

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

In the matter between:

EIKENDAL PRIMARY SCHOOL First Applicant

**THE GOVERNING BODY OF EIKENDAL
PRIMARY SCHOOL** Second Applicant

and

**THE MINISTER OF EDUCATION FOR
THE WESTERN CAPE PROVINCE** First Respondent

**THE HEAD OF THE WESTERN CAPE
EDUCATION DEPARTMENT** Second Respondent

HILARY PETERSEN Third Respondent

CALVYN JAMES SOLOMONS Fourth Respondent

JUDGMENT DELIVERED: 8 APRIL 2009

GRIESEL J:

Introduction

[1] The first applicant is the Eikendal Primary School (*the school*) situated in Kraaifontein in the Western Cape and the second applicant is the school's governing body. The applicants seek to review the decision of the second respondent, the Head (*HoD*) of the Western Cape

Education Department (*WCED*), appointing the third respondent (*Mrs Petersen*), instead of the fourth respondent (*Mr Solomons*), in the post of deputy principal at the school.

[2] The decision in question was made by Mr Harry Wyngaard in his capacity as Acting Director: Internal Human Capital Administration in the WCED, acting in terms of delegated authority by the HoD in terms of the Employment of Educators Act 76 of 1998 (*the EEA*). It is common cause that his decision was the result of ‘administrative action’ as defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (*PAJA*). The applicants claim that the decision is reviewable on various grounds listed in s 6(2) of PAJA.

[3] The application is being opposed by the WCED and the HoD, while the third and fourth respondents have not taken any active part in the present proceedings. Where reference is made to ‘the respondents’ herein, it therefore refers to the first and second respondents collectively.

Factual background

[4] During August 2008 the school advertised for applications to fill the post of deputy principal on its staff with effect from 1 January 2009. The requirements for the post were described in the Vacancy List circulated by the WCED as follows:

‘Teaching and leadership skills in intermediate and senior phase: Learning areas: mathematics and technology,¹ administrative, managerial and organizational skills in the following areas: Management and financial skills, operational skills towards

¹ The Afrikaans version reads: ‘*Leerareas: wiskunde / tegnologie*’, a perceived difference that featured prominently in the decision in question, as will appear from the discussion later herein.

general school functionality, promotion and management of general school safety, excellent communication skills, curriculum management, basic computer skills, willingness to work beyond normal school hours, staff development, maintaining good discipline, interactive in promotion of school community development, interpersonal and conflict resolution skills, athletics, soccer, chess, cross-country and netball (any two).’

[5] The full governing body participated in the process of sifting, short-listing and interviewing of the various applicant candidates. In doing so, the governing body followed the procedure as prescribed in detail by the WCED. The committee was required to put a series of prescribed and approved questions to each candidate, aimed at assessing the level of each candidate’s ability in the fields of school and classroom management, knowledge of the curriculum and learning programmes, inter-personal relationships, development and implementation of new systems and teaching methods, administration, work ethic and leadership.

[6] At the conclusion of the process, the governing body minuted the following conclusion with reference to the two candidates in question:

Hilary Petersen

- Redelik goed van haar taak gekwyt, sterk kandidaat
- Deurgeskemer in onderhoud sy is meer ’n lewensoriëntering persoon.
- Nie vr. 5 volledig beantwoord nie – meer proses verduidelik, nie hoe sy dit gaan doen nie.

Calvyn Solomons

- Uitstekend van taak gekwyt
- Sterk kandidaat
- Het alle vrae volledig beantwoord
- Kandidaat se ondervinding het duidelik deurgeskemer
- Die komitee is dit eens dat hy die geskikste kandidaat is.

[7] The governing body unanimously placed Mr Solomons first in order of preference, with Mrs Petersen second and a certain Mr Harris third. The whole process, including the governing body's order of preference of the three candidates, was overseen by a Departmental representative, Mr Smith. According to the minutes, Mr Smith was 'tevrede dat die proses deursigtig en regverdig afgehandel is' and thanked the governing body on behalf of the WCED 'vir opofferings gemaak'.

[8] The short list of three names was thereupon submitted to the HoD by the governing body, accompanied by a letter of motivation, explaining in some considerable detail why Mr Solomons was the governing body's preferred candidate. On 10 December 2008, however, the governing body's recommendation of Mr Solomons was turned down by the HoD when he announced his decision to appoint Mrs Petersen instead, thus giving rise to the present application. (Mr Solomons had previously, during 2007, been recommended by the governing body as its preferred candidate for a similar position at the school, but had on that occasion also been overlooked by the HoD in favour of a woman.)

Reasons advanced by the decision-maker

[9] In justification of his decision to reject the governing body's recommendation, Mr Wyngaard explained that he considered both candidates to fulfil the inherent requirements of the position. With regard to the relative abilities of the two candidates, he came to the conclusion that both were regarded by the governing body as 'strong candidates' and that there was 'not a significant gap' between them.

[10] He was obliged to consider the provisions of the Employment Equity Act 50 of 1998 (*the Equity Act*), the provisions of the WCED's Employment Equity Plan (*EEP*),² the WCED's policy implementation directive, and the provisions of the EEA, particularly ss 7(1) and 6(3)(f) thereof.

[11] He then proceeded to consider the gender profile of the senior management of the school, which at that stage contained an equal distribution of males and females. Due to the under-representation of females within the WCED overall, however, he decided that the appointment of Mrs Petersen to the position of deputy principal would 'advance transformation within the WCED' and saw this factor as tipping the scales in her favour.

Discussion

[12] The appointment of educators within the WCED is regulated by a stringent and an intricate statutory framework. Such framework has recently been analysed and authoritatively interpreted by the Supreme Court of Appeal in *Head, Western Cape Education Department and Others v Governing Body Point High School and Others*.³ In that case, the SCA dealt in some detail with the provisions of ss 6(3) and 7(1) of the EEA, as well as the provisions of para 3.4.3 of the EEP. Those same provisions also govern the decision in this case. It is accordingly not necessary for this Court to repeat those provisions herein or to reiterate

² Adopted by the WCED pursuant to the provisions of s 20 of the Equity Act.

³ 2008 (5) SA 18 (SCA), an appeal from a judgment in this Division in *Governing Body of the Point High School and Another v Head, Western Cape Education Department and Others* [2007] JOL 19989 (C).

the conclusions reached by the SCA in that regard. Suffice it for present purposes to highlight the following salient aspects:

- In terms of s 6(3)(a) of the EEA, 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.
- In making its recommendation, the governing body must ordinarily submit in order of preference to the HoD a list of at least three names of recommended candidates but, despite the order of preference, the HoD may appoint any suitable candidate on the list.⁴
- In exercising the discretion vested in him by s 6(3)(f), the HoD does not enjoy an unfettered discretion, but 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'.⁵
- Where the governing body has performed its functions properly, the HoD must obviously attribute 'substantial weight' to the recommendations submitted to him.⁶
- While it is quite correct that he has a specified discretion to disregard the governing body's motivated recommendation and even its order of preference, he must clearly exercise this discretion in a manner

⁴ Section 6(3)(c), read with s 6(3)(f).

⁵ *Point* case (SCA) para 10, referring to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) paras 45 and 49.

⁶ *Point* case (SCA) para 11.

which conforms to the statutory requirements of fair administration in the Constitution and in PAJA and also, in general, with the Department's policy.⁷

The Employment Equity Plan

[13] Paragraph 3.4.3 of the EEP provides as follows:

'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 or specific designated groups. ...'

[14] There was much debate before us as to the inherent requirements of the position in question. Thus, the applicants submitted that the qualification and ability to teach mathematics was an inherent requirement of the position. They referred to the English version of the advertisement for the position,⁸ which stated as requirements *inter alia* '(t)eaching and leadership skills in intermediate and senior phase: learning areas: mathematics *and* technology [...]' (my emphasis). The respondents, on the other hand, relied on the Afrikaans version which refers to 'leerareas wiskunde / tegnologie' which, according to them, put those two learning areas as alternative requirements. They also sought support for their interpretation in one of the questions put to candidates during the interviews, where candidates were requested to answer the question: 'How involved are you in the development of your learning

⁷ *Id.*

⁸ Quoted in para [4] above.

area whether mathematics or technology, and at what level are you involved?’

[15] In the view that I take of the matter, it is not necessary to resolve this dispute. The fact is that, even where both candidates meet the inherent requirements of the position,

‘(e)mployment equity provisions should only prevail in circumstances where there is approximate equality between the ability or potential ability of the two candidates.’⁹

[16] It is true that, unlike in the *Point* case, the governing body in this instance did not rate the various candidates with reference to a score sheet. This has enabled Mr Wyngaard to rationalise his decision by arguing that there was in fact an insignificant gap between the two candidates in question. The applicants, however, vehemently denied that this was the case and submitted, to the contrary, that the gap between the two candidates in this matter was actually more significant than the gaps between the various candidates in the *Point* case.

[17] In their letter of motivation, the governing body went to some considerable length to validate their recommendation of Mr Solomons as ‘die mees bevoegste kandidaat’. In fact, so strongly did the governing body feel about their preferred candidate (according to Mr Gouws, the Chair of the governing body) that, had the option of submitting only one candidate been open to them, the governing body would have submitted only the name of Mr Solomons. The respondents countered that, by virtue

⁹ *Point* case (SCA) para 14 and (CPD) para 29.

of the provisions of s 6(3)(c) of the EEA,¹⁰ this option was indeed open to the applicants. The applicants, in turn, alleged that it was inflexible Departmental policy to only allow fewer than three names to be submitted to the HoD where there were fewer than three applications for the position. The respondents deny that there is such a policy. Again, I do not find it necessary to resolve this side-issue. The fact of the matter is that the applicants did not put this policy to the test in the present instance by submitting fewer than three names to the HoD. In the result, we are not called upon to review the supposed policy (if it exists).

[18] Be that as it may, having regard to the evidence placed before them – as well as the undeniable advantage of having seen and heard the respective candidates being interviewed – I am satisfied that the governing body was entirely justified in concluding that there was a significant gap between the two candidates in question. The reasons that weigh with me in this regard are mainly the following:

- Even if it were to be accepted in favour of the decision-maker that he was justified in regarding mathematics and technology as alternative learning areas as far as the inherent requirements of the position were concerned, mathematics had been identified by the governing body as a priority learning area for the school. In that regard, it was a known fact that Mr Solomons had excelled in taking ‘ownership’ of mathematics at the school and the governing body was entitled to regard that as a major factor in his favour.

¹⁰ Section 6(3)(c) reads as follows:

‘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.’

- Mr Solomons is qualified to teach both mathematics and technology. Mrs Petersen, by contrast, has no qualifications or experience whatsoever with regard to mathematics. As for her ability to teach technology as a learning area, Mr Wyngaard significantly overrated her experience in this regard by accepting that she had eight years' experience in that field, whereas it was actually less than five years.
- In any event, the learning areas of mathematics/technology were not the only inherent requirement of the position. As is apparent from the advertisement, there were various other requirements laid down by the governing body with which candidates had to comply. With regard to the other inherent requirements, especially the requirement of management and financial skills, it is apparent from the interviews that there was a marked disparity between the two candidates and that Mr Solomons was significantly better qualified and more experienced than Mrs Petersen. Moreover, he had achieved demonstrable success at the school in this field.
- Mr Solomons was the present incumbent in the position, albeit in an acting capacity, and he had been acquitting himself most satisfactorily of his responsibilities. The governing body was, in my view, entitled to regard this as a significant advantage over a candidate who, as an outsider, is an unknown factor to the governing body.

[19] In the circumstances, I cannot agree with the decision-maker's evaluation of Mr Solomons and Mrs Petersen as being 'similarly placed as regards the teaching of mathematics and technology', with the corollary that they 'were both equally suitable to be appointed to the said

position'. On the contrary, I agree with the governing body that the inherent requirements of the position called for the appointment of Mr Solomons on the basis of a significant gap between the two candidates regarding their respective 'merit/performance'. It follows that, in my view, considerations of employment equity should not have been relied upon in this instance in order to overrule the governing body's well-motivated recommendation. Mr Wyngaard seems to have overlooked this, because he said the following in his answering affidavit herein:

'Even if it could be said that the fourth respondent was better qualified than the third respondent for the position in question, and that there existed a significant gap between them as regards their respective abilities (which I deny), I nevertheless was of the view that she met the inherent requirements for the position, would be able to discharge her duties in the said position competently and that her appointment would advance transformation within the WCED.'

In my view, this approach involves the incorrect application of para 3.4.3 of the EEP.

[20] In any event, even if employment equity considerations were to be regarded as relevant in this instance – notwithstanding the significant gap between the two candidates – the decision in question was dictated by employment equity considerations on *Provincial*, and not *local* (school), level. According to the statistics contained in the EEP, it appears that at Provincial level, 'coloured males' are over-represented in the WCED except at post level 1, whereas 'coloured females' are under-represented at levels 3 to 6 and it was this imbalance that Mr Wyngaard sought to redress when he made the decision.

[21] As noted above,¹¹ however, the gender profile of the senior management of the school contained an equal distribution of males and females. Thus, the school has succeeded (at least at management level) in meeting the equity targets set by the EEP as well as the policy implementation directive in respect thereof 'to ensure that its work environment reflects representivity with regard to [...] gender'. (With regard to the educator corps of the school as a whole, however, males are by far outnumbered by females – 22 to 7.)

[22] I accordingly agree with the submission of the applicants that this was not an instance where the provincial statistics and targets required such prominent consideration as was afforded it by Mr Wyngaard. In my view, in deciding to appoint a female to the position, Mr Wyngaard took into account irrelevant considerations and failed to take into account relevant considerations. Moreover, 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.

Reasonableness

[23] In the *Point* case, the Supreme Court of Appeal held that the HoD's decisions were impugnable 'on the broad ground of unreasonableness as contemplated in s 6(2)(h) [of PAJA]'. This was so, according to Hurt AJA, because –

¹¹ Para [11] above.

'[...] the HoD proceeded without a proper understanding of the scope of the discretion which he was called upon to exercise. He disregarded the necessity of actually weighing the equity considerations to which he sought to give effect, against the interests of the Governing Body and the School (including its pupils) to have the benefit of improved ability in the teaching staff. In doing so he omitted to reach a reasonable equilibrium between these interests, rendering his decision reviewable on the basis described in *Bato Star*.'¹²

[24] On a proper assessment of the facts of this matter, the HoD again displayed a lack of proper understanding of the scope of the discretion which he was called upon to exercise, failed to weigh up the relevant considerations and therefore failed to reach a reasonable equilibrium between those interests.

[25] In all the circumstances, I am satisfied that the applicants have succeeded in establishing that the decision of the HoD to appoint Mrs Petersen ahead of Mr Solomons is impugnable under the provisions of s 6(2) of PAJA, first, because irrelevant considerations were taken into account, while relevant considerations were not considered;¹³ secondly, on the 'broad ground of unreasonableness'.¹⁴

Relief sought

[26] It is clear from the record that, but for the above errors committed by the decision-maker, he would have appointed Mr Solomons, who was properly assessed to be best suited for the appointment. As in the *Point* case, it is clear, furthermore, that little purpose

¹² *Point* case (SCA) para 15.

¹³ Para (e)(iii).

¹⁴ Para (h).

would be served by referring the matter back to the second respondent to be dealt with *de novo*. In these circumstances, it was common cause between the parties that, if the applicants' contentions were to be upheld, an order similar to the one in the *Point* case would be justified,¹⁵ namely setting aside the appointment of Mrs Petersen and directing the HoD to appoint Mr Solomons to the position.

Costs

[27] As for costs, the applicants sought a special costs order, on the grounds that it would be highly inequitable that the applicants should be out of pocket, even if successful in the case, given that:

- the WCED has in this case again committed many of the same errors which have already been pointed out in the two *Point High School*-cases. Given the involvement of Mr Daniels in these cases, this is particularly untenable.
- as in previous cases, the reasonable wishes of the applicants have been ignored and the interests of learners have been compromised by the WCED's actions.

[28] I have carefully considered this argument, but am not persuaded that the attitude by the WCED in this instance was so unreasonable as to justify a special costs order as a mark of the Court's disapproval.

¹⁵ Cf *Point* case (*SCA*) para 17.

[29] The applicants also asked for an order that the applicants' bill of costs be taxed by the Law Society, rather than the Taxing Master of this Court in view of the lengthy waiting period for taxation of bills by the latter. Although somewhat unusual, the respondents did not oppose this request which will, accordingly, be granted as part of the Court's order. The parties were further agreed that the employment of two counsel was justified and that the costs should be taxed on that basis.

Order

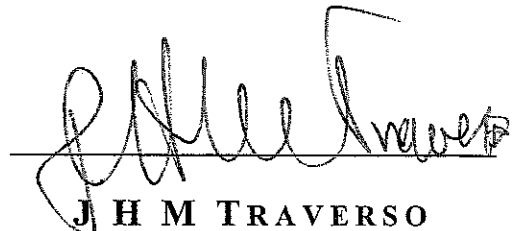
[30] For the reasons set out above, the following order is issued:

1. **The decision of the second respondent to appoint the third respondent as deputy principal of the first applicant is reviewed and set aside.**
2. **The second respondent is directed to appoint the fourth respondent as deputy principal of the first applicant.**
3. **The first and second respondents are ordered to pay the costs of the application, such costs to include the costs of two counsel and to be taxed by a taxation committee of the Cape Law Society.**



B M GRIESEL
Judge

TRAVERSO AJP: I agree. It is so ordered.



J H M TRAVERSO
Acting Judge President