

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 6402/2022

(1)	REPORTABLE: YES/NO	
(2)	OF INTEREST TO THE J	
(3)	REVISED.	
DATE: 23/04/2022		SIGNATURE

In the matter between:

SCHOOL GOVERNING BODY OF
SEKGOPO PRIMARY SCHOOL

Applicant

And

HEAD OF DEPARTMENT:

First Respondent

LIMPOPO DEPARTMENT OF EDUCATION

MEMBER OF EXECUTIVE COUNCIL

Second Respondent

FOR THE EDUCATION, LIMPOPO PROVINCE

MORONGWA SALOME RAMMALA

Third Respondent

JUDGEMENT

LEDWABA AJ

Introduction

- [1] As the School Governing body referred to in section 1 read with section 16 OF THE South African Schools Act 84 of 1996, the applicant is praying for the declaratory order that the appointment of the third respondent as the principal of Sekgopo Primary School (the school) be reviewed, declared unlawful and set aside. The applicant also prays that the first respondent be ordered to start the principal appointment process afresh.
- [2] The first and the seconds respondent (the respondents) have filed the opposing papers.
- [3] The appointment of the third respondent by the first respondent as the school principal followed the shortlisting and interview of three candidates. In terms of the three name list submitted by the applicant as required by section 6(3)(c) of the Employment of Educators 76 of 1998(the Act) , the names submitted to the first respondent in order of preference are Mamabolo MA as the first candidate with 88 score points, Maluleke NR the second candidate with 79 points and the third respondent as the third

candidate with 72 points.¹

- [4] It is not clear what prompted the investigations by the first respondent. The investigation found that the first candidate committed fraud by misrepresenting her profile. This disqualified this candidate for appointment. The second candidate was in the meantime appointed the principal in another school with the result she was no longer available for the post. In accordance with the applicant's recommendation, the first respondent appointed the third respondent to the post.
- [5] The appointment of the third respondent by the first respondent to the post aggrieved the applicant. It submits that in terms of section 6(3)² of the Act read with section 3(2) of the Promotion of Administrative Justice Act 3 of 2000(PAJA) , the third respondent's appointment constitutes an administrative action which affects its fair administrative rights and that the first respondent should have started the appointment process afresh to give the applicant an opportunity to make representation. The applicant avers that it is common cause that the applicant's recommendation did not comply with the requirement collectively agreed upon or determined by the National Education Minister. It reasons that because the first candidate misrepresented her profile, that tarnished the whole appointment process with the result that the applicant's recommendation that the candidates be appointed in the recommended preference constituted an irregularity resulting in the need that

¹ Page 66 of the bundle

²² The paraphrased relevant part of the provision is to the effect that any promotion to any post may only be made on the recommendation of the school governing body. In considering the applications, the governing body must ensure that the principles of equity, redress and representivity are complied with and among others, the it must adhere to the democratic values and the principles referred in section 7(1) of the Act, any procedure and requirement collectively agreed upon or determined by the Minister for the promotion of educators

the appointment process should have started afresh to give the applicant an opportunity to make an informed recommendation. Based on the fact that the first candidate committed fraud, the applicant submits that its recommendation to the District Office and then to the first respondent did not comply with the requirements collectively agreed upon or determined by the National Minister of Education.

- [6] The first respondent's case is that it appointed the third respondent in accordance with the applicant's recommendation. It says that when it transpired that the first and second candidates could not be appointed to the post, it appointed the third candidate as recommended by the applicant, with the result that there was no need to start the process afresh and invite the applicant to make any representation it had already made.
- [7] Apparently because the only relevant record of the proceeding is the applicant's record which reflected how the third respondent was appointed, there was no need to file any additional record referred in Rule 53(1)(b) of the Uniform rules.

Discussion

- [8] This is not the legality review brought by the applicant to set aside its administrative action. It is expressly a review application brought in term of Rule 53 of the Rules of this court to review and set aside the first respondent's decision to promote the third respondent to be the principal of the school.

- [9] The first respondent accepted the list submitted by the applicant and its order of preference.
- [10] The alleged common cause that the applicant's recommendation did not comply with the requirement collectively agreed upon or determined by the Education Minister is not expressly mentioned. The applicant avers that in terms of section 6(3)(e), if the government body has not met the requirements in paragraph (b), the Head of the Department is obliged to decline the recommendation.
- [11] In terms of section 6(3)(b) and section 7 of the Act³, the government body is required to ensure that the principles of equality, equity, redress and representivity as well as basic democratic values and principles governing public administration as contemplated in section 195 of the Constitution are complied with.
- [12] I make the distinction between the constitutional principles of equality, equity, redress and representivity and basic values and principles governing public administration as contemplated in section 195 of the Constitution on the one hand (the Constitutional principles and values) and other considerations referred to in section 6(3)(b) of the Act
- [13] If the Constitutional principles and values have not been complied by a governing body, such a process is nullity, with result that the Head of Department has no option but to decline the recommendation for the appointment process to start afresh. This is

³ Section 7 requires that in making appointment or filling of any post, due regard be had to equality, equity and other democratic values and principles contemplated in section 195 of the Constitution.

because Constitutional principles and values are foundational to our Constitution as stated in section 1 of the Constitution. In terms of section 2 of the Constitution, the Constitution is the supreme law of the Republic and any conduct inconsistent with it is invalid. It is not the applicant's case that in its recommendation, it did not comply with the Constitutional values and principles of the Constitution.

- [14] On the other hand, noncompliance with other non-Constitutional requirements should not necessarily lead to the Head of Department declining a governing body's recommendation.
- [15] Even if it is conceded that it is common cause that the applicant's recommendation did not comply with the requirement collectively agreed upon or determined by the Minister, such noncompliance does not offend Constitutional values and principles for the first respondent's appointment of the third respondent to be set aside as an invalid conduct.
- [16] The respondents' case is that in filling the principal post, the first respondent's starting point was the applicant's recommendation. When the investigation revealed that the first preferred candidate committed fraud, the first respondent sought to appoint the second preferred candidate, only to discover that the candidate was in the meantime promoted to another principal post. The first respondent then appointed the third respondent as the next preferred candidate. The respondents correctly dispute the applicant's assertion that because the first preferred candidate committed fraud, that tainted the whole recommendation process that the whole appointment process was to start afresh. If that was the intention of the Act, the applicant would not be legally

obliged by section 6(3)(c) of the Act to submit the candidates' names in order of preference. There is no basis to start the appointment process afresh, in the process risking the appointment of the qualifying third respondent.

[17] The applicant bases its case on the Act as the empowering legislation. In terms of section 39(2) of the Constitution, when interpreting legislation, the courts are obliged to promote the spirit, purport and objects of the Bill of Rights. This section has introduced a new approach to the interpretation of statutes.⁴ The starting of the appointment process afresh while there is a qualifying third respondent cannot be in line with the section 29 education Constitutional right.

[18] Noncompliance with the Constitutional principles is the basis on which the Head of the Department is obliged to decline the governing body's recommendation. Even if there is a qualifying candidate, noncompliance with Constitutional principles dictates that the recommendation be declined and the appointment process starts *de novo*. This is because the Constitution does not allow unconstitutional conduct to stand.

[19] The applicant has complied with the recommendation requirements and there is no evidence that it has contravened the Constitutional values and principles for the first respondent to decline the recommendation.

[20] The applicant submits that because the first respondent did not decline its own recommendation to allow the appointment process to be started afresh to give it an

⁴ *Liesching & Others v S & Another* (2016) ZACC 41; 2017(4) BCLR 454 (CC); 2017(2) SACR 193(CC)- paragraphs 21 and 30

opportunity to make representation as an interested party, its right to an administrative action that is procedurally fair was denied.⁵ The complaint is that when the first respondent decided against appointing the first candidate to the post, the applicant should have been informed and invited to make representations. The finding that the first respondent rightly decided to accept the applicant's recommendation makes it unnecessary to consider whether there was compliance with the procedurally fair administrative action referred to in section 3 of PAJA. The first respondent's decision meant it acted on the applicant's recommendation with the result that the applicant cannot be heard to be complaining that the first respondent acted on the applicant's own recommendation. From the bar, on behalf of the first respondent it was stated that it is acceptable that the applicant has no capacity to investigate fraud allegation against the first preferred candidate.

[21] The applicant's application fails. The applicant is the governing body referred to in section 1 read with section 16 of the South African Schools Act 84 of 1996. In terms of section 16(1) of the South African Schools Act 84 of 1996, the governance of every public school is vested in its governing body. There is no evidence as to how the applicant raises funds that can be used to pay the costs. The applicant did not vexatiously pursue this application. This is not the case where the costs follow the results.

Order

⁵ Section 33 of the Constitution gives everyone the right to administrative action that is lawful, reasonable and procedurally fair. Section 3 of PAJA is the empowering provision.

- [a] On the balance of probabilities, the applicant has failed to prove that the first respondent was obliged to decline the applicant's recommendation for the principal post of Sekgopo Primary School.
- (b) The applicant's application is dismissed.
- [c] Each party is ordered to pay its own costs.



LEDWABA AJ
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION: POLOKWANE

APPEARANCES

For the applicant : Adv SS Tebeila

TA Makola

Instructed by: Israel Maenetja Attorneys

Polokwane

For the first respondent : Mr T Nkwana

Instructed by: State Attorney

Polokwane

Heard on: 26th February 2024

Judgement delivered electronically on 23rd April 2024:

POLOKWANE HIGH COURT