IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

REPORTABLE
CASE NO **D110/06**

DATE 2006/03/31

In the matter between

NATIONAL TEACHERS UNION Applicant

and

DEPARTMENT OF EDUCATION & CULTURE, KZN 1st Respondent

SUPERINTENDENT-GENERAL, DEPARTMENT OF EDUCATION & CULTURE, KZN 2nd Respondent

MEC FOR EDUCATION, KWAZULU-NATAL 3rd Respondent

SOUTH AFRICAN DEMOCRATIC TEACHERS UNION 4th Respondent

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JUDGMENT DELIVERED BY
THE HONOURABLE MADAM JUSTICE PILLAY
ON 31 MARCH 2006

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ON BEHALF OF APPLICANT: MR I PILLAY
[Instructed by Deneys Reitz]

ON BEHALF OF 1ST, 2ND & 3RD RESPONDENTS: MR V SONI SC

ON BEHALF OF 4TH RESPONDENT: MR L C A WINCHESTER SC

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JUDGMENT 31 MARCH 2006

PILLAY D, J

[1] The applicant is the National Teachers Union (NATU). The first, second and third respondents are the Department of Education, the Superintendent-General and the MEC for Education, KwaZulu-Natal respectively. The fourth respondent is, the South African Democratic Teachers Union (SADTU)

[2] NATU and SADTU are constituent members of the Chamber of the Education Labour Relations Council ("the ELRC") in KwaZulu-Natal. NATU launched an urgent application for an order interdicting the respondents from filling the so-called office based educator posts ("the posts") until the review launched in this court has been disposed off.

[3] A collective agreement was concluded on 22 April 2005 in the KwaZulu-Natal Chamber of the ELRC. It provided for the filling of the posts. The Superintendent-General appointed panellists to the interview committee. The short-listing, interviews and selections were completed when the process was stalled by this application.

[4] The Vice-President of NATU, Bongani Mpungose, attested that he was advised by Mdunge Sisa, an official of NATU, of a meeting that occurred on 2 February 2006 between certain SADTU members and officials of the Department concerning the filling of the posts. Neither the founding affidavit, nor that of Sisa state that he was present at that meeting.

[5] On 14 February 2006 Bhekuyiso Khumalo, another member of NATU, attended a meeting where a SADTU official announced that all the panellists were SADTU members and that they were purposely selected by the Superintendent-General. The SADTU official allegedly advised Khumalo that SADTU members would be given posts as it was "their turn".

[6] At two of its functions, in September 2005 the Provincial Chairperson of SADTU implored the Superintendent-General to fill vacancies with SADTU members.

[7] Putting the four incidents together, NATU submitted that its members would not be treated fairly because of the perception of bias which had been created by the conduct of NATU, the Department and its officials.

[8] Mr *Winchester*, for SADTU, submitted that NATU's case was built on hearsay. I turn to each of the paragraphs of the Founding Affidavit that he seeks to strike out. Paragraph 11.8 reads:

> "On or about 6 February 2006, information came to my attention that there was something unusual taking place with respect to these interviews."

This statement is hearsay as regards the contents of the information. It is not hearsay in so far as it is evidence that Mpungose got information. The evidence is admitted to this limited extent.

[9] Paragraph 11.10:

> "What was of further concern is that indication was given that the panellists which were appointed were largely members of SADTU."

This is clearly hearsay as the identities are not disclosed of the persons who gave and received the "indication".

[10] Evidence of the four incidents described above which triggered this application (paragraphs 11.9, 11.13, 11.19 and 11.20 of the Founding Affidavit) is admissible because confirmatory affidavits have been filed in respect of information obviously not within B Mpungose's knowledge. Although Sisa does not indicate whether he was present at the meeting, the Court, in its discretion, allows that evidence because the affidavit is ambiguous and the application was brought urgently.

[11] The crux of the hearsay challenge is to NATU's evidence regarding the number of SADTU members on the interviewing panel. That is also the heart of NATU's case. It has to prove on a balance of probabilities that SADTU members constituted a majority sufficiently significant to suggest that the respondents connived to advantage SADTU.

[12] Here I agree with Mr *Winchester* that all NATU's evidence in this regard amounts to guesses and hearsay and is unreliable. Attaching the list of panellists (Annexure

E) and identifying their membership was not the best evidence available. In urgent applications, the most reliable and the best available evidence must be adduced. Annexure E cannot be accepted as the final or most reliable lists are those provided by the first to third respondents. These lists reflect the trade union membership of the panellists. The lists are attached by the first to third respondents as FSA1, 2 and 3, respectively. They are underpinned by the information extracted from the Persal print-outs. Accordingly Annexures FSA1, 2 and 3 cannot be rejected. It is not as if the information was not available, difficult to access or denied to NATU. NATU could quite easily have obtained from the Department a list of the panellists if it did not already have this and their trade union membership. It would have been entitled to the information both as a trade union party to the Chamber and in terms of the access to information rights under the Constitution. So material was this evidence to NATU's case that the information had to be in its founding affidavit. NATU failed to plead the trade union membership of each panelist. A hand-written note against the names appearing on Annexure E is not good enough as B Mpungose does not state how he “managed to establish the unions status as 75 of 106 pannelists” and why he would only be able to determine the membership of the rest only before the hearing. NATU had to plead its case fully in the founding, not in a supplementary affidavit. The application must therefore fail on this ground alone.

[13] Assuming nevertheless that SADTU members did constitute the majority of panellists, Mr I *Pillay*, for NATU, submitted that sections 195(1) and 197 of the Constitution Act of the Republic of South Africa, Act No 108 of 1996, applies. They provide as follows:

> "195(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representation."
>
> "197(3) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause."

[14] NATU relied furthermore on section 5(2) of the Labour Relations Act No 66 of 1995, which provides:

> "Without limiting the general protection conferred by sub-section (1), no person may do, or threaten to do, any of the following:
>
> .....
>
> (c) prejudice an *employee* or a person seeking employment because of their past, present or anticipated -
>
> (i) membership of a *trade union* or *workplace forum*."

[15] The appointment of SADTU members as panellists violated these provisions, it was submitted. In

addition, the constitutional right to just administrative action (section 33 of the Constitution and sections, 3, 4, 5, 6(2)(a)(iii) of the Promotion of Administrative Justice Act No 3 of 2000) entitled NATU to have the decision to appoint the panellists set aside because it was biased or reasonably suspected of being biased.

[16] Public employment is political. This is so because of the dual responsibility of the State as employer and as the legislative or executive authority and the rights of everyone to freedom of association and expression. (Freedom of Association and Collective Bargaining Report of the Committee of Experts (ILO) para 261.) Political allegiance is exploited by all parties for their respective advantage. (Sandra Fredman and Gillian S Morris, *The State as Employer : Labour in the Public Services* 1989 123.) Politics impacts structurally on the public service with the appointment of officials being based on their loyalty or sympathy to one or other political organization.

[17] The purpose of this application is to apply a legal remedy to a political and structural problem. Parties to this application are acutely mindful of the interplay of politics and employment in the public service. SADTU members' statement "Now it's our turn" is, as Mr *Pillay* explained, clearly an acknowledgment that SADTU, a COSATU affiliate, is in alliance with the African National Congress ("the ANC"), the now dominant party in the KwaZulu-Natal Legislature.

[18] Mr *Winchester* pointed out evidence that NATU benefited

when the Inkatha Freedom Party ("the IFP") dominated. It is common cause that NATU is perceived to be in alliance with the IFP. Annexure SUPP1 and FSA3 to the affidavit for the first to third respondents show that more NATU than SADTU members held positions in the upper echelons of the administration as a consequence of the NATU - IFP alliance in the past.

[19] About politics and employment the ILO has the following guidelines to offer:

"449. In order that trade unions may be sheltered from political vicissitudes, and in order that they may avoid being dependent on the public authorities, it is desirable that, without prejudice to the freedom of opinion of their members, they should limit the field of their activities to the occupational and trade union fields; the government, on the other hand, should refrain from interfering in the functioning of trade unions.

450. In the interests of the normal development of the trade union movement, it would be desirable to have regard to the principles enunciated in the resolution on the independence of the trade union movement adopted by the International Labour Conference at its 35th Session (1952) that the fundamental and permanent mission of the trade union movement is economic and social advancement of the workers and that when trade unions, in accordance with national law and practice of their respective countries and at the decision of their members, decide to establish

relations with a political party or to undertake constitutional political action as a means towards the advancement of their economic and social objectives, such political relations or actions should not be of such a nature as to compromise the continuance of the trade union movement or its social or economic functions, irrespective of political changes in the country.

451. The Committee has reaffirmed the principle expressed by the International Labour Conference in the resolution concerning the independence of the trade union movement that governments should not attempt to transform the trade union movement into an instrument for the pursuance of political aims, nor should they attempt to interfere with the formal functions of the trade union movement because of its freely-established relationship with a political party.

452. Provisions imposing a general prohibition on political activities by trade unions for the promotion of their specific objectives are contrary to the principles of freedom of association."

[20] In South Africa the Constitution and the Labour Relations Act permit trade unions the freedom of political and trade union association in public employment. The caution against compromising the social and economic interests of trade unions applies equally to sacrificing good public administration for political ends.

[21] To sanction the filling of administrative posts purely on the basis of political affiliation will surely conflict with

sections 195(1) and 197 of the Constitution and prejudice employees in terms of section 5(2) of the Labour Relations Act.

[22] It is a fact of public life that in the exercise of discretion, judicial or administrative, the ideological predilections of the decision-maker can influence the decision. Hence rules are formulated to ensure a disciplined outcome as far as is humanly possible. Despite this reality and the potential for political bias, none of the parties to the collective agreement saw fit to set criteria for the appointment of panellists. All the trade unions participated in the interview and selection process without demur. NATU missed the opportunity to build in safeguards against political patronage during the negotiations for the collective agreements and subsequently during its implementation.

[23] But for the four incidents, the posts would have been filled. All four incidents arise from alleged utterances of SADTU members and officials. SADTU was not the party that made the decision to appoint the panellists. The Superintendent-General made that decision. The proper course for NATU should therefore have been to ascertain as a fact before launching this application whether:

(a) the Superintendent-General made the decision;

(b) if so, on what criteria his decision was based;

(c) the reasons for the decision;

(d) the list of candidates chosen to fill the posts.

[24] NATU's failure to do so has created many difficulties for it. Firstly, it pleaded (paragraph 11.4 of the founding affidavit) that the Superintendent-General appointed the panellists. Having learned from the answering affidavit that the Labour Relations Directorate recommended a list of candidates to be appointed, NATU changed tack and denied that the Superintendent-General exercised his discretion when appointing the panellists. In support of this submission it relied, amongst other things, on the absence of an affidavit by the Superintendent-General in the proceedings. NATU did not take issue with the exercise by the Superintendent-General of his discretion in its founding affidavit.

[25] As indicated above, it could have quite easily ascertained how the decision to appoint the panellists was taken before launching this affidavit. NATU cannot be allowed to raise this challenge for the first time in reply.

[26] Because it failed to allege in its founding affidavit that the Superintendent-General did not make the decision to appoint the panellists, the respondents were not put to their defence. Accordingly, they were not obliged to file an affidavit by the Superintendent-General. Furthermore, the first to third respondents state that the Labour Relations Directorate made a recommendation. There is nothing in that to suggest that the Superintendent-General did not exercise his discretion. In the nature of public administration and executive decision-making, the decision-maker is not

involved operationally in marshalling or compiling information on which decisions are made. Recommendations, submissions and cabinet memoranda are compiled which the decision-maker is free to check, correct, reject or accept. There is no evidence that the Superintendent-General did not apply his mind to the recommendation or that he merely rubber-stamped the decision already taken by the Labour Relations Directorate.

[27] NATU's contention therefore that there has been an unlawful delegation of authority to the Labour Relations Directorate is unfounded.

[28] Secondly, NATU can only surmise on the basis of SADTU's alleged utterances about what criteria the Superintendent-General applied when selecting persons for appointment to the panel.

[29] The only criterion prescribed in the collective agreement was that the chairperson should be at least one post level higher and members should be on an equivalent or higher grading than the post for which the interviews were being held. Qualifications, experience, suitability and competence must have influenced the decision. NATU should have ascertained from the Superintendent-General what criteria constituted these and any other qualities that might have applied.

[30] NATU might have learnt of the additional panellists being co-opted and why this was so if it had asked the first

to third respondents for the information listed in paragraph 23 above. If it had not been supplied with this information it would have been entitled to raise the matter in reply. It missed the boat in making this enquiry when the panellists were appointed and during the interview process. It might nevertheless have been able to challenge the co-option of additional panellists if the decision to co-opt was irrational. For now, it is limited to raising in argument only that the co-option was not authorised by the collective agreement.

[31] Having failed to make the elementary enquiries referred to in paragraph 23 above, NATU is hamstrung in that it is confined to contesting the appointments purely on the general basis that the panellists were predominantly SADTU members. Hence the contention that the decision was biased in favour of SADTU and against NATU.

[32] As determined at the outset, NATU failed to establish the number of SADTU members who were appointed to the panel. On the evidence supplied by the first to third respondents, it transpires that the co-opted members added many NATU members to the panel.

[33] On the issue of bias Mr *Pillay* relied on *BTR Industries (SA) (Pty) Ltd v Metal and Allied Workers Union* 1992 (3) SA 673 (A) at 670A-694 and *Monnig and Others v Council of Review and Others* 1989 (4) SA 866 (CPD) at 879A.

[34] It is trite that the decision to appoint panellists must be set aside if NATU proves the existence of a reasonable suspicion of bias. NATU's suspicion stems from two sources:- the utterances of SADTU's officials and B Mpungose's knowledge of the union membership of the panellists. Neither source is reliable for founding a reasonable suspicion about a decision taken by the Superintendent-General.

[35] All the respondents deny that the meeting of 2 February 2006 took place at all. They also deny that they conspired against NATU or to favour SADTU. SADTU denies the utterances attributed to its members. It alleges that it was Khumalo, a NATU member, who uttered the statement attributed to Hlengani, a SADTU member.

[36] Again, if NATU had asked for the information itemised above before launching this application, it would have been on a sounder footing, especially if the second respondent failed or refused to give reasons for his decision. Without that information it can only speculate who made the decision, what the reasons for it were and whether all the candidates selected for the posts are indeed SADTU members.

[37] That the first to third respondents' decision to appoint the panellists is rational and without a hint of bias in favour of SADTU appears from Annexures GNN1 and GNN2, two memoranda to the Superintendent-General. Extracts from these annexures read as follows:

"(4) Although in the past, panels were constituted by the head of department, the constitution still had a regional/district component slant whereby the Director of that particular unit chaired these meetings. In terms of the new provisions, it is envisaged that there will be standing committees for the respective levels irrespective of the specialization or direction of the post concerned. In essence more focus will be placed on expertise to manage rather than on the levels of knowledge of the specialization. However in order to ensure that knowledge of the specific specialization is not disregarded, it is intended to co-opt the head of the component/district where the post exists. However the main committee will act as a roving committee which will move from district to district. The key intention of having standing committees is obviously strongly influenced by the principles of consistency, fairness and objectivity in order to significantly reduce the number of grievances that are normally attendant with filling of promotion posts, especially given the large number of posts that are being advertised." (sic)

Page 108 to 109 of the bundle And paragraph (3) on page 113 of the bundle, reads:

"In my previous submission to you I indicated that there would be a possibility of appointing additional panels should circumstances so warrant. It is clear from the

> statistics provided per post that the panels that have been approved would not be able to cope with the volume and therefore not be able to accomplish the process within the envisaged time frame as per the management plan. In the circumstances further officials were identified and as a result the composition of the existing panels were also adjusted. In deciding on the composition of the panels, an attempt was again made to recruit officials from across regions due consideration also being taken of gender and race."

[38] The explanation for co-opting the heads of the component or district had no regard for trade union membership. As a result of the co-option the number of NATU members swelled by 31, whilst SADTU members increased by only 8, excluding those who held dual membership.

[39] The first to third respondents therefore made a genuine effort to implement a fair and professionally competent process. NATU's challenge to Annexure SUPP1, namely that the number of NATU members had been inflated to "muddy the waters" is pure speculation. It could easily have confirmed this with an affidavit by a non-member of SADTU who alleges that he or she did not actually participate as a panellist. If it had logistical difficulties in obtaining such an affidavit because of time constraints then it has no one but itself to hold responsible for launching an application on an urgent basis without conducting a meaningful investigation beforehand.

[40] When the application was brought the relief claimed was to stop the filling of the posts. The principal basis for this was the alleged bias of the panellists. Attacks have also been levelled at the interviewing process itself. Thus NATU alleges in its first reply that its members were not present during some interviews because they were not invited. This challenge was not levelled when the alleged irregularities occurred during the process, nor was it pleaded in the founding affidavit. NATU's case has whittled down to challenging only the decision to appoint the panel. However, no relief is claimed in setting aside that decision. Consequently, if I grant the interdict, there will still be no order setting aside the decision to appoint panellists.

Clear right

[41] Everyone has a clear right to all the rights in the bill. The question in this case is whether any of them have been violated. NATU has failed to show even on a *prima facie* basis that any of its rights have been violated.

Urgency

[42] On NATU's own version it had the list of panellists in November 2005. Based on B Mpungose's knowledge of the trade union membership of the panellists, he should have realised that the panel was allegedly loaded in favour of SADTU. NATU should have started its investigation then by requesting information from the respondents. NATU created the urgency by delaying this application until after the alleged

utterances by SADTU members.

Balance of convenience

[43] NATU wants the Court to stall the appointment of 143 educators. There has already been a delay in their appointment. Education in the entire province will suffer if the Court grants the interdict. The granting of the interdict is not in the public interest but only in the interest of NATU.

Prejudice

[44] As the posts have not been filled yet, NATU suffers no actual prejudice. Such prejudice as it might suffer can only be determined once the posts are filled.

Alternative Remedy

[45] NATU opted out of the of discussions aimed at finding a mutually acceptable resolution on the basis that the matter was *sub judice*. That rule has not stood in the way of litigants settling matters before. Mediation is usually without prejudice, hence the *sub judice* rule need not have been raised to stall that process. The entire labour relations regime is built on the belief that agreed outcomes are preferable to adjudication.

[46] Disputes arising from the collective agreement must be referred to the ELRC for resolution. Furthermore NATU can, if it so wishes, persist with its pending application to review the decision to appoint the panellists.

[47] The application is dismissed with costs.