

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: 21132/2008

In the matter between:

JAN KRIEL SCHOOL	1st Applicant
THE GOVERNING BODY OF JAN KRIEL SCHOOL	2nd Applicant

and

THE MINISTER OF EDUCATION FOR THE WESTERN CAPE PROVINCE	1st Respondent
THE HEAD OF THE WESTERN CAPE EDUCATION DEPARTMENT	2nd Respondent
TERENCE NEFDT	3rd Respondent
HESTER FAASEN	4th Respondent

JUDGMENT : 09 SEPTEMBER 2009

TRAVERSO, AJP :

[1] These proceedings concern a review of the decision of the second respondent, The Head of Department ("HoD") of the Western Cape Education Department ("WCED"), to appoint the third respondent (Terence Nefdt) to the position of Deputy Principal of first applicant, the Jan Kriel School, and not the fourth respondent (Hester Faasen) who was the candidate recommended by the second applicant, the governing body of the school.

[2] For the sake of convenience I will, throughout this judgment, refer to the various parties by name, ie the first applicant as the Jan Kriel School, second applicant as the Governing Body, third respondent as Mr. Nefdt and fourth respondent as Mrs. Faasen.

[3] The Jan Kriel School is a special needs school. All the learners are disabled and need special education. Only learners with the ability to obtain a Grade 12 education will be admitted to the school. Jan Kriel School is the only school in this particular

category of schools which offers academic training to Afrikaans learners for Grades 10, 11 and 12. Other special needs schools only offer academic training up to Grade 9.

[4] The factual background is briefly the following.

[5] The deponent to the founding affidavit, Mr. Burger, is the principal of the school. He was acting principal from January 2007 until 1 July 2008, when he was appointed as principal on a permanent basis. His appointment as principal self-evidently led to the post of deputy principal becoming vacant. This post was filled by Mrs. Faasen in an acting capacity. She in fact held the position of acting deputy principal for a period of 4¼ years in the 5 years preceding this application.

[6] This post was formally advertised by the WCED and the advertisement read as follows:

"DEPUTY PRINCIPAL**REQUIREMENTS**

PROVEN AND APPLICABLE MANAGEMENT EXPERIENCE; STRONG LEADERSHIP, ADMINISTRATIVE, ORGANISATIONAL AND HUMAN RESOURCE MANAGEMENT SKILLS; SOUND KNOWLEDGE OF THE NATIONAL CURRICULUM STATEMENT AND ASSESSMENT FOR GET AND FET, SPECIFICALLY THE IMPLEMENTATION IN AN ELSEN SCHOOL; PROVEN SUCCESS IN TEACHING; EXCELLENT COMMUNICATION SKILLS IN ENGLISH AND AFRIKAANS; KNOWLEDGE, EXPERIENCE AND COMPETENCY IN BUDGETING, FUND-RAISING AND EXTRA-MURAL ACTIVITIES, IQMS, WHOLE-SCHOOL EVALUATION, DISCIPLINARY PROCEDURES, SPECIFICALLY LEARNERS WITH BEHAVIOURAL PROBLEMS/AT RISK LEARNERS' HOSTEL MANAGEMENT AND COMPUTER LITERACY

RECOMMENDATIONS:

A SOUND KNOWLEDGE OF ELSEN, ALTERNATIVE ASSESSMENT, BARRIERS TO LEARNING, FOR EXAMPLE SPECIFIC LEARNING PROBLEMS, THE FUNCTIONING OF A MULTI-DISCIPLINARY TEAM AND KNOWLEDGE OF EDUCATIONAL LAWS AND POLICIES; ELSEN QUALIFICATION"

[7] All applications are sent directly to the WCED. The WCED then considers all the applications and supplies the governing body with the names of all candidates which, in its view, could be considered for the position. In this case 18 names were put

forward. These names were submitted to a sub-committee of the governing body for consideration.

[8] The committee was of the view that of the 18 names submitted, 5 did not meet the minimum requirements. The remaining 13 candidates were ranked in order of the additional requirements. After further consideration of the various candidates it was decided to invite 5 candidates to interviews with the governing body. The 5th and 6th candidates had achieved the same score. The 6th candidate was Mr. Nefdt. He was given preference over the 5th candidate, *inter alia*, because of his prior experience as deputy principal at the Bet-El School (also a school for disabled learners) and for equity considerations because he was from a designated group, namely a coloured male. It is common cause that the process which was followed was procedurally correct and fair.

[9] The interviews took place on 15 October 2008 and were conducted in accordance with the procedure prescribed by the WCED. The candidates were allocated points according to pre-determined criteria. The scores of the 3 recommended candidates were:

Mrs. Faasen	73,2%
Mr. T Nefdt	59,8%
Mr. C. Botha	57,2%

[10] The governing body minuted their conclusions regarding Mrs. Faasen and Mr. Nefdt as follows:

"VAKATURELYS 2/2008

MOTIVERING T.O.V. DIE BENOEMDE KANDIDATE:

POSNUMMER 2009

JAN KRIELSKOOL

ALGEMENE VEREISTES:

Van die suksesvolle kandidaat word verwag om die VOO afdeling te bestuur en aan 29 ervare leerkragte leiding te gee t.o.v. die NKV, die Addendum tot die beleidsdokument, (sake soos slegs 5 vakke, aangepaste slaagvereistes), en alternatiewe assessering. Vandaar die scenarios as deel van die onderhoud om dié vaardigheid te bepaal. Volgens die

Beheerliggaam en die onderhoudskomitee sou 'n persoon sonder hierdie kundigheid en vaardigheid nie op 'n geloofwaardige wyse leiding kon neem in hierdie afdeling nie.

Jan Kriel is 'n akademiese skool, die enigste skool in die BO groep waar leerders met die potensiaal in Afrikaans Graad 12 kan behaal.

EERSTE POSISIE: MEV H FAASEN (51381494):

Mev Faasen is wit dame en neem tans waar in hierdie pos. Sy is reeds etlike jare verantwoordelik vir die VOO afdeling en is 'n gesoute loerkrag met diepgaande kundigheid in alle leerareas. Sy word dikwels deur die WKOD gebruik om ander skole-kollegas op te lei (sien Mev Rossouw se getuigskrif). Veral die scenarios het duidelik getoon dat sy in 'n klas van haar eie is en dat haar kundigheid buitengewoon, selfs as uniek beskou kan word. Die personeel is deur haar tot 'n hoë vlak van kundigheid geneem en vir 'n kollega met beperkte ervaring kan dié pos uiters hoë eise stel. Sy het op een uitsondering na die hoogste punte verwerf by alle komiteede. Die Adjunkhoof se taak is om veral nuwe leerkragte te lei om op te lei t.o.v. die "andersheid" van Jan Kriel.

TWEEDE POSISIE: MNR NEFDT:

Mnr T Nefdt (50591231) is 'n bruin, manlike persoon en is verbond aan Bet-Ei Skool. Dié skool het nie 'n VOO fase nie, dit is al vir 'n periode uitgefaseer en hul leerders kom na Jan Kriel vir Grade 10 tot 12. Uit die onderhoud het hy as 'n goeie, ervare administrateur en mensgerigte persoon na vore getree. Dit het duidelik geblyk dat hy nie oor 'n grondige kennis beskik van die Addendum, alternatiewe assessering en die VOO-Kurrikulum nie. Hy is besonder kundig op die gebied van praktiese vakke, Jan Krielskool se akademiese aanslag maak egter geen ruimte vir dié vakke nie!"

[11] Despite the recommendation of Mrs. Fassen as the preferred candidate, the WCED appointed Mr. Nefdt to the position.

[12] Mr. Daniels, who is employed by the WCED as a Director: Internal Human Capital Administration, was the person who considered the recommendation of the governing body, and made the decision to appoint Mr. Nefdt.

[13] His motivation for appointing a candidate other than the preferred candidate can be summarised thus:

13.1 Although he was satisfied that Mrs. Faasen met all the requirements that would enable her to discharge her duties as deputy principal competently, he was of the view that Mr. Nefdt had the necessary potential, if given the opportunity, to discharge his duties efficiently and also had the potential of eliminating the advantage which Mrs

Faasen enjoyed over him. He bases this finding on the fact that, according to him, there was no significant parity between the two candidates. Accordingly, having regard to employment equity considerations, he decided to appoint Mr. Nefdt;

13.2 He further states he was of the view that the committee had failed to properly consider the question of employment equity and redressing the imbalances of the past as contemplated by Section 7(1)(b) of the Employment of Educators Act, No. 76 of 1998. Mr. Daniels had regard to the equity profile of the Jan Kriel School which showed that the management team of the school was exclusively white and predominantly female. He therefore felt compelled to adopt, what he termed, a broader approach by doing a comparative study between the two candidates.

[14] The process of appointments by the WCED is regulated by a complex and intricate statutory scheme which includes Section 9 of the Constitution of South Africa, Act No. 108 of 1996; the Employment Equity Act, No. 55 of 1998; The Employment of Educators Act, No. 76 of 1998 and the Employment Equity Plan of the WCED, prepared in terms of the provisions of Section 20 of the Employment Equity Act. These statutory provisions were analysed and interpreted in Head of the Western Cape Education Department & Others v. Governing Body, Point High School & Others¹ and need not be repeated herein.

[15] For purposes of this application the following provisions of the Employment Equity Act are cardinal:

"6. Powers of employers. ...

(3) ...

(b) In considering the applications, the governing body or the council, as the case may be, must ensure that the principles of equity,

¹ 2008(5) SA 15 SCA

redress and representivity are complied with and the governing body or council, as the case may be, must adhere to –

- (i) the democratic values and principles referred to in section 7(1);**
 - (ii) any procedure collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators;**
 - (iii) any requirement collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators which the candidate must meet;**
 - (iv) a procedure whereby it is established that the candidate is registered or qualifies for registration as an educator with the South African Council of Educators; and**
 - (v) procedures that would ensure that the recommendation is not obtained through undue influence on the members of the governing body.**
- (c) The governing body must submit, in order of preference to the Head of Department, a list of**
- (i) at least three names of recommended candidates; or**
 - (ii) fewer than three candidates in consultation with the Head of Department.**
- (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).**
- (e) If the governing body has not met the requirements in paragraph (b), the Head of Department must decline the recommendation.**
- (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) If the Head of Department declines a recommendation, he or she must –**

- (i) *consider all the applications submitted for that 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."*

[16] The wording of the above sections is clear and unambiguous. If Mr. Daniels was, as he contends, not satisfied that there had been compliance with the provisions of Section 7(1)(b), he was obliged to decline to make a recommendation as provided for in Section 6(3)(e) and then had to act in accordance with the provisions of Section 6(3)(g). (See Point supra at 27 E-F).

[17] It was argued on behalf of the applicants that Mr. Daniels' decision to make an appointment, was an indication that he had accepted that the appointment was validly made, and therefore that there had been compliance with Section 7(1)(b) by the Governing Body, despite his allegations to the contrary which, it was argued, was a mere afterthought.

[18] On the papers before Court I am of the view that such a finding will not be warranted. The conduct of Mr. Daniels shows that he had scant regard for statutory provisions, the Employment Equity Plan or generally accepted procedures in making the appointment. I mention, briefly, a few:

18.1 (a) Section 20(1) of the Employment Equity Act provides:

***"20. Employment equity plan. – (1) A designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce.
..."***

The section thereafter circumscribes how the Employment Equity Plan must be structured, and what it must provide for.

The WCED has complied with the provisions of the Act and has such a plan in place (the "EEP").

(b) Paragraph 3.4.3 of the EEP of the WCED provides:

"3.4.3 All appointments will be based on the inherent requirements of the position. However, where there is an insignificant gap between possible candidates in terms of merit/performance, preference will be given to an employee from a designated group, should the appointment contribute to the improvement of the representation of specific designated groups. Should there be a candidate who is rated lower than the third candidate, but who demonstrates the ability or potential to develop and who would contribute to the employment equity targets of the WCED, then that candidate should be considered for nomination. (Part of Affirmative Action Policy.)" (Emphasis supplied)

Despite Mr. Daniels' repeated statements in his answering affidavit that there was not a significant gap between Mrs. Faasen and Mr. Nefdt, Mr. Albertus, who appeared for the second and third respondents, was constrained to concede that the gap between them was indeed significant. And although the term "*insignificant gap*" is vague and

unfortunate, it appears to be settled (see Point supra 27 G-H) that the term refers to an “*approximate equality*” between the candidates.

Mr. Daniels’ decision to appoint Mr. Nefdt is therefore contrary to the scheme of the EEP.

18.2 In addition contrary to the accepted and normal procedure Mr. Daniels made his decision prior to receiving the input of Dr. Theron. Dr. Theron is the Department’s expert in the field of specialised education. Dr. Theron disagreed with the appointment of Mr. Nefdt above the preferred candidate. Dr. Theron is the only director in the South African education system who is specifically tasked with extraordinary education, and is the most authoritative official in the WCED in regard to special schools.

[19] The likelihood is therefore great that Mr. Daniels lost sight of the relevant provisions, alternatively was unaware of them or alternatively wrongfully ignored them. In any one of these scenarios he was obliged to refrain from making an appointment.

[20] That being the case, it cannot be found that Mr. Daniels decided to make the appointment because he was satisfied that there had been compliance with the provisions of Section 7(1)(b) of the Act.

[21] In the circumstances the only appropriate order will be the following:

The matter is referred back to the first respondent to re-advertise the post as contemplated in Section 6(3)(g) of the Employment of Educators Act, No. 76 of 1998.

AJP Traverso
TRAVERSO, AJP

I agree:

J Saldanha
SALDANHA, J



IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)

JAN KRIEL SCHOOL,
THE GOVERNING BODY OF JAN KRIEL SCHOOL

1st APPLICANT
2nd APPLICANT

And

THE MINISTER OF EDUCATION FOR
THE WESTERN CAPE PROVINCE

1st RESPONDENT

THE HEAD OF THE WESTERN CAPE
EDUCATION DEPARTMENT

2nd RESPONDENT

TERENCE NEEDT

3rd RESPONDENT

HESTER FAASEN

4th RESPONDENT

DISSENTING JUDGMENT

DILODLO, J

[1] I have had the privilege of reading the Judgment of the Court by my sister Traverso AJP. She has competently set out the factual scenario of this case such that same need not be repeated in my Judgment. Instead of such factual scenario I have chosen to set out what Traverso AJP has labeled as "a complex and intricate statutory scheme" governing a process of appointments by the WCED.

THE APPLICABLE STATUTORY SCHEME

[2] It is of importance to prefix this Judgment by quoting the provisions of section 9 (2) of the Constitution Act 108 of 1996, namely:

"9 (2) Equity 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."

The above provision indeed does involve a known and structured plan in accordance with which such persons may be advanced. The purpose of the Employment Equity Act 55 of 1998 *inter alia* is to ensure the implementation of employment to redress the effects of discrimination and to achieve a diverse workforce broadly representative of the people of this country (See preamble of the Employment Equity Act). It is accepted that the Department of Education is a designated employer as defined in the Employment Equity Act. Section 1 of the same Act defines designated groups as meaning black people, women and people with disabilities. In terms of section 5 of the Employment Equity Act every employer has to take steps to promote equal opportunity in the workforce by eliminating unfair discrimination in any employment policy or practice. It must be added that the provisions of section 5 are written in peremptory terms consistent with the aforementioned provisions. Section 6 (1) proscribes unfair discrimination against employees in employment policy or practice on one or more of the therein enumerated grounds. However, it is not unfair discrimination to take affirmative action measures consistent with the purpose of the Employment Equity Act or to distinguish, exclude or prefer any person on the basis of an inherent requirement for the job. See section 7 (2) (a) and (b) of the Employment Equity Act. In terms of section 13 (1) of the Employment Equity Act every designated employer is required to implement affirmative action measures for people from designated groups in order to achieve employment

equity. In terms of section 13 (2) (c) of the same Act designated employers are required to prepare an employment equity plan as required by section 20 of the same Act.

EMPLOYMENT EQUITY PLAN

[3] Section 20 (1) of the Employment Equity Act requires (in peremptory terms) designated employers to implement employment equity plans which will achieve reasonable progress towards employment equity in that employer's workforce. Subsection (2) lays down the requirements with which such employment equity plans have to comply. This does include the affirmative action measures to be implemented as required by section 15 (2). The latter section in turn *inter alia* requires affirmative action measures implemented by designated employers to include the making of reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer. See section 20 (2) (b) read with section 15 (2) (c) of the Employment Equity Act.

[4] The Department's 2008-2012 Employment Equity Plan was formulated to give effect to section 20 of the Employment Equity Act. Paragraph 3.4.3 thereof reads as follows:

"All appointments will be based on the inherent requirement of the position. However, where there is an insignificant gap between possible candidates in terms of merit/performance, preference will be given to an employee from a designated group should the appointment contribute to the improvement of the representation of

specific designated groups. Should there be a candidate who is rated lower than the third candidate, but who demonstrates the ability or potential to develop and who would contribute to the employment equity targets of the WCED, then that candidate should be considered for nomination (Part of Affirmative Action Policy)."(Underlining is my own)

I am in agreement with the submission made by Mr. Heunis SC in this regard, namely that employment equity plans have the status of "law" as defined in section 1 of the Interpretation Act 33 of 1957, that is "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law."

Section 20 (1) (i) of the South African Schools Act 84 of 1996 provides that:

"...the governing body of a public school must -

- (i) recommend to the Head of Department the appointment of Educators at the school subject to the Employment of Educators Act, 1998 (Act 76 of 1998), and the Labour Relations Act, 1995 (Act 66 of 1995)."

EMPLOYMENT OF EDUCATORS ACT, NO. 76 of 1998

[5] In terms of section 6 (1) (b) of the Employment of Educators Act and subject to the provisions of that section, the appointment of any person or the promotion or transfer of any educator in the service of a provincial Department of Education has to be made by the Head of Department. The phrase "subject to" was held by Miller JA in *S v Marwane* 1982 (3) SA 717 (A) at 747H-748A to have the following meaning:

"The purpose of the phrase 'subject to' ... is to establish what is dominant and what subordinate or subservient: that to which a provision is 'subject to', is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be 'subject to' the other specified one."

The dictum of Miller JA *supra* was approved by the Constitutional Court in *Zantsi v Council of State, Ciskei and Others* 1995 (4) SA 615 (CC) at para 27; by Chaskalson P in *Executive Council, Western Cape Legislature, and others v President of the Republic of South Africa and others* 1995 (4) SA 877 (CC) at para 62; and again by the Constitutional Court in *Ynuico Ltd v Minister of Trade and Industry and others* 1996 (3) SA 989 (CC) at para 8 and *Ex parte Speaker of the Western Cape Legislature: In re Certification of the Constitution of the Western Cape*, 1997 (4) SA 795 (CC) at para 32. In terms of section 6 (3) (a) subject to para (m) of the Employment of Educators Act any appointment, promotion or transfer to any post of the educator establishment of a public school may only be made on the recommendation of the Governing Body. Section 6 (3) (b) of the same Act requires that a Governing Body, when it considers application has to ensure that the principles of equality redress and representivity are complied with and the governing body has to adhere to the democratic values and principles referred to in section 7

- (1). The latter section requires regard to be had to equality, equity and other democratic values and principles contemplated in section 195 (1) of the Constitution.
- [6] In terms of section 6 (3) (c) of the Employment of Educators Act a Governing Body has to submit (in order of preference) to the Head of Department a list of at least three (3) names of recommended candidates or fewer than three (3) candidates in consultation with the Head of Department. Section 6 (3) (d) provides that when the Head of Department considers the recommendation of the Governing Body made in terms of paragraph (c), he or she has to ensure that the Governing Body has met the requirements in paragraph (b) before making an appointment. That means it has ensured that the principles of equity, redress and representivity, are complied with and has adhered to the requirements of subparagraphs (i) to (v) of paragraph (d) of subsection (3).
- [7] The implication of this is that when the Head of Department elects to make an appointment from the list compiled by the Governing Body, he or she signifies that the Governing Body has properly exercised its statutory responsibilities as provided for in section 6 (3) (b) of the Act. If he or she is not so satisfied, paragraph (e) provides that he or she has to decline the recommendation. This is a very important provision since the making of an appointment from a list supplied by a Governing Body signifies that the Head of Department is, for example, satisfied that in considering the applications the Governing Body had ensured that the principles of equity, redress and

representivity are complied with. Despite the order of preference provided for in paragraph (c), section 6 (3) (f) provides that, subject to paragraph (d), the Head of Department may appoint any suitable candidate on the list. Again, the "subject to paragraph (d)" signifies that he or she may only make an appointment after having ensured that the governing body has met the requirements in paragraph (b).

- [8] It remains important to note that the Governing Body does not have an appeal to the MEC against the decision of the Head of Department. It is against the above legislative backdrop that this case falls to be decided. The Supreme Court of Appeal has provided us with a precedent in *Head, Western Cape Education Department and Others v Governing Body, Point High School and Others* 2008 (5) SA 18 (SCA). We have been referred to this Judgment and particularly that portion of it that deals with the process provided for in section 6 (3) of the Employment of Educators Act. The Supreme Court of Appeal stated as follows:

"The decision-making process contemplated in the section is a dichotomous one. The first step is for the governing body to make a comparative assessment of the candidates and to compile a list of those whom it recommends for appointment in its order of preference. This it must do in accordance with the precepts in s 6 (3) (b). The HOD is then required to consider whether the governing body has arrived at its recommendation by a process which meets those precepts. It does not appear that he has a perceptible discretion in this regard. If he is of the view that the requirements have not been met, he is bound by s 6 (3) (e) to reject the governing body's

recommendation as a whole and to proceed in terms of s 6 (3) (g) If he is satisfied that the stipulated requirements have been complied with, he may appoint a candidate from the governing body's list in terms of the discretion vested in him by section 6 (3) (f)." (At para [10]). Notably, the Head of Department does not, however, have an unfettered discretion once presented with a list of three (3) candidates. This is because section 7 (1) of the Employment Educators Act (referred to above) provides that in the making of any appointment for the filling of any post on any educator establishment, the Head of Department has to have due regard to equality, equity and other democratic values and principles contemplated in section 195 (1) of the Constitution.

- [9] I remain mindful of the provision of section 28 (2) of the Constitution to the effect that "a child's best interests are of paramount importance in every matter concerning the child." I also bear in mind the view expressed by Potgieter AJ in **Governing Body, Point High School & Another v Head, Western Cape Education Department & Others** [2007] JOL 19989 (C) at paragraph [33] of his Judgment, namely:

"A further relevant factor, in my view, concerns the best interests of the learners as entrenched in section 28 (2) of the Constitution (Cf Saddlers Agricultural High School and Another v Head of Department: Department of Education, Limpopo Province and Others [2002] JOL 10167 (T); Grootboom v Oostenberg Municipality and Others 2000 (3) BCLR 277 (C) at 288I-J). Although all of the recommended candidates are suitable for appointment in a

general sense, it cannot, in my view, be in the best interests of the learners to appoint a candidate who has been properly assessed to be significantly less suitable than some of the other (sic)."

I accept that the decision of the Head of Department is that of a functionary exercising administrative powers. There can be no debate therefore on whether or not the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") applies in the instant matter. The ground norm of administrative law is now to be found in the first place, in the Constitution itself as well as in PAJA. See *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).

- [10] The above cited case also decided *inter alia* the following relevant issues, namely:
- (a) What constitute a reasonable decision (as contemplated in section 6 (2) (h) of PAJA) would depend on the circumstances of each case, much as what will constitute a fair procedure would depend on the circumstances of each case.
 - (b) Factors relevant to determining whether a decision was reasonable or not would include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the nature of the competing interests involved and, importantly, the impact of the decision on the lives and well-being of those affected.

DISCUSSION

[11] It is common cause that the Governing Body scored the candidates involved in the instant case as follows:

- | | | | |
|-----|-------------|---|------------------|
| (a) | Ms H Faasen | - | 73, 2% (77, 75%) |
| (b) | Mr Nefdt | - | 59, 8% (58, 75%) |
| (c) | Mr Botha | - | 57, 2% (58, 75%) |

In the *Point High School* case *supra* the Supreme Court of Appeal considered that there have been a "very significant disparity between the assessed suitability of the first candidate for the position of Principal compared with the second and third candidates and that similar considerations applied in relation to the first and second candidates for the position of deputy Principal, but although the difference of fourteen (14) points between these two (2) candidates was not nearly as marked as that in the case of the candidates for the Principal's post, it was nevertheless substantial and there would have to have been weighty considerations for deviating from the purpose of making an appointment."

Much is made of Mr. Daniels' failure to give due regard to Dr. Theron's recommendations that Ms Faasen should be appointed and the former's stated reasons why Mr. Nefdt should not be appointed. Mr. Daniels contended in the Answering Affidavit that the input was noted and that the motivation therein contained is not compelling enough to necessitate the review of the approval. Whilst I remain concerned that the appointment was made by the Head of Department prior to having had sight and consideration of Dr. Theron's memorandum, that alone does not vitiate the decision made. The contents of Dr. Theron's memorandum does not bring to the forth

issues of the moment. Infact its content is similar to what the Governing Body had submitted to the Head of Department in the first place. This alone, in my view, caused Mr. Daniels to contend in the Affidavit that even if he had received Dr. Theron's recommendation prior to taking his own decision, it would not have made a difference to his decision. Failure on the part of the Head of Department to have regard to Dr. Theron's memorandum prior to taking a decision was stigmatized by Mr. Heunis SC as indicative of a transgression of section 6 (2) (c) (ii) of PAJA which postulates failure to take into account relevant consideration as a ground of judicial review of administrative action. I have already expressed my view on this issue supra. In view of the content of such memorandum I would accept that the Head of Department's response is consonant with reality, namely that such memorandum did not add anything more to the body of facts which he as decision-maker had before him when the decision was made on 15 November 2008. I personally, find no merits in this ground of review.

- [12] It is true that Mr. Daniels acknowledged that the considerations supportive of Ms Faasen's appointment and dismissive of that of Mr. Nefdt (as set out by Dr. Theron) had been taken into account by the Governing Body. See Annexure "NABS" to the Answering Affidavit. I accept, as Mr. Daniels does, that Ms Faasen has an "advantage" over Mr. Nefdt. There is, in my view, merits on the view Mr. Daniels took, namely that *"even to the extent that (a significant) distinction may be said to exist, the Third Respondent has sufficient potential to grow into the position and eliminate the distinction."*

The Supreme Court of Appeal in *Point High School* case *supra* did not outlaw potential as a consideration the Head of Department may have regard to. This is particularly dealt with at page 28 paragraph F to G of *the Point* case. It is important to quote the formulation by Hart AJA and this reads as follows:

".....A difference in actual ability between candidates where one is from a so-called 'designated group', though marked, may be rendered insignificant by the potential of the candidate from the designated group. In other words the benefit of employing such a candidate may only become perceptible with training and experience. I do not intend to embark upon an analysis of what precisely is meant by 'insignificant' in this particular passage, but the general intention behind the precept is plain. Employment equity provisions should only prevail in circumstances where there is approximate equality between the ability or potential of the two candidates." (Underlining is my own)

- [13] The question of potential was brushed aside by Mr. Heunis SC on the basis that Mr. Nefdt has been with the teaching department for many years and should by now have attained potential. This argument fails to accept the reality that Mr. Nefdt has always been in a coloured school. In my view, potential goes hand in glove with the transfer of skills by one teacher or a group of teachers to another. There is no doubt that the school which historically has always been white and staffed with predominantly white teachers would make any person of colour learn more and be a better professional in due course. We cannot turn a blind eye to the truth, namely that the education system

in this country was never the same for all its citizens and that the white race group had the best system of education. I thus cannot agree with Mr. Heunis SC that potential can play no role in the instant case. Mr. Heunis SC contended that Mr. Daniels takes the line that the Governing Body (and its nomination committee) failed to comply with the requirements of section 6 (3) (b) of the Employment of Educators Act. I am not so sure of the correctness of this submission. The submission is premised on paragraph 62 of the Answering Affidavit where it reads as follows:

"I strongly doubt that the Committee which interviewed the various candidates, scored them and made the recommendation to the Second Applicant that the Fourth Respondent should be recommended for the position of Deputy Principal, had thoroughly or properly considered the question of employment equity and redressing imbalances of the past in order to achieve broader representation as contemplated by Section 7 (1) (b) of the Employment of Educators Act."

- [14] According to Mr. Heunis SC, Mr. Daniels rendered himself guilty of ignoring the decision of the Supreme Court of Appeal in the *Point High School* case *supra*. It remains very important and critical to bear in mind that the above cited paragraph 62 of the Answering Affidavit came about in response to paragraph 104 of the Founding Affidavit. Perhaps this will be clearer if I quote paragraph 104 of the Founding Affidavit. This paragraph reads as follows:

"104. Ek benadruk dat die aangewese komitee van die Beheerliggaam die kwessie van gelykberegtiging deeglik oorweeg het, ook teen 'n agtergrond waar vroue tot in die jongste verlede nie

eers vir sulke poste, ongeag meriete, oorweeg is nie. Foule in hierdie verband is seer sekerlik deel van "die wanbalanse van die verlede", wat reggestel moet word "ten einde breë verteenwoordiging te bewerkstellig." Ek kan nie in artikel 7 (1) (a) inlees dat die bekwaamheid van kandidate gelykgestel kan word aan die potensiaal om tot bekwaamheid te ontwikkel nie."

[15] In my view, Mr. Daniels only began doubting that the committee had "thoroughly or properly considered the question of employment equity and redressing imbalances of the past in order to achieve broader representation", as contemplated, when he read the contents of paragraph 104 of the Founding Affidavit by Mr. Burger. That does not mean that at the time of appointing Mr. Nefdt, Mr. Daniels was not satisfied that the Governing Body had complied with the prescribed requirements. To say so is to read too much into the response Mr. Daniels gave. Alternatively put, to contend that Mr. Daniels doubted even at the time he considered documentation before him and when he proceeded to appoint Mr. Nefdt is to stretch his response to paragraph 104 of the Affidavit too far.

[16] I hold the view that it is not for this Court to endeavour to read and second-guess what was in the mind of the deponent of the Answering Affidavit in this regard. It must be remembered that consideration of the documentation placed before Mr. Daniels took place on 15 November 2008. The Answering Affidavit from which paragraph 62 is quoted was deposed to by Mr. Daniels only on 6 January 2009. Mr. Daniels does not say that at the time he considered documentation

and made the decision to appoint Mr. Nefdt, he strongly doubted that the interviewing committee (Governing Body) complied with requirements contemplated in section 7 (1) (b) of the Employment of Educators Act. To contend that in effect paragraph 62 of the Answering Affidavit so says tantamount to "putting words" in Mr. Daniels' mouth. Section 7 (1) (b) of the Employment of Educators Act has been dealt with *supra*.

[17] It is helpful to place on record the following factual scenario that, in my view, makes this case rather unique. When the Head of Department (in considering Employment Equity as part of the decision-making process) had before him a copy of the Employment Equity Profile, which was forwarded to him by the Governing Body, strangely the Head of Department was not given the racial and gender profile of the Jan Kriel's senior management team. The result was that the first mentioned used the Department's records from which the racial and gender profile of the Jan Kriel's senior management was reflected as follows:

<i>"Principal</i>	-	<i>1 White male</i>
<i>Deputy Principal</i>	-	<i>1 white female</i>
<i>Deputy Principal</i>	-	<i>1 Vacant</i>
<i>Head of Department (HOD)</i>	-	<i>3 White males</i>
<i>Head of Department (HOD)</i>	-	<i>5 White Females</i>
<i>Head of Department (HOD)</i>	-	<i>1 Vacant."</i>

The fact established from the reading of this profile is simply that the senior management team of Jan Kriel School is exclusively white and predominantly female. It is clear that the Head of Department was

aware that in the Western Cape white and coloured males are over-represented at management level in the relevant sector and that white and coloured females were under-represented. This is apparent from the following extract from the Answering Affidavit, namely:

"whilst females may very well be under represented within the Department at post level 3, employment equity can only be appropriately applied in the context of the particular racial and gender demographics applicable at the particular school."

- [18] According to the submission by Mr. Heunis SC, the Head of Department should have focused on the position in the Western Cape as set out in the Employment Equity Plan. In my view though, it is not wrong to consider the composition i.e. racial and gender profile in a particular school. This school (Jan Kriel), in my view, should not be allowed to remain exclusively white and predominantly female. Griesel J in *Elkental Primary School & Another v The Minister of Education for Western Cape Province & Others* (an unreported Western Cape Judgment in Case No. 394/2009) correctly found that the decision in question was dictated by employment considerations on Provincial, and not local (school), level. Griesel J went on to find that:

"...where gender balance at institutional level is one of the objectives of the EEP, Mr. Wyngaard's decision to ignore such balance in this instance in favour of the imbalance on provincial level, is not rationally connected to the reasons furnished for the decision"

At the risk of being accused of indulging in politics, it is concerning that almost sixteen (16) years into democratic governance of this

country there is still a school in this Province which is exclusively white and predominantly female. This should not be the position because legislation to address the imbalances of the past is in place.

It is not necessary to enumerate documents that the Head of Department had before himself when he proceeded to make the decision which is the subject of attack in the instant matter. He indeed had quite a number of documents. The score sheets depicting the scoring of each candidate and the recommendation by the Governing Body that Ms Faasen should be appointed were some of such documents presented to the Head of Department. The following comment regarding Mr. Nefdt was also before the Head of Department:

"TWEDE POSISIE: MNR NEFDT

Mnr. Nefdt (50591231) is 'n bruin, manlike persoon en is verbonde aan Bet-El Skool. Die skool het nie 'n VOO fase nie, dit is al vir 'n periode uitgefaseer en leerders kom na Jan Kriel in grade 10 tot 12. uit die onderhoud het hy as 'n goeie ervare administrateur en mensgerigte persoon navore getree. Dit het duidelik geblyk dat nie oor 'n grondige kennis beskik van die Addendum, alternatiewe assessering en die VOO-Kurrikulum nie. Hy is besonder kundig op die gebied van praktiese vakke, Jan Krielskool se akademiese aanlag maak egter geen ruimte vir die vakke nie.!"

- [19] I gather from the papers in this matter that Mr. Nefdt was involved and it conversant with the FEI phase because this was offered at Bet-El School. The fact that it is no longer offered at Bet-El School does not nullify the experience he picked-up on this FEI phase. It is also

for me difficult to comprehend the Governing Body's comment that Mnr. Nefdt lacked a sound knowledge of the Addendum, alternative assessment and academic curriculum of Jan Kriel School. The difficulty I experience in this regard is compounded by the score he achieved during the interview i.e. an aggregate of fourteen (14) out of twenty (20) for the National Curriculum Statement, I'ET and Alternative Assessment (this equates to 70%. Moreover, according to Mr. K. Baron (the Principal of Bet-Lil School): "*Mnr. Nefdt het ons assesserings beleid opgestel, in samewerking met sy afdelting en sorg dat dit nagekom word.*"

Mr. Nefdt was found by the Governing Body and its interviewing committee to be particularly proficient in the area of practical subjects the drawback being that the academic focus of Jan Kriel School's curriculum did not afford any scope for such proficiency. In my view, this is an unjustified criticism because seeing that Mr. Nefdt had no formal training in respect of the proficiency he had in certain practical subjects appointing him to the post would enable him to acquire new skills. The following attributes also militate against the criticism leveled against Mr. Nefdt, namely that:

- (a) his post-matric qualifications are BSC (Education) and Bachelor of Education;
- (b) he taught matric biology from the year 1992 to 1999; and
- (c) the Principal at the Bet-El School stated in his testimonial (dated 26/2/2008) that Mr. Nefdt was responsible for the academic department of the school, a portfolio he discharged with great empathy and conscientiousness.

The above attributes are indicative of the caliber of Mr. Nefdt and that he certainly was able to discharge the duties of Deputy Principal at Jan Kriel.

[20] I do not dispute the fact that Ms Faasen is shoulders above Mr. Nefdt and that she had a distinct advantage in that she had acted for a number of years in the position of Deputy Principal. With all this in mind I cannot fault the decisions of Head of Department. The latter considered that Mr. Nefdt had demonstrated the necessary potential, which if given the opportunity of not only efficiently discharging the duties of Deputy Principal, but also of "eliminating the advantage which the Fourth respondent enjoyed over him." In this regard I agree with the submission made by Mr. Albertus SC. The following attributes of Mr. Nefdt have not been disputed and are therefore common cause in this matter:

- (a) Mr. Nefdt was Deputy Principal for a number of years at a similar school to that of the Jan Kriel School. According to his Principal, he, together with his department, had prepared the assessment policy of the school and ensured that it was complied with;
- (b) he had knowledge of the working of the hostel and played a leading role in the planning of the hostel program and roster;
- (c) he had a thorough knowledge of school administration and management and was responsible for the school's academic department and had discharged his duties as Acting Principal with distinction;

- (d) he had acquired a proficiency in teaching practical subjects without formal training;
- (e) he was, according to the Governing Body, a good administrator;
- (f) he had completed a certificate for School Managers at the Cape Teaching and Learning Institute of the Department in 2008; and
- (g) he had expressed the desire in his application to acquire further skills and to discharge the duties required of him for the benefit of both learners and educators at the Jan Kriel School and in pursuance thereof, had taken the initiative to apply for the post.

[21] I therefore fully align myself with the following principal submission made by Mr. Albertus SC:

"Considering the above, and taking into account the motivation by the Second Applicant in respect of both candidates, as well as his own analysis thereof, the overall scores achieved by both candidates during the interviews and the fact that the Fourth Respondent had scored an overall 73%, whilst the Third Respondent had scored an overall 60%, their relative experience as Deputy Principals at similar schools; the fact that they were both able to discharge the duties of Deputy Principal; there was not a significant distinction between them as regards their relative abilities and even to the extent that such a distinction may be said to exist, the Third Respondent has sufficient potential to grow into the position and eliminate the distinction; the employment equity requirements and how each of them would advance transformation at the school, the decision-maker

decided in favour of the Third Respondent, because his appointment would advance transformation at the First Applicant."

In Mr. Albertus SC's submission the decision made by the Head of Department to appoint Mr. Nefdt was rationally connected to the information before him. I do not differ from this submission either.

[22] Mr. Hounis SC, relying on *Point High School case supra*, contended that the decision taken to appoint Mr. Nefdt over Ms Faasen was so unreasonable that it fell foul to the following extract from that case:

"The law is now clear that, in exercising the discretion vested in him by section 6 (3) (f) of the Act, the Head of Department is required to act reasonably and, by taking into account all of the relevant factors and considering the competing interests involved, to arrive at a decision which strikes a 'reasonable equilibrium' "

One must also bear in mind that the Supreme Court of Appeal held in *Trinity Broadcasting (Cliskei) v ICA of SA* 2004 (3) SA 346 at 353 T – 354 B that:

"[20] In requiring reasonable administrative action, the Constitution does not, in my view, intend that such action must, in review proceedings, be tested against the reasonableness of the merits of the action in the same way as in an appeal. In other words, it is not required that the action must be substantively reasonable, in that sense, in order to withstand review. Apart from that being too high a threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as substantively unreasonable: cf Bel Porto School Governing Body and Others v Premier, Western Cape, and Another. As made clear in Bel Porto, the

review threshold is rationality. Again, the test is an objective one, it being immaterial if the functionary acted in the belief, in good faith, that the action was rational. Rationality is, as has been shown above, one of the criteria now laid down in s 6 (2) (f) (ii) of the Promotion of Administrative Justice Act. Reasonableness can, of course, be a relevant factor, but only where the question is whether the action is so unreasonable that no reasonable person would have resorted to it (see s 6(2) (h))."

[23] I am of the view that the Head of Department acted reasonably in that he had to consider the racial profile of the management of Jan Kriel School. He considered the comparative abilities of Mr. Nefdt and that of Ms Faasen insofar as they related to the position applied for as well as whether or not they met the equity requirements for the position. The Head of Department complied with the relevant provisions of the Employment of Educators Act, the Employment Equity Act, the Department's Employment Equity Plan as well as the Employment Equity Directive. I do not share the view that the Head of Department acted unreasonably in the circumstances of this particular case.

[24] The Policy Directive was developed and distributed by the Department. This Policy Directive is for implementation of Employment Equity in schools (January 2008). Therefore the equity profile of the Department's employees, measured per post level against the equity profile of the demographics of the Western Cape remains the Department's primary objective. It is needless to mention

that each case necessarily must be considered in terms of a variety of factors including the overall promotion of employment equity within the Department. In my view, the appointment of Mr. Nefdt rather than Ms Faasen was intended to make and in fact made the management component of Jan Kriel School more representative of the demographics of the Province and was therefore in line with equity requirements and it served to advance transformation at Jan Kriel School. Mr. Heunis SC submitted that coloured (and white) males are over-represented at management level in the Western Cape and white (and coloured) females are under-represented. There is no dispute on this. But I hold that the focus should be on the individual school. In this matter the focus should be on Jan Kriel School and not the Western Cape Province.

[25] I find it necessary to refer to the Employment Equity Plan of 2008 which is currently in operation. Paragraph 3.4.3 of the 2008 Employment Equity Plan quoted earlier on in this Judgment makes it clear what the aim is. There is no harm in repeating this hereunder:

"All appointments will be based on the inherent requirements of the position. However, where there is an insignificant gap between possible candidates in terms of merit/performance, preference will be given to an employee from a designated group, should the appointment contribute to the improvement of the representation of specific designated groups. Should there be a candidate who is rated lower than the third candidate, but who would contribute to the employment equity targets of the WCED, then that candidate should be considered for nomination (Part of Affirmative Action Policy)."

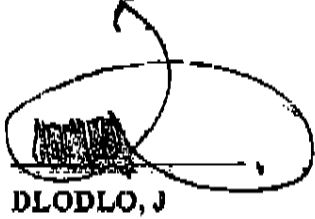
The difficulty in this matter is that Mr. Nefdt and Ms Faasen both belong to designated groups. In my view, what needs to happen in a matter where both candidates belong to the designated group, is that one must look at the race and gender profile of the individual school and one must then ask oneself which candidate's appointment can result in reduced racial and gender domination of a particular race at Jan Kriel School. I have mentioned earlier on that the two (2) candidates do not come from the same educational background. To me that is one of the weighty considerations that favoured the appointment of Mr. Nefdt rather than Ms Faasen. It is my view that the fact that Ms Faasen comes from what I want to call, a superior educational background compared to Mr. Nefdt, counts for the gap in the scorings which the two (2) attained.

[26] I bear in mind that Potgieter AJ in the *Point High School* case *supra* (paragraph 33) found that it could not be in the best interests of learners to appoint a candidate who has been properly assessed to be significantly less suitable than some of the other recommended candidates in the absence of any justifiable reasons to do so. I have accepted earlier on in this Judgment that Ms Faasen is indisputably the best candidate of all three (3) candidates. I also accept that Mr. Nefdt was assessed to be less suitable than Ms Faasen by the Governing Body and its interviewing committee. I hold, though, there are many justifiable reasons and/or weighty considerations why the Head of Department decided to appoint Mr Nefdt rather than Ms Faasen. I hasten to add that Mr. Nefdt is also not a newcomer in the Department of Education and particularly to a special school which

Jan Kriel is. I have gathered from the papers in the instant matter that at Jan Kriel School a few non-white pupils have enrolled as well. It is certainly in the best interests of such non-white students and their parents that there be at least one (1) non-white member of staff at the senior management level of Jan Kriel School which currently is exclusively white and predominantly female. I bear in mind that preference of Mr. Nefdt over Ms Paasen may be described as discrimination on basis of race. But there is a rationale behind this appointment. This "discrimination" has a purpose to achieve. Its purpose is clear if one has regard to the enabling legislation. Among other things it is intended to correct the wrongs of the past. In that sense I would call it "positive discrimination."

- [27] The best interests of the learners were, in my view, not ignored. The Head of Department considered the respective abilities of both Mr. Nefdt and Ms Paasen (as Mr. Albertus SC submitted) and how each one of them could advance transformation at Jan Kriel School. In my view, the Head of Department sought to strike a reasonable equilibrium between these competing interests as he was obliged to do. See: *Point High School supra*. I do not find the decision by the Head of Department to appoint Mr. Nefdt to have contravened any of the provisions of PAJA and therefore having rendered itself to be reviewable and liable to be set aside. In the circumstances I would dismiss this Application to review and set aside such decision. On the question of costs, my order would be that the costs shall follow the result. That means in my Judgment the Applicants shall pay the costs of this matter. This, I would order, despite the fact that Jan Kriel

School claims poverty and that Mr. Albertus SC also conceded that his client shall not insist on costs. When parties litigate they must know that at the end of the day somebody shall have to pay the costs of litigation.



DLODLO, J