Settlers Agricultural High School & another v Head of Department: Department of Education, Limpopo Province & others
[2002] JOL 10167 (T)

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Case No:	16395 / 02
Judgment Date(s):	03 / 09 / 2002
Hearing Date(s):	None Indicated
Marked as:	Not Reportable
Country:	South Africa
Jurisdiction:	High Court
Division:	Transvaal
Judge:	Bertelsmann J
Bench:	E Bertelsmann J
Parties:	Settlers Agricultural High School (1At), The Governing Body of the Settlers Agricultural High School (2 At); The Head of Department: Department of Education, Limpopo Province (1R), MB Mashamaite (2R), Gerhardus Petrus Viljoen (3R)
Appearance:	Mr Du Toit (A); Ms Cassim SC (1R)
Categories:	Application – Civil – Substantive – Private
Functions:	Confirms Legal Principle

Key Words

Administrative law – Education – Schools – Appointment of principal – Governing body's decision – Overturning by state – Review – Appeal – Application for leave

Employment Equity Act 55 of 1998

South African Schools Act 84 of 1996

Mini Summary

The first applicant was a public school, with the second applicant as its governing body. In filling the post of principal of the school, the governing body recommended that the third respondent be appointed. However, the first respondent rejected that recommendation and appointed the second respondent to the post. The applicants successfully obtained the overturning of that decision by the court, leading to the present application by the respondents, for leave to appeal against the court's decision.

Held, that in order to resolve the dispute between the parties, the statutory framework for the appointment of educators had to be examined. The court looked at the procedure adopted in the appointment of successful candidates, and found that the applicants had acted properly. It was found that there were no reasonable prospects of success on appeal, and leave to appeal was refused.

BERTELSMANN J: This is an application for leave to appeal against the judgment which I gave in this matter on 27 June 2002. I will refer to the parties in their

capacities in the principal application.

The first applicant is a pubic school as defined in the South African Schools Act 84 of 1996 as amended. The second applicant is its governing body. The first respondent is the Head of Department of the Department of Education, Limpopo province, and is before this Court in his capacity as such. In

particular, he is cited as the employer of educators of the Limpopo province of the Department of Education, as determined in section 3(1)(b) of the Employment of Educators Act 76 of 1998 ("the Act"), as amended.

The second respondent is an adult female educator, presently employed at Rehlasa Secondary School, Chuenespoort, Limpopo province. The third respondent is Gerhardus Petrus Viljoen, an adult male educator. He is the acting principal of the first applicant.

The first applicant has been without a principal for some time.

The vacant post of principal of the first applicant was advertised. Both the second and third respondents applied. After having interviewed five

candidates, the interviewing committee of the second applicant recommended the appointment of the third respondent as the preferred candidate. The second respondent was listed as the second choice of the interviewing committee.

The second applicant accepted the interviewing committee's choice and recommended to the first respondent that the third respondent be appointed.

The first respondent refused to appoint the third respondent, but appointed the second respondent instead.

The applicants approached this Court by way of urgency to have this appointment set aside and to have the appointment of the third respondent confirmed.

After hearing argument, I granted an order in terms of which the first respondent's decision to appoint the second respondent was set aside. The first respondent was furthermore ordered to appoint the third respondent to the post of principal of the first applicant. It is against this order that leave to

appeal is sought.

The notice of appeal is directed at the finding that the interviewing committee and the second applicant decided upon the person of the new principal while taking all relevant considerations into account and, in particular, applying the provisions of section 7(1) of the Act.

It is furthermore argued that a departmental employment equity plan, which the first respondent has developed, was not taken proper cognisance of when the appointment of the new principal was considered.

The judgment is also said to be wrong in that it expects the first respondent to simply "confirm and rubberstamp" the decision of a school governing body.

Section 7(1) of the Act reads as follows:

> "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–

(1)
the ability of the candidate; and

(2)
the need to redress the imbalances of the past in order to achieve broad representation."

It was the first respondent's case on the original papers, and the principal plank upon which leave to appeal is sought, that:

[1]
it emerges from the papers before me, and indeed from the applicants' own case, that both the interviewing committee and the school governing body failed to take into account the provisions of section 7(1)(b) of the Act;

[2]
that, once this has been established, the first respondent is entitled to appoint any candidate from the list submitted by

the school governing body, regardless of the order of preference in which the interviewing committee and/or the school governing body has ranked the candidates.

In order to properly consider this submission in its context, it is necessary to record the steps which need to be taken once a post of principal (or any other post on the educators establishment of a public school) is advertised. The process has been considered in *Douglas Hoërskool en 'n ander v Premier van die Noord-Kaap Provinsie en andere* 1999 (4) SA 1131 (NK). In short, the following steps must be followed:

1.
The appointment of educators is regulated by the Act and by the "Personnel Administration Measures", which were published by the Minister in terms of the Act in *Government Notice* 222 dated 18 February 1999. These Personnel Administration Measures ("PAM") are still applicable.

2.
Vacant posts for educators must be duly advertised, which, according to paragraph 3.1(a)(iii) of the PAM must:

". . . be non discriminatory and in keeping with the provisions of the

Constitution of the RSA; and . . .

(1)
clearly state that the State is an affirmative action employer."

3.
The employing department (*in casu* the first respondent's department) must handle the initial sifting process of applications to eliminate those candidates who do not comply with the (professional) requirements for the post which is being advertised.

4.
The Education Labour Relations Council is involved in the appointment of educators. It was established in terms of the Education Labour Relations Act 146 of 1993, which Act was repealed by section 212 of Act 66 of 1995, the Labour Relations Act. The Education Labour Relations Council does continue in existence, however, in terms of section 7 of the Labour Relations Act. Paragraph 3.2(d) provides that trade union parties to the Council must be given a full report, at a formal meeting, on the names of educators who have met the minimum requirements for the

posts in terms of the advertisement, those who did not meet the requirements but still applied, and all other relevant information that may reasonably be incidental to the sifting process

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performed by the employing department.

5.

The public school which advertised the vacancy must establish an interviewing committee, which shall comprise of:

[1]

one departmental representative as an observer and resource person; (he may be the school principal, but it is obvious that where the post of principal is advertised, it will have to be another staff member of the first respondent's department);

[2]

the principal of the school (if the principal is not the departmental representative) except in the case where he is an applicant;

[3]

members of the school governing body, excluding those members who have applied for the post;

[4]

one union representative per union that is a party to the provincial chamber of the Education Labour Relations Council ("ELRC"). The union representatives are observers to the process of shortlisting, interviews and the drawing-up of a preference list (section 3.2(b)

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of the PAM).

6.

The interviewing committee must appoint from among its members a chairperson and a secretary.

7.

All applications that meet the minimum requirements and provisions of the advertisement must be handed over to the school governing body which is responsible for the public school.

8.

The governing body must convene the interviewing committee and must ensure that all persons and organisations who have an interest in the process are informed at least five working days prior to the date of the time and venue of the shortlisting, interviews and the compilation of the so-called preference list.

9.

The interviewing committee may conduct shortlisting provided:

[1]

the criteria it uses to shortlist candidates must be fair, non-discriminatory and in keeping with the Constitution;

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[2]

the curricular needs of the school must be taken into consideration;

[3]
the obligation of the employer towards serving educators (who are entitled to preferential appointment) must be borne in mind;

[4]
the shortlisted candidates should not exceed five per post;

[5]
the interviews must be conducted according to guidelines which must be agreed to by the parties to the provincial chamber of the ELRC;

[6]
all interviewees must receive similar treatment during the interview;

[7]
the interviewing committee shall rank candidates in order of preference, together with a brief motivation and submit this to the school governing body for their recommendation to the employing department;

[8]
the governing body is obliged ("must") submit the recommendation to the provincial education department in their order of preference, according to section 3.3(b)(j) of the PAM.

It is common cause on the papers that all the formal steps and requirements listed above were properly complied with by the first respondent's department, the second applicant and the interviewing committee. It is also not in dispute that the unions were properly informed and played their part in the process. It is also and in particular not in dispute that the first respondent, the representatives of the applicants and the unions agreed upon the procedure in the provincial chamber of the ELC, which was to be followed by the interviewing committee and the school governing body.

No objections were raised by any of the parties involved in the process which resulted in the interviewing committee and the second applicant drawing up a list which was headed by the name of the third respondent as the preferred candidate. There is no suggestion that the union representatives who participated as observers in the process were dissatisfied with the process or

the result thereof when this list was submitted to the first respondent.

The process which is followed by the interviewing committee in short-listing and interviewing candidates is recorded on pre-printed forms which the first respondent's department makes available to the first applicant and the interviewing committee. Some of these forms have been annexed to the applicants' founding affidavit. From these it emerges that the interviewing committee consisted of eight members comprising all categories of members of the school governing body. It also appears that the first respondent's department was represented as provided for in the PAM.

A representative of the educators' union SAOU, one Van Koller, attended while another union, SADTU, was representend by one Mogokga Kwena.

On the so-called RF1 form, the chairperson of the interviewing committee, Mr NR Leshiba, recorded that, after the five short-listed candidates had been interviewed and evaluated, the third respondent had received 145,6 points whereas the second respondent had received 105,8 points. The brief motivation which the first respondent's department required in support of the

recommendation in the order of preference records the following, apparently in Mr Leshiba's handwriting:

> "Viljoen GP is strongly recommended to be appointed as the Principal of this school, SAHS, because he successfully performed excellent in all dimentions". (*sic*).

The motivation for the listing of the second respondent as the second candidate reads as follows:

> "Should Viljoen, GP fail to avail himself, Mashamaite, MD should be appointed to become the Principal."

The interviewing committee records that it consisted of, as full members Mr NR Leshiba, Mr DM Langa, as secretary, and as co-opted members Messrs RF Modiba, F van der Walt and J Leta. The departmental representative was Mr H van Aardt, while the educators' unions SADTU and SAOU were represented as stated before.

One form, the RF3 form, which apparently records that all material requirements were met during the interview procedure, and in particular that the provisions of section 7(1) of the Act were complied with, was not annexed by the applicants, and was, as I record in my judgment, not discovered by the first respondent.

The shortlisting form, form RF2, is supplied by the first respondent's department to the applicants and records in its pre-printed preamble that:

> "Recommending an order of preference means that if, for one reason or another the most preferred candidate is not available, the Department shall proceed to make an appointment from the next available recommended choice."

Once a recommendation has been made by the school to the Head of Department, section 6(3) of the Act reads as follows:

> "(a)
> Subject to paragraph (d), any appointment or 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 the 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 the Department, who are so 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–
>
> (1)
> any procedure collectively agreed upon or determined by the Minister for the appointment, promotion or transfer has not been followed;

(2)

the candidate does not comply with any requirement collectively agreed upon or determined by the Minister for the appointment, promotion or transfer . . .

(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)."

In argument, Ms *Cassim* SC, (who had not appeared for the first respondent at the hearing) argued that there was no evidence before the court that the applicants had indeed complied with the provisions of section 7(1)(b). The applicants allegedly failed to comply with the so-called equity plan. The fact that the relevance of the equity plan to the appointment procedure was disputed by applicants constituted proof of the fact that the provisions of section 7(1) were not observed, leaving the way open for the first respondent to ignore the second applicant's recommendation.

The applicants allege in their founding affidavit that all provisions relevant to the appointment were taken into consideration. Form RF3, I was

informed during the hearing from the Bar, was no longer in the applicant's possession and consequently not annexed. I have already pointed out that the first respondent did not annex the form himself. Ms *Cassim* suggested that the form, a copy of which had been supplied to her, ought to be disclosed at this stage as it might support her argument. Mr *Du Toit*, on behalf of the applicants, objected thereto and, as there was no application for condonation, and no explanation for the initial failure to disclose the form, I declined to consider the content of the form at the hearing for leave to appeal.

The first respondent annexed Chapter 1 of the Employment Equity and Affirmative Action Plan, which was apparently adopted by his department. It is based upon the Employment Equity Act 55 of 1998 and seeks to translate the provisions of the Constitution and of the Employment Equity Act, read with the South African Schools Act 84 of 1996 and the Employment of Educators Act and other relevant labour legislation, into practice. The goal is to translate the basic policy of the department:

". . . to safeguard and protect the right of and opportunity for all persons to seek, obtain and hold employment without discrimination on the

count of race, colour, religious creed, nationality, age, gender, actual or perceived sexual orientation and disability as set forth in the Constitution and other laws governing employment practices.

The Department recognises an obligation to develop practical steps to achieve the goal of employment equity and affirmative action in its employment practices and to use its authority to encourage parties who deal with the Department, to adopt similar policies and practices."

The document lists in paragraph 8 thereof several affirmative action measures, which read, *inter alia*, as follows:

"8.1

Appoint members from designated groups by means of unbiased selection criteria and targeted advertising.

8.2

Increase the pool of available candidates by means of community investment and bridging programmes.

8.3
Training and development of people from designated groups with regard to accelerated training in the provision of mentorships and coaching.

8.4
Promotion of people from designated groups through structured succession and experience planning.

8.5
Retention of designated groups through retention strategies.

8.6
Reasonably accommodate target groups by providing an enabling environment for disabled workers and workers with family responsibilities.

8.7
Members of designated groups are appointed to positions where they can participate in meaningful decision making processes.

8.8
Persons are to be appointed with commensurate authority.

8.9
Transform corporate culture through programmes."

The equity plan does not in express words deal with the situation which has arisen in this case: a white male, probably middle-aged, Afrikaans-speaking candidate who outscored the nearest competing applicant for the same post, a black woman, in the evaluation process by a not inconsiderable margin, was preferred by the school after an agreed evaluation process which was approved by all relevant parties and which was fairly applied. The question then arises whether, bearing in mind that the agreed procedure must obviously in itself comply with the Constitution, the first respondent still has the right and the power to reject the preferred candidate because he happens to belong to a previously advantaged community, and to appoint a member of a previously disadvantaged community who is, on the face of it, less qualified for the appointment, merely on the strength of the fact that such candidate belongs to a group which suffered discrimination and disadvantage in the past. (It was common cause during argument between the parties that black women are the most disadvantaged group in South African society.)

Apart from referring to the RF3 form, there was little which Ms *Cassim* could argue on the facts to suggest that the interviewing committee and the

second applicant had failed to take the needs for transformation and the righting of past wrongs into account in the selection process. She expressly rejected the suggestion which I put to her during argument, that it might be argued by the first respondent that the mere failure to appoint a suitably qualified candidate who was a black woman while there was a considerably better qualified applicant who was a white male, constituted proof that section 7(1)(b) had not been complied with. She also agreed with the propositions (which I put to her) that the procedure, agreed to by all interested parties, must of necessity comply with the Constitution, and that the absence of any factual indication that the interviewing committee or the second applicant had erred in its correct application stood in the way of a finding that section 7(1) of the Act had not been properly taken cognisance of.

I believe that these concessions were correctly made. It might possibly be argued – I make no finding in this regard – that the provisions of section 7(1)(b) indicate 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. But where the difference in the

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respective suitability for the post is, in the opinion of an interviewing committee which honestly applies the agreed procedure, as substantial as is the case here, neither the Constitution nor the statute or the equity plan demand the preferring of the candidate who belongs to a group which was previously discriminated against.

It is clear that the Constitution, Act 108 of 1996, places our society firmly on the foundational values of democracy, human dignity, equality, non-racism, non-sexism and the respect for the individual, and that every organ of State and every court is enjoined to promote the spirit, purport and objects of the Bill of Rights, including affirmative action.

But the Constitution also entrenches the right to proper education and provides specific protection for children. Section 28(2) of the Constitution reads as follows:

> "A child's best interests are of paramount importance in every matter concerning the child."

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As important as the rights of educators, and in particular those belonging to previously disadvantaged communities are, the paramountcy of children's rights and interests must not be overlooked. Section 7(1)(a) of the Act expressly decrees that the candidate's ability must be taken into consideration as much as the need to redress the imbalances of the past and the desirability of achieving broad representation in the composition of the educators' compliment of the applicant.

Where it is common cause that the third respondent is clearly the candidate best able to perform the function of principal of the applicant, and in the absence of other compelling reasons why he should not be appointed, the interviewing committee and the second applicant cannot be said to have erred in the observance of their duty to accord paramountcy to the best interest of the school's learners.

From the composition of the interviewing committee and the second applicant it would appear to be likely that the first applicant serves learners from all communities in the Limpopo province. It is in all their interests that the best candidate be appointed.

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In the alternative, Ms *Cassim* argued that the first respondent did in fact, because of the provisions of section 7(1) of the Act, have a discretion to disregard the recommendation of the school governing body and appoint one of the other candidates who were qualified for the post.

This argument cannot hold water. The first respondent has, in terms of section 6(3)(b) of the Act, only a fettered discretion. Once it is clear that the five requirements enumerated in this statutory provision have been complied with, and that the interviewing committee and the second applicant have honestly and *bona fide* determined an order of preference, the first respondent has no discretion but to comply with the wishes of the school community expressed in this fashion. Consequently, the preferred candidate must be appointed.

During the preparation of this judgment, I raised a question with counsel which I had not addressed during argument, namely what the appropriate remedy would be if I were to hold that there was indeed a factual basis for the finding that the interviewing committee and the second applicant had failed to properly apply the provisions of section 7(1)(b). In particular, I requested

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argument on the issue whether the first respondent could in such event appoint the candidate of his or her choice, or whether the recommendation made by the interviewing committee and the second applicant had to be set aside and the matter referred back to them to reconsider the appointment of a candidate for the post of principal in accordance with the provisions of section 6(3)(b) and the PAM. I am indebted to counsel for their further written agreements, which have assisted me greatly.

Although it is not necessary to make a definitive finding on this issue, I am of the view that the first respondent would not be entitled to substitute his own choice for that of the interviewing committee and the school governing body, but would have to refer the matter back to the interviewing committee and the school governing body with the instruction to apply the law properly. Section 6(3)(c) of the Act appears to be clear in this regard.

In the light of the findings of fact it is unnecessary to express a final opinion on this issue.

In the light of these conclusions, it is clear that there can be no

reasonable prospect that another court will come to a different conclusion on the merits of this matter. Leave to appeal is consequently refused with costs.