



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: **2056/2024**

In the matter between:

BLOEMFONTEIN SOUTH HIGH SCHOOL GOVERNING BODY

Applicant

and

MEC: FREE STATE DEPARTMENT OF EDUCATION

1st Respondent

HOD: FREE STATE DEPARTMENT OF EDUCATION

2nd Respondent

MOTHEO DISTRICT DIRECTOR

3rd Respondent

Coram: JP DAFFUE J

Heard: 24 OCTOBER 2024

Delivered: 29 NOVEMBER 2024

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 16H30 on 29 NOVEMBER 2024.

Summary: A school governing body sought a declaratory order that candidates recommended by it for appointment be considered by the Department of Education and that the MEC, HOD and District Director be mandated to appoint one of the candidates as Deputy Principal. In opposing the application, the respondents proved that the District Director, duly authorised thereto, had already taken a final decision and declined to accept the recommendation. The court held that the relief sought by the applicant was not competent and could not be granted. The application was dismissed with costs.

ORDER

1. The application is dismissed with costs, such costs to include the fees of counsel on scale A.
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JUDGMENT

DAFFUE J

Introduction

[1] The central issue in this application is the alleged refusal by the Department of Education to appoint a candidate of the Bloemfontein South High School Governing Body in the vacant Deputy Principal post at the school. Not a word is said in the application papers as to the identity of the preferred candidate. Interviews for the post have been held on 30 June 2023, more than a year ago. A decision had been taken on 1 November 2023 not to approve the School Governing Body's recommendation. The School Governing Body issued a belated application on 12 April 2024 to which the respondents replied in an answering affidavit filed on 31 May 2024. The applicant did not file a replying affidavit and did nothing further to obtain finality of the dispute. This caused the State Attorney to set the matter down on the opposed roll of 24 October 2024. Heads of argument were then filed by the parties whereupon oral argument was heard. Judgment was reserved.

[2] The applicant's application was issued five and a half months after the aforesaid decision had been taken on 1 November 2023. Its lacklustre approach continued thereafter insofar as it did not even consider and/or file a replying affidavit. If the State Attorney did not set the matter down for hearing, it would probably still be pending, notwithstanding the fact that the applicant considered it urgent.

The parties

[3] As mentioned, the Bloemfontein South High School Governing Body is the applicant in these proceedings. Its heads of argument were drafted by an unidentified person, but Adv N Malghas appeared on its behalf before me, instructed by AP Belot Attorneys.

[4] Three respondents were cited, to wit the MEC: Free State Department of Education, the HOD: Free State Department of Education and the Motheo District Director as first, second and third respondents respectively. Adv A Swanepoel appeared on behalf of the respondents, instructed by the State Attorney.

The relief sought

[5] The applicant applied for the following relief, which I quote *verbatim*:

- i. An order declaring that candidates recommended by the School Governing Body (SGB) following the interviews of the Deputy Principal post held on the 30th of June 2023, be considered for decision of appointment as prescribed in terms of Chapter 3 (a) to (g) of the Employment of Educators Act, 76 of 1998;
- ii. That the First, Second and Third Respondents be directed to appoint a candidate as the Deputy Principal as per the School Governing Body's recommendations in terms of the provisions of Section 3 (a) and (b) of the Employment of Educators Act, 76 of 1998' (emphasis added)

[6] It should be pointed out from the onset that the reference to *Chapter* in paragraph 1 is wrong. Secondly, the relief sought in the applicant's heads of argument is in direct conflict with the relief sought in the notice of motion. In paragraph one of the heads it is submitted that an order was required to declare the decision of the Department of Education 'not to appoint the recommended candidates into the position of Deputy Principal unlawful'. This submission was repeated in paragraph 10.6 of the heads of argument in seeking an order that 'the recommended candidates be employed within 30 days of the finalisation of this application'. The reference to 'candidates' in the plural is strikingly incorrect.

[7] The applicant sought a declaratory order in paragraph 1 of the notice of motion and a mandamus in paragraph 2. It did not seek the review and setting aside of any decision taken. Having said this, it is clear that it relied on several PAJA grounds of review.¹ The applicant preferred to bring the application in accordance with the provisions of rule 6 of the Uniform Rules of Court and not in terms of rule 53. Consequently, the matter was set down for hearing before a single judge in the

¹ The Promotion of Justice Act 3 of 2000; see record: pp17-19, para 8 of the founding affidavit.

opposed motion court on a Thursday and not before two judges in the review court on a Monday.

The main defence raised by the respondents

[8] It is submitted that the applicant ignored the fact that a final decision had already been taken by the third respondent on 1 November 2023. Notwithstanding its referral to the relevant letter attached to the founding affidavit,² the applicant did not grasp the effect of the contents. Therefore, so the respondents submitted, the court cannot be required to make any decision regarding the appointment of a candidate for the Deputy Principal's post, or to make the declaratory order sought insofar as effect must be given to the decision of 1 November 2023. The applicant does not seek the setting aside of this decision which shall therefore stand until set aside by a court.

Relevant background

[9] On 3 March 2023 the Department of Education advertised a Deputy Principal post for the Bloemfontein South High School. The applicant undertook the shortlisting process on 15 June 2023 in conjunction with the Department of Education and the Unions.

[10] Interviews were conducted on 30 June 2023 and on 20 July 2023 the applicant submitted the interview documents and its recommendation to the Department of Education. Correspondence ensued between the applicant and the Department of Education. The parties were not in agreement as to the applicant's compliance with all legal requirements.

[11] On 1 November 2023 the decision of the third respondent referred to above was communicated to the chairperson of the applicant. It is clearly stated in the letter to be 'my final opinion on your recommendation' and 'your recommendation was not approved because of the discrepancies identified and communicated to you.' It is also stated in this letter that the applicant was given the option to rerun the recruitment process which it failed to exercise.

² Record: p 27, read with paras 40.6-40.8 answering affidavit, p 64 of the record.

[12] Further correspondence ensued and the Department of Education was specifically requested by the applicant's attorneys to ensure that the Head of Department (HOD) makes the required decision pertaining to the recommendation of the recommended candidate who was never identified in the letters or the application papers. Clearly, the applicant insisted that the HOD failed to take a decision.

Evaluation of the evidence and submissions by the parties

[13] The respondents filed a supplementary affidavit belatedly, having established that there was a missing page from the delegation of powers attached to the answering affidavit. I enquired from Mr Malghas during the hearing whether his clients had any problems with the acceptance of the supplementary affidavit and the annexure thereto. He pertinently pointed out after receiving instructions in court that he did not object to the filing of the document. He submitted eventually that the delegation was unlawful, the reason being that the MEC as Head of the Department was delegated by the Minister and consequently, he had to take the decision himself. I accept that Mr Malghas incorrectly referred to the MEC and wanted to refer to the HOD who was delegated by the Minister of Education. He relied on *delegatus delegare non potest*. More about this later.

[14] The third respondent, Mr DS Moloi in his capacity as the District Director: Motheo Education District within the Department of Education, Free State Province filed the answering affidavit on behalf of the respondents. Mr Moloi's affidavit has been confirmed by the HOD, Mr T Malakoane³ and by Mr BM Tshabalala, the Deputy Director: Human Resource at the Motheo Education District.⁴ Mr Moloi pointed out that no relief could be granted against the MEC, cited as the first respondent, he being the appeal authority and not the appointing authority in terms of the Employment of Educators Act 76 of 1998 (the EEA). The third respondent also confirmed to be the author of the letter attached to the founding affidavit as annexure BSH4 dated 1 November 2023. Furthermore, he confirmed that he had made a final decision not to approve the recommendation of the applicant. Whilst accepting that the appointing powers were those of the HOD, he attached the delegation of powers dated 6 December 2021, empowering him to make decisions on behalf of the HOD in the

³ Record: p 160, annexure AA9.

⁴ Record: p 164.

specific circumstances.⁵ I also refer to the supplementary affidavit with annexure mentioned above.

[15] The State Liability Act 20 of 1957 provides that the executive authority of a department, which is the MEC, shall be cited as nominal defendant/respondent in proceedings against the Province. The MEC does not have the power to appoint educators. Section 6(1) of the EEA is the enabling provision in this regard. The HOD has the original power in accordance with s 6(1) to appoint educators. This provision should be read in conjunction with s 36(4) of the EEA which *inter alia* authorises delegation of authority by the HOD.

[16] The applicant failed to file a replying affidavit. Therefore, the delegation of the HOD was not attacked on a factual basis. Some argument was addressed to me in respect of the legal principle, *delegatus delegare non potest*. In accordance with this principle a person to whom a function has been delegated may not further delegate their function. *In casu*, the HOD received original powers to appoint educators as is evident from s 6(1) of the EEA. Therefore, nothing prohibited him from delegating his powers to the third respondent. Once it is accepted that the third respondent was duly delegated to decide the issue on behalf of the HOD, this should really be the end of the matter and no further issues should warrant the attention of the court.

[17] Much attention was given in the applicant's heads of argument and during oral argument to the legality principle and rationality in order to show that the HOD unlawfully declined to accept the applicant's recommendation. I reiterate that the applicant clearly misunderstood its own case. There is no reason to consider the arguments raised in this regard.

[18] There is a factual dispute as to the lawfulness of the recruitment process. If the applicant embarked on a proper review application in order to attack the process and eventual decision of 1 November 2023, the respondents would be duty-bound to present the full record and the reasons for the decision taken. It failed to act accordingly. It is possible that it acted in compliance with its duties pertaining to recruitment and that there is more to make of the decision of the third respondent than meets the eye. However, I am not called upon to speculate.

⁵ Record: p 74 and further, delegation of power attached as annexure AA1 to the answering affidavit.

[19] The relief asked for in the notice of motion is not competent. As mentioned, a decision has already been taken in terms of the EEA. In any event, as indicated earlier, no relief is sought to review and set aside the process adopted by the respondents and the eventual decision taken by the third respondent. I am bound to consider the factual dispute based on the Plascon-Evans rule. I cannot find on the papers that the respondents' version is far-fetched and/or untenable or palpably implausible.

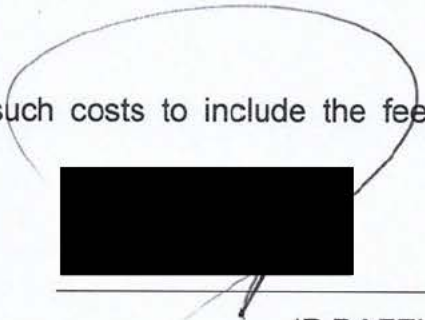
Costs

[20] The general rule is that the successful party is entitled to its costs. The effect hereof is that the applicant shall be ordered to pay the successful respondents' costs of the application, unless the *Biowatch*⁶ principle finds application. In the event of constitutional litigation each party should pay their own costs if the private party is unsuccessful. *In casu*, the applicant has not raised a constitutional issue in the papers. Far from it. It failed to appreciate what relief might be available to it. Its application was brought belatedly and it failed to pursue it with the necessary vigour. There is no reason why the aforesaid general rule should not be applied and the applicant be ordered to pay the successful parties' costs.

Order

[21] The following order is made:

1. The application is dismissed with costs, such costs to include the fees of counsel on scale A.



JP DAFFUE J

⁶ *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) para 43.

Appearances

For applicant: Adv N Malghas
Instructed by: AP Belot Attorneys
Bloemfontein

For respondents: Adv A Swanepoel
Instructed by: State Attorney
Bloemfontein