

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)

CASE NO. : 3743/2017

Heard on : 03 May 2018

Date delivered: 07 August 2018

In the matter between:

**MDLANKOMO JUNIOR SECONDARY SCHOOL,
LIBODE**

First Applicant

**SCHOOL GOVERNING BODY, MDLANKOMO
JUNIOR SECONDARY SCHOOL**

Second Applicant

ANDISWA MADULINI

Third Applicant

And

**MEMBER OF EXECUTIVE COUNCIL FOR
THE DEPARTMENT OF EDUCATION,
EASTERN CAPE**

First Respondent

**HEAD OF DEPARTMENT, DEPARTMENT
OF EDUCATION, EASTERN CAPE**

Second Respondent

JUDGMENT

MAJIKI J

[1] The applicants approached court seeking an order in the following terms:

That the:

- (1) second respondent (HOD)'s decision of 08 May 2017 declining the second applicant's (SGB) recommendations of 8 August 2016 be declared unlawful, invalid and set aside;
- (2) second respondent's delay in appointing a permanent principal in Mdlankomo Junior Secondary School be and is hereby declared unlawful, invalid and accordingly set aside.
- (3) second respondent be and is hereby directed to forthwith appoint a permanent principal in Mdlankomo Junior Secondary School, Libode.
- (4) Second respondent be ordered to consider and decide the second applicant's recommendation dated and submitted on 8 August 2016.
- (5) second respondent be and is hereby ordered to advise the applicants of his decision referred to in paragraph 3 and 4 above within seven days of taking thereof.

The application is opposed by the respondents, the second respondent has filed opposing affidavit for that purpose.

[2] The main support for the seeking of the orders is that the second respondent's decision of 8 August 2016, to decline the recommendation to appoint the third applicant, is irrational, not in accordance with the empowering statutes and inconsistent with the rule of law. Further, the applicants were not given notice of the proposed decision, to enable them to make representations

against the taking of the decision or afford them an opportunity to deal with the shortcomings that were in the recommendation form.

[3] It is common cause that the third applicant applied and was recommended by the second applicant for the position of the principal of the first applicant. The position had not had a permanent incumbent since about year 2014. In a letter addressed to the district director, dated 8 May 2017, annexed to the founding and answering affidavits, the department of education's superintendent general did not approve the second applicant's recommendations and instead made certain directives, having the effect of having the appointment process started afresh. This constitutes a second round of re-advertisement of the position after a third court application that relates to the issues surrounding the appointment of the principal for the school.

[4] It is also common cause that the recommendation form and the process of recommendation had certain shortcomings which will be dealt with later in this judgment. The reason for the declining to approve the third respondent's appointment appear in the letter of 8 May 2017 but according to the second respondent those constitute only a summary of the decision. The applicants did not request the copy of the record in terms of rule 53 of the Uniform Rules. It however appears that the review is brought in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Section 6(2) (a)(i) provides:

“A court or tribunal has power to judicially review an administrative decision if the administrator who took it was not authorised to do so by the empowering provision.”

[5] The applicants made various averments pointing to the history of challenges in the applicant school, caused by lack of leadership, indecisiveness of the department and disingenuity of the respondents, among others. I do not regard most of these as central to the determination of issues herein.

[6] The respondents have referred to Employment of Educators Act 76/1998 (the Act) and Personnel Administration Measures (PAM) published by the Minister of Basic Education on 12 February 2016, as legal and policy framework he acted in accordance with, in declining the recommendation for the appointment.

According to the applicants, only a failure to comply with section 6(3)(b) of the Act can constitute a valid basis for and empower the third respondent to decline the recommendation of the second applicant and nothing else. In support hereof the applicants rely of the provisions of section 6(3) (e).

According to the applicants section 6(3)(e) does not refer to section 6(3)(c).

Furthermore, the decision was not preceded by a legal process, there is no rational correction between the process and the decision. There being no legal process, there was no means by which the decision was taken.

[7] The issue to be determined in this matter is whether a decision based on another legal framework other than the provisions of section 6(3)(b) could give rise to a binding, lawful and valid decision or only the one based on the said section can have that effect. Further, whether it was necessary to afford the applicants an opportunity to make representations before the second respondent's decision of 8 August 2016.

[8] Section 6(3) of the Act provides:

“(b) in considering the applications, the governing body or the council, or 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 maybe, must adhere to-

(i) *The democratic values and principles refer 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 appointment, promotion or transfer of educators with 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 or council as the case may be (as amended by Further Education and Training Colleges (Act 16/2006)).*
- (c) *The governing body or the council as the request may be (as amended) must submit in order of preference to the head of department at least three names of recommended candidates; or fewer than three candidates in consultation with head of department.*
- (d) *When head of department considers the recommendations contemplated in paragraph (c), he or she must before making an appointment ensure that the governing body or council as the case maybe (as amended) had met the requirements in paragraph (b).*
- (e) *If the governing body or the council, as the case may be, has not met the requirements in paragraph (b) the head of the department the government must decline the recommendation.*
- (f) *.....*

- (g) *If the Head of the Department declines the recommendation he or she must –*
Consider all the applications, submitted for that post; apply the requirements in paragraph (b) (i) to (iv) ... ”

Section 7(1) provides:

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 other democratic values and principles which are contemplated in section 195 (1) of the Constitution of the Republic of South Africa, 1996 (Act No. 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 post in order to achieve broad representation.”*

Section 4 provides:

“(1) Notwithstanding anything to the contrary contained in any law but subject to the provisions of this section, the Labour Relations shall determine the salaries and other conditions of service of educators. (My emphasis). The government notice publishing PAM government gazette number 396684 refers to PAM as consolidation of the terms of employment of educators determined in terms of section 4 of the Act.”

[9] It is not clear from the papers what documents had been sent to the second respondent. The respondents attached part A, which is the portion to be completed by the relevant SGB after interview process and the verification of

all documentation attached in respect of the third applicant only, who was the first ranking recommended candidate, she had scored a total average score of 282 as scored by the interview panel.

[10] In respect of the second candidate only her names, persal and identity numbers and her average score, indicated as 205 appeared under paragraph (9). She was referred as being another remaining shortlisted applicant recommended for the appointment. Another page contained a list signatures of interviewing panel consisting of:

Dlepu N- Educator

Zono N- Parent

Mampangashe- Secretary Parent

Mdikane A – Parent

Baliwe S- Chairperson, Parent

LL. Mgixigxa- His signature seems to be the resource person.

The paragraph of recommendation indicated the third applicant, it is signed by the chairperson of the governing body and is dated 08 August 2016. The District director signed indicating that the recommendation is supported, on 08 September 2016.

[11] In the circumstances, I am not able to know what information was before the second respondent when considering the application of the second recommended candidate. This would have been available had the applicant utilised rule 53 of the Rules.

[12] The relevant part of the letter of 8 May 2017 containing the decision sought to be set aside is framed as follows;

“on perusing the submission and attachments, I have noted the following:

1. *The bulletin was published in 2015, with interviews only taking place more or less one year later on 8 August 2016.*
2. *There were only two names recommended to the HOD - see PAM paragraph B.5.4.13. There was no consultation with the HOD to only submit two names.*
3. *Form D does not indicate the SACE registration number of the applicant.*
4. *Questions 7, 8 and 9 were not completed by the candidate.*
5. *Form D was not signed by the SGB Chair.*
6. *Appendix D was not completed and not signed by the deputy director HRA.*
7. *Form C1 page 4 was not signed by union reps - see PAM paragraph B.5.4.3.4.*
8. *Form C1 page 5 was not recommended by cluster Chief Director.*

Due to these crucial omissions, I therefore cannot approve the recommendation for the appointment of Ms Madulini as principal of Mdlankomo Junior Secondary School.

I hereby direct that:

1. *The vacant post for principal shall be advertised as soon as possible in the bulletin, and ;*

2. *The whole process for the appointment for a principal shall start de novo, and;*
3. *The District Director shall personally ensure that the process of appointing a principal for Mdlankomo Junior Secondary School shall not be unnecessarily delayed”.*

[13] As a start, I propose to measure the reasons appearing above, against the provisions of section 6(3)(b). It is common cause that the application did not comply with 6(3)(b) (iv), in that the applicant’s SACE registration number was not indicated. As regards 6(3)(b) (ii)(iii), they refer to procedure and requirement “*collectively agreed upon or determined by the minister for appointment..... of educators*”.

PAM in the government notice is set to be consolidation of terms and conditions of employment of educators determined in terms of section 4 of the Act. Term A.1.1. of PAM states that PAM is applicable to all educators as defined in the Act.

Term B.5.4 provides:

“B.5.4.1 – Interview Committees must be established at educational institutions where vacancies are advertised.

B.5.4.2 – The Interview Committee must comprise:

B.5.4.3.4 - One union representative per union that is a party to the provincial chamber of the ELRC.

The union representatives will be observers to the shortlisting, interviews and drawing of preference list.

B.5.4.13 - repeats what is required by section 6 (3)(c) of the Act.”

[14] Section 4.1 of the Act on which PAM is said to be determined in terms of Provides:

“Notwithstanding anything to the contrary contained in any law but subject to the provisions of this section, the Labour Relations Act or any collective agreement concluded by Education Labour Relations Council, the Minister shall determine the salaries and other conditions of service of educators’.

[15] The applicant avers that, PAM is not binding; also, the outstanding information regarding SACE registration could have been requested or is already in the department’s system. Further, with regard to submitting fewer than three candidates, the HOD was represented by the acting principal Mr Dlepu in the process.

[16] In my view the applicants seem to minimise the requirement of Section 6 (3)(c) by stating in reply that Mr Dlepu, the acting principal stood in as HOD delegated representative, in the process. It is not the applicants’ case in the founding affidavit that Mr Dlepu was specifically consulted with a view of submitting two names for recommendation. It is not clear what the number of the candidates who applied, shortlisted and interviewed was. In the circumstances, I can accept that neither the HOD nor Mr Dlepu was consulted as required by section 6(3) (c) and 5.4.13 of PAM.

The applicant says SACE Certificate with the registration number was attached with documentation sent to the second respondent. The respondents disputes this. Even in the court papers such is not attached nor is the registration number furnished, therefore section 6(3)(b)(iv) was not complied with. I have to accept the version of the respondent that same was not furnished. I doubt that it would be expected that with educators already in the system the second respondent has look for their information which is not furnished by the educator or him/herself. If the intention was to exempt those educators, such

would not be a requirement that it be established that they are so registered. The provisions of section 6(3)(e) therefore immediately kick in, the second respondent has to decline the recommendation.

[17] The issues that had to be dealt with in **School Governing Body of Ntilini Junior Secondary School and Others v Makitshi and Others [2009] ZAECMHC23** and **Kimberly Junior Secondary School v Head of Northern Cape Education Department 2010 (1) SA 217 SCA** are different to the issue in this matter. In both decisions it was found that the jurisdictional requirement of the existence of the SGB's recommendation was not met, such recommendation was lacking, therefore the HOD's power in terms of section 6(3)(a) could not be exercised. In the present case the decision that is challenged is the one declining to appoint, in line with the recommendation.

[18] As regards PAM being binding, PAM is said to be applicable to all educators as defined in the Act. In **Godwin vs Minister of Labour and Others 1951 (2) SA 605**, the phrase conditions of service had been considered in the context of section 64 (1) of the **Industrial Conciliation Act 26/1937** at **609 F–G** the wider meaning *comprehends* “*all the circumstances of an employee's employment...*”

At 611 D-E it is stated “*the engagement, suspension, discharge, etc., of the employees may fall within the ambit of the expression conditions of employment*” PAM represents terms and conditions of educators, in **National Professional Teachers Organisation of South Africa (NAPTOSA)** website page PAM is referred to as encapsulating collective agreements, of coordinating Bargaining Council (PSCB) and Education Labour Relation Council. This is what is envisaged in section 6 (3)(b)(ii)(iii). In my view, there can be no conflict between PAM and the Act or provisions of Section 4 of the Act.

[19] The requirement of a number of candidates to be interviewed is also contained in the Act. The requirement of a trade union representative is an agreement that is sought to ensure that the provisions of section 6 (3)(b)(v) are adhered to. It appears from the applicant's case itself that **South African Democratic Teachers Union (SADTU)** exists in the area and has an interest in the matter, there is no indication that it declined to participate.

In my view, on these omissions alone, the second respondent was entitled and justified to decline the recommendation. I therefore do not agree that the decision was not in accordance with the empowering statute. This is over and above the failure to comply with section 6(3)(b)(iv). The relevant parts of PAM provide a mechanism to achieve what the statute requires, it is therefore applicable and binding to all educators defined in the Act.

[20] With regard to whether the respondents should have called on the applicants to make representations, the application and the recommendations constitute representations on the basis of which a decision to accept or decline them has to be made. It is not clear what further representations would be made. There was no decision made to take away an existing right that was to be affected adversely by the decision. I therefore agree with the respondents that there would have been no need to call for further representations. The second respondent neither interfered with an existing right of the second applicant to recommend nor any in as far as the third applicant is concerned.

[21] The second respondent called on the district director to personally ensure that the process of appointment is not unnecessarily delayed. This addresses prayer 3 of the notice of motion.

[22] Prayers 4 and 5 of the notice of motion have no place. The letter of 8 May 2017 communicated a decision taken by the second respondent.

With regard to prayer 1 and 2 I am not persuaded that the applicant has made out a case for the granting of the said order.

In the circumstances,

The application is hereby dismissed with costs.

B MAJIKI

JUDGE OF THE HIGH COURT

Attorney for the applicant : Mr A.S. Zono

Instructed by : Messrs Zono & Associates
Suite 153 – 1st Floor
ECDC Building
MTHATHA

Counsel for the respondent : Mr Pitt

Instructed by : State Attorney
Broadcast House
No. 94 Sisson Street
Fortgale
MTHATHA