

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case No : 4997/09

In the matter between :

School Governing Body
Ndabomuhle Primary School 1st Applicant

M A Hlela
Chairperson/Governing Body 2nd Applicant

N C Hlengwa 3rd Applicant

B Z Sithole 4th Applicant

Z A Ngcobo 5th Applicant

B Z Mbonambi 6th Applicant

B A Hlela
(recommended candidate for
post 70 – principalship of
Ndabomuhle Primary School) 7th Applicant

and

The Minister of Department
of Education and Culture 1st Respondent

E M Kganye
District Director 2nd Respondent

Mr Lushozi
Superintendent of Education Management 3rd Respondent

J U D G M E N T

LOPES J

[1] This matter concerns the appointment of a principal to the Ndabomuhle Primary School in KwaMashu.

[2] The applicant is the chairperson of the governing body of the school. During 2008 the Department of Education and Culture advertised for candidates to fill the vacant position of principal. The advert was contained in what is referred to as the "*HRM circular no. 62 of 2008*". The circular provided for :-

- (a) the general principles underlining the employment of the principal;
- (b) the procedure to be followed by applicants; and
- (c) the responsibilities of the post and the educational requirements for eligibility for appointment to the post; and
- (d) that the governing body was to establish an interview committee which would be responsible for the shortlisting of applicants.

[3] The governing body appointed an interview committee ("the committee") consisting of five members of the governing body and that committee interviewed candidates on the 15th December 2008. Two of those candidates are the subject of this application and they are Mr B A Hlela and Ms M B Malinga.

[4] A recommendation was made by the committee that Mr B A Hlela be appointed to the post. The recommendation of the committee and accordingly of the governing body was made in accordance with the provisions of s 6 of the Employment of Educators Act, 1998. That section provides :-

“6. Powers of Employers. – (1) *Subject to the provisions of this section, the appointment of any person or the promotion or transfer of any educator –*

(a) in the service of the Department of Education shall be made by the Director-General; or

...
 (3) *(a) subject to paragraph (m), any appointment, promotion or transfer to any post on the educator establishment of a public school may only be made on the recommendation of the governing body of the public school ...”*

[5] There follows in s 6 the requirements with which the governing body is obliged to comply in carrying out its function.

[6] After the recommendation had been made by the governing body one of the candidates, Ms M B Malinga, submitted a grievance listing various complaints about the conduct of the committee which had interviewed her. Her complaints were :-

- (a) the chairperson had a personal interest in the matter, it being alleged that she was a relative of Mr B A Hlela; and
- (b) that she had not been formally told of the outcome of the governing body’s interviews; and
- (c) that her interview had only endured for a very short time;

- (d) the chairperson of the committee had led a protest march for the removal or expulsion of Ms Malinga who was at the time the acting principal of the school.

[7] It seems clear from the papers that a grievance committee heard the complaint of Ms Malinga and, finding some merit in the complaints, purported to set aside the recommendations of the governing body.

[8] On the 23rd March 2009 Mr E M Kganye, a District Manager of the Department of Education, addressed a letter to, *inter alia*, the governing body, notifying them that the grievance committee had found that the correct procedure had not been followed in terms of Clause 13.2 of the HRM circular no. 62 of 2008 and that there were serious divisions among the members of the governing body. The grievance committee had therefore recommended that the selection process be conducted by the Department of Education and that a submission had been sent to the Superintendent-General to allow the Department to take over the process.

[9] It is clear from the founding affidavit of the second applicant who was the chairperson of both the governing body and the committee, that she received Mr Kganye's letter and understood the contents thereof. She did not however accept the attitude of the Department and, together with the first applicant which is the governing body and the second to sixth applicants who are members of the

governing body brought this application. The seventh applicant is Mr B A Hlela.

The applicants seek an order :

- (a) interdicting the respondents who are the Minister of Education and Culture, Mr Kganye and Mr Lushozi the Superintendent of Educational Management of the Department from continuing with the process of shortlisting and interviewing candidates and appointing a principal; and
- (b) that the respondents be interdicted from interfering with the Governing Body Constitution with regard to the establishment of the interviewing committee pursuant to the provisions of HRM circular no. 62 of 2008; and
- (c) that the respondents be directed to confirm the recommendation of Mr B A Hlela as the principal.

[10] The decision of the representatives of the Department of Education to take over the process of appointing the principal was one made in terms of sub-s 22(1) of the South African Schools Act, 1996 which provides :-

“22. Withdrawal of functions from governing bodies. -

- (1) *The Head of Department may, on reasonable grounds, withdraw a function of a governing body;*
- (2) *The head of department may not take action under subsection (1) unless he or she has :-*
 - (a) *informed the governing body of his or her intention so to act and the reasons therefor; and*
 - (b) *granted the governing body a reasonable opportunity to make representations to him or her relating to such intention; and*
 - (c) *given due consideration to any such representations received.*

...
(5) *any person aggrieved by a decision of the Head of Department in terms of this section may appeal against the decision to the Member of the Executive Council.*"

[11] Mr Shange, who appeared for the applicant submitted that the basis for the applicants' application is that the Head of Department (who is defined in s 1 of the South African Schools Act as meaning the head of an education department) had not made a decision, and that the application was necessary in order to compel a decision to be made. He submitted that as no decision had been made the Department of Education was not at liberty to withdraw the function of appointing a principal from the governing body. The application papers, however, do not seek to compel the department to perform its functions, but rather to present it with a *fait accompli*.

[12] Mr Khuzwayo, who appeared for the respondent pointed out that the grievance committee, which was compiled by the Minister of Education pursuant to an internal process in the department, had set aside the recommendation of the governing body and elected to take over the process in terms of s 22.

[13] Upon a perusal of the papers there can be no doubt that :-

- (a) Annexure J to the founding affidavit of the second applicant was a notification from the department that the department intended to take over the process of the appointment of the principal; and
- (b) the second applicant (and indeed that other applicants) understood that that is what the letter intended to convey.

[14] Mr B A Hlela stated that during March he has received a letter from the South African Democratic Teachers Union notifying him that the process was to be redone from the shortlisting stage under the auspices of the Department of Education. That letter, unfortunately did not find its way into the Court papers despite having been described as Annexure A3 to the affidavit of Mr B A Hlela. There were in fact no annexures to his affidavit.

[15] What is, however, clear from the applicants' papers is that the governing body knew and understood that the Department of Education had made a decision that the process would be re-done and that the function of recommending the most suitable candidate for appointment to the post of principal had been withdrawn from the governing body and would be decided upon under the control of the Department of Education.

[16] Accordingly, any dissatisfaction harboured by the governing body with regard to the procedure followed by the head of department in withdrawing the function of the appointment of a principal from the governing body had to be dealt

with in the first instance in terms of sub-s 22(5) – ie an appeal against the decision to the member of the Executive Council in KwaZulu-Natal.

[17] It was accordingly not open to the applicants at that stage to have approached this Court for interdictory relief without first exhausting the remedies available in terms of the Act.

[18] In the applicants' heads of argument reference is made to a contravention of s 3 of the Promotion of Administrative Justice Act, 2000 ("PAJA"). In any review instituted pursuant to the provisions of that Act, a Court is precluded from reviewing an administrative action unless any internal remedy has first been exhausted. It is clear that the applicants have not proceeded in terms of sub-s 22(5) of the South African Schools Act, and no exceptional circumstances enabling me to act in terms of sub-s 7(2)(c) of PAJA were suggested to me.

[19] The fact that the applicants did not seek to pursue the provisions of sub-s 22(5) of the South African Schools Act was not in any way defended on the papers. In argument Mr Shange contented himself with alleging that no decision had yet been taken by the Department of Education. That was clearly not the case.

[20] Given that there is an adequate, ordinary and reasonable legal remedy available to the applicants, they have failed to establish the requisites for a final interdict. See Setlogelo v Setlogelo 1914 AD 221 @ 227.

[21] Insofar as I may have a discretion with regard to the satisfaction of the requirements for an interdict and in particular the absence of an alternative remedy, I am by no means persuaded that in this instance I should usurp the functions of the Department of Education, and I decline to do so.

See United Technical Equipment Co v Johannesburg City Council 1987(4) SA 343 (TPD) @ 346 C – G.

[22] Insofar as it may be said that there is a dispute of fact evidenced in the papers, that dispute relates to the allegations of bias and misconduct on the part of the governing body. I do not believe that a referral to oral evidence can be of assistance in this matter. Indeed no such referral was suggested or requested in argument. As Mr Khuzwayo submitted, such disputes as do exist do not survive the test for granting an interdict as set out in Plascon Evans Paints (Ltd) v van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) @ 634 E – I.

[23] In the premises the applicants have not established their entitlement to an order in terms of the notice motion. I accordingly dismiss the application.

[24] There are two further issues with which I am required to deal :-

(a) Costs.

The application papers in this matter were very poorly put together. The Court file consisted to two bundles, one containing the founding and replying affidavits of the applicants and the other containing the opposing affidavits. Although indexes were provided for each of these bundles none of the papers had been paginated. In addition, all the annexures to the founding affidavits were out of order. No attempt whatsoever appears to have been made to comply with the provisions of Rule 62 of the Uniform Rules of this Court.

Anxious that the matter should not be delayed I contacted the applicants' firm of attorneys on four occasions. On each occasion I requested to speak to the attorney dealing with the matter, I was told he was not available, and that there was no other attorney available to whom I could speak. I explained in each case my problems with the papers. On three occasions the papers were uplifted from my chambers and returned in a similar unsatisfactory condition. Eventually, on the fourth occasion, I took time to explain to the members of the staff of the applicants' attorneys who attended on my chambers how the papers were to be paginated and indexed. A genuine effort was thereafter made by those staff members, but the papers were still woefully deficient. What was most disconcerting was that the applicants' attorney made no attempt whatsoever to contact

me in order to deal with the inadequacy of the papers, more particularly when this took place over a period of days.

I raised this matter with counsel for the applicant and he informed me that he had instructions that the attorneys for the applicants undertook to pay the costs of the hearing on the 20th July 2010 *de bonis propriis*.

The future of the appointment

- (b) I queried with Mr Khuzwayo how long the process of appointing a principal would take as it was now under the control of the Department of Education. After taking instructions he assured me that the matter would be finalised by the 29th October 2010. I make no order in that regard but merely record the undertaking of the Department.

[25] I make the following order :-

- (a) the application is dismissed;
- (b) the costs of the hearing on the 20th July 2010 are to be paid *de bonis propriis* by the applicants' attorneys, Mbatha & Associates;
- (c) the applicants are to pay the remaining costs of the application.

Date of hearing : 20th July 2010

Date of judgment : 23rd July 2010

Counsel for the Applicants : A T Shange (instructed by Mbatha & Associates)

Counsel for the Respondents : T Khuzwayo (instructed by the State Attorney)