In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No: 14098/2019

In the matter between:

SCHOOL GOVERNING BODY, PAARLZICHT PRIMARY SCHOOL	**Applicant**
and	
MEMBER OF EXECUTIVE COUNCIL FOR EDUCATION, WESTERN CAPE	**First Respondent**
HEAD OF EDUCATION, WESTERN CAPE EDUCATION DEPARTMENT	**Second Respondent**
PAARLZICHT PRIMARY SCHOOL	**Third Respondent**
D.J DURAAN N.O	**Fourth Respondent**
D OORDMEYER	**Fifth Respondent**
ACTING WYNLAND DISTRICT MANAGER, WESTERN CAPE DEPARTMENT OF EDUCATION	**Sixth Respondent**

Date of Hearing : 16 November 2020
Date of Judgment : Delivered electronically on 11 February 2021

JUDGMENT

LEKHULENI AJ

INTRODUCTION

[1] This is a review application. Initially, this matter served before this Court on an urgent basis. It consisted of two parts, i.e. Part A and Part B. Part A dealt with an application for an interdict and Part B dealt with the review proceedings. The applicant and the second respondent have since reached an agreement with regard to the prayers in Part A and it was recorded that there shall be no order in respect of Part A as a consequence thereof. In essence, the issues before this Court relates to Part B, that is, the review proceedings.

[2] The applicant (a School Governing body of the third Respondent) seeks to review and set aside the decision of the second respondent taken on 26 January 2019 to appoint, the fourth respondent ("Mr. Duraan") as the principal of third respondent. Plainly summarized, the applicant avers that the second respondent as a result of bias, decided to appoint Mr Duraan as the principal of the third respondent. When the second respondent so appointed Mr Duraan, he did so unreasonably and without considering the preferred candidate by the applicant being the fifth respondent *("Mr Oormeyer")* by placing too much weight and / or emphasis on the psychological assessment of Mr Oormeyer, and without considering factors indicating that Mr Oormeyer was a better candidate than Mr Duraan. The applicant contended that the decision of the second respondent is procedurally tainted.

[3] As stated by the parties, the schooling system at the third respondent has not been disrupted by this application. At the hearing of this matter, the Court was informed that all the necessary arrangements have been made towards the

management of the third respondent. What was outstanding, was the finalization of this review application. This application is only opposed by the second respondent.

PRELIMINARY ISSUES

The misjoinder of the first respondent

[4] The second respondent took issue with the misjoinder of the first respondent. According to the second respondent, he is the functionary that took the impugned decision. The second respondent avers that he took the decision in the exercise of his statutory powers in terms of section 6 of the Employment of the Educators Act 76 of 1998 ("*the EE Act"*) and not the first respondent. In *casu*, the Provincial Minister was not the decision maker. The second respondent further contends that as the Provincial Minister did not make the impugned decision, there was accordingly no basis in fact or in law to join the Provincial Minister in these proceedings, let alone cite her as the first respondent. The second respondent further submitted that the applicant failed to address the misjoinder of the first respondent in either its replying affidavit or its heads of argument. As a result, the second respondent avers that there was no basis for the applicant to join the first respondent.

[5] Indeed the applicant did not deal with this challenge. Having had regard to the powers of the second respondent, I tend to agree with their submissions on this point. In my view, there was no basis in law or fact why the Provincial Minister was joined in this matter. In terms of section 6(3)(a) read with 6(3)(f) of the EE Act the power to appoint, promote or transfer educators is vested in the head of department, that is, the second respondent in this matter. It remained common cause that the decision to appoint Mr Duraan was taken by the second respondent in terms the EE

Act. It is that decision that is the subject of review in this matter. In my opinion, the joinder of the Provincial Minister in this case is ill-advised and unwarranted. To this end, the submissions by Mr Farlam, the second respondent's counsel, that there was no basis in law for the applicant to join the first respondent are legitimate. This preliminary point in my view should succeed.

Unreasonable Delay in launching this application

[6] The applicant filed this application seventeen (17) days out of time. The second respondent submitted that the applicant was informed of the decision to appoint Mr Duraan on 29 January 2019. The respondent further states that it ought to have been clear to the applicant on that date that in terms of the EE Act, there was no internal mechanism available to it to challenge the decision. According to the second respondent, as at 30 January 2019, the applicant had already decided to take issue with the decision of the second respondent as it wrote to the Director Education for the Cape Wynland District voicing out its dissatisfaction in relation to the appointment of Mr Duraan. In pursuing this complaint further, the applicant requested the reasons from the second respondent for his decision. On 01 April 2019, the second respondent furnished the reasons for the appointment of Mr Duraan as a suitable candidate in terms of section 6(3)(f) of the EE Act after same were requested. By that time, the applicant had already sought legal opinion and had been advised that there were no internal appeal procedures. The remaining option was to proceed with the review proceedings. To this end, the second respondent contends that the applicant should have taken legal steps sooner to challenge the decision that the applicant was not prepared to accept. Notwithstanding, the applicant delayed until 14 August 2019, some seven months

after being informed of the decision to launch this application. The second respondent is of the view that the applicant has not provided any justification for the delay in instituting this application and has not properly sought condonation for the delay.

[7] The applicant on the other hand initially contended that the delay in filing this application was negligible and that there was no application for condonation necessary to bring this application. However, after the second respondent challenged the delay in filing this application, in its replying affidavit, the applicant applied for condonation. The applicant also stated that it exchanged correspondence with the second respondent in good faith in order to avoid litigation at all costs. It did so over a period of six months. The applicant avers that the array of correspondences accounts for the delay in bringing this application and that the second respondent also delayed significantly in producing his reasons for his decision. This delay had an impact in the launching of this application. The reasons for the decision were only produced some three months after the decision was taken and an entire month after the applicant requested his reasons. The applicant contended that it was in no position to review the decision before this point. In the applicant's view, the second respondent has not sought to demonstrate any prejudice caused by this slight delay.

[8] Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000, *("PAJA")* provides that any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action,

became aware of the action and the reason for it, or might reasonably have been expected to have become aware of the action and or the reasons. Section 9(1) of PAJA provides that "the 180-day period may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal, on application by the person or administrator concerned." It is trite law that such application may be granted where the interest of justice so requires. Where the delay can be explained and justified, then it can be considered reasonable, and the merits of the review can be considered - See *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at para 153.

[9] In *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) at para 50, the court said:

> The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself.

[10] At common law the application of the undue delay rule requires a two stage inquiry. The first question to be determined is whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned. See *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) pare 47. In *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] 4 AII SA 639 (SCA) para 26, the SCA found that section 7(1) of PAJA require the same two stage approach. However, the difference lies in the legislature's determination of a delay exceeding

180 days as *per se* unreasonable. The court observed that a court is only empowered to consider a review application if the interest of justice dictates an extension in terms of section 9 of PAJA. In the absence of such extension, the court has no authority to entertain or consider a review application at all.

[11] Reverting to the present matter, it is not in dispute that the applicant was informed of the decision of the second respondent on 29 January 2019. The applicant immediately expressed its consternation and objection to the decision of the second respondent on 30 January 2019 in a correspondence addressed to Mr Benjamin the Director of Education for the Wynland District. The applicant requested reasons for the decision and same were furnished on 01 April 2019. Notwithstanding, the applicant delayed until 14 August 2019, some seven months after being informed of the decision to launch this application. The application was launched 201-days after the applicants where informed of the decision of the second respondent to appoint Mr Duraan. As explained above, in terms of section 7(1) of PAJA, a delay of 180 days is unreasonable on its own.

[12] However it must be stressed that after the decision was made, there was a dense array of correspondences between the applicant and the second respondent and other officials of the WCED. In those correspondences, the applicant expressed its displeasure and asked the second respondent whether the decision could be revisited or overturned. The WCED later sought legal advice which was communicated to the applicant on 27 February 2019. The advice from Advocate Coleridge-Zils was that the decision of the second respondent could not be appealed but only reviewed. On 28 February 2019 the applicant requested written reasons

from the second respondent for his decision. The second respondent delayed by about a month to provide the reasons for his decision. The second respondent furnished his reasons on 01 April 2019. There were other correspondences that the applicant sent to the second respondent in an attempt to engage with second respondent's reasoning. The correspondences were exchanged for over a period of six months. Eventually in May 2019, the applicant sought the services of an attorney who also engaged the second respondent. Subsequently, in August 2019 this two-pronged application for review was then launched.

[13] After a careful consideration of the facts of this matter, I am of the opinion that the correspondences between the applicant and the second respondent comprehensively accounts for the delay in bringing this application. Subsequent to the applicant being informed of the decision of the second respondent to appoint Mr Duraan, the applicant did not at all remain complacent and or sit back. The applicant meaningfully engaged the second respondent in correspondences from the date of his decision. In my view, this court should be very slow to close doors for the applicant to access this court. The applicant may view this delay as negligible, however each day it has delayed on counts and should be accounted for. Since the matter goes to the core of the governance of the school, in my view, the delay such as the present should not stand on the way of the applicant in its quest to vindicate its constitutional right in terms of section 34 of our Constitution. It cannot be said that the applicant was indolent or slow-moving in bringing this application.

[14] In addition, in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) at par 49, the Constitutional Court stated that

the discretion to overlook an undue delay in instituting review proceedings cannot be exercised in the abstract. There must be a basis upon which to do so, arising from facts before the court by the parties, or objectively available factors. It is my considered view that the correspondences between the parties were clear, frank, candid, and meaningful and without any doubt account and explains fully the delay in launching this application. In my judgment, it will be thoughtless and against the interest of justice for this court to avoid considering this application by virtue of the 17-day delay in bringing this application. This is a matter that involves the management of the school and the education of young school children is at the coalface of this application. The stakes are high and the best interest of the school children is paramount. The prejudice to the learners at the school occasioned by the uncertainty which has existed since January 2019 and the detrimental consequences that might face the school for not having a permanent principal since that date are immeasurable and incomparable with the prejudice that will be suffered by the second respondent if any, if condonation is granted.

[15] On a conspectus of all the facts place before court, I am of the view that although there was a delay it was explained, the interest of justice weighs heavily in favour of condoning the late filling of the review application. Consequently, the applicants' application for condonation succeeds.

FACTUAL BACKGROUND

[16] The genesis of the dispute arose from a vacancy for a position of principal of the third respondent. The position became vacant on 01 July 2018, when the erstwhile principal of the third respondent, Mr Jacobs resigned due to ill health.

Pursuant thereto, the applicant commenced on a process of recruiting a new principal for the third respondent. The process commenced on 01 June 2018 when the second respondent advertised the vacancy and invited candidates to apply for the position. The advertisement of the second respondent, among others, provided that the position required a strategic thinker and a visionary; knowledge of the relevant national and provincial education regulations and proven experience in leading a primary school as a principal.

[17] Following the advertisement, 29 candidates applied for the position for principal and on 29 August 2018, the applicant shortlisted four candidates for interview. The interview process included competency based assessment which was conducted by the Western Cape Education Department *("the WCED").* The interview process was monitored by Mr Dalvey, a representative of the WCED.

[18] As part of the recruitment process or criteria, the applicant sought a candidate with experience in managing a primary school with approximately 1000 learners. They sought a principal who is familiar with the broader community and the parents of the school. They also looked for a candidate who has experience in primary school activities and who has experience in the day to day management of a school environment. According to the applicant, Mr Oormeyer complied with all the requirements as he is currently serving as a principal of AME Primary School.

[19] After the interview process was concluded, the applicant unanimously found Mr Oormeyer as the suitable and ideal candidate for the position of principal of the third respondent. The applicant avers that Mr Oormeyer performed extremely well in

his interview and did far better than Mr Duraan. According to the applicant, Mr Oormeyer has a deep understanding of the issues facing education in the 21st century and the sensitivity required to meet the needs from diverse backgrounds. The applicant stated that its intention was to only submit the name of Mr Oormeyer to the second respondent in terms of section 6(2)(c) of the EE Act. However, Mr Dalvey, who was the department's official overseeing the recruitment process, interfered in the deliberations of the applicant and insisted that Mr Duraan's name be submitted to the second respondent. The applicant eventually submitted the names of Mr Duraan and Mr Oormeyer to the second respondent in terms of section 6(2)(c) of the EE Act.

[20] On 05 October 2018 both candidates underwent a psychological assessment conducted by the WCED. Mr Duraan apparently performed better than Mr Oormeyer in the assessment test. However, the psychometrist conducting the test highlighted the fact that the results of the test should not be considered in isolation but instead, should be combined with other relevant information when deciding on the appointment of a suitable candidate. After consulting other officials of the WCED, on 26 January 2019, the second respondent appointed Mr Duraan as the principal of the third respondent. The applicant contended that the departmental official interfered with the appointment process and that Mr Dalvey was friends or acquainted with Mr Duraan and another short listed candidate, and should therefore not have overseen the recruitment process on behalf of the department, let alone intervene in the way he did.

[21] After the appointment of Mr Duraan as principal of the third respondent, the applicant implored the second respondent to review his decision to appoint Mr Duraan as it felt that Mr Oormeyer was the preferred candidate on the list submitted for consideration as a principal. On 28 February 2019, the applicant requested from the second respondent the reasons for the appointment of Mr Duraan as the principal of the third respondent over their preferred candidate Mr Oormeyer. The applicant also requested that the involvement of Mr Dalvey and his influence on the applicant be investigated.

[22] On 01 April 2019, the second respondent furnished the reasons for the appointment of Mr Duraan as a suitable candidate in terms of section 6(3)(f) of the EE Act after same were requested. The reasons for this decision included but was not limited to the following:

"(i) That Mr Duraan has both a Degree and Honours Degree in Education Management as well as 10 years' experience as advisor in Primary Schools.

(ii) Neither candidate has extensive Primary School experience; Mr Duraan's Primary School work for 10 years and post Graduate qualification in Education Management support my decision."

[23] The second respondent also alluded to the fact that although not a deciding factor in his decision, the Competency Based Assessment (psychological assessment report) supported his original decision that Mr Duraan is the most suitable candidate for this post. However, the applicant did not accept the second respondent's reasons. As a consequence thereof, these proceedings were instituted in order to review and set aside the decision of the second respondent.

GROUNDS OF REVIEW

[24] The applicant's grounds of review can be succinctly summarized as follows:

24.1 That the second respondent was biased when he appointed Mr Duraan on 26 January 2019 instead of Mr Oormeyer;

24.2 That the second respondent failed to consider relevant considerations in making the decision;

24.3 That the decision of the second respondent was unreasonable;

24.4 That the second respondent unlawfully delegated his powers and failed to comply with the mandatory requirements; and

24.5 That the decision was irrational (not rationally connected to the information that served before the second respondent).

ANALYSIS OF THE PARTIES' SUBMISSIONS AND APPLICABLE LEGAL PRINCIPLES

[25] For the sake of brevity and completeness, I will deal with the grounds of review set out above ad seriatim.

(i) Was the first respondent biased when he appointed Mr Duraan on 26 January 2019 instead of Mr Oormeyer

[26] Mr Arendse argued on behalf of the applicant that there was clear bias in this case. Counsel contended that the bias operated on two levels. *First*, that the second respondent worked together with Mr Duraan in the West Coast Education District and in the Wynland Education District. They were closely acquainted, and thus creating an impression of bias. *Second,* the involvement of Mr Dalvey creates a reasonable apprehension of bias. Counsel contended that the crucial facts concerning Mr Dalvey among others, are that: Mr Dalvey was present at all times during the interviews and nominations of Mr Duraan and Mr Oormeyer. Mr Dalvey had been a referee for Mr Elton-John Du Plessis one of the short listed candidates. Mr Dalvey has a close relationship with Mr Duraan and moreover, Mr Dalvey and Mr Duraan were colleagues for years in the Atlantis and Wynland District offices. Mr Dalvey is effectively Mr Duraan's Manager and superior. Mr Dalvey and Mr Duraan have worked together on the latter's PowerPoint presentation for his interview with the applicant and has also prepared Mr Duraan's practical component of the interview. Mr Dalvey did not disclose to the applicant his relationship to two of the candidates and on the contrary, members of the applicant discovered these relations themselves. Mr Arendse also argued that on 12 September 2018 after interviewing the candidate, the members of the applicant felt that only Mr Oormeyer should be nominated for appointment by the second respondent and Mr Dalvey interrupted during the deliberations when he realized that Mr Duraan would not be nominated to the second respondent. He insisted that Mr Duraan be included in the list.

[27] Mr Farlam for the respondent argued that Mr Dalvey merely had an oversight role during the interviews and he performed his duties diligently. He refuted all the allegations made by the applicant against Mr Dalvey. It was contended that there

was no relationship between Mr Dalvey and Mr Duraan as alleged and that Mr Dalvey did not assist Mr Duraan with the latter's' PowerPoint presentation for the interview with the applicant. The allegations that Mr Dalvey prepared Mr Duraan's practical interview component were also refuted. Counsel argued that Mr Dalvey was not the decision maker. It was further contended on behalf of the second respondent that there is nothing at all untoward that can be attributed to Mr Dalvey's presence during the interview and nomination process. Counsel contended that Mr Dalvey was required to oversee the nomination and selection process, and was simply doing his job diligently.

[28] From the above submissions of the applicant's counsel, it is very clear that the applicant's allegations of bias on the part of the second respondent are based on two grounds, namely, that the second respondent was closely acquainted with Mr Duraan as they worked together in the West Coast Education District and in the Wynland Education District. The second ground of the alleged biasness against the second respondent is the involvement of Mr Dalvey during the interview and nomination process.

[29] It is trite law that decision makers ought to be impartial. They must be prevented from making decisions that are based on illegitimate motives and considerations. This ancient common law principle was captured in section 6(2)(a)(iii) of PAJA which gives the court the power to review administrative actions where the administrator was biased or reasonably suspected of bias - See Hoexter *Administrative Law in South Africa* 2 edition at page 451. In *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union* 1992 (3) SA 673 (A), the court

found that in order to have a decision set aside, the affected individual merely has to prove an appearance of partiality rather than its actual existence.

[30] For the applicant to succeed on this ground of review, the applicant must demonstrate with proof that the second respondent was biased or that on the facts there is a reasonable apprehension that the second respondent was biased. In *President of the RSA v South African Rugby Football Union* 1999 (4) SA 147 (CC) at para 45, the Constitutional Court confirmed that the test for apprehended bias is objective and that the onus of establishing it rests upon the applicant who alleges it. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. Incorrect facts which were taken into account by an applicant must be ignored in applying the test.

[31] In this case, the second respondent has flatly denied that he was acquainted with Mr Duraan as alleged or at all. In fact, he was emphatic that he cannot recall at this time who Mr Duraan is. It was against this background that he refuted the allegations of bias against him. In my view, there is no reason to discount the denial of the second respondent to the allegations levelled against him. Importantly, the applicant did not produce any shred of evidence to support its allegations that the second respondent was acquainted with Mr Duraan. The applicant merely made bald and unsupported statements of friendship and / or acquaintance between the second respondent and Mr Duraan. To this end, I agree with the views expressed by Mr Farlam that a bald assertion without any factual basis cannot begin to lay a basis for a finding of a reasonable apprehension of bias an enquiry which involves an objective test that requires the person making the assertion to show that a

reasonable person in the position of the litigant would, on reasonable grounds, consider the decision maker biased.

[32] In my view, the applicant failed to prove or to adduce any evidence to support its allegation that the second respondent was in fact acquainted to Mr Duraan. Even if the applicant had proved any friendship between the second respondent and Mr Duraan, which in my view it failed to do, this allegation is unfounded. From the objective facts placed before court, it is abundantly clear that the applicant is seeking to rely on bald assertions without any basis in fact or law. In my view, the bald allegations are unsupported and ill-conceived. At the same time, the second respondent's denial of these allegations cannot be disregarded by this court and in the absence of any evidence to the contrary, that disposes of the bias allegations of the applicant.

[33] The applicant also contends that Mr Dalvey influenced the interview and the nomination process and that his involvement in the interview process give rise to a reasonable apprehension of bias. In my view, this argument misses the point. It must be stressed that Mr Dalvey was not the decision maker. Even if it could be accepted for once that he made a decision, such decision is not reviewable. Mr Dalvey was merely present during the interview process to oversee the smooth running of the recruitment process.

[34] Furthermore, the allegations by the applicant that Mr Dalvey influenced the process and the nomination of Mr Duraan is unfounded and undoubtedly in conflict with the correspondences of the applicant to the Provincial Minister. From the time

the decision was made to appoint Mr Duraan, the applicant did not complain of any illegality of the interview process or the involvement and / or interference of Mr Dalvey in this exercise. Instead, on 04 February 2019, the applicant wrote to the Provincial Minister and emphasized how well and flawless the process had functioned. For the sake of completeness, I deem it wise and prudent to quote verbatim the said correspondence to the Minister. The applicant through its representative stated:

> "Ons as Skool Beheerliggaam wil net onder u aandag bring dat ons baaie ontevrede is dat by Paarlzicht primer te Paarl 'n 2de benoemde kandidaat in pos 1105 as Hooffaangestel is en dat die 1st benoemede oor die hof gesien was sonder enige verduideliking! Ons wil did duidelik stel dat die proses wat ons gevolg het regeverdig gevolg was soos deur Mnr Dalvie (kringbestuurder) uitgewys was! Daar was niks verkeerd met die proses! Ons het seker gemaak dat die proses wat die SBL gevolg nie bevragteken word nie. Die 1ste benoemde het nie n ander pos aanvaar by n ander skool nie and dit is ons hoofrede hoekom ons Mnr D. Oormeyer as Prinsipaal by Paarlzicht wil aanstel he..."(my underling).

[35] In my view, this email is very clear and unambiguous. Evidently, it makes the point that the interviewing and nomination process was faultless, impeccable and above reproach. It lends support to the fact that there was nothing untoward that Mr Dalvey did during the interview process. In subsequent correspondences of the 19 February and 28 February 2019 respectively that were addressed to the second respondent, the applicant raised concerns about the appointment of Mr Duraan. Neither of those correspondences did the applicant raise any concern on the impropriety of Mr Dalvey's conduct. Furthermore, when the second respondent was taking time to furnish reasons the applicant approached the Provincial Minister for

assistance. In my view, if indeed there was concern that Mr Dalvey unlawfully interfered with the process, the applicant would have raised this concern at the earliest available opportunity. The applicant only raised this concern about the purported conduct of Mr Dalvey in an email dated 18 March 2019. The applicant sought a response to its request for reasons and it requested that the involvement of Mr Dalvey and his purported influence on the applicant be investigated. In this correspondence, the applicant did not give details of Mr Dalvey's alleged undue influence or involvement in the appointment process. The first time that the averments on which the applicant relies on in its founding affidavit with regard to the alleged conduct of Mr Dalvey, were only raised in a letter dated 24 April 2019.

[36] The applicant did not provide this court with an explanation as to why the alleged improper conduct of Mr Dalvey was only raised some four months after the applicant was informed of the decision and only seven months after the applicant had made the decision to recommend Mr Oormeyer and Mr Duraan as the two candidates for the Principal's position. The impugned decision was made in January 2019 and the complaint about Mr Dalvey only surfaced clearly in April 2019. In my view, if indeed the applicant was concerned with the conduct of Mr Dalvey, the applicant would have raised its concern with the second respondent immediately after the interviews were conducted or when the names of the two candidates were submitted to the second respondent. Needless to say the fact that this alleged concern was not raised at the time is highly revealing and questionable.

[37] The allegation that Mr Dalvey insisted in nominating Mr Duraan is unsupported by the facts and the evidence before court. In the minutes of the

meetings for the interview in particular, the minutes of 12 September 2018 confirming the nomination and the suitability of Mr Oormeyer and Mr Duraan, it is not recorded that there was any improper conduct of Mr Dalvey as alleged by the applicant. Nowhere in the minutes is it recorded that Mr Dalvey insisted in the appointment of Mr Duraan. These minutes were signed by the chairperson and secretary of the applicant. The minutes also incorporates the names of all the officials involved in the interview process in particular members of the applicant. The argument that this information is not recorded in the minutes because Mr Dalvey prepared these minutes objectively speaking does not at all hold sway. If there was any impropriety conduct by Mr Dalvey this would have reflected on the minutes.

[38] In my view, the alleged indictment of impropriety against Mr Duraan is an afterthought and glaringly unconscionable. To top it all, at no stage prior to the decision of the second respondent did the applicant raise any concern with the second respondent or the department in regard to the role played by Mr Dalvey in the interview and appointment process. These allegations against Mr Dalvey were only raised in peripherally or tangentially in March 2019 and / or April 2019 respectively, after the reasons for the decision had been received. In my judgment, this is not consistent with the applicant's version that Mr Dalvey was biased and unduly partial to one candidate. In fact, this outrightly negates the applicant's version.

[39] The final issue that requires consideration before I conclude on this review ground is the presence of Mr Dalvey during the interviews and the allegation that he was a referee for one of the candidates. Having had due regard to all the evidence

placed before court, there is nothing inappropriate or infelicitous that can be attributed to Mr Dalvey's presence during the interview and nomination process. The minutes of the meeting and the correspondences of the applicant to the second respondent completely negates the version of the applicant. In any event Mr Dalvey was required to oversee the nomination and the selection process and was simply doing the task assigned to him in the best way he could. There is no reason whatsoever for this court to falter his performance.

[40] Furthermore, the allegation that he was a referee to one of the candidates is inconsequential to the decision that was taken by the second respondent. More importantly, the decision to appoint Mr Duraan was taken by the second respondent and not Mr Dalvey. It has not been established that the second respondent nor Mr Dalvey had any interest in appointing Mr Duraan over Mr Oormeyer. However what has been established is that the second respondent appointed a candidate whom he considered to be a better candidate. In my view, the fact that the applicant takes umbrage at the second respondent's choice does not give rise to a reasonable apprehension or bias. Consequently, I am satisfied that the applicant has failed to demonstrate a reasonable apprehension of bias in the present matter.

(ii) Did the second respondent fail to consider relevant considerations in making the decision

[41] The applicant contends that the second respondent decided to appoint Mr Duraan and failed to afford proper weight to various factors. To this end, the applicant contends that after the two candidates were nominated and their names

were submitted to the second respondent, both candidates underwent a psychometric assessment test conducted by the WCED. In this test, Mr Duraan performed well than Mr Oormeyer. However, the Psychometrist who conducted the test warned that the results from the test should not be considered in isolation but should be combined with other relevant information when deciding on the appointment. The applicant also contends that the psychological assessment was not at all the requirement of the post. The applicant also contended that the second respondent failed to attribute enough weight to the recommendation of the applicant that Mr Oormeyer was a preferred candidate. The applicant averred that the second respondent failed to make mention that Mr Oormeyer has 23 years of teaching experience and ignored the memorandum recommending Mr Oormeyer to be appointed.

[42] Sections 6(2)(e)(iii) and (vi) of PAJA provides for judicial review where an action was taken because irrelevant considerations were considered or relevant considerations were not considered or the action was taken arbitrarily or capriciously. In cases such as this, it is important for the courts to defer to the decisions of the functionary unless it can be established that the decision maker has not brought his unbiased judgment to bear in making the impugned decision. The court must consider the actions of the employer, in this case the second respondent, and can only interfere with that discretion if the employer acted frivolously or capriciously or unreasonably - See *Arries v CCMA and others* (2006) 27 *ILJ* 2324 at para 19.

[43] In this case, the second respondent recorded in his correspondence dated 01 April 2019 that his reasons for his decision include but are not limited to that:

> "Duraan has an honours degree as well as 10 years' experience as an advisor to primary schools;
>
> Neither candidates had extensive primary school experience;
>
> Mr Duraan had however worked with primary school for 10 years.
>
> Mr Duraans' competency Based Assessment (although not a deciding factor) was a consideration supporting the second respondent's view that Mr Duraan was the most suitable candidate for the post."

[44] From this response, it is evident that the reasons advanced by the second respondent to the applicant were not exclusive. The second respondent explained to the applicant that he considered all the relevant factors including the qualifications and experience of the two candidates as well as the competency based assessment and other relevant information as reflected in the rule 53 record. These included the CV of the candidates and motivations, the scoring of the candidates during the interviews and all the relevant recommendations from the various officials from the WECD. There is nothing to suggest that the second respondent did not consider all the relevant factors placed before him before he made the appointment. The second respondent averred in his answering affidavit and even in his correspondences to the applicant that he had considered all the relevant factors, including the qualifications and experience of the two candidates, as well as the psychological assessment results.

[45] The applicant seems to suggest that the second respondent afforded certain factors in particular, the psychological assessment report and the qualification of Mr Duraan more weight and failed to take other relevant considerations into account. In my view, the decision of the *Supreme Court of Appeal in MEC for Environmental Affairs and Development Planning v Clarison's CC* 2013 (6) SA 235 (SCA) at para 60, is apposite and relevant for present purposes. In that matter the court said:

> "The Court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision maker's discretion".

[46] The second respondent, in my view, considered all the factors placed before him. In addition, he considered all the documents that served before the applicant during interview as well as the CV's of the incumbents. Similarly, from the record placed before court, it is clear that Mr Oormeyer's experience was placed before the second respondent and that the latter considered it. In his correspondence to the applicant and in his answering affidavit, the second respondent stated that he considered the fact that Mr Oormeyer mainly had experience in teaching in High School and not at a Primary School level. He made it clear that neither candidate possessed extensive Primary School experience.

[47] In my view, this is indicative that he considered the experience of Mr Oormeyer. Furthermore, the argument that the factors which rendered Mr Oormeyer the preferred candidate were purportedly not afforded any weight by the second respondent is unfounded and without basis in reason or fact. There is no evidence

adduced to support this argument. The fact that Mr Duraan, a second candidate was appointed does not suggest or mean on its own that the second respondent did not consider all the relevant facts placed before him. The psychological assessment report as well as the fact that Mr Duraan had an honours degree was one of the considerations but was not a deciding factor. The second respondent was unequivocal and emphatic that these were but some of the range of factors which he considered. Furthermore, the fact that the applicant is in disagreement with the decision of the second respondent does not render the decision reviewable. To this end, I agree with the views expressed by Mr Farlam that for a ground of review based on failure to consider relevant factors to succeed, the complaint cannot be that one factor was supposedly weighed too heavily or too lightly. It must instead be demonstrated that the decision maker failed to take into account facts which, if they had been taken into account, would have materially influenced the decision, or alternatively took into account factors which are relevant to the process.

[48] In *Head of the Western Cape, Education Department and Others v Governing Body of the Point High School and Others* 2008 (5) SA 18 (SCA) at para [10], the court considered the exercise of a discretion by the head of department in the position of the second respondent and stated as follows:

> "…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 ss 6(3)(f). The law is now clear that, in exercising this discretion, the HOD 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'. The

Court has no power to review this decision purely because there may be another, perhaps better, 'equilibrium' which could have resulted by attributing more weight to some factor or factors and less to others. If that struck by the decision maker is reasonable, then it must stand." (My emphasis).

[49] Taking into account the facts of this case and the guidelines set out above, I am of the view that there is no basis whatsoever warranting the setting aside of the decision of the second respondent in terms of section 6(2)(e)(iii) of PAJA. The second respondent does not have to rubber stamp the recommendations of the applicant. In this matter he demonstrated that he applied his mind considerably. Therefore, this ground of review falls to be dismissed.

(iii) Was the decision of the second respondent unreasonable

[50] Section 6(2)(h) of PAJA provides that a decision can be reviewed where the exercise of the power or performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. It is now trite that for a decision to be impugned on the basis of lack or reasonableness, the decision must have been so unreasonable that no reasonable decision maker could have come to the same decision.

[51] If I understood the argument of the applicant correctly it stated that, the appointment of Mr Oormeyer who was the applicant's preferred candidate was a forgone conclusion. The applicant however, does not dispute the fact that Mr Duraan

as well was a suitable candidate. Likewise, Mr Duraan was recommended by the applicant to the second respondent to be considered for the position of principal. Therefore, it is common cause that the second respondent was presented with two suitable and competent candidates. One had an honours degree and performed better than the preferred candidate of the applicant at the psychological assessment test.

[52] In my view, the second respondent exercised his discretion fairly in selecting one candidate over the other. I gather and appreciate the fact that the second respondent has to attribute substantial weight to the recommendations of the School Governing body as was stated in *the Point High School (supra)* however, this does not mean that in doing so he had to ignore his statutory powers to exercise his discretion in terms of section 6(3)(f) of the EE Act which states that:

> "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*". (My emphasis).

[53] Furthermore, the argument of the respondent's counsel holds true that the decision in *the Point High School (supra)* is no authority for the proposition that the governing body's preference for a specific candidate removes the discretion of the head of department envisaged in section 6(3)(f) of the EE Act. This case is also no authority for the proposition that substantial weight must be attributed to the specific choice of a governing body. Instead due weight must be accorded to the recommended list of all candidates with the preference of a governing body being a factor*, albeit* not a determinative one.

[54] As explained above, for a decision to be attacked on the basis of lack of reasonableness, the impugned decision must have been so unreasonable that no reasonable decision maker could have come to the same conclusion. On a conspectus of all the evidence that has been placed before court, I am of the view that there is nothing advanced by the applicant in its submissions which indicates that the second respondent's appointment of Mr Duraan was so bereft of reason to an extent that it should be set aside. This review ground should fail.

(iv) Unlawful delegation and Mandatory conditions

.[55] Section 6(3)(c) of the EE Act provides 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."

[56] It is common cause that in this matter, the applicant only submitted the names of two candidates to the second respondent – the head of department. According to the applicant, it intended to submit the name of Mr Oormeyer only but Mr Dalvey insisted that the name of Mr Duraan be submitted as well. There was no consultation between the applicant and the second respondent on the submission of fewer candidates as envisaged in section 6(3)(c)(ii) of the EE Act. It is my considered view that a careful reading of section 6(3)(c)(ii) of the EE Act suggests that the head of

department can condone a list of less than three nominees. The phrase “in consultation” with in the subsection means that there must be unanimity and concurrence on the part of the head of department. It is different to the phrase “after consultation with”.

[57] In *President of South Africa and Others v Reinecke* 2014 (3) SA 2015 (SCA) at ft. 11, the Supreme Court of Appeal found that the difference between the two expressions is correctly described in the judgment of Griesel J in *McDonald and Others v Minister of Minerals and Energy and Others 2007 (5) SA 642 (C) at para 18 where he stated:*

> “(W)here the law requires a functionary to act "in consultation with" another functionary, this too means that there must be concurrence between the functionaries, unlike the situation where a statute requires a functionary to act "after consultation" with another functionary, where this requires no more than that the ultimate decision must be taken in good faith, after consulting with and giving serious consideration to the views of the other functionary.”

[58] To this end, I agree with the views expressed by the respondent’s counsel that the purpose of the consultation envisaged in section 6(3)(c)(ii) operates to ensure that the Head of department, in this case second respondent, is not effectively removed or excluded by the governing body recommending fewer than three candidates. If the governing body intends to submit fewer than three candidates, they are required to do so in consultation with the head of department. To the extent that the second respondent is able to condone the failure by the governing body to submit three names, which in my view by implication, he did in this

matter, there was no consultation necessary with the second respondent as envisaged in section 6(3)(c)(ii) of the EE Act. Be that as it may, in my view, this disparity does not vitiate the legality of the appointment process. This ground of review in my view has no merits and must fail. This leads me to the applicant's last ground of review for consideration.

(v) Irrationality

[59] Section 6(2)(f)(ii) of PAJA provides that a decision can be reviewed if it bears no rational relation to the reasons given. If I understand correctly the argument of the applicant's Counsel, the reading of section 6(3)(f) of the EE Act suggests that all candidates on the list provided by the governing body are suitable. Counsel also argues that the power to appoint an educator in terms of section 6(3)(f) must be read alongside the power to decline a nomination in terms of section 6(3)(g) of the EE Act. Section 6(3)(g) of the EE Act envisages unsuitability as a ground for rejection a nominee. Mr Arendse argued that the power to appoint a candidate under section 6(3)(f) assumes that all candidates are suitable for the post. Counsel asserted that the second respondent should have made his decision on other grounds such as distinct experience or skills. It was argued that because the candidates were already suitable and the reasons of the second respondent addresses suitability, the second respondent's reasons are not rationally connected to the purpose for which his power in terms of section 6(3)(f) was granted to him.

[60] In my view this argument misses the point. The second respondent cannot act beyond the bounds of section 6(3)(f). The essence and objective of section 6(3)(f) is to ensure that the most suitable candidate is appointed for a vacant post. The

second respondent in this matter considered a number of factors placed before him and ultimately came to the conclusion that Mr Duraan was the most suitable candidate given among others his experience, psychological assessment results and qualifications. In my view, the second respondent brought his unbiased judgment to bear when he appointed Mr Duraan. He clearly exercised his discretion within the framework of Section 6 of the EE Act. In *Pharmaceutical Manufacturers of SA in re: Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 90, the following was said:

> "Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries…The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately."

[61] In my judgment, the decision of the second respondent viewed objectively, is rational and unquestionable. The applicant ground of review in this regard falls to be dismissed.

[62] As far as costs are concerned, it is a trite principle of our law that a court considering an order of costs exercises a discretion. *Ferreira v Levin NO and Others; Vreyenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC). The court's discretion must be exercised judicially. *Motaung v Makubela and Another, NNO;*

Motaung v Mothiba NO 1975 (1) SA 618 (O) at 631A. In my view, this case raises an issue of special constitutional concern in particular the right to just administrative action envisaged in section 33 of our Constitution. Furthermore, the applicant is a public interest group representing parents and school children. A cost order against the applicant in my opinion, would hinder the advancement of constitutional justice. (see *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

ORDER

[63] In the result, the following order is granted:

63.1 The application for misjoinder succeeds;

63.2 The application for condonation for the late filing of the review application is granted;

63.3 The applicant's application to review the decision of the second respondent of 26 January 2019 to appoint the fourth respondent (Mr Duraan) as principal of the third respondent is dismissed;

63.4 Each party is ordered to pay its own costs.

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LEKHULENI AJ
ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Applicant	Advocate N. Arendse, SC
Instructed by	Andrews & Co. Attorneys (ref: Mr. J. Andrews)
For the 2nd Respondent	Advocate P. Farlam, SC Advocate M. Adhikari
Instructed by	The State Attorneys (ref: Ms S Chetty)