

SOUTH AFRICA / JUDGMENT

Alpha Primary School and Another v Head of Department, Department of Education, Northern Cape and Others (1120/2017) [2018] ZANCHC 10 (12 February 2018)

[2018] ZANCHC 10

COURT

Northern Cape High Court, Kimberley

BEFORE

Snyders, Williams

CASE / FILE NUMBER

1120/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(Northern

Cape Division, Kimberley)

Saakno

/ Case number: 1120/2017

Datum

aangehoor / Date heard: 02/11/2017

Datum

beskikbaar/Date available: 12/02/2018

In

the matter between:

ALPHA
PRIMARY
SCHOOL
1st Applicant
THE
SCHOOL GOVERNING
BODY
2nd Applicant
OF
ALPHA PRIMARY SCHOOL
and
THE
HEAD OF
DEPARTMENT,

1st Respondent
DEPARTMENT
OF EDUCATION,
NORTHERN
CAPE
THE
DISTRICT
MANAGER
2nd Respondent
IN
THE PIXLEY KA SEME DISTRICT OF THE
NORTHERN
CAPE DEPARTMENT OF EDUCATION
THE
MEMBER OF THE EXECUTIVE COUNCIL
3rd Respondent
FOR
EDUCATION IN THE NORTHERN CAPE
MR
JOHNNY GERT
CLARKE
4th Respondent
MR
OXFORD PLAAITJIE
JACK
5th Respondent
MRS
GEORGINA
DUTHIE
6th Respondent
MRS
HELLEN DESIRY ALETTA BITTERBOSCH
7th Respondent
MRS
THERESA GETRUIDA CLARKE
8th Respondent
MRS
JOHANNA ELIZABETH LAMBERTS
9th Respondent
MR
DANNY
KAPEL
10th Respondent
MR
PIETER LAWRENCE
ANDRIES
11th Respondent
MR
DEON
SALTER
12th Respondent

Coram:Williams J et Snyders AJ

JUDGMENT

SNYDERS, AJ

1. This is a review lodged by the applicants 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 first and second respondent to instruct the first and second applicant to re-advertise the posts for Principal, Deputy Principle and HOD (Afrikaans first language Grade 1- 7). The applicants alternatively requested that the first respondent's failure to appoint educators in these posts be reviewed and set aside. The applicant further requested that the first respondent be ordered and directed to permanently appoint the third respondent in the Principal post, the seventh respondent in the Deputy Principal post, the tenth respondent in the HOD post and the twelfth respondent in the Post Level 1 Educator post.

2. The grounds upon which this application is brought are that the decision

taken by the first and second respondent is procedurally unfair and/or the decision was taken for ulterior purposes or motives and/or irrelevant considerations were taken into account and/or the decision was taken in bad faith; alternatively that the first respondent is in failure to make a decision relating to the appointment of educators in the specific posts.

3. Although it was initially disputed that the conduct by the first respondent

was an administrative action, it was later conceded 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

4. The first applicant is Alpha Primary School ("the School") and the second applicant is the Governing Body ("SGB") of the School. The first to twelfth respondents are:

4.1 The first respondent is the Head of Education ("the HOD") for the Northern Cape Department of Education ("the department");

4.2 The second respondent is the District Manager of the Pixley Ka Seme District of the Northern Cape Department of Education ("the District Manager");

4.3 The third respondent is the Member of the Executive Council for Education in the Northern Cape Province ("the MEC") ;

4.4 The fourth respondent, Mr Johnny Gert Clarke ("Clarke"), is the candidate who applied for the post of principal at Kakamas

High School;

4.5 The seventh respondent, Mrs Hellen Desiry Aletta Bitterbosch ("Bitterbosch"), is the candidate who applied for and was

recommended by the SGB for the post of Deputy Principal at the School;

4.6 The tenth respondent, Mr Daniel Kapel, is the candidate appointed in the Post Level 1 post but who applied for and was recommended by the SGB for the HOD post;

4.7 The eleventh respondent, Mr Pieter Lawrence Andries is the recommended candidate by the SGB for an educator post at the School. He was appointed as such by the HOD during the process in issue in these proceedings;

4.8 The twelfth respondent, Mr Deon Salter, is the candidate who applied and was recommended for the Post Level 1 post;

4.9 The fifth, sixth, eighth and ninth respondents, respectively are Mr Oxford Plaatje Jack, Ms Georgina Duthie, Mrs Theresa Getruida

Clarke and Mrs Johanna Elizabeth Lamberts. These respondents are educators at the School.

THE FACTUAL

BACKGROUND

5. It is common cause that on 09 June 2016, the Principal's post, Deputy

Principal's post, the HOD post and the Post Level 1 post of the School were published in the Department's Vacancy circular.

6. It is also common cause that from May 2015 to December 2015, the SGB

consisted of six parent members, one non-teaching member, three teachers and the Acting Principal. In December 2015, one of the

parent members, Mrs Eksteen's SGB membership automatically terminated when her child completed Grade 7.

7. The parties further agree that certain statutory prescripts are to be followed in appointment procedures, as governed by Chapter B, Section 3 of the Personnel Administrative Measures ("PAM"). These procedures entail receipt of the applications by the HOD; the acknowledgement of receipt of the applications by the department

and the assurance that all applications which comply with the requirements of the post are handed to the relevant SGB; the SGB

appoints a Shortlisting- and Interview Committee ("the Interview Committee") who shortlist and interview candidates according to criteria set by the SGB; the committee grades and scores the candidates and makes recommendations to the SGB of preferred candidates, which they rank from 1 to 3, in order of preference; the SGB considers the recommendations and in turn make their recommendations in order of preference, ranked 1 to 3, to the HOD; the HOD then appoints the suitable candidate in the vacant post.

8. It is common cause that the SGB appointed an Interview Committee at its meeting of 13 August 2016. Mr Bekeer was nominated as the secretary of the interview committee. The committee completed the shortlisting process and conducted the necessary interviews. Thereafter it made recommendations to the SGB on the preferred candidates. On 15 September 2016 the SGB met in order to consider the recommendations made by the interview committee in order to make recommendations to the HOD of the preferred candidates for appointment.
9. The SGB recommended ten candidates to the HOD and six appointments were filled. Five of these six candidates were appointed by the District Manager and one of the six (Mr Andries, the eleventh respondent) by the HOD. The four remaining posts in question were not filled by the HOD despite the recommendations of the respondents for the posts set out above.
10. It is common cause that the applicant requested reasons from the HOD for his decision not to appoint the remaining four recommended candidates and that there was no response from the HOD, save for an electronic

message in the form of a WhatsApp sent on 16 November 2016 to an educator of the School. This message stated that all vacant posts are to be re-advertised.

11. The applicant alleges that in these circumstances, the SGB met on 17 November 2016 and resolved to institute the current proceedings against the HOD, District Manager and the MEC.
12. The HOD provided reasons for his decision for the first time in the opposing affidavit. He stated that while considering the application of Bitterbosch, he recalled that he had previously ordered an investigation into the process of her appointment in the post that she currently occupied. The HOD was not aware of the outcome of the investigation and was hesitant to proceed with the appointment in the absence thereof. When he paused to consider Bitterbosch's appointment, he became more attentive to the process. It was at this stage that he realised that there were irregularities in the process, namely:

12.1 the shortlisting and interview committee's recommendations were not accompanied by a brief motivation as to why the candidates were

recommended;

12.2 the candidates were not arranged in order of preference with a brief motivation but merely stated which candidate was to be appointed.

13. As a consequence of the above, the HOD contended that he could not properly apply his mind on the appointments and with the flawed process, decided not to appoint any of the further candidates. (At that stage, the HOD had already approved the appointment of Mr Andries).
14. In addition to the HOD's reasons for not proceeding with any further appointments, the respondents have raised several further defences to the review application, inter alia that the 5GB irregularly proceeded with the short-listing and interview process after Ms Eiman, a member of the 5GB, proposed that the Department take over the process, the Unions were not properly represented during the short-listing and interview proceedings and that Kapel in any event did not meet the requirements for the post.
15. The respondents have also raised certain points in limine which related to the composition and authority of the 5GB when decisions pertinent to the application were taken and which can for the sake of convenience be formulated as follows:
 - 15.1 The SGB did not quorate when the recommendations were made to the HOD on 15 September 2016; and
 - 15.2 The SGB irregularly resolved, as it was not properly constituted, to institute proceedings against the respondents and therefore does not have the necessary authority to bring these proceedings.
16. Before dealing with the points in limine, which determination may obviate the necessity to traverse the other defences raised, one further issue raised by the respondents needs to be addressed. It is common cause that a parent member of the SGB, a certain Mrs Eksteen, ceased to be a member of the SGB at the end of 2015 when her child completed her primary schooling and that no other parent had been co-opted to replace her throughout the period leading up to the application. The respondents thus contend that the SGB throughout this period generally conducted their business unlawfully.
17. Section 23 of The South African School's Act 8 of 1996 ("the Schools Act") and Regulation 3 of the Regulations for the Constitution and Election of Governing Bodies in Public Schools in the Northern Cape Province ("the Regulations")^[1] issued in terms of the Schools Act, provides that at all relevant times, the parent component of the SGB should have consisted of at least six parent members. In terms of s 27 of Northern Cape School Education Act, 6 of 1996 ("the Northern Cape Schools Act"), the majority of members of a governing body shall be parents of learners at that school.
18. With Eksteen's departure from the SGB, the parent component only consisted of five parent members, namely Bekeer, Eiman, Duthie, Eksteen, Van Nel and Mackay. The non-teaching member was Mr Mitchell. The three

teachers were Bitterbosch, Lamberts and Kapel, and Clarke in his capacity as acting principal. Thus, the parent component, from

December 2015, equalled that of the total remaining members of the SGB.

19. The composition of the SGB during the relevant period is not a situation which was unknown to the respondents. As early as 14 March 2016 the applicants informed the Department of the vacancy and undertook to

fill the vacant position on the SGB as soon as possible. Moreover, a full Monitoring Instrument by the Circuit Manager, Ms Manana, dated 27 October 2016, after investigating all matters at the School, including the SGB, confirmed that the SGB was properly constituted.

That this was in fact not the correct position is obvious but the point made by Mr Merabe, for the applicants, is well taken, that it is unfair of the respondents who initially apparently condoned the state of affairs now take issue with the composition of the SGB generally. The position is, however, that although the SGB may have conducted their business and made decisions unlawfully during this period, such decisions are not automatically invalid and its consequences stand until such decision is set aside by a competent Court. (See *Camp's Bay Ratepayer's and Resident's Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) at para 62; *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) at para 97 -101).

20. I now turn to the points in limine. Paragraph 7.10 of the SGB's Constitution stipulates that a quorum for any meeting of the SGB will comprise of the majority of SGB members. The SGB meeting of 15 September 2016 had as its purpose to consider and discuss the recommendations of the interview committee. In the opposing affidavit, Bekeer states that only he; Mackay and Mitchell were present at this meeting. The SGB is silent on this issue in the replying papers. The consequence of that is that only three SGB members were in attendance and the SGB meeting of 15 September 2016 therefore did not quorate. The SGB made the recommendations to the HOD on the strength of the procedures followed at the meeting of 15 September

2016. It follows that the recommendations to the HOD were unlawful. However, the same considerations apply as in paragraph 19 above.

21. At its meeting on 17 November 2016, the SGB allegedly resolved to institute the current proceedings against the HOD and further respondents. However, Eiman, Bekeer and Duthie deposed to affidavits in confirmation that no such resolution was taken at that meeting and that they were present at the meeting from its commencement to its

conclusion.

These three SGB members did not sign the attendance register for the meeting but stated that they refused to sign it as they did not receive the minutes of the previous meeting. The minutes do not reflect any apologies or who was present and was only signed

by the Chairperson of the 5GB, Ms Mackay. All that stands in contrast to this, is a factual denial by Ms Mackay that these three members were present at the said meeting.

22. Section 26 of the Schools Act stipulates that a member of a governing body must withdraw from a meeting of such governing body for the duration of the discussion and decision-making on any issue in which the member has a personal interest. This is confirmed in paragraph 7.11 of the SGB's constitution which states that affected members of an 5GB shall not be present when decisions are taken by such 5GB in which the affected member has an interest.
23. It is not disputed that Clarke, Duthie, Bitterbosch, Kapel and Lamberts, as members of the 5GB, were present at the meeting when it was resolved to institute legal action. These members had all applied for the posts in respect of which this matter relates. The applicants state, however, that the process of short-listing and interviewing had been completed at the date upon which the decision to institute legal proceedings was taken and that the affected 5GB members above,

did not have any material interest in the matter, save that they were not appointed in the posts in question. This argument is untenable. The resultant legal action flowing from the resolution directly affects these members and their presence at such discussion is contrary to the statutory prescripts and their own constitution and is unlawful. The 5GB was not properly constituted and therefore did not have the authority to institute proceedings herein.

24. The argument by Mr Merabe that Uniform Rule 7 should have been used to question the authority of the 5GB is misplaced since the authority challenged is not merely that of a person acting on behalf of the applicants (which is what Rule 7 governs) but an issue of locus standi of the 5GB.
25. Having determined the case on a point in limine, we do not intend to deal with the other defences and it follows that the application must fail. We do pause here to impress upon the parties that the vacant posts are re-advertised as a matter of priority to ensure that the best interests of the affected children are protected and advanced. Taking into account the averments in the papers, it may be prudent for the 5GB to accept the offer of guidance and assistance by the department as was tendered by Mr Petersen on behalf of the department during argument.

COSTS

26. We deem it fair and equitable that each party bear their own costs because the HOD should have provided reasons when he was called upon to do so and not only at the stage when the application had already been launched. Had such reasons been provided, it may have obviated the need to move the application.

We therefore make the following order:

1. THE APPLICATION IS DISMISSED.

2. EACH PARTY IS TO PAY THEIR OWN COSTS.

JA SNYDERS

ACTING JUDGE

NORTHERN CAPE DIVISION

I concur

CC WILLIAMS

JUDGE

Northern Cape Division, Kimberley

On behalf of Applicants: Adv MJ Merabe (Instructed by: Elliot Maris Wilmans & Hay)

On behalf of 1st & 2nd Respondent: Adv Petersen (Instructed by Office of the State Attorney)

[1] Provincial Gazette No. 1860 dated 3 December 2014

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