THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 278/08

In the matter between:

KIMBERLEY JUNIOR SCHOOL	**FIRST APPELLANT**
THE GOVERNING BODY OF THE KIMBERLEY JUNIOR SCHOOL	**SECOND APPELLANT**

and

THE HEAD OF THE NORTHERN CAPE EDUCATION DEPARTMENT	**FIRST RESPONDENT**
PAUL MELVILLE THEUNISSEN	**SECOND RESPONDENT**
SEATILE SARAH RANTHO	**THIRD RESPONDENT**
DONNA-LEE MARCELÉ BRAND	**FOURTH RESPONDENT**

Neutral citation: *Kimberley Junior School v The Head of the Northern Cape Education Department* (278/08) [2009] ZASCA 58 (28 May 2009)

CORAM:	**STREICHER ADP, BRAND, MAYA, SNYDERS *et* MHLANTLA JJA**
HEARD:	**21 MAY 2009**
DELIVERED:	**28 MAY 2009**

SUMMARY: Employment of Educators Act 76 of 1998 – appointment of principal of public school by first respondent in terms of s 6(3) of the Act – recommendation by school governing body found to be essential prerequisite for such appointment – held on the facts that such recommendation had never been made – appointment consequently set aside.

ORDER

On appeal from: Kimberley High Court (Bosielo AJP *et* Majiedt J sitting as court of first instance.)

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and replaced with an order in the following terms:
   '(a) The decision taken by the first respondent to appoint the third respondent as principal of the first applicant, is hereby reviewed and set aside.
   (b) The first respondent is ordered to pay the applicants' costs.'

JUDGMENT

BRAND JA (Streicher ADP, Maya, Snyders and Mhlantla JJA concurring)

[1] The appellants in this matter are the Kimberley Junior School ('the School') and the Governing Body of the School ('the SGB'). The first respondent is the Head of the Northern Cape Education Department ('the HoD') while the second, third and fourth respondents are Mr Paul Theunissen ('Mr Theunissen'), Mrs Seatile Rantho ('Mrs Rantho') and Mrs Donna-Lee Brand ('Mrs Brand') respectively. Only the HoD actively involved himself in these proceedings. The matter has its origin in the decision of the HoD to appoint Mrs Rantho – a black female person – instead of Mr Theunissen – a white male person – as principal of the School. The application by the School and the SGB to the Kimberley High Court for that decision to be reviewed and set aside was dismissed by Majiedt J, with Bosielo AJP concurring. The appeal against that judgment is with the leave of the court a quo.

[2] The issues between the parties will best be understood in the light of the factual background that follows. At the beginning of May 2006 the

Northern Cape Education Department ('the Department') advertised for applications to fill various vacant teaching posts in its area. Included amongst these was the vacancy for the position of principal at the School. Seven applicants applied. Two of those, who did not comply with the requirements stated in the advertisement, were sifted out by the district office of the Department. Of the remaining five, four were short-listed for interviews by an interview committee of the SGB specially constituted for that purpose in accordance with directives from the Department. The interviewing and assessment procedure to be followed by the interview committee was likewise prescribed in detail by the Department. Inter alia the committee was required to put a series of questions to each candidate that were aimed at determining the candidate's ability in twelve prescribed categories. Every committee member was then called upon to score the candidate's performance in each category. In the end, these scores were added up and the average mark calculated. Following upon its assessment of the four candidates involved in the manner prescribed, the interview committee made its proposals to the SGB. These were adopted by the latter and conveyed to the HoD in a letter of 12 June 2006.

[3] That letter and the ensuing correspondence between the SGB and the HoD are directly relevant to the dispute that eventually arose for determination. This explains the somewhat extensive extracts that are to follow.

- In its letter of 12 June 2006 the SGB informed the HoD:

'Re: Appointment of Principal

In the nomination of the above post, equity, redress and representivity were carefully considered at both the shortlisting and the interviewing process.

The demographics of the school are attached.

Having calculated the scores of the four candidates the following is relevant:

1. Mr P Theunissen, who obtained a score of 98.8, has been a deputy principal for 9 years and acting principal for 6 months. He has excellent experience, sound knowledge of the administration and financial management of a primary school. He has taught for 17 years in a primary school and has

insight into current education issues relevant to primary school education. He has had leadership experience in a multi-cultural school.

2. Mrs S Rantho, the second candidate, obtained a score of 58.1. She is currently HOD at a Secondary School in Bloemfontein and does not have teaching experience in a primary school. Nor does she have adequate administration and management skills to be a principal of a Primary School.
3. Mrs D-L Brand, the third candidate, obtained a score of 55.8. She is a Foundation Phase educator and has some experience in an acting HOD position. As such she lacks the necessary administration and management skills required to be principal of a suburban school with more than 700 learners.

It is very evident that Mr P Theunissen is the only suitable applicant to take up the post of principal at Kimberley Junior School.'

• The demographics of the school attached to the letter showed that the learner population was made up of 60 per cent African; 25 per cent Coloured; 8 per cent Indian and 7 per cent white learners. It also showed that the top management at the School consisted of one white male and three white female persons. The letter also accompanied several forms prescribed by the Department, including form NCK2 which described all three candidates as being 'recommended for appointment'.

• On 12 October 2006 the HoD decided to appoint Mrs Rantho as principal and conveyed that decision to the SGB in a letter of the same date. It reads:

'I refer to the above-mentioned matter and your recommendation for the appointment of a principal at your school.

Having considered the recommendation and ensured that you have complied with the requirements in section 6(3) of the Employment of Educators Act, 76 of 1998, in that at least three candidates have been recommended for appointment as contemplated in section 6(3)(c) and having satisfied myself that there has been compliance with the provisions of section 6(3)(b). I am satisfied with your recommendation and shall proceed with the appointment of Ms S S Rantho as per your recommendation.'

• The SGB's response to this letter was dated 25 October 2006. The relevant part reads as follows:

'This letter serves to confirm our telephone discussion held on Monday 23 October 2006 and has reference to your letter signed 12 October 2006, but only received 19

October 2006, . . . It is obvious that there is a patent error in your letter in that you state that you accept the Governing Body's recommendation that Ms S S Rantho be appointed as the Principal of Kimberley Junior School. . . . This is not what was recommended by the Governing Body and I again attach the recommendation that Mr. P Theunissen is the only suitable candidate.

You also state very clearly that the Governing Body had followed the required procedure correctly in terms of the relevant sections of the Act.

If it is not a patent error on your part then I respectfully request that you supply the Governing Body with:

(1) reasons for your deviation from our recommendation . . .

(2) . . . '

• It is not clear from the papers what was said during the telephone conversation of 23 October 2006, but, as I see it, not much turns on that. What is clear is that Mrs Rantho was informed of her appointment on 25 October 2006.

[4] On 31 October 2006 representatives of the Governing Body met with the HoD. In a letter of that date to the HoD, the chairperson of the Governing Body recorded what he regarded to be the gist of the meeting as follows:

'Our meeting this morning scheduled for 09h00 and held at the Department of Education has reference. . . .

I would like to place on record my understanding of our meeting and my request for you to reconsider your decision forwarded to myself on 12 October 2006.

You made it clear that due to a technical misinterpretation, by the Governing Body, of Section 6(3)(c) of the Employment of Educators Act, 76 of 1998 you chose one of the three candidates put forward by the Governing Body, notwithstanding the fact that only one clear candidate was indicated as suitable in the letter dated 12 June 2006.

You further indicated that as the Governing Body and the Department of Education have differing interpretations as to the intention of the abovementioned Act that the Governing Body now only has the courts to turn to, to make a final interpretation of the law, as your decision is final and there is no further appeal process.

. . . '

• The HoD concluded the exchange of correspondence by his letter of 10 November 2006, which reads:

'With reference to your letter dated the 25th October 2006, I wish to respond as follows:

1. There is no error in the position that I have taken in my letter dated the 12th October 2006. I believe this position was fully explained to you at our meeting.
2. To the extent that you are not aware of the reasons for my decision which I believe were given to you at our meeting I wish to re-iterate them:

2.1 While I accept that the recommendation complies with Section 6(3) [of the Employment of Educators Act 76 of 1998] an obligation is placed on me by Section 7(1) to always have regard to the democratic values and principles set out in Section 195 of the Constitution. This I have to do while taking into account the ability of the candidate and the need to address the imbalances of the past. Given the context of the school I have striven to meet this obligation in appointing Ms Rantho.

2.2. I am satisfied that with the necessary support Ms Rantho will be able to discharge her duties as principal of your school.

. . . '

[5] The correspondence shows an appreciation by both parties that the roles of both the HoD and the Governing Body in the present context are governed by s 6(3) of the Employment of Educators Act 76 of 1998. In terms of s 6(1) the authority to appoint, promote or transfer any educator employed by a provincial department of education vests in the head of that department. That authority is, however, subject to s 6(3) of which the relevant part provides:

'(3)(a) . . . (A)ny 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 . . .

(b) In considering the applications, the governing body . . . must ensure that the principles of equity, redress and representivity are complied with and the governing body . . . must adhere to-

(i) the democratic values and principles referred to in section 7 (1);

(ii) any procedure collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators;

(iii) any requirement collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators which the candidate must meet;

(iv) a procedure whereby it is established that the candidate is registered or qualifies for registration as an educator with the South African Council for Educators; and

(v) procedures that would ensure that the recommendation is not obtained through undue influence on the members of the governing body.

(c) The governing body must submit, in order of preference to the Head of Department, a list of-

(i) at least three names of recommended candidates; or

(ii) fewer than three candidates in consultation with the Head of Department.

(d) When the Head of Department considers the recommendation contemplated in paragraph (c), he or she must, before making an appointment, ensure that the governing body has met the requirements in paragraph (b).

(e) If the governing body has not met the requirements in paragraph (b), the Head of Department must decline the recommendation.

(f) Despite the order of preference in paragraph (c) and subject to paragraph (d), the Head of Department may appoint any suitable candidate on the list.

(g) If the Head of Department declines a recommendation, he or she must-

(i) consider all the applications submitted for that post;

(ii) apply the requirements in paragraph (b) (i) to (iv); and

(iii) despite paragraph (a), appoint a suitable candidate temporarily or re-advertise the post.

(h) The governing body may appeal to the Member of the Executive Council against the decision of the Head of Department regarding the temporary appointment contemplated in paragraph (g).

(i) The appeal contemplated in paragraph (h) must be lodged within 14 days of receiving the notice of appointment.

(j) The appeal must be finalised by the Member of the Executive Council within 30 days.

(k) If no appeal is lodged within 14 days, the Head of Department may convert the temporary appointment into a permanent appointment . . ..'

[6] To complete the legislative picture; s 7(1) of the Act – to which reference is made in s 6(3)(b)(i) – provides:

'(1) In the making of any appointment or the filling of any post on any educator establishment under this Act due regard shall be had to equality, equity and the other

democratic values and principles which are contemplated in section 195 (1) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), and which include the following factors, namely-

(a) the ability of the candidate; and

(b) the need to redress the imbalances of the past in order to achieve broad representation.'

[7] In formulating its case for the review of the HoD's decision to appoint Mrs Rantho instead of Mr Theunissen, the SGB accepted, quite correctly, so it seems, that that decision had been taken in terms of s 6(3)(f). Departing from that premise its contentions, broadly stated, were twofold. First, that Mrs Rantho was not a 'suitable candidate' for the position of principal as required by the subsection. Secondly, that although the subsection allows the HoD to deviate from any order of preference proposed by the SGB, Mr Theunissen is so markedly better qualified for the position and so markedly outscored Mrs Rantho during the interview procedure, that her appointment could not be justified on any reasonable grounds.

[8] The response to the first proposition elicited from the HoD was in essence that, since the SGB recommended Mrs Rantho as one of three candidates for the position, albeit as a distinct second option, it is not open to it to argue that she is not suitable. In this regard the HoD referred to the definition of 'recommendation' in the Concise Oxford English Dictionary, namely, 'to put forward with approval as being suitable for a purpose or role'. The proposition by the SGB that it recommended someone who it regarded as not suitable, so the HoD contended, therefore amounts to a contradiction in terms. As to the markedly superior score attained by Mr Theunissen during the interview and assessment procedure, the HoD's response appears to be encapsulated by the following statement in his answering affidavit:

'The constitutional imperative of the need to redress imbalances of the past in order to achieve broad representation as echoed in Section 7(1) of the EEA and Section 195(1)(h) and (i) of the Constitution could only be given effect to by appointing as principal of [the School] someone other than [Mr Theunissen]. These constitutional imperatives could, in my respectful submission, only be achieved by appointing [Mrs Rantho] as principal of [the School].'

[9] The way in which the battle lines were thus drawn led the court a quo to believe that the dispute presented for determination turned on whether the HoD had properly exercised the discretion bestowed on him in terms of s 6(3)(f) when he decided to appoint Mrs Rantho instead of Mr Theunissen. Having thus understood the dispute, the court proceeded to decide it in favour of the HoD. Its *ratio decidendi* appears from the following statement (in para 23):

'I unreservedly endorse this approach by the HOD. Once he had taken the position, correctly so in my view, that the three candidates proffered for recommendation had been regarded as suitable for appointment after having undergone a rigorous and extensive process of sifting and evaluation, he was not only at liberty, but in fact enjoined by legislation, particularly by the Constitution, to exercise his discretion in favour of a candidate who would promote equity, redress and representivity. The top management demographics is clearly out of proportion to the learner demographics at the school. This required redress as envisaged by the applicable legislation. In my view therefore, it cannot be said that his decision was not rationally connected to the purpose of the empowering legislation.'

[10] But as I see it, a proper analysis of the facts directs the spotlight to an issue which is entirely different from the one identified by the court a quo. As the court a quo saw it, the question was essentially the same as the one that arose in *Head, Western Cape Education Department v Governing Body, Point High School* 2008 (5) SA 18 (SCA), namely, whether the HoD had properly exercised his discretion under s 6(3)(f). In my view, the real enquiry in this case, however, relates to the antecedent question, namely, whether the HoD had any discretion to make an appointment under s 6(3)(f) at all. That, in turn, depends on the answer to the more pertinent question, whether the SGB had recommended Mrs Rantho to be appointed as principal of the School. The question arises from the pre-condition in s 6(3)(a) – which could hardly be stated in any clearer terms – that 'any appointment, promotion or transfer . . . [of an educator by the head of the department to a post at a public school] may only be made on the recommendation of the governing body of the public school . . .' (See also *Head, Western Cape Education Department v Governing Body, Point High School (supra)* para 10.) The same theme is maintained in s 6(3)(f). Though the head of department is not bound by the

order or preference proposed by the governing body, he or she can only appoint from the list of candidates recommended by the latter.

[11] Under common law, necessary preconditions that must exist before an administrative power can be exercised, are referred to as 'jurisdictional facts'. In the absence of such preconditions or jurisdictional facts, so it is said, the administrative authority effectively has no power to act at all (see eg *Paola v Jeeva NO* 2004 (1) SA 396 (SCA) paras 11, 14 and 16). The same principle finds application under the provisions of the Promotion of Administrative Justice Act 3 of 2000 – PAJA – albeit that the formulation is in somewhat different terms (see *President of the Republic of South Africa v South African Football Union* 2000 (1) SA 1 (CC) para 168). This is borne out, for example, by the following statement by Cora Hoexter, *Administrative Law in South Africa* 227:

'Section 6(2)(a)(i) of the PAJA gives effect to s 33(1) of the Constitution [which guarantees the right to administrative action that is lawful] by allowing judicial review of administrative action where the administrator who took it "was not authorised to do so by the empowering provision". Section 6(2)(f)(i) of the PAJA similarly provides that an administrative action may be reviewed where it "is not authorised by the empowering provision". These two provisions reflect the position at common law.'

[12] In administrative law parlance the head of department's power to appoint under s 6(3)(f) is therefore dependent on the jurisdictional fact of a recommendation by the governing body. As was pointed out by the Constitutional Court in *President of the Republic of South Africa v South African Football Union (supra)* para 168 note 132, the judgment of Corbett J in *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) remains the leading authority on jurisdictional facts in our law. In that judgment Corbett J (at 34 *in fine* – 35C) identified two categories of jurisdictional facts that can be encountered in empowering legislation. The first category, described as 'objective jurisdictional facts', includes the type of fact or state of affairs that must exist in an objective sense before the power can validly be exercised. Here the objective existence of the fact or state of affairs is justiciable in a court of law. If the court finds that objectively the fact

or state of affairs did not exist, it will declare invalid the purported exercise of the power.

[13] In the second category, that of subjective jurisdictional facts, the empowering statute has entrusted the repository of the power itself with the function to determine whether in its subjective view the prerequisite fact or state of affairs existed or not. Expressions often used by the legislature to express this intent are, eg, 'in his or her opinion' or 'if he or she is satisfied that' the particular fact or state of affairs exists. In this event the question is not whether the prescribed fact or state of affairs existed in an objective sense. The court can only interfere where it is shown that the repository of the power, in forming the opinion that the fact or state of affairs existed, had failed to apply its mind to the matter. Whether a particular jurisdictional fact can be said to fall within the one category or the other, will depend on the interpretation of the empowering statute.

[14] On my interpretation of s 6(3)(a) and s 6(3)(f) the prerequisite of a recommendation by the governing body falls in the first category, ie of objective jurisdictional facts. For the existence of this fact, the HoD in this case relied on the form NCK2 which specifically described all three names submitted as 'recommended candidates'. Self-evidently, however, the form must be read together with the SGB's letter of 12 June 2006. The pertinent question is therefore whether form NCK2, read with that letter, can objectively be construed as a recommendation of three candidates, including Mrs Rantho, for the position of principal of the School. The HoD concluded that it did. From his answering affidavit it appears that that conclusion evolved from the following process of reasoning: s 6(3)(c)(i) requires in peremptory language that the governing body 'must submit a list of at least three names of recommended candidates'. Moreover, s 6(3)(c)(ii) provides for the eventuality that a governing body finds itself unable to recommend three candidates. In that event it can submit a list of fewer than three candidates, but in consultation with the head of department. In this case, so the HoD's reasoning went, the SGB made no attempt to invoke the s 6(3)(c)(ii)

procedure. It must therefore be understood to have recommended three candidates as required by s 6(3)(c)(i).

[15] The replying affidavit on behalf of the SGB presented the explanation that its members were unaware of the s 6(3)(c)(ii) option because the directives of the Department and the form NCK2 itself provided for no alternative but to submit the names of three candidates. Consequently the SGB decided that, although they found only one candidate suitable, they would submit three names but recommend only one. However, as I have said, the question is not what the SGB intended nor what the HoD thought. The question is whether form NCK2 read with the letter by the SGB of 12 June 2006 can objectively be construed as a recommendation of Mrs Rantho as principal of the school.

[16] The term 'recommendation' is so commonly used that dictionary definitions can hardly contribute to greater clarity. But the definition of the term in the Concise Oxford English Dictionary which both the HoD and the court a quo found helpful, namely 'to put forward with approval as being suitable for a purpose or role', accords with my understanding of the term. Simply stated the question is thus: can form NCK2 read with the letter of 12 June 2006 be understood to put three candidates, including Mrs Rantho, forward as suitable candidates for the post of principal? I believe the answer to the question is: clearly not. In fact, the letter conveys the exact opposite. By saying in the last sentence that only one of the three candidates referred to is suitable, the author clearly intended to convey that the other two are not. Logic allows for no other inference. Moreover, what I regard as the only sensible inference is accentuated by two comments in paragraph 2 of the letter with specific reference to Mrs Rantho, namely, first that she has no experience in teaching at a primary school and, secondly, that she does not have adequate administration and management skills to be a principal of a primary school.

[17] The HoD's response to the first comment is that teaching experience at a primary school is not required by the advertisement for the post. But that is neither here nor there. The author of the letter obviously thought, rightly or

wrongly, that it was and therefore concluded that Mrs Rantho's lack of such experience rendered her unfit for recommendation. The second comment in paragraph 2 of the letter the HoD regarded, so he said (in para 36.3) as 'an acceptance by the [SGB] that [Mrs Rantho] does have administration and management skills to be a principal of a primary school, albeit inadequate'. I find the answer untenable. How can Mrs Rantho be understood to be recommended as suitable to be a principal if her administration and management skills were assessed to be inadequate to perform that function? What is more, what goes for Mrs Rantho must also go for Mrs Brand who can plainly not be understood to be recommended. It is true that form NCK2 on its own describes all three nominees as 'recommended candidates', but the message conveyed by the letter is so clear that it can hardly be obscured by the contents of the form.

[18] As to the HoD's process of reasoning based on his interpretation of s 6(3)(c), my conclusion is this: though I agree with his interpretation of the section, his reasoning cannot be sustained. Section 6(3)(c)(i) plainly requires a governing body to recommend at least three candidates. For the recommendation of a lesser number it must consult the head of the department with a view to invoke the procedure under s 6(3)(c)(ii). What the SGB tried to do in this instance, namely to nominate or put up the names of three candidates, but to recommend only one, is simply not permitted by s 6(3)(c). The SGB was supposed to recommend three candidates. But the HoD's inference that the Governing Body did in fact do something just because it was required to do so, simply does not follow. Experience of life dictates otherwise. Things are often not what they are supposed to be. The question remains whether, on a proper interpretation of its letter of 12 June 2006, the SGB did in fact recommend three candidates. For the reasons I have given, I believe the answer to that question is 'self-evidently not'.

[19] In the absence of the jurisdictional fact of a recommendation by the SGB the HoD had no authority to make an appointment. Or – in the language of s 6(2)(a)(i) and s 6(2)(f)(i) of PAJA – absent any recommendation by the SGB, the HoD was not authorised by the empowering provision to make an

appointment. It follows that his appointment of Mrs Rantho as principal of the School falls to be set aside. In the event, the SGB requested that we should appoint Mr Theunissen as principal of the School. I do not believe that would be appropriate. Apart from the principle of separation of powers, which dictates that a court should be hesitant to usurp executive functions, there was in this case not even a proper recommendation by the SGB as contemplated by s 6(3)(c). In the circumstances, both the SGB and the HoD should, in my view, be afforded the opportunity to perform their respective functions in terms of s 6(3) in a proper manner.

[20] In the result it is ordered that:

1. The appeal is upheld with costs.

2. The order of the court a quo is set aside and replaced with an order in the following terms:

'(a) The decision taken by the first respondent to appoint the third respondent as principal of the first applicant is hereby reviewed and set aside.

(b) The first respondent is ordered to pay the applicants' costs.'

.....
F D J BRAND
JUDGE OF APPEAL

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