High School Carnarvon and another v MEC for Education, Training, Arts and Culture of the Northern Cape Provincial Government and another
[1999] 4 All SA 590 (NC)

Division:	Northern Cape Division
Date:	27 September 1999
Case No:	850/99
Before:	Alkema AJ
Sourced by:	JJ Schreuder
Summarised by:	D Harris

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

[1] Administrative law - Exercise of discretion by public authority - Extent of discretion - Discretion may be exercised only in terms of provisions of empowering statute - Consideration of factors other than as set out in relevant statute will render action ultra vires.

[2] Education - Appointments and promotions - When can the department of education decline the recommendation of the school's governing body in respect of an appointment - Extent of the department's discretion to decline recommendation is limited to circumstances set out in the Employment of Educators Act 76 of 1998.

Editor's Summary

The background to the dispute *in casu* involved ongoing litigation between the parties, in respect of the possible amalgamation of the First Applicant with two other schools in the area. The First Respondent's attempts to amalgamate the entirely white populated First Applicant with the other two black populated schools were opposed by both Applicants. The reason for the amalgamation attempts was mainly the fact that the black schools were filled to capacity, while the First Applicant was filled to less than half its capacity. This formed the backdrop to the present application for the setting aside of First Respondent's decision that the decision to fill the post of principal of the First applicant be abandoned due to the possible amalgamation of schools in the area. The Second Applicant had already held interviews and had submitted its recommendation to the First Respondent, when it was informed that the First Respondent had decided not to fill the vacant post of principal for the reasons mentioned above.

Held - The legislation governing the dispute was the South African Schools Act 84 of 1996, and the Employment of Educators Act 76 of 1998. In terms of section 6(3)(*a*) of the latter Act any appointment to a post on the educator establishment of a school has to be made on the recommendation of the school's governing body. The First respondent is entitled to decline this recommendation only if any of five stipulated sets of circumstances exist.

It was submitted by the Applicants that the reason provided by the First Respondent for declining the recommendation of the Second Applicant, did not fall within the purview of any of the five circumstances set out in the Act, and that the First Respondent was therefore not lawfully entitled to decline the recommendation.

In reply, the Respondents claimed that the First Applicant was entitled to decline the recommendation. The point of departure, according to the Respondents was section 7(1) of the Act which required due regard to be had to democratic principles and values in making appointments of this nature. The Respondents disputed whether this was done in the present appointment process.

The Court was not prepared to accept the Respondents' argument or its interpretation of the relevant legislative provisions. It was held that the facts did not support the Respondents' contentions. No factual evidence was placed before the Court to prove that the appointment of the chosen candidate would frustrate the promotion of efficient use of resources as contended by the Respondents.

The South African Schools Act 84 of 1996 was seen to acknowledge that a school cannot function without a principal, and the Respondents were seen to have recognised this and accepted it in requiring the governing body to interview candidates for the post.

In the opinion of the Court, the point of departure had to be section 6(3)(a) and not section 7(1) of the Employment of Educators Act 76 of 1998. The former section provides for the recommendation of the governing body as a precondition for any appointment, promotion or transfer.

It was emphasised that a public authority with discretionary power may not simply act as it pleases because of that discretionary power. The discretion is always a limited one, which will vary according to the language of the empowering legislation. A functionary with a discretion may only exercise that discretion as provided in the empowering statute. If he acts other than as authorised by the relevant statute, then his actions will be *ultra vires* his powers.

In the present case, the facts and circumstances which the First Respondent is entitled to take into account, are

set out in section 6(3)(*b*) of the Employment of Educators Act 76 of 1998. No other factors may be taken into account.

The discretion conferred upon the First Respondent did not extend to the power to sit in judgment on the recommendation of the governing body. The First Respondent is not concerned with the merit of the recommendation, but with its compliance with section 6(3)(*b*).

In permitting the First Respondent to decline the recommendation, the statute's use of the word "only" shows that the First Respondent may only decline the recommendation if it fails to meet one of the stipulated requirements, and not on any other grounds. If the requirements are met, then the First Respondent is obliged to accept the recommendation.

The next question facing the Court was whether the issue should be referred back to the First Respondent for reconsideration. The general rule in this regard is that a court will not substitute its own decision for that of a public authority but will refer the matter back for a fresh decision except in four circumstances:

(i) where the end result is a foregone conclusion and it would be a waste of time to order the functionary to reconsider the matter.

(ii) Where further delay would cause unjustifiable prejudice to the applicants

(iii) Where the functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same authority again.

(iv) Where the court is in as good a position to make the decision itself.

The overriding principle is fairness to both parties. The Court was of the view that fairness required that the matter be referred back to the First Respondent for reconsideration.

Notes

For Administrative Law, see *LAWSA* Re-issue (Vol 1, paras 56-96)

Cases referred to in judgment

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

Barrett NO v Macquet 1947 (2) SA 1001 (A) [**HN1**]

Bonnievale Wine and Brandy Co Ltd v Gordonia Liquor Licensing Board 1953 (3) SA 500 (C)

Commissioner of Taxes v First Merchant Bank of Zimbabwe Ltd 1998 (1) SA 27 (ZS)

Drakensberg Administration Board v Town Planning Appeals Board 1983 (4) SA 42 (N) [**HN1**]

Jaga v Dönges NO and another 1950 (4) SA 653 (A)

Johannesburg Stock Exchange and another v Witwatersrand Nigel Ltd 1988 (3) SA 132 (A)

Livestock and Meat Industries Control Board v Garda 1961 (1) SA 342 (A)

Local Road Transportation Board v Durban City Council 1965 (1) SA 586 (A)

Secretary for Inland Revenue v Sturrock Sugar Farm (Pty) Ltd 1965 (1) SA 897 (A)

The Monastery Diamond Mining Corporation (Edms) Bpk v Schimper 1983 (3) SA 538 (O) [**HN1**]

Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika 1976 (2) SA 1 (A)

University of the Western Cape and others v MEC for Health and Social Services and others 1998 (3) SA 124 (C)

Judgment

ALKEMA AJ

The first applicant is the High School Carnarvon, a public school established in terms of the provisions of the South African Schools Act 84 of 1966. For the sake of easy reference I will hereinafter refer to the first applicant as "the School".

The second applicant is the governing body of the school, constituted under the same legislation. I will hereinafter refer to the second applicant as "the governing body".

The first respondent is the Member of the Executive Council for Education, Training, Arts and Culture of the Northern Cape Province. She is cited in these proceedings in her representative capacity and, save for costs, no order is sought against her.

The second respondent is the responsible official in the Provincial Department of Education charged with the duty under section 6 of the Employment of Educators Act 76 of 1998 (hereinafter referred to as "the Act") to make appointments or promotions to any post on the educator establishment of a public school. Having regard to his

statutory duties and obligations under the Act, and the definition of his office in section 1 thereof, it will be convenient to refer to the second respondent in this judgment in his official capacity, namely "Head of Department".

This application marks another chapter in a long history of litigation between the parties.

The learners of the school are predominantly, if not exclusively, from the so-called "white" community of Carnarvon. The other two schools in Carnarvon share the same facilities, and their learners are almost exclusively from the so-called "coloured" or "black" communities of Carnarvon.

The school has a capacity for 540 learners, whereas its actual number of learners is 250, being slightly less than one half of its capacity. The other two schools share the same facilities and are stretched to capacity.

The medium of education in all three schools is the Afrikaans language and the schools are located within a radius of approximately two kilometres from one another.

The first respondent and her predecessor have since 1996 taken various steps in an attempt to amalgamate the schools in Carnarvon with a view to using the available resources in an economic and effective manner. Various terms have been used in the affidavits to describe these steps, such as "rationalise", "merge" and "amalgamate". I will stick to the term used in these proceedings, namely "amalgamate".

For reasons which are not relevant for present purposes, the governing body has fiercely resisted all attempts at amalgamation. The school and its governing

body take the view that the respondents have no statutory or other legal right to amalgamate the schools. Although the South African Schools Act 84 of 1996 makes provision for certain mechanisms such as the closure of a public school and the forfeiture of assets to the State, there is at present no statutory mechanism in place which provides for the forced amalgamation of public schools.

The first attempt at amalgamation was to close the school. The litigation which ensued between the parties as a result of the respondents' initial attempts at closure of the school to force amalgamation, was settled.

Thereafter, on 3 March 1997 the respondents issued a notice in the *Provincial Gazette* aimed at the amalgamation of schools in Richmond. The school was joined as an interested party to the proceedings when the validity of this notice was attacked by another school in Richmond. The litigation was inconclusive and the respondents have, for the time being, abandoned the steps envisaged by this notice.

On 21 October 1998 the respondents caused a Bill to be published in the *Provincial Gazette* with the object

"... that public schools should be restructured and rationalised in order to give effect to the policy guidelines ..."

The ensuing litigation was settled and the notice was withdrawn.

On 10 August 1999 the Education Laws Amendment Bill, 1999, was published which seek to amend, *inter alia*, the South African Schools Act 84 of 1996 by introducing a new section to cater for the merger of public schools, and to provide for a process and to deal with the consequences of such a merger. If this Bill becomes law, the respondents will be provided with a mechanism to achieve the object of amalgamation of schools throughout South Africa.

On 10 September 1999 an amendment to the Northern Cape Schools Act was published which follows, in broad terms, the proposed amendment of the South African Schools Act 84 of 1996. This proposed amendment, if passed, will provide a further mechanism to amalgamate the schools.

Whatever the outcome of the litigation between the parties, it seems that the amalgamation or restructuring of the schools in Carnarvon, at some uncertain time in the future, is inevitable. The relevance of this event, and of the history outlined above, will follow later. In the meantime, a further event occurred which gave rise to further litigation between the parties and to this application.

With effect from 1 January 1998 the principal of the school accepted another post as principal in another province. This resulted in the school functioning without a principal from such date. Since 1 January 1998 the deputy principal of the school, Mr CA Prins, has been acting as principal of the school pending the final appointment of a principal.

During January 1999 the Head of Department (the second respondent) duly advertised the post of principal of the school in the *Northern Cape Education Gazette* and invited educators to apply for the post. Two applicants applied, namely Mr Prins and one L Victor.

In terms of section 6(2) of the Act, promotions to posts on any educator establishment shall be made in accordance "... with such procedure and such requirements as the Minister may determine".

Subject to what follows, it is not disputed by the respondents that these procedures and requirements were adhered to.

On 18 February 1999 the Head of Department notified the school and its governing body that two educators who qualified for the post of principal, had applied. Acting in terms of the Act and policy procedures, a sub-committee of the governing body was formed to conduct interviews with the two applicants. A Mrs R Wiessie, representing the

Head of Department and the first respondent, was co-opted to this committee and she attended the interviews. In addition, and in accordance with the required procedure, two representatives of Education Trade Unions were also co-opted to the sub-committee, and they too attended the interviews with the applicants.

The successful candidate is chosen by the use of a points system, and Mr Prins obtained the highest points.

Shortly after 4 April 1999 the sub-committee unanimously recommended to the Head of Department that Mr Prins be appointed to the post of principal of the school. It appears from the advertisements placed by the Head of Department that he intended to fill the post by no later than 7 April 1999.

On 12 April 1999 the governing body received a letter from the Head of Department, which reads as follows:

> "Die Department is nie bereid om op hierdie stadium die vakante betrekking soos geadverteer in die Januarie *Gazette* (pos nommer 9901\0263) te vul nie, aangesien die voorgestelde amalgamasieproses van skole te Carnarvon nog nie afgehandel is nie."

The following day, 13 April 1999, the attorney acting for the governing body addressed a letter to the Head of Department demanding that the vacant post of principal be filled without further delay in accordance with its recommendation. The Head of Department failed to respond to this demand. The lines were drawn for a further battle between the parties, and the war of litigation continues.

During June 1999 the school and its governing body instituted review proceedings against the first respondent and the Head of Department, claiming the following relief:

> "1. Dat die Tweede Respondent se besluit om Mnr C A Prins nie aan te stel in pos nommer 9901\0263 as die prinsipaal van die Eerste Applikant nie, vernietig en ter syde gestel word;
>
> 2. Dat dit verklaar word dat Mnr C A Prins geregtig is om aangestel te word as prinsipaal van die Eerste Applikant met ingang vanaf 7 April 1999, op sterkte van die aanbeveling wat die Tweede Applikant gemaak het tot daardie effek;
>
> 3. Dat die Tweede Respondent hiermee gelas en beveel word om binne sewe dae van datum van hierdie bevel:
>
> 3.1 skriftelik aan die Eerste en Tweede Applikant kennis te gee dat die aanbeveling van die Tweede Applikant dat Mnr C A Prins aangestel moet word in pos nommer 9901\0263 as die prinsipaal van die Eerste Applikant, met ingang van 7 April 1999, aanvaar word;
>
> 3.2 die gesegde Mnr C A Prins aldus aan te stel en alles te doen wat nodig is om uitvoering te gee aan sodanige aanstelling;
>
> 4. Dat die Eerste en Tweede Respondente die koste van hierdie aansoek gesamentlik en afsonderlik betaal op die skaal soos tussen prokureur en eie kliënt."

The case for the school and its governing body can, shortly, be summarised as follows.

In terms of section 6(3)(*a*) of the Act, any appointment or promotion to any post on the educator establishment of a public school:

> "... may only be made on the recommendation of the governing body of the public school ..."

Section 6(3)(*b*) of the Act provides that the Head of Department may only decline the recommendation of the governing body if one or more of five defined sets of circumstances are found to exist.

Much debate has revolved around the interpretation and effect of section 6(3)(*b*), and it is prudent to quote this section in full:

> "The Head of Department may only decline the recommendation of the governing body of the public school ... 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)."

Mr *du Toit*, who appeared on behalf of the school and its governing body, submitted that the reason advanced by the Head of Department for declining the recommendation of the governing body, namely that the proposed amalgamation process of the school had not yet been completed, does not fall within the ambit of any one of the five circumstances described in section 6(3)(*b*) above, and that the Head of Department was therefore not lawfully entitled to decline the recommendation of the governing body.

The respondents, on the other hand, and represented in these proceedings by Mr *Jacobs*, perceive the statutory duties and functions of the Head of Department quite differently. They contend that the Head of Department was lawfully entitled to decline the recommendation of the governing body pending the final completion of the proposed amalgamation process. Mr *Jacobs* submitted that the point of departure in the interpretational process is section 7(1) of the Act, read with section 195(1) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution").

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. No. 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."

In terms of section 6(1)(*b*) of the Act, so the argument goes, the Head of Department is charged with the duty to make an appointment or to promote an educator in the service of a provincial department of education. In the making of such an appointment or the filling of such a post, the Head of Department is therefore obliged, in terms of section 7(1), to have due regard to those democratic values and principles contemplated in section 7(1) read with section 195(1) of the Constitution.

Section 195 of the Constitution provides for "Basic values and principles governing public administration", and it sets out those principles and democratic values in accordance with which public administration "must" be governed.

One of the principles enshrined in section 195 of the Constitution, is that the

"... efficient, economic and effective use of resources must be promoted."

With reference to the use of the word "must", Mr *Jacobs* submitted that section 195 of the Constitution imposes a constitutional imperative concerning the governance of the school, which is part of the public administration. He argued that section 2 of the Constitution, which provides for the supremacy of the Constitution, read with section 195 thereof, imposes an obligation in respect of the governance of public schools which may not be negated or qualified by any other law, including section 6(3)(*b*) of the Act.

Developing his argument, Mr *Jacobs* contended, and I quote from his heads of argument, that:

"... The Second Respondent's decision not to fill the post was underpinned by the consideration that the amalgamation process of the Schools in Carnarvon are contemplated and that the appointment of a principal at the First Applicant would not promote efficient, economic and effective use of resources."

He therefore concludes that the use of the word "may" in section 6(3)(*b*) of the Act indicates that the five sets of circumstances described therein which may justify the second respondent declining the recommendation of the governing body, are not exhaustive. Read with section 7(1) of the Act and sections 2 and 195(1) of the Constitution, the Head of Department is entitled, according to the argument, to decline to make an appointment if such appointment will not promote "efficient, economic and effective use of resources" within the meaning of those words in section 195(1) of the Constitution.

The short answer to this argument is that, even if the respondents are correct in their interpretation of the statutory provisions, the facts do not support their contentions. No factual evidence whatsoever was placed before me to show that the appointment of Mr Prins will frustrate the promotion of "efficient, economic and effective use of resources".

The respondents' answering affidavits contain submissions in regard to the interpretation of the applicable

legislation, but no evidence in regard to the impact of the proposed amalgamation on appointments, or the effect of the appointment of Mr Prins on the use of available resources.

On the contrary, and as I have indicated, the entire issue of amalgamation of schools in Carnarvon is clouded in controversy. The effect of amalgamation,

when and if it occurs, on the appointment of educators is a matter of speculation and these issues are not canvassed in the papers. In any event, it is common cause that between the three schools in Carnarvon, there is only one school principal. There are two school facilities, and however an amalgamation is structured, there will be two schools in Carnarvon and if Mr Prins is appointed, two school principals.

Section 16(3) of the South African Schools Act 84 of 1996 provides as follows:

> "Subject to this Act and any applicable provincial law, the professional management of a public school must be undertaken by the principal under the authority of the Head of Department."

The South African Schools Act therefore acknowledges, by implication, that a school cannot function without a principal. This was recognised by the Head of Department by advertising the post of principal of the school, and by requiring the governing body to interview the candidates for the post.

It is significant that the Head of Department advertised the post of principal at a time when the parties were locked in battle in regard to the proposed amalgamation process. It follows that at the time, neither the first respondent, nor the Head of Department, could have considered the appointment of a principal to the school as being destructive of the principle of efficient and economic use of resources. If so, they would not have advertised the post and required the governing body to make recommendations regarding the appointment. As far as I know, nothing has changed since then.

However, and notwithstanding the aforesaid finding, and for reasons I will return to, I have been requested by the parties to pronounce on the interpretation of the relevant statutory provisions. Accordingly, and however tempting it may be to dismiss the respondents' contentions on a factual basis, I am duty bound to consider the statutory provisions and I proceed to do so.

I do not agree with the submissions advanced on behalf of the respondents in regard to the interpretation of sections 6 and 7 of the Act. The fallacy of this argument lies in its very foundation, namely that the point of departure is section 7(1) of the Act.

The argument fails to have regard to the provisions of section 6(3)(*b*)(v) which bring section 7(1) into contention. The Head of Department may only decline a recommendation of the governing body if, *inter alia*,

> "The *recommendation* of the governing body ... did not have regard to the democratic values and principles referred to in section 7(1)" (the emphasis is mine).

The section requires that the recommendation, and not the Head of Department, must have regard to those values and principles. Section 7(1) cannot be read in isolation. It sets out those democratic values and principles to which a recommendation under section 6(3)(*b*) must have regard. Its very terms direct that appointments and filling of posts are made "under this Act", including the provisions of section 6.

In my view, the point of departure is section 6(3)(*a*) which provides that:

> "any appointment, promotion or transfer to any post on the educator establishment of a public school ... may only be made (by the Head of Department) on the recommendation of the governing body of the public school ..."

Section 6(3)(*a*) takes one to section 6(3)(*b*) which describes the nature and extent of the discretion. When considering the recommendation of the governing body, the Head of Department exercises a discretion, but such discretion is very limited. He may only decline the recommendation if one or more of the five defined sets of circumstances exist. The words "the Head of Department may only decline the recommendation ... if" (die Departementshoof mag slegs die aanbeveling ...van die hand wys ... indien) imposes a duty on the Head of Department to accept the recommendation of the governing body unless those circumstances exist. I think this follows from the use of the words "may only decline ... if" (mag slegs van die hand wys ... indien). I shall return to this aspect again later in this judgment.

In terms of section 20(1)(*i*) of the South African Schools Act 84 of 1966, one of the functions of a governing body of a public school is to:

> "recommend to the Head of Department the appointment of educators at the school, subject to the Educators Employment Act, 1994 (Proclamation No 138 of 1994), and the Labour Relations Act, 1995 (Act No. 66 of 1995)."

The above quoted section of the South African Schools Act is in harmony with Section 6(3)(*a*) quoted above. It is thus the function of the governing body, when making recommendations to the Head of Department, to have regard to :

> "... the democratic values and principles referred to in section 7(1) of the Act."

section 7(1) then refers to those democratic values and principles in section 195(1) of the Constitution.

This does not mean that the governing body need only have scant regard to the democratic values and principles, or that it may pay lip service to these requirements. It is required by sections 7(1) of the Act and 195(1) of the Constitution to properly consider the recommendation against those values and principles. If the proposed recommendation falls short of those requirements, it has a statutory obligation not to make such recommendation to the Head of Department. It must apply its mind to those values and principles and must ensure that its recommendation complies therewith. In this manner full effect is given to those democratic values and principles referred to in sections 7(1) of the Act and 195(1) of the Constitution. The constitutional imperatives in these sections are therefore not negated or qualified, as submitted by Mr *Jacobs*.

The prescribed procedure which calls for representatives of the Head of Department and Trade Unions to be members of the selection sub-committee of the governing body which makes the recommendation, is designed to ensure that those constitutional imperatives referred to in sections 7(1) of the Act and 195(1) of the Constitution, are indeed reflected in the recommendation. I find support for this contention in section 6(3)(*b*)(i) of the Act which provides for a further control mechanism to ensure that the "... procedure collectively agreed upon or determined by the Minister for the appointment, promotion or transfer has ... been followed .".

Such procedure ensures that the composition of the selection committee is representative of all interested parties, including the respondents.

I do not agree with the submission that the use of the word "may" in section 6(3)(*b*) empowers the Head of Department to decline a recommendation on grounds other than those described in section 6(3)(*b*).

The word "may" in a provision in an enactment usually indicates a discretionary power (EA Kellaway *Principles of Legal Interpretation* at 78 *et seq*).

In the context of section 6(3)(*b*) the word "may" must, in my judgment, be accorded its ordinary meaning as conferring a discretionary power on the Head of Department to either accept or decline the recommendation of the governing body. However, such power must be exercised strictly within the confines of the section.

The first applicant and the Head of Department need reminding that as public officials, they may only do what by law they are empowered or authorised to do (*The Monastery Diamond Mining Corporation (Edms) Bpk v Schimper* 1983 (3) SA 538 (O); *Drakensberg Administration Board v Town Planning Appeals Board* 1983 (4) SA 42 (N) at 45A).

It does not follow that a public authority that possesses a discretionary power is free to act as it pleases. Even though discretion entails a choice, the choice is always a limited one. (Baxter *Administrative Law* at 408). The limits within which a discretionary power may be exercised, as well as the degree of the discretion, will vary according to the language employed in the empowering legislation. (Baxter (*supra*) at 404; Wiechers *Administratiefreg* 2 ed at 156).

A functionary who is charged with a statutory duty to exercise a discretion, such as the Head of Department in this case, may only exercise his discretion in the manner provided for in the empowering statute and he may only take those facts or circumstances into account which the statute allows him to do. If he takes other facts or circumstances into account not authorised by the statute, he acts *ultra vires* his powers (*Barrett NO v Macquet* 1947 (2) SA 1001 (A) at 1015-1016).

If the functionary misconceives the nature of the discretion conferred upon him and takes into account irrelevant considerations or ignores relevant ones, his decision can be set aside on review (*Johannesburg Stock Exchange and another v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 142A-D).

In the present matter section 6(3)(*b*) defines the facts and circumstances which the Head of Department is obliged to take into account. He may not take any other factors into account.

In terms of section 6(3)(*b*)(v) he

"... may only decline the recommendation of the governing body ... if:

(i) ...

(ii) ...

(iii) ...

(iv) ...

(v) the recommendation of the said governing body ... did not have regard to the democratic values and principles referred to in section 7(1)."

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 may 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. Even if the Head of Department does not agree with the recommendation, but he is satisfied that due regard was had to the required criteria he must accept the recommendation and he has no discretionary power to decline it. The section does not empower him to substitute the recommendation with his own.

Of course, if the recommendation manifestly had no regard to the democratic values and principles referred to in section 7(1) and 195(1)(*i*) of the Constitution, then the Head of Department will be entitled in the exercise of his discretion to decline the recommendation. This will be the case where a recommendation is so obviously biased and undemocratic, that no other inference can be drawn but that the governing body failed to have regard to the said values and principles. Such failure may also be proved with reference to the evidence of the members of the selection sub-committee.

If it was intended by the legislature that the Head of Department should have a discretion to decide whether or not a particular recommendation complies with the stated democratic values and principles, it would have been an easy exercise to couch the words in section 6(3)(*b*) in those terms. The section would have empowered the Head of Department to decline the recommendation if such recommendation ". does not comply ..." with those values and principles. However, the use of the words "... did not have regard to ..." are not in my view compatible with "... did not comply ...".

This construction also accords with the general tenor of the South African Schools and the Employment Educators Acts.

Under the South African Schools Act 84 of 1996 the governing body of a public school is given wide powers. In terms of section 6(2) thereof it may determine the language policy of the school, subject to the Constitution, the South African Schools Act and any provincial law. In terms of section 16 the governance of every public school is vested in its governing body. Extensive powers in regard to its functions are given to the governing body under section 20.

The legislature clearly intended by the above provisions that, subject to certain controls, every school in South Africa should be given the freedom to govern itself according to its own peculiar character. In a population and society as diverse and multi-cultural as South Africa, it can not be otherwise.

The provision that any appointment to any post on the educator establishment may only be made by the Head of Department on the recommendation of the governing body, fits into the bigger scheme of things. It is wholly compatible with the provision in section 6(3)(*b*) that the Head of Department may only decline the recommendation of the governing body in certain defined circumstances. Section 6 gives further effect to the important role which a governing body plays in the administration of the school, and it is in harmony with the provisions of the National Schools Act.

It is a recognised canon of construction that the Act as a whole must be looked at when interpreting a particular section. Even when the language is unambiguous, the purpose of the Act and other wider contextual considerations may be involved in aid of a proper construction (*Secretary for Inland Revenue v Sturrock Sugar Farm (Pty) Ltd* 1965 (1) SA 897 (A) at 903H; *Jaga v Dönges NO and another* 1950 (4) SA 653 (A) at 664; *Commissioner of Taxes v First Merchant Bank of Zimbabwe Ltd* 1998 (1) SA 27 (ZS)).

That the Head of Department has no discretion if the requirements under section 6(3)(*b*) are met, follow from the use of the word "only" in the introductory words to the section. He may "only" decline the recommendation if it fails to comply with the requirements. He may not decline the recommendation on any other ground. If the requirements are met, he is obliged to accept the recommendation. In my view, the introduction of the word "only" places a clear limitation on the discretionary power under section 6(3)(*b*).

To this extent the argument advanced on behalf of the respondents fail to have regard to the meaning and effect of the word "only". On that argument, the word becomes meaningless and superfluous, and the presumption against such a construction is well documented (see, generally, Devenish *Interpretation of Statutes* at 107 *et seq*).

It emerges clearly from the respondents' answering affidavit that the Head of Department never exercised his discretion under section 6(3)(*b*) of the Act. He adopted the attitude that his appointment of Mr Prins will be in conflict with those values and principles referred to in section 7(1) of the Act read with section 195 of the Constitution, and for this reason he declined the recommendation. Mr *Jacobs* conceded in argument that the Head of Department never exercised his statutory duty under section 6(3)(*b*), namely to consider the recommendation.

In the view I take of the matter, the question then arises whether the issue should not be referred back to the Head of Department for a reconsideration of the recommendation and the discharge of his statutory duty under section 6(3)(*b*). It is in this context that I was requested by counsel to deal in this judgment with the issue of interpretation of the relevant statutory provisions.

Mr *du Toit*, on behalf of the school and the governing body, expressed the concern that, having regard to the view which the respondents take regarding the interpretation of sections 6 and 7 of the Act, it will serve no purpose to refer the matter back to the Head of Department.

Mr *du Toit* urged me not to refer the matter back, and he reminded me of all the failed attempts at amalgamation on the part of first applicant and her predecessor. He submitted that it is the respondents' declared view that the appointment of Mr Prins, at this stage and pending amalgamation, will be contrary to those democratic values and principles referred to in section 7(1) of the Act and section 195(1) of the Constitution. Finally, he submitted that on the view which the Head of Department takes in regard to his statutory powers and discretion, he will not consider the recommendation of the governing body and will refuse to appoint Mr Prins. This will result in further litigation and unnecessary legal costs. He therefor asked me to substitute my own decision for that of the Head of Department, and to appoint Mr Prins as principal of the school.

The legal principles are clear; the difficulty lies with the application of the facts to those principles.

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. To do otherwise "... would constitute an unwarranted usurpation of the powers entrusted (to the public authority) by the Legislature" (*Bonnievale Wine and Brandy Co Ltd v Gordonia Liquor Licensing Board* 1953 (3) SA 500 (C) at 503**;** Baxter (*supra*) at 681; *University of the Western Cape and others v MEC for Health and Social Services and others* 1998 (3) SA 124 (C) at 131D-I).

Baxter (*supra*) at 681 *et seq* has conveniently categorised four circumstances under which a court will substitute its own decision:

1. Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter (*Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T) at 76).

   Whereas a strong argument can be made out that there is no basis upon which the Head of Department may find that the recommendation to appoint Mr Prins does not comply with the laid down requirements, his appointment is not necessarily a foregone conclusion. It is true that the selection sub-committee comprised of representatives of the governing body, the respondents, and certain Trade Unions. It is also true that the recommendation to appoint Prins was unanimous, and that the correct procedures were followed.

   However, it is also common cause that the Head of Department never applied his mind to the requirements under section 6(3)(*b*), and never considered the recommendation in accordance with the behests of the statute. For reasons I shall revert to, this Court is not in the same position as the Head of Department for purposes of deciding whether or not the recommendation had regard to the democratic values and principles referred to in section 7(1) of the Act and 195(1) of the Constitution. Whereas I can find, on the facts before me, that it is probable, or even extremely likely, that the Head of Department, if he properly exercises his statutory discretion, will accept the recommendation, I am not in a position to find that such acceptance is a foregone conclusion.

2. Where further delay would cause unjustifiable prejudice to the applicants. (*Local Road Transportation Board v Durban City Council* 1965 (1) SA 586 (A) at 598-599).

   Mr Prins had been the acting principal of the school for nearly two years. A consideration of the recommendation of the governing body to appoint him as principal can take place within a few days from the date of this order. Such further delay can, in the circumstances, not be unjustifiably prejudicial to the school or its governing body.

3. Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again (*Johannesburg City Council v Administrator, Transvaal* (*supra*) at 76G).

   Support for this ground can be found in the reasons advanced by respondents for not appointing Mr Prins. In the last sentence of paragraph 21 of his answering affidavit, the Head of Department says:

   > "It would certainly not only be unfair to appoint a principal to the first applicant at this stage but it would also bedevil the whole process of amalgamation as the first applicant would have an unfair advantage over Carnarvon Secondary Senior School in the amalgamation process."

   In paragraph 23 he states:

   > "Moreover, the appointment of a principal at the first applicant will have the effect that educators, who hold a certain post level, become

   > in excess ('botallig') with the result that the department would not be able to provide another post at the same level. Furthermore, and in any event, the administration of education in Carnarvon would become more complicated and would be seriously compromised."

   The question is whether the above statements were induced by bias or by such a degree of incompetence that a court is justified in substituting it's own decision for that of the tribunal.

   I have already indicated that the decision of the Head of Department not to appoint Mr Prins was based on a misconception of his powers and discretionary duties under the Act. I was assured by Mr *Jacobs* in the course of argument that if the matter were to be referred back, the respondents will adhere to the guidelines in this judgment regarding the meaning of sections 6 and 7 of the Act and the nature and extent of the discretionary powers thereunder. I have no reason to doubt this assurance. I am not able to find, on the facts of this matter, that the respondents will disregard their statutory duties as described in this judgment.

   The refusal of the Head of Department to appoint Mr Prins, as I have said, is the result of a misconception of his statutory duties. There is nothing before me to suggest that the above quoted paragraphs were induced by bias on the part of the Head of Department; or incompetence to discharge his statutory duties. He was ill-advised in regard to his duties, and his explanation for not accepting the recommendation is based on such ill advice.

4. Where the court is in as good a position to make the decision itself (*Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A)).

As I have indicated, both the first respondent and the Head of Department were represented when the candidates were interviewed and when the procedure preceding the interviews was followed. The Education Trade unions were also represented in these events.

The recommendation favouring Mr Prins was unanimous and it is agreed that the proper procedure was followed. In these circumstances I may be in the same position as the Head of Department in regard to the adjudication of those matters described in sub-paragraphs (i) to (iv) of section 6(3)(*b*). However, I am in no position to sit in judgment on the issue whether or not the recommendation did have regard to those values and principles referred to in section 7(1) as required by section 6(3)(*b*)(v).

No facts or circumstances have been placed before me to consider the requirement under section 6(3)(*b*)(v) and to this extent I am not in the same position as the Head of Department to make the decision.

The above four categories are not exhaustive, and it is conceivable that there may be other circumstances not mentioned above which may warrant a court to substitute the decision with its own. The overriding principle is fairness to both parties. In this regard Baxter (*supra*) at 681 quotes with approval the following dictum of Holmes AJA (as he then was) in *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at 349:

> "... the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and ... although the matter will be sent back if there

> is no reason for not doing so, in essence it is a question of fairness to both sides."

Having particular regard to the fact that the Head of Department, for the reasons mentioned, never exercised his discretionary powers under section 6, and never properly considered the recommendation, coupled with the absence of any evidence that he will not do so, I am of the view that fairness dictates that the matter should be referred back to him for fresh consideration.

It emerges from the papers that in the course of the litigation between the parties and the attempts at amalgamation, one Prof N Wiehahn was appointed by the respondents to act as facilitator between the schools in Carnarvon with a view to achieving amalgamation by consent rather than by legislative force. I can not refrain from noting with regret that his appointment was terminated. I do not know how far the negotiations have progressed, but on a reading of the papers one is left with the distinct impression that some progress has been made towards a negotiated amalgamation of the schools. The virtues of a negotiated settlement, however imperfect, as opposed to forced amalgamation, are self-evident. The parties should merely look at our own constitutional history as an example.

I sincerely trust that the prediction of Mr *du Toit*, namely that the Head of Department will not properly exercise his discretion and will decline the recommendation on improper grounds, will not be fulfilled. In my view, the terms of the order which I propose will sufficiently cater for this eventuality.

I make the following order:

1. The decision of the second respondent to decline the recommendation of the second applicant, namely to appoint Mr CA Prins as principal of the first applicant, be and is hereby set aside.
2. The matter is referred back to the second respondent and he is hereby ordered to exercise his statutory duty under section 6(3)(*b*) of the Employment of Educators Act 76 of 1998, having regard to the proper interpretation of sections 6 and 7 of the said Act as outlined in this judgment.
3. In the event of the second respondent failing to comply with paragraph 2 above within fifteen (15) days of the date of this Order, then the first and second applicants are granted leave to set this matter down for hearing again on five days notice to the respondents, supplemented in so far as may be necessary, for an order in terms of paragraphs 2 and 3 of the notice of motion dated 15 June 1999.
4. The first and second respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of this application, including the costs occasioned by the adjournment of this matter on 23 July 1999.

For the applicants:

J du Toit instructed by *Van de Wall & Vennote*, Kimberley

For the respondents:

DJ Jacobs instructed by *Duncan & Rothman*, Kimberley