IN THE GAUTENG DIVISION, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

12/12/2014

CASE NO: 26424/12

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED ✓

12-12-2014
DATE

SIGNATURE

In the matter between:

REYNOPARK HIGH SCHOOL	1ST APPLICANT
THE GOVERNING BODY OF THE REYNOPARK HIGH SCHOOL	2ND APPLICANT

And

THE MEMBER OF THE EXECUTIVE COUNCIL: DEPARTMENT OF BASISEDUCATION MPUMALANGA PROVINCE	1ST RESPONDENT
HEAD OF DEPARTMENT OF BASIC EDUCATION	2ND RESPONDENT
S M NCHABELENG	3RD RESPONDENT
K J MAGAGULA	4TH RESPONDENT

JUDGMENT

MSIMEKI J:

INTRODUCTION

[1] This application was brought by the applicants in two parts. Part A was brought by way of urgency while Part B seeks to have the decision of the second respondent to appoint the third and fourth respondents to the posts of Head of Department: Languages (post no. 62032 – 0407) ("the Languages post") and the Head of Department: Administration and Management: Career Guidance (post no. 62031-0408) ("the administration post") at the first applicant reviewed and set aside. Part A sought to prevent the difficulty that would arise if the matter was dealt with before or after the appointment of the third and the fourth respondents to the posts.

THE BRIEF FACTS

[2] As alluded to in the introduction. the third and the fourth respondent's had applied; been selected; short listed: interviewed and ultimately appointed to the two posts respectively. The posts were three but the other post is not the subject of this application and I shall therefore disregard it. The Language post and the Administration post are key to this application. The third respondent was appointed to the language post while the fourth respondent was appointed to the Administration post. The applicants contend that Ms I L Ras and Mr J P Pistorius were recommended for the two posts respectively. The second respondent, instead, appointed the third and the fourth respondents. The applicants, dissatisfied with the appointments, registered their dissatisfaction with the second respondent and ended up bringing this application which the first and the second respondents are opposing. The third and the fourth respondents did not enter the fray.

[3] I, at the outset, regard it prudent to refer to Part A of the application. The application in respect of Part A was set down for hearing on 5 June 2012. An order, at the

hearing of the matter, was made by agreement between the parties postponing the review proceedings to a date that would be fixed by the registrar. The respondents were to furnish the record referred to in the notice of motion by 19 June 2012 and to suspended the appointments of the third and fourth respondents pending the outcome of the review. The costs were reserved. It became unnecessary to pursue the urgent application. This court therefore has to give attention to the review which is the remaining issue.

THE ISSUE

[4] The issue to be determined is whether the second respondent had authority to appoint the third and fourth respondents.

[5] The applicants contend that such authority was absent when the second respondent acted while the first and the second respondents contend that the second respondent acted within the law.

COMMON CAUSE FACTS

[6] These are that:

1. The first respondent is Reynopark High School ("the school"). I shall refer to it as the first applicant. The High school is a public school.
2. The second applicant is the school governing body ("the SGB") and I shall refer to it as the second applicant.
3. Provision for parallel medium status at the first applicant is made by the language and admission policies of the first applicant. As a result the first applicant's educators are required to be proficient in English and Afrikaans. Tuition at the first applicant is therefore presented in both languages. The

requirement, as a result, was included in the advertisement of the posts as a prerequisite for appointment by the selection panel of the second applicant.

4. There were two Heads of Department vacancies relevant to this application which needed to be filled.

5. The necessary advertisements were effected and aspirant candidates applied for the posts. The process which was followed to the end had to be repeated due to the fact that disputes had been declared on the basis of irregularities in the process of appointment.

6. The third and fourth respondents fall within the second process which was a repitation of the first process.

7. The third and the fourth respondents were short listed and interviewed by the panel that had been identified.

8. A list of names of the aspirant candidates was prepared and forwarded to the second respondent for appointment. Relevant documents accompanied the preferred names.

9. The second respondent appointed the candidates who, according to the applicants, had not been recommended for the posts by the second applicant.

10. Objections were lodged and the matter culminated in this application serving before me.

11. Mr J J Mabena (Mabena) with delegated powers was the District Director: Nkangala District, Department of Basic Education, Mpumalanga Province.

12. Mabena had delegated authority from the second respondent to approve appointment of educators in public schools within the district in terms of section 6 of the Employment of Educators Act No. 76 of 1998 ("the EEA"). The first applicant fell within his district.

13. The third respondent formed part of the short listed candidates in respect of the Language vacancy while the fourth respondent was one of the short listed candidates for the Administration vacancy.

THE LAW

[7] Key to this application are the following Acts:

1. The Employment of Educators Act No. 76 of 1998 ("the EEA")
2. The Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and
3. The Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution Act")

[8] **Section 6 (1) (b) of the EEA provides**:

"(1) Subject to the provisions of this section, the appointment of any person, or the promotion or transfer of any educator –

(a) ....

(b) In the service of a provincial department of education <u>shall be made by the Head of Department."</u> (my emphasis)

Section 6 (3) (a) of the Act provides:

(3) Subject to paragraph (m), any appointment, promotion or transfer to any post on the educator establishment of a public school <u>may only be made on the recommendation of the governing body of the public school</u> and, if there are educators in the provincial department of education concerned who are in excess of the educator establishment of a public school due to operational requirements, that recommendation may only be made from candidates identified by the Head of Department, who are in excess and suitable for the post concerned." (my emphasis)

Section 6 (3) (b) (i) provides:

(b) in considering the applications, the governing body or the council, as the case may be, must ensure that the principles of equality, redressed and representativity are complied with and the governing body or council, as the case may be must adhereto –

(1) the democratic values and principles referred to in section 7 (1)

Section 6 (3) (c) of the Act provides:

(c)The governing body must submit, in order of preference to the Head of Department, a list of -

(1) <u>at least three names of recommended candidates</u>; or

(ii) <u>fewer than three candidates in consultation with the Head of Department</u>."(my emphasis)

Section 6 (3) (d) of the Act provide:

"(d) when the Head of Department considers the recommendation contemplated in paragraph (c), he or she must, before making an appointment ensure that the governing body has met the requirements in paragraph (b)".

Section 6 (3) (e) of the Act provides:

(e) "if the governing body has not met the requirements in paragraph (b), the Head of Department must decline the recommendation"

Section 6 (3) (f) of the Act provides:

(f) Despite the order of preference in paragraph (c) and subject to paragraph (d), the Head of Department may appoint any suitable candidate on the list."

(g) Section 6 (3) (g) of the Act provides:

"(g) if the Head of Department declines a recommendation, he or she must –

(i) consider all the applications submitted for the post;

(ii) apply the requirements in paragraph (b) (i) to (iv); and

(iii) despite paragraph (a), appoint a suitable candidate temporarily or re-advertise the post."

Section (6) (3) (h) allows the governing body to appeal to the Member of the Executive Council against the decision of the "Head of Department regarding the temporary appointment contemplated in paragraph (g)"

The Head of Department may convert the temporary appointment into a permanent appointment as contemplated in section 6B in the event that no appeal is lodged as prescribed.

Section 7 (1) of the Act provides:

"(1) 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 section 195 (1) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), and which include the following factors, namely –

(a) the ability of the candidate; and

(b) the need to redress the imbalances of the past in order to achieve broad representation."

[9] **Section 9 of the Constitution Act provides:**

"9 Equality –

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

Section 195 of the Constitution Act provides:

"195. **Basic values and principles governing public administration** – (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development - oriented.

(d) Services must be provided impartially, fairly, equitably, and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career – development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people with employment and personnel management practices based on ability, objectivity, fairness and need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to –

(a) Administration in every sphere of government;

(b) Organs of state; and

(c) Public enterprises."

Section 33 of the Constitution Act provides:

"33 Just administrative action –

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

[10] **Section 6 (2) (a) (i) of PAJA provides:**

"(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."

Section 6 (2) (f) (i) of PAJA provides:

"(f) the action itself –

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

[11] It is the applicants' case that the jurisdictional pillars and facts of recommendation by the second applicant as envisaged by section 6 (3) (a) and 6 (3) (f) of the EEA were not met. It is further their contention that the jurisdictional fact of recommendation is also non- existent as provided for in the language of section 6 (2) (a) and (f) of PAJA. It was on that basis argued that the second respondent was not authorised by the empowering provision to appoint the third and fourth respondents. This, in my view, for the reasons I shall later give, seems to be the correct interpretation of the sections and the documents relevant to the interview and the outcome of the said interview by the selected panel.

[12] **In Kimberly Junior, School and Another v Head Northern Cape Education Department and Others 2010 (1) SA 217 (SCA)** the question the court had to answer was whether the appointment of the candidate by the Head of Department had met the requirements of section 6 (1) (b), 6 (3) (a), 6 (3) (b), 6 (3) (c) (i), 6 (3) (c) (ii), 6 (3) (d) and 6 (3) (f) of the EEA and section 6 (2) (a) (1) and 6 (2) (f) (i) of PAJA. The issue to be determined was whether the Head of Department had satisfied the jurisdictional facts of recommendation. Put differently, the issue was whether the Head of Department was empowered to act as he did. Without the jurisdictional facts of recommendation and compliance with section 6 (3) (c) (i) of

the EEA, the answer in those circumstances, and on the facts of the case, was no. there had been no recommendation from the school governing body and the requirement of the list of names recommended was not met.

[13] It is the first and second respondents' case that the third and fourth respondents were short listed, interviewed and recommended for the posts. The deponent to the answering affidavit, according to them, exercised his powers as contemplated in section 6 of the EEA read with the delegation documents to appoint the third and the fourth respondents. It was submitted by Mr Skosana, for the first and second respondents, that the Head of Department, as of right, was entitled to appoint any suitable candidates and these happened to be the third and the fourth respondents who happened to be on the lists of recommended candidates. The nub of the matter is whether. indeed, the compliance that is referred to, on behalf of the first and the second respondents, exists. I shall answer the question shortly.

[14] A consideration of the documents relevant to the interviews and the recommendations is necessary when the question posed in paragraph 12 is answered.

[15] The procurement of suitable candidates to fill the vacancies followed the school's post establishment in respect of 2012, the first applicant's vacancy list and the first applicant's selection panel profile which are annexures "B" "C" and "D" to the founding affidavit of the chairperson of the school governing body of the first applicant Mr Piet Van Eeden respectively. Minutes of the short listing meeting for the posts are annexures "I 1 to I 6".

[16] Annexures "M-M2" deal with the filling of the advertised post of Departmental Head: Post Ref: 62032 – 0407, Languages. It shows how the panel was constituted and that the chairperson was Mr P Van Eeden. It is clear from the annexures how the business of the day was conducted. The participants were the third respondent, the fourth respondent Ms I L Ras Mr Masango and Mr M J Muroa. A document I have marked "M2-1 to M2-8" was handed up during argument without any objection. This document is a complete version of annexure M, M1 and M2 which are but a few pages of the complete document. Annexure M1 (M2-3) reflects the scores obtained by the participants. Ms I L Ras obtained 101, Mr Masango, 84, Mr Muroa, 81 and the third respondent 65. The evaluations of the participants appear on annexures M2-3 to M2-5. The participants (candidates) were recommended as follows:

1. Ms I L Ras: first candidate
2. Mr N A Masango: second candidate, and
3. Mr M J Muroa: third candidate.

[17] It is noteworthy that despite the above recommendations the panel agreed that Ms I L Ras was recommended for the post and in the event that she declined the post, then, and in that event, Mr N A Masango was recommended. There is no evidence to show that Ms I L Ras declined the post. There is also no evidence to show that the panel wanted Mr M J Muroa to fill the vacancy in the event that Mr N A Masango was not appointed. This, in my view, clearly shows that Mr Muroa was not considered as the next candidate as that would clearly have been indicated by the panel on annexure M2-5, the last block. It is evident from the last block that the panel, although it recommended 3 names it actually was recommending two names, namely Ms Ras and Mr Masango. The preferred candidate, however, was Ms Ras. This becomes clearer when one considers what the panel said on

annexure M (M2-1) under purpose. The purpose is: "To secure the District Director's authorisation to appoint Ms I L Ras as the Head of Department for Languages at Hoërskool Reynopark." Annexure "Q" to the founding affidavit of Mr P Van Eeden confirms this in respect of Ms Ras and Mr J P Pistorius regarding the Administration post. The annexure is a letter dated 2 March 2012. Mr Skosana for the first and second respondents, however, submitted that the letter should carry no weight as it was written by the principal who is Ms Ras's husband and who, according to him, also does not disclose that he wrote the letter representing the school governing body. Mr Skosana's challenge, in my view, has no merit if regard is had to the contents of annexure M2-1, M2-5 and M2-6 especially the last sentence. The chairperson of the school governing body, in any event, wrote a follow up letter to Mr Mabena dated 14 March 2012. The panel clearly recommended and wanted Ms Ras to fill the vacancy. It is noteworthy that the third respondent's name has not been recommended.

[18] Regarding the Administration post annexure O to the founding affidavit becomes key. The annexure is incomplete just like annexure M. annexure O on page 62 of the papers, under purpose, just like annexure M on page 58 of the papers clearly shows that the panel recommended and wanted Mr J P Pistorius appointed as the Head of Department for Administration, Management and Career Guidance at the first applicant.

[19] Mr P Van Eeden was still the chairperson of the panel. I must point out that the work in respect of both posts was done on 27 February 2012. The short listed candidates for this post were: Ms K J Magagula, Ms E N Msiza and Mr P J

Pistorius. Their scores appear on page 66 of the papers which is annexure P to the founding affidavit.

1. Mr Pistorius obtained 112
2. Ms Magagula obtained 91, while
3. Ms E N Msiza obtained 86.

[20] The candidates were recommended as follows:

1. Mr Pistorius: first candidate
2. Ms K J Magagula: third candidate

The document relating to the second candidate is missing but I believe that we can safely assume that the second candidate must have been Ms E N Msiza (see annexure 02 on page 64 of the papers) page 64 of the papers reveal that the panel agreed that Mr Pistorius be recommended for the post and if he declined then, and in that event, Ms K J Magagula was recommended. Annexure 02 on page 64 of the papers clearly reveal that the panel concerned itself with Mr Pistorius and Ms Magagula and not Ms Msiza. Furher the indication is that the panel was recommending Mr Pistorius whom it wanted appointed Head of Department: Administration and Career Guidance. Annexure Q and R to the founding affidavit support this.

[21] A proper interpretation of the documents clearly shows that the provisions of section 6 (3) (c) (i) were not complied with. It can hardly be said that a list of three names of the recommended candidates was submitted to the Head of Department by the governing body (the panel). It must be remembered that the Head of Department notwithstanding that he or she is not bound by the order or preference proposed by

the governing body, can only appoint from the list of candidates recommended by the panel.

[22] In **Kimberly Junior School and Another** (supra), the court found that the Head of Department's power to appoint under section 6 (3) (f) is dependent on the jurisdictional of fact of recommendation by the governing body. The question to be answered, in this matter, is whether annexure M2-1 to M2-8 together with annexures 0, 01, 02, Q and R can objectively be construed to mean that the third and fourth respondents were recommended for the posts. The third respondent was clearly not recommended. Regarding the fourth respondent, the requirements of section 6 (3) (c) (i) and 6 (3) (c) (ii) were not met. The panel, in my view, recommended Mr Pistorius and Ms Magagula. The provisions of section 6 (3) (c) (i) and (ii) remain unsatisfied. The Head of Department, in that event, lacks the discretion to make an appointment under section 6 (3) (f).

Annexure 02 on page 64 of the papers describes the three candidates as recommended for the post but the annexure also, in so many words, conveys the message that Mr Pistorius is recommended and upon his declining then Ms Magagula was recommended. This then excludes Ms Msiza and thereby demonstrating that the provisions of section 6 (3) (c) (i) and (ii) indeed, were not met. **(See the Kimberly Junior School and Another (supra) at 224 F-G, 225A-J, 226E and 227 C-D.**

The provisions of section 6 (2) (a) (i) and 6 (2) (f) (i) of PAJA were also not met

[23] The prerequisite of a recommendation by the second applicant as envisaged by section 6 (3) (a) and 6 (3) (f) of the Act were not made. Proper messages in respect

of the recommendations of the third and fourth respondents by the second applicant were duly conveyed to the second respondent who, in my view, could not have been in doubt regarding the objective jurisdictional pillar which would entitle her to perform an administrative action in terms of section 6 of the EEA. The second respondent was not authorised by the empowering provision to make the appointments. The second respondent's decision to appoint the third and fourth respondents, in my view, stands to be reviewed and set aside.

[24] The court is unable to make a substitutory order that Ms I L Ras and Mr P J Pistorius be appointed to the two posts as that would amount to usurping the work of the relevant organ of State.

[25] **The following order is accordingly made:**

1. **The second respondent's decision to appoint the third and the fourth respondents as heads of departments of the first applicant in posts numbers**

   62032-0407 and 62032-0408 is hereby reviewed and set aside.

2. **The first and second respondents are ordered to pay the applicants' costs.**

M W MSIMEKI
JUDGE OF THE GAUTENG DIVISION
PRETORIA

COUNSEL FOR THE APPLICANT:
INSTRUCTED BY:

COUNSEL FOR THE RESPONDENT:
INSTRUCTED BY:

DATE OF HEARING:
DATE OF JUDGMENT: 17 NOVEMBER 2014