

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 7237/2017

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

DATE..... SIGNATURE.....

DIKELEDI PRECIOUS MASWANGANYI

APPLICANT

And

HOD: DEPARTMENT OF BASIC EDUCATION,

LIMPOPO

1ST RESPONDENT

MEC OF THE DEPARTMENT OF

BASIC EDUCATION, LIMPOPO

2ND RESPONDENT

DEPARTMENT OF EDUCATION, LIMPOPO

3RD RESPONDENT

SGB, GIYANI COMPREHENSIVE SCHOOL

4TH RESPONDENT

SGB, KHWEZU PRIMARY SCHOOL

5TH RESPONDENT

JUDGMENT

SEMENYA J:

[1] The applicant in this matter is an educator in the employ of the 3rd respondent. She is currently employed at Khwezu Primary School within Mopani District and has been working there for the past 23 years.

[2] The applicant applied for three posts of HOD (Head of Department), for Khwezu Primary School (Khwezu), Giyani Comprehensive Primary School (Giyani Comprehensive) and Khomosani Primary School (Khomisani) as advertised by the Department of Basic Education, Limpopo Province. She was interviewed and scored position 1 in all three posts. It is common cause that the panel recommended the applicant for the Khwezu post. The 3rd respondent recommended to the 1st respondent, the appointment of the 6th respondent, who was scored No.3 during the interviews, for Giyani Comprehensive.

[3] After the recommendations, the applicant requested the 3rd respondent to furnish her with the reasons for the decision made. It is common cause that the reasons furnished were that the 6th respondent was recommended for the Giyani Comprehensive because the applicant was already recommended for Khwezu. The applicant was aggrieved by the decision taken. She is of the view that the respondents should have asked her to choose the school that she prefer to work at, as she scored position 1 in all three schools. She thereupon instructed her attorney to request the 2nd respondent to verse the appointment of the 6th respondent and/or transfer her to Khwezu and to appoint her (applicant) to Giyani Comprehensive. The 2nd respondent was given 30 days to do so.

[4] Pursuant to the 2nd respondent's failure to respond to the applicant's request, the applicant launched this application in terms of section 6(2)(g) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). She alleges that her rights as entrenched in section 33 of the Constitution of the Republic of South Africa, 1996 .were violated. She further alleges that her right to freedom of trade, occupation and promotion as protected in section 22 of the Constitution were also violated.

[5] According to the applicant section 6(2)(g) of PAJA is applicable in that the 1st and 2nd respondents failed to reverse the appointment of the 6th respondent and to appoint her at Giyani Comprehensive, which she states, amounts to failure to take a decision which is reviewable in terms of this section.

[6] The 1st, 2nd and 3rd respondents' ground of opposition are firstly that the applicant cannot claim that she was successful in the Giyani Comprehensive interview in view of the fact that the panel did not recommend her for appointment at that school. Secondly, that, by applying for the Khwezu post, the applicant availed herself for appointment there, and therefore she cannot blame the respondents for appointing her on the basis of the recommendations of the panel. It is also the respondents' belief that the applicant does not have the right to instruct them to appoint her at Giyani Comprehensive according to her personal preferences.

[7] On the 1st, 2nd and 3rd respondent's failure to reverse the appointment of the 6th respondent and to transfer her to Khwezu as a ground of review in terms of section 6 of PAJA, the respondents stated that there is no lawful reason that compels them to transfer the 6th respondent to Khwezu as she was not recommended and appointed in that post.

[8] Section 6(1) and (2) (g) of PAJA provides that:

"(1) Any person may institute proceedings in a court or tribunal for the judicial review of an administrative action.

(2) a court or tribunal has the power to judicially review an administrative action if-

...

(g) the action concerned consists of a failure to take a decision."

[9] PAJA is the product of section 33 of the Constitution which provides as follows:

"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

[10] In **The Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal 1999 (2) SA 91 (CC)** at 41 the court held that:

"In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognized in our common law and that of other countries)."

[11] I deem it necessary to determine whether the conduct complained of is an administrative action before I could deal with the issue of whether the said conduct is reviewable on the ground relied upon by the applicant. In **Gcaba v Minister of Safety and Security and Others 2010 (1) SA 238 (CC)** at paragraph 64 (Gcaba), the Constitutional Court stated that:

"Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognized by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of section 33 is to deal with the relationship between the state as bureaucracy and the citizens and guarantees the right to lawful,

reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the state as employer and its workers. When a grievance is raised by an employee relating to the conduct of the state as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action."

[12] In bringing the decision in Gcaba within the ambit of this case, the applicant contends that the respondent's failure to respond to his attorney's request to reverse the appointment of the 6th respondent amounts to a failure to make a decision as envisaged in section 6(2) (g). The applicant wanted the respondents to appoint her in the Comprehensive School after the said reversal of the 6th respondent's appointment. There is no doubt that the decision to reverse the recommendations would have direct implications on the 6th respondent.

[13] However the matter does not end there. At paragraph 68 of Gcaba, the CC held that the failure to appoint or promote the applicant in that case was not an administrative action.

[14] The respondents submitted that there are no legal grounds for the setting aside of the 6th respondent's recommendation for appointment to Giyani Comprehensive. It was contended on the respondent's behalf that the applicant has no quarrel with the procedures followed during the shortlisting and the interviews. She is also satisfied with the ratings of the panel. The respondents contend further that the applicant is

not imputing any bias or malice on the part of the respondents. The submission is that the applicant is satisfied that the procedure followed in that regard was fair. I agree with this submission.

[15] It is not the applicant's case that she brought her preferences in respect of the three posts to the respondents' attention when she completed the application form. Nowhere in her founding affidavit does she allege that she informed the respondents that she would prefer to be recommended for the Giyani Comprehensive School post as it is closer to her home and that it will give her the opportunity for change as she has been employed at Khwezu for some years. The applicant is further not alleging that the respondents had reason to believe that she was not interested in the Khwezu post. I therefore agree with the respondents' contention that the applicant created an impression that she is interested in an appointment at Khwezu, by applying for the post. She therefore cannot complain when the panel recommended her to a post that she has applied for.

[16] The applicant places reliance on section 6(2) (g) of PAJA. The issue is whether the respondents' failure to reverse the appointment of the 6th respondent amounts unfair reviewable administrative action in the form of failure to make a decision as envisaged in the section. I agree with the respondents that the decision to reverse the recommendation and or the appointment of the 6th respondent and to appoint the applicant in the Giyani Comprehensive School on the grounds raised by the applicant would have been unlawful. The same would apply to the decision to transfer the 6th respondent to Khwezu.

[17] It appears from the founding affidavit that the applicant's main complaint is that she was not appointed at the school of her preference. I find her reliance on section 6 of PAJA to be misguided and opportunistic. As already stated, the Constitutional Court in Gcaba has ruled that failure to appoint or promote is not an administrative act. She was bound to follow the procedures laid down in the Labour Relations Act as it appears that her complaint is that her promotion opportunities have been prejudiced, the allegations that I do not agree with.

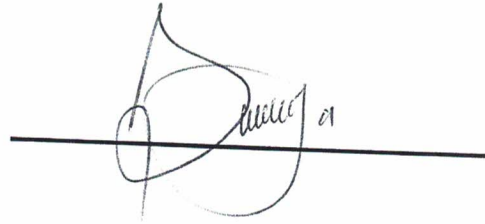
[18] With reference to The Premier, Mpumalanga, I find that it was crucial for the department to fill the vacancies in order to ensure the smooth running of the schools. It could not have been possible to appoint the applicant on all three posts or at a school of her choice in the absence of a clear indication on her part in that regard. In any event, it is my view that her personal reasons and choices cannot override the need to ensure that the administration of schools and the interests of the children.

[19] I find that the applicant cannot succeed, both on the merits and on the fact that her complaint does not fall within the ambit of PAJA.

[20] I have decided not to order the applicant to pay the costs in line with the decision in *Biowatch Trust v Registra Genetic Resources and Others* 2009 (6) SA 323 (CC).

[21] It is ordered:

The application is dismissed.



M.V SEMENYA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION.

APPEARANCES

ATTORNEYS FOR THE PLAINTIFF	: MG MABUNDA ATT
COUNSEL FOR THE PLAINTIFF	:
ATTORNEY FOR THE RESPONDENT	: STATE ATTORNEY
COUNSEL FOR THE RESPONDENT	: ADV. U.B MAKUYA
DATE OF HEARING	: 17 MAY 2018
DATE OF JUDGMENT	: 10 AUGUST 2018