IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

REPORTABLE

CASE NO: P131/2003
DATE HEARD: 22/3/2005
DATE DELIVERED: 23/3/2005

In the matter between

THANDIWE CYNTHIA STOKWE **APPLICANT**

and

THE MEMBER OF THE EXECUTIVE COUNCIL
DEPARTMENT OF EDUCATION
EASTERN CAPE PROVINCE **1ST RESPONDENT**

MR D JACOBS **2ND RESPONDENT**

JUDGMENT DELIVERED BY
THE HONOURABLE MADAM JUSTICE PILLAY

PILLAY D, J

[1] The applicant applied for promotion to the post of principal at Despatch Primary School on 8 March 2001. She was interviewed by the Interviewing Committee (IC) in terms of paragraph 3.3 of Chapter "B" of the Personnel Administration Measures ("PAM"). She and D Jacobs, the second respondent, were two of the four candidates who were interviewed. The applicant and the second respondent scored equally during the interview. As there was a tie, the chairperson of the IC, Mr Wannies, urged the members to make a final choice. He adjourned the meeting so that the IC could consider its decision. During the adjournment the record of each candidate in relation to their previous interest in the community was considered as the involvement of the community in the shortlisting process was very important.

[2] Mr Wannies testified that the applicant was better qualified in psychology than the second respondent. This resulted in the

applicant being preferred by the IC over the second respondent. The IC ranked the applicant first, the 2second respondent second and the acting principal, Mr Mattrass, third and forwarded the list to the School Governing Body (SGB) for it to make a recommendation in terms of paragraph 3.3(i) of Chapter B of the PAM to the first respondent. The SGB, which is established in terms of section 16(1) of the South African Schools Act No. 84 of 1996, (SASA) included the members of the IC. It held an emergency meeting on 23 April 2001 to consider the preference list.

[3] Mr Wannies, the sole witness for the respondent, conceded that a delay of six weeks from 8 March 2001, when the IC submitted its list to the date when the SGB made a recommendation, was unusual. From Mr Wannies's evidence it emerged that during those six weeks the SGB had great difficulty in convening. The teacher representative on the IC disclosed to other staff that the applicant was the preferred candidate. The staff were opposed to her appointment. They preferred Mr Mattrass. The teachers staged a boycott of the SGB meeting. A meeting was held with parents to galvanise support to resist the recommendation of the applicant for the post.

[4] On seeing that the applicant bore an African name, members of the SGB raised their own concern about her ability to speak Afrikaans. According to Mr Wannies, he allayed their fears in this regard.

[5] The reason the SGB changed the preference order so that the applicant ranked second and the second respondent was placed first was allegedly because a "hands-on" person was better suited to the needs of the position than one who was more qualified in psychology.

[6] This reason does not appear anywhere in the minutes of the SGB's meeting of 23 April 2001. Contrary to Mr Wannies's evidence, the minutes recorded that the motivation for the change was the language question ("taalkwessie").

[7] The applicant in the meantime waited to be informed about the outcome of the application for promotion. About June 2001, she called the school and learnt that there was a problem with the filling of the post. She was directed to the Department. She eventually spoke to Mr Kani, the district manager. In the meantime, Mr Kani

had written to the Acting Regional Director recording his rejection of the recommendation of the second [3]respondent as it amounted to discrimination based on language.

[8] Mr Ngamlana, an education development officer (EDO) employed by the Department informed the applicant that an independent panel had been established to review the recommendation of the SGB. The applicant was by this stage desperate. Her workplace at the time was in Patensie and her home was in Magxaki, a distance of some 35 kilometres from each other, connected by gravel and unserviced roads. She had two young daughters to return home to every day. When she was invited to an interview by the review panel she reluctantly acquiesced simply to expedite the appointment process. She was also assured that the panel would be independent of the Department and the SGB. The interview itself, she was told, would deal with ways of addressing the specific problems of a school which had been without a principal for a long time.

[9] The SGB on the other hand initially agreed to support the establishment of the review panel. However, on further consideration, it withdrew its support as it realised that there was no statutory basis for such a procedure.

[10] The review panel interviewed the applicant on 7 August 2001. The panel consisted of three White male Afrikaans speaking principals from other primary schools around the area. They were J C Nortier, A F Vosloo and J H Bester. The panel may have been sufficiently independent of the Department in the sense that they were institution and not office based educators. It may also have been independent of the SGB for Despatch Primary School as the panellists did not serve on that structure. However, as the interview progressed it became clear that the panel was far from impartial.

[11] From the outset, the panellists fostered a tense and hostile atmosphere by insisting that the interview proceed in Afrikaans. The applicant refused to speak Afrikaans. She maintained that it was her constitutional right to conduct the interview in one of the official languages. She could choose to speak in Xhosa if she wanted to, but in order to meet the panellists halfway, she had agreed to speak in English. She was asked to translate "continuous evaluation" into Afrikaans. She refused to do so pointing out that she was advised

to prepare herself for an interview that would deal with ways of addressing problems at the school. The 4panel persisted that the school was an Afrikaans medium school, she should therefore not have applied for the position if she could not speak Afrikaans.

[12] The applicant replied that being an Afrikaans medium school meant that Afrikaans was the medium of instruction in the subjects taught at the school. It was not the medium of management of the school. She spoke Afrikaans well enough having been born in the predominantly Afrikaans speaking town of Graaff-Reinet, having taught Afrikaans, having evaluated grade 12 orals and scripts for the district, having taught in Cockscomb, a rural English/Afrikaans medium school which had both Coloured and African learners and having studied at Fort Hare and passed Afrikaans 1. She was reluctant to be interviewed in Afrikaans because she felt that the panel might use technical terminology which she may not grasp and would thereby disadvantage herself. Eventually the panel continued the interview in English.

[13] She was challenged about how she, as a woman, would cope if she were to compete against a man and whether she was bold enough to do so. These questions infuriated her. She was told that 50% of the staff wanted her and the other 50% did not want her. That information was, in her opinion, irrelevant to the purpose of the interview and biased against her seeking the appointment. The more than one hour long interview left her feeling abused.

[14] She was cross-examined about why she did not object to the composition of the panel and walk out during the proceedings. She responded that she simply wanted to co-operate to complete the process. She was desperate and not in any position to bargain about the composition of the panel.

[15] It was prudent of the applicant not to walk out of the interview because if she had done so, she would have had difficulty in challenging the decision of the panel. The panel could have taken refuge under cover of the fact that the applicant, by walking out, deprived herself of the opportunity of presenting her case fully to them. It could have absolved itself of any shortcomings in its decisions.

[16] The applicant heard that Mr Jacobs was subjected to an interview

by the review panel. However, there was no direct evidence about this and the content of his interview. 5

[17] The applicant proceeded to lodge a complaint about the interview to Mr Kani. Mr Kani advised her to put it in writing and submit it before 08:00 the next morning. She did so. The applicant detailed her complaints against the review panel under the broad headings of the very tense atmosphere at the interview, discrimination in terms of gender, sex and colour, the questions being too biased and the unrepresentative composition of the review panel. She submitted the letter timeously. To date she still awaits a response.

[18] She also awaits a written response to her application for promotion advising her in terms of paragraph 3.4 of Chapter "B" of the PAM that she was unsuccessful.

[19] Unknown to the applicant at the time, Mr Kani wrote on 27 August 2001 to the Acting Regional Director in the following terms:

> "Kindly receive final recommendation for the principal's post at Despatch Primary School. The language problem has been resolved much as it is not in the satisfaction of everybody. Also attached please find a letter from a neutral committee that we requested to assist us in this regard." (*Sic*)

[20] The applicant had no knowledge of the language problem being resolved. Nor was she aware of the contents of the letter from the "neutral committee", that is the review panel.

[21] The review panel's letter merely declares Mr Jacobs to be the more suitable candidate for Despatch Primary School with its unique problems and parent community. It gives no reasons for this conclusion.

[22] That, in essence, is the sequence of events that led to the launching of this application.

[23] The second respondent did not oppose the claim. The applicant testified on her own behalf. The second respondent called only one witness. Despite indicating earlier in the proceedings that it may call

a total of about three witnesses, no one but Mr Wannies was called. As the chairperson of the IC and the SGB, [6]Mr Wannies had direct knowledge about decisions taken within those structures. He did not have any direct knowledge about the decision taken by the Head of Department. No evidence was led about what information was placed before the Head of Department and how or why the decision to appoint Mr Jacobs was made.

[24] The applicant challenges her non-promotion substantively on the ground that she was discriminated and procedurally on several grounds. The constitutional grounds on which the applicant's case was argued was based on sections 9, 23(1) and 195(1)(j) of the Constitution of the Republic of South Africa Act No. 108 of 1996. Section 23(1) is linked to the residual unfair labour practice provisions relating to unfair discrimination and failure to promote prior to the 2002 amendment. Section 195 refers to the basic values and principles governing public administration. When making appointments of educators, Heads of Department must have regard to subsection (1)(j) to develop an administration that is broadly representative of South Africans.[1]

Discrimination

[25] An applicant, who alleges discrimination must prove the fact of the discrimination. The onus then shifts to the respondent to prove that the discrimination is fair.[2] If the discrimination is on a specified ground then unfairness is assumed.[3] Thereafter it rests on the respondent to justify the unfair discrimination.[4] It is common cause that a Coloured male was preferred over the applicant, an African female. Whether such preference has the purgorative element of discrimination, must be determined from an analysis of all the facts.

[26] The issue of language did not arise during the processes leading up to the IC's decision to nominate the applicant as the preferred candidate on the list. The advertisement for the post merely stated that Despatch Primary School was an Afrikaans medium school. Afrikaans was not prescribed as a qualifying requirement for appointment. Contrary to the practice in non-appointment disputes, the advertisement for the post was not produced to the court. The

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1 Section 7 of EEA.

2*Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & Others* 1997 (19) ILJ 285 (LC).

3 *Harksen v Lane NO & Others* 1997 (11) BCLR 1489 (CC) at para 53(b)(1).

4 Dupper, O & Garbers, Christopher *Employment Discrimination: A Commentary in SALL* - edited by Thompson & Benjamin at CC 1-30.

court therefore had to rely on the evidence of the applicant in this regard, which was not seriously [7]challenged. The IC was satisfied about her proficiency in Afrikaans.

[27] The issue of language reared its head at the SGB only when the members realised that an African was being appointed. Mr Wannies's evidence is that he succeeded in assuaging their concerns about the applicant's proficiency in Afrikaans is not supported by the minutes of the SGB meeting. The minutes clearly record that the motive for the change in the preference list submitted by the IC was "die taalkwessie". Wannies's evidence that the true reason for the change, namely that the SGB preferred a hands-on principal to one who was better qualified in psychology, does not feature anywhere in the minutes. Wannies could not explain this omission of the most important part of the decision i.e. the reason for the appointment of the second respondent and the non appointment of the applicant.

[28] Also not minuted was the fact that there was a vote and what the results of it were. On the probabilities, I am of the view that language and race motivated the decision of the SGB. Mr Wannies, as chairperson of the SGB, struck me as being sufficiently experienced and knowledgeable to realise that pegging the language as a reason for the non-promotion of the applicant could be discriminatory. Hence his valiant but weak attempts at constructing a version for the court.

[29] On Mr Wannies's own version, the applicant was proficient in Afrikaans. The SGB had assumed that, as an African she would not be proficient in Afrikaans. Such stereotyping is an obvious manifestation of bias and prejudice and is a typical form of unlawful discrimination.

[30] Reference is also made in the minutes to the various meetings between the SGB, the parents and the teachers. Mr Wannies denied that these meetings had any impact on the SGB's decision. He himself did not feel pressured by the parents' and teachers' resistance to the promotion of the applicant.

[31] Even if I accept his evidence, the decision of the SGB is not his alone. As none of the members of the SGB testified, there is no evidence of what motivated the other members of the SGB.

MrWannies's evidence stands uncorroborated on a material issue. His evidence as a whole is unconvincing [8]about the reasons for the SGB changing the IC's preference list.

[32] Turning to the decision of the Head of Department to appoint Mr Jacobs, I must, in the absence of any reasons advanced by the first respondent, find that the first respondent failed to discharge the onus of justifying the appointment of Mr Jacobs and thereby avoiding the unfair discrimination claim.

[33] The first respondent must have used the recommendation of the review panel in arriving at its decision to appoint Mr Jacobs since it commissioned its establishment. Its decision is also consistent with the panel's recommendation.

[34] From the uncontroverted, clear evidence of the applicant, I must accept that the review panellists were prejudiced against her because of her race, sex, gender, colour and language preference. They discriminated against her on these grounds. Their conduct was unprofessional, appalling and wholly discordant with the values of a democratic constitutional order.

Procedures

[35] Mr Randall, for the applicant, conceded that the SGB could change the preference list of the IC. I agree. The function of recommending to the HOD the appointment of educators at the school vests in the SGB.[5] IC's are established in the PAM to assist the SGB in shortlisting and interviewing candidates for appointment.[6] The SASA does not define powers of the SGB's. Consequently, it is also silent about their power to delegate their functions. As the establishment of the IC is obviously for practical reasons,[7] the delegation by the SGB to the IC of its function is effectively administrative deconcentration[8] or the IC acts as the agent of the SGB.[9] The IC is accountable to the SGB who retains the authority to make a recommendation to the HOD.[10] As such, the SGB must exercise its discretion rationally and objectively. Unjustified discrimination, which I have found

5 Section 20(1)(j) of SASA.

6 Para 3.3 of Chapter B of PAM.

7De Ville at 145.

8 Wiechers, Marinus: *Administrative Law*; Butterworth Publishers, 1985 at 54

9 De Ville, JR: *Judicial Review of Administrative Action in South Africa*; Butterworths at 142.

10 Para 3.3(i) of Chapter B of PAM.

above, is not a rational basis to change the decision of the IC. In the absence of a valid basis for changing the preference list of the 9IC, I agree with Mr Randall, that the SGB could not change the list.

[36] Mr Randall also suggested that the SGB did not have the benefit of interviewing the candidates and therefore was not in as good a position to assess their suitability. Insofar as this suggestion implies that the SGB should also interview candidates in every case where it intends to change the decision of the IC, I disagree.

[37] The members of the IC also serve on the SGB. They can share their experiences with those members of the SGB who did not have the benefit of having attended the interview. This is the procedure contemplated in paragraph 3.3 of Chapter "B" of the PAM. It is also a necessary, practical approach to ensure that the appoinment process is not duplicated and protracted and that posts are filled expeditiously.

[38] Whether an SGB conducts an interview of the candidates recommended by the IC depends on the information it has and whether further information is then required. It may not warrant the interview of all the candidates, but only those candidates who can provide the additional information.

[39] Having found as I did that the SGB's reason for changing the list was a veneer for its prejudice, interviewing the applicant would not have cured their defective reasoning. If the members of the SGB were genuinely concerned about who was objectively the best candidate for the post, they could have interviewed the second respondent and the applicant themselves instead of allowing their discretion to be fettered by the Department.

[40] It was common cause that there is no legislative support for the establishment of the review panel. The Department appears to have conceived it as a deadlock breaking mechanism. On receipt of a recommendation for promotion from the SGB, the Department must satisfy itself that the agreed upon procedures were followed and that its decision complies with the Employment of Educators Act No. 76 of 1998, (EEA), the SASA and the Labour Relations Act No. 66 of 1995 (LRA). The Department may decline the recommendation of the SGB in certain circumstances. These circumstances are identified in section 6(3)(b) of the EEA to include:

"(i) any procedure [10]collectively agreed upon

or determined by the Minister for the appointment, promotion or transfer has not

been followed; ----------

(iv) sufficient proof exists that the recommendation of the said governing body or council, as the case may be, was based on

undue influence; or

(v) the recommendation of the said governing body or council, as the case may be, did not have regard to the democratic values and principles deposed to in section 7(1)."

[41] If the department rejects the recommendation of the SGB, it must refer the matter back to the SGB for a fresh recommendation.

[42] In *Highfeld District Council v Commission for Conciliation, Mediation & Arbitration*[11] it was held that procedural fairness must be judged by what has actually been done and not necessarily by what the terms of a contract of employment, or a code of conduct might contain.[12] The Public Service, however, is far more regimented. The obvious reason for this is that public authorities are also regulated by administrative law. (Contrast with the High Court decision of DANIELS, J, in *Feinberg v African Bank Ltd & Another*[13] who held that a disciplinary inquiry conducted in the private sector was also reviewable). Where a procedure and remedy is prescribed either by legislation or collective agreement in the public service, the public authority has to apply it. Conversely, if there is a vacuum, the public authority may devise an appropriate procedure or remedy. In this case, there was no procedural or remedial vacuum. The procedure it should have followed was to refer the matter back to the SGB for another recommendation.

[43] Devising *ad hoc* procedures for individual cases also has inherent risks. Having regard to the emphasis in paragraph 3.4 of Chapter "B" of the PAM to “agreed upon procedures” and in section 6(3)(b)(1) of the EEA to “collectively agreed upon procedures”, a public authority should as far as possible implement procedures only after having endeavoured to collectively agree on them. The emphasis is on "collective" because if agreements are reached with individuals, the public authority will have to justify its decision to enter into such an agreement

11 (2003) 24 ILJ 517 (LAC).

12 Contrast with *Denel v Vorster* (2004) 25 ILJ 659 SCA.

13 (2004) 10 BLLR 1039 (T)

on objective grounds. It must also be willing and able to act consistently in all such cases. This is not easy to accomplish, not [11]least because even within a single public entity, authority may be exercised by different individuals. These agreements, when published, create certainty and predictability of the rules, practices, procedures and remedies that govern the public authority.

[44] The court has no evidence as to what information was placed before the Head of Department on the basis of which a decision was taken to appoint Mr Jacobs. But paragraph 3.5 of Chapter "B" of the PAM requires the employer to ensure that accurate records are kept of proceedings dealing with the interviews, decisions and motivations relating to the preference list submitted by school governing bodies and other structures.

[45] The employer is not defined in the PAM, but the EEA defines it as follows:

> "'Employer' in relation to any provision of Chapter 4, 5 or 7 which applies to or is connected with -
> ---
> (b) an educator in the service of the provincial department of education,
>
> means the Head of Department."

[46] The Head of Department must therefore have been seized with all the records of the interviews, decisions and motivations relating to the preference list submitted by the SGB. In any event, if it made a decision without these records, its decision would be manifestly irregular.

[47] On studying the record, the Head of Department should have realised that sub-section (i), (iv) and (v) of section 6(3)(b) of the EEA (quoted above) applied. The review panel was not a collectively agreed upon procedure. As is manifest from the SGB's minutes there might have been undue influence exerted by the teachers and parents that resulted in the SGB changing the list. The minutes of the IC and the SGB reveals that neither of these structures had regard to the democratic values and principles contemplated in section 195(1) of the Constitution. There was no evidence at all that either structure considered the need to redress the imbalances of the past in order to achieve broad representation.[14] In those circumstances the Department could not have satisfied itself in terms of paragraph 3.4 of Chapter "B" of the PAM. Its remedy was therefore to decline to make the recommendation and request the SGB to

14 Section 7(1)(b) of the EEA

make another recommendation in terms of section 6(3)(c) of the EEA.

[48] In the circumstances, the Department had no basis in law or fairness to appoint the review panel or to defer its decision making to it. The filling of the post was procedurally and substantively unlawful and unfair.

Remedy

[49] The order that the applicant sought in the Notice of Motion was in the following terms:

> "6.1 Directing the respondent's decision to appoint the said Jacobs to the post of principal of the Despatch Primary School be reviewed and set aside as irregular and discriminatory.
>
> 6.2.1 Directing the respondent to consider the appointment of the principal's post at the Despatch Primary School afresh.
>
> 6.2.2 Directing that the respondent appoint the applicant as principal of the Despatch Primary School."

[50] My concern about directing the first respondent to consider the filling of the principal's post afresh is firstly, the delay that would ensue in finalising the appointment. The first Respondent would have to request the SGB to make a fresh recommendation. Secondly, I am not convinced that the applicant's candidature would be considered fairly, objectively and dispassionately by the SGB.

[51] Thirdly, the options open to the court were to either uphold the decision of the IC as the SGB had no rational basis for changing it. Or, the court could substitute the decision of the SGB if it was satisfied that the SGB was unlikely to bring an independent mind to bear on the matter if it was called upon to consider the application afresh.[15] Either option would mean that Mr Jacobs, the third party, who was not responsible for the flawed process, might have to be removed from his post. That could also cause disruption at the school.

[52] I expressed these reservations to the parties after the matter was argued and invited them to get a fresh mandate on an apropriate remedy that would avoid involving the SGB again, if I were to grant an order in terms of paragraph 6.1 of the relief sought. The parties returned the following morning to inform me that the matter had been settled. They asked that the settlement be made an order of the court. The terms of the settlement were as follows:

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15 Baxter 681-684; De Ville pg 337 fn 352.

"The 13parties agree that the matter be settled on the following terms:

1. That the applicant be appointed to a post level 4 position within the Nelson Mandela Metropole in terms of the Employment of Educators Act.
2. That the first respondent implement this settlement within 60 days as from date hereof.
3. That the first respondent pay the applicant's costs.

[53] In devising this settlement the parties relied on section 8(1)(c) of the EEA relating to the transfer of educators. The settlement was reached in order to address the difficulty of devising an appropriate order. I gathered from the settlement that the respondent was equally keen to dispose of the dispute finally.

[54] The court was prepared to record that the matter was settled but it was not convinced that it could make such a settlement an order. The legislation for the appointment of educators and the filling of posts is meticulously detailed and has been consistently enforced by the courts. The process involves the advertising of the post, shortlisting, interviews and selection of the preferred candidates. Any employee who covets the position to which the applicant is to be transferred, may legitimately object if the post is filled without the procedures being followed.

[55] Section 8(1)(c) of the EEA provides as follows:

"1. Subject to the provisions of this chapter

(c) the Head of Department may transfer any educator in the service of the Provincial Department of Education to any other post in that department."

(My underlining)

[56] Sections 6 and 7 of the EEA relating to [14]powers of the employer and the appointment and filling of posts respectively fall within the same chapter as section 8 of the EEA.

[57] The representatives for the parties persisted in chambers that section 8 must cater for the transfer of educators in exceptional circumstances. I am persuaded that that must be so. Section 8(1)(c) must exist for a reason. The plain meaning of the word "transfer" in the section does not exclude the movement of educators on promotion by order of the court. However, it was necessary to set out fully the facts, circumstances, submissions and reasons for my findings in this case, for neither section 8(1)(c) nor this judgment should be construed as a licence for remedying every unlawful or unfair promotion effected in the public service.

[58] An order of court escapes the limitations of section 8(1)(c). The exceptional circumstances I find in this case is that the IC did identify the applicant as the best candidate for the job. But for the discrimination, she would have been promoted.

[59] Accordingly the order that I grant, which is by agreement of the parties, is in the following terms:

1. The applicant is to be appointed to a post level 4 position within the Nelson Mandela Metropole in terms of the Employment of Educators Act.

2. The first respondent is directed to implement paragraph 1 of the order within 60 days as from date hereof.

3. The appointment in terms of paragraph 1 hereof shall be effected in terms of section 8 of the Employment of Educators Act No. 76 of 1998.

4. The first respondent is to pay the applicant's costs.

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Pillay D, J

FOR THE APPLICANT: Mr. M Randell
INSTRUCTED BY: Michael Randell Incorporated

FOR THE RESPONDENT:
INSTRUCTED BY: State Attorney