Kimberley Girls' High School and another v Head of Department of Education, Northern Cape Province and others
[2005] 1 All SA 360 (NC)

Division:	NORTHERN CAPE DIVISION
Date:	30 MAY 2003
Case No:	32/2003
Before:	FD KGOMO JP AND SA MAJIEDT J
Sourced by:	JJ Schreuder
Summarised by:	D Harris

• Editor's Summary • Cases Referred to • Judgment •

[1] Administrative law – Education – Education Department's power to appoint educators is subject to governing body's recommendation unless, as in this case, the governing body's decision displays flagrant disregard of agreed policy.

[2] Civil procedure – Review proceedings – The onus of establishing that there are grounds on which a court can review a functionary's decision is on an applicant.

Editor's Summary

The applicants were respectively a public school and its governing body. A recommendation by the governing body that the second respondent be appointed to a post at the school was rejected by the first respondent on the ground that the governing body had failed to follow agreed procedure in giving preference to previously disadvantaged candidates. The applicants sought to review the first respondent's decision.

Held – In determining the review application, the Court had to determine whether his decision was irregular and not whether it was correct or not.

The onus of establishing that there are grounds on which a court can review a functionary's decision, rests on an applicant.

Although the first respondent had the power to appoint educators in his province, that power is regulated by section 6(3)(*a*) of the Employment of Educators Act 76 of 1998, which provides that an appointment may only be made on the recommendation of a governing body. There are only a limited number of grounds upon which the governing body's recommendation may be rejected.

In the present case, it was quite clear from the evidence that the governing body had done nothing to attempt to redress the imbalances of the past at the school. None of the short listed candidates were previously disadvantaged persons, and although the post required a candidate who spoke English as a first language, one of the short listed candidates was an Afrikaans speaker. The conclusion drawn by the Court was that the first respondent's decision was not reviewable. The application was dismissed with costs.

Notes

For Administrative Law see:

- *LAWSA* Second Edition (Vol 1, paras 70–171)
- Y Burns *Administrative Law under the 1996 Constitution* Durban LexisNexis Butterworths 2003

Cases referred to in judgment

("**C**" means confirmed; "**D**" means distinguished; "**F**" means followed and "**R**" means reversed. **HN** refers to corresponding headnote number.)

Judgment

MAJIEDT J

1. In this matter the applicants seek to have the first respondent's decision to decline the recommendation made by the second applicant for the appointment of the second respondent in post number 02/10/0079 as a post level 1 educator at the first applicant reviewed and set aside.

2. . . .

2.1 The first applicant is the Kimberley Girls' High School, a public school with full juristic personality in terms of section 15 of the South African Schools Act 84 of 1996 ("the Schools Act").

For the sake of convenience I shall refer to the first applicant herein as "the school".

2.2 The second applicant is the governing body of the school, which is vested in terms of section 16(1) of the Schools Act with the governance of the school. I shall refer to the second applicant as "the governing body".

2.3 The first respondent is the Head of the Department of Education in the Northern Cape, who is the employer of all educators in the Northern Cape in terms of the provisions contained in section 3(1)(*b*) of the Employment of Educators Act 76 of 1998 ("the Employment Act").

I shall refer to the first respondent as "the Head of Department".

2.4 The second respondent is Ms Tanya Matthews ("Ms Matthews") an educator with full legal capacity.

2.5 The third respondent is Ms Ayeshe Williams ("Ms Williams") also an educator with full legal capacity.

3. A post for an educator for English higher grade first language for grades 10–12 had become vacant at the school. The procedure for the filling of such a post at a public school is prescribed by statute and entails the following:

(a) The advertising of the post;

(b) The sifting of candidates by the Department of Education;

(c) The shortlisting of the sifted candidates by a subcommittee of the governing body or the governing body itself;

(d) Interviews with the shortlisted candidates by an interviewing committee of the governing body and recommendations to the governing body by such interviewing committee;

(e) Deliberations by the governing body and recommendations follow-ing such deliberations to the Head of Department with regard to the filling of the vacant post. A useful summary of the procedures to be followed in the filling of vacant posts can be found in *Douglas Hoërskool v Premier Noord-Kaap en andere*[1]

Footnote ×

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

1999 (4) SA 1131 (NC) at 1138H–1139F. It is common cause in this matter that the aforementioned is the statutorily prescribed procedure and it is not necessary to deal with it any further.

4. It is common cause that the governing body had followed the aforementioned procedures and had made a recommendation for the appointment of Ms Matthews in the vacant post. Such a recommendation was made in terms of section 6(3)(*a*) of the Employment Act. The Head of Department declined to make the appointment as recommended by the governing body, hence this review application.

5. The reasons for the Head of Department's decision to decline the recommendation is to be found in Annexure "FA 9" of the founding affidavit. These reasons can be summarised as follows:

(a) That the governing body had failed to adhere to a process collectively agreed upon in that it has failed to give preference to candidates disadvantaged by the injustices of the past; (i.e. that the recommendation is declined in terms of section 6(3)(*b*)(i) of the Employment Act); and

(b) That the governing body's recommendation did not have regard to the democratic values and principles referred to in section 7(1) of the Act (i.e. that the recommendation is declined in terms of section 6(3)(*b*)(v) of the Employment Act).

In respect of both (a) and (b) above it is the Head of Department's contention that suitably qualified candidates from previously disadvantaged backgrounds were completely overlooked to the extent that they had not even been shortlisted and invited for interviews.

6. Most, if not all, of the facts which I set out as background herein are common cause or at least not seriously disputed.

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6.1 The vacant post for English first language higher grade in respect of grades 10 to 12 at the school was advertised and attracted a number of applications.

6.2 The Department undertook the process of sifting the candidates and thereupon furnished the governing body with a list of twelve suitably qualified candidates and their applications.

6.3 An interviewing committee was established by the governing body. This committee shortlisted three of the twelve candidates for an interview. These candidates were Ms Matthews, Ms Williams and one Ms A Fourie. All three of them are White women. In the shortlisting process, the interviewing committee purportedly applied the prescribed norms and criteria.

6.4 Personal interviews were thereafter conducted by the interviewing committee with the three shortlisted candidates. The prescribed norms and scoring system were again purportedly applied in the selection process during this phase. Ms Matthews significantly outperformed the other candidates, with Ms Williams placed a distant second and with Ms Fourie in third place.

6.5 The interviewing committee recommended the two top candidates (Ms Matthews and Ms Williams) to the governing body. At a meeting of the governing body, this recommendation was unanimously endorsed and a recommendation for the appointment of Ms Matthews as first choice was made to the Head of Department.

7. The reasons for declining the recommendation as set forth in paragraph 4 (*supra*), were amplified and motivated by the Head of Department in his answering affidavit as follows:

7.1 The interviewing committee, when shortlisting the candidates, completely overlooked or accorded little or no weight to the excellent academic (more specifically English) qualifications of three Black candi-dates – Ms Malebo, Ms Selebogo and Ms Mokgalagadi ("the three disadvantaged candidates"). In contrast, full or nearly full marks were awarded in the scoring process to other candidates (including the three who were eventually shortlisted) who were not of a disadvantaged background and whose academic qualifications were comparable to or of a lower standard than that of the three disadvantaged candidates.

7.2 In a letter to the Head of Department pursuant to his refusal to accept its recommendation, the governing body averred that:

(a) it had correctly applied the criteria as laid down by the Department in the course of the shortlisting process; and

(b) *the governing body regarded it as reasonable to have set as an absolute prerequisite for the filling of the vacant post that a candidate* ***must*** *be an English first language speaker to be considered for the post.*

7.3 The three disadvantaged candidates were excluded on paper alone (i.e. on their applications and accompanying *curricula vitae*) – in this way their proficiency in English could not be objectively ascertained at all.

8. It is abundantly clear *ex facie* the papers that the three disadvantaged candidates are, at the very least, on par with the three shortlisted candidates as far as their academic qualifications, more particularly in English, is concerned.

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Their exclusion from the interviewing phase can, on this score alone, hardly be justified in my view.

Mr *Du Toit*, for the applicants, has sought to persuade us that even if the three disadvantaged candidates' scores in respect of their academic qualifications were to be corrected, they would still not have scored sufficient points to advance to the interviewing phase.

This begs the question however – why were they not afforded an equal opportunity with the other shortlisted candidates to demonstrate their proficiency in English and their competence as educators at the interview?

9. In a review of the Head of Department's decision, this Court has to determine whether his decision is irregular, not whether it is correct or not.

See: *Ferreira v Premier, Free State and others* 2000 (1) SA 241 (O) at 251I.

Schoch NO and others v Bhettay and others 1974 (4) SA 860 (A) at 866E–F.

Liberty Life Association of Africa v Kachelhoffer NO and others 2001 (3) SA 1094 (C) at 1110 J–1111 A.

10. The onus of establishing that there are grounds on which a court can review a functionary's decision is on an applicant.

See: *Jockey Club of South Africa v Feldman* 1942 AD 340 at 359.

Davies v Chairman, Committee of the Johannesburg Stock Exchange 1991 (4) SA 43 (W) at 47 H.

11. In considering whether the Head of Department's decision to decline the recommendation is reviewable or not, a careful analysis of the provisions contained in section 6(3)(*b*)(v) and section (7(1) of the Employment Act is required. Section 6(3)(*b*)(v) reads:

> "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)."

Section 7(1) reads as follows:

> "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."

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12. The Head of Department has the power to appoint educators in this province [section 6(1)(*b*)]. His power to do so is regulated by section 6(3)(*a*) which provides that an appointment may only be made on the recommendation of a governing body. It is further regulated by section 6(3)(*b*) which sets out the limited grounds upon which a head of department may decline a recommendation. The Head of Department's discretionary power is thus severely curtailed under section 6(3)(*b*);

See: *High School Carnarvon v MEC for Education, Training, Arts and Culture of the Northern Cape Provincial Government and another* [1999] 4 All SA 590 (NC) at 602*a–b*;

Douglas Hoërskool en 'n ander v Premier, Noord-Kaap 1999 (4) SA 1131 (NC) at 1140G.

13. In the *High School Carnarvon* case (*supra*) Alkema AJ in considering the provisions of section 6(3)(*b*)(v), held that:

> "Having regard to the ordinary grammatical meaning of the above quoted words, the enquiry is directed at the recommendation, and not at the democratic values and principles. Of course, regard must be had to those values and principles in order to assess the recommendation, but the Head of Department is only required to consider whether or not the governing body took those values and principles into account in arriving at its recommendation. If it did take those values and principles into account, the recommendation must be accepted; if not, the recommendation must be declined".

In my view, the discretion conferred upon the Head of Department under section 6(3)(*b*) does not extend to the power to sit in judgment on the recommendation of the governing

body. He is not concerned with the merit of the recommendation; he is only concerned with whether or not it meets with the requirements of section 6(3)(*b*). The question is not whether the recommendation accords with those values and principles, but simply whether or not the recommendation had regard thereto."

14. In an unreported judgment, *Hoërskool Namakwaland en 'n ander v LUR Opleiding, Kuns en Kultuur, Noord-Kaapse Provinsiale Regering en 'n ander*, case number 1241/2001, delivered on 15 November 2002, I had expressed strong reservations in an *obiter dictum* about the correctness of the aforementioned decision of Alkema AJ. It was, however, not necessary to make a finding on the correctness of that decision, given the facts in the *Hoërskool Namakwaland* case (*supra*).

    In the instant matter however, it is pertinent to the enquiry before us to assess the correctness of the judgement in the *High School Carnarvon* case (*supra*).

15. Mr *Danzfuss* for the respondents has, correctly in my view, emphasised the fact that the provisions of section 6(3)(*b*)(v) and section 7(1) of the Employment Act should be interpreted in consonance with each other. This is clearly necessary since they deal with the exact same subject, namely whether the appointment of a particular educator will have due regard to equality, equity and the other democratic values and principles contemplated in section 195(1) of the Constitution. Mr *Danzfuss* is in my view correct when he refers to these sections as two sides of the same coin.

16. I find myself in respectful disagreement with Alkema AJ that the Head of Department is ". . . not concerned with whether or not it meets the requirements of section 6(3)(*b*). *The question is not whether the recommendation*

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accords with those values and principles, but simply whether or not the recommendation had regard thereto." (Emphasis supplied.) This approach completely negates the positive obligations imposed upon a head of department in terms of section 7(1).

It furthermore reduces the role of a head of department in making the appointment of an educator into a rubber stamping exercise. No enquiry as to whether a governing body has paid mere lip service to the democratic values and principles referred to in section 7(1) is permitted on the part of a head of department on this approach.

17. . . .

17.1 Section 7(1) requires that there must be due regard to

- equality,
- equity and
- the democratic values and principles contemplated in section 195(1) of the Constitution

(which importantly includes in section 195(1)(*i*) the requirement that the "*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* and taking into account:

- the ability of the candidate and
- the need to redress the imbalances of the past in order to achieve broad representation.

17.2 It can hardly be said, in my view, that there had been equitable and equal treatment afforded to the three disadvantaged candidates (whose ability on their application forms and *curricula vitae* cannot be questioned) in refusing them an opportunity to compete on an even footing at an interview with the three shortlisted candidates.

17.3 Moreover and most importantly, the governing body's 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's staff establishment.

18. The aforesaid difficulties for the governing body are further greatly exacerbated by the shortlisting of the candidate Ms A Fourie, which I find start-ling, to put it mildly.

This candidate is an Afrikaans first language speaker and should therefore not even have been considered at all, based on the governing body's prerequisite that candidates are required to have English as their home language to be even considered for the post.

The inference is inescapable and indeed compelling that the governing body had completely failed to grasp the opportunity to redress the imbalances of the past at the school as far as personnel is concerned.

19. In *George v Liberty Life Association of Africa Ltd* [1996] 8 BLLR 985 (IC) Landman P examined the concept of affirmative action in the workplace and stated that:

> "Affirmative action, viewed positively, is designed to eliminate inequality and address systemic and institutionalised discrimination including racial and gender dis-

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> crimination. It is a mechanism which is capable of eventually ensuring equal opportunities" (at 1005 H).

See also: *Department of Correctional Services v Van Vuuren* [1999] 11 BLLR 1132 (LAC) at 1135G–H.

20. The imperatives contained in section 6(3)(*b*)(v), section 7(1) of the Employment Act and more importantly, section 195(1) of the Constitution are of the utmost importance in this matter. In addition, it has to be borne in mind that all legislation now has to be interpreted and measured in accordance with the constitutional imperatives, *inter alia* the need to redress the imbalances of the past.

See: *Matiso v Commanding Officer, Port Elizabeth Prison and another* 1994 (4) SA 592 (SE) at 597F:

> "The interpretative notion of ascertaining 'the intention of the Legislature' does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the Legislature. This means that both the purpose and method of statutory interpretation in our law should be different from what it was before the commencement of the Constitution on 27 April 1994. *The purpose now is to test legislation and administrative action against the values and principles imposed by the Constitution*. This purpose necessarily has an impact on the manner in which both the Constitution itself and a particular piece of legislation said to be in conflict with it should be interpreted. The interpretation of the Constitution will be directed at ascertaining the foundational values inherent in the Constitution, whilst the interpretation of the particular legislation will be directed at ascertaining *whether that legislation is capable of an interpretation which conforms with the fundamental values or principles of the Constitution*. Constitutional interpretation in this sense is thus primarily concerned with the recognition and application of constitutional values and not with a search to find the literal meaning of statutes". (Emphasis supplied.)

Burns, in her work *Administrative Law under the 1996 Constitution*, cautions that:

> "The approach that administrative law is nothing more than the interpretation of statutes is limited and incorrect and it must constantly be remembered that the principles of administrative law have a constitutional and common-law foundation." (At 82.)

21. The notion that a head of department may not, in terms of the provisions contained in section 6(3)(*b*)(v) of the Employment Act, independently and objectively ascertain whether a recommendation does indeed on the facts and prevailing circumstances accord with the democratic values and principles, is untenable in my view. In the present case the Head of Department was fully justified in my view to decline the recommendation and to remit the matter to the governing body. It follows that I am of the respectful view that the *High School Carnarvon* case (*supra*) has been wrongly decided.

22. In paragraph 4 *ante*, I had set out the reasons for the Head of Department's decision as furnished by him to the governing body. Based on my findings on the issue regarding section 6(3)(*b*) it is abundantly clear that the Head of Department's decision is not reviewable.

I may add that, although it is not strictly necessary to decide same, there is no merit in the first ground advanced by the Head of Department (see paragraph 4(a) *ante*).

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The Head of Department contends that the governing body had failed to adhere to a process collectively agreed upon in that it has failed to give preference to candidates disadvantaged by the injustices of the past. This purports to be a declining of the recommendation in terms of the provisions contained in section 6(3)(*b*)(i) of the Employment Act. The crisp answer to this contention is that no procedure has been collectively agreed upon or determined by the Minister in terms whereof candidates disadvantaged by the injustices of the past has to be given preference. That imperative is, on the contrary, derived from the provisions contained in the Employment Act [section 6(3)(*b*)(v) and section 7(1)] and from the Constitution [section 195(1)].

23. Mr *Danzfuss* has, with very little conviction it must be said, contended that the *Education Gazette* contains a collective agreement in paragraph 7.7 (2002 *Gazette*) to the effect that:

> "Preference has to be given to race and gender representivity in order to be proportional and reflect the learner population of the school".

Buys J has, correctly in my view, decided in the *Douglas Hoërskool* case (*supra*) that the *Education Gazette* is not a collective agreement (at 1142B–F). It follows that, insofar as it is necessary to make a finding thereon, there is no merit in the first ground advanced by the Head of Department.

24. I now turn to the submission advanced by Mr *Du Toit* for the applicants that the governing body's recommendation is, in any event, justified by the provisions contained in the Employment Equity Act 55 of 1998. His argument goes as follows:– because the Department of Education has no employment equity plan in place, there is no guidance in matters of employment practices where uncertainty may exist. In addition, women as a group (without any racial connotation) is a "designated" group in terms of the aforementioned Act who should be given preference in employment practices (it will be recalled that the recommended candidate, Ms Matthews, is a woman).

Consequently, so the argument goes, effect has been given to the fullest extent to all the factors enumerated in terms of section 7(1) of the Employment Act.

25. As Mr *Danzfuss* has correctly pointed out, the applicants' reliance on section 6(2)(*b*) of the Employment Equity Act 55 of 1998 is completely misplaced. Section 6(2)(*b*) provides that:

> "It is not unfair discrimination to –
>
> (*a*) take affirmative action measures consistent with the purpose of this Act; or
>
> (*b*) distinguish, exclude or prefer any person on the basis of an *inherent requirement of a job*." (My emphasis.)

I fail to comprehend how an educator (who is otherwise suitably qualified and has the requisite experience) can be excluded on the basis that it is an "inherent requirement" of the post in this matter that he or she must be an English first language speaker (as opposed to being *proficient* in English). Furthermore, the interview committee itself has set only the following two criteria in the shortlisting process as far as language is concerned, namely *proficiency* in English and whether the candidate has already taught through the medium of English – that much is clear from Annexure "O9" to the Head of Department's answering affidavit.

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26. . . .

26.1 Moreover and importantly, there is a further aspect which militates against this argument advanced by Mr *Du Toit*. The preamble of the Employment Equity Act 55 of 1998 reads as follows:

> "Recognising –
>
> that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and

> that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws,
>
> Therefore, in order to –
>
> promote the constitutional right of equality and the exercise of true democracy;
>
> eliminate unfair discrimination in employment;
>
> ensure the implementation of employment equity to redress the effects of discrimination;
>
> achieve a diverse workforce broadly representative of our people;
>
> promote economic development and efficiency in the workforce; and
>
> give effect to the obligations of the Republic as a member of the International Labour Organisation" . . .

26.2 The Head of Department alludes in his answering affidavit to the striking racial imbalance in the educator establishment of the school namely 19 Whites, 4 "Coloureds" and 1 African. In contrast thereto there are 272 African, 130 "Coloured", 30 Indian, 86 White and 2 "other" learners at the school.

In reply thereto the applicants sought refuge in:

(a) the fact that the racial composition of the school (i.e. the learner component thereof) develops organically, whereas unless there is intervention through death, transfer or resignation, the school is "stuck with educators previously appointed"; and

(b) the argument concerning Ms Matthews as a member of a "designated" group in terms of the Employment Equity Act 55 of 1998, discussed above.

26.3 The applicants' reply in 26.2(a) above is no more than a feeble excuse. It completely misses 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. This has clearly not happened in this matter.

26.4 I have already to an extent dealt with the reply furnished in 26.2(b) (*supra*). A further aspect which requires emphasis is the fact that it has never been the applicants' case that they strove, through the recommendation for appointment of Ms Matthews, to correct past imbalances of *gender representivity* on their educator establishment. There is in any event no evidence, nay, not even a suggestion, of such an imbalance. What is clear, however, is that there is a serious imbalance in racial/ demographic representivity in the school's educator establishment. The

shortlisting process, culminating in the recommendation as had occurred in the present matter, whereby the three (suitably qualified) disadvantaged candidates were not even afforded the opportunity to compete on an equal footing at an interview, does nothing at all to begin to redress the racial imbalance of educators at the school as required by section 6(3)(*b*)(v) of the Employment Act read with section 7(1) of the Employment Act and section 195(1) of the Constitution.

26.5 In *Stoman v Minister of Safety & Security and others* 2002 (3) SA 468 (T), the successful (Black) candidate had scored lower than the aggrieved (White) candidate during the evaluating phase. The latter had been recommended for appointment in the post by the evaluating committee, but was not appointed by reasons of employment equity (or more correctly, the lack thereof). Unlike in the matter before us, the respondent department (Safety and Security) had an employment equity plan in place. In reaching his decision to dismiss the unsuccessful candidate's application for a review of the decision not to appoint him, which review was primarily based on alleged unfair discrimination, Van der Westhuizen J undertook a detailed analysis of the concept of substantive equality and the questions of affirmative action and representivity in the public service.

With regard to substantive equality the learned Judge states at 477J–478D:

> "The Constitutional Court recognises the concept of substantive equality and has linked its understanding of substantive equality to the need to address and remedy South

> Africa's history of deep racial inequality and other forms of systemic discrimination. In *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* 1999 (1) SA 6 (CC) paras [60]–[61] at 38H–39D the Court agreed that equality has a remedial and a restitutionary purpose and stated, *inter alia*, that it is necessary to comment on the nature of substantive equality, a contested expression which is not found in either of our Constitutions. Particularly in a country such as South Africa persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through a bill of rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately where the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. The need for remedial measures has been recognised in ss 8(2) and 9(3) of the interim and final Constitutions. The notion of substantive as opposed to formal equality has been encapsulated, according to Ackermann J. See also *President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 (CC)."

In emphasising the need to act positively to advance the ideal of equality as envisaged in section 9 of the Constitution, Van der Westhuizen J says the following at 482G–I:

> "Efficiency and representivity, or equality, should, however, not be viewed as separate competing or even opposing arms. They are linked and often interdependent. To allow equality or affirmative action measures to play a role only where candidates otherwise have the same qualifications and merits, where there is virtually nothing to choose between them, will not advance the ideal of equality in a situation where a society emerges from a

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> history of unfair discrimination. The advancement of equality is integrally part of the consideration of merits in such decision-making processes. The requirement of rationality remains, however, and the appointment of people who are wholly unqualified, or less than suitably qualified, or incapable, in responsible positions cannot be justified."

26.6 It bears repeating that the three disadvantaged candidates are suitably qualified for the vacant post – that much is common cause or, at the very least, not seriously placed in issue on the papers. The requirement of rationally justified administrative action demands that a candidate can only be appointed by virtue of affirmative action or by the demand of representivity if such a candidate is suitably qualified and capable of doing the work.

See: *Public Servants Association of South Africa and others v Minister of Justice*[2]

Footnote ×

2 Also reported at 1997 (5) BCLR 577 (T) – Ed.

1997 (3) SA 925 (T) at 989J–990H.

Stoman v Minister of Safety and Security and others (*supra*) at 482 I.

26.7 One last point needs to be made – it has been obliquely suggested that even if the entire process of filling the vacant post, as set out in paragraph 2 *ante* is repeated, Ms Matthews may very well turn out to be the top candidate and be recommended for appointment again. To engage in conjecture of this nature is not only unnecessary but also inadvisable. The crisp answer is simply that the governing body has, as I have already found herein, failed to carry out its statutory obligations imposed by the Employment Act and by the Constitution.

27. In conclusion I deem it necessary to refer to one last troubling aspect. Mr *Du Toit* has laid much emphasis on the fact that the governing body has been extremely diligent and conscientious in its application of the rules, norms, prescripts and criteria laid down by the Department of Education or collectively agreed upon. The emphasis is misplaced:

(a) firstly because these are mere guidelines;

See: *Douglas Hoërskool en 'n ander v Premier Noord-Kaap* (*supra*) at 1142B–G; 1144E–I; and

(b) in the second place, a school governing body should more importantly be acutely aware of the prescripts contained in section 6(3)(*b*)v) of the Employment Act, read with section 7(1) of the Employment Act and section 195(1) of the Constitution.

Regardless of how much compliance there may have been with regard to procedural guidelines, norms, criteria, regulations and prescripts in the selection process, the entire exercise is rendered completely futile if the constitutional and legislative imperatives contained in the aforementioned sections are overlooked. What is called for is more than a mere mechanical allocation of points and a mere say-so that regard has been had to the democratic values and principles.

The Schools Act has brought about a drastic change in the governance of public schools. Extensive new powers have been allocated to school governing bodies in terms of the Schools Act (*supra*) as part of the process of

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the democratisation of school governance in order to give parents a bigger say in the education of their children. These powers are, *inter alia*:

- the governance of a public school has now been entrusted to its governing body (section 16(1) of the Schools Act);

- the governing body must develop a mission statement for the school, a code of conduct for learners; determine times of the school day, administer the school's property; recommend the appointment of educators and non-educator staff (section 20(1) thereof);

- it may even be allocated functions with direct financial implications upon application to the Head of Department (section 21 thereof).

With these vast new powers and functions, however, come vast new responsibilities and obligations. One of these is to recognise and address the need to correct the imbalances of the past as far as recommendations for the appointment of educators are concerned.

In the matter before us the governing body has clearly failed to meet this responsibility and statutory obligation.

28. There are therefore no grounds, either as advanced by the applicants or any other grounds, to review the Head of Department's decision to decline the governing body's recommendation for the appointment of Ms Matthews to the vacant post.

By letter dated 19 December 2002 (Annexure FA 11 to the founding affidavit) the Head of Department had advised the governing body to act in accordance with section 6(3)(*c*) of the Employment Act (ie to make another recommendation for consideration by the Head of Department) or to pursue any other remedy.

The applicants have elected to pursue these review proceedings and accordingly it would not be competent for us to remit the matter in terms of section 6(3)(*c*) of the Employment Act.

29. As far as costs are concerned, there is no reason why we should not order that costs follow the result.

The Department of Education had offered to make a temporary educator available to the school, which offer had been refused. In addition there is a great deal of merit in Mr *Danzfuss*'s submission that much of the urgency which had prompted the initial urgent application had been caused by the applicants themselves. The urgency was mostly contrived.

It behoves the applicants not, in my view, to argue that it had been necessary to approach this Court on an urgent basis for relief.

30. I would dismiss the application with costs.

(Kgomo JP concurred in the judgment of Majiedt J.)

For the applicants

JI Du Toit instructed by *Hugo, Matthewson & Theunissen Incorporated,* Kimberley

For the first respondent:

FWA Danzfuss instructed by *Haarhoffs Incorporated,* Kimberley

Footnotes