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**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSCVAAL PROVINCIAL DIVISION)**

DELETE WHICH OF THE FOLLOWING APPLIES TO THIS DOCUMENT

(1) REPORTABLE: YES NO

(2) OF INTEREST TO OTHER JURISDICTIONS: YES NO

(3) REVISED.

21 09 2007 *Tate*

DATE

**DATE : 21/09/2007
CASE NO: 22179/2007**

In the matter between

**GOVERNING BODY OF UNITY
PRIMARY SCHOOL**

Applicant

AND

**MEC, DEPARTMENT OF EDUCATION,
LIMPOPO PROVINCE**

First Respondent

**HEAD OF DEPARTMENT, LIMPOPO
DEPARTMENT OF EDUCATION**

Second Respondent

**MOPANI DISTRICT SENIOR DISTRICT
MANAGER, LIMPOPO DEPARTMENT
OF EDUCATION**

Third Respondent

NP MABUNDA

Fourth Respondent

J U D G M E N T

MAKGOKA (AJ)

- [1] This is an application by the First and Second Applicants to review and set aside a decision by the Second Respondent to reject recommendation to appoint the Second Applicant as Principal of Unity Primary School in Tzaneen. The ancillary but also substantive prayer is to review and set aside the decision of the Second Respondent to appoint the Fourth Respondent as Principal of the said school.
- [2] The initial application, which was brought on an urgent basis, involved only the First Applicant. The Second Applicant was later granted leave by this court to intervene as Second Applicant in this application. In terms of the said order, the Second Applicant's affidavit in the application for intervention stands as his founding affidavit, and the answering and replying affidavits, respectively, filed consequential thereto, would constitute the answering and replying affidavit in these proceedings.

BACKGROUND.

- [3] Unity Primary School ["the school"] was establish in Tzaneen in January 2005 by the Limpopo Education Department, [the Department]. The Second Applicant ['Bekker'] was requested by

the Department to take up a position as acting principal of the school. He was duly appointed by the Second Respondent who is the Head of the Department, ["HOD"]. At that stage, Bekker was the Deputy Principal of Tzaneen Primary School. It appears that when Bekker was appointed Acting Principal, infrastructure was still under construction and no proper facilities were in place. Bekker arranged provision of basic facilities such as water and sanitation. Shortly after commencing duties as acting principal, the position of permanent principal for the school was advertised.

- [4] Bekker submitted his application for appointment as permanent principal of the school. He was short listed with the Fourth Respondent ["Mabunda"] and three other candidates. On 29 July 2005 the School Governing Body, ['SGB'] of the school, interviewed the above candidates and at the end of that process, the SGB recommended that Bekker be appointed to the position of principal of the school. This recommendation was sent to the circuit manager, who accepted the SGB's recommendation. On 6 December 2005, the District Senior Manager for Education Mopani District directed a letter to the Circuit Manager for the Tzaneen Circuit regarding the SGB's recommendation. The letter stated:

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- “2. *Kindly be informed that the recommendations by the SGB to have Mr B.J. Bekker appointed as the Principal of the school have not been acceptable to the HOD as Mr Bekker's documents have not been certified.*

3. *The HOD has further directed that the SGB be advised to recommend their other preferred candidate for the post. The SGB is, therefore, requested to make other recommendations as soon as possible*

4. *Enclosed herewith are applications l.r.o the five candidates for further attention and return, please.*

5. *Banking on your co-operation.”*

[5] In response thereto, the SGB indicated that they stood by their recommendation of Bekker. On 3 April 2007, the District Senior Manager appointed Mabunda as Principal of the school with effect from 1 June 2007. After exchange of correspondence and request for a meeting, the HOD on 29 May 2007 made it clear that the

position to decline Bekker's appointment, and the subsequent appointment of Mabunda was final. The result is this application.

- [6] Now the power to appoint any person in the Department rests in the HOD, who has to exercise such power in accordance with the procedures and requirements determined by the Minister of Education. At all material periods hereto, the appointment of educators to public schools within the province was governed by section 6 of the Employment of Educators Act, No 76 of 1998 ['the EEA'], the regulations and collective agreements contemplated in that section, as well as the Education Gazette. With effect from 6 January 2006, such procedure is governed by the Education Laws Amendment Act of 2005. However, the cause of action herein arose before the coming into effect of the ELA. Therefore the EEA was the applicable law relating to the present application. Of particular relevance, are the provisions of section 6 [3] [a] & [b] of the EEA. Section 6 [3] [a] provided that:

"any appointment . . . to any post on the education establishment of a public school . . . may only be made on the recommendation of the governing body of the public school . . ."

- [7] This recommendation was to be made to the HOD, who was not obliged to accept same. The HOD's decision whether or not to accept the recommendation of the SGB, had be exercised within the confines of section 6 [3] [b] which provided:

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

- (i) any procedures collectively agreed upon or determined by the Minister of appointment, promotion or transfer has not been followed;*
- (ii) the candidates does not comply with any requirement collectively agreed upon or determined by the Minister for the appointment or transfer;*

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- (iii) *the candidates is not registered or does not qualify for registration as an educator with the South African Council of Educators;*
- (iv) *sufficient proof exists that the recommendation of the said governing body or council, as the case may be, was based on undue influence;*
- (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].*

[8] It is [b] [ii] of the above section that the HOD based its decision not to accept the recommendation of the SGB to appoint Bekker as principal of the school. The argument by the HOD was that Bekker's copies of qualification did not comply with the collective agreement referred to that section, namely Resolution No 1 of 2000 of the Northern Province Chamber of the Education Labour Relations Council [*" the Resolution"*]. Among the provisions of the Resolution, an applicant for an educator vacancy must enclose

with his application, certified copies of qualifications or statement[s] of results.

[9] I must mention at this stage that Bekker's copies of qualifications were endorsed by the stamp and signature of the principal of Tzaneen Primary School. It does not appear therefrom, whether the said principal purported to be a Commissioner of Oaths, or whether he had satisfied himself that the copies he endorsed were true copies of the originals. I am therefore satisfied that Bekker's copies of qualifications were not certified. The next enquiry then is whether the requirement of certification above is peremptory, in other words, whether non-compliance therewith is fatal. In approaching this question, I must have regard to various considerations.

[11] *Firstly*, the sifting process of the candidates is done by the Department. If the non-certification of Bekker's documents was an issue, Bekker's name should not have been forwarded to the SGB for short-listing. In terms of paragraph 5.1 of the Resolution, all applications that meet the minimum requirements and provisions of the advertisement, shall be handed over to the school governing body, who would then convene an interview committee. The

interview committee then conducts a short-listing procedure. In my view, by submitting Bekker's name to the SGB, the Department created a reasonable, legitimate explanation to Bekker that he satisfied the minimum requirements for the post. By not alerting him of this perceived defect, Bekker was led to act to his detriment. The Department is therefore estopped from averring the contrary.

- [12] *Secondly*, in terms of paragraph 3.2 (a) [ii] the Personnel Administration Measures [*"PAM"*] issued under the EEA, the Department as the employer was obliged to "*acknowledge receipt*" of all applications, clearly indicating whether the application was complete or not. In Bekker's case, an acknowledgement receipt of his application was sent to him, without any indication that his application was incomplete. On the contrary, the circuit manager who had received and checked Bekker's application, supported the SGB's recommendation of Bekker.

- [13] *Thirdly*, Bekker had been an employee of the Department since its inception, and before then as an employee of the Department's predecessor, the Transvaal Education Department. This presupposes that Bekker's qualifications, ought to be on the system

of the Department. Clearly the requirement for certified copies is meant to reduce submissions of falsified copies of qualifications. If the HOD was *bona fide* in his approach, he could easily have verified Bekker's qualifications on the Department's systems.

[14] *Fourthly*, it is the HOD who appointed Bekker to an acting principalship of the school. In making this appointment, he would have satisfied himself of Bekker's qualifications. *Fifthly*, there is no suggestion whatsoever by the Department, that Bekker's qualifications are suspect. The only argument before me is that the non-submission of certified copies of qualifications disqualified Bekker from being short listed, and eventually, being appointed as principal of the school.

[15] It was further argued on behalf of the Respondents that by being short listed while disqualified, Bekker's short-listing would have prejudiced other candidates who may have been eliminated at the short-listing stage on the basis of this requirement. There is no substance in this argument. If any of such candidates were prejudiced, they have the necessary remedies at their disposal. They are not before me, and as such their prejudice, actual or perceived, is speculative at this stage.

- [16] Regard being had to what is stated above, it is my finding that the HOD's decision not to accept the SGB's recommendation to appoint Bekker as principal of the school, was misdirected and not in accordance with the spirit and purport of the EEA, regulations and the Resolution. By pedantically insisting on certified copies under these circumstances, would, in my view, elevate from above substance. It follows then that the HOD's decision falls to be set aside. Bekker had satisfied the minimum requirements for the post, was short-listed in accordance with procedure, interviewed, and recommended by the SGB. In the absence of any impediment postulated in section 6 (3) [b] of the EEA, the HOD was obliged, and must have appoint Bekker as the principal of Unity Primary School. It follows therefore that the Fourth Respondent's appointment in that position, must be set aside.
- [17] As regards to costs, on various occasions the application was before court and costs were reserved in certain instances. During argument I invited counsel for the parties to address me on these costs. They ably did so, and their submissions have been taken into account.

[18] Accordingly, I make the following order:

[18.1] The decision of the Second Respondent dated the 6 December 2005, in terms of which the Second Respondent rejects the recommendation of the School Governing Body, to appoint the Second Applicant as Principal of the Unity Primary School, is set aside.

[18.2] The decision of the Second Respondent dated the 3 April 2007, in terms of which the Fourth Respondent is appointed as Principal of the Unity Primary School, is set aside;

[18.3] The First and Third Respondents are ordered to pay the costs of the application, jointly and severally, the one paying the others to be absolved, inclusive of the reserved costs occasioned on 5 June 2007, as well as the costs.

[18.4] The Second Applicant is ordered to pay the costs occasioned on 14 June 2007 and 21 June 2007 respectively.

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[18.5] No order is made as to the costs of the Intervening Application.



T M MAKGOKA
ACTING JUDGE OF THE HIGH COURT

1. HEARD ON: 28 AUGUST 2007
2. DATE OF JUDGMENT: 21 SEPTEMBER 2007
3. FOR THE FIRST APPLICANT: MS TAN MAKHUBELE
INSTRUCTED BY : ZAKES GARRINE [LIMPOPO] AND MBANJWA
INC, [PRETORIA]
4. FOR THE SECOND APPLICANT: MS G ENGELBRECHT
INSTRUCTED BY: ERASMUS INC, [PRETORIA]
5. NO APPEARANCE FOR THE FIRST RESPONDENT
6. FOR THE SECOND RESPONDENT: MR T SKOSANA
INSTRUCTED BY: STATE ATTORNEY, [PRETORIA]
7. NO APPEARANCE FOR THIRD RESPONDENT.