OBSERVATORY GIRLS PRIMARY SCHOOL AND ANOTHER v HEAD OF DEPARTMENT OF EDUCATION, GAUTENG 2003 (4) SA 246 (W)

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Citation 2003 (4) SA 246 (W) Case No15349/2002
Court Witwatersrand Local Division
Judge Horwitz AJ
Heard December 17, 2002 Judgmen tDecember 17, 2002 Counsel J I Du Toit for the applicants G Hulley for the respondent.
AnnotationsLink to Case Annotations

Flynote : Sleutelwoorde

School and school board - Teachers - Appointment of - Interview procedure - Respondent alleging non-compliance with prescribed interview procedure - Court accepting, for present purposes, that prescribed interview procedure peremptory - Strict compliance with prescribed procedure not necessary - Substantial compliance sufficient - Procedure followed by school's governing body fully achieving purposes of applicable legislation, namely ensuring fair and transparent procedure for appointing teachers to fill vacancies - No lawful basis for respondent to withhold appointment because of insignificant departures from prescribed procedure - Court having power to order respondent to make appointment - Respondent, accordingly, ordered to accept governing body's recommendation.

Headnote : Kopnota

The post for a mathematics teacher had been vacant at the first applicant school for approximately six months. The school authority believed it had done everything required of it in terms of the applicable law to secure a properly qualified teacher for the job. The post had been properly advertised and D was the preferred candidate. In the view of the school, all that remained was for the respondent to appoint her to the position. The respondent, however, had not done so. The applicants therefore approached the Court for its intervention and to ensure that the respondent made the appointment.

According to the applicants, there had been three vacancies at the first applicant school and the governing body (the second applicant) had complied in all material respects with the prescribed procedures for the appointment of candidates to those vacancies and had recommended the appointment of educators in respect of all three posts to the respondent. In respect of two of the posts, the respondent had made the recommended appointments. In respect of the post in contention, however, it had failed to do so.

The procedure which had been followed was the following: there had been six candidates for the three vacant posts. Each candidate had been considered by an interview committee. At the conclusion of each interview, each of the four members of the interview committee had completed a score sheet in respect of that particular candidate. The scores were then tallied and the weak candidates eliminated. That had left three candidates, in order of preference, K, D and G. However, a final decision could not be made at that stage as the committee had not yet received a reference from the principal of the school at which K had been employed. Two of the committee members then contacted the principal and had learnt that K did not have the requisite teaching experience. She therefore did not meet all the necessary criteria for the post and the members concerned had decided to drop K in favour of D. A form had been completed and sent to the Gauteng Department of Education (GDE) recommending D as the committee's first choice, K as second choice and G as third.

Section 3.4 of the Personnel Administrative Measures (enacted by the Minister of Education in terms of s 4 of the Employment of Educators Act 76 of 1998) provided that the respondent could decline the recommendation of the governing body of the school only if it could show the existence of one of several sets of circumstances enumerated by the section, including the fact that the proper procedure for the appointment had not been followed. The respondent justified declining the recommendation of the second applicant on the ground that the interview procedure described in s 3.3 of the Personnel Administration Measures for the appointment of D had not been followed by the second applicant. He alleged various respects in which the members of the interview committee had conducted themselves during the interview process and also raised a number of technical points. Inter alia, and first, he contended that there was a grievance procedure in place and that he could not make

the appointment until the grievance had been resolved: G had apparently felt aggrieved at the proposed appointment of D and had had the matter referred to a District Grievance Committee. There was, however, no prescribed grievance procedure in place. The essence of G's grievance was that she had developed a bad relationship with one of the members of the committee, that that member had been biased against her and had D orchestrated the failure to appoint her. In other words, the failure to recommend her as the committee's first choice for the post. Secondly, he made much of the discrepancies in the scores allocated by the various committee members.

Held, that the applicants had demonstrated that there was no merit in G's complaint. The respondent had failed to advance any facts which supported the complaint. If there had been any merit in her complaint, she would have had to have shown that she was entitled to be promoted above K in the order of preference. There was no evidence of such entitlement. (At 253B - B/C and 253H.)

Held, further, that no inference could be drawn from the discrepancies in the scores of the various committee members as the allocation of points for the various criteria was necessarily subjective and the approach of the professional members would inevitably have differed from that of the lay members. Moreover, it appeared that, if the votes of the allegedly biased member of the committee had been excluded from the tallying process, the results would have remained materially the same. (At 253D - E/F.)

Held, further, that the question then arose whether the multitude of the applicable laws and regulations which prescribed the procedure to be followed in the appointment of new teachers were peremptory or merely directory. In either event, the further question arose whether exact compliance was required or whether substantial compliance was sufficient. Accepting, for present purposes, that the prescribed procedure was peremptory, strict compliance was not necessary: all that was called for was substantial compliance. (At H 255B - C and D - D/E.)

Held, further, that the procedure that the school had followed fully achieved the purposes of the legislation of ensuring that there was a fair and transparent procedure in place for appointing teachers to fill vacancies. (At 255F/G - G.)

Held, further, that, if it had wanted to investigate the grievance, the department should have supplied the investigating committee with the particulars which the latter had wanted and it could have completed its investigation within a few days. Six months was simply too long for an investigation of the nature contemplated. It therefore only remained for the respondent to effect the appointment and he had no reason not to do so. There was no lawful basis for withholding the appointment because of insignificant departures from the prescribed procedure. (At 257A/B - C.)

Held, further, that the Court indeed had the power to order the respondent to appoint D to the position. The respondent, accordingly, ordered to accept the second applicant's recommendation. (At 257D and 258B - B/C.)

Cases Considered

Annotations

Reported cases

Castel NO v Metal and Allied Workers Union 1987 (4) SA 795 (A): dictum at 808 applied

Douglas Hoërskool en 'n Ander v Premier, Noord-Kaap, en 'n Ander 1999 (4) SA 1131 (NC): dicta at 1144I - 1145I and 1148C - I applied

Makwetlane v Road Accident Fund 2003 (3) SA 439 (W): considered

Reynolds Brothers Ltd v Chairman, Local Road Transportation Board, Johannesburg, and Another 1985 (2) SA 790 (A): dictum at 805F - I applied

Yates v University of Bophuthatswana and Others 1994 (3) SA 815 (B): distinguished.

Case Information

Application for an order compelling the respondent to accept second respondent's recommendation of a particular candidate to a teaching post at the first applicant school. The facts appear from the reasons for judgment.

J I Du Toit for the applicants

G Hulley for the respondent.

Cur adv vult.

Postea (December 17).

Judgment

Horwitz AJ: Whilst adults squabbled about who should be appointed to a mathematics post to give instruction to Grades 5 and 6 pupils at the Observatory Girls Primary School, the pupils (now called 'learners') in those grades remained, from about June 2002, without a permanent teacher (now called an 'educator') in that subject and had to make do with temporary arrangements. Unless the problem is addressed soon, it will no doubt be carried over into the new year. The school authority believes that it has done everything required of it in terms of the applicable law to secure a properly qualified teacher for the job. The post was properly advertised as post No JE22C219 and a Mrs Desraj was the preferred candidate. All that remains, in the view of the school, is for the respondent to appoint that person to the position. The respondent, however, does not do so. The applicants therefore want the Court to intervene: they want it to take up the cudgels and effectively ensure that the respondent makes the appointment. In the alternative, the applicants want the Court to order the respondent to make a decision, one way or the other and, if the decision is to not effect the appointment, the applicants will then pursue whatever route is open to them, whether by way of instituting further Court proceedings or otherwise.

The procedure for appointing teachers to vacant positions is not to be found in one single piece of legislation. In terms of s 4 of the Employment of Educators Act 76 of 1998, the Minister of Education enacted Personnel Administration Measures. These were published in Government Notice R 222 in Government Gazette 19767 on 18 February 1999. Of relevance to the present case are the provisions of s 3.3 thereof. (I should first mention that the existence of a vacancy at a school is reported to the respondent, who advertises the post in a gazette. The employing department of the Department of Education receives and scrutinises all applications for the post, whereafter it delivers the applications to the governing body of the relevant school.

This all appears from s 3.1 and 3.2. There is no attack on the procedure that was followed at that stage and it can be ignored for present purposes.)

Subsections (a) and (b) of s 3.3 provide for the establishment of interview committees. Once the school governing body has received all the applications for a particular post, it must convene an interview committee, which must then deal with applications in accordance with the following guidelines and procedures (adumbrated in paras (f) - (j) of s 3.3):

'(f) The interview committee may conduct shortlisting subject to the following guidelines:

(i) The criteria used must be fair, non-discriminatory and in keeping with the Constitution of the country.

(ii) The curricular needs of the school.

(iii) The obligations of the employer towards serving educators.

(iv) The list of shortlisted candidates for interview purposes should not exceed five per post.

(g) The interviews shall be conducted according to agreed upon guidelines. These guidelines are to be jointly agreed upon by the parties to the provincial chamber of the Education Labour Relations Council, which is abbreviated in the papers as "ELRC".

(h) All interviewees must receive similar treatment during the interviews.

(i) At the conclusion of the interviews the interviewing committee shall rank the candidates in order of preference, together with a brief motivation, and submit this to the school governing body for their (sic) recommendation to the relevant employing department.

(j) The governing body must submit their (sic) recommendation to the provincial education department in their order of preference.'

Section 3.4 of the Personnel Administration Measures, insofar as it is relevant, then provides:

'3.4 Appointment

(a) The employing department must make the final decision subject to:

(i) satisfying itself that agreed upon procedures were followed; and

(ii) that the decision is in compliance with the Employment of Educators Act of 1998, the South African Schools Act, 1996, and the Labour Relations Act, 1995.'

(I interpolate here that there is no suggestion by any of the parties that any aspect of either the South African Schools Act, 1996, or the Labour Relations Act, 1995, was not complied with. Also, as regards para (g) of s 3.3 of the Personnel Administrative Measures, I was not told whether any guidelines were agreed upon but there is likewise no suggestion that the process that was followed in selecting a suitable candidate for the job was in conflict with any such agreement that might exist.)

Despite the tenor of the opening words of s 3.4 (that is, that the employing department must make the final decision), s 6(3)(b), (c) and (d) of the Employment of Educators Act provides:

'(b) The Head of Department [in casu, the respondent] may only decline the recommendation of the governing body of the public school . . . if -

(i) any procedure collectively agreed upon [by all relevant role players, such the relevant trade union and others] 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 . . . was based on undue influence; or

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

(c) If the Head of Department declines a recommendation in terms of para (b), the governing body . . . concerned shall make another recommendation in accordance with para (a), for consideration by the Head of Department.

(d) A recommendation contemplated in para (a) shall be made within two months from the date on which a governing body . . . was requested to make a recommendation, failing which the Head of Department may make an appointment without such recommendation.'

It seems clear to me that, unless the respondent can bring his case within one of the various circumstances postulated in (b), he is obliged to act in accordance with the governing body's recommendation.

The respondent's answering affidavit was deposed to by one Silas Bakwadi Thembo, who describes himself as 'the Labour Relations Co-ordinator, District D9, in the employ of the Gauteng Department of Education'. Therein he refers to a 'Departmental circular', 5 of 1999. He also refers to 'the Department's School Management Handbook'. He calls attention to the advertisement published in the Provincial Gazette, calling for applications for the vacant posts at the school. In that advertisement, there is a reference to circular 5 of 1999, which is stated to be 'based on ELRC Resolution 5 of 1998', and also to Gauteng Department of Education circulars 73 and 74 of 2001.

Despite explanations tendered to me during argument, I remain confused about the relevance of the various circulars. I cannot find anything which suggests that they have the force of law and counsel could not point me to anything which indicates that they do. Happily, it seems to me that I can ignore them all because they all relate to a stage in the process which is not relevant to the present case.

Finally, on this score, the deponent to the respondent's answering affidavit alleges that there is a grievance procedure in place: if anyone is aggrieved at the proposed appointment of a particular candidate, the aggrieved party may have the matter referred to a District Grievance Committee and the respondent may not appoint the candidate until the grievance has been resolved. In fact, the deponent to the

answering affidavit alleges: 'The objection was, in accordance with the terms of annexure A to circular 5/1999, forwarded to the District Grievance Committee.'

The grievance procedure referred to in the answering affidavit is described in annexure A to the circular and is stated to be based on ELRC Resolution 6 of 1998.

Thoroughly frustrated at not being able to find anything which gave that document the force of law, I called upon counsel to address me on this issue, only to be told that resolution 6 of 1998 has been superseded by resolution 2 of 2001 and that there is in fact no new grievance procedure in place.

It now remains for me to consider whether the applicants complied with those provisions of the Personnel Administration Measures with which they were required to comply. It is clear from the papers, and in fact it was common cause, that in the present context it is the interview procedure described in s 3.3 (which I have quoted above) which is in issue.

According to the founding affidavit, the school had three vacancies and the governing body of the school (the second applicant)

'complied in all material respects with the prescribed procedures contained in the afore stated (sic) laws and regulations in respect of all three vacancies and recommended the appointment of educators in respect of the three vacant posts to the respondent'.

In respect of two of the posts, the respondent made the recommended appointment. In respect of the post in contention, however (the recommended candidate being Mrs Desraj), the respondent has not done so. According to the answering affidavit, a grievance was lodged and is pending and that has to be resolved in accordance with E the grievance procedure before an appointment can be made. What aggravated the problem, however (so I was informed by the respondent's counsel during the hearing of this application), was that the grievance procedure that was set in motion may itself have been flawed because of some or other technicality, so the parties involved in it may have to start that procedure all over again. None of this, of course, is of the applicants' making but, as in the case of most illnesses, the school has to suffer the debilitating effect thereof although it was not responsible therefor. As I

indicated above, I was informed that there is in fact no prescribed or agreed procedure for resolving grievances.

I turn now to consider the allegations in the affidavit concerning the interview procedure, which the respondent alleges was flawed.

It appears that for the teaching posts in question, six possible candidates were in contention. Their names are: Mrs Mohammed, Miss Khoza, Mrs Desraj, Miss De Jong, Miss Gcwensa and Mrs Kala. (It is not entirely clear from the affidavits whether these applicants were applying for appointment to only one of the advertised posts or whether they were applying for two of the posts. Nothing, however, really turns on this.) The candidates were considered by an interview committee, consisting of Mr Ndamase (the chairman of the second applicant), Mrs Watson (the school principal), Mr Banda and Ms Swanepoel. The committee met on 17 May 2002 and decided on four candidates for appointment to either one or two of the available posts. To enable the committee to reach that stage, at the conclusion of the interview of each candidate, each member of the interview committee had to complete his or her own score sheet reflecting his or her impression of the relevant candidate and, as the applicants fairly concede, the scoring is subjective. And so it inevitably must be; for how else does one measure, and allocate a score for, criteria such as 'Curriculum development' and 'Discipline', to name but two? Because of this subjectivity (so says Mr Ndamase, the deponent to the applicants' founding affidavit and replying affidavit), committee members such as Mrs Watson and Ms Swanepoel, both of whom are members of the teaching profession, would probably assess candidates differently from the other two lay members of the interview committee (Messrs Banda and Ndamase). That makes sense to me.

When the scoring process had been completed, the scores were tallied; the weak candidates were then eliminated and that left three candidates. They were, in order of preference, Khoza (with 249 points), Desraj (with 243 points) and Gcwensa (with 219 points). It is important to record that none of the committee members knows what scores any other member has awarded to each candidate, until the tally process commences.

This process took place on 17 May 2002. A final decision, however, could not be reached at that stage because the committee had not yet received a reference from

the principal of the school at whic Miss Khoza was employed. The committee therefore decided that Mrs Watson (the principal) and Mr Ndamase (the chairman) should contact Miss Khoza's principal to obtain a reference. They did so on 20 May and learnt from the principal that Miss Khoza had had no experience teaching mathematics to the classes for which a teacher was required. She therefore did not meet all the necessary criteria for the post and Mrs Watson and Mr Ndamase decided to drop Miss Khoza in favour of Mrs Desraj. Following this decision, a form was completed and sent to the Gauteng Department of Education. It purports to have been signed by the 'Managing Chairperson: Governing Body' of the first applicant. Mrs Desraj was recommended as the first choice, Miss Khoza as the second choice and Miss Gcwensa as third.

It is also important for me to mention a decision that was taken at a meeting of the second applicant which had been held on 13 May 2002, that is four days before the first meeting of the interview committee. When the decision was taken to appoint the four persons to the interview committee, the following was also resolved: 'Interview committee given mandate to make final recommendation to GDE.' The 'GDE' is of course the Gauteng Department of Education and I will use the same abbreviation.

As I have already said, the applicants' position is that, having received the recommendation, the respondent should have made the appointment but has not done so. It therefore becomes necessary to consider the latter's reasons for not appointing Mrs Desraj to the post.

The first point which the deponent to the respondent's answering affidavit makes is that the GDE has received a 'grievance' from one of the applicants for the post. Although the deponent states that he does not wish to disclose the complainant's identity, Mr Ndamase states in the applicants' replying affidavit that the applicants are aware that it is Miss Gcwensa. During the hearing of the application, this was not in contention. The essence of the grievance, according to Thembo, was that Miss Gcwensa had developed a bad relationship with Mrs Watson, that Mrs Watson was biased against her and had orchestrated 'the failure to appoint her'. (The latter complaint was obviously intended to refer to the fact that she was not recommended as the first choice for appointment to the relevant teaching post.)

I think that the applicants have unquestionably demonstrated that there is no merit in that complaint. Aside from the fact that the applicants reject the allegation, the respondent has not advanced any facts at all to support the allegation. To bear out the allegation of bias, the deponent to the answering affidavit alleges that Miss Gcwensa complained that Mrs Watson had summoned her to Mrs Watson's office to inform her of the outcome of the process before some of the other candidates were advised of the outcome. I am not sure that I understand the nature of this complaint. Apparently Miss Gcwensa suggests that Mrs Watson did so 'in order to add insult to injury'. I find this rather far-fetched. In any event, the applicants deny the allegation and point out that in fact when Mrs Watson informed Miss Gcwensa of the results, Mrs Desraj had already been informed.

Apropos the scoring, the respondent makes much of the discrepancies in the scores allocated by the various committee members, but I am not able to draw any inference from that, given that the allocation of points for the various criteria is admittedly, by its nature, a subjective one and the approach of the professional members will inevitably differ from that of the lay members. Moreover, as Mr Du Toit, who appeared for the applicants, pointed out during argument, if one excludes Mrs Watson's votes from the final count, the results remain materially the same.

What is telling is the following statement in the respondent's answering affidavit:

'I should point out that it is not contended that there has indeed been any wrongdoing on the part of Watson or any other member of the interview committee. However, in the face of a grievance that, prima facie, is supported by the documentation, the department is duty bound to satisfy itself that there were no irregularities.'

The department's concern for propriety is to be commended but on the facts before it, it should quite easily have come to the conclusion that Miss Gcwensa's complaint about Mrs Watson was without merit. What also strikes me as odd is that, if anyone had reason to complain, it was Miss Khoza. But she did not do so. If there were any merit in Miss Gcwensa's complaint, she would have had to have shown that she was entitled to be promoted above Miss Khoza in the order of preference. Of such entitlement there is no evidence at all.

The respondent makes a number of other points but there is no purpose to be served in dealing with each and every one. For example, the point is made that a certain Mrs Mohamed actually scored the highest number of points so the respondent questions why Mrs Desraj was recommended for the job. Quite apart from the fact that those two persons were applying for different positions, the respondent has misconstrued his function. First, no one complained about this. Secondly, the interview committee was not bound to recommend the person with the highest number of points. It was duty bound to act honestly andrecommend the most suitable candidate and the relevant provisions of the law do not vest the respondent with the right to override the committee's choice, save in the limited circumstances referred to. On the respondent's own version, it had no reason to question the honesty of the members of the interview committee.

Aside from the above points, which all relate to how the members of the interview committee conducted themselves during the interview process, the respondent raises a number of technical points. He questions whether the recommendation of the interview committee was endorsed by the second respondent, clearly relying for this on paras (i) and (j) of s 3.3 of the Personnel Administration Measures.

I think that it is clear that the decision to recommend Mrs Desraj over Miss Khoza as the school's first choice was really taken by Mrs Watson and Mr Ndamase, but this must be seen in context. They were delegated by the interview committee to obtain a reference regarding Miss Khoza from the principal of the school at which she was employed. Once it transpired that she was not qualified to do the job, it must have followed that she could not be the committee's first choice. It is therefore not quite accurate to say that the committee as a whole did not play a role in the nomination process.

A further point which Mr Hulley, who appeared on behalf of the respondent, made during argument was that the second applicant had abdicated in favour of the interview committee its function to make the recommendation to the respondent. Mr Hulley relied on the following recordal in the minutes of the meeting of the second applicant held on 13 May 2002: 'Interview committee given mandate to make final recommendation to GDE.'

To support his argument, Mr Hulley referred me to s 20(1)(i) of the South African Schools Act 84 of 1996. That provides as follows:

'(1) Subject to this Act, the governing body of a public school must -

(i) recommend to the Head of Department the appointment of educators at the school, subject to the Employment of Educators Act 76 of 1998 and the Labour Relations Act 66 of 1995.'

I do not believe that the intention behind that provision was to charge governing bodies of schools peremptorily with the duty of making recommendations to the Head of Department regarding the appointment of educators. In my view, it serves as a directive to those bodies that when they make recommendations of that kind, they must do so paying due regard to the two Acts mentioned in that provision of Act 84 of 1996.

Mr Du Toit counters with the argument that reg 38(1) of the regulations made in terms of s 31 of the School Education Act 6 of 1995 (Gauteng), relating to governing bodies of public schools, empowered the second applicant to delegate to the interview committee the function of making the relevant recommendation. There is merit in Mr Du Toit's submission, but, for reasons which I will enunciate below, I do not believe that it is necessary for me to express a final opinion thereon.

Lastly, as regards alleged irregularities in the procedure which the interview committee followed, the deponent to the answering affidavit alleges:

'In addition, the limited investigations conducted by the Department (as appears from what is set out above) suggest other irregularities not related to the grievance.'

No particulars whatsoever are provided by the deponent and his allegation is highly speculative. For present purposes it can be ignored.

The question that then arises is whether all these laws and regulations, which prescribe the procedure that has to be followed in the appointment of new teachers to posts, are peremptory or merely directory. In either event, one must ask further: do they require exact compliance or is substantial compliance sufficient?

I recently had occasion to research, and comment on, the peremptory and directory nature of statutory provisions. It was in the case of Makwetlane v Road Accident Fund (unreported) case No A3101/2001 * . It would be supererogatory for me to repeat the exercise here. Accepting, for present purposes, that the prescribed procedure is peremptory, I am satisfied that strict compliance is not necessary: all that is called for is substantial compliance. See also: Douglas Hoërskool en 'n Ander v Premier, Noord-Kaap, en 'n Ander 1999 (4) SA 1131 (NC) at 11441 - 11451.

One does not go digging to find points to stymie the process of appointing suitable candidates to teaching positions. In this context, I mention a criticism which the respondent levels against the scoring procedure. The deponent to the answering affidavit states:

'. . . the opportunity for one member to dishonestly determine the outcome of the process is much greater'.

Of course members of any committee might act dishonestly but even on the respondent's version there is no reason at all to suspect any of the members of the interview committee of such behaviour.

The purpose of the legislation is to ensure that there is a fair and transparent procedure in place for appointing teachers to fill vacancies. Nepotism and the like are to be eschewed. I am satisfied that the procedure that the school followed fully achieved the purpose of the legislation. To hold otherwise would be to elevate form above substance.

An example of this is the following: The respondent complains that the decision to exclude Miss Khoza was taken by Mr Ndamase and Mrs Wilson 'sitting on their own'. As I have already said, Miss Khoza's elimination is not a factor at all. If it reflected adversely on Miss Gcwensa's position, then I fail to comprehend how it did. The respondent has not tendered any evidence to show that were the interview process to be repeated strictly according to the letter of the law, Miss Gcwensa's chances of being nominated as the preferred candidate would be so vastly improved that she would become the school's first choice. On the facts before the Court, the decision by the interview committee to relegate Miss Khoza to second place is unimpeachable.

Mr Hulley referred me to the case of Yates v University of Bophuthatswana and Others 1994 (3) ASA 815 (B) to support his argument that because the decision was not taken by the entire committee, deliberating as a body, the decision was fatally flawed. He referred specifically to the following passage at 848E - 849B, where Friedman J (as he then was) said:

'It has been held repeatedly that, where powers are conferred on a statutory body, the body must be properly constituted in order to exercise its powers validly. As was stated by Innes CJ in the case of Schierhout v Union Government (Minister of Justice) 1919 AD 30 at 44:

"When several persons are appointed to exercise judicial powers, then in the absence of provisions to the contrary, they must all act together, there can only be one adjudication, and that must be the adjudication of the entire body. . . . And the same rule would apply whenever a number of individuals were empowered by statute to deal with any matter as one body; the action taken would have to be the joint action of all of them . . . for otherwise they would not be acting in accordance with the provisions of the statute."

I respectfully agree with what has been stated so lucidly by Innes CJ. This implies that there must be full attendance and participation by all the members of the committee and that they must reach their decisions unanimously or by the requisite majority. They have been selected for a purpose and that purpose would be defeated if one or more of them were not present at the time of adjudication. The fact that they may have conveyed their views to the chairman of the committee individually is irrelevant. What is important is that they should all have the opportunity of discussing and considering their respective views in the presence of each member of the committee. The fact that one or two were unavoidably absent does not cure the position. A time should have been fixed for all of them to be present in order to consider what were very serious and strong allegations against the applicant.

This committee was charged with making certain recommendations regarding complaints by the first respondent against the applicant, and it is clear that this matter could not be disposed of in the cavalier manner in which it was done. It was far too serious for members to be absent, and merely to inform the chairman of their views. There should have been a joint discussion and adjudication. The fact that the

committee of enquiry did not give the applicant a fair trial, and the fact that it did not adjudicate complaints against the applicant in the proper manner, leads me to the conclusion that the proceedings and recommendations of the committee of enquiry of the first respondent into the conduct of the applicant on 13 and 15 May have to be set aside. Furthermore, the committee of enquiry's report of 27 May 1991 was not arrived at properly as aforesaid and consequently its findings must be set aside.

Consequently the proceedings of the Council of the first respondent at its meeting on 28 May 1991, insofar as they relate to the decision to terminate the services of the applicant, must be set aside.'

That case was concerned with the exercise by a committee of quasi-judicial powers in disciplinary proceedings and different considerations apply. The principle enunciated in that case is inapplicable to the facts of the present case.

Finally, I should mention a complaint that the respondent raises about the alleged reluctance of the interview committee to participate in the grievance procedure and 'fact finding [investigation]' which the department had initiated. I do not intend to dwell on this at length. I am satisfied that the committee acted justifiably because it wanted particulars of its alleged wrongdoing and none were forthcoming. There is no merit in the allegation in the answering affidavit that

'(t)he applicants have sought to subvert the established procedure by approaching this honourable Court for relief rather than submit to an investigation'.

If the deponent is referring to the grievance procedure then, as I have already stated, there is none. In any event, if it wanted to investigate anything, the department should have supplied the investigating committee with the particulars which the latter wanted and it could have completed its investigation within a few days. Six months (from May 2002, when the recommendation was made, until December 2002) is simply too long for an investigation of the nature contemplated.

It therefore only remained for the respondent to effect the appointment and he had no reason not to do so. There was no lawful basis to withhold the appointment because of insignificant departures from the prescribed procedure. He certainly had no reason to withhold the appointment on the spurious ground that there might have been other irregularities in the process, albeit that none were identified.

As to whether the Court has the power to order the respondent to appoint Mrs Desraj to the position, I am satisfied that it indeed has that power: see, for example, Reynolds Brothers Ltd v Chairman, Local Road Transportation Board, Johannesburg, and Another 1985 (2) SA 790 (A) at 805F - I; Castel NO v Metal and Allied Workers Union 1987 (4) SA 795 (A) at 808; the Douglas Hoërskool case supra at 1148C - I. I would therefore have been prepared to grant an order in terms of prayer 2 in its unamended form, which read:

'That the respondent is directed and ordered to accept the recommendation within seven days from date of the order.'

The applicants, however, applied for, and were granted, an amendment to that prayer, so that it now reads:

'Alternatively:

That the respondent is directed and ordered to accept or decline the recommendation within seven days from date of the order.'

I cannot regard the words 'or decline' as mere surplusage because they change the import of the whole sentence. I also do not believe that I should grant an order in terms of prayer 1, which refers to the entitlement of Mrs Desraj to be appointed to the post. Mrs Desraj is not a party to these proceedings so it would not be proper for the Court to pronounce on her entitlement. In fact, she may not want the position anymore. Were I to order the respondent to appoint her to the post, however, she would also be free to decline the appointment so she would not be adversely affected by such an order.

As we are now in Court recess and it is also important that the matter be resolved before the new school term commences in the new year, I propose making an order in terms of prayer 2 in its unamended form under the general prayer for 'Further and/or alternative relief', subject to certain conditions. I do not believe that the respondent will be prejudiced at all by the grant of an order in I that form because the application for the amendment came at a late stage in the proceedings (in fact, at the commencement of the hearing) and the whole case was fought on the basis that the respondent was not obliged to effect the appointment at all. The power of the Court to grant an order and, if it did, the form thereof,

was not an issue. In fact during argument, I raised with applicants' counsel the power of the Court to grant an order in terms of prayer 2 in its unamended form and respondent's counsel made no submissions thereanent. In the unlikely event that the respondent might want to say something on this score, I have decided to formulate my order as follows:

1. The respondent is directed to accept the second applicant's recommendation of Mrs Anjani Desraj to the post of mathematics teacher for Grades 5 and 6 pupils at the Observatory Girls Primary School, within 14 days from the date of this order.

2. Either party may apply, by notice to the other parties given within seven days from the date of this order, for reconsideration by me of the form of the order embodied in para 1 of the order of Court, failing which that part of the order will stand.

3. The respondent is ordered to pay the applicants' costs of the application.

Applicants' Attorneys: Walter Swanepoel Inc. Respondent's Attorney: State Attorney.

* Now reported at 2003 (3) SA 439 (W) - Eds.