Reportable: Yes / No
Circulate to Judges: Yes / No
Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: 1356\07
Date heard: 2007-11-02
Date delivered: 2007-11-23

In the matter of:

KIMBERLEY JUNIOR SCHOOL — **1ST APPLICANT**

THE GOVERNING BODY OF THE KIMBERLEY JUNIOR SCHOOL — **2ND APPLICANT**

versus

THE HEAD OF THE NORTHERN CAPE EDUCATION DEPARTMENT — **1ST RESPONDENT**

MR P THEUNISSEN — **2ND RESPONDENT**

MRS S RANTHO — **3RD RESPONDENT**

MR DL BRAND — **4TH RESPONDENT**

Coram: **BOSIELO AJP *et* MAJIEDT J**

JUDGMENT ON REVIEW

MAJIEDT J:

1. The applicants apply that this Court review and set aside the decision taken by the first respondent on or about 12 October 2006 to appoint the third respondent as principal at the first applicant school, instead of the second applicant's preferred choice, the second respondent.

2. By agreement between the parties, an interim order was earlier

granted by this Court suspending the implementation of this aforementioned decision, pending the outcome of this review application. This order is still in force.

3.1 During the course of 2006 the first respondent, to whom I shall hereinafter refer to as "*the HOD*", caused a vacancy list to be published which served as a notice of vacant educator posts in the Northern Cape province and which invited qualified persons to apply for appointment in the positions so advertised.

3.2 In terms of the aforementioned vacancy list, prospective applicants were reminded that appointments were to be made in accordance with the provisions contained in the Employment of Educators Act, 76 of 1998, (hereinafter referred to as "*the Employment Act*") and instructions were furnished regarding the procedures to be followed during the process of application and appointments.

3.3 One of the vacant positions contained in the aforementioned vacancy list was the position of principal of the first applicant (hereinafter referred to as "*the school*").

3.4 There were seven applications received for the post of principal, of which five qualified technically in terms of the procedural requirements for the post.

3.5 Subsequent to the shortlisting process by the selection panel appointed by the second applicant (hereinafter referred to as "*the SGB*"), interviews were held with the candidates who were identified

as having scored sufficient points. During these interviews the candidates were evaluated and points were awarded in accordance with the prescribed procedures. The selection panel thereafter resolved to recommend to the SGB that the second, third and fourth respondents, in that particular order of preference, be recommended for appointment.

3.6 A meeting of the SGB, held on 7 June 2006, received and considered the aforementioned recommendations of the selection panel and resolved to recommend the aforementioned three candidates in that same order of preference to the Department. The names were forwarded together with the necessary documents and a letter of motivation on 12 June 2006 to the HOD.

4. On 19 October 2006 the HOD informed the SGB that he was satisfied that the SGB and its selection panel had duly complied with the provisions of s6(3)(b) of the Employment Act and that the HOD has decided to appoint the third respondent in the vacant post. This decision prompted the review before us.

5.1 There is no dispute whatsoever with regard to the fact that the procedure for the filling of the vacant post has been followed correctly by all concerned. See in this regard, generally:
Douglas Hoërskool en 'n ander v Premier, Noord-Kaap en andere 1999(4) SA 1131 (NC) at 1138H – 1139F;
Kimberley Girls' High School and another v Head, Department of Education, Northern Cape Province and others, 2005(5) SA 251 (NC) at 254 G-I

5.2 The primary attack on the aforementioned decision of the HOD is based on the following:

a) That the HOD failed to consider properly whether the third respondent is a suitable candidate for the position; and

b) That the HOD has misconstrued his powers under the Employment Act; and

c) That the HOD has failed to take into account relevant considerations in making the appointment, and/or he had taken into account irrelevant considerations.

6. The letter of motivation by the SGB dated 12 June 2006, in which it had recommended the second, third and fourth respondents **in that particular order of preference** for appointment, contained the following important statements which were heavily relied upon by Mr Van Niekerk SC for the applicants during the course of his argument:

"In the nomination of the above post, equity, redress and representivity were carefully considered at both the shortlisting and the interviewing process. The demographics of the school are attached."

After setting out the three candidates' scores and commenting on their experience and capabilities, the letter is concluded with the following remarks:

"It is very evident that Mr P Theunissen is the only suitable applicant to take up the post of principal at Kimberley Junior School."

7. Mr Van Niekerk has argued that the letter, read in context with the scores obtained by the candidates (the second respondent obtained a score of 98,8; the third respondent scored 58,1 and the fourth respondent scored 55,8), it is clear that the only suitable candidate was the second respondent. He has submitted that the HOD had failed to consider the suitability of the candidates himself, which ineluctably would have led to the conclusion that the second respondent is the only candidate suitable for appointment. He has submitted further that the HOD's failure in this regard renders his decision reviewable in the circumstances.

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

> (a) Subject to paragraph (m), any appointment, promotion or transfer 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 and,
> .....
>
> (b) In considering the applications, the governing body or the council, as the case may be, must ensure that the principles of equity, redress and representivity are complied with and the governing body or council, as the case may be, must adhere to-
>
> (i) the democratic values and principles referred to in section 7 (1);
>
> (ii) any procedure collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators;
>
> (iii) any requirement collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators which the candidate must meet;
>
> (iv) a procedure whereby it is established that the candidate is registered or qualifies for registration as an educator with the South African Council for Educators; and
>
> (v) procedures that would ensure that the recommendation is not obtained through undue influence on the members of the governing body.

(c) The governing body must submit, in order of preference to the Head of Department, a list of-

(i) at least three names of recommended candidates; or

(ii) fewer than three candidates in consultation with the Head of Department.

(d) When the Head of Department considers the recommendation contemplated in paragraph (c), he or she must, before making an appointment, ensure that the governing body has met the requirements in paragraph (b).

(e) If the governing body has not met the requirements in paragraph (b), the Head of Department must decline the recommendation.

(f) Despite the order of preference in paragraph (c) and subject to paragraph (d), the Head of Department may appoint any suitable candidate on the list.

(g) If the Head of Department declines a recommendation, he or she must-

(i) consider all the applications submitted for that post;

(ii) apply the requirements in paragraph (b) (i) to (iv); and

(iii) despite paragraph (a), appoint a suitable candidate temporarily or re-advertise the post.

(h) .....

(i) .....

(j) .....

(k) If no appeal is lodged within 14 days, the Head of Department may convert the temporary appointment into a permanent appointment as contemplated in section 6B.

(l) .....

(m) ....."

9. Section 7 of the aforementioned Act reads as follows:

(1) In the making of any appointment or the filling of any post on any educator establishment under this Act due regard shall be had to equality, equity and the other democratic values and principles which are contemplated in section 195 (1) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), and which include the following factors, namely-

(a) the ability of the candidate; and

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

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

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

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

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

10.1 The parties were *ad idem* before us that in terms of the Employment Act, the HOD is the sole repository of the power to make an appointment. Such appointment is made on the recommendation of the SGB, which in turn is the sole repository of the power to make such a recommendation in terms of the Employment Act. It is imperative in my view, to delineate carefully the functions and powers of these two bodies.

10.2 A recommendation is no more and no less than exactly that. In the Oxford Concise English Dictionary, 10th Edition, revised, "*recommend*" is defined as follows:

"**recommend** •v **1.** put forward with approval as being suitable for a purpose or role. ▶advise as a course of action. ▶advise to do something. **2.** make appealing or desirable. **3.** (**recommend someone/thing to**) archaic commend or entrust someone or something to."

10.3 "*Appoint*" is defined in the same work of reference as:

"**appoint** •v **1.** assign a job or role to. **2.** determine or decide on (a time or place). ▶archaic decree. **3.** Law determine the disposal of (property) under powers granted by the owner.

10.4 Central to the adjudication of the dispute before us is the question of the suitability of the third respondent, as well as the question as to what the HOD was empowered and in fact enjoined to do by the Employment Act, in the taking of a decision regarding the filling of the vacant post, based on the recommendation of the SGB. Before turning to a consideration of the legislation, it is appropriate, in my view, to consider the meaning of "*suitable*" and "*suitability*". "*Suitable*" is defined in the aforementioned dictionary as:

"**suitable** •adj. right or appropriate for a particular person, purpose, or situation."

11.1 The pertinent pieces of legislation which require consideration herein are the following: s195(1) of the Constitution, Act 108 of 1996 (*"the Constitution"*) and s6(3)(b) of the Employment Act set forth in par. 8 above, more particularly s6(3)(b)(i), the terms whereof I set out again, due to its importance:

"(b) In considering the applications, the governing body or the council, as the case may be, must ensure that the principles of equity, redress and representivity are complied with and the governing body or council, as the case may be, must adhere to-

(i) the democratic values and principles referred to in section 7 (1); ....."

11.2 I have also quoted in full the provisions of s7 of the Employment Act. That section contains a cross-reference to s195(1) of the Constitution, which reads as follows:

"Basic values and principles governing public administration

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

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

maintained.

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

(c) Public administration must be development-oriented.

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

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

(f) Public administration must be accountable.

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

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

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

12. A meeting was convened at the request of the SGB with the HOD and certain of his departmental officials on 31 October 2006. The contents of the discussions at that meeting were reduced to writing by the chairperson of the SGB by letter of even date, which forms annexure SB5 to the founding affidavit. In terms of that letter, it is clear that a difference of opinion had arisen between the parties as to the proper interpretation of the provisions contained in s6(3)(c) and s6(3)(f) of the Employment Act. The relevant extracts of the aforementioned letter read as follows:

"You made it clear that due to a technical misinterpretation, by the governing body, of s6(3)(c) of the Employment of Educator's Act, 76 of 1998, you choose (*sic.*) one of the three candidates put forward by the governing body, notwithstanding the fact that only one clear candidate was indicated as suitable in the letter dated 12 June 2006. You further indicated that as the governing body and the Department of Education have differing interpretations as to the

intention of the abovementioned Act, that the governing body now only has the courts to turn to, to make a final interpretation of the law, as your decision is final and there is no further appeal process."

By letter dated 10 November 2006, the HOD furnished reasons for his decision to appoint the third respondent in the vacant principal post as follows:

"2.1 While I accept that the recommendation complies with s6(3) of the South African Schools Act, no. 84 of 1996 (this reference is patently incorrect, it should be the Employment of Educators Act) an obligation is placed on me by s7(1) to always have regard to the democratic values and principles set out in s195 of the Constitution. This I have to do while taking into account the ability of a candidate and the need to address the imbalances of the past. Given the context of the school, I have striven to meet this obligation in appointing Ms Rantho.

2.2 I am satisfied that with the necessary support Ms Rantho will be able to discharge her duties as principal of your school.'

13. In the answering affidavit, the HOD elucidates further on the aforementioned reasons provided by letter to the SGB. He indicated that, in taking the aforementioned decision to appoint third respondent as principal of the school, he had applied his mind not only to the recommendation of the SBG and the relevant legislative instruments, but also to the policies applicable within the Department of Education, which he is enjoined to implement. He averred further that it was clear from the recommendation by the SGB that the third respondent was suitable for appointment in that she had met the minimum requirements and provisions of the post as advertised and also, more importantly, that her appointment would promote equity, redress of the imbalances of the past and representivity in the school.

14. The arguments propounded before us by Counsel for the respective parties can therefore be summarised as follows:

a) On behalf of the applicants, Mr Van Niekerk SC has submitted that the HOD himself had to determine whether the third respondent was suitable for appointment to the post. In that regard, so it was submitted, the HOD was obliged to have regard to the points scored during the interviews by the various candidates and also to the fact that, in the opinion of the SGB, as informed by its selection panel, the only really suitable candidate for the post was the second respondent, Mr Theunissen. This approach clearly lays much emphasis on the question of the capabilities of the particular candidate to administer and manage the school. With regard to the third respondent, the SGB's letter of 12 June 2006 to the HOD categorically states that:

> "..... she (does not) have adequate administration and management skills to be a principal of a primary school".

b) On behalf of the 1st respondent, Mr Sibeko SC, has emphasized that the HOD's approach is that the mere fact that the third respondent had been recommended for appointment (albeit only as the second preferred candidate on the list of preference from the SGB), indicated that she was suitable for appointment with regard to her capabilities. The HOD was enjoined by legislation, more particularly s6(3)(b)(i) and s7(1) of the Employment Act read with s195(1) of the Constitution, *supra*, to have regard as to whether the appointment of the

preferred candidate (the second respondent, Theunissen) would meet the demands of equity, redress and representivity as set forth in the legislation. For this reason he preferred the third respondent (who is a Black female) to the second respondent (who is a White male).

15. In **Kimberley Girls' High School, *supra***, at 264 D-H, I had held as follows with regard to the legislative duties, functions and responsibilities imposed on a governing body by the South African Schools' Act, 84 of 1996 ("*the Schools' Act*"):

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

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

(b) 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 (s 20(1) thereof); and

(c) it may even be allocated functions with direct financial implications upon application to the head of department (s 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."

In the same judgment I had also indicated that the role of the HOD

entails more than a mere rubber stamping of a recommendation from a SGB.

See: **Kimberley Girls' High School, *supra*,** at 258 G.

16. In summary, the grounds on which the HOD's decision is sought to be reviewed by the applicants, are set out as follows in their founding papers, as supplemented:

a) that the decision was biased or is reasonably suspected of bias, as contemplated in s6(2)(iii) of the Promotion of Administrative Justice Act, 3 of 2000, as amended ("*PAJA*");

b) that the decision was materially influenced by an error of law, as contemplated in s6(2)(d) of PAJA, since the HOD's reliance on the provisions of s6(3)(f) of the Employment Act to take unfounded and irrational administrative action, is wrong in law;

c) that the administrative action was taken for a reason not authorised by the empowering provision and/or for an ulterior purpose or motive and/or because irrelevant considerations were taken into account or relevant considerations were not considered as contemplated in subparagraphs (i) – (iii) of s(6)(2)(e) of PAJA.

As motivation for this particular submission, it is averred that the inability of the third respondent for the particular post played no, or a totally insufficient role, in the consideration process of the HOD, whilst he ignored the excellent credentials of the second respondent for the particular post. It is submitted

further in this regard, that no reason at all is advanced why an appointment was made of a person (third respondent) who does not have adequate administrative and management skills to be a principal of a primary school. On this basis it is averred that the inference is justified that the appointment of third respondent did not take heed of the provisions of s195(1) of the Constitution and is not authorised by statute and that therefore there was an ulterior purpose in taking the decision;

d) that the decision was taken in bad faith as comtemplated in s6(2)(e)(v) of PAJA;

e) that the administrative action was taken arbitrarily and irrationally and lacked legality (s6(2)(e)(vi) of PAJA);

f) that the action is not rationally connected to the purpose for which it was taken and/or the purpose of the empowering provision, as contemplated in s6(2)(f)(ii) of PAJA;

g) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have exercised the power or performed the function in that fashion (s6(2)(h) of PAJA);

h) that the decision is unconstitutional in the respects outlined

hereinbefore;

i) Overall the submission is made that the conduct of the HOD does not constitute fair, reasonable and rational administrative action.

17.1 A court's power to review an administrative decision was set out authoritatively by the Constitutional Court in **Batho Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others 2004(4) SA 490 (CC)** at par.22 (504 F – 505 B) as follows:

"[22] In Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others, the question of the relationship between the common-law grounds of review and the Constitution was considered by this Court. A unanimous Court held that under our new constitutional order the control of public power is always a constitutional matter. There are not two systems of law regulating administrative action - the common law and the Constitution - but only one system of law grounded in the Constitution. The Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The grundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by-case basis as the Courts interpret and apply the provisions of PAJA and the Constitution. "

17.2 The requirement of a rational connection between the decision and the purpose for which the power was given to the decision maker was stated as follows by the Constitutional Court in **Pharmaceutical Manufacturers of South Africa: In re *ex parte* President of the RSA 2000(2) SA 674 (CC)** at par.85 (708 D – E):

"[85] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they

are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."

17.3 It is imperative to bear in mind that the exercise of a discretion in favour of one rational option available to a decision maker over another available rational option, does not make the decision irrational. See in this regard:

Bel Porto School Governing Body and others v Premier, Western Cape and another 2002(3) SA 265 (CC) at par.45 (282 E – G):

"[45] ..... The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the Executive. Courts cannot interfere with rational decisions of the Executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable."

This last mentioned passage is particularly apposite in the circumstances of the present matter as I shall presently show.

18. A matter of cardinal importance, which in my view is in fact decisive in the dispute between the parties, is the composition of the school's demographics. In its letter of recommendation, setting forth the order of preference of the three candidates, the SGB had attached a document outlining the demographics of the school. It reflects the following:

a) With regard to the learner population, 60% are African, 25% "Coloured", 8 % Indian and 7% White.

b) In respect of the top management of the school, there is one White male and three White females. No other racial groups are represented in the school's top management structure.

c) This is a significant feature and I will return to it later in this judgment.

19. Mr Van Niekerk has referred in his argument to the as yet unreported judgment of Potgieter AJ in the matter of **The Governing Body of the Point High School and another v Head of the Western Cape Education Department and others,** case nr. 14188/2006 (CPD) delivered on 21 May 2007. That particular matter concerned the review of the appointment of a principal and deputy-principal of the applicant school. The reasons given by the HOD for the appointments, which differed from the ones recommended as the preferred choice of the SGB, were that the appointment of the recommended candidates, would have added to the skewed racial profile at the school and would not have promoted equity and representivity, since the two candidates recommended by the SGB were White males from outside the Western Cape Province. The HOD's argument in that matter was to the effect that it would indirectly lead to an aggravation of the skewed racial profile of Western Cape school management staff, hence his decision to appoint two candidates who were also White males, but who were from the Province (and who were in fact on the applicant school's staff establishment already).

20. In the aforementioned **Point High School** judgment, Potgieter AJ

stated as follows at par. 26 thereof:

"[26] The following appears from the above analysis. Prior to the amendments effected to section 6 of the EEA (with effect from 26 January 2006 by the Education Laws Amendment Act 24 of 2005), first respondent was obliged to make an appointment in accordance with the preference of the school governing body, save in strictly circumscribed circumstances. It is readily apparent that the effect of the amendment of section 6(3)(f) of the EEA is to afford first respondent a wider discretion in making appointments. He is no longer bound by the preference of the school governing body. However, upon a proper construction of section 6(3)(f) it is readily apparent that first respondent does not enjoy an unfettered discretion in this regard. The discretion to appoint is constrained by the relevant provisions of the EEA, PAJA and the Constitution. Although first respondent is not bound by the preference of the school governing body, he is not at large simply to ignore such preference, but is obliged to give due weight thereto as well as to the assessment of the recommended candidates by the school governing body. In a case such as the present, where there is a significant discrepancy between the assessment results (properly arrived at) of the preferred candidate of the school governing body and the candidate eventually appointed by first respondent, the reason advanced for such deviation on the part of first respondent are subject to close scrutiny to determine whether the decision is rational and reasonable in accordance with the provisions of PAJA."

There can be no quarrel with this exposition of the applicable law as set out by Potgieter AJ. A careful analysis of the HOD's reasons for his deviation from the SGB's preferred choice in the present matter is clearly required. Having said that, I hasten to add the caveat expressed in the **Kimberley Girls' High School** case, *supra*, that the SGB's recommendation is not the alpha and omega and that the HOD cannot be expected to merely rubberstamp same.

21.1 Has the HOD acted improperly and in fact unlawfully (as contemplated in PAJA) in deviating from the SGB's recommended order of preference? I do not think so. The HOD cannot be faulted, in my view, when he states in his answering affidavit that the mere fact that the third respondent had been recommended for

appointment (albeit as second preferred choice of the SGB), indicated that she was regarded as fit and proper with the requisite experience and skills and qualifications for the advertised post. She made it onto the list of recommended candidates, based on the pre-screening requirements, the shortlisting for interviews and the recommendation from the selection panel to the SGB, endorsed by the latter that she be recommended for appointment as second preferred choice. If she had not been regarded as suitably qualified, or as possessing the requisite skills, experience and capability, she would not have made it onto the list of shortlisted candidates, even less onto the list of recommended candidates.

21.2 Moreover and importantly, s6(3)(c) of the Employment Act, couched in peremptory terms, requires of the SBG to submit in order of preference to the HOD a list of

> "(i) at least three names of recommended candidates; or
> (ii) fewer than three candidates in consultation with the Head of Department."

The option was therefore available to the SGB to, as their letter of recommendation to the HOD, dated 12 June 2006 (portions of which have been quoted hereinbefore) seems to suggest, consult with the HOD with a view to recommending one candidate only, namely second respondent, since they seem to have taken the rather puzzling view that despite the recommendation of three candidates in preferred order of sequence, there was in fact only one suitable candidate. Section 6(3)(c)(ii) was available as an alternative course to follow in such circumstances. Notwithstanding this, the recommendation was quite clearly made in terms of s(6)(c)(i), as is

common cause between the parties. The concluding paragraph of the aforementioned letter to the effect that

> "it is very evident that Mr P Theunissen is the only suitable applicant to take up the post of principal at Kimberley Junior School",

is a contradiction in terms in as much as the letter itself recommends three candidates in order of preference.

21. During the course of his argument, both orally and in the written heads, Mr Van Niekerk suggested that the recommendation submitted by the SGB to the HOD "was actually not meant to be a recommendation". This would, however, be in violation of the provisions of s6(3)(c) and (d) of the Employment Act. A recommendation which is required in mandatory terms in s6(3)(c) of the Employment Act, has to comply with the said provisions not only in form but also in substance. To suggest, as Mr Van Niekerk does, that the recommendation was made simply to comply with the form of the legislative requirement, but not its substance, is fallacious. This argument cannot be sustained at all. A governing body must elect whether it is going to submit a recommendation in terms of s(6)(3)(c)(i) (i.e. at least three recommended candidates) or in terms of s6(3)(c)(ii) (i.e. fewer than three candidates in consultation with the HOD). I am also not convinced that the explanation proffered in this regard holds much water, namely to the effect that the prescribed forms submitted by the Department for the interviewing and recommending process, made provision for only one choice, namely the submission of at least three recommended candidates to the HOD. In addition it was explained that an official of the Department,

one Mr. Motingoe, had explained the process in similar terms to SGBs, including the SGB in this matter. This does not in my view detract from the fact that the law is clear on the point and that, sans the exercising of an option to consult with the HOD in order to furnish the names of fewer than three candidates for recommendation for appointment, the HOD is entitled to accept that the three candidates recommended in the present case have been sifted and sorted by the selection panel and SGB and have been regarded as fit and proper persons for possible appointment in the particular order of preference.

22. The facts of the **Point High School**, differ substantially from those in the present case – this much was readily conceded by Mr Van Niekerk during argument. What is of further importance is that that case is also distinguishable from the present one in another important aspect, namely the fact that it was common cause between the parties there that the SGB had properly assessed and scored the various candidates, with regard to considerations of employment equity and representivity as required, *inter alia*, by s6(3)(b) and s7(1) of the Employment Act. In the present case this is precisely one of the important issues of dispute between the parties. The HOD takes the view in his answering affidavit that the SGB had completely missed the boat in grasping an opportunity to promote equity and representivity and to redress the imbalances of the past with regard to the top management demographics of the school, by not recommending the third respondent as its first preferred choice. The HOD, after making reference to the learner and top management

demographics of the school as set forth earlier in this judgment, puts it thus in his answering affidavit:

> "The constitutional imperative of the need to redress imbalances of the past in order to achieve broad representation as echoed in s7(1) of (the Employment Act) and s195(1)(h) and (i) of the Constitution, could only be given effect to by appointing as principal of the first applicant someone other than the second respondent. These constitutional imperatives could, in my respectful submission, be only achieved by appointing the third respondent as principal of the first applicant."

I unreservedly endorse this approach by the HOD. Once he had taken the position, correctly so in my view, that the three candidates proferred for recommendation had been regarded as suitable for appointment after having undergone a rigorous and extensive process of sifting and evaluation, he was not only at liberty, but in fact enjoined by legislation, particularly by the Constitution, to exercise his discretion in favour of a candidate who would promote equity, redress and representivity. The top management demographics is clearly out of proportion to the learner demographics at the school. This required redress as envisaged by the applicable legislation. In my view therefore, it cannot be said that his decision was not rationally connected to the purpose of the empowering legislation.

24. Mr Van Niekerk has laid much emphasis on the fact that the HOD did not himself ascertain the suitability of the candidates. This submission is made in a very narrow ambit, namely the points scored by the various candidates and also the SGB's view expressed in its letter of recommendation that the second respondent is the only suitable applicant to take up the vacant post. There are two answers to this proposition:

24.1 Firstly there is absolutely no merit in taking such a narrow, confined view of the requirement of suitability. It would in fact be contrary to the empowering provisions and in particular to the Constitution, if suitability is regarded as capability in skills and qualifications and experience only. The notion of affirmative action to redress imbalances of the past and to promote equity and representivity is very firmly established in the empowering legislation, as I have already showed. See in this regard too, generally, the **Kimberley Girls' High School** decision referred to earlier.

24.2 In the matter of **Alexandré v Provincial Administration of the Western Cape Department of Health [2005] 6 BLLR 539 (LC)**, Murphy AJ held as follows in the course of interpreting the concept of suitability within the context of the Employment Equity Act, 55 of 1998:

> "[4] Section 2 of the EEA defines its purpose as the achievement of equity in the workplace by promoting equal and fair treatment in employment through the elimination of unfair discrimination and implementing affirmative action measures to redress the disadvantages in employment experience by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace.
>
> [5] Insofar as the EEA aims at achieving equitable representation of suitably "*qualified*" people from designated groups in all occupational categories and levels, it is important to keep in mind the legislature's recognition that past disadvantageous treatment of the designated groups under Apartheid denied many able people access to educational opportunities and formal qualifications. For the purposes of the EEA, therefore, a person may be suitably qualified for a job as a result of any one, or any combination of that persons formal qualifications, prior learning, relevant experience or capacity to acquire, within a reasonable time, the ability to do the job. Employers determine suitability are thus legislatively mandated to review all these factors and to accord due weight to potential capacity (see section 20(3) and (5) of the EEA."

24.3 In **Minister of Finance and another v Van Heerden 2004(6) SA 121 (CC),** Sachs J eloquently articulated this proposition as follows (at par. 143-146, 172 H – 173 D):

> "[143] It also means that where disadvantage was imposed because of race, then race may appropriately be taken into account in dealing with such disadvantage (the same would apply to gender, disability, language and so on). It accordingly makes it clear that properly designed race-conscious and gender-conscious measures are not automatically suspect, and certainly not presumptively unfair, as the High Court held.
>
> [144] Remedial action by its nature has to take specific account of race, gender and the other factors which have been used to inhibit people from enjoying their rights. In pursuance of a powerful governmental purpose it inevitably disturbs, rather than freezes, the status quo. It destabilises the existing state of affairs, often to the disadvantage of those who belong to the classes of society that have benefited from past discrimination.
>
> [145] Yet, burdensome though the process is for some, it needs to be remembered that the system of State-sponsored racial domination not only imposed injustice and indignity on those oppressed by it, it tainted the whole of society and dishonoured those who benefited from it. Correcting the resultant injustices, though potentially disconcerting for those who might be dislodged from the established expectations and relative comfort of built-in advantage, is integral to restoring dignity to our country as a whole. For as long as the huge disparities created by past discrimination exist, the constitutional vision of a non-racial and a non-sexist society which reflects and celebrates our diversity in all ways, can never be achieved. Thus, though some members of the advantaged group may be called upon to bear a larger portion of the burden of transformation than others, they, like all other members of society, benefit from the stability, social harmony and restoration of national dignity that the achievement of equality brings."

24.4 In summary: the HOD was perfectly correct and in fact compelled by law to take a much wider view of the concept of the suitability of the three recommended candidates. His enquiry was not and could not have been restricted to a mere formalistic consideration of whether a mechanical allocation of points to applicants considering only their suitability with regard to skills, qualifications and experience was in

order, without having any regard to the broader view of suitability as set forth in s7(1) of the Employment Act and s195(1) of the Constitution.

In the circumstances it follows that I am of the view that the applicants' attack in this regard is devoid of any merits.

25. I am of the view further that Mr Van Niekerk's submission that the HOD had erred and misdirected himself in law by "assuming" that a mere nomination of recommended candidates means that they are all suitable, is completely misconceived. I have to a large extent already considered this aspect and I repeat my view enunciated hereinbefore, that a recommendation in terms of s6(3)(c)(i) of the Employment Act leads to the inescapable conclusion that the candidates so recommended are regarded by the SGB as fit and proper and suitable for the post. To require, as Mr Van Niekerk suggested during argument, that the HOD himself should have undertaken a process of interviewing and assessing of the three candidates, borders on the absurd in my view. That is not the function of a HOD. It is the function allocated to a SGB, which was correctly fulfilled in this case. What is required of the HOD is to ascertain firstly whether the procedural requirements contained in the legislation have been met and secondly and importantly in the context of the dispute in this case, whether **as a matter of fact,** the SGB did take into account equity, redress and representivity in making their recommendations. I repeat my views expressed in the **Kimberley Girls' High School** case, *supra,* that a SGB has a responsibility and duty in terms of the Employment Act to go further than the mere allocation of points. It

must be seen to be applying the criteria set forth in the empowering statute, namely the need for equity, redress and representivity. The HOD, in turn, cannot be a mere mechanical rubberstamp of a recommendation and must be seen to be complying with the said statute in making appointments so as to promote equity, redress and representivity. This is exactly what has happened in the present case.

26. Mr Van Niekerk has also been critical of the HOD's statement in correspondence and in his answering affidavit that he was "satisfied that with the necessary support" the third respondent would be able to discharge her duties as principal of the school. The criticism is unfounded. In my view the HOD was not alluding to the third respondent's inability to do the job or to any incompetence on her part, but rather to the fact that she should be assisted in her tasks by her top management (which is what they are there for anyway). This relates in my view to the need for there to be co-operation and support for the third respondent and that she ought not to be undermined in fulfilling her tasks.

27. In conclusion therefore I am of the view that the HOD's decision is sound in fact and in law and that it is not reviewable. It follows that the application must fail.

28. Costs must follow the outcome, for there is no sound reason, nor has any been suggested, that this not be the case. The interim interdict which regulated matters in the interim pending the outcome of this review application, must now be discharged so as to give effect to the

HOD's decision.

29. In the premises I make the following order:

a. The application for review is dismissed with costs.

b. The interim interdict order is hereby discharged.

SA MAJIEDT
JUDGE

I concur and it is so ordered.

D BOSIELO
ACTING JUDGE PRESIDENT

ADVOCATE FOR THE APPLICANTS	:	JG VAN NIEKERK SC
ADVOCATE FOR THE RESPONDENTS	:	LT SIBEKO SC
ATTORNEY FOR THE APPLICANTS	:	ENGELSMAN MAGABANE INC
ATTORNEY FOR THE RESPONDENTS	:	STATE ATTORNEY
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