IN THE ARBITRATION UNDER THE AUSPICES OF THE EDUCATION LABOUR RELATIONS COUNCIL HELD AT CAPE TOWN

In the matter between: Case No.: PSES: 439-05/06WC

D.A.Kotze Applicant

And

Western Cape Education Department Respondent

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

The arbitration hearing was held on the 29, 30 November and 7 December 2005 at the offices of the Western Cape Education Department (WCED), in Cape Town. Applicant was represented by Ms J.Titus, a representative of SADTU and respondent was represented by Ms I.February. The parties elected to submit their closing arguments in writing, the last of which was received on the 9 January 2006 in view of the holiday period.

BACKGROUND

Mr Kotze applied for a principal's post, post no.2847 in vacancy list 6/2000. A dispute was declared with regards to the filling of the post . The arbitrator at the subsequent arbitration hearing ordered a repeat of the process. At some point after the dispute had been declared, the nominated candidate, a Mr Beerwinkel, was appointed to the post. The union representing Mr Kotze was informed by the WCED that the process could not be repeated because the appointed candidate could not be removed from the post. The matter was then taken to the Labour Court which ordered the WCED to comply with the arbitration award.

The WCED then requested the SGB to repeat the process. Attempts were made by the SGB to get the process off the ground, but they were unsuccessful. The WCED then withdrew the function of the SGB in this regard, and appointed an EMDC panel to give effect to the process. The EMDC panel then conducted the repeat of the process during which Mr Kotze was shortlisted and interviewed. The person nominated to the post was the previous nominee/appointee, Mr Beerwinkel. Mr Kotze declared a dispute to this repeated process, which is the subject of this arbitration.

ISSUES TO BE DECIDED

I was asked to decide whether the WCED had committed any unfair labour practice in the filling of post number 2847 in vacancy list 6/2000 . In particular, I was asked to

decide whether the WCED was prejudiced towards Mr Kotze, both before and during the process. I was also asked to decide whether there were any procedural errors during the filling of the post , at EMDC level; and whether the WCED had the right to take away the powers of the SGB.

The relief sought by the applicant is for the process to be repeated by the SGB.

At the very outset of the hearing the WCED raised the issue of jurisdiction with regard to the removal of the function of the SGB. I advised the parties to submit written argument to me in this regard but decided that it was also necessary for me to hear the evidence pertaining to the circumstances that led to the removal of the function from the SGB, since applicants main allegation against the WCED is that he was prejudiced because the process was not conducted by the SGB.

SURVEY OF EVIDENCE AND ARGUMENT

1. Did the WCED have the right to withdraw the function of the SGB?

The WCED argues that the withdrawal of the function of the SGB does not fall within the scope of section 186(2) of the LRA as an unfair labour practice, and that the South African Schools Act makes provision for an employer to take away this function from a governing body who on reasonable grounds has shown that they cannot complete the process. Although I would agree that the withdrawal of the function of the SGB does not *per se* fall within the definition of an unfair labour practice, it is my view that it is nevertheless necessary to examine the consequences of this action in so far as they relate to Mr Kotze and the eventual selection process that he was involved in.

Applicant also argues that the Labour Court judgement ordered a repeat of the process by the SGB. One should not interpret the judgement in its narrow sense – existing laws defining or limiting the functions of the SGB are not excluded by the judgement. Accordingly, the WCED was well within its rights to withdraw the function of the SGB if it deemed it necessary in terms of the South African Schools Act.

The main body of evidence at the hearing centred on circumstances that led to the removal of the SGB from the process. I shall not record the lengthy testimony of the numerous witnesses since the entire proceedings were recorded on tape. Both witnesses for the applicant as well as witnesses for the WCED were unanimous in their testimony that there was disagreement between the parent component and the educator component within the SGB. It also emerged clearly during testimony that the main point of disagreement was with regard to a particular point regarding

criteria, and that the educator component refused to proceed with the process. Save to record that there was evidence of disunity within the SGB, I will not rule on the merits of the decision by the WCED to withdraw the function of the SGB. There is sufficient evidence to suggest that there was reason for the WCED to elect to exercise its discretion in this regard. Applicants representative does concede that the WCED does have the right to withdraw the functions of the SGB, but feels that in this instance, the WCED should have intervened to force the educator component to co-operate. I cannot see how this would have rendered the process fair. It is apparent that applicant would have preferred the process to have been conduced by the SGB, despite the obvious problems within the SGB.

Applicant seems to be suggesting that even though the WCED had every right to withdraw the function of the SGB, it should not have done so in this case because it would have suited applicant better if the process was conducted by the SGB. Applicant goes further during argument to suggest that it suited the WCED to have the process conducted by the EMDC panel. It is ludicrous for applicant to hypothesise on the fairness or suitability of a process that never took place. The SGB did not conduct the final process and one cannot postulate that if the process was conducted by the SGB then it would have guaranteed the applicant automatic fairness. By the same token , the fact that the process was conducted by the EMDC panel does not render the process automatically unfair.

Was the process procedurally fair?

Applicants main argument in this regard is that it was prudent for the WCED to nominate Mr Beerwinkel to the post again since he was the original appointee and was still being paid a salary for a principals post. Applicant suggests that the WCED manipulated and /or drove the process in order to ensure that Mr Beerwinkel was nominated for the post.

The WCED submits that according to the minutes, Mr Kotze was not on the shortlist, but after it was discovered that all candidates were not given a chance to update their applications, all applicants were invited to be interviewed. This also emerged from the testimony of Mr Joubert, the circuit manager who was also the secretary of the EMDC panel that conducted the final process. His evidence was not refuted in any material way. The WCED argues, quite correctly, that Mr Kotze was in fact advantaged by this decision. Applicant suggests that the reason why all candidates were invited was because the WCED wanted to include Mr Beerwinkel who had not updated his application. The fact that Mr Beerwinkel was also included in the shortlist does not in itself mean that he was being favoured. All candidates were given an opportunity to compete for the post, including Mr Kotze.

Applicant also submitted that he was prejudiced by comments that were made by the panel after the conclusion of the interviews. The comments were that applicant is too young for the post and that one could not move from a post level1 post to a post level 4 post. It is common cause that applicant is currently in a post level one post. It is evident from the minutes, as well as from the evidence of Mr Joubert that it had been decided to use the point system as well as consensus. The discussion took place after the points had been allocated. I have noted that the

minutes do not record a discussion about all the candidates, and it is therefore understandable why upon reading of the minutes, Mr Kotze feels that he was perhaps victimised by the discussion focussing mainly on him. However, I am satisfied form the oral testimony presented to me that a discussion did in fact take place about various candidates and not only about Mr Kotze. Points had already been allocated and Mr Kotze had been placed fourth on the list. He therefore did not suffer any prejudice in terms of his ranking. It is common cause that the nominated candidate, Mr De Jongh, declined the post. The person that was second on the list was eliminated by consensus, which the panel was entitled to do in terms of agreed procedure. The reason for the elimination of the second candidate emerged from the testimony of Mr Joubert, and is not evident from the minutes. Accordingly the person that was third on the list, Mr Beerwinkel, was nominated. The question then is whether the non recordal of the entire discussion in the minutes is a gross procedural lapse and whether it is of a sufficiently serious nature to render the entire process invalid. The question is also whether Mr Kotze has suffered any prejudice. I do not feel that the procedural lapse is of a sufficiently serious nature to render the entire process invalid, particularly because I cannot see how Mr Kotze has been prejudiced.

There is also a suggestion by applicant that the WCED should not have invited Mr De Jongh to the interview because he was already a principal and that the process was therefore a sham. It must be borne in mind, however, that this was a repeat of a process that took place in 2000/2001. The job status of the various applicants to the original process could very well have changed due to the time lapse. However, the WCED was obliged to repeat the original process.

I do not deem it necessary to comment on the grievance meeting. The arbitration hearing is neither a review nor an appeal to the outcome of the grievance meeting.

Was the WCED prejudiced towards applicant,before and during the process?

This is a difficult onus to discharge, and on the evidence before me, applicant has failed to discharge this onus.

AWARD

On the evidence and argument before me, applicants case is dismissed.

Arbitrator

Arthi Singh-Bhoopchand
16/01/06