IN THE EDUCATION LABOUR RELATIONS COUNCIL

HELD AT CAPE TOWN

Case No PSES 281-05/06WC

In the matter between

F WILLIAMS Applicant

and

DEPARTMENT OF EDUCATION WESTERN CAPE Respondent

ARBITRATOR: Adv D P Van Tonder

HEARD: 22 NOVEMBER 2005

DELIVERED: 14 DECEMBER 2005

SUMMARY: Labour Relations Act 66 of 1995 – Alleged unfair dismissal based on alleged reasonable expectation of renewal of fixed term contract

Resolution 5 of 1998 – Interpretation and application of – School principal not present during interview of job applicant –effect of

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ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

[1] This matter concerns two disputes, the first of which is a dispute concerning an alleged unfair dismissal in terms of section 186(1)(b) of the Labour Relations Act No 66 of 1995("LRA"). The second dispute concerns the interpretation of a collective agreement (Resolution 5 of 1998). Both disputes have been referred to the ELRC for resolution in terms of the LRA.

[2] After the matter was unsuccessfully conciliated, the arbitration hearing took place on 22 November 2005 at the offices of the Western Cape Department of Education in Cape Town. The applicant was present at the arbitration and represented by Ms. S Smart, an official of the National Union of Educators (NUE), a registered trade union of which applicant is a member. Respondent was represented by Ms. Z Rikwe, an employee of the Labour Relations Department of the Western Cape Provincial Department of Education. The proceedings were only finalised on 13 December 2005, when the final written heads of arguments were received.

[3] During the arbitration hearing, applicant gave evidence on his own behalf and called no further witnesses. Respondent called two witnesses. The applicant handed in a bundle of documents, marked as exhibit A1-73, whereas the respondent handed in a bundle of documents, marked as exhibit B1-28. The evidence was mechanically recorded on four cassette tapes. At the request of applicant, who elected to give his evidence in Afrikaans, an Afrikaans interpreter was used during the proceedings.

[4] Ms. T Abrahams, who I considered to have an interest in the dispute relating to the application and interpretation of Resolution 5 of 1998, she being the candidate recommended by the school for appointment, which decision applicant seeks to have rescinded in these proceedings, was invited to join the proceedings, but did take part in or attend the proceedings. In this regard Ms. Smart indicated that she had served a copy of the referral forms in this matter together with annexures as well as particulars regarding the time, date and venue of the arbitration hearing on Ms. Abrahams. Proof of service was included in the bundle of documents handed in as exhibit A. Ms. Smart also indicated that she had not received and response from Ms. Abrahams after she had notified her of the hearing. I was accordingly satisfied that Ms. Abrahams had received sufficient notification of the hearing and that she had elected not to participate in the proceedings.

THE ISSUES IN DISPUTE

[5] There are two issues in dispute which have been referred to this tribunal for resolution. Regarding the first dispute, I have to decide whether there was a dismissal or not, and if so whether the dismissal was substantively and procedurally fair or not and, if not the appropriate relief. Regarding the second dispute, I have to decide whether there was any irregularity in the interview process, when applicant applied for appointment as full time educator at Dennemere Primary School in post 0654, and, if so, the appropriate relief.

THE BACKGROUND TO THE DISPUTES

[6] Applicant, who was born in 1964, has been employed as an educator at Dennemere Primary School since January 2002 until the end of June 2005 on a temporary basis on various fixed term contracts at a salary of R6451,25 per month, teaching grades 5 to 7. His last fixed term contract ended on 30 June 2005. During 2005 he applied for permanent appointment in the position in which he was acting when that post was advertised as post 0654 in vacancy list 1 of 2005. He was interviewed, but was unsuccessful. Instead, Ms. T Abrahams was recommended by the school governing body for appointment. The position was advertised to be filled on a permanent basis as from 1 July 2005.

[7] Applicant was not happy with the decision of the school governing body and registered a grievance with the respondent regarding the manner in which the interviews were conducted. This resulted in respondent placing a moratorium on the filling of the position on a permanent basis, and Ms. Abrahams has to date therefore not yet been appointed. I may just mention that it is standard practice for respondent to act in this manner and to place a moratorium on the filling of a position when a grievance is registered, which moratorium will only be lifted when the dispute is settled or when this tribunal has handed down an arbitration award regarding the dispute.

[8] As a result of applicant registering a dispute regarding the permanent filling of the post, it became available as a temporary position again as from 1 July 2005. Applicant's temporary fixed term contract which terminated on 30 June 2005, was however not renewed and a Ms. Van Wyk was appointed in the third quarter on a three month fixed term contract.

DETAILS OF THE DISPUTES

The dispute relating to the interview process

[9] Ms. Smart indicated that Applicant feels that the governing body did not comply with Resolution 5 of 1998 during the interview process. The ELRC is therefore asked to declare that the interview process was invalid and that the appointment process as from the short listing be repeated.

[10] The applicant attacked the interview process on numerous grounds, *inter alia*, the following:

10.1 The school principal was not present during the interviews;

10.2 There was no one on the interview committee who could advise the committee on the needs and requirements for this post.

10.3. One of the members of the interview committee, who was on the committee in her capacity as member of the school governing body, was not properly elected to the governing body

10.4 The school principal made no input when he was present during the ratification process, when the decision of the interview committee was placed before the full school governing body for ratification;

10.5 The principal of a neighbouring school, Mr. Johnson who was also on the interview committee, exceeded his powers in taking part in the process because he was only meant to be an observer and the representative of respondent;

10.6 There was bias on the part of the members of the interview committee;

10.7 The ratification meeting of the governing body took place after applicant had a grievance meeting with the same governing body to express his concerns about the interview meeting

The dismissal dispute

[11] Because of the dispute which was registered in respect of the permanent filling of the position, which position was due to be filled on a permanent basis as from 1 July 2005, the temporary contract for this post continued into the third and fourth quarters of 2005. Applicant alleges that he had a reasonable expectation that his fixed term contract would be renewed for a further 6 months from July 2005 until December 2005. His fixed term contract was however not renewed for the third and fourth quarters of 2005. Applicant accordingly requested this tribunal to award compensation equal to six months' salary.

[12] The main reasons why applicant claims that he had a reasonable expectation that the fixed term contract would be renewed are:

12.1 The fact that the contract had been renewed on numerous occasions in the past; and

12.2 The fact that the post continued to be available during the third and fourth quarters of 2005;

SUMMARY OF EVIDENCE AND ARGUMENT

[13] Due to the approach I intend to adopt regarding the interview dispute, I do not intend summarising all the evidence relating to that dispute, because it would not be relevant for purposes of this arbitration. To the extent that I may not mention aspects raised in the evidence or heads of argument(relating to both issues before me), this would only be with the intention of keeping this award as short as possible and should therefore not be seen as meaning that I did not take that evidence or argument into account. In fact, I have again after the hearing, listened to all the tapes, before writing my award. I also found the written heads of argument very helpful in writing this award.

Evidence on behalf of applicant

[14] *Mr. F Williams*, the applicant, testified that he had been teaching grade 5 to grade 7 at Dennemere Primary School since 2002 in a temporary capacity, in the employment of respondent. He also gave a summary of his qualifications and experience, which is not necessary to be repeated here.

[15] He started teaching at Dennemere, after he was approached by the school principal, Mr. Pearce, who asked him to come and teach at Dennemere and promised him that he would eventually be appointed permanently. He left his temporary position at Uitsig School to go and teach at Dennemere, with the hope of being appointed there permanently.

[16] According to his evidence, he was appointed on various fixed term contracts at Dennemere as follows and for the following periods:

16.1 January to March 2002;

16.2 April to June 2002;

16.3 July to September 2002;

16.4 October to December 2002;

16.5 January to March 2003;

16.6 April to June 2003;

16.7 July to September 2003;

16.8 October to December 2003;

16.9 January to June 2004;

16.10 July to September 2004;

16.11 October to December 2004;

16.12 January to June 2005;

[17] The position in which he was employed on a temporary basis, was advertised for permanent appointment during March 2005 and the starting date was 1 July 2005. The position was advertised as post 0654 in Vacancy list 1 of 2005, a copy of which was handed in exhibit B27. He applied for the position. The interview took place on 17 May 2005 at 9:00 in the evening. The minutes of the interview is contained in exhibit B21. Applicant was however unsuccessful. The interview committee ranked him second and recommended Ms. T Abrahams for appointment. According to applicant, he feels that he should have been successful, because he feels that he is qualified for the position, complies with all the requirements for the position and is the most suitable candidate, although not necessarily the best.

[18] The members of the school governing body present at the interview was Mrs. Blaauw(an educator and member of the governing body), Mrs. Clarke (a parent and acting chairperson of the governing body), Mr. Samsodien (a parent) and Mr. Snell (a cleaner at the school). None of these people have any knowledge of intermediary phase education. This position was an intermediary phase position.

[19] Mr. Johnson is the principal from the neighbouring school and he represented the respondent during the interview. He was only an observer and should not have participated as he did by opening the package containing the applications. The school principal, Mr. Pearce was not present at the interview, although applicant saw him at school on the night of the interviews. Applicant feels that it was vital that the school principal should have been present because, without him, there was no one on the interview committee who had knowledge of the needs of the school for the intermediary phase. He believes that Mrs. Blaauw, was not properly elected to the school governing body and furthermore believes that, prior to the interviews, she had in any event resigned and was not reelected. He also believes that the interview committee acted irregularly by not having taken his curriculum vitae into account during the interview process. The questions which were asked also did not relate the requirements for the post.

[20] Furthermore he feels that the interview committee was biased against him. This relates to an incident concerning a cheque for more than R18 000, which was issued on 23 December 2004 by the school principal and Mrs. Clarke, who was also on the interview committee. Applicant believed that there were irregularities concerning this cheque and laid a complaint in this regard with respondent during January 2005. He feels that the governing body was biased against him as a result of his conduct in this regard.

[21] On 20 May 2005, he was advised that his application for the permanent position was not successful. Applicant was not happy with the result because of the various procedural defects in the interview process, which had already been mentioned. On 25 May 2005 his union referred a grievance, on his behalf, to respondent as per exhibit A30. On 20 June 2005 he had a grievance meeting with the governing body to discuss his dissatisfaction with the fact that his application was not successful.

[22] During the grievance meeting, the governing body advised him that he did not sell himself well enough during the interview. They said that they only took into account what he had said during the interview, and did not take his curriculum vitae into account. On 22 June 2005, the full governing body ratified the decision of the interview committee to recommend Ms. Abrahams for appointment in the position.

[23] The practice was that before the end of a fixed term contract he would approach the school principal before the end of the school quarter regarding the renewal of his contract, and would then complete an application form for a new fixed term contract for the next school quarter. The governing body would then complete the nomination form to nominate him for the position and then the forms would be taken to respondent during the holidays.

[24] On 23 June 2005 he approached the principal Mr. Pearce and mentioned to him that since he had registered a dispute regarding the selection of a candidate for permanent appointment in the position, he would like to know how that would affect his position as a temporary teacher in that post during the next quarter. He wanted to know whether he had to return to the school the next quarter or not. The principal said he was not certain and will find out from the governing body. On 24 June 2005 when the schools closed for the holidays, he once again approached the principal, who said that the governing body will advertise the temporary post again and that applicant would have to apply for the post if he was interested. In the personnel meeting before the end of the quarter, Mr. Pearce then mentioned that applicant's post is terminated because his contract has ended. Applicant says that he thought that he would remain in the temporary position during the 3d quarter because a dispute was registered in respect of the post, which meant that the respondent has placed a moratorium on the filling of the post.

[25] Applicant testified that after the schools closed he looked for the advertisement everyday as from 24 June until 4 days after the reopening of the schools in the 3d quarter, so that he can apply for appointment on a temporary basis again during the third quarter. However, the post was never advertised.

[26] No one from the school or from respondent contacted him after 24 June 2005 in order to ask him whether he was interested to have his contract renewed for the 3d quarter. The principal has all his contact details and could have contacted him if he wanted him to return to school in the 3d quarter. He failed to do so. Two days after the schools reopened in July, Mr. Prinsloo, the deputy principal only contacted applicant to ask him whether he had any documents of the school in his possession. He did not mention anything regarding the temporary position and did not ask applicant if he wanted to return to school. He did not go back to the school in the 3d quarter because the principal at the end of the second quarter had told him that his services are suspended at school and that the post would be advertised. The onus was on the principal and respondent to contact him and ask him to come back to school in the 3d quarter.

[27] According to applicant, he was unemployed for July and August 2005. In September 2005 he acted in a position and earned R4000. As From 10 October 2005 he has also acted in a position and earned R4800 in October. For November he will earn R6000. In December he will probably only be paid for 5 days, which means that his salary could be R6000 divided by 31 days, multiplied by five.

Evidence on behalf of respondent

[28] *Mr. Beresford Gilmore Pearce*, testified that he is the school principal at Dennemere Primary School, where applicant was employed in temporary positions until the end of June 2005.

[29] It is the practice at the school that they take leave of every temporary educator at the end of the quarter when his fixed term contract ends, irrespective of whether he would return the next quarter or not. However such temporary educators, if the are interested to be appointed again the next quarter, normally enquire from him whether the contract would be available again for the next quarter. If the position is still available the next quarter, and the temporary educator is interested, he is appointed again after the necessary forms have been completed and furnished to respondent. At the end of the second school quarter of 2005, applicant did not approach the witness and neither did the witness approach applicant regarding renewal of his fixed term contract. The witness denied that he ever said to applicant that the temporary post would be advertised by the governing body and that he could apply if he was interested. There was never any intention to advertise the position externally.

[30] It is customary to present every contract teacher with a fruit basket at the end of the quarter (irrespective of whether he comes back or not the next quarter) when taking leave of them. When he took leave of the contract teachers and presented them with fruit baskets on the last day of the second school quarter of 2005, applicant said to him that he wants nothing from the school. Since then he has not had any contact with applicant.

[31] When the school reopened for the third school quarter, applicant did not report for duty. The school expected that applicant would indeed return which resulted in applicant's class being unattended during the first three days of the third school quarter. When applicant did not report for duty, it was assumed that he had taken up employment elsewhere. Accordingly another teacher, Ms. Van Wyk was appointed on a three month contract.

[32] In the past, applicant had on at least two occasions, during the school holidays, approached him and brought along his application forms for reappointment for the next quarter as well as those of other contract teachers, in order for the witness to complete. Applicant would then take these forms to respondent's head office in Cape Town for the forms to be processed. During the June 2005 holidays applicant did not approach him in this regard. It was the prerogative of applicant to approach the school if he was still interested in the contract position, because sometimes contract teachers rather decide to go to another school instead of returning to Dennemere.

[33] The witness confirmed that he was not part of the interviewing process when applicant was interviewed for the permanent position, because he had to attend a function on that evening. He was under the impression that it was not necessary for him to attend the interviews. The outcome of the interview would not have been different had he been on the interview committee. He was also not part of the short listing process because the short listing and interview is one process.

[34] *Ms. Beryl Blaauw* testified that has been teaching in a contract position at Dennemere Primary School for a while. She has been properly elected to the governing body and although she wanted to resign she was asked to withhold her resignation and accordingly has, to date, not yet resigned.

[35] She was on the interview committee who interviewed applicant for post 0654.The questions which were asked during the interview, were in line with the criteria for the post. During the interview, applicant gave very brief answers without elaborating and this did not impress the committee.

[36] It is the practice at the school that contract teachers who are appointed on fixed term contracts, would approach the principal during the holidays to enquire whether there will be any positions for them during the next quarter.

CLOSING ARGUMENTS

[37] Extensive written heads of argument were handed in by both applicant and respondent, the last of which were received on 13 December 2005. I am not going to repeat these arguments here in detail and will refer to them during my analysis of the evidence, where relevant.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

DISPUTE CONCERNING THE APPLICATION/INTERPRETRATION OF RESOLUTION 5 OF 1998

[38] In this dispute applicant seeks to have the decision of the governing body of Dennemere Primary School to recommend Mrs. Abrahams instead of applicant for appointment as an educator in post 0654 at Dennemere Primary School, advertised in Vacancy list 1 of 2005, set aside.

[39] The dispute arose after applicant applied for the position, was short listed and interviewed, but not recommended for appointment by the governing body. The interview committee's first choice was Mrs. Abrahams and applicant was their second choice. The full governing body ratified this decision and decided to recommend the appointment of Ms Abrahams. Before this tribunal, applicant has, on various grounds, attacked the procedure in which the interviews were conducted as well as the fact that Ms. Abrahams and not him, was recommended for appointment in the position.

[40] On 11 November 1998 the Department of Education as employer and trade unions in the education sector, entered into a collective agreement, referred to as Resolution 5 of 1998.

[41] This resolution provides for the manner in which the vacancies for educators in public schools should be advertised, as well as the manner in which suitable candidates should be identified, sifted, short listed and recommended for appointment by the school governing body.

[42] In terms of section 24(1) of the LRA every collective agreement must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement, which procedure must first require the parties to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration. Clause 5 of Resolution 5 of 1998 provides that any dispute about the interpretation or application of the agreement must be resolved by this tribunal.

[43] It may just be mentioned that Resolution 5 of 1998 has also been copied and published in Chapter B of PAM, as regulations by the Minister of Education in terms of section 4 of the Employment of Educators Act 1998(see GN 222 of 1999 published in Government Gazette No 19767 dated 18 February 1999, as amended). Resolution 5 of 1998 has however not been terminated and is still in existence. This leads to the unique situation that the same provisions at present moment exist in the form of a collective agreement as well as in the form of legislation. In respect of the Resolution, this tribunal has exclusive jurisdiction and in respect of PAM, the High Court, in terms of the Promotion of Administrative Justice Act No 3 of 2000, has exclusive jurisdiction.

[44] Therefore, a party has the choice to either approach this tribunal for the resolution of a dispute which arose as a result of an alleged contravention of a provision contained in the collective agreement or to approach the High Court in a review application in respect of exactly the same issue, not in terms of the collective agreement , but in terms of Chapter B of PAM read with the provisions of the Promotion of Administrative Justice Act. Applicant through his Union, NUE, chose to approach this forum for relief and was fully entitled to do so. It is perhaps also appropriate to mention that applicant, in my view, irrespective of whether he was indeed the best and most suitable candidate for the position or not, did have the necessary *locus standi* to approach this forum for relief. I say so because, having been part of the interview process, applicant has sufficient interest to demand that the prescribed and agreed interview procedures, are complied with and adhered to, even though he might not necessarily have been the best and most suitable candidate for the position.

[45] It is important to realise that this is not a promotion dispute and that I can therefore not approach this matter in the manner in which this tribunal may approach an unfair labour practice dispute. I am of the view that in interpreting and applying Resolution 5 of 1998, this tribunal cannot have any more powers than the High Court when exercising its review powers. Hence it is not the task of this tribunal to determine whether the decision of the interview committee and/or governing body was correct or whether the best candidate was indeed selected, but merely whether they acted *ultra vires* or irregular(see *Schoch NO and others v Bhettay and others* 1974 (4) SA 860 (A) at 866E-F; *Liberty Life Association of Africa v Kachelhoffer NO and others* 2001 (3) SA 1094 (C) at 1110J-111A). To enquire into the question as to whether the interview committee chose the best or most suitable candidate, would in my view be an usurpation of the powers of the interview committee, not authorized by law or Resolution 5 of 1998.

[46] Because of the approach I intend to adopt, I do not find it necessary to deal with each and every point which applicant has raised in support of his argument that the process which led up to the recommendation of Ms. Abrahams for appointment in the position, was irregular.

[47] It is common cause that the school principal of Dennemere Primary, Mr. Pearce was not present when the short listing and interviews in respect of post 0654 took place on 17 May 2005. It is also common cause that the reason why he was not present was because he attended a function. The question to be considered is, whether it was permissible for the interview to have been conducted in the absence of the school principal and if not, what the effect of that on the validity and legality of the process would be.

[48] Clause 3.2 of Schedule 1 to Resolution 5 of 1998 provides as follows:

> "3.2 The interview committee shall comprise of
>
> 3.2.1 In the case of public schools-
>
> a) one departemental representative (who may be the school principal), as an observer and resource person;
>
> b) the Principal of the school (if s/he is not the departemental representative), except in the case where s/he is an applicant;

c) members of the school governing body, excluding educator members who are applicants to the advertised post/s; and

d) one union representative per union that is a party to the provincial chamber of the ELRC. The union representatives shall be observers to the process of shortlisting, interviews and the drawing up of a preference list".

The importance of Resolution 5 of 1998

[49] The importance of the procedure agreed to in Resolution 5 of 1998, should not be underestimated. In the first place, the LRA actively encourages and promotes collective bargaining. Collective agreements are regarded as so important, that it even supersede existing individual contracts of employment.

[50] Secondly, a high premium has always been placed in our law on the sanctity of contracts, because parties should be held bound by the promises they make in contracts. Innes CJ expressed this principle as follows:

> "No doubt the condition is hard and onerous; but if people sign conditions they must in the absence of fraud, be held to them. Public policy so demands. 'If there is one thing which more than another policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts'"(*Wells v South African Alumenite Company* 1927 AD 69 at 73)

[51] The same principle was confirmed by Didcott J(as he then was):

> "Commerce needs freedom to bargain and loyalty to contracts already concluded…but its mercantile justification is not all there is to be said for sanctity of contracts. The principle has a moral foundation too, which gives it durability and universality beyond the norms of the marketplace. This consists of the simple requirement that people should keep their promises. That appeal to honour surely transcends all of present relevance.(see *Roffey v Catterrall, Edward & Goudre* 1977 (4) SA 494 (N) at 505F-H)

[52] Lastly, the procedure of shortlising and interviewing candidates, seems to me to be the most crucial part of the whole process in selecting and appointing an educator in terms of the Employment of Educators Act No 76 of 1998(hereinafter also referred to as the "EEA").

[53] Although it is in the final instance the respondent alone who appoints an educator, its powers in doing so are severely limited in terms of section 6 of the EEA. In the first place the respondent may only appoint an educator on recommendation of the governing body. Secondly, it may only decline the recommendation of the governing body on the limited grounds as set out in section 6(3)(b) (i) to (v) of the EEA. Refusal to accept the recommendation of the governing body's first choice candidate on any other grounds as those which are listed in this section, is irregular(see *Laerskool Gaffie Maree v MEC for Education, Training, Arts & Culture: Northern Cape Province* [2002] 12 BLLR 1228 (NC) at 1231-1233). Accordingly, unless any of the scenarios postulated in section 6(3)(b)(i)-(v) exists, the respondent must for all practical purposes merely rubberstamp the recommendation of the governing body and appoint the candidate recommended by the governing body.

[54] Ms. Rikwe placed great emphasis on the fact that it is not the interview committee itself which makes the recommendation to appoint to the respondent, but the full governing body. It is indeed so that the interview committee after having interviewed the candidates, must only rank the candidates in order of preference together with a brief motivation and submit this to the full governing body for recommendation (see clause 3.9 of Schedule 1 to Resolution 5 of 1998). It should however be borne in mind that in order to comply with section 33(1) of the Constitution (Act 108 of 1996), the recommendation of the full governing body must be rationally justifiable on the facts which were available at the time when the decision to recommend was taken (see *Carephone (Pty) LTD v Marcus* (1998) 19 ILJ 1425 (LAC) para 37, approved and applied by the Constitutional Court in *Bel Porto School Governing Body & others v Premier, Western Cape* 2002 (3) SA 265 (CC) at para 89*).* In my view, it would be extremely difficult for the full governing body, without having seen and interviewed the candidates, to change the preference of the interview committee, because to justify and motivate such a change on objective rational criteria, may be extremely difficult if not impossible. It is after all the interview committee who has seen the candidates and we all know that the impression made by a candidate during an interview, in many instances, weighs much more than impersonal details set out on paper in a curriculum vitae.

[55] Accordingly, the decision of the interview committee is one of the most crucial and important, if not the most crucial and important phase of the procedure for the appointment of an educator. For these reasons, non-compliance with the interview procedures provided for in Resolution 5 of 1998, should be seen in a serious light.

The importance of the presence of the school principal at the interviews

[56] In terms of section 18 of the South African Schools Act No 84 of 1996, the professional management of a public school must be undertaken by the school principal under the authority of the Head of Department. It therefore makes sense that the school principal, who is the manager of the school, should be present during all interviews of candidates, unless he is the applicant or has a personal interest in the matter.

The expressio unius est exclusio alterius - rule

[57] Loosely translated, this latin maxim, used as an important tool in the interpretation of contracts and statutes, means that the specific inclusion or mentioning of one thing in a contract or statute, necessarily implies that all the things which are not mentioned, are intended to be excluded(see *Murman v Minchin* 1910 (10) HCG 313*; Lessing v Steyn* 1953 4 SA 193 (O) 202; *Steyn* Die Uitleg van Wette 50-51, 166, 207). So for example, if a contract stipulates that a tenant may not fish in the dam and says nothing more, it may be inferred that the tenant may fish in the river.

[58] Paragraph b of clause 3.2.1 of the Annexure to Resolution 5 of 1998, specifically mentions that the school principal must be present during the interview, except in the case where he is the applicant. Because specific provision is made for the absence of the principal when he is the applicant, but no provision is made for his absence under any other circumstances, application of the *expressio unius est exclusio alterius – rule*, would mean that the principal must always be present at interviews unless he is the applicant

The common understanding on the Interpretation of Resolution 5 of 1998

[59] Support for the view that the parties never contemplated the school principal to be absent from the interview and shortlisting process (unless he is the applicant) can be gathered from the "Common Understanding on the Interpretation and Application of Certain Clauses of Resolution 5 of 1998", Resolution 1 of 2002 concluded in the Western Cape Provincial Chamber of the ELRC.

[60] Regarding the interpretation of clause 3.2.1 contained in Schedule 1 to resolution 5 of 1998, clause 2.5 of Resolution 1 of 2002 gives guidance. It specifically stipulates that the employer must ensure that a trained representative such as a circuit manager or principal from another school is present at all processes, so that the principal of the school would not be put in the position to decide if he should be the departemental representative or not. This seems to indicate that the common understanding between the parties were that the principal should always be present.

[61] Clause 2.5 continues to stipulate what should happen in case a departemental representative is not present. Nowhere does it however deal with or provide for the absence of the school principal himself. From reading clause 2.5, it seems to me that the parties, under no circumstances contemplated the possibility that a principal could not be present during the shortlisting and interview process, unless he is the applicant.

Use of the word "shall" as opposed to "may"

[62] The effect of non-compliance with provisions can to a great extent be determined by establishing whether the provision is peremptory (mandatory) or whether it is merely directory(permissive). It is said that a peremptory provision must be obeyed exactly whereas a directory provision need only be obeyed substantially. Non-compliance with a peremptory provision leads to nullity whereas non compliance with a merely directory provision does not lead to nullity(see *Woodward v Sarsons* (1875) LR 10 CP 733; *Steyn* Die Uitleg van Wette (5th ed) 192 - 201; *Devenish* Administrative Law and Justice in South Africa (2001) 250; *De Ville* A Judicial Review of Administrative Justice in South Africa 267; *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing Pty Ltd,* delivered in the Supreme Court of Appeal on 5 September 2003, Case No 129/03 para 33-34).

[63] The word "shall" as opposed to "may" is an indication that the provision is peremptory and that non compliance with it would lead to nullity(see *Sutter v Scheepers* 1932 AD 173; *Steyn* Die Uitleg van Wette (5th ed) 196; *Devenish* Administrative Law and Justice in South Africa (2001) 253). In this regard, the former Appellate Division for example remarked that if a provision:

> "is couched in such peremptory terms it is a strong indication, in the absence of considerations pointing to another conclusion, that the issuer of the command intended disobedience to be visited with nullity(see *Messenger of the Magistrate's Court v Pillay* 1952 (3) SA 678 (A) 683D-E)

[64] Clause 3.2 of Schedule 1 to Resolution 5 of 1998 does not say that only some of the parties mentioned in subclauses (a) to (d) must be present during the interview or that the committee may itself decide which of the parties referred to in subclauses (a) to (d) should be present during the interview. By using semi-colons between clauses (a) and (b), (b) and (c), (c) and (d) and then adding the word "and" after the semi-colon at the end of clause (c), it is clear that all the parties mentioned in these subclauses must be present.

[65] Furthermore, clause 3.2 clearly contains the word "shall" (as opposed to “may”) and accordingly appears to be peremptory and not only directory. Although the distinction between peremptory and directory provisions is not always conclusive in determining whether non compliance will in fact result in nullity, use of the word “shall” is certainly a strong indication that nullity has been intended in the case on non compliance.

[66] Applying the guidelines of interpretation I have referred to, it would therefore appear that all the parties mentioned in subclauses (a) to (d) of clause 3.2.1 must all simultaneously be present during the interview and that absence of any of them (including the principal) would lead to nullity of the process.

[67] I am fortified in this interpretation by the fact that subclause (b) only provides for absence of the principal where he himself is the applicant. No other exceptions are provided for. This seems to indicate that the parties, when entering into the collective agreement had in mind that the principal may only be absent when he has a personal interest in the matter.

[68] Had it only been for these considerations which I have mentioned so far, I might perhaps have found that although the principal was not intended to be absent from the process, such irregularity does not necessarily lead to nullity of the process.

The proper constitution of the interviewing committee

[69] However, in addition to the problems which I have already referred to, there is a wealth of authority to the effect that where a committee, board, tribunal or panel is not properly constituted, any decision taken by it, is *ultra vires* and invalid .

[70] For a panel or body to be properly constituted, this would imply that where the body consists of more than one person, all the members need to be present as well as participate in the decision making, failing which the proceedings are invalid(see *Rose Innes* Judicial Review of Administrative Tribunals in South Africa (1963) 121; *De Ville* A Judicial Review of Administrative Justice in South Africa 138; *Baxter* Administrative Law 428;)

[71] Where there is no provision for a quorum (as is the case with resolution 5 of 1998) the body may only act by participation of <u>all</u> the members(*Rose Innes supra* 121). Rose Innes remarks as follows:

> "Until all the members of the board or panel is present, a board is not properly constituted, and cannot exercise its powers"(*Rose Innes supra* 122; see also *Botha v Cavanagh* 1953 (2) SA 418 (N))

[72] In *Schierhout v Union Government (Minister of Justice)* the former Appellate Division made the following remarks:

> "When several persons are appointed to exercise judicial powers, then in the absence of provision to the contrary, they must all act together; there can only be one adjudication, and that must be the adjudication of the entire body...and the same rule would apply whenever a number of individuals were empowered by statute to deal with any matter as one body; the action taken would have to be the joint action of all of them...for otherwise they would not be acting in accordance with the provisions of the statute"(see *Schierhout v Union Government (Minister of Justice)* 1919 AD 30 at 44)

[73] There is no reason why this principle should not apply with regard to the interview committee provided for in resolution 5 of 1998. In any event, resolution 5 of 1998, has now been confirmed by legislation in Chapter B of PAM and as such non-compliance with it, would have the effect that the dictum of the Appellate Division in the *Schierhout* case would to be applicable. The only exception to this general rule that decisions taken in the absence of all the members of a board will lead to invalidity, is where a member has to recuse himself because he has an interest in the matter, because in such circumstances the board will have no choice but to sit without him(see *Mitchell v Mossel Bay Liquor Licensing Board* 1954 (1) SA 398 (C) 404B-405H; *Baxter supra* 431).

[74] The rule of law is a founding value in our Constitution(see section 1(c) of the Constitution Act 108 of 1996). All organs of the state are bound by it and may only act in accordance with the powers conferred on them by law. This is known as the principal of legality, an incident of the rule of law(see *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) 374 (CC) at 399D-E; *Pharmaceutical Manufacturers of SA: In re ex parte President of the RSA* 2000 (2) SA 674 (CC) at 687D-E). Therefore, whether the school principal's presence would have made any difference to the outcome of the process is actually not relevant at all. Where a court, tribunal, board or committee has not been properly constituted, it does not help to ask what difference the presence of the member who was absent, would have made to the final decision which was arrived at. Where a board or committee is supposed to be constituted in a certain manner, and where no quorum is provided for, the legitimacy and legality of the decision taken without all the members being present is called into question. Especially in a constitutional democracy such as ours, where the rule of law, transparency, good governance and human rights are all guaranteed in our Constitution, it is of the utmost importance that processes are conducted in a legitimate manner and objectively complies with criteria which had been laid down in statute or which had been collectively agreed upon. If this is not done, the process may loose its credibility and fall into disrepute.

Summary of the effect of the absence of a school principal

[75] I can briefly summarise the legal position with regard to the absence of a school principal from the shortlisting and interviewing process as provided for in clause 3.2.1 Schedule 1 to Resolution 5 of 1998 (and regulation 3.3 of Chapter B of PAM) to be as follows:

75.1 Where the school principal himself is the applicant or where he has a personal interest in the matter (where for example his wife or close relative is the applicant) and has no choice but to recuse himself, he must be excused from the process and will not form part of the shortlisting and interview committee;

75.2 In all other cases (in other words in matters where the school principal does not have an interest in the matter), the school principal <u>must</u> at all times be present during the shortlisting and interviewing process;

75.3 The result of the principal being absent (unless he has an interest in the matter), is that the shortlisting and interviewing process is invalid an null and void and no valid recommendation can therefore be made by the governing body to the respondent for the appointment of a candidate in the position;

Analysis of the facts in this particular case

[76] There is no evidence that the school principal, Mr. Pearce had any personal interest with regard to any of the candidates who were interviewed on 17 May 2005. Accordingly the fact that he was absent, resulted in the shortlisting and interviewing of candidates for post 0654 to be *ultra vires* and invalid. No lawful and valid recommendation could therefore have been made to the respondent in terms of section 6 of the EEA.

[77] This disposes of the dispute. Since it is a sound principle of law that courts and tribunals do not pronounce on issues which have become purely academic, it is therefore unnecessary for me to deal with any of the other issues which applicant has raised regarding the manner in which the interviews were conducted.

[78] I would however like to make some comments regarding the allegation of bias. On the available evidence I am unable to find that the interview committee was biased. The mere fact that applicant has laid a complaint regarding a cheque which the school principal and the chairperson of the governing body, Mrs. Clarke have signed, is certainly not enough reason to assume that the interviewing panel and governing body was necessarily biased against applicant. This fact might have laid a foundation for a motive to be biased, but having a motive to be biased and actually being biased, are two totally different things. In my view, the allegation of bias in this case, amounts to no more than speculation. What makes the allegation of bias against the governing body in this case totally far fetched and unfounded, is the fact that of all the members on the interviewing committee, Mrs. Clarke, who signed the cheque in respect of which applicant has laid a complaint, is actually the one who gave applicant the most marks. If she was so biased, this does not make sense.

[79] Furthermore, if the governing body was really so biased against applicant, they would surely not have ranked him as their second choice out of all the candidates. There was no guarantee that Mrs. Abrahams would necessarily accept the appointment and if she declined to accept, that would have meant that applicant would be appointed. If the governing body was so anxious to get rid of applicant, it therefore does not make sense that they would have ranked him as their second choice.

[80] Perhaps applicant might have thought that there was bias, but if he really did think so, I am of the view that his assumption and allegation of bias was totally unfounded and very unfair towards the members of the governing body.

RELIEF

[81] Since the subject matter under concern here is not in the nature of an unfair dismissal or unfair labour practice, the powers in terms of section 193 and 194 of the LRA (being compensation and reinstatement) are not at my disposal. However, in terms of section 138(9) of the LRA, I do have the power to make any appropriate arbitration award, including but not limited to, an award

(a) that gives effect to any collective agreement;
(b) that gives effect to the provisions and primary objects of the LRA;
(c) that includes, or is in the form of, a declaratory order.

[82] I have already indicated that I am of the view that in applying and interpreting a collective agreement, I cannot have more powers that the High Court when performing its review powers. Hence, in my view, the function of an arbitrator in interpreting and applying a collective agreement, is to scrutinise the legality of the actions performed in terms of the agreement. If the action or decision is found to be invalid, the arbitrator's function should not be to secure his own decision on the merits in the place of the body who was appointed to make that decision, which in this case would be the interview committee (see *Baxter* Administrative Law 681).

[83] As a general rule, courts and tribunals will not attempt to substitute their own decision for that of the body whose decision is being set aside. If a decision or action is found to be *ultra vires*, the decision or action is set aside and referred back to the same authority for a fresh decision, because to do otherwise would constitute an unwarranted usurpation of the powers entrusted to a public authority(see *Baxter* Administrative Law 681; *Bonnievale Wine and Brandy Co Ltd v Gordonia Liquor Licensing Board* 1953 (3) SA 500 (C) 503; *Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T) 76).

[84] Accordingly I am of the view that the most appropriate award in this matter would be to issue a declaratory order that the interview process performed in terms of Resolution 5 of 1998 in respect of post 0654 advertised in Vacancy List 1 of 2005, was invalid and to refer the matter back for a fresh decision. The advertising and sifting in terms of clause 1 and 2 of Schedule 1 to Resolution 5 of 1998, is not affected and would not need to be repeated. The process starting from shortlisting and interviewing (in terms of clause 3 of Schedule 1 to Resolution 5 of 1998) must however be repeated.

THE DISPUTE CONCERNING THE ALLEGED DISMISSAL

[85] In this dispute, applicant claims that he had a reasonable expectation that his temporary employment contract with respondent at Dennemere Primary School would have been renewed from July until December 2005 and seeks an order awarding compensation equal to 6 months' compensation, due to the fact that respondent failed to renew the contract for that period.

[86] In terms of section 186(1)(b) of the LRA "dismissal" means that-

> "an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it"

[87] This section allows for a radical departure from the application of general principles of contract in terms of which the employee would have no claim to future employment, unless specifically agreed to by the employer.

[88] On the other hand, this section, to a great extent merely confirms a doctrine which was incorporated into our law from English Law during the 1980's. The doctrine of legitimate (or reasonable) expectation is well known in English Law. *Everett v Minister of Interior* 1981 (2) SA 453 (C)was the first South African case in which this doctrine was considered. In 1989 the former Appellate division in *Administrator Transvaal v Traub* 1989 (4) SA 731 (A) explicitly recognized and applied this doctrine.

[89] In terms of this doctrine a person may have a legitimate expectation that a decision which affects him will be favourable or at least that before an adverse decision is taken, he will be given a fair hearing (see *Administrator Transvaal v Traub supra* 758I). Accordingly substantive protection may be given to a substantive legitimate (or reasonable) expectation. It should however be realised that this doctrine, cannot be applied indiscriminately to force contracts onto an unwilling party, who never consented to the contract. Unless there are strict limitations and boundaries to this doctrine, it could easily lead to abuse by opportunists, with unrealistic expectations. Accordingly, Corbett CJ in *Traub*, observed as follows:

> "whereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled, it could become an unruly horse"(see *Administrator Transvaal v Traub supra* 761F-G)

[90] Consequently, Corbett CJ emphasised that a legitimate expectation, must have a reasonable basis and in considering what conduct would give rise to a legitimate expectation, he cited with approval the remarks of Lord Roskill in *Council of the Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HL) 954g, to the following effect:

> "Legitimate, or reasonable expectation may arise either from an express promise … or from the existence of a regular practice which the claimant can reasonably expect to continue"

[91] A reasonable expectation must, in my view, always be based on some conduct by the person who according to the claimant, has created the reasonable expectation in the mind of the claimant. The conduct may consist of a clear and unambiguous promise which provides the strongest foundation for a claim. It may however also consist of a representation(such as for example past practice), which may arise from words or conduct or from a combination of the two(see *Craig* Administrative Law (5th ed) 651 and the authorities cited by the learned author in footnotes 62 and 63).

[92] Where the conduct relied on to found a reasonable expectation, is a representation, the requirements for liability, has been summarised as follows by the High Court:

> "(i) The representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification...
> (ii) The expectation must be reasonable...
> (iii) The representation must have been induced by the decision-maker...
> (iv) The representation must be one which it was competent and lawful for the decision-maker to make without which reliance cannot be legitimate...
> (per Heher J(as he then was) in *National Director of Public Prosecutions v Phillips and others* 2002 (4) SA 60 (W) para 280)

[93] In establishing whether an employee has a reasonable expectation of renewal, it should however be borne in mind that it is not only the conduct of the employer which is relevant. Any other relevant factor (such as for example the continued availability of the post) should be taken into account to determine the reasonableness of the expectation. In assessing the reasonableness of the expectation, the subjective believes of the employee are irrelevant, because reasonableness must be determined objectively. The employee must prove the existence of facts that, in the ordinary course, would lead a reasonable person to anticipate renewal(see *Grogan* Workplace Law (8th ed) 110-111). The onus to prove a reasonable expectation is on the employee(see section 192 of the LRA).

[94] The Labour Courts have ruled that an employee can only have a reasonable expectation of temporary employment and not of permanent employment(see *Dierks v University of South Africa* [1999] 4 BLLR 304 (LC); *Auf der Heyde v University of Cape Town* [2000] 8 BLLR 877 (LC); *contra McInnes v Technikon Natal* [2000] 6 BLLR 701 (LC)).

[95] Applicant bases the alleged reasonable expectation for renewal of his fixed term contract during the 3d and 4th quarter of 2005 on past practice (because his fixed term contract had been renewed numerous times since January 2002 until the end of June 2005) as well as the fact that the position was still available during the 3d and 4th quarter of 2005 and that the contract of an educator who is appointed on a fixed term contract, would normally be renewed if the position remains available.

[96] The fact that a fixed term contract has been renewed a number of times is not, however, in itself indicative of the existence of a reasonable expectation of renewal(see *Grogan* Workplace Law (8th ed) 111). This is only logical, because an employee cannot have a reasonable expectation of permanent employment. If an employee is allowed to merely base his expectation on the fact that his contract has been renewed on numerous occasions, he would in effect be allowed to remain in the position on a permanent basis, by merely relying on past practice every time when his fixed term contract is due to expire. It is for this reason that other surrounding factors also need to be taken into account.

[97] Although the failure of an employer to advise an employee well in advance that his fixed term contract would not be renewed, is certainly something to take into account, such failure can also not determine the outcome of the enquiry into the existence of a reasonable expectation to renew. The whole concept of a fixed term contract, necessarily implies that the employment relationship automatically terminates at the end of the fixed term contract. To expect of an employer to advise an employee before the automatic termination of his fixed term contract, that the contract will not be renewed, would be to change the very nature of a fixed term contract. When an employee enters into a fixed term contract, he knows exactly what he is getting into. He knows that his contract is for a limited period only and he knows when the contract is due to expire. That should be the point of departure in the enquiry. Unless the employer through his conduct has led the employee, reasonably to believe that the contract would be renewed again, failure to warn the employee in advance that the contract will not be renewed, can, in itself, not give rise to a reasonable expectation that the contract would be renewed.

[98] What is problematic about the continued existence of applicant's position during the 3d and 4th quarter, is that originally that position would not have been available at all. This is so because the position was advertised during March 2005 to be filled on a permanent basis as from 1 July 2005. Applicant knew this. He could therefore not have had any expectation that his fixed term contract would be renewed after June 2005. He could also not simply assume that he would be successful for permanent appointment in the position and he should therefore have started to look for alternative employment or prepared himself and his family for the possibility of being unemployed during the 3d quarter of 2005.

[99] On 25 May 2005 applicant registered a grievance with the respondent relating to the manner in which the interviews for the permanent position was conducted. That caused the respondent, in accordance with its normal practice, to place a moratorium on the permanent filling of the position which resulted in the position becoming available again on a fixed term contract basis, in the 3d quarter of 2005. Until 25 May 2005, there was therefore no basis for applicant to have had any expectation (reasonable or otherwise) that his fixed term contract would be renewed.

[100] By registering a grievance with respondent, applicant actually through his own actions caused the position to become available again during the 3d quarter of 2005. Although applicant was fully within his rights to register the dispute regarding the appointment, I must say that I have serious reservations as to whether an employee can indeed create his own "reasonable expectation" in such a manner. In fact, I am of the view, that it is impermissible for an employee to rely on factors, which are the result of his own conduct, in order to claim a reasonable expectation. To allow this, would mean that employees can basically, through their own actions, build up a case for a reasonable expectation of renewal of a fixed term contract. I am therefore not convinced that applicant may rely on the fact that the position became available again during the 3d quarter, to substantiate his alleged reasonable expectation, because he is the one who caused the position to become available again. Even if I am wrong in this regard, there are other reasons to hold that applicant has not made out a case for dismissal in terms of section 186(1)(b) pf the LRA.

[101] A further reason, why, on applicant's own version I have doubts as to whether he has proved a reasonable expectation as contemplated in terms of section 186(b) of the LRA, relates to the nature of his expectation. I have already pointed out that an employee can only have a reasonable expectation of temporary employment and not of permanent employment.

[102] Applicant testified that the principal promised him permanent employment at Dennemere Primary School when he commenced working there initially. The mere fact that applicant mentioned this in his evidence, seems to suggest that applicant considers this factor to be important. It therefore seems to me as if applicant always had the expectation that he would eventually become a permanent employee at Dennemere. In fact, his evidence was that he went to Dennemere with the expectation of being employed there in a permanent position.

[103]What is more, is that he specifically applied for permanent appointment in the post in which he was appointed in a temporary capacity. Not only did he apply for permanent appointment in that position, but he also lodged a grievance when he was not permanently appointed. He in fact contends that he was the most suitable candidate to be appointed permanently. It is therefore clear that applicant all along had the hope, desire and expectation to be permanently appointed in that position.

[104]As soon as an employee has an expectation to be permanently appointed in the position in respect of which he is appointed on a fixed term contract, section 186(1)(b) of the LRA is no longer applicable because that section, is only applicable when an employee has an expectation of temporary employment and not when he has an expectation of permanent employment. I am satisfied that applicant never had an expectation of temporary employment. He all along expected to be permanently employed, as the principal, who had no authority to do so, had apparently promised him. By registering a dispute concerning the interview process, he hoped that he would be able to remain in the position permanently, first by acting in the position on a temporary basis until the dispute had been resolved and then by hopefully being appointed after the interviewing process had been repeated.

[105] The purpose behind section 186(1)(b), is not, that an employer must be forced against his will to keep an employee in his employment for ever and ever. The relief intended is to be of a limited duration only in circumstances where an employer through his conduct induced a reasonable expectation. Despite applicant's statement during his evidence that he had a reasonable expectation to be appointed for 6 months, other aspects of his evidence as well as the evidence as a whole leaves me with the distinct impression that applicant's expectation all along was for permanent employment and not temporary employment. For this reason alone, applicant's claim, should be dismissed .

[106] I have so far attempted to rely on applicant's own version, to point out why I am of the view that his claim should be dismissed. In doing so, I have relied on two conclusions of law, the first being that I am of the view, that it is impermissible for an employee to rely on factors, which are the result of his own conduct, in order to claim a reasonable expectation, which in this case, is the fact that the post became available during the second school quarter because of the fact that applicant had registered a dispute concerning the post, which resulted in a moratorium being placed on its permanent filling. The second conclusion of law, was that I am of the view that applicant had an expectation of permanent as opposed to temporary employment which disqualifies him from relying on section 186(1)(b). However, in case I am wrong in these conclusions of law which I have drawn, I will also approach the matter from a different perspective, and that is to analyse whether I can indeed rely on applicant's version, and if not, what the effect of that on his claim would be.

[107] There are two conflicting versions before me as to what caused applicant's fixed term contract not to be renewed. The onus is on applicant to prove on a balance of probabilities that his version is the correct version, which basically means that he must persuade me that his version is more probable than not. According to applicant the reason why his contract was not renewed, was because when he approached the principal at the end of the second quarter to enquire about the renewal of his contract, the principal said that the temporary position would be advertised first. The principal also announced in the personnel meeting that applicant's contract has been terminated. Applicant regularly checked the newspapers, but never saw the post being advertised and accordingly he was never given an opportunity to apply for the position.

[108] The version of Pearce is very different. According to him, the practice was that fixed term contract teachers would approach him before the end of the school quarter to complete the necessary forms and apply for the position for the next term, if the position was still available. In applicant's case, applicant in the past at least on two occasions approached him during the school holidays to have the forms completed for his appointment during the next quarter. When he took leave of the contract teachers (which is customary at the school with all contract teachers irrespective of whether they would return the next quarter or not) on the last day of the second quarter by handing them each a fruit basket, applicant said he wanted nothing from the school. Applicant never approached him to enquire whether he could be re-appointed again in the temporary position for the 3d quarter as is the practice. He never said to applicant that the position would be advertised again or that he must apply if he was interested. In fact there was no intention to have the temporary position advertised. He was under the impression that applicant would return to school again during the 3d quarter and when applicant did not return at the start of the 3d quarter, a new teacher was appointed on a 3 month contract, after the class had been left unattended for 3 days.

[109] The technique generally employed by courts and tribunals in resolving factual disputes involving two irreconcilable versions has recently been summarised by the Supreme Court of Appeal as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.(See *Stellenbosch Farmers' Winery Group Ltd v Martell & Cie 2003 (1) SA 11 (SCA) at 14I para 5*). The Supreme Court of Appeal explained the process as follows:

> "As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.… But when all factors are equipoised probabilities prevail " (at 14I - 15E para 5 per Nienaber JA).

[110] When I look at the probabilities, there are not really any probabilities which can assist me in making a factual finding in favour of applicant. Ms. Smart argued that in the light of Pearce's admission that he did bid applicant farewell on the last day of the second quarter of 2005 at the last staff meeting, it can be assumed that if applicant had not previously clarified his position, he would have done so at this meeting, which he did not do because it was not necessary, as he already knew what the school's decision on the matter was. I do not agree. By the end of the second school quarter, applicant was clearly upset and angry about the fact that he was not recommended for permanent appointment, as he was earlier promised by the principal. I got the distinct impression during this hearing that there was animosity between applicant and the school. This was also in fact confirmed by Pearce during his evidence. According to Pearce, him an applicant did not even communicate with each other at the end of the second quarter anymore, because of the dispute which applicant had registered. This was never denied by applicant.

[111] A very reasonable explanation for applicant's failure to raise the issue of the renewal of his contract during the staff meeting, is more probably as a result of the fact that applicant was too upset and angry with the school to even ask about his reappointment and preferred not to speak to Pearce at all about this or anything else. My conclusion in this regard is supported by the fact that applicant simply told Pearce that he wants nothing from the school when he was presented with a fruit basket. This rude behaviour shows anger on the part of applicant and people who are angry do not act rational. Angry people do not necessarily think about the consequences of their actions. I therefore do not agree with Ms. Smart's argument that applicant would not have elected not to be employed at the Dennemere anymore because he would have thought about the fact that he had a family to support and that he cannot be unemployed. It seems to me more probable that applicant, being angry, wanted nothing to do with the school and actually preferred not to teach there anymore, thinking that he would be able to find employment elsewhere. Later, during the next quarter, when he realised that he could not find alternative employment and found himself unemployed, he probably realised that he had made a mistake by acting in this manner. For the same reasons, I also do not agree with Ms. Smart's argument to the effect that applicant's refusal of the gift was further proof that applicant had already addressed the renewal of the contract with Pearce before the staff meeting and had already known that his contract would not be renewed. Applicant's refusal of the gift, was, more probably as a result of the fact that he was angry because of the decision to recommend Abrahams and not him for permanent appointment.

[112] Ms Smart also argued that there is no logic in Pearce's argument that it was applicant's responsibility to contact him during the holidays to secure a post. I also do not agree with this argument. Pearce's statement in this regard cannot be taken in isolation in order to determine whether it is probable or not. It must be assessed in the light of his other evidence. According to Pearce, the practice was indeed that educators whose contracts expired, used to approach him if they wanted to have their contracts renewed. Applicant according to him, sometimes even approached him during the holidays in this regard. He would not know whether an educator would necessarily want to return to school and he therefore never approaches educators in this regard. They approach him. Seen against the background of this evidence, Pearce's statement that the responsibility was on applicant to contact him to secure a post, makes sense and no fault can be found with the logic behind it.

[113] Ms. Smart further argued that according to the general ruling of respondent, the contract of an educator who has acted in a temporary position, must be renewed unless curricular requirements of the school changed, which leads one to the conclusion that there was no need for applicant to have to re-apply for the same post he had for 3 years and 6 months. This argument does not take the matter further and does not assist at all in deciding whether applicant's version is more probable than that of Pearce. The fact is, on Pearce's version, there was a practice at this particular school in terms of which applicant was supposed to approach him if he was further interested in the post. In addition, we all know, that once a fixed term contract had expired, the educator will not and cannot be re-appointed on a further fixed term contract unless he has completed an application form and unless that form together with a recommendation had been sent to respondent.

[114] There are therefore, in my view, no probabilities, which favour applicant's version. One probability which does stand out, does not favour applicant's version but indeed favours Pearce's version. This is the fact that it seems improbable that Pearce would have any motive or reason to lie, because he could not possibly gain anything from lying. If I reject the version of Pearce and believe applicant's version, it would not be Pearce who would need to pay compensation but respondent. Accordingly Pearce has nothing to gain from lying because he has no interest the matter. Applicant on the other hand does have a motive to lie, because if I believe his version, his chances of succeeding are much better and he might be awarded compensation as he has requested.

[115] Now I am aware that a court or tribunal is never allowed to reject the version of one party, simply because it believes the witnesses of the other party(see *Schulles vs Pretoria City Council*, referred to with approval in *R v Mtembu* 1956 (4) SA 334 (T) at 335H-336B). I am indeed approaching the evidence in this manner mindful of the rule in the *Schulles* case. However, the fact that it is improbable that a certain witness would fabricate false evidence, is always a probability, which can and should be taken into account when assessing all the probabilities(see *S v M* 1999 (2) SACR 548 (SCA) at 555c-e para 18).

[116] Another probability which favours the version of Pearce that he expected applicant to return in the 3d quarter, is the fact that no teacher was appointed to replace applicant until three days after the beginning of the new school quarter. If Pearce all along knew that the school and/or respondent does not want to renew applicant's contract, it is highly unlikely that steps would not have been taken earlier to ensure that a teacher is appointed to be available on the first day of the 3d quarter so that the class would not be unattended for the first three days of the third quarter.

[117] I simply cannot believe that Pearce would have been so irresponsible by waiting until the school has already reopened before looking for a replacement teacher, whilst all along knowing that applicant would not return during the third quarter. This aspects seems to indicate that Pearce's version is much more probable that of applicant.

[118] In addition there is the probability that applicant probably did not want to communicate with Pearce or the school because he wanted nothing to do with them since he was angry as a result of the fact that he was not recommended for permanent appointment, after Pearce, on applicant's version, had promised him that he would be appointed on a permanent basis.

[119] Accordingly, the most striking probabilities which do stand out, do not favour applicant's version. This means that he has not discharged the onus. Assuming for purposes of argument, that I can ignore these probabilities, favouring respondent's version, this still does not assist applicant, because there are not any probabilities which favour applicant's version. That would leave me with the situation that the probabilities are at the most, evenly balanced.

[120] Where there are two mutually destructive versions, as we have in this case, and where the probabilities are evenly balanced, a court or tribunal may only find for the party upon whom the onus rests, if it is satisfied on a balance of probabilities that the version of the party upon whom the onus rests is true and the other is false(See *National Employers Mutual General Insurance Association v Gany 1931 AD 187 at 189*). The onus is not on respondent to prove that its version is the truth. It is for applicant to prove that his version is the truth. On the available evidence there is no basis for me to find that Pearce's version is false and that applicant's version is the truth. The probabilities certainly does not assist me in this regard. In addition Pearce made a favourable impression on me in the witness box. He was taken under intensive and extensive cross-examination by applicant's representative but did not deviate in any material respect from his evidence-in-chief. When the version of applicant was put to him, he was adamant that it was not the truth. His evidence was consistent with the probabilities. Where there were minor discrepancies in his evidence, they did not impact negatively on his credibility, but could be ascribed to genuine and bona fide mistake on his part.

[121] Accordingly, it necessarily follows that applicant has not discharged the onus and that I must therefore accept the version of Pearce in deciding whether applicant could have a reasonable expectation that his contract would be renewed. On the version of Pearce, it is clear that in accordance with past practice, it was for applicant to decide whether he wanted to return to the school or not, and if so, to approach Pearce and complete the necessary forms so that it could be sent off to respondent in order for applicant to be appointed. Applicant failed to do so. When applicant did not return in the 3d quarter, it was assumed that applicant was no longer interested in the position and someone else was appointed after the class was left unattended for 3 days.

[122] On this version of Pearce, it is clear that applicant himself is to blame for the fact that he was not reappointed for the 3d quarter. In terms of the EEA, an educator who is appointed on a fixed term contract, even if that contract had been renewed several times, cannot simply be reappointed after termination of the fixed term contract unless he has completed a new application form for temporary appointment. Applicant knew this because he had been through that process numerous times.

[123] Accordingly, applicant could therefore not have had any reasonable expectation that his fixed term contract would be renewed for the 3d quarter, until he has approached the principal and completed the necessary application forms for reappointment as was the practice at Dennemere, according to Pearce, whose version I have accepted. Applicant never did not so and accordingly he could not have had any expectation(reasonable or otherwise) that his contract would be renewed again. In the circumstances, applicant has not succeeded in proving a dismissal and is not entitled to any relief.

AWARD

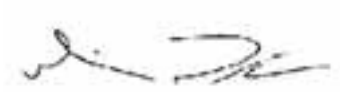
I accordingly make the following order:

1. I find that applicant did not have a reasonable expectation in terms of section 186(1)(b) of the LRA that his fixed term contract would be renewed after 30 June 2005 and that there was no dismissal as contemplated in section 186(1) of the LRA;

2. I hereby issue a declaratory order that that the shortlisting and interview process performed in terms of clause 3 of Schedule 1 to Resolution 5 of 1998, in respect of post 0654 at Dennemere Primary School, advertised in Vacancy List 1 of 2005, was unlawful, null and void and invalid;

3. The matter is referred back for a fresh decision so that the shortlisting and interview process in respect of post 0654 at Dennemere Primary School, advertised in Vacancy List 1 of 2005, can be repeated in terms of clauses 3 of Schedule 1 to Resolution 5 of 1998, by a properly constituted interview committee, which would include all the relevant members, including the school principal of Dennemere Primary School;

4. No order as to costs is made.



adv D P Van Tonder BA LLB LLM

Arbitrator/Panelist: ELRC