii) of PAJA for which the HoD remains liable. The applicants allege that they exhausted all internal remedies in order to resolve the issue to avoid litigation, but all in vain. The learners have been prejudiced, the argument goes. These positions would never be filled in the near future taking into account that the HoD wants it to be re-advertised. This is so because the vacancy lists for promotional posts are mostly published once a year.

[22] The Hod's main defences can be summarised as follows:

- [22.1] The interview committees, in preparing their recommendations, failed to take into account the need to redress the imbalances of the past and prepare and submit proper motivations, setting out clearly how the appointment of each candidate it recommended would promote equity, redress representivity at the school in order for the HoD to apply its mind;
- [22.2] The applicants failed to comply with the prescribed shortlisting and interview procedures of the Department. Not only was the SGBs' motivation misleading and unclear, it was also non-compliant with the obligations placed on the SGBs in terms of the legislative and other prescripts.
- [22.3] Section 6(3)(d) of the Educators Act, states that when the HoD considers a recommendation contemplated in subsection 6(3)(c) he must, before making an appointment, ensure that the SGB has met the requirements in subsection 6(3)(b) of the Act. In terms of subsection 6(3)(e) the HoD is obliged to decline the recommendation of the SGB if it has not met the requirements in subsection 6(3)(b) of the Act;
- [23] In addition the HoD took certain points *in limine* i.e;
- [23.1] The relief sought by the applicants in seeking an order that the HoD be directed to appoint the recommended candidates is incompetent since s 6(3)(e) of the Educators Act prohibits the HoD from accepting a recommendation by the SGB where the SGB has not met the requirements contained in section 6(3)(b). In any event, even if the recommendations are acceptable, the HoD still retains a discretion to appoint any of the alternative candidates instead;

[23.2] There were no proper recommendations; and

[23.3] Personal interest/bias.

[24] During argument Mr Pietersen for the HoD however withdrew the *in limine point* relating to recommendations most properly made.

[25] The parties are *ad idem* that the roles of both the HoD and the SGBs are governed by section 6(3) of the Educators Act. The authority to appoint, promote or transfer an educator employed by the provincial government of education vests in the HoD in terms of section 6(1). This authority is subject to section 6(3) of which the relevant portion provides:

“(3) (a)...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...

(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...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 as an educator with the South Africa 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.

...”

[26] Section 7(1) is referred to in section 6(3)(b)(i) above and it provides:

"7 (1) In making of any appointment or the filling of any post on any educator establishment under this Act due regard shall be had to equality, equity, and the other democratic values and principles which are contemplated in section 195 (1) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), and which include the following factors, namely-

- (a) The ability of the candidate; and
- (b) The need to redress the imbalances of the past in order to achieve broad representation."

WHETHER OR NOT THE DECISION TO DECLINE WAS TAKEN BECAUSE IRRELEVANT CONSIDERATIONS WERE TAKEN INTO ACCOUNT OR RELEVANT CONSIDERATIONS WERE NOT CONSIDERED.

[27] Section 6(3)(e) provides that if the governing body has not met the requirements in paragraph (b), the Head of Department must decline the recommendation. As already indicated the parties know that the HoD and the SGBs are governed by section 6(3). Section 6(3)(b) obliges the SGB that it '*must ensure*' that it complies with the requirements before the HoD makes any appointment according to its recommendations. My underlining

[28] The Educators Act obliges the SGB to ensure that the principle of equity, redress and representivity are complied with (section 6 (3) (b)) and must adhere to the democratic values and principles referred to in section 7(1). At the same time the HoD has a duty to work towards achieving a workforce that is broadly representative of the people of South Africa. Section 195(1) of the Constitution provides that our Public Administration must be governed by the following democratic values and principles enshrined in the Constitution-

- "(a) A high standard of professional ethics must be promoted and maintained
- (b) Efficient, economic and effective use of resources must be promoted.
- (a) Public Administration must be development-orientated.
- (b) Services must be provided impartially, fairly, equitably and without bias.
- (c) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

- (d) Public administration must be accountable.
- (e) Transparency must be fostered by providing the public with timely, accessible and accurate information.
- (f) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
- (g) Public Administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."

[29] In terms of section 4 of the Employment Equity Act ("the Equity Act")³ the HoD as the employer, must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Section 15 (2) provides that affirmative action measures implemented by a designated employer must include-

- "(a) Measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;
- (b) Measures designed to further diversity in the workplace based on equal dignity and respect of all people;
- (c) Making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunity and are equitably represented in the workforce of a designated employer;
- (d) [subject to the provision that such measures include preferential treatment and numerical goals but excludes quotas] measures to
 - (i) Ensure the equitable representation of suitably qualified people from designated groups in all levels in the workforce;
 - (ii) Retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development."

[30] In **SOLIDARITY AND OTHERS v DEPARTMENT OF CORRECTIONAL SERVICES AND OTHERS**⁴ the Constitutional Court as per Zondo J stated:

"It is accepted that the workforce that is required to be achieved is one that is inclusive of all these racial groups and both genders, the next question is whether there is a level of representation that each group must achieve or whether it is sufficient if each group has a presence in all levels no matter how insignificant their presence may be. In my view, the

³ Act 55 of 1998

⁴ 2016 (10) BCLR 1349 (CC)

level of representation of each group must broadly accord with its level of representation among the people of South Africa.”

[31] In **HEAD OF WESTERN CAPE EDUCATION DEPARTMENT AND OTHERS v GOVERNING BODY OF POINT HIGH SCHOOL AND OTHERS**⁵ the Court held:

“The first step is for the governing body to make a comparative assessment of the candidates and to compile a list of those whom it recommends for appointment in its order of preference. This it must do in accordance with the precepts in section 6 (3) (b). The HOD is then required to consider whether the governing body has arrived at its recommendation by a process which meets those precepts. It does not appear that he has a perceptible discretion in this regard. If he is of the view that the requirements have not been met, he is bound by section 6 (3) (e) to reject the governing body’s recommendation as a whole and to proceed in terms of section 6 (3) (g). If he is satisfied that the stipulated requirements have been complied with, he may appoint a candidate from the governing body’s list in terms of the discretion vested in him by section 6 (3) (f). The law is now clear that, in exercising this discretion, the HOD is required to act reasonably and, by taking into account all of the relevant factors and considering the competing interests involved, to arrive at a decision which strikes a “*reasonable equilibrium*”. The court has no power to review this decision purely because there may be another, perhaps better, “*equilibrium*” which could have resulted by attributing more weight to some factors and less to others. If that struck by the decision-maker is reasonable, then it must stand.”

[32] The HoD in declining to make an appointment considered that after more than twenty years into our democracy at the time, of the thirty nine educator posts at Kathu Primary only two were Black. The entire management of the school comprises of White educators. Notably, at the time of the interviews the school (Kathu Primary) had 1569 learners in total, of which 625 were White and 944, Black. The appointment of du Plessis, especially taking into account that the HoD has a constitutional and legislative mandate to ensure that transformation is adhered to when vacancies are filled would not assist the HoD to achieve his mandate.

⁵ [2008] 3 All SA 35 (SCA) at 41d-g

[33] At the time of the interviews the school (Seodin Primary) comprised of 845 learners in total. Of this number, 419 were White, 343, Black and 83, Coloured. The SGB accepted the Shortlisting and Interview Committee's recommendations. It mentions, *inter alia*, that a particular candidate was recommended "*according to merits.*" No detail and full motivation was given as to why the candidates were recommended. In respect of Möller for post 1 and Van Schalkwyk and Els for post 2 the recommendation fails to state whether or not these candidates were suitable for appointments and why.

[34] The HoD took into account the educator establishment of the schools. Of 39 educator posts in Kathu Primary 32 were post level 1, 4 head of department, 2 deputy principals and 1 principal. 26 educators were White females, two Coloured females and four White males. In Seodin Primary on the other hand of 19 educator posts 16 were post level 1, 1 head of department, 1 deputy principal and 1 principal. The HoD in both schools made the following comment when he declined the recommendations by the SGBs:

"You must appreciate that your educator component is almost entirely White while there is an under-representation of Africans in the school management team. What compounds the matter is that your school management team is entirely White. Your office must appreciate that it is required of the governing body to adhere to the principles of redress, equity and representivity. The recommendation of the school does not suggest that this has been the case."

In this regard it could not be said that the SGBs fulfilled their role to ensure equity, redress and representivity when it made its recommendations.

[35] Zondo J in *Solidarity supra* at paras [41] and [42] added:

"[41] It would be unacceptable, for example, for a designated employer to have a workforce of five hundred employees fifty of whom occupy senior management positions but only five of those senior management positions are held by African

people when twenty are held by White people, fifteen by Coloured people and ten by Indian people despite the fact that in the population of South Africa, African people are by far the majority. Such a workplace could not conceivably be said to be broadly representative of the people of South Africa.

[42] Why do I say that a designated employer is required to work towards achieving a workforce that is broadly representative of the people of South Africa? I say so because, upon a proper construction of the [Equity Act] read with the relevant provisions of the Constitution the Public Service Act...and the Correctional Services Act, that is what is required."

- [36] Whilst it may be that the HoD can be criticized for not properly elaborating on his reasons for declining the recommendations in his letter of 23 November 2017, he was fully aware of the lack of representivity at the respective schools as is obvious from his follow-up correspondence. In my view it therefore cannot be said that his decision to decline the recommendations was based on irrelevant considerations.

WHETHER OR NOT THE DECISION OF THE HOD IS RATIONAL

- [37] The applicants argue that the HoD's decision to decline their recommendations and re-advertise the positions was not rationally connected to the purpose for which it was taken or the empowering provision and/or the reasons given for it by the administrator. The HoD submits that if one has regards to Chapter 3 of the Employment of Educator Act read with the Constitution, the Equity Act, PAM and the Vacancy Circular the legitimate government purpose is not merely to employ educators but to ensure that substantive equity is achieved.
- [38] Rationality, however, imposes a less onerous standard than reasonableness.⁶ In **TRINITY BROADCASTING (Ciskei) v INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**⁷ Howie P held:

⁶ Bel Porto School Governing Body v Premier, Western Cape and Another 2002 (3) SA 265 (CC) at para [46]

⁷ 2004 (3) SA 346 (SCA) at para [20]

"[20] In requiring reasonable administrative action, the Constitution does not, in my view, intend that such action must, in review proceedings, be tested against the reasonableness of the merits of the action in the same way as in an appeal. In other words, it is not required that the action must be substantively reasonable, in that sense, in order to withstand review. Apart from that being too high a threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as substantively *unreasonable*: *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* . As made clear in *Bel Porto*, the review threshold is *rationality*. Again, the test is an objective one, it being immaterial if the functionary acted in the belief, in good faith, that the action was rational. Rationality is, as has been shown above, one of the criteria now laid down in s 6(2) (f) (ii) of the Promotion of Administrative Justice Act. Reasonableness can, of course, be a relevant factor, but only where the question is whether the action is so unreasonable that no reasonable person would have resorted to it (see s 6(2) (h))."

[39] In **PHARMACEUTICAL MANUFACTURERS ASSOCIATION OF SA AND ANOTHER: IN RE EX PARTE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**⁸ Chaskalson P had this to say:

'[90] Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.'

FURTHER ASPECTS REGARDING THE SHORTLISTING AND INTERVIEW PROCEDURES.

[40] It is worth mentioning that letters inviting the shortlisted candidates for interviews were dated 02 August 2017. The said invitations were inviting the candidates for interviews to be held on 04 August 2017, giving the candidates only two days' notice. It is clear from the

⁸ 2000 (2) SA 674 (CC) at para [90]

papers that the shortlisting took place on 01 August 2017. Paragraph B.5.4.5 of PAM provides that the SGB is responsible for convening of the Interview Committee and they must ensure that all relevant persons/trade unions are informed at least five working days prior to the date, time and venue for the shortlisting, interviews and the drawing up of the preference list. My emphasis

- [41] Mr Mok-Otto, one of the shortlisted candidates in Kathu Primary stayed in Aliwal North, Eastern Cape. He was employed as a PL2 HoD teacher at Aliwal North Primary School. He withdrew from the interviews due to the short notice period of two days. In his affidavit he states that he was unable to attend the interview due to lack of sufficient time to generate funds for transport from Aliwal North to Kathu. Had he been given the normal five to seven days period to attend the interviews he would have been able to attend. He did not inform the school of his withdrawal because he says he was unaware that he could challenge the short notice period.
- [42] According to Ms Samantha Mothibi, a legal administration officer in the HoD's office and Ms Anita Jansen, the Acting Deputy Director: Recruitment and selection responsible for the recruitment and selection of all teachers in the Department who were asked to make an objective scoring of the shortlisted candidates for the post found that Mok-Otto was an equity candidate and could have scored the highest in the shortlisting. The two officials also found that some of the candidates were underscored which made the process unfair. It would be correct to conclude that he was prejudiced by the two day notice period that did not comply with paragraph B.5.4.5 of PAM. This, in my view, nullifies the whole interview process.

- [43] The HoD was also concerned by the fact that two candidates, Ms Kivedo and Mok-Otto were both highly academically qualified and already teaching at PL2 HoD level. To them, the post would only have resulted in a lateral transfer. It also did not appear correct that they could only be scored one out of five for language.
- [44] The applicants insist that due process was followed at the shortlisting and interview meetings. It became apparent that Mr Titus, a SADTU member, was not present during the interviews. The minutes of a meeting held on 04 August 2017 reflect that he apologised in advance saying he was not going to be there early as he had another commitment. On 02 August 2017 he telephonically advised the school that he would be unable to attend the interviews. The NCK 19 and 21 Forms clearly show that neither Mr Titus nor any SADTU member was present during the interviews conducted on 04 August 2017. The absence of a SADTU member from the interviews is said to have made Ms Kivedo, the only African candidate, uncomfortable, taking into account that the panel was all White. Ms Kivedo confirmed this in an affidavit dated 10 May 2018.

BIAS (KATHU AND SEODIN PRIMARY SCHOOLS)

- [45] The HoD points out to what can be referred to as bias by Mr Louis Steyn, the deponent to the founding affidavit in the Kathu matter, who was a parent of a Grade 7 learner at the same school and apparently a reference of du Plessis. This clearly appears on NCK1 Du Plessis's CV. Mr Steyn was also the chairman of the Shortlisting and Interviewing Committee at the same school for the very post. He took part in both committees and did not recuse himself.
- [46] Regarding Seodin Primary Mr Laubscher, the headmaster, was the reference of both Van Schalkwyk and Möller. He also wrote testimonials for them which were attached to their CVs. By virtue

of the fact that he was the headmaster of the school, he is a member of the Interview Committee. He was also appointed by the SGB as *ex officio* member of the Shortlisting and Interview Committee. The minutes of the Shortlisting and Interview Committee meeting held on 28 June 2017 show that Mr Laubscher was present and did not recuse himself.

[47] Paragraph 6.13 of the Vacancy Circular published by the Department on 05 June 2017 in terms of section 5 of the Educators Act read with Measure 3 in Chapter B of the Personnel Administrative Measures (PAM) ("the Vacancy Circular") provides that members of the Interview Committee must recuse themselves for the duration of the discussion and decision making on any issue in which the members have a personal interest. Section 26 of the South African Schools Act, 84 of 1996 ("the Schools Act") provides:

'A member of a governing body must withdraw from a meeting of a governing body for the duration of the discussion and decision making in any issue in which the member has a personal interest.'

[48] Messrs Steyn and Laubscher clearly had a personal interest in the career advancement of du Plessis, Van Schalkwyk and Möller as indicated above. Both were present when the interviews were conducted and when the Shortlisting and Interview Committee made their recommendations to the SGBs. The impression that as the candidates' references they felt strongly that these candidates should succeed even before the commencement of shortlisting and interview process, would not be unfounded.

[49] Regarding the applicants' prayer that the HoD be directed and ordered to appoint the recommended candidates Brand JA had this to say at p144i-145a of *Kimberley Junior School v Head Northern Cape Educations Department* [2009]4 All SA 135 (SCA):

"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.”

[50] In the instant case the SGBs and the HoD should also be given an opportunity to perform their respective functions properly without the interference of the court. Moreover, the demographics of the educator establishment at Kathu Primary and the recommendation of the SGB of yet another White male and the fact that Van Schalkwyk and Möller are relatively young (Seodin Primary) would also affect transformation in the schools for a considerable period of time. The learners would not be prejudiced because there have been educators throughout.

[51] In my view, for reasons mentioned above the HoD acted reasonably and rationally in declining to appoint the recommended candidates in terms of section 6 (3) (d) due to non-compliance with sections 6 (3) (c) of the Educators Act. He then had to comply with section 6 (3) (g). He already made his election, that of re-advertising the positions, correctly in my view. In **INTERTRADE TWO v MEC ROAD AND PUBLIC WORKS AND ANOTHER**⁹ Plasket J held:

“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.”

[52] 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-

⁹ [2008] All SA 142 (Ck) at para 46

(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..."

[53] In my view the applicants did not make out a proper case for the review and setting aside of the HoD's decision. Therefore the applications must fail.

COSTS:

[54] Mr Merabe, who appeared for the applicants, contended that they raised constitutional issues, ie, the principle of legality and the right to basic education and that therefore the principle in **BIOWATCH TRUST V REGISTRAR, GENETIX RESOURCES AND OTHERS** 2009(6) SA 232 (CC) should be applicable. He submits that they should not be burdened with a costs order if they are unsuccessful and that each party should pay its own costs and if successful there should be no reason to deprive them of a favourable costs order.

[55] Mr Petersen for the HoD during argument conceded that a review in terms of PAJA constitutes a constitutional issue. (See *Harrielall v University of Kwazulu-Natal* 2018(1) BCLR 12 (CC) paragraph 17). In accordance with the general principle applicable in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs. (*Biowatch*)

Whilst this concession is correctly made, it would in addition be unfair to saddle the applicants with a cost order where the applications were brought primarily as a result of the unclear reasons provided by the HoD for declining the recommendations.

[56] In my view a proper costs order is for each party to pay its own costs.

In the circumstances I grant the following order in respect of each of applications no 308/2018 and no 561/2018

- 1. The application is dismissed.**
- 2. Each party is ordered to pay its own costs.**

BM Pakati

I Concur

CC Williams

For Applicants: Adv MJ Merabe
 M Janse Van Rensburg
 c/o Elliot Maris Wilmans & Hay

For 1st Respondent: Adv F Petersen
 Mjila & Partners