Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)

Saakno / Case number: **11/2017**
Datum aangehoor / Date heard: **29/06/2017**
Datum beskikbaar/Date available: **01/09/2017**

In the matter between:

NICOLAAS JOHNSON Applicant

And

THE HEAD OF DEPARTMENT,
DEPARTMENT OF EDUCATION,
NORTHERN CAPE 1ST Respondent

THE DISTRICT MANAGER
IN THE ZF MGCAWU DISTRICT OF THE
NORTHERN CAPE DEPARTMENT OF EDUCATION 2nd Respondent

THE GOVERNING BODY
OF HIGH SCHOOL KAKAMAS 3rd Respondent

CJ COETZEE 4th Respondent

G KOOPMAN 5th Respondent

HIGH SCHOOL KAKAMAS 6th Respondent

Coram: Mamosebo J et Snyders AJ

JUDGMENT

SNYDERS, AJ

1. This was a review lodged by the Applicant in terms of the Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA) for the review and setting aside of the decision by the 1st respondent to appoint the 4th respondent in the post of Principal of the 6th respondent. The applicant further requested that the 1st respondent be ordered and directed to permanently appoint 5th respondent in the post.

2. It was not disputed that the provisions of s 6(2) of the **Promotion of Administrative Justice Act 3 of 2000 ("PAJA")** are applicable and that the application is to be adjudicated in terms thereof.

THE PARTIES

3. The Applicant is Nicolaas Johnson ("Johnson"), who was at all relevant time a member of the Governing Body of Kakamas High School, as well as a parent of 2 daughters who are scholars at said school. The Respondents are:

3.1 The Head of Education ("the HOD") for the Northern Cape Department of Education ("the department");

3.2 The District Manager of the ZF Mgcawu district of the Northern Cape Department of Education ("the District Manager");

3.3 The Governing Body of High School Kakamas ("the SGB"). Marius Basson ("Basson") was at all relevant times the chairperson of the SGB;

3.4 CJ Coetzee ("Coetzee"), who was the incumbent appointed in the post of principal at Kakamas High School;

3.5 G Koopman ("Koopman"), being the person recommended for appointment in the post of principal at Kakamas High School by the SGB; and

3.6 Kakamas High School ("the School"). No relief is claimed against Koopman or the School and neither opposed the application.

4. The purpose of the application is to review and set aside the appointment of Coetzee as Principal of the School ("the post") and appoint Koopman in the post instead.

THE 1ST URGENT APPLICATION

5. The parties obtained an order from Pakati J on 13 January 2017 interdicting the HOD from implementing his decision to appoint Coetzee in the post and related relief, pending the finalisation of this review. The order was granted with costs and full reasons were provided in a judgment delivered on 17 March 2017. Thus the issue of urgency is moot and need not be dealt with herein.

6. There was a 2nd urgent application filed on 21 June 2017 which was heard prior to this review and will be dealt with later in the judgement, in order to contextualise it.

THE PROCEDURE FOR APPOINTMENT

7. The procedure to be followed in filling a vacant post is set out in s 6 of the **Employment of Educator's Act 76 of 1998 ("the EEA)**. The **Personnel Administrative Measures (PAM)**[1] set out the implementation of that which is envisioned in s 6 of the EEA. The post herein was advertised in a Vacancy List published by the Department in a bulletin during 2015.[2] After due process was

[1] G.N. 222 of 1999 published in *Government Gazette* NO. 19767 dated 18 February 1999

[2] Clause 3.1 of PAM

followed, the SGB recommended Koopman for the post to the HOD.[3] Such due process entailed:

7.1 The Department acknowledging receipt of the applications and conducting an initial sifting process to eliminate applicants who did not comply with the advertised requirements of the post. This procedure was conducted by the District Manager;[4]

7.2 Thereafter, the SGB appointed a Short-listing and Interviewing Committee;

7.3 This committee short-listed the candidates as per the requirements of the post and completed a score sheet in terms thereof;

7.4 Interviews were then conducted with the short-listed applicants by said committee.[5]

8. The committee graded and scored candidates during the interview process based on key performance areas and a questionnaire compiled by the committee.[6] After the interview process the committee made a proposal to the SGB in order of preference for the appointment of the preferred candidate.[7] Thereafter the SGB

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[3] S 6(3)(a) of the EEA

[4] Clause 3.2 of PAM

[5] Clause 3.3 of PAM

[6] S 6(3)(b)(i) –(iv) of the EEA read with Clause 3.3 (d) – (h) of PAM

[7] Clause 3.3 (i) of PAM

made a proposal of 3 names, in order of preference, to the HOD for appointment. The SGB may submit fewer than 3 names in consultation with the HOD.[8]

9. The appointment of any person in terms of the EEA shall be made by the HOD[9] who has the discretion to appoint any suitable candidate on the list by the SGB, despite the order of preference.[10]

10. It is common cause that, after the process above was followed, the SGB recommended Koopman for the post. The further processes that were to have been followed in terms of the EEA are being placed in contention by Johnson.

11. The EEA stipulates that the HOD must ensure that the SGB has met the requirements set out in s 6(3)(b)[11] of the EEA before making an

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[8] S 6 (3)(c) of the EEA read with clause 3.3 (j) of PAM

[9] S 6(1)(b) of the EEA

[10] S 6(3)(f) of the EEA read with clause 3.4 of PAM

[11] S 6(3)(b) reads as follows:

'(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.'

appointment.[12] If the SGB has failed to meet the stipulated requirements the HOD must decline the recommendation.[13] Should the HOD decline the recommendation he or she *must* consider all the applications submitted for the post, apply the requirements of s 6(3)(b)(i) – (iv) and appoint a suitable candidate temporarily or re-advertise the post.[14]

12. The post was to have been filled by the HOD by 1 April 2016. This was, however, not done and the department indicated on 11 January 2017, by way of a letter, that the post was to be re-advertised. On 14 June 2016 already the SGB addressed a letter to the department to highlight their dissatisfaction regarding the re-advertisement of the post, as same was done unilaterally and without providing reasons. At the time that this letter was written all indications were that the SGB was still satisfied with the recommendation of Koopman as their preferred candidate for appointment. This letter was signed by Basson and the secretary, Mr Andre Smith.

13. According to Johnson the department unilaterally re-advertised the post and interviews with candidates took place on 28 August 2016. Johnson further avers that no formal SGB meeting was convened in order to select a Short-listing and Interview Committee. However,

[12] S 6 (3)(d) of the EEA

[13] S 6(3)(e) of the EEA

[14] S6(3)(f) of the EEA

the SGB denied this and attached minutes of a SGB meeting that was held on 22 August 2016 at 10h00 for the purpose of selecting the committee. Johnson was present at such meeting but requested that he be excused from serving on the committee due to personal commitments. The committee was thus appointed on 22 August 2016 and the short-listing commenced on the same day. After the interviews were conducted on 28 August 2016 the SGB signed a recommendation for the appointment of Coetzee on 2 September 2016. Thus, a distinction must be drawn between the first process ("the 2015 process") at which Koopman was recommended and the second process ("the 2016 process") when Coetzee was recommended.

14. The question is whether the HOD was obliged to give reasons for declining the SGB's recommendation of Koopman; whether the HOD followed the prescripts of s 6(3)(g) of the EEA after declining same and whether he was liable to give reasons for the subsequent re-advertisement of the post. Should we find in favour of Johnson on this point, it will dispose of the application.

LEGAL PRINCIPLES AND ANALYSIS

15. The HOD, District Manager and the SGB did not dispute that the recommendation made during the 2015 process was a valid one. Adv Merabe, counsel for Johnson, argued that because the first process was a valid one, the second process was *void aborigine.*

The HOD thus acted *ultra vires* in his appointment of Coetzee. The definition of "administrative action" in s 1(a)(i) of PAJA that finds application here is:

'administrative action' *means any decision taken, or any failure to take a decision, by-*
(a) an organ of state, when-
(i) exercising a power in terms of the Constitution or a provincial constitution...'

16. Being an administrative action performed by the HOD s 3 of PAJA must be adopted to determine the duties of the HOD. The section reads as follows:

'Procedurally fair administrative action affecting any person

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2)(a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

(i) adequate notice of the nature and purpose of the proposed administrative action;

[Sub-para. (i), previously para. (a), renumbered by s. 46 of Act 42 of 2001 (wef 7 December 2001).]

(ii) a reasonable opportunity to make representations;

[Sub-para. (ii), previously para. (b), renumbered by s. 46 of Act 42 of 2001 (wef 7 December 2001).]

(iii) a clear statement of the administrative action;

[Sub-para. (iii), previously para. (c), renumbered by s. 46 of Act 42 of 2001 (wef 7 December 2001).]

(iv) adequate notice of any right of review or internal appeal, where applicable; and

[Sub-para. (iv), previously para. (d), renumbered by s. 46 of Act 42 of 2001 (wef 7 December 2001).]

(v) adequate notice of the right to request reasons in terms of section 5.

[Sub-para. (v), previously para. (e), renumbered by s. 46 of Act 42 of 2001 (wef 7 December 2001).]

(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to-

(a) obtain assistance and, in serious or complex cases, legal representation;

(b) present and dispute information and arguments; and

(c) appear in person.

(4)(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including-

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance.

(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.'

17. In the landmark Constitutional Court case of *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others*[15], it was held that s 3 of PAJA requires administrative action to be procedurally fair. It refers specifically to the giving of adequate notice and providing a reasonable opportunity to make

[15] 2006 (2) SA 311 (CC) at para 151

representations. The circumstances of each case will determine what is necessary for purposes hereof.

18. In *Joseph and Others v City of Johannesburg and Others*[16], the Constitutional Court held that procedural fairness is concerned with giving people an opportunity to participate in decisions that affect them. This signals respect for the dignity and worth of the participants. It also improves the quality and rationality of administrative decision-making and enhances legitimacy. Thus, the decision-maker who opposes an application for the review of the decision must show that the failure to comply with the procedural fairness caused no prejudice.

19. From the above, it is clear that the HOD was to provide the SGB with adequate notice of declining the recommendation of Koopman as per the 2015 process and adequate notice of their right to request reasons. The reasons relied upon by the HOD were contained in the letter addressed to the District Director by the Department of Education dated 11 January 2017. The letter indicated that the Department informed the SGB that they would be re-advertising the posts of deputy-principal as well as principal of the school. The reason for the re-advertisement was because there were only 4 applicants for the principal post and only 1 for

[16] 2010 (4) SA 55 CC at para 42

the deputy. Thus, stated the letter, the selection committee of the SGB requested the department to re-advertise the post. There are a number of problems with this letter, least of which was that it was dated *ex post facto*. Secondly, I am hard pressed to find reference to this request by the SGB in any one of the numerous minutes of SGB meetings that were filed in this application. In fact the SGB had made the recommendation for the appointment of Koopman to the post, it appears without qualification. To postulate that they were of the view that the post should be re-advertised due to lack of an adequate number of applicants is ludicrous. Lastly, but most importantly, it does not state that the HOD declined the recommendation of Koopman. Further, no reasons or a right to be furnished with reasons for this decision is reflected in the letter.

20. Advocate Olivier, for the HOD, could only rely on the letter above in an endeavour to show the HOD's reasons. It is evident that the record of decision and accompanying rights that Johnson, or even the SGB had, in terms of PAJA were not set out in the letter. This clearly falls far short of the duties imposed on the HOD by PAJA.

21. There is nothing before me that shows that the HOD followed the process set out in s 6(3)(g) of the EEA after declining to appoint Koopman. This too, would have formed part of the 2015 process

and **must** have been completed in order to finalise the 2015 process and move into the re-advertisement phase. The subsec reads as follows:

'(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

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

22. It is clear that, in absence of proof to the contrary by the HOD and SGB, the first recommendation should stand. The HOD also failed to make out a case on the papers that the procedural unfairness caused no prejudice. Having established that the 2015 process was not completed the appointment of Coetzee with the 2016 process was *ultra vires*. In the Appeal Court matter of *Kimberley Junior School and Another v Head, Northern Cape Education Department and Others*[17], it was stated that under common law, necessary preconditions that must exist before an administrative power can be exercised, are called 'jurisdictional facts'. In the absence of such jurisdictional facts, the administrative authority had no power to act at all. Similarly, a failure to adhere to the necessary legislative preconditions also prohibited the HOD from taking any further administrative action. His administrative actions and decisions are governed by law and any statutory precondition must

[17] 2010 (1) SA 217 (SCA) at para 11

be complied with. He may only exercise powers that have been lawfully reposed in him and must stay within the four corners of his empowerment in exercising such powers. He has no free hand to stray outside of the boundaries of his empowerment. The HOD was consequently not authorised to take the administrative action that he did with the 2016 process.[18]

23. Johnson must then overcome the hurdle of having lodged review proceedings within 180 days of having become aware of the administrative action in terms of s 7 of PAJA, which states:

'Procedure for judicial review

(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-

(a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the

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[18] *Police and Prisons Civil Rights Union & Others v Minster of Correctional Services and Others 2008 (3) SA 91 (E) at para 66*

person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

(3) The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985), must, before 28 February 2009, subject to the approval of the Minister, make rules of procedure for judicial review.

[Sub-s. (3) substituted by s. 27 (a) of Act 55 of 2003 (wef 31 March 2005) and by s. 29 of Act 66 of 2008 (wef 17 February 2009).]

(4) Until the rules of procedure referred to in subsection (3) come into operation, all proceedings for judicial review under this Act must be instituted in a High Court or another court having jurisdiction.'

24. The SGB, of which Johnson was still a member, and was *ad idem* with the recommendation of Koopman, wrote a letter to the members of the department on 14 June 2016. Therein they stated that their recommendation of Koopman stands and bemoan the re-advertisement of the post of principal. The SGB further states that the department is in default in responding to a request for reasons for the non-implementation of the recommendation of Koopman. It appears that this default was based on a verbal request to Ms Ferrus and Ms Van Wyk (representatives of the department) during a meeting between herself and the SGB on 19 January 2016. During said meeting, the SGB chairperson, as well as members of the short-listing and interviewing committee communicated that

the proper procedure was followed in nominating Koopman as the preferred candidate and requested reasons why the recommendation had not yet been implemented. The contents of this meeting were contained in a letter to the District Director dated 10 October 2016. The first apparent written request for reasons was therefore contained in that letter of 14 June 2016.

25. Section 5 of PAJA determines that a person whose rights are adversely affected by an administrative action may, within 90 days, request reasons therefore. The decision-maker then has 90 days to respond, furnishing its reasons. Should the decision-maker fail to advance such reasons, it will be deemed that no good reasons existed for decision. The affected person may thereafter, within 180 days, apply for the review of the matter. From the above, it is clear that Johnson, as a member of the SGB, would only have reasonably become aware of the fact that the recommendation was not implemented on 14 June 2016, as may be gleaned from the correspondence requesting reasons. The decision became cemented with the re-advertisement of the post without notification by the HOD to the SGB.

26. A calculation of 90 days from Johnson's imputed awareness on 14 June 2016 computes to 13 September 2016. No reasons were forthcoming from the HOD for the next 90 day period. The 180

days from then expired on 12 March 2017. The notice of motion was issued by the Registrar on 6 January 2017, well within the time frame allowed by PAJA. I was thus not convinced by the argument of Adv Simon, counsel for the SGB and Coetzee, that the review application was lodged outside the time limits prescribed in PAJA.

27. Johnson relied on the following provisions of PAJA as his grounds of review: s 6(2)(a)(i) and s 6(2)(f)(i) in that the decision was *ultra vires;* 6(2)(c) in that the process was procedurally unfair; s 6(2)(e)(ii) in that the action was materially influenced by an error of law; and 6(2)(i) in that the action is unconstitutional or unlawful. The relevant portion of s 6 of PAJA reads as follows:

'Judicial review of administrative action

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if-

(a) the administrator who took it-

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken-

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself-

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to-

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) 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 so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

(3) If any person relies on the ground of review referred to in subsection (2) (g), he or she may in respect of a failure to take a decision, where-

(a) (i) an administrator has a duty to take a decision;

(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

(iii)the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or

(b) (i) an administrator has a duty to take a decision;

(ii) a law prescribes a period within which the administrator is required to take that decision; and

(iv) the administrator has failed to take that decision before the expiration of that period, institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period.'

28. Applying the above provision to the facts concerning the procedural fairness of the first process, s 6(2) (b) and (c) find application herein. The EEA in s 6 prescribes a mandatory and material procedure or condition, an empowering provision, that was not complied with, thus rendering the administrative action by the HOD unfair in the following respects:

28.1 He failed to notify the SGB of his decision not to implement their recommendation;

28.2 He failed to provide reasons for such decision;

28.3 He failed to consider all the applications submitted for the post in terms of s 6 (3)(g)(i) –(ii), before re-advertising the post in terms of s 6(3)(g)(iii);

28.4 Consequently, he failed to provide reasons for the re-advertisement of the post, despite requests therefore.

THE SUITABILITY OF COETZEE

29. Should we have erred in the computation of the time periods set out in s 5 of PAJA, we proceed to consider the suitability of Coetzee to be appointed in the post at the School.

30. In 2007, Coetzee was found guilty of misconduct and dismissed for having a sexual relationship with a learner at the very school whom he rendered pregnant.[19] His defence was that the learner had already reached the age of majority and dapperly stated that he maintains the child. The approach by Coetzee, the HOD and the SGB in explaining Coetzee's behaviour, is disturbing. It smacks of attempting to defend the defenceless, alternatively explaining it away nonchalantly.

31. It is so, that Coetzee was re-admitted by the Department to enter into the teaching profession on 1 July 2014. He was then employed in a Post Level 1 temporary post as an educator at Kakamas Primary School, which appointment was supported by Johnson. Johnson, however, intimates that there is a vast

[19] S 17(1)(c) of the EEA stipulates that an educator must be dismissed if he or she is found guilty of having a sexual relationship with a learner of the school where he or she is employed, as this is stipulated to be serious misconduct.

difference between Coetzee teaching primary school children as opposed to high school children at the very school where he committed the misconduct. While accepting that Coetzee may have paid for his mistakes, we cannot accept that it would be in the best interests of the learners that he be appointed at the School, especially not in the highest position of leadership.

32. Section 7(1) of the EEA stipulates that 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 s 195(1) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ("the Constitution"), and which include the following factors, namely the ability of the candidate; and the need to redress the imbalances of the past in order to achieve broad representation. S 195(1) of the Constitution governs the democratic values pertaining to public administration, which includes the promotion and maintenance of a high standard of professional ethics by public administration.[20] These principles apply to the administration in every sphere of government and organs of state.[21]

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[20] S 195(1)(a) of the Constitution.

[21] S 195(2)(a) and (b)

33. Effect is given to this constitutional value in the South African Council for Educator Act, 31 of 2000 ("the SACE Act"). The SACE Act was promulgated to promote and maintain ethical and professional standards of all educators. This includes educators employed in terms of the EEA and the South African Schools Act, 76 of 1998 ("the Schools Act"). S 21(2) of the SACE Act stipulates that no person may be employed as an educator, unless they are registered with the council, effectively binding such educator to the Code of Professional Ethics of the South African Council for Educators ("the Code of Conduct"). Such Code of Conduct provides in clause 2.5 for an educator to act in a proper and becoming manner, such that their behavior does not bring the teaching profession into disrepute. Clause 3 of such Code of Conduct determines that an educator is to respect the dignity, beliefs and constitutional rights of learners[22] and refrain from any form of sexual relationship with a learner at any school.[23]

34. Neither the HOD nor the SGB provided a synopsis of whether they considered Coetzee's previous misconduct and what weight they attached to same. We do not accept Adv Olivier's contention that it must be inferred that it was considered, as Coetzee indicated his prior dismissal on his application form. These parties had a duty to

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[22] Clause 3.1 of the Code of Conduct

[23] Clause 3.9 of the Code of Conduct

promote the spirit and purpose of the Constitution with this appointment in clear and unambiguous terms.

35. In a judgment of this Division, *Kimberley Girls' High School and Another v Head of Department of Education, Northern Cape Province and Others*[24], Kgomo JP et Majiedt J, found as follows:

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

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

36. The test to determine whether Coetzee is a fit and proper person is an objective one. The factual findings against Coetzee go directly to this trustworthiness, honesty and integrity or lack thereof. We find

[24] [2005] 1 All SA 360 (NC) at para 27

no relevance in Adv Merabe's reference to the Oudekraal principle[25] as there has never been a contention that the administrative action to dismiss Coetzee and bar him from the teaching profession was invalid. What would, however, have been analogous to Oudekraal is that even though Coetzee was erroneously permitted to re-enter the teaching profession these factual findings remain and have legal consequences unless successfully appealed against.[26]

37. Although the HOD has the discretion in the appointment of a suitable candidate to the post, the discretion is not unfettered, as conceded by Adv Olivier. In *Johannesburg Stock Exchange & Another v Witwatersrand Nigel Ltd & Another*[27], the SCA held that the decision-maker must apply his mind to the relevant issues, which may, *inter alia,* be shown by proof of fact that the decision was arrived at arbitrarily, capriciously, *mala fide*, or as a result of an ulterior or improper motive.[28] It is clear that the SGB and HOD failed to apply their minds rationally in recommending and subsequently appointing Coetzee in the post.

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[25] after the decision of the SCA in *Oudekraal Estates (Pty) Ltd v Cape Town & others* 2004 (6) 222 (SCA) para 31 in which it had first been established

[26] *Compare Helen Suzman Foundation and Another v Minister of Police and Others [2017] ZAGPHC/2017 at para 35*

[27] [1988] 2 All SA 308 (A) at 321

[28] See also *Goldberg v Minister of Prisons [1979] 3 All SA 238 (A) at 256*

THE RELIEF

38. In the notice of motion Johnson prayed for the review and setting aside of the HOD's decision to appoint Coetzee as Principal of the School; that the HOD be directed and ordered to permanently appoint Koopman as principal of the School in terms of the SGB recommendation in 2015; and that the HOD pay the costs of the suit.

39. Adv Merabe, counsel for Johnson, urged us to set aside the appointment of Coetzee and to implement the recommendation of the SGB to appoint Koopman to the post, as the prevailing circumstances in the matter would justify such an order. S 8[29] of

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[29] **Remedies in proceedings for judicial review**

8.(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-

(a) directing the administrator-

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases-

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation;

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdict or other temporary relief; or

PAJA sets out the relief that may be granted in a review application based on PAJA. This includes setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions. In exceptional circumstances, we may substitute the administrative action. This is in effect what Johnson requests and we must then determine if there indeed are exceptional circumstances warranting the substitution of the administrative action.

40. The *Supreme Court of Appeal*, in the *Point High School case*[30], confirmed the order by Potgieter AJ, which directed that the HOD appoint an incumbent as the principal of the School in question. The reason for this was due to the long delay in appointing a principal and the HOD's misconstruing his duties. At para 17, he is quoted as finding:

'It is obviously in the best interests of all parties concerned, that the situation at second applicant should be regularised without any further delay in view of the

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(f) as to costs.

(2) The court or tribunal, in proceedings for judicial review in terms of section 6 (3), may grant any order that is just and equitable, including orders-

(a) directing the taking of the decision;

(b) declaring the rights of the parties in relation to the taking of the decision;

(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

[30] HEAD, WESTERN CAPE EDUCATION DEPARTMENT AND OTHERS v GOVERNING BODY, POINT HIGH SCHOOL AND OTHERS 2008 (5) SA 18 (SCA) at para 16

fact that the academic year [was] well advanced. Little purpose would accordingly be served by referring the matter back to the first respondent to be dealt with de novo.'

41. That case is comparable to this one. In the *Point High School matter*, a period of 14 months without a principal being appointed had passed. In this matter, almost 2 years have passed. It can however be distinguished on the facts in as far as the SGB were *ad idem* on the appointment process and the candidates they proposed to the HOD.

42. In the Point High School case it was further held that the decision had to be set aside on the broad ground of unreasonableness as contemplated in s 6(2)*(h)* of PAJA. The head proceeded, without a proper understanding of the scope of the discretion which he was called upon to exercise, and disregarded the necessity of actually weighing up the equity considerations to which he sought to give effect, against the interests of the governing body and the School (including its pupils) to have the benefit of improved ability in the teaching staff. In doing so he omitted to reach a reasonable equilibrium between those interests, rendering his decision reviewable. The Court also found that, because the academic year was already well under way and it was obviously in everybody's best interests that the matter be finalised without further delay, little purpose would be served by referring the matter back to the HOD to

be dealt with *de novo*. The court *a quo* was therefore correct in declining to remit the matter to the head for reconsideration.[31]

43. The *Constitutional Court*[32] held that some of the right to basic education is an immediately realisable right, unlike some other socio-economic rights. There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures". The right to a basic education in s 29(1)(a) may be limited only in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".

44. Adv Oliver sought to convince us that the role of the Court is no more than to ensure that the decision-maker has performed the functions with which he was entrusted. In this he referred to *MEC for Environmental Affairs & Development Planning v Clairison's CC*[33]. These remarks are correct and were made to refer to the learned Judge in the *court a quo's* apparent confusion between review and appeal proceedings. The remarks must be seen in the light of the provisions of PAJA. He also referred to the Constitutional Court

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[31] At para 16

[32] Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and 2011 (8) BCLR 761 (CC) (11 April 2011) at para 37

[33] [2013] 3 All SA 491 (SCA) at para 18

case in the benchmark decision of *Bato Star Fishing*[34], where the following was held:

'What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'

45. Although the Constitutional Court has decided that a court should hesitate to usurp the functions of an administrative body, it is my considered view that the circumstances of this case dictate that the matter should not be referred back to the HOD to start the process *de novo.* The principles and facts in the *Point High School* case find application herein. The HOD's argument that the interests of the learners are not affected, as there is an acting principal, is rejected. The SGB has internal conflict on the appointment of Coetzee. However, there have been no allegations by the SGB that Koopman

[34] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) at para 45

is an unsuitable candidate. Their opposition was primarily based on a proper process having been followed in appointing Coetzee. We were assured by counsel from the bar that Koopman was indeed available to take the post.

46. For the reasons addressed above, we conclude that the HOD should be directed to appoint Koopman in the post of principal at the School. For the record his profile is briefly as follows:

46.1 He is an educator employed by the first respondent currently stationed at Langberg High School, Olifantshoek;

46.2 He was unanimously found by the SGB to have been the successful candidate following the first interviews and was recommended for the post of principal with assumption of duty date expected to be 01 January 2016;

46.3 He has no misconduct record;

46.4 He is appropriately qualified for the post;

46.5 He is still available to assume the post of principal at Kakamas.

COSTS

47. No compelling reasons have been advanced as to why costs should not follow the result. The principle should be followed in this case. The first respondent (The HOD), the second respondent (the district manager), the third respondent (the SGB), and the fourth respondent, (Mr CJ Coetzee) are ordered to pay the costs jointly and severally, the one paying the other to be absolved. The fifth respondent (Mr G Koopman) and the sixth respondent (High School

Kakamas) were cited and did not oppose. There is no need for them to pay the costs.

THE 2ND URGENT APPLICATION: SUPPLEMENTARY AFFIDAVIT

48. The applicant, Mr Johnson, filed an urgent application on 21 June 2017 in which he sought relief that his supplementary affidavit, with several annexures, be admitted on 29 June 2017 when the review application, dealt with above, was set down for hearing. We dismissed the application with costs for the brief reasons described below:

49. The *fulcrum* of the application was meant to alert in the main the Department and the SGB and the school that Mr Marius Basson, the chairman of the SGB (the third respondent), has misconducted himself with certain specified school girls, whom he urged their identities not to be disclosed, and was at that point in time appearing in a criminal court for such alleged conduct.

50. In opposing the admission of the supplementary affidavit in evidence the SGB, through its deponent, Ms Felicity Booysen (the SGB secretary) states paras 22 and 23:

"22. *It is respectfully submitted that both Basson's involvement in a matter unrelated to the main application which allegedly includes the names of minor children is not relevant to the main application before this Honourable Court and can therefore not be entertained.*

That is a matter for another court to decide upon and both the applicant and Mr Adams [were] at all material times fully aware of that fact.

23. However, the applicant still persists and/or persisting improperly, frivolously and without sufficient and/or reasonable ground with this application which is manifestly or patently unsustainable, which has no prospects of success and which is doomed to fail at the onset. It therefore stands to be [struck] out."

51. Mr Johnson is evidently a concerned parent against what he perceived to have been an abuse by a member of the SGB, charged amongst others, with protecting the best interests of school children, doing the converse. In our view, if so advised, a separate application should have been brought in which Mr Basson ought to have been cited and perhaps interdicted from remaining in his current position. We were also satisfied that the supplementary urgent application contributed nothing to the application before us and was therefore not relevant.

Hence the dismissal.

We therefore make the following order:

1. THE DECISION BY 1ST RESPONDENT TO APPOINT 4TH RESPONDENT IN THE POST OF PRINCIPAL AT 6TH RESPONDENT IS HEREBY SET ASIDE;

2. THE 1ST RESPONDENT IS ORDERED TO APPOINT 5TH RESPONDENT IN THE POST OF PRINCIPAL OF THE 6TH RESPONDENT WITHIN 7 (SEVEN) DAYS OF DATE OF THIS ORDER.

3. THE 1ST RESPONDENT, 2nd RESPONDENT, 3RD RESPONDENT AND 4TH RESPONDENT ARE ORDERED TO PAY THE COSTS OF THE REVIEW APPLICATION JOINTLY AND SEVERALLY, THE ONE TO PAY, THE OTHERS TO BE ABSOLVED.

4. THE APPLICANT IS ORDERED TO PAY THE COSTS OF THE URGENT APPLICATION DATED 20 JUNE 2017.

5. THE 3RD RESPONDENT IS TO PAY THE COSTS OF THE RULE 7(1) APPLICATION UP TO AND INCLUDING 26 MAY 2017.

JA SNDYERS

ACTING JUDGE

NORTHERN CAPE DIVISION

I concur

MC MAMOSEBO

JUDGE

On behalf of Applicant:	Adv MJ Merabe (Instructed by: Horn & Van Rensburg Attorneys)
On behalf of 1st & 2nd Respondent:	Adv D Olivier (Instructed by: Office of the State Attorney)
On behalf of 3rd & 4th Respondent:	Adv Simon (Instructed by: K Le Grange Attorneys)