IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH-EASTERN CAPE LOCAL DIVISION)

CASE NUMBER: 808/07

In the matter between:

LAWSON BROWN HIGH SCHOOL	APPLICANT
AND	
THE MEMBER OF THE EXECUTIVE COUNCIL, DEPARTMENT OF EDUCATION, EASTERN CAPE PROVINCE	1ST RESPONDENT
THE HEAD OF DEPARTMENT, DEPARTMENT OF EDUCATION, EASTERN CAPE PROVINCE	2ND RESPONDENT
THE DISTRICT DIRECTOR, DEPARTMENT OF EDUCATION, PORT ELIZABETH	3RD RESPONDENT
DONOVAN P CAIRNCROSS	4TH RESPONDENT

JUDGMENT

PILLAY, J

This is the return day of a Rule Nisi granted by agreement and calling upon the Respondents to show cause why an order in the following terms should not be finally granted:

1. That the administrative actions of the First, Second and Third Respondents in appointing the Fourth Respondent as principal of the Applicant on 23 April 2007, be judicially reviewed and set aside.
2. That the Respondent pay the costs of the application, jointly and severally, the one paying the other one to be absolved.

This application is one of a number of applications related to the same issue. Some have been settled and another is still pending.

It may be as well to briefly sketch the background and the relevant chronological events in regard hereto because what has further complicated the issue is an amendment of the relevant law in the meantime.

In January 2005, the Department advertised the post of school principal calling upon applicants to apply to fill the vacancy at the Applicant School. A number of people applied.

At the end of that phase, a panel charged with dealing with the short listing, interviews and to make an appropriate recommendation, indeed made a recommendation to the School Governing Body ('SGB'). At the end of that phase, the SGB of the Applicant accepted the outcome of the process and decided to recommend one Mr Cyril Prinsloo as the candidate it regarded the most suitable to be appointed as principal of the Applicant school.

In accordance with the prescribed form, the Applicant listed all the interviewed persons in order of preference and indicated, as invited to do, which of these were not regarded as appointable to the position. In this case, the obligation to consider the recommendation of the SGB fell on the Provincial Head of the Department in terms Section 6 (3) b of the Employment of Educator's Act 76 of 1998 ('the Act').

In the course and scope of his duties, the Head chose to appoint the Fourth Respondent to the post despite Mr Cyril Prinsloo being the Applicant's first choice and Fourth Respondent its second choice.

As a result thereof, Applicant brought an application, case no. 2641/05 seeking relief that the decision be reviewed and set aside. The application (case number 2641/05) was settled on 6 May 2005 by agreement in terms of which the appointment by the Second Respondent of the Fourth Respondent to the principal's post was withdrawn. Furthermore in terms of the said agreement, the second respondent undertook to consider the Applicant's recommendation that Prinsloo be appointed, within two weeks thereof.

Soon thereafter the Fourth Respondent filed an application under case no. 2739/05 seeking the aforementioned withdrawal of his appointment to be set aside. The application was unsuccessful.

It seems that the application case no 2739/05 took more than two weeks to bring to finality. This obviously prevented the Second Respondent from complying with his undertaking to deal with Mr Cyril Prinsloo's position within the two week period which would have expired on or about 20 May 2005.

Despite the enforced delay, the Applicant launched an application to compel compliance with the agreed order in case no. 2641/05. It seems that the then Head of Department wrote a letter dated 18/05/2005 to the Applicant

requesting an urgent meeting with the School Governing Body on 19 May 2005. The letter clearly disclosed that the purpose of the meeting was to discuss the appointment of the principal.

The Head of the Department confirmed in a letter dated 20th May 2006 and addressed to the Chairman of the SGB that all legal formalities and court proceedings had, by agreement, been suspended and that he, in consultation with the First Respondent and certain officials, make a determination on how to further deal with the issue. He clearly urged a review of the recommendation and a serious consideration of the affirmative action obligations of both the school and employer. He required a further recommendation within fourteen (14) days of the letter.

The vice-chairman of the SGB, who acted herein on behalf of the Applicant denied any agreement as alleged by the second Respondent.

Whatever the situation might be, the matter was argued basically on legal principles despite the possible academic nature thereof.

Inter alia, Mr Pienaar who appeared on behalf of the Respondents, argued that since the dispute arose, the procedure in regard to such appointments, had by legislation been amended. He argued further that the import of the amendment clearly set out the rights and obligations of both the Respondents and the Applicant. He argued therefore that while the dispute in question

arose from the procedure governed by the law as it then was, the amendment renders this application academic and for practical reasons the application should be dismissed. See: *Commercial Union Assurance Company of SA LTD v Clarke* 1972 (3) SA 508 (AD) and *SCA Metcash Trading LTD v Credit Guarantee Insurance Corporation of SA* 2004 (5) SA 511 SCA. Mr Pienaar also pointed out that the law as it now stood, in any event allowed for the Respondent to choose and appoint from the list of persons regarded as appointable.

Mr Mullins, who appeared on behalf of the Applicant, insisted that the application should be adjudicated on the basis of the law as it then stood and as academic as the application might allegedly be, the Applicant was still entitled to a judgment based on its actions in terms of the law as it then was.

It is doubtful whether this is a case where events have been overtaken by the law rendering the relief sought academic or of no force or effect, even if granted. Neither is it an application which should fail merely because the act complained of was or has now been rendered the only practical and workable solution in the circumstances.

In my view, absent any complaint regarding the appointment in question, it is one which would have taken effect in terms of the Act as it was prior to the amendment, the appointment would have been valid. Consequently it would

seem that I should approach this matter on that basis and examine whether the law as it then stood was properly complied with.

I do so mindful of the existence of the amendment but I will disavow myself of the implications thereof.

Briefly, it would seem that this determination should be based on a proper interpretation of the Act as it then was. In particular, Section 6 (3)(b) of the Act is pertinent. It reads as follows:-

"The Head of Department may only decline the recommendation of the governing body of the public school or the council of the further education and training institution if –

(i) any procedure collectively agreed upon or determined by the Minister of the appointment, promotion or transfer has not been followed;

(ii) the candidate does not comply with any requirements collectively agreed upon or determined by the Minister for the appointment, promotion or transfer;

(iii) the candidate is not registered, or does not qualify for registration, as an educator with the South African Council for Education;

(iv) sufficient proof exists that the recommendation of the said governing body or council, as the case may be, was based on undue influence; or

(v) the recommendation of the said governing body or council, as the case may be, did not have regard to the democratic values and principles referred to in section 7(1)."

The argument by the parties centred around the issue of interpretation of the section especially the fact that section 6 of the Act speaks to a candidate and recommendation (my underlining). It is important to note that both notions

are referred to in the singular. Save for *Laerskool Gaffie Marree Members of the Executive Council for Education, Training, Arts and Culture, Northern Cape and Others* 2003 (5) SA 367, there does not seem to be any decided cases reported on this specific point and/or the implication of these words being used in the singular. I have not been referred to any other decision nor have I been able to find any other on point.

The recommendation of the SGB to the Head of Department has to be set out in document HRA : Form C1. This document makes provision for a primary recommendation in respect of one candidate. Paragraph 8 thereof makes provision for the motivation of the appointment of a recommended applicant (singular and my underlining).

Paragraph 9 thereof makes provision for the remaining short-listed candidates to be ranked and asks for specific reasons, if any, for regarding any of them as not appointable. This paragraph also clearly indicates that the remaining short listed applicants recommended for appointment should be listed in order of preference.

As in the Laerskool Gaffie Marree case, the argument in this case was crystallized into an issue as to whether the 'recommendation' referred to in section 6(3)(b) was in regard to a singular person ranked first or whether the whole list of appointable persons should be regarded as the recommendation.

Noteworthy is that despite the provision that another candidate might be appointed if the preferred one is not able to fill the post, there is no provision for the motivation of that candidate as is the position for the preferred candidate provided for in paragraph 8. Technically, therefore a post could be filled without full motivation to the Employer.

This is anomalous but permissible in certain circumstances as set out in paragraph 9 of HRA: Form C1. It therefore strengthens the contention that the section must be restrictively interpreted so as to allow for the preferred candidate to be appointed subject to such a candidate taking up the post.

It is not the Respondent's case that the recommendation falls foul any of the directives as envisaged in section 3(6)(b)(i),(ii),(iii),(iv) and (v). Its case is based on the belief that the appointment could be made from a list of appointable candidates. Neither is it the Respondent's case that the preferred candidates was not able to accept the offer. The Respondents were therefore not entitled to appointment any other candidate but the first preferred candidate.

In the circumstances, it is clear that the disregard for the recommendation of the SGB and the appointment of the Fourth Respondent instead is *ultra vires* and the application must succeed.

There is nothing specific which urges an unusual costs order and I think that costs should follow the result. I might add that I think it would however be appropriate to qualify the order as to costs so that no unfairness arises in that regard because of multiple Respondents.

In the result, I make the following order:-

1. The appointment of the Fourth Respondent by one or more of the First, Second and Third Respondents is reviewed and set aside;
2. The Respondents are ordered to pay the costs of the application, jointly and severally, the one paying the other(s) be absolved.

R PILLAY
JUDGE OF THE HIGH COURT