IN THE EDUCATION LABOUR RELATIONS COUNCIL HELD AT CAPE TOWN

Case No PSES 105-06/07WC

In the matter between

L LIEBENBERG Applicant

and

DEPARTMENT OF EDUCATION WESTERN CAPE First Respondent

A BOSMAN Second Respondent

ARBITRATOR: Adv D P Van Tonder

HEARD: 31 AUGUST 2006

DELIVERED: 18 SEPTEMBER 2006

SUMMARY: Labour Relations Act 66 of 1995 – Section 186(2)(a) - Alleged Unfair Labour Practice relating to promotion – Whether unfair conduct proved;
Statutory discretion vested in School Governing Body alone to select best candidate of their choice for appointment as educator – Such discretion to be exercised in a rational manner – Third parties, including Department of Education, Trade Unions and ELRC not entitled to dictate how such discretion must be exercised – Manner in which discretion is exercised will only be interfered with by ELRC if exercised in an irrational, capricious or arbitrary manner or if other recognised grounds of review such as bias or failure to apply the mind can be proved;

ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

[1] This dispute concerns an alleged unfair labour practice relating to promotion. The arbitration hearing in this matter took place in Cape Town on 31 August 2006. Applicant was represented by Mr. F Tassiem of CTPA, a registered trade union of which applicant is

a member. First respondent was represented by Mr. R Ahmed, an employee of its Labour Relations Department. Second respondent was represented by Ms. G Samson of NUE, a registered trade union of which second respondent is a member. The evidence was mechanically recorded on two cassette tapes. The proceedings were concluded on 8 September 2006 when the final written heads of argument were submitted.

THE ISSUE IN DISPUTE

[2] I have to decide whether any unfair labour practice relating to promotion was committed in respect of applicant and if so, the appropriate relief.

THE BACKGROUND TO THE DISPUTE

[3] During 2005, a vacancy for deputy school principal on post level 4 arose at Cavalleria Primary School in Scottsdene and was advertised in Vacancy list 2 of 2005 as post number 1518.

[4] Many candidates, including applicant and second respondent, applied for appointment. Applicant and second respondent, together with three other candidates, were shortlisted and invited for interviews. At shortlisting, applicant (a male) was ranked first, whereas second respondent (a female) as well as a certain R Fester, were both ranked fourth. Applicant and second respondent both attended the interviews which were held on 31 October 2005. The school governing body nominated second respondent for appointment and she accepted this nomination on 11 November 2005. Applicant was dissatisfied with the school governing body's decision to recommend second respondent for appointment, and referred a dispute to the ELRC, as a result of which first respondent placed a moratorium on the filling of the post, pending the outcome of this arbitration.

SUMMARY OF EVIDENCE AND ARGUMENT

Evidence on behalf of applicant

[5] ***Adam Liebenberg****,* the applicant has been an educator since 1985. He holds a diploma in education and has been a head of department at Cavalleria Primary school since 1992. He has also recently acted as deputy school principal for one school quarter.

[6] He has is very familiar with appointment/promotion processes in the education department since he has sat in as a union observer on many occasions during these processes. He is of the view that he was unfairly treated by the School Governing Body[1] since, according to him, three of the six questions which were asked at the interviews, were not related to the criteria for the post, as contained in the advertisement.

[7] Applicant testified that none of his skills in conflict management, school management administration, computer literacy, interpersonal skills and extra mural activities were tested during the interview, although he possesses these skills and although these skills were requirements in terms of the advertisement. He conceded that all these skills were set out in detail in his curriculum vitae which he submitted with his application. He however feels that each of these skills should have been tested during the interviews and that the SGB acted unfairly by not having done so.

Evidence on behalf of first respondent

[8] ***Ellen Rosetta Botha*** is an educator at Cavalleria Primary School, where she is also a member of the SGB. In her capacity as member and secretary of the SGB she was involved in the processes leading up to the nomination of second respondent for appointment in post number 1518.

[9] Prior to opening the envelopes containing the applications, the Interview Committee set the criteria for shortlisting, according to the requirements as stipulated in the advertisement, being school management and administration, organisational skills, sound knowledge of RNCS and OBE, computer literacy, extra mural activities, good interpersonal skills and conflict management. The envelopes were then opened and the candidates were ranked by comparing their curriculum vitae to the criteria. Five candidates, including applicant and second respondent were shortlisted and invited for interviews. It was decided that all the shortlisted candidates will be assessed afresh during the interview stage and that points allocated to them during the shortlisting stage will not be taken into account during the interview stage.

[10] In the business plan which the SGB drafted, it was decided that the method which will be used during the interview stage to select the candidate of their choice, will be consensus

[1] hereinafter also referred to as “the SGB”

and not a point system. During the interviews, each member of the panel did keep a score card containing a grid in order to guide himself or herself so that it would be easier for him or her to motivate to the other panellists why he or she prefers a certain candidate above the others, but these score cards did not constitute the method of selection; it was merely a guideline and useful tool, since the SGB decided that consensus will be the method which would be used. After the interviews were completed, the panellists all had opportunity to motivate why they preferred certain candidates. The curriculum vitae of all the candidates were passed around again and carefully studied and based on the information in the curriculum vitae, the manner in which candidates sold themselves during the interviews, and debates amongst the panellists, the SGB unanimously through consensus, decided that second respondent should be recommended for appointment.

[11] When it was put to her that questions 1, 3 and 4, were irrelevant, she disagreed with this. She also disagreed with the statement that most of the criteria in the advertisement were not covered by the six questions asked during the interviews.

[12] She testified that when a candidate applies for a management position, it is his duty to sell himself to the SGB during interviews. Question 1 was a general question inviting the candidates to tell the SGB more about themselves. Question 2 tested management skills, and it was the duty of the candidates to answer this question as well as some of the other questions in such a manner that they covered all the criteria mentioned in the advertisement. Questions 3 and 4 tested management skills. Financial and conflict management skills were tested by questions 5. Question 6 tested OBE and RNCS skills. She also stated that it would not be possible to test each and every requirement stated in the advertisement, such as extra mural activities and administration in separate questions during the interviews, but added that the candidates who were shortlisted, had all mentioned their skills in this regard in the cv's which were taken into account during the interview stage.

[13] She conceded that the minutes did not record everything which occurred, because it is extremely difficult to record each and every step of the procedure in the minutes.

[14] ***Marsha Wagenaar*** is a deputy principal at Cavalleria Primary School, where she is also a member of the SGB. In her capacity as member of the SGB she was involved in the

processes leading up to the nomination of second respondent for appointment in post number 1518. At that stage she was also acting school principal and was also part of the Shortlisting and Interviewing committee in that capacity.

[15] She confirmed the evidence Botha relating to the methods used by the SGB in order to shortlist and interview candidates and eventually recommend a candidate for appointment. She specifically confirmed that the cv's were available and used during the interview stage and that the SGB used a method of consensus in order to determine who they should recommend for appointment.

Evidence on behalf of second respondent

[16] ***Anthea Elizabeth Bosman***, the second respondent has been an educator since 1983. She holds the BA degree as well as a diploma in education. She is currently an educator at Palm Park Primary School where she has acted as a deputy school principal for 9 months. According to her evidence, she has all the necessary skills as required in terms of the advertisement and has fully set out her skills in this regard in the curriculum vitae which she has submitted with her application.

Closing arguments

[17] Written heads of argument were handed in by the parties. Save to state at this stage that it was argued on behalf of applicant that the process was unfair and should be repeated from interviews, whereas respondents argued that the process was fair and should be confirmed, I do not intend to repeat these arguments here in detail and will refer to them during my analysis of the evidence, if and where relevant.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

THE UNFAIR LABOUR PRACTICE DEFINITION

[18] The statutory provision, in terms of which this tribunal may arbitrate promotion disputes, is to be found in section 186(2)(a) of the Labour Relations Act No 66 of 1995,[2] which defines unfair labour practices with regard to promotion as follows:

[2] hereinafter referred to as "the LRA"

> " '***Unfair Labour Practice***' means any unfair act or omission that arises between and employer and an employee involving …unfair conduct by the employer relating to the promotion… of an employee"

[19] In order to succeed under this section, an applicant needs to prove at least two things:

19.1 That the dispute which was referred does indeed concern conduct by the employer relating to "promotion" of the employee;

19.2 That there was unfair conduct on the part of the employer during the promotion process;

WHETHER THE DISPUTE IS INDEED A DISPUTE RELATING TO PROMOTION

[20] In *Mashegoane and another v University of the North*[3] "promotion" was defined as being elevated to a position that carries greater authority and status than the current position and employee is in. At the time when applicant applied for appointment in the position, he was a permanent employee of first respondent. The position which he applied for was on a higher post level than his current post level. If applicant was successful in his application, he would indeed have been elevated to a higher position, which would have entailed more responsibilities and a higher salary. Hence applicant would have been "promoted" as contemplated in the LRA, had he been successful. Accordingly I am satisfied that the dispute which was referred does indeed concern a dispute relating to promotion.

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WHETHER ANY UNFAIR CONDUCT WAS PROVED

[21] An employee who alleges that he is the victim of an unfair labour practice bears the onus of proving the claim on a balance of probabilities. The employee must prove not only the

[3] [1998] 1 BLLR 73 (LC)

existence of the labour practice, if it is disputed, but also that it is unfair.[4] Mere unhappiness or a perception of unfairness does not establish unfair conduct.[5]

[22] What is fair depends upon the circumstances of a particular case and essentially involves a value judgement.[6] The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee. Fairness to both means the absence of bias in favour of either.[7] According to Du Toit, 'unfair' implies failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended.[8] In the education sector, regard should also be had to the procedures prescribed in ELRC Resolution 5 of 1998,[9] [10] in order to determine whether a fair procedure was followed in promoting a certain candidate as opposed to another. These procedures must be applied,[11] but are merely procedural guidelines and not mandatory,[12] and need only be substantially complied with and not strictly.[13]

[23] An employee who wants to persuade a court or employment tribunal that there was unfair conduct relating to promotion and that the employer's decision should be interfered with, has an onerous task. This is so because an employee has no right to promotion but only to be fairly considered for promotion.[14] In addition there is a presumption of regularity, expressed by the Latin maxim *omnia praesumuntur rite esse acta*[15] in terms of which it is presumed, in the absence of evidence to the contrary, that all the necessary procedural formalities pertaining to an official act have been complied with.[16]

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[4] Grogan *Dismissal, Discrimination and Unfair Labour Practices* (August 2005) Juta page 43; *Provincial Administration Western Cape (Department of Health & Social Services) v Bikwani & others* (2002) 23 ILJ 761 (LC) para 32

[5] *SAMWU obo Damon v Cape Metropolitan Council* [1999] 3 BALR 255 (CCMA); Du Toit et al *Labour Relations Law* (4th ed) 464

[6] *National Education Health & Allied Workers Union v University of Cape Town* (2003) 24 ILJ 95 (CC) par 33

[7] *National Union of Metalworkers of SA v Vetsak Co-Operative Ltd & others* 1996 (4) SA 577 (A) 589C-D; *National Education Health & Allied Workers Union v University of Cape Town supra para* 38

[8] Du Toit et al *Labour Relations Law* (4th ed) 463

[9] which have been duplicated in Chapter B of the Personnel Administrative Measures ("PAM")

[10] and which have been elaborated on in Western Cape Provincial Chamber ELRC Resolution 1 of 2002

[11] *Stokwe v MEC, Department of Education, Eastern Cape Province & another* [2005] 8 BLLR 822 (LC)

[12] *Douglas Hoërskool & 'n ander v Premier, Noord-Kaap & andere* 1999 (4) SA 1131 (NC) at 1144I–1145I

[13] *Observatory Girls Primary School & another v Head of Dept: Dept of Education, Province of Gauteng*, Case No 02 / 15349, [2006] JOL 17802 (W) per Horwitz AJ

[14] *Westraat and SA Police Service* (2003) 24 ILJ 1197 (BCA); .

[15] translated as "all acts are presumed to have been lawfully done"

[16] Baxter *Administrative Law* at 738 and the authorities referred to by the author in footnote 437; This presumption also applies to all acts performed by a SGB or by first respondent in selecting a candidate for appointment or promotion

[24] An arbitrator should exercise deference to an employer's discretion in selecting candidates for promotion. The function of an arbitrator is not to second-guess the commercial or business efficacy of the employer's ultimate decision. Nor is it an arbitrator's function to determine whether the best decision was taken. The test should rather be whether the ultimate decision arrived at by the employer was a reasonable decision in the sense that it was operationally and commercially justifiable on rational grounds:

> "The court should be careful not to intervene too readily in disputes regarding promotion, especially to senior management positions, and should regard this an area where managerial prerogative should be respected unless bad faith or improper motives such as discrimination are present….."[17]

> " ..the legislature did not intend to require arbitrating commissioners to assume the roll of employment agencies. A commissioner's function is not to ensure that employers choose the best or most worthy candidates for promotion, but to ensure that, when selecting employees for promotion, employers do not act unfairly towards candidates…The Labour Appeal Court has made it clear that it will not interfere with an employer's decision to promote or appoint a particular candidate if the employer considers another to be superior, unless when so doing the employer was influenced by considerations that expressly prohibited by the legislature, or akin thereto: see Woolworths (Pty) Ltd v Whitehead [2000] 6 BLLR 640 (LAC).."[18]

[25] Arbitrators must bear in mind that they are not qualified as employment agencies and do not have practical experience as managers in a corporate environment or in the civil service. Accordingly arbitrators are loath to prescribe to employers how they should go about in selecting a candidate for promotion. There may be reasons for preferring one employee to another apart from formal qualifications and experience.[19] The employer may attach more weight to one reason than another,[20] may take into account subjective considerations such as performance at an interview[21] and life skills[22]:

> "Inevitably, in evaluating various potential candidates for a certain position, the management of an organization must exercise a discretion and form an impression of those candidates. Unavoidably this process is

[17] P A K Le Roux in *Cheadle Landman Le Roux & Thompson* Current Labour Law 1991/1992 at 17
[18] *Cullen v Distell (Pty) Ltd* [2001] 8 BALR 834 (CCMA)
[19] *PSA obo Badenhorst v Department of Justice* [1998] 10 BALR 1293 (CCMA)
[20] *Rafferty v Department of the Premier* [1998] 8 BALR 1077 (CCMA)
[21] *PSA obo Dalton and another v Department of Public Works* [1998] 9 BALR 1177 (CCMA)
[22] *PSA obo Badenhorst v Department of Justice* [1998] 10 BALR 1293 (CCMA)

> not a mechanical or a mathematical one where a given result automatically and objectively flows from the available pieces of information. It is quite possible that the assessment made of the candidates and the resultant appointment will not always be the correct one"[23]

[26] Unless one of the recognized grounds of review are present, arbitrators and courts should not simply interfere with the manner in which a discretion was exercised simply because they do not like the decision which was made:

> "The courts are, generally, wary and reluctant to interfere with the executive or other administrative decisions taken by executive organs of government or other public functionaries, who are statutorily vested with executive or administrative power to make such decisions, for the smooth and efficient running of their administrations or otherwise in the public interest. Indeed, the court should not be perceived as having assumed the role of a higher executive or administrative authority, to which all duly authorised executive or administrative decisions must always be referred for ratification prior to their implementation. Otherwise, the authority of the executive or other public functionaries, conferred on it by the law and/or the Constitution, would virtually become meaningless and irrelevant, and be undermined in the public eye. This would also cause undue disruptions in the state's administrative machinery." [24]

[27] In deciding whether conduct relating to a promotion was unfair, a court or tribunal has a very limited function and is in a similar position to that of an adjudicator called upon to review a decision made by a functionary or a body vested with a wide statutory discretion.[25] Therefore in order to show unfairness relating to promotion, an employee needs to show that the employer, in not appointing him or her and appointing another candidate, acted in a manner which would ordinarily allow a court of law to interfere with the decisions of a functionary by proving for example that the employer had acted irrationally, capriciously or arbitrarily, was actuated by bias, malice or fraud, failed to apply its mind or discriminated.[26]

[28] That this is the correct approach in promotion disputes, was confirmed by the High Court, where Miller J remarked as follows:

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[23] *Goliath v Medscheme (Pty) Ltd* (1996) 17 ILJ 760 (IC) 768

[24] *Basson v Provincial Commissioner (Eastern Cape) Department of Correctional Services* (2003) 24 ILJ 803 (LC) at 820C–F

[25] *PAWC (Department of Health & Social Services) v Bikwani & others* (2002) 23 ILJ 761 (LC) 771

[26] *Ndlovu v CCMA & others* (2000) 21 ILJ 1653 (LC); Grogan *Dismissal, Discrimination and Unfair Labour Practices* (August 2005) Juta page 41; *SA Municipal Workers Union on behalf of Damon v Cape*

> "The Promotion Committee was tasked with assessing all the applications and had to exercise a discretion in selecting the best candidate. A court of review has no jurisdiction to enquire into the correctness of the conclusion arrived at by a body or functionary lawfully vested with a discretion (see *Davies v Chairman*, *Committee of the Johannesburg Stock Exchange* 1991 (4) SA 43 (W) at 46H–J and *Ferreira v Premier*, *Free State and others* 2000 (1) SA 241 (O) at 251I–J). It will only be entitled to interfere with the decision taken by such a body or functionary if it is shown that it failed to properly apply its mind to the relevant issues and such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or mala fide, or as a result of unwarranted adherence to a fixed principle, or in order to further an ulterior or improper purpose, or that it misconceived the nature of the discretion conferred, or that the decision was so grossly unreasonable as to warrant the inference that it failed to properly apply its mind to the matter (see *Johannesburg Stock Exchange and another v Witwatersrand Nigel Ltd and another* 1988 (3) SA 132 (A) at 152A–E), or if there is such a material misdirection of fact that it is clear that it failed to exercise its discretion (see *Ferreira v Premier*, *Free State and others* (*supra*) at 251J–252A)".[27]

APPLICANT'S CAUSES OF ACTION

[29] Applicant is not contending that he was the best of all the candidates who applied for the position, or that he is better qualified than second respondent for the position or that he should in fact have been appointed on his merits in the position instead of second respondent. Applicant's cause of action in this case is solely based on alleged procedural irregularities, which I will briefly list and then discuss under separate subheadings:

29.1 It is alleged that three of the six questions which were asked during the interviews, were not related to the criteria for the position as contained in the advertisement and that many of the criteria contained in the advertisement were not tested during interviews;

29.2 It is alleged that the guidelines which the SGB used in making a decision as to who they should recommend, were not clear;

Metropolitan Council (1999) 20 ILJ 714 (CCMA) 718; *Benjamin v University of Cape Town* [2003] 12 BLLR 1209 (LC) at 1223-1224; *Marra v Telkom SA LTD* (1999) 20 ILJ 1964 (CCMA) 1968 per Christie C

[27] *Jwajwa v Minister of Safety & Security & others,* Case No 817 / 01 [2005] JOL 15727 (Tk)

29.3 It is alleged that although the SGB agreed that they will use consensus in order to make their final decision, they did not do so but instead reached their final decision by means of a majority vote, without reaching consensus;

29.4 It is alleged that it was unfair of the SGB not to take into account during the interviewing stage, the points scored by the candidates during shortlisting, when applicant was ranked first;

[30] In deciding whether procedural irregularities, such as the ones relied on by applicant, will be sufficient grounds for setting aside the decision of a SGB during a selection process, an over-exacting approach should not be followed:

> "I am mindful of the need to avoid an over-exacting approach, The Interviewing Committee comprises educators and parents who do not necessarily have expertise in selection. Mistakes will inevitably happen, often resulting in prejudice to a candidate. But this does not mean that a candidate has been treated unfairly. An act or omission is unfair where it substantially impairs a candidate's chances of being properly considered on his or her merits"[28]

[31] The High Court itself recently, when referring to paragraph 3 of Chapter B of PAM,[29] held that strict compliance with PAM is not necessary, that form must not be elevated above substance and that:

> **"One does not go digging to find points to stymie the process of appointing suitable candidates to teaching positions**…"[30]

[32] There is no allegation that the SGB was actuated by bias, malice, fraud or corruption, exceeded its powers or discriminated. In the circumstances, it simply needs to be determined whether it applied its mind and acted rationally.

THE ALLEGATION THAT IRRELEVANT QUESTIONS WERE ASKED AND THAT CORE CRITERIA WERE NOT TESTED DURING SHORTLISTING

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[28] per D Woolfrey in *Bell v Western Cape Education Department*, Case Number PSES 240-03/04 WC, unreported ELRC arbitration award, paragraph 8.
[29] which is a replica of Resolution 5 of 1998
[30] *Observatory Girls Primary School & another v Head of Dept: Dept of Education, Province of Gauteng,* Case No 02 / 15349, [2006] JOL 17802 (W) per Horwitz AJ

[33] This ground really forms the basis of applicant's attack on the fairness of the process followed by the SGB.

[34] The following requirements for the post were contained in the advertisement: school management and administration, organisational skills, sound knowledge of RNCS and OBE, computer literacy, extra mural activities, good interpersonal skills and conflict management. The questions asked at the interviews are as follows:

34.1 *Tell us more about yourself: personal and professional* [Question 1]

34.2 *Management is about a number of processes. Decision making, implementation of decisions, initiative, creativity, improvising are some of them. Tell us of a situation where any of the management skills you possess was displayed and what results did you achieve* [Question 2]

34.3 *One of the problems experienced by schools in previously disadvantaged communities, is the non-payment or poor payment of school fees. Could you advise the panel how you went about to address this situation and what the results were*. [Question 3]

34.4 *Corporal punishment no longer has a place in our schools. So schools have to identify and implement alternative disciplinary practices or procedures. Tell us about some you have applied and how effective they were*. [Question 4]

34.5 *There is an educator who has not handed in his marks before the deadline. This prevents other educators from completing their reports timeously. How will you handle the situation?* [Question 5]

34.6 *What is your opinion about RNCS and OBE?* [Question 6]

[35] Applicant is of the view that questions 1, 3 and 4 were completely irrelevant and did not relate to the criteria as contained in the advertisement. He also contended that many of

the criteria as contained in the advertisement were not tested in and covered by the questions asked during interviews.

Is it necessary for all the questions to relate to the requirements for the posts?

[36] Mr Tassiem argued that in order for the process to be fair, it is necessary that all the questions asked during the interviews must directly relate to the requirements for the post as contained in the advertisement.[31] Clause 3.7 of Schedule A to ELRC Resolution 5 of 1998 provides that the interviewing committee shall conduct interviews according to agreed upon guidelines, which guidelines must be jointly agreed upon in the provincial chambers of the ELRC. In the Western Cape Province, these guidelines, are contained in Annexure B to ELRC Resolution 1 of 2002, adopted in the Western Cape Provincial Chamber of the ELRC on 22 April 2002. Clause B(i) of Annexure B of the this Provincial Resolution reads as follows:

> Finalise and adopt the questions to be asked. (Please note that the questions should be in accordance with the criteria/requirements for the post)

[37] These guidelines are exactly what it purport to be – merely guidelines, and not rigid rules. If the parties to the collective agreements intended these guidelines to be rigid rules, they would not have called them "guidelines".[32]

[38] Non-compliance with the guidelines contained in the provincial resolution, will not necessarily mean that that the SGB has therefore acted unfairly. Rigid guidelines negate the objectives of the LRA[33]. Although these guidelines should be taken into account by a SGB and although it is desirable that these guidelines should be substantially complied with as far as is practically possible, they need not be slavishly followed.[34]

[39] A similar finding was made with regard to the Code of Good Practice on Dismissal contained in Schedule 8 of the LRA, when it was held that the Code is not law in itself but

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[31] In support of his argument Mr. Tassiem relied on certain questions contained in the WCED Verification Checklist. This checklist however does not form part of Resolution 5 of 1998 or Resolution 1 of 2002. It is merely an internal form, drafted by the WCED and as such has no status in law.

[32] Compare *Douglas Hoërskool & 'n ander v Premier, Noord-Kaap & andere* 1999 (4) SA 1131 (NC) at 1144I–1145I where it was held that paragraph 3 of Chapter B of PAM contains procedural guidelines which are not mandatory.

[33] see Du Toit et al *Labour Law through the Cases* Sch8-2

[34] Compare *Observatory Girls Primary School & another v Head of Dept: Dept of Education, Province of Gauteng,* Case No 02 / 15349, [2006] JOL 17802 (W) where Horwitz AJ held that strict compliance with paragraph 3 of Chapter B of PAM(which is a replica of Resolution 5 of 1998) is not necessary

merely guidelines, that these guidelines do not give rise to rights and can therefore not give rise to an independent action,[35] and that they should not be slavishly followed but merely taken into account.[36] As long as a SGB acts rationally and reasonably during interviews and as long as the questions which it asks are rational and reasonable, an arbitrator may not interfere with its decision, merely because some of the questions may not directly relate to the requirements for the post. I will revert to this aspect shortly

Did questions 1, 3 and 4 relate to the advertised criteria for the post?

[40] I do not agree with applicant that questions 1,3 and 4 did not relate to the advertised criteria. I agree with Botha that a job applicant, especially if he applies for such a senior position as deputy school principal, must come fully prepared to the interviews. It is his duty to acquaint himself with the criteria in the advertisement, and sell himself to the panel during interviews by *inter alia* incorporating the advertised criteria in his answers.

[41] I cannot agree with Mr Tassiem's suggestion that question 1 is simply an icebreaker question. Before practising for my own account as an advocate, I was also an employee, attended many interviews and even interviewed secretaries and clerks who would work for me. I have been asked this very same question during interviews and have asked it myself. It is always related to the advertised criteria, because it is so open-ended that it allows the candidate to basically say whatever he feels will impress the interviewing panel. The answer to this question, should in my view be given in such a manner that most of the advertised criteria are covered. An applicant who thinks that the purpose of this question is to only tell the panel about his hobbies and family life, only has himself to blame, if other candidates perform better during the interviews. Question 3 not only tests financial skills but also interpersonal skills. Question 4 tests managerial skills as well as interpersonal skills and possibly also conflict management skills. There is therefore no merit in applicant's argument that questions 1, 3 and 4 were irrelevant and did not relate to the advertised criteria.

Were the advertised criteria reflected in the questions?

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[35] *Maropane v Gilbeys Distillers and Vintners (Pty) Ltd & another* [1997] 10 BLLR 1320 (LC) at 1325E; *BIAWU v Mutual & Federal Insurance Co Ltd* [2002] 7 BLLR 609 (LC).
[36] *Komane v Fedsure* [1998] 2 BLLR 215 (CCMA).

[42] Panellists should not do all the talking during a job interview. Instead the job applicant should do most of the talking and sell himself to the panel, by conveying relevant information and impressing the panel whenever he has the opportunity to do so. If other candidates are better at this than a particular job applicant, this will be to their advantage. A job interview is not an aptitude test. It is impossible to test whether a job applicant actually does have the skills which are required for the job during an interview which lasts 20 minutes. To a great extent, this is determined by perusing a candidate's curriculum vitae and verifying his formal qualifications and references. The purpose of an interview is mostly to see which candidate makes the best impression.[37] To think that an interview can achieve much more than this, especially testing the aptitude and skills of a candidate, is really naïve.

[43] As I have already mentioned, question1 is so open-ended that it gives the interviewee the perfect opportunity to sell himself to the panel by emphasising all his skills, which are related to the advertised criteria. By having asked this question, it is impossible for any candidate to argue that he or she was not given an opportunity to discuss his or her qualities which are related to the advertised criteria. Each and every skill referred to in the advertisement could have been addressed in the answer to this question.

[44] Question 2 is so open-ended that the answer could have covered management, financial, administrative, organisational and interpersonal skills. Question 3 tested financial and interpersonal skills, whereas question 4 tested managerial, interpersonal and possibly also conflict management skills. I agree with Ms Botha that question 5 tested conflict management skills. The question itself clearly suggests the possibility of conflict not only between the educator who did not hand in his marks and the interviewee but also potential conflict between that educator and the other educators who are inconvenienced through the laxity of the educator who were late in submitting the marks. At the same time the question also tested organisational skills and managements skills. Question 6 tested OBE and RNCS knowledge. The only advertised criteria not tested directly by any of the questions, are extra mural activities and computer literacy skills. These skills however could have been covered by the job applicant in his answer on question 1.

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[37] Subjective considerations such as performance at an interview and life skills, may indeed be taken into account by the employer during a promotion process and is indeed a very important aspect of the interview process - *PSA obo Dalton and another v Department of Public Works* [1998] 9 BALR 1177 (CCMA); *PSA obo Badenhorst v Department of Justice* [1998] 10 BALR 1293 (CCMA)

[45] I have grave reservations as to whether it is indeed actually possible to test a candidate's skills relating to computer literacy, extra mural activities and administration abilities during an interview. Surely the SGB was not expected to ask applicant to complete an excel project to test his computer skills or kick a rugby ball to see whether he can really coach rugby. Most of the criteria mentioned in the advertisement are of such a nature that it is any event impossible to effectively test it during an interview. All that an applicant will in most instances be able to do if asked questions during an interview about these aspects, would be to supply the same information which is already contained in his curriculum vitae and it is here where the weakness in applicant's claim lies.

[46] One must assume that the members of the SGB can all read and did read the curriculum vitae of all the job applicants. Merely asking candidates to repeat information which is already contained in the curriculum vitae serves no purpose and merely wastes everybody's time. Applicant had to concede that all his skills which relate to the advertised criteria, are contained in his curriculum vitae. On the available evidence I must accept that the SGB did peruse and take the information in the curriculum vitae into account during the interview stage prior to reaching consensus on the recommendation which they made.

[47] Where a SGB takes into account a candidate's curriculum vitae during an interviewing process, it would be very difficult for a job applicant to argue that he was prejudiced through unfair conduct, merely because questions which were asked during interviews did not relate to the advertised criteria. It is the duty of a job applicant to ensure that all the advertised criteria are covered in his curriculum vitae. As long as the candidate's curriculum vitae is taken into account during the interview process before a particular candidate is selected, it makes no difference whether not one single question was asked which related to the advertised criteria, because the criteria will necessarily be taken into account as it is contained in the curriculum vitae. It may be that I might have asked different questions had I been on the interview panel. Applicant also testified as to how he thought questions should have been framed and I will accept that had he been on the interview committee different questions would in all probability have been asked. Whether I or applicant would have asked different and even "better" questions, is however not the test. It is not for me, the applicant, applicant's trade union or even first respondent to dictate to a SGB what questions it should ask during the interview process. The Constitutional Court has confirmed that tribunals and Courts must be slow to interfere with

rational decisions taken in good faith by bodies whose responsibility it is to deal with such matters.[38]

[48] As long as the decision of an employer[39] during a promotion process was taken in good faith, and was not unreasonable,[40] irrational,[41] capricious,[42] or arbitrary,[43] an employment tribunal such as the ELRC, may not interfere with the decision of the employer, even if the tribunal does not agree with the decision.[44]

[49] When assessing the reasonableness or rationality of a decision which was taken by a decision maker, such as a SGB, it should be borne in mind that rationality and reasonableness are very wide concepts. There is a wide band of reasonableness and rationality, within which there is ample room for radical differences of opinion amongst reasonable people and where different reasonable people, based on the same facts, may come to very different reasonable and rational conclusions in which case neither of them can be said to have acted unreasonably or irrationally. There may be many different logical and rational methods and processes of reasoning in reaching a decision, and the task of a court or tribunal is merely to determine whether the decision was within this wide band or range of rational and reasonable decisions:[45]

> The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred.[46]

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[38] *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC)

[39] in this case the SGB

[40] To act unreasonable means to take a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 408

[41] To act rational means to act in a manner "based on reason or logic". Cf Oxford English Dictionary. With regard to rationality, Chaskalson P held, as follows, in *Pharmaceutical Manufacturers' Association of SA: In re ex parte President of the Republic of SA & others* 2000 (2) SA 674 (CC) at paras 85 and 90

> *"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. A decision that is objectively irrational is likely to be made only rarely"*

[42] Acting capriciously was defined *in Mail, Trotter & Co v Licensing Board, Estcourt* (1903) 24 NLR 447 at 452 as being the opposite of exercising it reasonably

[43] The word "arbitrary" was defined in *Beckingham v Boksburg Licensing Board* 1931 TPD 280 at 282 by Tindall J as meaning "capricious or proceeding merely from the will and not based on reason or principle".

[44] see authorities referred to in footnote 26 above

[45] Wade *Administrative Law* (9th ed) 364-367

[46] per Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC at 1014 at 1064

[50] For these reasons it is immaterial whether applicant or I, can suggest different, “better” or more relevant questions, which the SGB could or should have asked during interviews. The mere fact that we may believe that our questions might have been more relevant or correct, does not mean that our approach would have been more rational or reasonable than that followed by the SGB. There is nothing in the approach of the SGB which suggests that their actions were defiant of logic or not based on reason. Botha gave very good and logical explanations as to why certain questions were asked and others not. Her answers demonstrate that the SGB acted reasonably, rationally and logically in asking the questions they did. Based on the evidence, I cannot find anything irrational, unreasonable, capricious or arbitrary in the questions which the SGB asked during interviews.

[51] I am satisfied that applicant’s chances of being properly considered on his merits, were not impaired through the questions which were asked. Accordingly applicant’s argument that the SGB acted unfair through the questions which were asked, is without merit and rejected.

THE ALLEGATION THAT THE GUIDELINES USED BY THE SGB WERE NOT CLEAR

[52] After having weighed the evidence, I am satisfied that the guidelines used by the SGB during the process from shortlisting to interviews and finally when they selected second respondent as the candidate of their choice, were clear. In her evidence Botha referred to the business plan, which the SGB used and which was handed in as exhibit A9-10. On perusal of the business plan and minutes as elaborated on by Botha and Wagenaar in their evidence, it is apparent that clear guidelines were agreed on and used by the SGB. They shortlisted candidates, based on the advertised criteria. During interviews they asked questions based on the advertised criteria, perused the curriculum vitae of the candidates once again in order to establish to what extent candidates complied with the criteria and eventually they debated the suitability of the five candidates they have interviewed and reached a unanimous decision based on consensus. There is nothing which is unclear about this procedure.

THE ALLEGATION THAT THE SGB DECIDED TO REACH A DECISION THROUGH CONSENSUS AND THEN INSTEAD REACHED A DECISION THROUGH MAJORITY VOTE

[53] There is no factual basis in the evidence for this allegation. Although each panelist did allocate “points” to candidates during the interviews, this was only used as guideline in order to enable each panelist to motivate to other panelists why he or she prefers a certain candidate. At the end the panelists debated the suitability of the various candidates and eventually, through consensus came to a unanimous decision.

THE ALLEGATION THAT THE SGB WHEN MAKING THE FINAL DECISION, FAILED TO TAKE INTO ACCOUNT THE RANKING DURING SHORTLISTING

[54] Applicant is quite correct in his allegation that the SGB, when making their final decision, did not take into account the fact that he was ranked first during the shortlisting stage. Had the SGB completely ignored the curriculum vitae of the candidates during the interviewing stage, this would have been unfair, but given the fact that they did not, I cannot see how it could possibly have been unfair not to take into account the fact that applicant was ranked first during shortlisting, when the final decision was made. By adopting the method which the SGB did, it merely meant that although all applicant’s skills and achievements as set out in his cv were still taken into account when making the final decision, the information contained in the cv did not solely determine the final decision, but in addition, the manner in which the candidates performed during interviews was also taken into account and that based on all the information before the SGB, applicant was simply not the best candidate.

[55] This approach seems to me to be a very logical, reasonable and fair approach to adopt. Surely a decision to appoint a certain candidate cannot be based solely on merely looking at a cv. The subjective impression made by respective job applicants during interviews, is a very important factor and it is for this reason that courts and tribunals should be slow to interfere and usurp the statutory powers of a SGB.

CONCLUSION

[56] The statutory powers to interview candidates and select the best candidate, were entrusted by the legislature to school governing bodies alone. As long as these powers are exercised in good faith in a rational and reasonable manner, it is not permissible or proper for the ELRC and Courts of law, to dictate to a SGB how these powers should be exercised, because doing so would be to infringe on the democratic rights of parents who have elected those members to perform the functions which the legislature has entrusted to school governing bodies. I have no doubt that applicant is a good educator, who is passionate about his profession. That is commendable. However the criticism which was

leveled against the conduct of the SGB, was either unfounded or immaterial. A process of selecting the best candidate for a job cannot be regarded as so fragile, that even the slightest criticism which can be levelled against the process, can render it unfair.

[57] I am satisfied that no unfair conduct as contemplated in section 186(2)(a) of the LRA was proved. I am also satisfied that ELRC Resolution 5 of 1998, Western Cape ELRC Resolution 1 of 2002 and the provisions of the Employment of Educators Act No 76 of 1998 have been substantially complied with. Accordingly and since there is no merit in applicant's claim, his claim must be dismissed.

AWARD

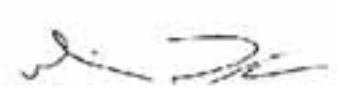
In the premises I make the following order:

1. No unfair conduct or any other legally recognized ground of review to justify interference with the decision of the School Governing Body, was proved with regard to the processes followed by the School Governing Body of Cavalleria Primary School in Scottsdene in shortlisting candidates, interviewing candidates and making a recommendation to first respondent as regards the filling of the post number 1518, advertised in Vacancy List No 2 of 2005.

2. The recommendation of the School governing body to appoint second respondent in post number 1518 is declared to be fair, lawful and valid and is hereby confirmed.

3. Applicant's claim is dismissed.

4. No order as to costs is made.



adv D P Van Tonder BA LLB LLM

Arbitrator/Panellist: ELRC