THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO: 584/07

In the matter between:

THE HEAD OF THE WESTERN CAPE EDUCATION DEPARTMENT	FIRST APPELLANT
JOHAN GEORGE VAN DER MERWE	SECOND APPELLANT
JACOBUS JOHANNES SWANEPOEL	THIRD APPELLANT
and	
THE GOVERNING BODY OF THE POINT HIGH SCHOOL	FIRST RESPONDENT
POINT HIGH SCHOOL	SECOND RESPONDENT
JOHANNES JACOBUS DU TOIT	THIRD RESPONDENT
FERDINAND PIETERSE	FOURTH RESPONDENT

CORAM: HOWIE P, MTHIYANE, VAN HEERDEN JJA and HURT, KGOMO AJJA

Date of hearing: 27 FEBRUARY 2008

Date of delivery: 31 MARCH 2008

Summary: Administrative action in terms of s 6(3) of the Employment of Educators Act 76 of 1998 – review by court – failure by decision-maker to weigh competing interests – resulting decisions unreasonable – decisions set aside – when court will give directive as to decision.

Neutral citation: Head of Western Cape Education Department v Governing Body of Point High School (584/2007) [2008] ZASCA 48 (31 March 2008)

JUDGMENT

HURT AJA

[1] This appeal concerns the legitimacy of two administrative decisions made by the Head of Department ('HoD') of the Western Cape Education Department ('the Department') to appoint a principal and a deputy principal to the Point High School, Mossel Bay ('the School'). On an application brought by the governing body of the School ('the Governing Body'), the Cape High Court (Potgieter AJ) set aside the appointments on the basis that the HoD had fallen foul of various provisions of s 6(2) of the Promotion of Administrative Justice Act 3 of 2000. The learned judge also made an order directing the HoD to appoint the two candidates who had been recommended by the Governing Body as its first choices for the posts. He dismissed an application for leave to appeal, but leave was subsequently granted on petition to this court. In this judgment it will be convenient to refer to the parties by their names rather than by their designations in the High Court or in these proceedings.

[2] During the second half of 2006 the School advertised for applications to fill the posts of principal and deputy principal on its staff with effect from 1 January 2007. The two posts were due to become vacant as a result of the retirement of the incumbents at the end of 2006. The applicant candidates were sifted and short-listed by a committee specially constituted for that purpose in terms of a set of directives from the Department. The short-listed candidates were interviewed and assessed by the committee during September and October 2006. The interviewing and assessment procedure was, likewise, prescribed in detail by the Department. The committee was required to put a series of prescribed and approved questions to each candidate, aimed at assessing the level of the candidate's ability in the fields of school and classroom management, knowledge of the curriculum and learning programmes, inter-personal relationships,

development and implementation of new systems and teaching methods, administration, work ethic and leadership. For the purpose of making quantitative assessments of these aspects, the procedure agreed upon by the committee was that each member of the interviewing committee would score the candidate's performance in each of the categories, the scores would be collated and averaged and an aggregate for each candidate thus arrived at. It was also specifically prescribed that the short-listing and interviewing processes were to be supervised by the Department's local representative, in this case the Circuit manager for the Mossel Bay Region, a Mr Anthony.

[3] In so far as the selection of a principal was concerned, the three most successful aspirants were Mr J J du Toit (the third respondent in this appeal), Mr J J Bester and Mr J G van der Merwe (second appellant) who was, at that time, the acting principal, having taken up the post when the principal became ill during April 2006. Both Mr du Toit and Mr Bester were principals at schools in KwaZulu Natal. On the scoring system devised for the purposes of comparative assessment, Mr du Toit scored 118 points out of a possible 125, Mr Bester 108 points and the acting principal, Mr van der Merwe, 86 points. The names and comparative scores of the most successful candidates for deputy principal were Mr F Pieterse (who is the fourth respondent in this appeal) 111 points, Mr J J Swanepoel (third appellant) 97 points and a Mr G J Swart, 82 points. Mr Pieterse was employed in Wolmaransstad, North West Province. Mr Swanepoel, who was employed at the School, had stepped into the shoes of Mr van der Merwe, as acting deputy principal, in April 2006 and had occupied that post for the remainder of the year.

[4] It is convenient, at this point, to set out the provisions of sections 6(3) and 7(1) of the Employment of Educators Act 76 of 1998 ('the EEA'), since these contain the fundamental prescriptions, both to the Governing Body and to the HoD, as to how the selection and appointment procedures were to be conducted. The relevant portions of the sections read as follow:

'(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 . . .

(b) In considering the applications, the governing body . . . must ensure that the principles of equity, redress and representivity are complied with and the governing body . . . 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;

(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.

(d) When the Head of Department considers the recommendation contemplated in paragraph (c), he or she must, before making an appointment, ensure that the governing body has met the requirements in paragraph (b).

(e) If the governing body has not met the requirements in paragraph (b), the Head of Department must decline the recommendation.

(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.

(g) If the Head of Department declines a recommendation, he or she must –

(i) consider all the applications submitted for that post;

(ii) apply the requirements in paragraph (b)(i) to (iv); and

(iii) despite paragraph (a), appoint a suitable candidate temporarily or re-advertise the post.

. . . .

7 Appointment and filling of posts

(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 (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.'

It is also important, for reasons which will become apparent later, to note that the provisions of s 6(3)(f) created a situation with regard to the HoD's powers of selection which was materially different that which had prevailed prior to the amendments which took effect in January 2006 (in terms of amending Act 24 of 2005). The situation until the beginning of 2006 was that the HoD was virtually bound to appoint the preferred candidate nominated by a governing body.[1] Only one name needed to be submitted, and if the HoD was disinclined to appoint the nominee, he was required to afford the

[1] The original s 6(3) provided that the HoD could only decline to give effect to the recommendation in specific circumstances, viz failure by a governing body to follow the prescribed procedure, the candidate not complying with minimum requirements for appointment or not being registered, proof of bias on the part of the governing body and a failure by the governing body to have regard to the provisions of s 7(1).

governing body the opportunity of nominating a different candidate. Accordingly, before January 2006, a governing body's recommendation, if made in good faith and without the governing body being subjected to 'undue influence', was almost invariably implemented by the HoD. For practical purposes, the effect of the amended s 6(3)(f) was that the interviewing and assessment procedure yielded a 'condensed' short-list of three or more 'suitable candidates' and the HoD was given a discretion to select any of these, notwithstanding the order of preference referred to in s 6(3)(c).

[5] Initially, after the interviews and assessments had been completed, the members of the Governing Body took the view that only the names of Messrs du Toit and Bester should be submitted to the HoD. However, it is accepted that Mr Anthony persuaded them that the HoD would not agree to accept a list of only two 'suitable candidates', this notwithstanding the provisions of s 6(3)(c)(ii). Accordingly, despite reservations about the suitability of Mr van der Merwe in comparison with the other candidates for the post of principal, the Governing Body submitted the names of Messrs du Toit, Bester and van der Merwe, together with a motivated recommendation that Mr du Toit be appointed. In relation to the post of deputy principal, the names of Messrs Pieterse, Swanepoel and Swart were submitted, the Governing Body's recommendation being that Mr Pieterse be appointed.

[6] The HoD announced, on 26th November 2006, that he had appointed Mr Swanepoel to the post of deputy principal. As this appointment was contrary to the Governing Body's motivated recommendation, the HoD was asked to furnish his reasons for making the appointment. In response, the following letter, dated 4 December 2006, was received from the Department:-

'Your fax of 27 November 2006 concerning the above-mentioned is hereby acknowledged. The Western Cape Education Department (WCED) wishes to emphasise that the nomination was dealt with in terms of section 6(3) of the Employment of Educators Act, 1998, as amended, as well as the relevant regulations with regard to the filling of advertised posts, with special reference to the Employment Equity Directive issued under Circular 18/2006 of 17 September 2006.

As you are aware, there is an over-representation of males at post level three in the WCED. The appointment of any of the other nominees would not have promoted or improved the EE targets of the WCED, therefore the appointment of Mr Swanepoel was approved.'

Within the next few days the appointment of Mr van der Merwe to the post of principal was announced. It appears that further requests by the Governing Body for reasons, or for elaboration of the reasons set out in the letter of 4 December 2006, were not formally responded to and the urgent application to review and set aside the appointments was lodged on 21 December 2006.

[7] The Governing Body based its application for review on contentions that the HoD's decisions were reviewable under various subsections of s 6(2) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). In the founding affidavit, Mr C Fivas, the Chairman, complained that the Governing Body had been in a state of perplexity relating to the Department's references, in explanation for the decision, to considerations of employment equity. This perplexity is understandable. Standing on its own, the letter of 4 December is confusing. Mr Fivas stated that he could obtain no clarity, in subsequent telephone conversations with officials in the Department as to how

employment equity could feature as a factor in a decision as to which of three white males to appoint, since no members of so-called 'designated groups' were involved.

The Basis for the HoD's Decision.

[8] In defence of the decisions, a lengthy answering affidavit with voluminous annexures reflecting, in the main, the Department's policies relating to employment equity, was delivered. This main answering affidavit was deposed to by an employee of the Department, a Mr. N A Daniels, who described himself as a 'Director: Personnel Management (Educators)'. There were very brief confirmatory affidavits by various members of the Department's administrative staff and by Messrs van der Merwe and Swanepoel. The HoD himself made a short affidavit in disconcertingly general terms, in which, after confirming the correctness of the statements in Daniels' affidavit in so far as they related to him, he went on to say: -

'3. More particularly I confirm having appointed [Mr van der Merwe] and [Mr Swanepoel] respectively on 12 December and 24 November 2006 in terms of section 6(3)(f) read together with section 7 of the Employment of Educators Act 76 of 1998, as amended. I confirm that having considered all relevant matter, and having disregarded irrelevant matter, and having applied my mind to submissions made to me by the [Governing Body] in relation to its preferred candidates, and having considered the submissions made to me by Messrs Daniels, Kirsten, Winegard, and other officials employed in the WCED, I decided that the second and third respondents were indeed suitable for appointment, and that their appointment would enhance employment equity in the WCD in the education sector.

4. I deny having taken unfair administrative action in one or more of the respects alleged in paragraph 77 of the first applicant's affidavit. I am moreover confident that I at all material times

had regard to the paramount interests of learners at (the School), and I confirm furthermore that the appointment of the second and third respondents is indeed in the best interests of learners at [the School]. I have no doubt that the other educators preferred by the first applicant, ie [Messrs du Toit and Pieterse] are also fine educators but I considered that not only are [Mr van der Merwe] and [Mr Swanepoel] suitable appointments having regard to a variety of factors (including their competence, ability, track record and service to (the School) over a long period of time), but that their employment would also promote employment equity within the WCED.'

Given that the HoD was the person who had made the challenged decision, it would obviously have been preferable for him to give an explicit statement of the factors which he took into account. However, for the purposes of this judgment it is not necessary to elaborate on this aspect as the matter can be decided simply on the basis that Mr Daniels has correctly reported the factors which weighed with the HoD in deciding to appoint Messrs van der Merwe and Swanepoel.

[9] What emerges from Daniels' affidavit is that the main reason for rejection of the recommended candidates was that each of them was employed outside the Cape province. He stated:

'In relation to the specific case of the appointment of (Messrs van der Merwe and Swanepoel) to the posts of Principal and Deputy Principal . . . respectively, in view of the broader Employment Equity Plan of the WCED, it was obvious that the appointment of a white male candidate from outside the ranks of the WCED in effect would mean adding to an already over-represented group (in) the establishment whilst the aim is to reduce the numbers of that specific group, i.e. white males. By contrast, should a person from within the ranks of the WCED be appointed, it does not worsen the situation, and in effect it creates another opportunity (where a vacancy now arises) to afford a designated person a chance of appointment, thus promoting equity. . . . .

Accordingly, in applying his mind to the matter, (the HoD) took a decision to appoint (Messrs van der Merwe and Swanepoel) thus promoting broader equity in the WCED.' What also emerges from the answering affidavits is the distinct probability that this approach only evolved during the discussions referred to by the HoD which took place subsequent to the receipt of the Governing Body's recommendations. Certainly, Mr Anthony did not mention to the Governing Body before the recommendations were made, that white male candidates from outside the Province were at a distinct disadvantage because of the employment equity policy.[2] If the Department, and the HoD in particular, held this view before the selection process commenced, but Mr Anthony failed to disclose it to the interviewing committee or the Governing Body, then I think that the decisions may well be reviewable on the basis that they were procedurally unfair as contemplated in s 6(2)(c) of PAJA. This issue was not canvassed in argument and, for the purposes of this judgment, I will accordingly assume, in favour of the appellants, that it was only when the recommendations to appoint candidates from outside the Province were submitted to the HoD that these employment equity consequences were considered for the first time. The crisp question is whether they were relevant to the HoD's decision and whether it was proper for him to have taken them into account.

[10] The appointments made by the HoD were plainly the result of 'administrative action' as defined in s 1 of PAJA.[3] The empowering provisions were those set out in

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[2]Mr Daniels states: 'Mr Anthony also denies that he would have given any directions during the selection process regarding employment equity. As Mr Anthony did not know what the (Governing Body) would do, or ultimately recommend, Mr Anthony did not discuss the issue of the appointment of two white males from outside of the Western Cape.'

[3] **'Administrative action'** means any decision taken, or any failure to take a decision, by-

(a) . . .

s 6(3) of the EEA. The decision-making process contemplated in the section is a dichotomous one. The first step is for the governing body to make a comparative assessment of the candidates and to compile a list of those whom it recommends for appointment in its order of preference. This it must do in accordance with the precepts in s 6(3)(b). The HoD is then required to consider whether the governing body has arrived at its recommendation by a process which meets those precepts. It does not appear that he has a perceptible discretion in this regard. If he is of the view that the requirements have not been met, he is bound by s 6(3)(e) to reject the governing body's recommendation as a whole and to proceed in terms of ss 6(3)(g). If he is satisfied that the stipulated requirements have been complied with, he may appoint a candidate from the governing body's list in terms of the discretion vested in him by ss 6(3)(f). The law is now clear that, in exercising this discretion, the HoD is required to act reasonably and, by taking into account all of the relevant factors and considering the competing interests involved, to arrive at a decision which strikes a 'reasonable equilibrium'.[4] The court has no power to review this decision purely because there may be another, perhaps better, 'equilibrium' which could have resulted by attributing more weight to some factor or factors and less to others. If that struck by the decision-maker is reasonable, then it must stand.[5]

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect . . .'

[4] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) paras 45 and 49.

[5] *Loc cit.*

The significance of my reference to a 'dichotomous procedure' is that, if he considers that the governing body has performed its functions properly, the HoD must obviously attribute substantial weight to the recommendations submitted to him. He is called upon to decide upon the appointment of a person from a list of people about whom he may have no personal knowledge. The governing body of such a school, constituted (in terms of the South African Schools Act) mainly by elected representatives of parents and staff, would naturally be expected to have a reliable comparative picture of the various candidates and their suitability for appointment at the school. Its choice and recommendation would obviously be better-motivated, and more reliable, than any that the HoD could make in the circumstances. While it is quite correct that he has a specified discretion to disregard the governing body's motivated recommendation and even its order of preference, he must clearly exercise this discretion in a manner which conforms to the statutory requirements of fair administration in the Constitution and in PAJA and also, in general, with the Department's policy.

[11] I think it is fair to say that the main grounds advanced in the answering affidavits to justify the HoD's decisions are as follows:-

(a) the Governing Body had misconstrued the meaning and effect of the amendment to s 6(3) and in particular the change in scope of the discretion conferred on the HoD by the new s 6(3)(f);

(b) the Governing Body's comparative assessment of the respective suitability of the various candidates was flawed because there were clear indications of subjective bias

on the part of certain members of the interviewing committee, demonstrated by the divergence in the scores allocated by them;

(c) the mere fact that the Governing Body had submitted the names of Mr van der Merwe and Mr Swanepoel in its lists meant that they were regarded as 'suitable candidates' and the Governing Body could not *ex post facto* be heard to say that any of them was not suitable;

(d) in any event, both Messrs van der Merwe and Swanepoel had proved their worth between April and December 2006 by performing their functions satisfactorily;

(e) in the light of the above, it was justifiable to give priority to considerations of employment equity in deciding which candidates to appoint.

The Scope of the HoD's Discretion.

[12] With regard to the HoD's contention in (a), above, to the effect that the Governing Body misconstrued the scope of the HoD's 'new' discretion, it actually seems that the boot is on the other foot. The contentions on behalf of the HoD both in the answering affidavits and in argument by counsel were to the effect that there was now no longer an onus on the HoD to make an appointment in conformity with the Governing Body's recommendation or, indeed, its list containing its order of preference. It would be wrong, so the contention ran, to require the HoD to justify his decision to appoint anyone other than the recommended candidate. The contention that the amendment to the EEA broadened the scope of the HoD's discretion is obviously correct. But the contention that this wider scope excused him from having to furnish acceptable reasons for his decision is not. The duty to justify the exercise of a discretion such as this arises

directly from s 5 of PAJA and this duty has nothing to do with the scope of the discretion itself. That the HoD considered that he was free, under the provisions of the amended section, to disregard the Governing Body's recommendation in favour of considerations of employment equity, is clear. In taking this view he failed, signally, to perform the balancing exercise referred to in *Bato Star* by weighing the (somewhat obscure) employment equity considerations which had occurred to him, against the disparity in ability and suitability between the candidates recommended by the Governing Body and the candidates whom he decided to appoint.

[13] As to the matters mentioned in (b), (c) and (d) of para 11, I can be brief. First, it did not lie in the mouth of the HoD to criticise the basis of the Governing Body's assessment of the candidates as a means of justifying his own decision. The assessment had been carried out in terms of the Department's instructions and under the general supervision of the Department's Circuit Manager. If the HoD had qualms about the propriety of the procedures adopted, his only course was to decline to make an appointment in terms of s 6(3)(e). Once he embarked upon the task of choosing a candidate for appointment, he was bound to accept that the recommendations before him were validly made. As far as (c) is concerned, the HoD seized upon the fact that Mr van der Merwe's name appeared on the Governing Body's list. His conclusion that this necessarily meant that the Governing Body was putting Mr van der Merwe forward as a suitable candidate is somewhat naive. Accepting, for the moment, that the HoD was unaware of the exchange between Mr Anthony and the Governing Body on the issue of the inclusion of Mr van der Merwe's name on the list, the view allegedly taken by the HoD involves ignoring the very significant disparity between the assessed suitability of

Mr van der Merwe compared with Messrs du Toit and Bester. Similar considerations apply in relation to Messrs Swanepoel and Pieterse. Although the difference of 14 points between these two candidates was not nearly as marked as that in the case of the candidates for the principal's post, it was nevertheless substantial and there would have to have been weighty considerations for deviating from it for the purpose of making an appointment. As to (d), the papers reflect a difference of opinion in regard to the performance of Messrs van der Merwe and Pieterse in their acting capacities during 2006. What is beyond dispute, however, is that the Governing Body genuinely took the view that its preferred candidates were capable of performing their respective functions more effectively than Messrs van der Merwe and Pieterse. There would also have had to be weighty considerations necessary to justify the sacrifice of superior performance which the HoD's decision entailed.

– [14] It follows, from what I have set out in the previous paragraph, that the considerations of employment equity which, according to the HoD, were regarded as outweighing the other factors relevant to his decision, should necessarily have been weighty indeed. In fact they were not. In the first place it is apparent that the HoD overlooked, or misunderstood, or failed to apply an important provision of the Department's own policy concerning the role of employment equity in the making of appointments.[6] The passage to which I refer reads as follows:-

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[6] This policy, updated to September 2006, is set out fully in a document entitled ' Policy Implementation Directive for Compliance with Employment Equity Targets at Education Institutions', annexed to the answering affidavit. The passage quoted is from the section dealing with the appointment of educators

'The recruitment, selection and appointment procedure will be utilized to achieve the goals of representitivity. The following will be used to create vacancies in the department in line with the objectives of the Employment Equity Plan:

- natural staff turnover (resignations, retirements, dismisssals, etc)
- transfers and promotions;
- expansion of the department;
- restructuring of the public service.

All appointments will, however, be based on the inherent requirements of the position. However, where an insignificant gap between possible candidates exists in terms of merit/performance, preference will be given to an employee from a designated group, should the appointment contribute to the improvement of the representation of specific designated groups.'

It seems that the word 'insignificant' may have been unfortunately chosen, but it must obviously be construed in its context and bearing in mind the fundamental principles of employment equity. A difference in actual ability between two candidates where one is from a so-called 'designated group', though marked, may be rendered insignificant by the potential of the candidate from the designated group. In other words the benefit of employing such a candidate may only become perceptible with training and experience. I do not intend to embark upon an analysis of what precisely is meant by 'insignificant' in this particular passage, but the general intention behind the precept is plain.

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and headed ' Addressing Representation'. The document is also referred to in the letter of 4 December 2006 in para 6, above, as constituting the 'regulations' with regard to the filling of advertised posts.

Employment equity provisions should only prevail in circumstances where there is approximate equality between the ability or potential ability of the two candidates. Counsel for the appellants sought to avoid the effect of this passage by contending that it was only applicable in situations where there was direct competition for appointment between candidates, one of whom was from a 'designated group'. That may possibly be so, but I think that the effect of the policy applies *a fortiori* to a case such as the present, where all of the candidates were white males. In such a situation, if the differences in suitability between them were appropriately small, the HoD *may* (I express no firm view on this) have been justified in appointing a governing body's second or third choice on the basis that such an appointment would leave a vacancy in the Province which would open the way to employment of a person from a designated group in the appointee's place. But that is a purely hypothetical situation. In making both appointments in this case, the HoD ran roughshod over the significant disparities in suitability and effectively sacrificed the interests of the School on the altar of employment equity – and 'contingent employment equity' at that.[7]

[15] Potgieter AJ found, on separate bases, that the HoD's decisions were impugnable under the provisions of s 6(2)(f)(ii) and 6(2)(h) of PAJA. Of course, the second of these includes within its broad ambit situations where the first is applicable.[8] A decision which has no objectively rational connection to the purpose of the empowering provisions must necessarily be one which no reasonable decision-maker

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[7] As pointed out by Potgieter AJ, all that the HoD achieved by choosing appointees from within the Province was to create vacancies in the vacated posts. The HoD had not shown that these would inevitably have been filled by persons from designated groups.

[8] Cf *Trinity Broadcasting v ICA* of SA 2004(3)SA 346 (SCA) paras 20 and 21.

could make, but an unreasonable decision may not necessarily be so because of irrationality. While I might be inclined to agree with Potgieter AJ that the HoD's decision to make contingent provision for increasing the proportion of persons from designated groups in the senior echelons of the teaching staff was not a rational method of achieving the purposes of the EEA and Department Policy, I would prefer to base my conclusion that the decision should be set aside on the broad ground of unreasonableness as contemplated in s 6(2)(h). In my view the HoD proceeded with out a proper understanding of the scope of the discretion which he was called upon to exercise. He disregarded the necessity of actually weighing the equity considerations to which he sought to give effect, against the interests of the Governing Body and the School (including its pupils) to have the benefit of improved ability in the teaching staff. In doing so he omitted to reach a reasonable equilibrium between these interests, rendering his decision reviewable on the basis described in *Bato Star.*

[16] Potgieter AJ decided not to remit the matter to the HoD for reconsideration. He said:

'As indicated, the only reason for not appointing first applicant' is preferred candidates was first respondent's erroneous belief that it was justified to make an appointment from the ranks of his existing employees in order somehow to advance employment equity. But for this error, it is quite apparent that the first respondent, acting rationally and reasonably as required by the provisions of PAJA, would have appointed the candidates who were properly assessed to be best suited for the appointment.

It is obviously in the best interests of all parties concerned, that the situation at the second applicant should be regularised without any further delay in view of the fact that the academic year has well

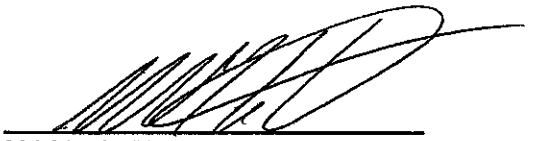
advanced. Little purpose would accordingly be served by referring the matter back to the first respondent to be dealt with *de novo*.'

While it is trite that a court should always be chary of obtruding its views and decisions into an administrative system when it considers that there has been reviewable action, this is clearly a case where the learned judge's approach was justified. Counsel for the respondents informed us that, due to the very passage of time referred to by Potgieter AJ, Mr du Toit is no longer available for the appointment. However, counsel confirmed that the Governing Body still holds the view that, in the absence of Mr du Toit, Mr Bester should be appointed. We were also assured that Mr Bester is still available and willing to accept the appointment and that it is crucial for a decision to be made which will dispose of the uncertainty which the Governing Body and the School have had to face over the past 14 months. Counsel for the appellants attempted to persuade us that it was neither desirable nor competent for this court to make a directive as to the appointments, especially that of Mr Bester who has not been joined in these proceedings. Counsel did not identify any prejudice which might be occasioned to anyone arising out of the non-joinder of Mr Bester, and there is no substance in this or the other contentions put forward by counsel against the proposal that this court should effectively make the appointment which should have been made by the HoD.

[17] The appeal is dismissed with costs, such costs to include those occasioned by the employment of two counsel.

2. The order made by the court *a quo* is confirmed, save that para (b) is amended to read:

'The first respondent is directed to appoint Mr J J Bester as principal and Mr F Pieterse as deputy principal.'



N V HURT
ACTING JUDGE OF APPEAL

CONCUR:) **HOWIE P**
) **MTHIYANE JA**
) **VAN HEERDEN JA**
) **KGOMO AJA**