Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case Nr: 765/2006

Heard: 30/10/2006
Delivered: 08/12/2006
In the matter:

Hartswater High School **First Applicant**

The Governing Body of the Hartswater High School **Second Applicant**

and

The Head of the Department of Education: Northern Cape **First Respondent**

Paul Roux Steenkamp **Second Respondent**

Stephan Phillip Paulus **Third Respondent**

Deon Joubert **Fourth Respondent**

Louis Eugene von Below **Fifth Respondent**

Mrs C M Van Zyl **Sixth Respondent**

David Petrus Jason **Seventh Respondent**

Coram: Tlaletsi AJP *et* Molwantwa AJ

JUDGMENT

Tlaletsi *AJP:*

INTRODUCTION

1. The first applicant, Hartswater High School (Hartswater High) is a public school in the Northern Cape Province. In terms of the *South African Schools Act*, Act no 84 of 1996 ("the Schools Act"), section 15 thereof, it is clothed with juristic personality. The second applicant, the School Governing Body of Hartswater High School ("SGB"), is also authorized to bring this application because in terms of section 16 of the Act the governance of the school is vested in it.

2.

3. The First Respondent is the Head of the Department of Education ("HOD") in the province who, in terms of Section 3(1)(b) of the *Employment of Educators Act*, Act no: 76 of 1998 ("the Employment Act") is the employer of all the educators in the Northern Cape Province.

4. The second Respondent, Mr Paul Roux Steenkamp(" Steenkamp"), was one of the candidates who applied for the post of principal at Hartswater High, was shortlisted for an interview, was interviewed and recommended by the SGB as their preferred candidate for the appointment. The recommendation was however not accepted by the HOD.

5. The Third Respondent, Mr Stephan Phillip Paulus ("Paulus") was a competitor for the said principal's post, was shortlisted for an interview, was interviewed and not recommended by the SGB as their preferential candidate for appointment. He was however, notwithstanding, appointed by the HOD as principal of Hartswater High.

6. The Fourth to the Seventh Respondents were also competitors for the post. They were also shortlisted, interviewed and not recommended by the SGB.

7. The relief sought by the two applicants as contained in the Notice of Motion is divided into "Part A" and "Part B". "Part A" is an urgent interdictory relief in terms whereof the applicants are seeking the following orders:-

   6.1 that the appointment of Paulus by the HOD as principal of Hartswater High be suspended;

6.2 that costs of this part of the application stand over for later determination with "part B".

The order in paragraph 6.1 was to be operational with immediate effect pending the determination of "Part B" of the application.

8. In "part B" the applicants seek the relief that the two decisions described below be reviewed, nullified and set aside:

7.1 The decision embodied in a letter dated 5 December 2005 (Annexure "H") in which the HOD rejected the SGB's recommendation that Steenkamp be appointed principal of Hartswater High.

7.2 The decision incorporated in a letter dated 10 May 2006 from the HOD in terms whereof Paulus is appointed principal of Hartswater High with effect from 1st June 2006.

9. On 7 July 2006 the application was before *Lacock J.* With the agreement of the parties the entire application was postponed to 11 September 2006. Further papers were filed by the parties to give substance to Part B of the application.

BRIEF BACKGROUND

10. As a brief background on 25 July 2005 the Department of Education, Northern Cape Province ("the Department") advertised the position of principal at Hartswater High. From the applications received from the Department, the SGB's Selection Committee ("the Committee") shortlisted six candidates. These are the second to seventh respondents. Interviews were conducted with the candidates. The committee's recommendation for the appointment was approved by the SGB on 7 October 2005. Recommendations by the SGB was communicated to the HOD. In a letter dated 5 December 2005 which was received by the SGB chairperson on 12 December 2005, the HOD rejected the recommendation of the SGB, and *inter alia*, referred the matter back to the SGB to make another recommendation. A series of events happened until the appointment of Paulus by the HOD. I will revert to these events at a later stage.

PROCEDURE TO BE FOLLOWED

11. For convenience and better comprehension of the issues and the regulatory aspects, the applicable prescribed procedure to be followed at the time, from the stage that a vacancy occurs or exists at a public school in the province throughout the various phases until the deserving candidates, preferentially ranked, are recommended by the SGB for appointment by the HOD, is necessary. These are the steps that are extrapolated from the "Personnel Administration Measures" ("PAM") which have been issued by the Minister of Education[1]. The procedure has now been amended[2]. Section 7(2) of the Amendment Act provides as follows:

"Any vacant post that was advertised before the commencement of this section must be filled in terms of the provisions of the Employment of Educators Act, 1998, as it existed immediately before the commencement of this section if interviews in respect of the vacant post were held before such commencement."

It is common cause that the regime provided for in the Amendment Act is not applicable in *casu.* The procedure that is applicable is as hereunder.

10.1 The School notifies the Department of the existence of a vacancy.

10.2 Vacancies in public schools are advertised in what is basically an education gazette, a bulletin or circular and in the public media.

10.3 The advertisement must clearly state that the state is an affirmative action employer and must be non-discriminatory and in keeping with the provisions of the Constitution[3] of the

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1 See*: **Douglas Hoërskool v Premier Noord-Kaap en Andere*** 1999(4) SA 1131 (NC) at 1138H – 1139F; ***Kimberley Girls High School and Another v Head of Department of Education, Northern Cape Province and Others*** [2005] 1 All SA 360 (NC) at 362b-c.

2 Section 6 of the Act has now been amended by EDUCATIONAL LAWS AMENDMENT ACT 24 of 2005. The relevant preamble states that 'to amend the Employment of Educators Act 1998, so as to provide for the refinement of the process of the appointment of educators. Section 7 of the Amendment Act amends section 6 of the Act by substituting subsections (3).

3 PAM Chapter B paragraph 3.1.

Country.

10.4 The Department is tasked with the Sifting Process of the applications. This sifting must not be confused with the shortlisting of candidates which latter function resorts under the competency of the SGB. The sifting process is a check and balance process to eliminate applications of candidates who do not comply with the minimum requirements for the post as reflected in the advertisement.

10.5 At the sifting stage "Trade Union parties to the council" have to be given a full report at a formal meeting of who were eliminated and who made it to the shortlisting stage[4].

10.6 The Education institution then establishes an Interview Committee. The Committee shall comprise of [5]:

10.6.1 One departmental representative (who may be the school principal), as an observer and a human resource official;

10.6.2 The school principal (if he/she is not the departmental representative). Such a principal is obviously disqualified to fulfill these tasks if he/she is a candidate;

10.6.3 Members of the SGB, excluding an educator member who is an applicant;

10.6.4 One Union representative per union that is a party to the provincial chamber of the *Education Labour Relations Council* ("ELRC"). These union representatives shall be observers of the process of shortlisting of interviews and the drawing up of a preference list.

4PAM Chapter B paragraph 3.2.
5 PAM Chapter B paragraph 3.3.

10.6.5 The Interview Committee shall appoint a chairperson and a secretary from amongst its members;

10.6.6 All the applications that meet the minimum requirements and provisions of the advertisement will be handed over to the SGB of the affected school;

10.6.7 It is the obligation of the SGB to convene the Interview Committee and ensure that all relevant persons and organizations are notified at least 5 (five) working days prior to the date, time and venue of the shortlisting, interviews and drawing up of the preference list.

10.6.8 The Interview Committee may conduct the shortlisting according to the following guidelines:

10.6.8.1 The criteria used must be fair, non-discriminatory and in keeping with the Constitution;

10.6.8.2 The particular needs of the school must be had regard to;

10.6.8.3 The obligation of the Department towards the serving educators must be taken into account; and

10.6.8.4 The list of shortlisted candidates for interview purposes should not exceed 5 (five) candidates per post.

10.6.9 The interviews shall then be conducted according to agreed guidelines. These guidelines are to be jointly agreed upon by

the parties to the provincial chamber.

10.6.10 The SGB must then submit their recommendation to the HOD in their order of preference.

10.6.11 PAM requires that before the HOD make his final decision he must be satisfied that the agreed procedures were followed and the decision is in compliance with the Employment Act, the *Schools Act*, and the Labour Relations Act, Act 66 of 1995 ("the LRA") [6].

LEGISLATIVE FRAMEWORK

12. It is not in dispute that the Department and the SGB followed the procedure prescribed, at least up to the stage when their recommendation was rejected by the HOD. What poses a problem is the substantive compliance. The relevant legislative framework provisions deserve reference for better understanding of the issues:

11.1 Sections 6 and 7 of the Employment Act at the relevant time stipulated that [7]:

"***6 Powers of employers***

(1) Subject to the provisions of this section, the appointment of any person, or the promotion or transfer of any educator-

(a) in the service of the Department of Education shall be made by the Director-General; or

(b) in the service of a provincial department of education shall be made by the Head of Department.

(2) Subject to the provisions of this Chapter, the Labour Relations Act or any collective agreement concluded by the Education Labour Relations Council, appointments in, and promotions or transfers to, posts on any educator establishment under this Act shall be made in accordance with such procedure

6 PAM Chapter B paragraph 3.4.

7 PAM Chapter B paragraph 3.1.

and such requirements as the Minister may determine.

(3) (a) Subject to paragraph (d), any appointment, promotion or transfer to any post on the educator establishment of a public school or a further education and training institution, may only be made on the recommendation of the governing body of the public school or the council of the further education and training institution, as the case may be, and, if there are educators in the provincial department of education concerned who are in excess of the educator establishment of a public school or further education and training institution 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) The Head of Department may only decline the recommendation of the governing body of the public school or the council of the further education and training institution, if-

(i) any procedure collectively agreed upon or determined by the Minister for appointment, promotion or transfer has not been followed;

(ii) the candidates does not comply with any requirements collectively agreed upon or determined by the Minister for the appointment, promotion or transfer;

(iii) The candidate is not registered, or does not qualify for registration, as an educator with the South African Council of Educators;

(iv) sufficient proof exists that the recommendation of the said governing body or council, as the case may be, was based on undue influence; or

(v) The recommendation of the said governing body council, as the case may be, did not have regard to the democratic values and principles referred to in section 7(1).

(c) If the Head of Department declines a recommendation in terms of paragraph (b), the governing body or council concerned shall make another recommendation in accordance with paragraph (a), for consideration by the Head of Department.

(d) A recommendation contemplated in paragraph (a) shall be made within two months form the date on which a governing body or council was requested to make a recommendation, failing which the Head of Department may make an appointment without such recommendation.

(e) Until the relevant governing body or council, is established, the appointment, promotion or transfer in a temporary capacity to any post on the educator establishment must be made by the Head of Department where a-

(i) new public school is established in terms of

the South African Schools Act, 1996, and any applicable provincial law;

(ii) new further education and training institution is established in terms of the Further Education and Training Act, 1998, and any applicable provincial law; or

(iii) new public adult learning centre is established in terms of the Adult Basic Education and Training Act, 2000, and any applicable provincial law."

"7. Appointments 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, 1996 (Act 108 of 1996), and which include the following factors, namely-

(a) the ability of the candidate; and

(b) the need to redress the imbalances of the past in order to achieve broad representation.

(2) A person may be appointed under this Chapter-

(a) in a permanent capacity, whether on probation or not;

(b) in a temporary capacity for a fixed period, whether in a full-time, in a part-time or in a shared capacity; or

(c) on special contract for a fixed period or for a particular assignment, whether in a full-time or in a part-time capacity." (My underlining).

13. Section 195(1) of the *Constitution Act 108 of 1996("the Constitution")* decrees that:

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

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-

development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation." (My underlining).

THE ISSUES

14. The main issues to be decided are whether the applicants are entitled to the order to have the decision of the HOD dated 5 December 2005 declining to appoint Mr Steenkamp reviewed as well as the decision of 10 May 2006 by the HOD appointing Mr Paulus as principal of the first applicant with effect from 1st June 2006.

15. The applicants bear the onus to establish that there are grounds on which this court should review the decisions of the HOD. There is no onus on the body whose conduct is the subject of review to justify its conduct[8].

16. The authority of the court to review a decision of a functionary was authoritatively stated by the Constitutional Court in Bato *Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*[9] as follows.

"In ***Pharmaceutical Manufacturers Association of SA and Another***: ***In re Ex parte President of the Republic of South Africa and Others***, *the question of the relationship between the common-law grounds of review and the Constitution was considered by this Court. A unanimous court held that under our new constitutional order the control or public power is always a constitutional matter. There are no two systems of law regulating administrative action-the common law and the Constitution- but only one system of law grounded in the Constitution. The courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The*

8 See: **Darlies v Chairman, Committee of the Johannesburg stock Exhange** 1991(4) SA 43(W) at 47H, **Kimberley Girls High School and Another v The head of Department of Education, Northern Cape Province and two Others** [2005] 1 ALL SA 360(NC) at 364 d-e and JR de Ville **"Judicial Review of Administrative Action in South Africa"** Lexisnexus Butterworths p313-315.

9 2004(7) BCLR 687(CC) at 702-703; 2004(4) SA 490(CC) at 504f-505b.

grundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires, nor in the doctrine of parliamentary sovereignty, not in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by case basis as the courts interpret and apply the provisions of PAJA and the Constitution."

The grounds upon which administrative action may be judicially reviewed are listed in section 6 of Promotion of Administrative Justice Act 3 of 2000("PAJA")[10].

The Grounds of Review

17. The grounds of review relied upon by the applicants are set out in paragraph 51 of the founding affidavit by *Christoffel Johannes Van Vuuren*. These are:

16.1 that the HOD erred in finding that regard was not had to Sec 7(1) of the Employment Act, as well as sec. 195(1) of the

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10 Sec 9(2) reads: A court or tribunal has the power to judicially review an administrative action if-

(a) the administrator who took it-
  (i) was not authorised to do so by the empowering provision;
  (ii) acted under a delegation of power which was not authorised by the empowering provision; or
  (iii) was biased or reasonably suspected of bias;
(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
(c) the action was procedurally unfair;
(d) the action was materially influenced by an error of law;
(e) the action was taken-
  (i) for a reason not authorised by the empowering provision;
  (ii) for an ulterior purpose or motive;
  (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
  (iv) because of the unauthorised or unwarranted dictates of another person or body;
  (v) in bad faith; or
  (vi) arbitrarily or capriciously;
(f) the action itself-
  (i) contravenes a law or is not authorised by the empowering provision; or
  (ii) is not rationally connected to-
    (aa) the purpose for which it was taken;
    (bb) the purpose of the empowering provision;
    (cc) the information before the administrator; or
    (dd) the reasons given for it by the administrator;
(g) the action concerned consists of a failure to take a decision;
(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
(i) the action is otherwise unconstitutional or unlawful.

Constitution.

16.2 That there was no basis for the HOD to decline the appointment of Steenkamp in terms of sec. 6(3)(b), (v) of the Employment Act;

16.3 That the HOD erred in his approach that white candidates from outside the Northern Cape Province are not suitable for appointment in that this is an irrelevant factor and ignored a factor that is relevant which is the ability of the candidate.

16.4 That the HOD erred in concluding that there is no proof that Steenkamp contributed towards transformation.

16.5 That the HOD erred in taking the statistics into consideration without appreciating that during the past few years, no so-called previously disadvantaged individuals applied for appointment.

17. Van Vuuren concludes, in somewhat wide terms, with a catch all phrase that taking into account all factors set out above the HOD's decision is reviewable and should be set aside on one or more of the grounds listed in sections 6(2)(a)(iii), 6(2)(b), 6(2)(c); 6 (2)(d), 6(2)(e)(i), (ii) (iii) and (vi), 6 (1)(f)(i), (ii) (aa)-(dd) en 6(h) of PAJA.

THE PARTIES' ARGUMENT

18. *Adv. Heunis SC*, who appeared on behalf of the applicants, argued inter alia, that the HOD's conduct fails to pass muster at the first level of enquiry, i.e. if it is measured against the clear and unambiguous wording of the main Act which provides that he may only decline the recommendation of the SGB if the recommendation "did not have regard to the democratic values and principles referred to in section 7(1)". Secondly the HOD, he argued, has disavowed the scores which the various candidates obtained which action makes his decision to be tainted and liable to be set aside. Thirdly, the HOD grossly underestimated the requirements concerning the ability or inability of a candidate.

19. *Adv. Dansfuss SC*, who appeared on behalf of the respondents, raised both technical and substantive defences. Firstly, he argued that the applicants have not complied with the provisions of sec. 6(3)(c) of the Employment Act. The SGB failed to make another recommendation after the HOD declined its recommendation. Secondly, that the SGB in form NCK2 only recommended one person although it referred to three names in the form. Thirdly, that it is abundantly clear from the papers that no attention was paid in the process to redressing the imbalances or to archieve broad representation. As a result the recommendation and the process which preceded it does absolutely nothing to redress the imbalances of the past in order to achieve broad representation in the school staff establishment for compliance with sec. 7(1) of the Employment Act as well as sec.195(1) of the Constitution. The HOD therefore, he argued, was justified in declining the recommendation, and was entitled to make an appointment in terms of sec.6 (3)(d) of the Employment Act without any recommendation, and that the appointment was in any case justified in terms of sec. 7 of the Employment Act.

ANALYSIS

20. It is common cause on the papers and as confirmed during argument, that other than the technical points raised, all the formal steps and requirements listed in paragraph 10 above, were properly complied with by the first Respondent, the Second Applicant and its interviewing committee. It is further common cause that the Department as well as Union representatives were part of the process, playing their respective roles as required by the agreed procedures set out above. None of the parties or interested person(s) raised any objection of whatever nature when a recommendation to the SGB was made by the interviewing Committee. The process followed by the SGB in considering the recommendation of the interviewing Committee and finally making a recommendation to the HOD was not challenged or queried.

21. It is not in dispute that the points allocation yielded the following results: PR Steenkamp 83.9, D Joubert- 77.9, LE Van Below 62.6, C M Van Zyl 60.31, DP Jason 57.5 SP Paulus 53.61. These points explain why they were ranked one up to six and why the second Respondent became the preferred candidate of the SGB.

22. In declining the recommendation of the SGB the HOD in a letter dated 5 December 2005 gave the SGB the following summarized reasons:

22.1 That they only paid lip service to the democratic values and principles mentioned in sec. 7(1);

22.2 Referred them to the Kimberley Girls High School judgment and the fact that what is called for is more than a mechanical allocation of points and a mere say-so that regard has been had to the democratic values and principles;

22.3 That none of the candidates referred to in NCK 2 form were employed by him;

22.4 That there is no evidence that the second respondent has made a contribution to transformation;

22.5 That he (HOD) owes his employees a duty in terms of sec. 195 of the Constitution;

22.6 That too much emphasis was placed on the ability of the second respondent at the expense of an equally important requirement that appointments also redress the imbalances of the past. This is of great importance when regard is had to the fact that all but one(at that stage) educator at the school are white.

22.7 That there is a striking imbalance in the demographics at the school and in the province.

23. The HOD thereafter concluded by stating that the reasons advanced by the SGB for their recommendation have not satisfied him that sufficient regard to the democratic values and principles referred to in sec. 7(1) as required by sec. 6(3) (b)(v) of the Employment Act and referred the matter back to the SGB for it to make another recommendation in terms of sec. 6(3)(c).

24. It is not disputed that there were various attempts to have a meeting between the representatives of the SGB, the member of the Executive Council(“MEC”) responsible for Education in the province and the first respondent. Not all these attempts, for reasons that are not entirely relevant for the purposes of

this matter, were successful. It is however, common cause that Van Vuuren wrote a letter marked Annexure 'L' addressed to the HOD in which they fully motivate their desire for the appointment of the second Respondent as principal. The record revealed that a letter dated 4 May 2006 written by C Kgotlaemang Head: Legal Services advised that the SGB has *"failed, neglected or refused to make another recommendation as contemplated in sec. 6(3)(c) of the Employment of Educators Act, consequently the Head of Department may make an appointment without such a recommendation as prescribed by section 6(3)(d) of the afore-mentioned Act. In the light hereof you may proceed with the appointment of Mr S P Paulus."* In a letter dated 10 May 2006 Paulus was then appointed as principal with effect from 1 July 2006.

25. It is appropriate at this stage to deal with the issue relating to failure to exhaust the internal remedies raised by the HOD. I say this because should the respondent succeed on this aspect it may potentially bring the matter to an end. The thrust of Mr Danzfuss' argument is that the provisions of sec. 6(3)(c) of the Employment Act are peremptory that once the HOD declines a recommendation the SGB has to make another recommendation within two months, failing which the HOD may make an appointment without such a recommendation. This argument is indeed correct. However, he contended that annexure 'L' does not constitute another recommendation because in annexure 'L' a different person, other than Steenkamp is not recommended. The applicants were insisting on the appointment of Steenkamp. He referred us to Concise Oxford English Dictionary p.54 where the word 'another' is defined as "*one more; a further. 2. used to refer to a different person or thing from one already referred to."* I am not of the view that this argument is entirely correct. The section does not say the SGB should recommend another person. It merely refers to another recommendation. Nothing in my view precludes the SGB from recommending the same person if they feel strong about such a person based on sound reasons and having followed proper procedures. Mr Danzfuss's concession in this regard is in my view well considered.

26. This brings me to the second leg of the argument relating to another recommendation. In this regard the argument was that the procedure set out in PAM includes a process of shortlisting and interviewing of candidates. When the SGB has to make 'another' recommendation so goes the argument, it had to follow the entire process i.e repeating the entire process that brought

about the first recommendation. Because it is not the applicants case that they repeated the process, the recommendation if any does not comply with sec. 6(3)(d) of the Employment Act. Once again I am not of the view that this argument holds any water. Annexure 'L' on the face of it supports the applicants' contention that the SGB met and considered the candidates as well as the recommendation made by the interviewing committee once again. They also considered the objections raised by the HOD and concluded that Steenkamp remained their choice. To suggest that the entire process should be repeated in the absence of an express term being provided in the PAM or elsewhere would be cumbersome. The interviewing committee is merely to assist the SGB and the SGB is the body which is entrusted with the authority to make a recommendation.

27. However, I must state that the HOD's argument that there is a possibility that a further meeting was not held is not far-fetched. It is indeed correct as he contends that in the founding affidavit no mention whatsoever was made of the meeting of 1 February 2006. At that stage, the SGB had already been requested to make another recommendation in the letter dated 5 December 2005, as well as in a letter dated 1 February 2006. In the latter letter the HOD expressly advised the chairperson of the SGB that he will be left with no option but to invoke the provisions of sec. 6(3)(d) of the Employment Act. Subsequent to that, in the first opposing affidavit the HOD raised the contention that the applicants have failed to make another recommendation. Furthermore, Annexure 'L' which contains 'another recommendation' does not refer to the meeting of 1 February 2006 at all. It was only in the supplementary founding affidavit filed on 8 August 2006 for the first time reference is made to the meeting of 1 February 2006. The reasons advanced for this initial omission is that seeing that Van Vuuren had just relocated when he deposed to the founding affidavit he could not trace the minutes timeously and he only later in the process traced the minutes. Although this explanation is not entirely convincing, we are faced with the reality that a document purporting to be the minutes of that meeting has been filed. The respondents on their own actions, managed to independently obtain a copy of these minutes from the present Acting Principal of the school. In the absence of any evidence to the contrary, I cannot find that the meeting did not take place. At best for the respondent, the argument may be that the applicants did not during the inception of the proceedings disclose their case fully and was mainly made out in the supplementary founding affidavit. This aspect

however, will also depend on the findings regarding the decision of the HOD to decline the first recommendation.

28. It is now clear that the HOD when appointing Paulus acted in terms of sec 6(3) (d) of the Employment Act. He was acting on the advice of C Kgothaemang that the SGB failed or neglected to make another recommendation. Logic therefore dictates that he did not take into account the contents of Annexure L. The procedure that was followed to appoint was therefore incorrect. On this basis the decision was irregularly made and should be reviewed and set aside.

29. Once the decision to appoint Paulus is set aside we are left with the decision declining the initial recommendation together with another recommendation by the SGB. The option available is to refer the matter back to the HOD to make a decision taking into account the recommendation of the SGB. This option is in my view not a proper one under the circumstances. Firstly, the applicants are also challenging the decision declining the recommendation, and the respondents have already given reasons why the recommendation was declined. Secondly the matter was fully argued and need to be decided. Lastly it will not be in the best interests of the parties as well as the children at the school to cause any further delay. I say so because the HOD may arrive at the same conclusion and the applicants will be forced to take the second decision on review based on the same set of facts and argument. I now proceed to consider the decision declining the recommendation.

30. The argument raised on behalf of the applicants is that the Employment Act does not permit the HOD to decline a recommendation if the SGB, in his view, did not have sufficient regard to the democratic values and principles referred to in section 7(1). It was submitted that it only mandates that if the governing body did not have 'any' regard to the democratic values and principles referred to in section 7(1). I am not of the view that this submission is correct. If that was the case, it would mean that the HOD is merely a rubber stamp and not a meaningful employer of educators in the province[11]. In my view the HOD should independently and objectively ascertain whether a recommendation indeed has regard to the democratic values and principles referred to in sec 7(1). It is the statutory duty of the HOD in making

11 See Seodin Primary School v MEC of Education, Northern Cape and Others [2006] 1 ALL SA 154(NC) at 184h-I Federation of the Schools Governing Bodies of South Africa: Northern Cape & Others v The Head of Department of Education: Northern Cape & Others case no:1246/03(unreported).

appointments in terms of sec 7(1) to have due regard to the factors listed, including sec 195(1) of the Constitution. He cannot leave it only to the SGB to have due regard without himself being satisfied. These regards will depend on the circumstances of each case. To expect the SGB to comply on its own with all the values contained in sec 195(1) of the Constitution will be to place a heavy burden on it as the information relevant is not within its domain. The HOD as the employer is in my view correctly suited to satisfy these requirements. The information and considerations necessary for some of the values is not necessarily limited to the operational scope of the SGB, which is within the first Respondent. It will therefore depend on the circumstances of each case.

31. The point is correctly summarised by Mr Danzfuss, that the HOD must in the first place decide whether the recommendation did have regard to these values, and in the second place in terms of sec 7(1) he may only appoint if in the making of the appointment due regard shall be had to equality, equity and the other democratic values and principles[12].

32. The main reason advanced by the HOD for declining the recommendation relates to the democratic values and principles[13]. Of these values it was not the respondents' case on the papers or during argument that the requirements of equality and equity are in issue. As I understood the argument it was contended that the SGB placed too much emphasis on the ability of Steenkamp at the expense of an (equally) important requirement that appointments also redress the imbalance of the past. In the letter dated 5 December 2005 the HOD states inter alia:

"I also cannot help noticing that you have placed to much emphasis on the ability of Mr Steenkamp, that at the expense of an equally important requirement that appointments also redress the imbalances of the past. This is particularly poignant in your case when regard is had to the fact that all but one state-employed educators at your school are white. This undue emphasis on the ability that has been subjectively determined by the interview process does absolutely nothing to redress this striking imbalance. Mr Steenkamp's transformation credentials will not assist the elimination of this gap."

33. Mr Danzfuss contended that the second applicant followed the process of

12 Kimberley Girls High case (supra) at 258(par.15).

13 In the letter dated 5 December 2005 he states that "The reasons that you have advanced for your recommendation have not satisfied me that you had sufficient regard to the democratic values and principles referred to in section 7(1) as required by section 6(3)(b)(v) of the Act."

allocation of points based on the abilities and characteristics of the candidates. By so doing, goes the argument, the SGB claims to have complied with the duty to have due regard to equality, equity and the other democratic values and principles contemplated in section 195(1) of the Constitution and section 7(1) of the Employment Act. They only made provision by allocating 3 points additional for a candidate from a previously disadvantaged group. He submitted that this can never be compliance with either section 7(1) of the Employment Act or section 195(1) of the Constitution. Basing his argument in the *Kimberley Girls' High* judgment[14] he submitted that the SGB completely missed the point that when the opportunity arises to correct the imbalances of the past by filling a post left vacant by a resignation, a concerted effort should be made (and importantly, should clearly be seen to be made) to comply with the obligations imposed on a school governing body by section 6(3)(b)(v) of the Employment Act.

34. The facts of this case however do not entirely support this submission. Mr Van Vuuren in his affidavit states that they could not access any help or guidance from the department to enable them to fully comply with the democratic values set out in sec.7 of the Employment Act. He avers that the district manager who was present was specifically asked as to what the SGB could possibly do to give effect to transformation in a fair and just manner. He was not in a position to assist. He states further that during the shortlisting session he asked the two departmental representatives present for guidance and they also were not in a position to assist. All these averments are not disputed. The SGB therefore in the absence of any guidance on its own devised a means of allocation of points. The respondent has confirmed that there is no formula in existence to be followed by schools and that the decision is a value judgment based on all the relevant facts and considerations keeping in mind not only the interests of the specific school but the interests of education and training in the entire process.

35. It is therefore not entirely correct that no attempt was made to comply with the democratic values provided for in sec 7 of the Employment Act. The question can rather be was this sufficient. Of course it cannot. However, the SGB should not be blamed if the departmental representatives who were part of the process failed to provide guidance and leadership. These officials themselves did not raise any query or problem during the process. Neither did they give any negative report to the HOD about the process. The situation at Hartswater High is, to say the least, alarming. As the respondent has shown, during the year 2005, 59.5% of the learners at this school were black and at present there is not even one black educator at the school. This situation is unacceptable given the unenviable historical background of this country.

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14 Ibid at 262 D

36. Mr Heunis, argued that in the context of appointment of educators, transformation is not primary. It ranks, at best, with the other considerations to which section 7 refers. In my view, the circumstances of a particular institution should dictate the weight to be attached to a particular value, also taking into account the interests of the learners which are paramount in all matters affecting the rights of children[15]. The same would apply to the question whether the provisions of Sec. 7(1)(b) dictate that a candidate from a previously disadvantaged community ought to be preferred in cases where the evaluation of such candidate and a competitor from a previously privileged group leads to a comparative parity in the assessment of their suitability for the post[16]. This cannot be a rigid rule and should depend on the circumstances of each case. A number of factors, some of which may be historical, would play a role. Such approach may in some instances go against the spirit and the values contained in the constitution.

37. In this case I am of the view that the decision declining the recommendation is reviewable. The SGB did what it could under the circumstances to comply with the imperatives prescribed in section 7(1) of the Employment Act. It may not be enough. However, the issue is that on the facts of this case they received no assistance from the Department. To find otherwise would be unfair, not only to Steenkamp but to the learners at the school. In *Stoman v Minister of Safety and Security and Others*[17], Van der Westhuizen J correctly said the following:

"In order to honour constitutional ideals and values, and to strive to truly move towards the achievement of substantive equality, proper plans and programs must be designed and put into place. Mere random and haphazard discrimination would achieve very little, if anything, and might be counter-productive."

38. In the light of the view I take, it is therefore not necessary to decide suitability or otherwise of Paulus in the light of the additional information obtained by the SGB regarding his creditworthiness. On the facts, Steenkamp is by far

15 See sec. 28(2) of the Contitution.
16 c/f Settlers Agricultural High School & Another v Head of Department: Department of Education, Limpopo Province & Others [2002]JOL 10167(T) AT p21.
17 2002(3) SA 468(TPD) at 480 C-D. See also Public Servants Association of South Africa and others v Minister of Justice 1997(3) SA 925(T).

well suited for appointment regard being had to the process that was followed. The applicants are, in my view, entitled to the relief they seek. As a general rule, a court will not substitute its own decision for that of the public authority, but will refer the matter back for a fresh decision. One must guard against an unwarranted usurpation of the powers entrusted to the public authority by the legislature[18].

COSTS

39. Mr Heunis argued that the first respondent must bear a heavy burden of public approbrium for his conduct and that approbrium should be reflected in the special costs order[19]. I see no reason why I should make such a special order. One should also bear in mind, my remarks relating to failure by the applicants to disclose timeously the existence of the meeting held in order to make another recommendation in their founding affidavit, and the fact that the minutes thereof were available. Their conduct has contributed to the respondent's sceptical challenge of the existence of the meeting. An ordinary order of costs will under the circumstances be appropriate.

ORDER

In the result I make the following order:

1. The decision by the HOD enbodied in a letter dated 5 December 2005 rejecting the SGB's recommendation that Paul Roux Steenkamp be appointed principal of Hartswater High is hereby reviewed and set aside.

2. **The decision by the HOD incorporated in a letter dated 10 May 2006 in terms whereof Stephen Phillip Paulus is appointed principal of Hartswater High with effect from 1st June 2006 is hereby reviewed and set aside.**

3. The matter is referred back to the HOD to make the appointment

18 See: Bél Poto School Governing Body Premier, Western Cape 2002 (3) SA 265 (CC) at 292; Bato Star fishing (Pty) Ltd v Minister of Eviromental Affairs and Tourism and others 2004 (4) SA 490 (CC) 514G-B (2004(7) BCLR 687 (CC).

19 See: Governing Body, Mikro Primary School and Another v Minister of Education, Western Cape, and Others 2005(3) SA 504(C).

as per the recommendation of the Second Applicant.

4. **Should the HOD fail to appoint as per order 3 above, the applicants are granted leave on the same papers, supplemented if need be, to approach this court for appropriate relief.**

5. **The First Respondent is ordered to pay the costs of this application.**

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L P TLALETSI
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

I concur:

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B C MOLWANTWA
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the Applicant: Adv J C Heunis SC
Instructed by: Duncan & Rothman
For the Respondents: Adv F W A Danzfuss SC
Instructed by: Haarhoffs Inc.