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**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

CASE NO: 286/2022

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

AVRIL CONSTANCE KOTZEE

Applicant

and

**DEPARTMENT OF EDUCATION NORTHERN
CAPE: HEAD OF DEPARTMENT**

First Respondent

ORANJEZICHT HIGH SCHOOL

Second Respondent

**CHAIRPERSON OF THE SCHOOL GOVERNING
BODY: ORANJEZICHT HIGH SCHOOL**

Third Respondent

ESTELLE BEUKES

Fourth Respondent

ANDY BEUKES

Fifth Respondent

FABIAN KOTZE

Sixth Respondent

Coram: Stanton J et Chwaro AJ

Heard on: 16/09/2024

Delivered on: 11/10/2024

Summary: Judicial review - Decision of provincial head of department of education to appoint a school principal - Grounds of review based on PAJA and the principle of legality- Condonation for late prosecution of the review application- Exemption from exhausting internal remedies-Reviewable irregularities not established -Application dismissed.

ORDER

1. The applicant's failure to institute judicial review proceedings within the time period contemplated in s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 is condoned in accordance with s 9 of the said Act and the applicant is granted an extension of time up to and including the date of institution of this application.
 2. The application is dismissed.
 2. Each party is ordered to bear its own costs.
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JUDGMENT

CHWARO AJ:

Introduction

[1] This application concerns a dispute about the decision of the Head of Department, Northern Cape Department of Education, (the first respondent) to appoint a school principal at Oranjezicht High School, a public school situated at Keimoes, (the second respondent).

[2] Aggrieved by the decision of the first respondent above, Ms Avril Constance Kotzee (the applicant) launched this application for the judicial review of the impugned decision in terms of the provisions of the Promotion of Administrative Justice Act 13 of 2000 ("PAJA") alternatively on the principle of legality.

[3] Except for the usual costs order against those who oppose her application, the applicant seeks relief in the following terms:

- '1. Declaring that the First Respondent's appointment of the Fourth Respondent to the post of Principal of the Second Respondent be ruled irregular, invalid and accordingly set aside.
2. Ordering that the Fourth Respondent (or any person(s) who took over from her and/or who replaced her, if any) is to be removed by the First Respondent from the post of Principal of the Second Respondent with immediate effect and that such appointment be set aside.
3. Ordering that the Applicant be appointed by the First Respondent retrospectively from 01 January 2021 into the post of Principal of the Second Respondent with immediate effect.
4. Ordering that the Applicant be paid all salaries, bonuses, increases and such other related benefits associated with the post of Principal of the Second Respondent retrospectively from 01 January 2021 or such other date as the above Honourable Court considers just and equitable.

5. Ordering that the Applicant's appointment to the post of Principal of the Second Respondent be designated a 'protected appointment' in order to protect the Applicant against any form of retaliation and/or unfair treatment on account of the Applicant having pursued this route to nullify the First Respondent's decision.
6. Condoning the late filing of this application in terms of section 9(2) of the Promotion of Administrative Justice Act, No. 3 of 2000....'

[4] The application is opposed by the first respondent on the bases that their¹ decision to appoint Ms Estelle Beukes, (the fourth respondent) was lawful and unassailable as it was premised on the recommendations of the school governing body of the second respondent (SGB) that they properly considered and exercised their discretion to appoint the fourth respondent as so empowered by s 6(3)(a) and (f) of the Employment of Educators Act 76 of 1998, (the EEA).

Background facts

- [5] The applicant is an educator by profession. She previously served as principal of the second respondent for a period of four years until her resignation on 31 December 2018. Since 2019, the fourth respondent was appointed to hold fort on an acting capacity as principal. On or about 7 September 2020, the Northern Cape Department of Education (the department) issued a vacancy circular inviting prospective candidates to apply for a vacant position of principal of the second respondent.
- [6] In preparation for the recruitment process that was to ensue after the closing date of applications, the department constituted a panel of members who were going to sift, shortlist and interview suitable candidates who would in turn be recommended by the SGB for appointment by the first respondent.

¹ I adopt the neutral pronouns to refer to the Head of Department of Education in this judgment as the gender identity of the incumbent who took the decision at the relevant time is not apparent *ex facie* the pleadings and record.

- [7] The panel consisted of the following members of the SGB: V Kakuyi who acted as chairperson, FHJ Kock, G Van Neel, AM Damon and REJ Klaaste. The departmental representative in the panel was S Ferrus who also served as a resource person in her capacity as the Circuit Manager and the two teacher unions, SADTU and CTU-ATU were represented by BJ Dywili and J Blom respectively.
- [8] The department received six applications for the post. At its meeting held on 23 October 2020, the shortlisting committee found that only five candidates met the requirements of the post. The shortlisted candidates were the applicant, the fourth respondent, Mr Andy Beukes (the fifth respondent), Mr Fabian Kotze (the sixth respondent) and Mr LP Harnoster.
- [9] Shortlisted candidates were invited to attend interviews scheduled for 30 October 2020. The rest of the shortlisted candidates, except for Mr Harnoster, underwent an interview process predicated on a set of questions agreed upon by the interviewing committee. The individual candidates were allocated average scores by both the shortlisting and interview committees, which scores were later combined to constitute a total average for each candidate after the interview process.
- [10] The applicant obtained a total of 81,9 points, the fifth respondent received 80,2 points, the sixth respondent was allocated 79,1 points and the fourth respondent scored a total of 77,8 points.
- [11] The interview committee resolved to submit the outcome of the interview process to the department, though the SADTU representative registered his dissatisfaction with the way the individual candidates were allocated points. He indicated that his union would lodge a formal dispute with the department.
- [12] Ordinarily, the names of the candidates found to be suitable for appointment would have been submitted to the SGB for deliberation and recommendation

of a minimum of three candidates to the first respondent in accordance with the provisions of s6(3)(c)(i) of the EEA.

- [13] Pursuant to its deliberation, the SGB recommended the fourth, fifth and sixth respondents for possible appointment by the first respondent. It is common cause that first respondent eventually appointed the fourth respondent as principal of the second respondent with effect from 1 February 2021.
- [14] On 2 February 2021, the applicant became aware of the appointment of the fourth respondent as principal of the second respondent through the latter's Facebook page. Perturbed by the turn of events, on 17 February 2021 she lodged a dispute with the Education Labour Relations Council (ELRC) in relation to her non-appointment as principal of the second respondent.
- [15] Despite numerous communications exchanged between her and the officials of the ELRC, nothing came out of that process. During August 2021, the applicant managed to obtain the services of her present attorneys of record who advised her that the ELRC was the wrong forum and that she ought to approach this Court for relief.
- [16] Due to lack of funds, she only managed to pay the full deposit required of her during November 2021. This application was launched on 11 February 2022, a period of almost 360 days since she gained knowledge of the decision of the first respondent to appoint the fourth respondent as principal and the alleged irregularities beseeching the recruitment process.

Contentions by the parties

- [17] The nub of the applicant's complaint is that a gross procedural irregularity was committed by the SGB in the process of making its recommendation to the first respondent in that:
 - (a) At the behest and insistence of Mrs S Ferrus, a departmental representative in the interview committee, the SGB convened a

meeting during December 2020 to discuss motivations for candidates that were to be recommended to the first respondent for appointment.

- (b) The said meeting manipulated the interview committee's recommendations by including the name of the fourth respondent in the list of candidates who were to be considered for recommendation to the first respondent under circumstances where her name was not put forward by the interview committee.
- (c) Mrs Ferrus and Mr Dywili unduly influenced SGB members to nominate three names that were to be recommended to the first respondent and made the SGB to determine the list of the three candidates through a secret vote, resulting in the fourth, fifth and sixth respondents being recommended by the SGB for possible appointment by the first respondent.

[18] In the opposing affidavit filed on behalf of the first respondent, it is contended that the applicant is seeking to assail a wrong decision in that *ex facie* the notice of motion, the applicant only seeks to review and set aside the decision of the first respondent to appoint the fourth respondent. The process undertaken by the SGB, leading to the recommendation of the three candidates to the first respondent is not challenged.

[19] It is further submitted that the first respondent acted well within the purview of the empowering legislation in deciding to appoint the fourth respondent. To this effect, the SGB made a recommendation of the minimum number of candidates for consideration by the first respondent and after the latter was satisfied about the process' compliance with the prescripts, exercised the statutory discretionary powers vested on them to appoint the fourth respondent.

The issues

[20] The competing contentions by the parties herein require this Court to determine the following issues: (a) whether condonation for the late prosecution of the review ought to be granted , (b) whether the applicant was obliged to exhaust internal remedies, (c) whether the conduct forming part of the applicant's complaint is reviewable on the grounds of PAJA as pleaded by the applicant or the principle of legality and (d) in the event of a declaration of invalidity, what would be a just and equitable remedy.

[21] In the scheme of this Court's jurisdictional limitations to review an administrative decision on the grounds anchored on PAJA or principle of legality, the determination of the first two issues listed as (a) and (b) above against the applicant would result in there being no need to further traverse the remainder of the issues outlined as (c) and (d) above.

Preliminary issues

Undue delay

[22] Our law is settled in relation to what constitutes undue delay in the institution of judicial review proceedings. If the review is premised on the provisions of s 6(1) of PAJA, such an application must be brought within a period of 180 days after becoming aware of the administrative action and the reasons for such an action. If the review is based on the principle of legality, such a review must be brought within a reasonable time.

[23] In **Khumalo and Another v MEC for Education, Kwazulu-Natal**² the court described the determination of an undue delay in legality reviews in the following terms:

‘..Nevertheless, it is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction [h\[...\]](#) to regulate their own proceedings) to refuse a

² 2014 (5) SA 579 (CC) para 44

review application in the face of an undue delay in initiating proceedings or to overlook the delay.....’

- [24] The above position was expanded upon in **Altech Radio Holdings (Pty) Ltd and Others v Tshwane Metropolitan Municipality**³ in the following terms:

‘A legality review, unlike a PAJA review, does not have to be brought within a fixed period. However, whilst the 180-day bar set by s 7(1) of PAJA (which may be extended under s 9) does not apply to a legality review, in both the yardstick remains reasonableness. It is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to either overlook the delay or refuse a review application in the face of an undue delay.’

- [25] In as far as a review premised on the provisions of PAJA is concerned, the time limitation is prescribed in s 7(1)(a) and (b) of PAJA which provides as follows:

‘7 Procedure for judicial review

- (1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-
 - (a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or
 - (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons...

³ 2021 (3) SA 25 (SCA) para 18

[26] In **Cape Town City v Aurecon SA (Pty) Ltd**⁴ the court analysed and explained the interpretation of s 7(1)(b) of PAJA as follows:

‘Section 7(1) of PAJA does not provide that an application must be brought within 180 days after the City became aware that the administrative action was tainted by irregularity. On the contrary, it provides that the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to an applicant.’

[27] The above proposition was endorsed and applied in subsequent cases to mean that the proverbial clock begins to run only after the aggrieved party has knowledge of the decision and the *reasons* for such a decision.⁵

[28] In *casu*, it is common cause that the applicant became aware of the first respondent’s decision on 2 February 2021, when she saw the Facebook page of the fourth respondent notifying her followers to that effect. She was soon thereafter informed by one of the interview committee members about the irregularities that beseeched the process.

[29] In terms of s 5(1) of PAJA, the applicant had a period of 90 days, within which to request reasons, calculated from 2 February 2021, being the date when she became aware of the decision. It does not appear that the applicant availed herself of this option.

[30] In terms of s 5(2), an administrator has a period of 90 days within which to furnish the requested reasons. Where there are no reasons provided after the expiry of the said days, s 5(3) provides that unless there is proof to the contrary, it is presumed that the decision was taken without good reason. The statutory periods to request reasons and to provide same would have expired on 1 August 2021. It follows that the clock in respect of the 180 days

⁴ 2017 (4) SA 223 (CC) para 41

⁵ See *Sasol Chevron Holdings Limited v Commissioner, South African Revenue Service* 2024 (3) SA 321 (CC) para 31 and *Centre for Child Law and Others v South African Council for Educators and Others* 2024 (4) SA 473 (SCA) paras 9-10

prescribed in s 7(1) would have started to run from 1 August 2021 until 1 February 2022.

[31] At the time when the review application was instituted on 11 February 2022, the applicant was ten days out of time. On the strength of the guidance articulated in **eThekweni Municipality v Ingonyama Trust**,⁶ I have duly considered the nature of the relief sought by the applicant herein, being to ventilate her right to a fair and lawful process of appointment. The explanation proffered by the applicant is in my view, reasonable given the efforts she took soon after learning of the appointment of the fourth respondent, coupled with the restrictive measures that were put in place during the mid stages of the Covid pandemic. It is important that this Court pronounces on the main issue underlying this application to bring finality and certainty to all involved, despite the strength or otherwise of the prospects of success.

[32] In the premises, I am of the considered view that the interests of justice dictate that the period of 180 days contemplated in s7(1) of PAJA be extended by a period up to and including the date of the institution of this review application as contemplated in s 9(2) of PAJA.

Internal remedies

[33] The relevant provision dealing with the need for a party seeking to attack an administrative action through judicial review to firstly exhaust internal remedies is s 7(2) of PAJA which provides:

- '(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
- (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in

⁶ 2014 (3) SA 240 (CC) para 28

paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

- (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.’

[34] In **Koyabe and Others v Minister of Home Affairs and Others**⁷ the Constitutional Court recognised the need to utilise internal appeal mechanisms provided for by any statute so as to afford decision-makers an opportunity to reflect on their decisions, rectify same and thus providing an often quick and cost-effective remedy to those who are materially affected by administrative decisions. However, the court cautioned that the utilisation of internal remedies should not be abrogated to a rigid procedure intended to frustrate those who are affected by their decisions or as a tool to shy away from being subjected to judicial scrutiny.

[35] The applicant submits that when she lodged her grievance with the ELRC during February 2021, she also submitted a copy of such form at the district offices of the department on 17 February 2021, where it was received for the attention of the District Director. She did not receive any response from the department in relation to the dispute that she has since withdrawn. Upon being able to secure the services of an attorney, the latter sent a letter dated 17 November 2021 outlining her dispute and similarly seeking resolution of the dispute internally before opting for judicial review. Similarly, no reaction was received from the department.

[36] In an opposing affidavit filed on behalf of the first respondent, the deponent, Mr O Mogatle, Director: Legal Services in the department, submits that upon receipt of the letter from the applicant’s attorneys referred to above, he

⁷ 2010 (4) SA 327 (CC) paras 35-38

embarked upon a process of establishing relevant facts with a view to advise the first respondent and appoint legal representatives. The opposing affidavit does not state what efforts, if any, were taken to resolve the applicant's dispute internally and whether the process of establishing facts bore any fruit. The deponent only states that these efforts were shunned by the applicant who chose to ignore other possible avenues.

- [37] As explained elsewhere in this judgment, the first respondent nor any of the department's functionaries, ever provided the applicant with reasons for the decision taken to appoint the fourth respondent. This failure leads to an ineluctable conclusion that the applicant would not have been expected to meaningfully engage the first respondent with a request for exhaustion of internal remedies in the absence of cogent reasons.
- [38] The EEA does not provide for statutory internal remedies that a party who is aggrieved by the decision of the first respondent to appoint a candidate to a position of a school principal could explore. The only internal remedy found in the said Act, in the form of an appeal to the MEC, is in relation to the decision of the first respondent to appoint a candidate on a temporary basis⁸.
- [39] On the conspectus of the facts above, I find that the applicant was contrived by the non-provision of reasons for the decision taken by the first respondent to meaningfully and substantially explore any possible internal remedy to the impasse. The applicant was further not obligated by the EEA regulating her appointment to exhaust internal remedies.
- [40] It follows that this is a case where this Court is entitled to exercise its discretion in favour of the applicant and hold that there was no obligation, either on the basis of the established facts or in terms of the prevailing legislative prescript governing her dispute, placed on her to have embarked on a process of seeking internal remedies prior to instituting this review application or to apply for exemption from doing so.

⁸ See s 6(30(h)-(k) of the EEA

- [41] Even if I am wrong in the above conclusion, the utilisation of any available internal remedy would not have amounted to an adequate remedy for the applicant having regard to the primary relief sought by the applicant herein, being to review and set aside the appointment of school principal who has already assumed duties with effect from 1 February 2021.
- [42] It is trite that only this Court has the inherent power to review and set aside an administrative decision⁹ and therefore in the absence of any statutory powers specifically given to an internal body, it is only a court of law that has the requisite powers to review and set aside the decision of the first respondent.¹⁰
- [43] On this point alone, there was no need for the applicant to have exhausted any internal remedy prior to launching this application and equally, there was no need for the applicant to have sought exemption contemplated in s 7(2)(c) of PAJA.

Process leading to the decision of the head of department

- [44] In the realm of administrative law, it is generally accepted that an objective process undertaken to enable the repository of a public power to make an ultimate decision, sometimes referred to as a jurisdictional fact or a precursor, is not a decision on itself which may be subjected to judicial review under PAJA.
- [45] Nonetheless, our jurisprudence recognises the fact that being part of the broader fair and lawful decision-making requirement within the spectrum of legality, the means towards the end must also be subjected to the scrutiny of rationality and lawfulness. In **Democratic Alliance v President of the**

⁹ Merafong City Local Municipality v AngloGold Ashanti Ltd 2017 (2) SA 211 (CC) para 41

¹⁰ DPP Valuers (Pty) Ltd v Madibeng Local Municipality (233/2015) [2015] ZASCA 146 (1 October 2015) paras 16-26

Republic of South Africa and Others¹¹ the court explained the above position of our law as follows:

‘The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred.’

- [46] The applicant mounts her attack on the decision of the first respondent to appoint the fourth respondent premised on the principle articulated above, and what Mr Snyders, counsel for the applicant, referred to as ‘the fruit of a poisoned tree’ in that the process undertaken by the SGB was not in line with what was allegedly an agreed upon process of recruitment and contrary to the provisions of s 6(3)(b) of the EEA.

Outcome of the interview process

- [47] The appointment of school principals is highly regulated. Before an SGB could make its recommendation to the head of department for appointment of any of the recommended candidates in accordance with the provisions of s 6(3)(a) - (c) of the EEA, the process undertaken by the interviewing committee must be in compliance with, amongst others, the provisions of the Collective Agreement No. 5 of 1998¹² (‘the collective agreement’) read with

¹¹ 2013 (1) SA 248 (CC) para 36. See also *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA) para 69

¹² This is a collective agreement concluded by the parties to the Education Labour Relations Council, a bargaining council for public education sector at a national and provincial level.

the Personnel Administrative Measures determined by the Minister of Basic Education and published on 12 February 2016 ('the PAM').¹³

- [48] Clause 3.9 of Schedule 1 to the collective agreement provides as follows regarding the role of the interviewing committee after concluding its business:

'At the conclusion of the interviews the interviewing committee shall rank the candidates in order of preference, together with a brief motivation, and submit this to the school governing body for their recommendation to the relevant employing department.'

- [49] On the other hand, clause 5.4.12 of Chapter B of the PAM mirrors clause 3.9 of the collective agreement and provides thus:

'At the conclusion of the interviews the Interview Committee must rank the candidates in order of preference, together with a brief motivation, and submit this to the SGB for their recommendation to the relevant employing department.'

- [50] The applicant seeks to assail the process undertaken by the SGB by relying on the assertion that at the conclusion of its business on 30 October 2020, the interviewing committee "agreed" on a process that they were going to follow, being to recommend only the top three candidates to the SGB for its consideration and recommendation. This "agreed" process resulted in the fourth respondent, who was ranked as number four, not being recommended to the SGB.

- [51] On a cursory perusal of the clauses contained in the collective agreement and the PAM respectively and referred to above, it becomes apparent that the "agreement" reached by the interviewing committee to only recommend three out of four candidates was clearly in contravention of these clauses. The

¹³ These are determinations for salaries and other conditions of employment made by the Minister of Basic Education in terms of section 4(1) of the Employment of Educators Act 76 of 1998

interviewing committee was expected to rank all candidates in order of preference and motivate each candidate to the SGB.

[52] Contrary to what is asserted by the applicant, the administrative decision record filed in terms of rule 53 of the Uniform Rules of Court, (“the record”), reveals that the interviewing committee did in fact rank the four candidates in order of preference and submitted the names to the SGB. This reality is captured in the handwritten minutes of the committee at its sitting on 30 October 2020 as well as in form NCK15, which contains the names of recommended candidates in order of preference, which was sent to the SGB.

[53] It is the finding of this Court that this ground of attack cannot be sustained as the interviewing committee fully complied with the collective agreement and the PAM in fulfilling its mandate. The SGB did in fact submit names of four candidates, including that of the fourth respondent, for consideration by the SGB.

Recommendation by the school governing body

[54] The role of the SGB after receipt of the names of recommended candidates from the interviewing committee is to independently consider the candidates and make its own recommendation, in order of preference and with a motivation, to the head of department. This is clearly articulated in the provisions of s 6(3)(a) to (c) of the EEA, which I find apposite to reproduce below:

‘(3)(a) Subject to paragraph (m), 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 and, if there are educators in the provincial department of education concerned who are in excess of the educator establishment of a public school due to operational requirements, that recommendation may only be made from candidates identified by the

Head of Department, who are in excess and suitable for the post concerned.

- (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 or council, as the case may be, 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 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.
- (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.'

- [55] The record shows that at its meeting held on 2 November 2020, the SGB sat to deliberate on the names of four candidates that were submitted to it by the interviewing committee. The SGB opted for a secret vote to determine the ranking order of three names that were to be submitted to the first respondent for his consideration and appointment.
- [56] The first round of votes resulted in the applicant and the fourth respondent being tied on the first position, followed by the fifth and sixth respondents on the second and third positions respectively. As a deadlock breaking mechanism, the SGB conducted a second vote for the candidate who was to be ranked as the preferred candidate and the fourth respondent obtained the highest votes.
- [57] The SGB recommended the fourth, fifth and sixth respondents to the first respondent and submitted form NCK2, which makes provision for the names of three candidates to be recommended for appointment. Acting in accordance with the provisions of section 6(3)(f)¹⁴ of the EEA and presumably having been satisfied that the process complied with the law and all other prescribed formalities, the first respondent appointed the fourth respondent as a successful candidate.
- [58] The applicant seeks to assail the process undertaken by the SGB by suggesting that her name was miraculously taken out of the three recommended candidates and replaced by the fourth respondent through the undue influence of the departmental circuit manager and a trade union observer who insisted on a secret vote to determine the three names of candidates who were to be recommended.

¹⁴ (f) Despite the order of preference in paragraph (c) and subject to paragraph (d), the Head of Department may appoint any suitable candidate on the list.

- [59] It is trite law that in a review application of this nature, the onus rests on the applicant to demonstrate that a public functionary has committed a reviewable administrative action¹⁵.
- [60] On the synopsis of the facts detailed above, there can be no suggestion that the SGB was unduly influenced to reach its recommendation as the record clearly demonstrates the due process undertaken by the SGB until its recommendation was placed before the first respondent. The interviewing panel submitted four names of candidates who were found to be suitable for appointment to the SGB.
- [61] As it is statutorily empowered, the SGB engaged on its own independent decision-making process in considering the names of the four candidates and eventually voted on the three candidates who were to be recommended to the first respondent.
- [62] To the extent that the applicant seeks to assail voting as a means to determine the recommended candidates, she has not adduced facts to demonstrate that either the prevailing legislative prescripts, policies or circulars of the department or the constitution of the SGB itself disavow voting as a deadlock breaking mechanism.
- [63] The decision of the first respondent cannot be said to have been taken contrary to what the court in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others**¹⁶ held to be the standard of assessing the reasonableness of the decision-making process in the following terms:
- ‘...That decision must strike a reasonable equilibrium between the different factors but the factors themselves are not determinative of any particular equilibrium. Which equilibrium is the best in the circumstances is left to

¹⁵ See *Kimberley Girls' High School and Another v Head, Department of Education, Northern Cape Province and Others* 2005 (5) SA 251 (NC) para 10 and cases referred therein.

¹⁶ 2004 (4) SA 490 (CC) para 49

the decision-maker. The Court's task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances.

- [64] The process and the actual decision made by the first respondent was thus done in a procedurally fair and reasonable manner as there are no grounds, either relied upon by the applicant or that could possibly be garnered from the facts, for the review of the first respondent's decision based on PAJA or the principle of legality. The application falls to be dismissed.
- [65] *En passant*, I have observed that the department's form NCK2 makes provision for the insertion of only three names of candidates to be recommended to the head of department for possible appointment. On the face of it, this form seems to confine the SGBs to recommend a maximum of three candidates only.
- [66] Applying the fundamental tenant of statutory interpretation as expounded in **Cool Ideas 1186 CC v Hubbard and Another**¹⁷ the ordinary grammatical meaning of s 6(3)(c)(i) of the EEA which directs SGBs to recommend '*at least*' three candidates does not support the stance taken by the compilers of form NCK2.
- [67] An interpretation of the ordinary meaning of the provisions of s6(3)(c)(i) entails that the minimum of three candidates must be recommended without restricting the maximum number of candidates that may be recommended in each situation. It is hoped that the department and all stakeholders will attend to this seemingly impasse before it leads to further disputes in the future.

Costs

- [68] In the normal course, the costs would follow the results. However, it is trite that the determination of costs requires an exercise of a judicial discretion

¹⁷ 2014 (4) SA 474 (CC) para 28

based on the facts and circumstances placed before a court in respect of a particular case.

[69] The applicant took all conceivable efforts that could be undertaken to assert her right to a fair administrative justice. In that process, the department failed to act as an exemplary organ of state in discharging its obligations towards its potential employee by failing to provide her with the written reasons on her unsuccessful contestation for a post of principal of the second respondent.

[70] Despite the substantive appointment having been made by the department during or about January 2021, the applicant only came to know of the reasons of her non-appointment upon being served with the record of the administrative decision in terms of the provisions of rule 53 of the Uniform Rules of Court, after having launched this application on 11 February 2022.

[71] This conduct amounts to a failure to uphold its obligations to provide the applicant with written reasons. As a demonstration of this Court's displeasure, it is my finding that the first respondent is not entitled to their costs. Resultantly, I am of the view that an appropriate order is to the effect that each party must bear its own costs.

Order

[72] In the premises, the following order is made:

1. The applicant's failure to institute judicial review proceedings within the time period contemplated in s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 is condoned in accordance with s 9 of the said Act and the applicant is granted an extension of time up to and including the date of institution of this application.
2. The application is dismissed.
3. Each party is ordered to bear its own costs.

OK CHWARO
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY

I agree, and it is so ordered.

A STANTON
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY

APPEARANCES:

For the Applicant:

Adv T W Snyders
With him: Adv K Maponya
Instructed by:
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For the First Respondent: Adv M Motlogelwa

Instructed by:
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