

Reportable: Yes / No Circulate to Judges: Yes / No Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case no: 1246 /03
Date heard: 20/08/2004
Date delivered: 15/10/ 2004

In the matter between:

**THE FEDERATION OF THE SCHOOLS
GOVERNING BODIES OF SOUTH AFRICA:**

NORTHERN CAPE
Applicant

1st

DIAMANTVELD HIGH SCHOOL
Applicant

2nd

THE SCHOOL GOVERNING BODY
OF DIAMANTVELD HIGH SCHOOL

3rd Applicant

POSTMASBURG HIGH SCHOOL
Applicant

4th

THE SCHOOL GOVERNING BODY
OF POSTMASBURG HIGH SCHOOL
Applicant

5th

DE AAR JUNIOR PRIMARY SCHOOL
Applicant

6th

**THE SCHOOL GOVERNING BODY
OF DE AAR JUNIOR PRIMARY SCHOOL**

7th Applicant

and

THE HEAD OF DEPARTMENT

OF EDUCATION: NORTHERN CAPE

1st Respondent

C. M VAN ZYL

Respondent

2nd

A.A VAN ZYL

3rd Respondent

S.M WESSELS

4th Respondent

Coram: Majiedt J *et* Tlaletsi J

JUDGMENT

TLALETSI J:

1. The appointment of educators in certain schools within the Northern Cape Province has become a highly litigious matter. This is one of such cases. The First Applicant is the Federation of School Governing Bodies of South Africa: Northern Cape, an association which by virtue of its constitution, has legal capacity, capable of acquiring assets and liabilities and capable of suing and being sued in its name and having its principal place of business at 10 Dennis Street, Kimberley.

2. The Second Applicant is Diamantveld High School a public school with legal capacity in terms of Section 15 of the South African Schools Act, (Act 84 of 1996 as amended) hereinafter “the Schools Act”, of 2 Voortrekker Street, Kimberley.
3. The Third Applicant is The Governing Body of the Diamantveld High School established and constituted in terms of the provisions of Section 16(1) of the Schools Act as the governing structure of the second applicant.
4. The Fourth Applicant is Postmasburg High School a public school with legal capacity in terms of the provisions of Section 15 of the Schools Act of Hout Street, Postmasburg.
5. The Fifth Applicant is the Governing Body of the Postmasburg High School established and constituted in terms of Section 16(1) of the Schools Act as a governing structure of the fourth Applicant.
6. The Sixth Applicant is De Aar Junior Primary School, a public school with legal capacity in terms of the provisions of Section 15 of the Schools Act, of Oxford Street, De Aar.
7. The Seventh Applicant is the Governing Body of De Aar Primary School a body constituted and established in terms of

section 16(1) of the Schools Act as a governing structure for the Sixth Applicant.

8. The First Respondent is the Head of the Department (“HOD”) of the Department of Education, Northern Cape Province.
9. The Second Respondent is Christa Marie Van Zyl an adult female of 2 Frans Lategan Street, Winburg, Free State Province.
10. The Third Respondent is Arnold Auret Van Zyl an adult male residing at 26 Collin Street, Ladybrand, Free State.
11. The Fourth Respondent is Susanna Maria Wessels an adult female residing at the farm Kinkelspruit, Biesiesvlei, North West Province.
12. The applicants have instituted an application against the HOD on urgent basis in which they seek orders to the following effect:
 - 12.1 That a Declaratory order in terms of the provisions of Section 33, 38 and 172 of the Constitution of the Republic of South Africa Act, Act 108 of 1996 (“the Constitution”) be granted whereby the administrative action by the HOD, that applications by the candidates

from outside the Northern Cape province (“province”), for vacant teaching posts in public schools in the province which are published in the vacancy list: -

12.1.1 are to be adjudicated differently from those of the candidates from within the province.

12.1.2 by refusing to appoint candidates from outside the province who have been recommended for appointment by the school governing bodies, solely on the basis that they are not from within the province.

or

12.2 that candidates from outside the province who have in the process of applications, sifting, short listing, interviewing, recommendations and appointment for posts in public schools in the province in any way whatsoever be penalised or prejudiced solely on the basis that they are from outside the province, or;

12.3 by making relocation allowances payable to applicants for vacant posts of educators from outside the province at public schools within the province by virtue of uniform norms and standards applicable to civil servants and more specifically to educators, in any manner a factor for

consideration for the appointment of educators by governing bodies of public schools in the Northern Cape,

is declared inconsistent with the provisions of Sections 195 and 197 read with Section 33 of the Constitution and that such action is therefore invalid.

12.4 That the decision of the HOD in refusing to accept: -

12.4.1 the recommendation by third applicant that second respondent be appointed as an educator at Diamantveld High School;

. the recommendation of fifth applicant that third respondent be appointed principal of Postmasburg High School; and

12.4.2 the recommendation of seventh applicant that fourth respondent be appointed principal of De Aar Junior Primary School,

be reviewed, nullified and set aside.

12.5 That it be declared, with immediate effect that: -

12.5.1 second respondent is entitled to be appointed as an educator at second applicant as recommended by the third applicant;

12.5.2 third respondent is entitled to be appointed principal of fourth applicant as recommended by fifth applicant; and

12.5.3 fourth respondent is entitled to be appointed principal of sixth applicant as recommended by seventh applicant.

12.6 That first respondent is ordered to effect the appointments as ordered within seven days of the order.

12.7 That first respondent be ordered to pay the costs of the application.

13 The second to the fourth respondents are cited on the basis that they have an interest in the outcome of the application. No order is sought against them and they are also not opposing the application.

14 The application is opposed by the HOD. At the time of the hearing of the application the *lis* between fourth and fifth applicants and the HOD had been settled and therefore does not require adjudication in this judgment.

- 15 What triggered the dispute in this matter is the refusal of the HOD to appoint second to fourth respondents as educators and principal on the recommendations of third, fifth and seventh applicants respectively. The procedure to be followed in the appointment of educators to public schools within the province is set out in Section 6 of the ***Employment of Educators Act 76 of 1989*** (“the Act”), regulations and collective agreements contemplated in Section 6 of the Act as well as the Education Gazette (“the gazette”). A detailed summary of the procedure can be found in ***Douglas Hoërskool v Premier Noord-Kaap en Andere 1999(4) SA 1131 (NK) at 1135B-F***. A full repetition of the selection procedure is not necessary as it is common cause. Suffice it to state that it briefly consists of advertising of the post, sifting of candidates by the Department of Education (“the department”), the short listing of the sifted candidates by the governing body, interviews conducted by the governing body or its selected subcommittee, and the recommendation for appointment by the governing body to the HOD.

FACTUAL BACKGROUND

- 16 On 15 September 2003 a number of vacant posts at various public schools in the province were advertised in the gazette. Included in the gazette, which was distributed to various interested organisations were the following: -
- 16.1 Vacancy lists;
 - 16.2 Instructions;

- 16.3 Procedures when applying for a teaching post;
 - 16.4 Minimum qualifications for service requirements;
 - 16.5 Appointment requirements for persons not presently employed in a State Department;
 - 16.6 Short Listing;
 - 16.7 Regulations for short listing and interviewing;
 - 16.8 Interviews;
 - 16.9 Nominating Procedures;
 - 16.10 Appointments;
 - 16.11 Various forms to be used in the entire process.
 - 16.12 Management plan for appointments, which had target dates.
17. Among the posts advertised were the posts of teacher (PL1) at second applicant (“Diamantveld”) and Deputy Principal (PL3) at sixth applicant (De Aar Junior). Second respondent (“Van Zyl”) was among the educators who applied for the Diamantveld post and fourth respondent (“Wessels”) was among those who applied for the De Aar Junior post.
18. It is common cause that the prescribed process of sifting, short listing, interviewing and recommendation was followed. In the case of Diamantveld third applicant recommended to the HOD that Van Zyl be appointed to the post. In the case of the De Aar Junior, seventh applicant recommended to the HOD that Wessels be appointed to the post.
19. It is further common cause that the HOD found himself unable

to accept both recommendations. In the case of Diamantveld the HOD stated the following reasons in his letter declining the recommendation:

“1. The recommendation did not have regard to the democratic values and principles referred to in Section 7(1) of the Employment of Educators Act in that:

1.1 The recommendation ignored my responsibility in terms of Section 195(1) of the Constitution to cultivate good human resource management and career development practices to maximise the human potential of my employees. One of the candidates Ms Lubbe, is temporarily employed in the post, and according to my records there is nothing to suggest that she has not performed satisfactorily during her incumbency.

1.2 The appointment of Ms Van Zyl will not promote the efficient, economic and effective use of the resources of the department.

Having regard to the above, I do not believe that circumstances justify a departure from the principles expressed in Section 195(1) of the Constitution read with Sections 7(1) of the Employment of Educators Act.

I am accordingly referring the recommendation back to you in terms of Section 6(3)(c) of the Act.

Yours faithfully”

20. In the case of De Aar Junior, a similar letter was written except that the specific portion relating to the candidate reads as follows:

“... One of the candidates, Ms Moolman, is currently acting principal in your school and there is no evidence before me to suggest that she has not performed her functions satisfactorily. She has also, according to the documentation you have supplied, acquitted herself satisfactorily during the selection process.”

21. The applicants, having been aggrieved by the decision of the first respondent not to accede to their recommendations, launched this application.

ISSUES

22. The issues to be determined are firstly whether the first applicant is entitled to the orders set out in paragraphs 12.1, 12.2 and 12.3 above. The second issue is the review of the HOD's decision not to accept the recommendations of third and seventh respondents.

CLASS ACTION

23. Paragraphs 12.1, 12.2 and 12.3 above are in the form of a class action. The class action is based on the provisions of Section 38(c) of the Constitution. Firstly it is brought by the first applicant on behalf of and in the interests of all the school governing bodies for public schools in the province. In the first alternative the application is brought by third and seventh applicants (the governing bodies) in their capacity as members of the class and also in terms of Section 38(c) of the

Constitution. In the second alternative it is all the applicants' contention that they are acting in the public interest.

24. The effect of the order sought is widely couched and seeks a declaratory order in general terms that: -

24.1 candidates from outside the province for vacant posts not be treated differently from candidates within the province,

24.2 their appointment should not be refused solely because they are from outside the province; and

24.3 that such candidates should not be penalised or disadvantaged solely because they are from outside the province.

25. The question at this stage is whether the applicants have established that the HOD has refused or declined to appoint second and fourth respondents, solely on the grounds that they are not from within the province. What has been presented is a blanket and unsubstantiated allegation that first respondent is declining to appoint candidates from outside the province. On the contrary, the HOD has vehemently denied that he has at any stage declined to appoint candidates solely because they are from outside the province. He further

undertakes not to do so in the future. He states that the test applied is exactly the same, but naturally other considerations such as costs and his responsibility to his own employees come into play. He has mentioned at least three instances where candidates from outside the province have been appointed to public schools in the province.

26. Applying the test in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984(3) SA 623(A) at 634E-635C this aspect must be decided in favour of the HOD. This would accord with Mr Danzfuss' argument that the granting of a declaratory order on the terms of paragraphs 12.1, 12.2 and 12.3 will be of academical value only as there is no dispute on this aspect between the parties. See: ***ASBRO Investments Co. Ltd v Minister of Interior and Others*** 1961(3) SA 283 (T) at 285D where it was held as follows: -

"... some tangible and justifiable advantage in relation to the applicant's position with reference to an existing future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought."

27. In paragraph 12.3 above, applicants are seeking an order in terms whereof it is declared that the HOD is not entitled, in the case of open vacancies, to take into account in any manner whatsoever, relocation costs as a factor when he considers

appointment of educators. Once again this order is worded in general terms and is intended to have general application. For the reasons above and what will be discussed hereafter it cannot be countenanced.

28. The *onus* of establishing that there are grounds on which a court can review a functionary's decision is on an applicant. There is no onus on the body whose conduct is the subject matter of review to justify its conduct. See: ***Davies v Chairman, Committee of the Johannesburg Stock Exchange*** 1991(4) SA 43 (W) at 47H and ***Kimberley Girls High School and Another v the Head of Department of Education, Northern Cape Province and two Others*** (Unreported case no.: 32/2003 NCD at paragraph 10).
29. The power to appoint any person in the Department is vested in the HOD. This power is to be exercised in accordance with the procedures and requirements determined by the Minister (of Education) (Section 6(1) and (2) of the Act). Section 6(3) (b) of the Act provides that:

“The Head of Department may only decline the recommendation of the governing body of the public school or the council of the further education and training institution, if –

- i) any procedure collectively agreed upon or determined by the Minister for the 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 exists 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 on section 7(1).*" (my underlining).

Section 7(1) provides that: -

- "(1) *In the 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."*

Section 195(1) of the Constitution, which prescribes the basic values and principles governing public

administration, reads as follows: -

“(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.*
- (b) Efficient, economic and effective use of resources must be promoted.*
- (c) Public administration must be development-oriented.*
- (d) Services must be provided impartially, fairly, equitably and without bias.*
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.*
- (f) Public administration must be accountable.*
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.*
- (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.*
- (i) 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.”*

30. The authority of the court to review a decision of a functionary was authoritatively stated by the Constitutional Court in ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs***

and Tourism and Others, 2004(7) BCLR 687 (CC) at 702-703 as follows: -

*“In **Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others**, the question of the relationship between the common-law grounds of review and the constitution was considered by this Court. A unanimous court held that under our new constitutional order the control of public power is always a constitutional matter. There are no two systems of law regulating administrative action - the common law and the Constitution - but only one system of law grounded in the Constitution. The courts’ power to review administrative action no longer flows directly from the common law but from PAJA and the constitution itself. The grundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by case basis as the courts interpret and apply the provisions of PAJA and the Constitution. ”*

Section 6 of the **Promotion of Administrative Justice Act 3 of 2000** (PAJA) lists the grounds upon which administrative action may be judicially reviewed.

31. The grounds upon which the applicants are seeking to review the decision of the HOD are contained in the founding affidavit.

They are based on various subsections of Section 6 of PAJA.

These are that: -

- i) the HOD was not authorised to take the decision, as he was not authorised to do so by the empowering legislation, or that he contravened a law.
- ii) the decision does not take into account the mandatory and material procedure or condition prescribed by the legislation (the Act and Personnel Administration Measures (PAM) and the regulations).
- iii) the action was materially influenced by an error of law, his interpretation of the Act, PAM, Regulations and the Constitution.
- iv) the decision was taken because of irrelevant considerations being taken into account or relevant considerations not taken into account and is also arbitrary and capricious.
- v) the action is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the HOD and the reasons given for it by the HOD.

- vi) the decision is so unreasonable that no reasonable person could have taken it.
- vii) that the decision is contrary to the interests of the learners of second and sixth applicants whose rights are guaranteed by Section 28(2) of the Constitution.
- viii) that the decision took into account factors which should not have been taken into account, which are totally outside of the provisions of Section 7(1) of the act.
- ix) the HOD misconstrued his role in applying the provisions of Section 195(1) of the Constitution by being provincially biased.
- x) the HOD erred by deciding not to appoint a person from outside the province based on the provisions of Section 195(1) of the Constitution, when such appointment is not in conflict with the provisions of the said Section.
- xi) that the HOD erred by considering without any law or norm that forces him to do so, the interests of his employees favourably contrary to the provisions of Section 195(4) read with Section 197 of the Constitution, which demand that such favourable consideration should be authorised by national legislation before the HOD can

take such steps.

- xii) the HOD erred by not taking into account the provisions of Section 197(1) and (4) of the Constitution in terms whereof, recruitment, appointment, promotion, transfer and dismissal of members of the public service should be made within a framework of uniform norms and standards applying to the public service.
32. It will not be necessary for the purpose of this judgment to discuss each specific ground separately as they are all linked to each other and based on the same set of facts which are largely common cause. Some of the grounds are so far removed from the facts of the case that a suggestion of a fishing expedition may not be unjustified.
33. The factual argument of Mr Du Toit on behalf of the applicants is that the HOD has published in the gazette, countrywide what the requirements or rules are for the appointment to the positions, and encouraged educators to see the vacancies as an opportunity to contribute towards reconstruction of education in the country. That all role players were advised to familiarise themselves with the contents of the gazette, which he submitted, contained the rules to be followed; that second to fourth respondents responded to the advertisement, and that the entire process was followed as prescribed and that

second and fourth respondents were identified as suitable candidates for appointment. He argued that it was only after this stage and unbeknown to all the role players that the HOD changed the rules and introduced new rules when the process was almost 99% complete. He introduced economic considerations and his responsibility to his employees. Mr Du Toit argued that these considerations should have been made known in advance so that all the role players should have considered their position to participate under the circumstances. It is this conduct, which according to him amounted to unfair and unjust administrative action and contravened second and fourth respondent's constitutional rights. The HOD, he argued, did not take into account democratic values and principles enshrined in the Constitution.

34. It is common cause that the process that was followed by the interviewing panel of the respective applicants was the allocation of points based on the abilities and characteristics of the candidates. It is very clear from the score or comparison sheets that no other considerations were taken into account. The governing bodies accepted the recommendations of these subcommittees based on the abilities and characteristics of the candidates. They too, did not take into account any other factor. This is evidenced by the minutes of the meetings at which the decisions were taken. They should not be blamed for their approach. All that they are concerned with is the best

candidate for their respective schools. They may not have access to information pertaining to other factors relating to education.

35. This may be one of the reasons why the final decision to appoint is vested in the HOD who, in terms of the Constitution and the Act, has wider responsibilities than those of the governing bodies. The HOD is better placed than the governing bodies to take into account the interests of the learners in the province as a whole, efficient, economic and effective use of the resources, and the employees' needs, to name but a few. These are imperative considerations that ought not to be ignored by the HOD.
36. The notion of equating the role of an HOD to that of a track and field officer in a race, or a referee in a soccer or rugby game is in my view undermining his role and ignorant of the HOD's imperative responsibilities. The role of the HOD cannot be limited to a passive assessment as to whether the school governing bodies have complied with the guidelines issued by the department. He is also required to independently and objectively ascertain whether a recommendation does indeed on the facts and prevailing circumstances accord with the democratic values and principles. (See: ***Kimberley Girls' High School*** case (supra) at paragraph 21).

37. The HOD has, in the case of Diamantveld established *inter alia*, that Ms Lubbe was at the time occupying the post in issue in an acting capacity, and is already in the employ of the department. The relocation costs for Van Zyl would amount to R 165 936-59. In the case of De Aar Junior, it has been shown *inter alia*, that Ms Moolman was already occupying the post in issue in an acting capacity and that the relocation costs for Wessels were estimated at R 120 788-69.
38. In my view nothing prohibits the HOD from taking these factors into account. As the head and accounting officer of the department he cannot ignore the impact an appointment would have on the budget of the department as well as on the efficient and economic use of financial resources in the province as a whole. He is also duty bound to cultivate good human resource management and career development process in order to maximise the human potential of his employees.

Mr Du Toit has referred us to a passage in **Laerskool Gaffie Maree v MEC for Education Northern Cape Province** 2003(5) SA 357 (NC) at 373 I-J (par.14) whereat Majiedt J stated as follows:

“So, for example, however laudable it may be for him or his Department to prefer that candidates from within the Northern Cape Province be appointed in vacant posts, it is abundantly clear on the authorities and on the statutory provisions that that is not a consideration on the strength of which he could decline a recommendation.”

Mr Du Toit has, correctly, conceded during argument that the quoted passage is *obiter dictum*. The learned Judge quite clearly made this statement in general terms. In any event, there is no basis on which it can be said that the two educators in the present case were declined appointment by the HOD solely by reason of the fact that they are from outside the province, as I have already shown herein.

39. The test that is applicable is whether there is a rational objective basis justifying the connection made by the HOD between the material made available and the conclusion he arrived at. (See: ***Trinity Broadcasting (Ciskei) v ICA of SA*** 2004(3) SA 346 (SCA) at.354 G – 355 A).
40. Simply put, the enquiry is not whether the HOD has taken the best decision under the circumstances, but rather whether the decision taken falls within the range of the decisions he can take, and that there is a rational connection between the decision taken and the material before the HOD, i.e. whether the decision is justified taking into account the material before him and the applicable legislative imperatives.
41. I therefore take the view that the HOD took a decision which is authorised by the empowering legislation; that the decision took account of the material and conditions prescribed by the

legislation; that he did not commit an error of law or fact in the interpretation and application of the legislation; that he did not take into account irrelevant considerations; and finally that the decision is reasonable and justifiable and that he is entitled to take into account the interests of the learners and educators in the province as well as economic and financial considerations. The application therefore ought to be dismissed.

42. What remains is the issue of costs. Both counsel submitted that costs should follow the result. I am in agreement that this approach is fair, reasonable and justified under the circumstances.

I therefore make the following order.

The application is dismissed with costs.

L P TLALETSI
JUDGE
(Northern Cape Division)

I concur

S A MAJIEDT
JUDGE
(Northern Cape Division)

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