Laerskool Gaffie Maree & another v MEC for Education, Training, Arts & Culture: Northern Cape Province & others
[2002] 12 BLLR 1228 (NC)

Division:	High Court, Northern Cape Division
Date:	02/08/2002
Case No:	**1240/01**
Before:	Majiedt, Judge

Flynote

Application to the High Court

Educators – Failure to appoint – Head of department declining to appoint person recommended by governing body to principal's post on grounds not permitted by statute – Decision set aside.

Editor's Summary

The third respondent applied for a position as principal of the first applicant. After the governing body of the first applicant interviewed three candidates, the third respondent was ranked highest. His name was forwarded to the relevant head of department (the second respondent) together with the names of the candidates rated second and third. The second respondent referred the recommendation back to the governing body on the grounds that preference should have been given to candidates from within the province, and that no indication had been given why the candidate ranked third was not selected, as he had been acting principal of the school for some time. The applicants contended that the second respondent had no basis in law for declining the recommendation, and that his refusal to appoint the third respondent constituted a contravention of the Promotion of Administrative Justice Act 3 of 2000. The respondents contended that the application was fatally defective because the candidates who were ranked second and third had not been joined in the proceedings. The applicants argued that the other candidates had no interest in the matter because the second respondent was obliged to appoint the third respondent.

The Court noted that in terms of the Employment of Educators Act 76 of 1998 the grounds on which a head of department may decline a recommendation by the governing body of a school are limited to those expressly stated in the Act. However, the Act does not expressly state that the head of department is obliged to appoint the candidate recommended by a school governing body. If the matter were to be referred back to the second respondent for a fresh decision, it did not follow that the other candidates would have a right to be appointed. The respondent's point *in limine* was accordingly dismissed.

As to the merits, the Court held that the governing body had recommended only the third respondent for appointment; the mere mention of the names of the other candidates did not constitute a recommendation that any of the three favoured candidates could be appointed. The second respondent's claim that he was entitled to appoint any of the three candidates whose names were forwarded to him was accordingly rejected. The second respondent was obliged to appoint a candidate recommended unless specific exceptions applied. None of those exceptions applied *in casu*. The second respondent had accordingly acted unlawfully.

As to relief, the Court held that it was inappropriate in the circumstances to order the second respondent to appoint the third respondent to the post. The matter was accordingly remitted to the second respondent with an order compelling him to take a decision. Leave was granted to the applicants to approach the Court again on the same papers should they be dissatisfied with the decision taken by the second respondent.

Judgment

Majiedt J

[1]

The applicants' papers as well as the heads of argument of both counsel in this matter are in Afrikaans, however the answering affidavits of the second respondent are in English. Given the end result of this matter, I have decided to deliver my judgment in English.

[2]

The dispute between the parties concerns the appointment of a headmaster to the vacant post on the staff establishment of the first applicant. Only the first and second respondents are in opposition to the application. The third respondent has been joined as a party by virtue of his interest in the matter, as will appear more fully later herein. The applicants seek an order as follows:

(a) That the second respondent's decision not to appoint the third respondent in the aforesaid vacant post as the principal of the first applicant be rescinded and set aside;

(b) A declaratory order that the third respondent is entitled to be appointed as headmaster of the first applicant with effect from 1 July 2001, on the basis of the recommendation to that effect made by the second applicant;

(c) That second respondent be ordered to do the following within seven days from the date of this order:

(i) to advise the applicants in writing that the recommendation of the second applicant that third respondent be appointed in the vacant post as headmaster of the first applicant is accepted with effect from 1 July 2001;

(ii) That the third respondent is appointed accordingly and that all things necessary are done to give effect to such appointment;

(iii) That the first and second respondents pay the costs of this application jointly and severally on the scale as between attorney and client.

[3]

In his heads of argument Mr Du Toit, who appears for the applicants, has conceded that since it is apparent on the papers that no decision has as yet been taken, the applicants cannot proceed with the relief sought in paragraph 2(a) above. The applicants, however, persist in seeking relief in terms of the balance of paragraph 2 above.

[4]

The second respondent has deemed fit to raise a number of points *in limine*, all but one of them devoid of any substance whatsoever. The only point *in limine* which has some merit and which requires adjudication at

this stage is the alleged non-joinder of certain other respondents. This is an important aspect and I shall deal with it in considerable detail later.

[5]

The following aspects are common cause in this matter:

(a) A vacancy for the post of headmaster of the first applicant had arisen; this fact was reported to the second respondent who had then advertised it in the *Education Gazette* of April 2001.

(b) A selection committee of the second applicant compiled a shortlist of applicants on 24 May 2001 consisting of five candidates who were then invited for interviews.

(c)

The selection committee conducted interviews with the five candidates and awarded points to each of the candidates. The selection committee submitted a list of three names to second applicant with the third respondent's name on top followed by those of a Mr Van der Westhuizen and a Mr N Sauer.

(d)

The second applicant, utilising a standard form known as NCK2, submitted the name of the third respondent to the second respondent as its first choice for appointment to the vacant post. Mr JMP van der Westhuizen was listed as the second choice and Mr NE Sauer as the third choice.

(e)

On 25 June 2001 a regional director of the Department of Education advised the applicants that the recommendation of the second applicant was referred back to it for the following reasons:

(i)

Preference should be given to candidates within the Province; and

(ii)

An indication should be given why Mr Sauer (the third choice) had not been recommended for appointment, since he had been acting in that post at the particular school where he was still a member of staff.

(f)

Until date hereof the second respondent has not made any appointment to the vacant post.

[6]

It is the applicants' case that, having regard to the provisions contained in section 6(3)(b) of the Employment of Educators Act 76 of 1998 ("the Employment Act") the second respondent has no basis in law on which to decline the recommendation made to him by the second applicant. The applicants further aver that the second respondent's refusal to implement the second applicant's recommendation and to make an appointment accordingly, contravenes section 6(3)(a) of the Promotion of Administrative Justice Act 3 of 2000.

[7]

7.1

It is convenient at this stage to deal with the point of non-joinder which has been taken *in limine* by the second respondent. The second respondent avers that the non-joinder of the other two candidates recommended as second and third choices by second applicant, namely Messrs Van der Westhuizen and Sauer, constitutes a fatal defect in the proceedings. The applicants on the other hand aver that, while these candidates may have an indirect interest

in the matter, their interest is not of the nature that requires them to be joined in these proceedings.

7.2

It is now trite law that a party must of necessity be joined in proceedings if he/she/it has a substantial direct and legal interest in those particular proceedings; a mere commercial or financial interest itself is not sufficient (see, *inter alia*, *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659; *Hartland Implemente (Edms) Bpk v Enal Eiendomme BK & andere* 2002 (3) SA 653 (NC) at 663F–G and cases there cited.

7.3

Section 6(3)(b) of the Employment Act reads as follows:

> "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 the appointment, promotion or transfer has not been followed;

(ii)
the candidate does not comply with any requirement 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 for 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 or council, as the case may be, did not have regard to the democratic values and principles referred to in section 7(1)."

Counsel for the second respondent, Mr Danzfuss, has submitted that any one of the three candidates nominated (and not only the first choice, the third respondent), could still be appointed by the second respondent in the vacant post of headmaster. Mr Du Toit, for the applicants, holds a contrary view and has argued strongly that section 6(3)(b) above, read in context with the rest of the provisions of the Employment Act, of necessity implies that the first choice recommendation (third respondent) has to be appointed by the second respondent.

7.4

The aforementioned provision has been pronounced upon in this Division in two reported judgments, namely *High School Carnarvon & another v MEC for Education, Training, Arts & Culture of the Northern Cape Provincial Government & another* [1999] 4 All SA 590 (NC); *Douglas Hoërskool & 'n ander v Premier, Noord-Kaap* 1999 (4) SA 1131 (NC).1

In neither one of these cases, however, has the question arisen as to whether section 6(3)(b) obliges the Head of Department to appoint a governing body's first choice recommendation. What these two decisions clearly outline is that a head of department, such as the

second respondent, is obliged to act within the confines of section 6(3)(b) or, put differently, he can only decline a recommendation made to him if any of the five scenarios postulated in section 6(3)(b)(i)–(v) exists.

[8]

8.1

While there is much to be said for Mr Danzfuss's submissions, I am of the view that the applicants' failure to join the two candidates, Van der Westhuizen and Sauer, does not render the application fatally defective. I am of the view that Van der Westhuizen and Sauer cannot at this stage lay claim to appointment to the post. The third respondent has clearly been joined in these proceedings by the applicants, since they seek a declaratory order from this Court that Mr Edwards is entitled to be appointed as headmaster of the first applicant. If, for example, I should at the end of the day heed the request of the applicants for a declarator as aforementioned, then that is the end of the matter as far as the other non-joined candidates are concerned. Conversely, should I decline to do so and refer the matter back to the second respondent to take a decision on the matter, it does not in my view follow that any one of the other recommended candidates are entitled to be either recommended again by the second applicant or, more importantly, to be appointed by the second respondent. I shall in due course provide further reasons for my last mentioned view, since this lies at the crux of this matter.

8.2

Consequently there is no merit in the point *in limine*, in my view.

[9]
The respondents' case, as far as the merits of the matter is concerned, can be summarised as follows:

9.1
The minutes of the meeting of the interviewing committee merely lists three recommendations for the filling of the posts, namely Messrs Edwards, Van der Westhuizen and Sauer.

9.2
The second applicant's recommendation, set forth in the form NCK2 to which I have already alluded, reads as follows under the heading "RECOMMENDATIONS BY GOVERNING BODY": "We recommend that one of the applicants mentioned in item 12 be appointed to fill the vacancy." Item 12 referred to in the aforegoing passage lists Edwards as first choice, Van der Westhuizen as second choice and Sauer as third choice.

9.3
According to the respondents' submissions, the second respondent is at liberty to appoint any one of the three educators recommended as aforementioned. They submit that there is no provision in law which compels the second respondent to appoint the second applicant's first choice (i.e. the third respondent).

[10]
The applicants' case is that there is only one recommendation from the second applicant, namely that of the third respondent, for appointment to the vacant post. They further submit that on a proper interpretation of the provisions contained in section 6(3)(b) of the Employment Act, there can *de jure* only be one such recommendation.

[11]
11.1
It is noticeable that the aforementioned provision in the Employment Act refers to "recommendation" in the singular: "The Head of

Department may only decline the recommendation of the Governing Body of the Public School . . ." (my emphasis). I have considerable difficulty with Mr Danzfuss's interpretation that the word "recommendation" as quoted aforesaid in the present case means the recommendation of three candidates. In my view the extract quoted, read in context with the provisions in the Employment Act which are applicable to the present matter, do not support that submission. A similar use of the word "recommendation" in the singular, is of course to be found in section 6(3)(b)(iv) and (v).

11.2
Mr Du Toit, for the applicants, has correctly, in my view, laid emphasis on the fact that section 6(3)(b)(ii) and (iii) of the Employment Act refers to "candidate" in the singular. This, again in my view, supports the interpretation that what is envisaged is the recommendation of one candidate for appointment to a vacant post. There is, as far as I could ascertain, no decided cases on this particular provision in the Employment Act. Counsel for the parties have also not referred me to any such decisions.

[12]
When one considers the provisions contained in section 6(3)(b) of the Employment Act in context and bearing in mind the objects of the Act, I am of the view that the interpretation which Mr Danzfuss seeks to place on the said provision is untenable. In applying the ordinary principles in the interpretation of a statute, one is constrained to afford to the words their ordinary grammatical meaning and to bear in mind the context in which the words are being used. There is, to my mind, no ambiguity whatsoever within the provision. I am accordingly of the view that what is envisaged in this section is the recommendation of one person to be appointed in the post and in the instant case it would be the recommendation of the third respondent for appointment.

[13]

Having come to the aforesaid conclusion, the question arises as to what relief I should grant to the applicants. As I have indicated, Mr Du Toit, for the applicants, has conceded that since no decision has been taken as yet, the applicants cannot proceed with the relief sought in paragraph 1 of the notice of motion. It is clear that this is not a matter where this Court ought to make an appointment. The approach by the court in the *Hoërskool Douglas* case, to which I have referred in paragraph 7.4 *supra*, to make the appointment itself, was apposite given the circumstances and the facts of that case. The approach in the *High School Carnarvon* case, also referred to in paragraph 7.4 *supra*, is the one which commends itself to me, given the fact that no decision has as yet been taken in this matter. It is clear, however, on the papers before me and given the statutory duties which the Employment Act imposes upon the second respondent, that it is imperative for the second respondent to take a decision in this matter. It would therefore appear to me to be proper to refer this matter back to the second respondent with a *mandamus* to take a decision within a stipulated period, failing which the applicants should be authorised to return to court on these papers, supplemented as far as may be necessary, for further relief.

[14]

Mr Du Toit has urged me to issue an order that, in the event that the second respondent appoints a person other than the recommended candidate,

namely third respondent, second respondent should furnish reasons for that decision. I do not think that that is an appropriate order in this matter, given the fact that no decision whatsoever has been taken as yet. There are other considerations which may inform the view of the second respondent, which I may not be aware of at this time. It is clear from the authorities (the *Carnarvon High School* and *Hoërskool Douglas* cases cited herein) that the second respondent is severely curtailed by the statute as to what decision he can take on the recommendation forwarded to him by a school governing body of a public school. So, for example, however laudable it may be for him or his Department to prefer that candidates from within the Northern Cape Province be appointed in vacant posts, it is abundantly clear on the authorities and on the statutory provisions, that that is not a consideration on the strength of which he could decline a recommendation. I am, however, prepared to assist the applicants to the extent that I would issue an order that they be granted leave to approach this Court again on the same papers, duly supplemented insofar as may be necessary, in the event that they continue to feel aggrieved with whatever decision the second respondent may take.

[15]

As far as the costs is concerned, Mr Du Toit for the applicants has argued strenuously for a punitive costs order on the basis that the *High School Carnarvon* and *Hoërskool Douglas* cases contain clear authority in this Division which authority should have informed the second respondent of his statutory duties and responsibilities in this matter. The matter is, however, not that simple. As I have indicated herein, there is no decided authority as far as I could ascertain, regarding the material aspect which required adjudication in this matter, namely as to whether section 6(3)(b) of the Employment Act compels a head of department to accept a governing body's first choice of recommendation, or whether he is at liberty to make a choice from any one of a number of candidates, nominated in order of preference. In effect, therefore, the second respondent's opposition in this matter cannot be said to be spurious or frivolous; on the contrary, I am of the view that he was fully entitled to test his own interpretation of the applicable provision. On the other hand, the applicants were compelled to approach this Court in order to compel the second respondent to take a decision on the recommendation forwarded to him by the second applicant. I am therefore of the view that the applicants are entitled to their normal party and party costs.

[16]

In the premises I issue the following order:

(a)

This matter is referred back to the second respondent and he is ordered to make a decision on the recommendation of the second applicant dated 30 May 2001 in respect of the filling of the vacant post of headmaster of the first applicant.

(b)
The second respondent is ordered to take such decision within 10 (ten) days from the date of this order.

(c)
In the event that the second respondent fails to take such decision within the time period stipulated as aforesaid, or in the event of the applicants seeking further relief as a consequence of such decision, the applicants are granted leave to approach this Court on the same

papers, duly supplemented as may be necessary, for such further relief as they may require.

(d)
The first and second respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

For applicants:

Acv JI du Toit, instructed by Van de Wall

For the first & second respondents:

Adv FWA Danzfuss, instructed by Haarhoffs

Cases referred to

Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)	1231
Douglas Hoërskool & 'n ander v Premier, Noord-Kaap [1999] 4 All SA 146 (1999 (4) SA 1131) (NC)	1231
Hartland Implemente (Edms) Bpk v Enal Eiendomme BK & andere 2002 (3) SA 653 (NC)	1231
High School Carnarvon & another v MEC for Education, Training, Arts & Culture of the Northern Cape Provincial Government & another [1999] 4 All SA 590 (NC)	1231

Footnotes

Footnote	
Also reported at [1999] 4 All SA 146 (NC) – Ed.	1