IN THE EDUCATION LABOUR RELATIONS COUNCIL HELD AT RIVERSDALE

Case No PSES 512-05/06WC

In the matter between

DOG MULLER Applicant

and

DEPARTMENT OF EDUCATION WESTERN CAPE First Respondent

J TARANTAL Second Respondent

ARBITRATOR: Adv D P Van Tonder

HEARD: 24 FEBRUARY 2006; 12 MAY 2006; 21 JULY 2006

DELIVERED: 14 AUGUST 2006

SUMMARY: Labour Relations Act 66 of 1995 – Section 186(2)(a) - Alleged Unfair Labour Practice relating to promotion – Whether unfair conduct 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 Riversdale on 24 February 2006, 12 May 2006 and 21 July 2006. Applicant was represented by Ms. Kwazi of SADTU (South African Democratic Teachers Union), a registered trade union of which applicant is a member. First respondent was represented by Mr. F Scholtz, an employee of its Labour

Relations Department in Cape Town. Second Respondent was also present and represented himself. The evidence was mechanically recorded on 8 cassette tapes. The proceedings were concluded on 7 August 2006 when the final written heads of argument were received.

THE ISSUES IN DISPUTE

[2] I have to decide whether an unfair labour practice relating to promotion was committed and if so, the appropriate relief.

THE BACKGROUND TO THE DISPUTE

[3] During June 2004 applicant, who is an educator, applied for the position of school principal at the Oker Primary School in Albertinia, which was advertised as post no 0228 in Vacancy List No 1 of 2004. Various other educators, including second respondent, also applied for the same position. Second respondent was one of the 5 candidates who were shortlisted and interviewed, and the School Governing Body recommended that Second Respondent should be appointed in the position. Subsequently on 21 November 2005, First Respondent appointed Second Respondent with effect from 1 January 2006 in the position of School principal of Oker Primary School and Second Respondent is currently still in that position, having been the successful candidate.

[4] Although the applicant's application and curriculum vitae was indeed received and perused by the shortlisting and interviewing committee, applicant was not one of the five candidates who were shortlisted for the position. Accordingly he was not invited for an interview. Applicant felt aggrieved about certain issues regarding the appointment process and consequently referred a dispute to this tribunal, alleging that certain irregularities occurred and asking for the process to be repeated from shortlisting. Both Respondents are opposing this request and argued that the selection and appointment process which eventually resulted in Second Respondent being appointed, was indeed a fair process.

SUMMARY OF EVIDENCE AND ARGUMENT

Evidence on behalf of applicant

[5] ***Darryl Osmund Graeme Muller***, the applicant, testified that he was acting as school principal of Oker Primary in Albertinia for 3 years until the end of 2005. So when the position of school principal of Oker Primary was advertised for permanent filling during 2004, he applied for permanent appointment in the position. When the official envelope containing the applications in respect of this position arrived at the school one morning, he himself and the caretaker went to the post office to collect the mail. He did however not know that the envelope was due to arrive on that day. He merely went to collect the mail. There was a lot of post for the school and he noticed that one thick envelope was torn at the top. It had two tears which were both approximately 5cm in length. The tears were however of such a nature that no documents could have been removed from or fallen out of the envelope. He cannot recall to whom the envelope was addressed, but can recall that the sender was Mrs. Solomons from Head Office. He knew that she deals with the applications for appointments and therefore suspected that the envelope contained the applications for the position. He then went back to the post office to ask the lady there whether they had noticed that the one envelope was torn. She confirmed that they had noticed this and the lady in fact made a written statement to this effect.

[6] He then phoned his circuit manager, Mr. Anthony to advise him about the torn envelope. Mr. Anthony then told him to lock the envelope away in the safe. The chairman of the School Governing Body, Mr. Kroukamp later also came to school on that same day and remarked that someone had tampered with the envelope upon inspecting the envelope. Applicant did not make any comments to Kroukamp about the torn envelope and did not tell him about the statement which the lady at the post office had made. He did not inform the school governing body about the torn envelope and does not know who had informed them or Kroukamp. Later Dr Galant, also a circuit manager, came to fetch the envelope at the school. Gallant made a comment that nobody could have tampered with the envelope. When Galant came to collect the envelope, members of the school governing body were also present and applicant was asked to leave the office.

[7] Much later, when the shortlisting and interview process was about to start, Mr. Anthony informed applicant that the envelope was now lost and asked applicant to look for the envelope in the safe. Applicant however advised him that Dr Gallant had taken the envelope. Mr. Anthony had in the meantime taken over from Dr Gallant again because Dr

Gallant was not available due to his father falling ill. Later the envelope was discovered in first respondent's head office in Cape Town.

[8] After he discovered that he was not shortlisted for the position, his union representative Mr. Witbooi told him that he had heard in George from a director of First Respondent that the reason why applicant was not shortlisted was because his curriculum vitae was incomplete in that pages were missing to such an extent that only 3 pages were left. In addition the remark was made that the curriculum vitae was not prepared well. He knew that the curriculum vitae he sent in with his application consisted of approximately 10 pages. During cross-examination, Mr. Scholtz showed applicant a copy of applicant's curriculum vitae which first respondent had received back from the school governing body after the whole appointment process for post No 0228 was finalized.

[9] Applicant perused this curriculum vitae during cross-examination and acknowledged that it contains all 11 pages of his curriculum vitae and that no pages were missing. When asked how applicant could alleged that someone have tampered with his curriculum vitae seeing that all the pages were there, applicant mentioned that he heard from Witbooi that pages were missing.

[10] Mr. Scholtz pointed out to applicant that he did not prepare his curriculum vitae well since he for example jumped from paragraph 6 to paragraph 8, with no paragraph 7 and one page was blank except for one single sentence at the top of the page. To this applicant responded that he cannot see anything wrong with this. When it was put to him that he was not shortlisted because he did not put enough information in his curriculum vitae, he replied that he complied with the minimum advertised criteria. It was then pointed out to applicant that he did not comply with the minimum advertised criteria since he did not have computer literacy which was mentioned as a recommendation in the advertisement. Applicant conceded this, but stated that he complied with all the other criteria mentioned in the vacancy list.

[11] When it was pointed out to applicant that the SGB decided to only shortlist candidates who were in possession of matric plus a four year qualification and that a point of 0 was allocated to applicant in respect of qualifications because he is only in possession of matric plus a three year qualification, applicant replied that although he only has matric plus a 3 year diploma, matric plus a three year qualification is sufficient because that is indeed the minimum academic requirements for this specific position. The minutes of the meeting of the school governing body when five candidates were shortlisted, of which applicant was not one, were shown to applicant and he was shown that he was allocated

a total point of 9 whereas the five candidates who were shortlisted scored more. To this applicant responded that he cannot understand how he could have scored so low.

[12] When it was put to applicant that the school governing body also allocated a point of 0 to him in respect of extra mural activities, because he did not furnish sufficient information about this in his curriculum vitae, he referred to aspects mentioned in paragraph 4.3 of his curriculum vitae as well as to information supplied in paragraph F of his application form. Applicant was of the opinion that this information was sufficient information regarding extra-mural activities and that he had always done his part in extra mural activities and the community.

[13] ***Faiek Valtyn***, a boy aged 14 years, who was assisted in these proceedings by an adult Felicia Valtyn, duly appointed in writing by Faiek Valtyn's mother to be the witnesses' guardian in these proceedings, also gave evidence under oath, after I established that I was satisfied that he did indeed understand the meaning and importance of the oath and that he considered it as binding on his conscience.

[14] He testified that he is currently in Albertinia High School. During 2005 he was the head boy at Oker Primary School in Albertinia. He was also on the school governing body. He knows about the appointment of a new school principal for the school, because Mr Kroukamp, the chairman of the School governing body informed him that a new school principal had to be appointed. Although he had been on the school governing body for one year, he never actually took part in the process of appointment of educators. All that he could tell this tribunal about the process was that applications are received and that a successful candidate has to be chosen but he had no idea how one would go about to choose the successful candidate. More than this he did not know about the procedure. He denied that he was aware of or attended a training session, which was organized to train the school governing body for the appointment of a school principal.

[15] Mrs. Kroukamp, who is also an educator at Oker Primary and who is the wife of Mr. Kroukamp, told him one day that he had to make a written statement to the effect that he did not want to be part of the appointment process of the school principal. She dictated the letter to him and he wrote down what she told him to say.

[16] Although this letter was written on 22 June 2005, Mrs. Kroukamp told him that the date he must insert, is 27 April. She did not give him a copy of this letter and when he told his mother about this and she went to enquire from the school whether she could get a copy of this letter, the request was denied, which caused her to go and lay a complaint at the

local police station. Later during cross-examination he conceded that he had already, prior to Mrs. Kroukamp asking him to make the statement, decided on his own that he did not want to be part of the process to appoint the school principal, because he feared that things would go wrong. He could however not tell us why he thought that things were going to go wrong. When asked during cross-examination, how he knew what to write in the letter stating that he did not want to be part of the process anymore, he said that he discussed it with his mother who assisted him.

[17] He was not present during the shortlisting and interviewing process for the appointment of the school principal. On the day of that meeting, he was just given a time to be at school when the whole process was finalized. He complied with this request and when he arrived the proceedings were finalized and he just had to sign an attendance register. The same procedure was followed on 1 September 2005 when the whole SGB recommended the appointment of Mr. Tarantal. Once again he was not part of the process and merely arrived afterwards to sign the attendance register. He went to sign the register because an educator, Ms Sophie instructed him to come and sign the register afterwards. He did not know why he had to sign the attendance register and merely complied with the instruction given to him. When he signed this document, he did not even know who the principal was going to be. He conceded that he told his mother that something was not right and that he had to go and sign the attendance register. His mother said that he had to comply with the request to go and sign the register. He conceded that he knew that he had a choice to sign the attendance register. He later also conceded that he knew that the whole governing body had to sign in order to confirm the appointment of the school principal.

[18] When it was put to him that he was contradicting himself because he earlier testified that he did not know what he signed for, he said that he did not know what he signed for in the first process but the confirmation of the appointment of the school principal was the second process and then he knew what he signed for.

[19] When asked how it came about that he became a witness in this matter, he said that a week prior to 24 February 2006, being the day on which he testified, applicant personally came to his house to speak to him and to ask him to be a witness. When asked how applicant would have known about the evidence he could give, he said that he had told his mother and that she had told applicant.

[20] ***Ronald Abrahams*** testified that he is the vice chairman of SADTU in Riversdale, the union of which applicant is a member. During April 2005 he was asked by Mr. Witbooi, the chairman of SADTU in Riversdale to attend a shortlisting meeting in respect of the appointment of a candidate for the position of school principal for Oker Primary. He attended that meeting which was held on 12 April 2005 and was there in his capacity as observer from SADTU. He is not aware of the shortlisting meeting which was held on 2 July 2005, when the shortlisting process was repeated. When it was shown to him that first respondent has proof that SADTU was invited to this meeting and that the invitation was successfully transmitted to SADTU's fax number, the witness reiterated that he is not aware of this and cannot say why SADTU did not attend this second shortlisting meeting.

[21] During the shortlisting meeting held on 12 April 2005, a certain Mr. Gunter was the chairperson of the meeting. There was also another person, Mr. Kroukamp, who acted as if he was the chairman. He acted as if he was in charge and took notes. The witness is however aware that the reason why Kroukamp took notes was because the secretary was absent. Mr. Kroukamp played a very domineering roll in the meeting. When the members decided on the criteria for shortlisting, Mr. Kroukamp suggested that the candidates had to have an HOD or a degree, be computer literate and have language proficiency.

[22] The witness indicated that the committee was entitled to set higher criteria than the advertised criteria when it comes to shortlisting and that he was happy with the additional criteria agreed on for shortlisting and that he feels it was fair. The committee then agreed to use a point system to shortlist candidates. The witness also feels that this was fair in the circumstances, given the fact that certain candidates, including applicant were known to most of the members whilst others from outside were not.

[23] The meeting perused all the applications and cv's of the applicants. Mr. Kroukamp had negative remarks to make about the curriculum vitae of almost every applicant, including applicant. This could have influenced the other members because they kept quiet when he made these remarks.

[24] Kroukamp also commented that they could go through the curriculum vitas but that they knew who they wanted. The witness conceded that all the members were allowed to make an input but that it was actually only Kroukamp and Gunter who made any input, because the rest of the members mostly said nothing. He conceded however that nobody prevented any of the other members to speak and that nobody forced them to go along with suggestions made by Kroukamp and Gunter. In fact, the other members were asked for their opinion but had no comments. The witness also conceded that applicant was not

shortlisted during the meeting of 12 April because the other candidates were better qualified than him. Although he did not make any objections during the meeting of 12 April 2005, he did write a report in which he set out his concerns. He handed this report to Mr. Witbooi.

[25] ***Pieter Johannes Smith*** resides in Albertinia. He has known applicant for many years. Although he has a grandchild in Oker Primary School in Albertinia, he is not a member of the school governing body and does not attend parent meetings at the school. He is a member of the local church where Pastor Kroukamp, who is also a member of the school governing body of Oker Primary, is the minister of religion.

[26] He assumes that second respondent is also a member of this church because he used to attend the church with his mother when he was still a boy and recently Smith had also seen second respondent attending services at this church. During July 2005 Pastor Kroukamp paid a visit to him at his house and asked him and his wife to sign a document regarding appointment of the new school principal. He cannot recall what the document said. During the same period Pastor Kroukamp also said in church from the altar that they should pray for the home boy who has come home. When asked whether Kroukamp specifically mentioned the name of second respondent when he said these words, the witness answered that Kroukamp did not mention the name of second respondent.

Evidence on behalf of first respondent

[27] ***Fernholdt Henry Michael Galant*** is employed by first respondent as a circuit manager and has a approximately 25 school in his jurisdiction. The schools in Albertinia do not fall in his circuit. He was however requested by the director of the EMDC to facilitate the process leading up to the appointment of the school principal at Oker Primary. He could however not complete the process because his father became terminally ill and he therefore had to recuse himself from the process. Another circuit manager was then asked to take over his roll.

[28] When he paid a visit to the school, applicant advised him that the envelope containing the applications for the position, was torn when he received it. At this stage the school governing body had not yet commenced with the process. Applicant informed him that he had obtained a letter from the post office, certifying that the letter was torn when he received it. Although it was clear that nobody could have tampered with the envelope, the witness decided to remove the envelope and lock it away in his office in a steel cabinet, in

the light of the fact that that it had been torn. Seeing that it was torn, he placed it in a larger envelope. When he recused himself from the process, he handed the envelope to Mr Anthony, another circuit manager.

[29] ***Freek Christoffel Kroukamp*** is a pastor at a local church in Albertinia. He had served on the school governing body of Oker Primary in Albertinia in various positions. At some stage he was the chairman of the school governing body. At some stage he was also the chairman of the shortlisting committee but later he withdrew as chairman of that committee and then became the secretary of the committee.

[30] When the previous school principal Mr. Weber left, applicant who was at that stage the deputy principal, approached him and advised him that the educators at the school feels that applicant should become the acting school principal. The witness advised applicant that it was not for the educators to take such a decision. He also advised him that the position would have to be advertised for permanent filling. When applicant did however become the acting school principal, the school governing body accepted his appointment. The position was however advertised for permanent filling. After the position was advertised, applicant refused to greet either Kroukamp or the other members of the school governing body. Applicant in fact still refuses to greet Kroukamp or the other members of the school governing body.

[31] When he first heard about the torn envelope containing the applications for the position for school principal, which was received by applicant, it was via rumours and gossip stories. The school governing body was quite surprised that applicant had not informed them about the torn envelope and accordingly the witness and the chairlady of the school governing body went to applicant to confront him about the torn envelope. Applicant went to fetch the envelope and showed it to them.

[32] On inspection of the envelope, his conclusion was that one could not definitely say that somebody necessarily tampered with it and they accepted applicant's word that he had received it in that condition from the post office. On behalf of the school governing body the witness did however phone first respondent's offices in order to report the incident. Galant then came to fetch the envelope from the school.

[33] The envelope containing the applications, was only opened after the shortlisting criteria were set. It was decided that the identities of the candidates would be hidden from the SGB during the shortlisting process. After opening the envelope containing the cv, the union representatives in fact processed the cv's of the different candidates and concealed

the identities and then allocated a number to each curriculum vitae so that instead of seeing names on the curriculum vitae, the school governing body only saw numbers. This prevented them from being biased in favour of any candidates during the shortlisting process. They then used a point system in order to shortlist candidates and decided that only the five candidates with the highest scores, would be shortlisted. Applicant was not one of the candidates who were shortlisted because there were five candidates who scored more than him. He was the chairman of the shortlisting committee. He however recused himself as chairman before the interviews because of disputes which were lodged. The interview process was done twice. Second respondent scored the highest during the second interview process and was recommended for appointed by the school governing body.

[34] The grade 8 learner representatives on the school governing body decided not to take part in the process of selection of the school principal, because they were in applicant's class. When the school governing body learnt that the learner representatives did not want to be part of the process, they enquired about this and the learners then confirmed at a meeting of the school governing body that they did not want to be part of the process. This is contained in the minutes of the school governing body, but those minutes are not contained in the bundle of exhibits handed in as exhibit "A". A representative from the first respondent then advised the school governing body that it would be safer to obtain a signed letter from each learner representative stating that he or she does not want to take part in the process. This is how his wife Mrs. Kroukamp who is an educator of the school as well as a member of the school governing body, assisted the learner representatives to draft the letters stating that they did not want to take part in the process.

[35] He did visit Mr. Smith as well as many other parents with a document. This did however not concern the appointment of a school principal. The school governing body was falsely accused of certain things by certain individuals who presented a petition, allegedly signed by parents. Each school governing body member was then asked to visit a certain number of parents regarding these charges and the petition. It was with regard to the integrity of the SGB that he went to visit Smith and other parents. He never attempted to influence anybody to vote for any specific candidate as school principal. He denied that he ever made any negative remarks concerning any candidate during the shortlisting process, as alleged by Adams. He also denied that he ever asked the community to pray for second respondent or for his appointment as school principal.

[36] The criteria they decided on for shortlisting is contained on page 140 of exhibit A. Page 138 contains the actual grid the shortlisting committee used during shortlisting allocating marks to the respective candidates for certain aspects. When it was put to him during cross-examination that the school governing body deviated from their own shortlisting criteria as contained on page 140 of exhibit A when doing the actual shortlisting, the witness denied this. Although the grid on page 138 does not contain all the subheadings as contained on page 140, the ones which are not specifically mentioned in the grid, would be considered under subheadings in the grid. For example experience relating to the curriculum on page 140 would be taken into account under the subheading administrative experience on the grid as contained on page 138. He explained that everybody on the shortlisting committee as well as the union representatives agreed that the grid contained on page 138 should be in that format, which was not exactly in accordance with the headings listed on page 140. This would be contained in the minutes. It was put to him that second respondent should not have received 2 points for managerial experience since he only indicates that he had acted as deputy school principal without indicating for how long he had acted. It was put to him that since the criteria referred to "years" of experience as manager, applicant could not have received points for this. The witness answered that the emphasis was not on years of experience but on some managerial experience.

[37] ***Anton Gunter*** is employed by first respondent as a circuit manager. He is responsible for training school governing bodies with regard to the shortlisting and interviewing of candidates for appointment. In fact he developed the system which is being used in the Southern Cape and Karoo regions in this regard. He is based in Oudtshoorn and was asked by first respondent to act as facilitator in the process when the new school principal was due to be elected at Oker Primary in Albertinia. The reason why he was approached in this regard was because he was completely objective, came from a different area and was not familiar with any of the parties. Before the process started he gave the School Governing proper training. This training session would have lasted for approximately 2 to 3 hours. The document contained in exhibit A pages 139 and 140 was drafted by him and is merely a manual or guideline. He was adamant that if Kroukamp during his evidence said that this document in fact constituted the criteria for shortlisting as opposed to a mere guideline, the evidence of Kroukamp in this regard was simply wrong.

[38] The shortlisting process in this case was done twice and he was involved during both processes. The shortlisting criteria were agreed upon before the envelope containing the applications were opened. Because two applicants were already employed at the school, they feared that members of the school governing body might favour those candidates. Accordingly they decided that the members of the school governing body should not see the applications and curriculum vitae of the candidates during the shortlisting process. Hence, after the envelope was opened, he personally took out the applications and numbered all the applications. Each applicant received a number. The members of the school governing body accordingly only knew the candidates by numbers and not names. He, Mrs Barnard from his office as well as the observer representatives from the trade unions then went through each curriculum vitae and allocated points to each individual candidate in accordance with the criteria drafted by the school governing body. The points were then entered on a grid and displayed on a screen.

[39] Only the candidates with the highest scores were shortlisted and since applicant was not one of them, he was not shortlisted. The reason why applicant was not shortlisted, was because his score was so low. Applicant scored nought in respect of qualifications because the SGB decided that they would require the candidates to have an M + 4, which is either a degree or four year diploma, which applicant does not have. He does not believe that this was an unfair requirement because applicant was not excluded merely because he did not have an M + 4. He was still allowed to compete with all the other candidates and given an opportunity to outscore them on other criteria, but he could not.

[40] Kroukamp did contribute more to the criteria than other members in the sense that he was the most energetic. He however never influenced anybody not to shortlist applicant. He also did not make any comments with regard to any of the candidates, including applicant. In fact Kroukamp never saw any of the curriculum vitae during the shortlisting process.

[41] When asked how second respondent could comply with the requirement of management experience, he said that the mere fact that he indicated in his cv that he acted as deputy school principal was sufficient, irrespective of whether he merely acted in the position and irrespective of the period that he has acted in the position.

CLOSING ARGUMENTS

[42] Extensive written heads of argument were handed in by applicant and respondents. 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 RELEVANT LEGAL PRINCIPLES

[43] The statutory provision, in terms of which this tribunal may arbitrate promotion disputes, is to be found in section 186(2)(a) of the LRA, which defines unfair labour practices with regard to promotion as follows:

> " '***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"

[44] An employee who alleges that he or she 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 existence of the disputed labour practice, if it is disputed, but also that it is unfair.[1] Mere unhappiness or a perception of unfairness does not establish unfair conduct.[2]

[45] What is fair depends upon the circumstances of a particular case and essentially involves a value judgement.[3] 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.[4] 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.[5]

---

[1] 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

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

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

[4] *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

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

[46] In the education sector, regard should also be had to ELRC Resolution 5 of 1998, as elaborated on in Western Cape Provincial Chamber ELRC Resolution 1 of 2002, in order to determine whether a fair procedure was followed in promoting a certain candidate as opposed to another. The promotion procedures which have collectively been agreed to in terms of Resolution 5 of 1998, have been duplicated in chapter B of the Personnel Administration Measures ("PAM"), which were promulgated as regulations by the Minister of Education in terms of section 4 and 35 of the Employment of Educators Act No 76 of 1998. First respondent as the employer, is bound to follow the procedures stipulated in these regulations.[6]

[47] 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.[7] In addition there is a presumption of regularity, expressed by the Latin maxim *omnia praesumuntur rite esse acta*[8] 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 and that the decision was made properly, validly, correctly, regularly and honestly.[9] Furthermore, the mere fact that an employee has acted in a position, does not in itself create an entitlement to be appointed on a permanent basis in that position.[10] 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.

[48] The following remarks by academic writers and arbitrators, demonstrate how careful an arbitrator should be before interfering with an employer's decision to promote:

> "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

---

[6] *Stokwe v MEC, Department of Education, Eastern Cape Province & another* [2005] 8 BLLR 822 (LC)
[7] *Westraat and SA Police Service* (2003) 24 ILJ 1197 (BCA); .
[8] translated as "all acts are presumed to have been lawfully done"
[9] Wade *Administrative Law* at 292-293; 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
[10] Grogan *Dismissal, Discrimination and Unfair Labour Practices* (August 2005) Juta page 51

> respected unless bad faith or improper motives such as discrimination are present….."[11]
>
> " ..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).."[12]

[49] 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. In this regard the following remarks of the Labour Court are apposite:

> "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." [13]

[50] Arbitrators must bear in mind that they are not qualified as business consultants 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 about in selecting a candidate for promotion. There may be reasons for preferring one employee to another apart from formal qualifications and experience.[14] The employer may attach

---

[11] P A K Le Roux in *Cheadle Landman Le Roux & Thompson* Current Labour Law 1991/1992 at 17
[12] *Cullen v Distell (Pty) Ltd* [2001] 8 BALR 834 (CCMA)
[13] *Basson v Provincial Commissioner (Eastern Cape) Department of Correctional Services* (2003) 24 ILJ 803 (LC) at 820C–F
[14] *PSA obo Badenhorst v Department of Justice* [1998] 10 BALR 1293 (CCMA)

more weight to one reason than another,[15] may take into account subjective considerations such as performance at an interview[16] and life skills[17]:

> "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 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"[18]

[51] 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.[19] 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.[20]

APPLICATION OF THE LAW TO THE FACTS

[52] 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 in the position. Applicant's cause of action in this case is solely based on alleged procedural irregularities, which allegedly occurred during the process leading up to the School governing body's decision to recommend second respondent for appointment in post Number 0228. It is alleged that as a result of certain alleged procedural irregularities, the recommendation of the School Governing Body[21] to

---

[15] *Rafferty v Department of the Premier* [1998] 8 BALR 1077 (CCMA)
[16] *PSA obo Dalton and another v Department of Public Works* [1998] 9 BALR 1177 (CCMA)
[17] *PSA obo Badenhorst v Department of Justice* [1998] 10 BALR 1293 (CCMA)
[18] *Goliath v Medscheme (Pty) Ltd* (1996) 17 ILJ 760 (IC) 768
[19] *PAWC (Department of Health & Social Services) v Bikwani & others* (2002) 23 ILJ 761 (LC) 771
[20] *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 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

[21] hereinafter also referred to as the "SGB"

appoint second respondent, is invalid and that the process should be repeated as from shortlisting. Applicant relies on the following alleged procedural irregularities:

52.1 It is alleged that some unauthorised person has tampered with applicant's curriculum vitae prior to it having been perused by the SGB;

52.2 It is alleged that in respect of a certain period, there exists some mystery regarding the whereabouts of the envelope containing the applications and that during this period the contents of the envelope could have become known to people who were not supposed to have knowledge of the contents;

52.3 It is alleged that since the shortlisting process was done twice, the SGB could not have been objective when they set the criteria for the final shortlisting because they were at that stage already aware of the contents of the curriculum vitas of the respective candidates, having become aware of that contents during the first shortlisting meeting;

52.4 It is alleged that certain members of the SGB prevented other members of the SGB, in particular the two learner representatives on the SGB, to take part in the process;

52.5 It is alleged that certain members of the SGB unduly influenced other members with regard to which candidates should be shortlisted and recommended for appointment;

52.6 It is alleged that the school governing body did not stick to its own criteria when it shortlisted candidates;

52.7 It is alleged that second respondent should not have been allocated points for certain issues during shortlisting;

52.8 It is alleged that the SGB misled first respondent in its motivation concerning the reason why second respondent was nominated;

[53] I will now proceed to discuss these issues under separate subheadings. Before doing so, I must emhasise that I am not in favour of an over technical approach in terms of which each and every small procedural defect can give rise to a cause of action in labour disputes.[22] Since the early days of Roman Dutch Law it has been recognized that substance should not be sacrificed to form.[23] I therefore do not believe that exact compliance with each and every procedural requirement, is necessary in order for the decisions and recommendations of a SGB to be valid. Requiring exact compliance with each and every formality, would lead to absurd consequences. It would lead to absurd consequences because SGB's consist of lay people.

[54] To expect them to act like High Court Judges or Magistrates in complying with procedure is simply unrealistic. If they are expected to comply exactly with each and every minute procedural requirement, we would probably find that first respondent will never be able to fill any vacant positions because in most cases one would be able to find some procedural irregularity committed by the school governing body. That could never have been the intention of the legislature. It could also not be in the interests of the learners, whose interests are really the determining factor, because it would lead to instability and uncertainty at schools if posts are frozen for months and years whilst disputes about trivial technicalities concerning the filling of posts are being battled out in employment tribunals and courts. Accordingly, I am of the view that arbitrators should be loath to interfere in promotion disputes on the mere basis of alleged procedural defects committed by a school governing body. I will revert to this aspect in due course later in this judgement.

Alleged tampering with the curriculum vitae

[55] In applicant's referral form, the alleged unauthorised tampering with his cv, is indeed the only basis upon which the process is attacked and upon which his cause of action is based. In the referral form, applicant summarized the facts in support of his cause of action as follows:

> "The envelope containing the application forms and cvs of applicants that were sifted by the WCED was broken. There is an allegation that Mr.

[22] see for example my recent remarks in this regard in the reported arbitration award of *Peterson v Shoprite Checkers* reported by Butterworths publishers in their arbitration law reports as *Peterson v Shoprite Checkers* [2006] 3 BALR 292 (CCMA) at 317

[23] see for example Johannes Voet *Commentarius ad Pandectas* 1.3.16, which was written between 1698 and 1704 and which still remains one of the most authoritative sources of our common law

> Muller's cv was incomplete, and he disputes that as there is a possibility that there was tampering with the contents of the envelope"

[56] It appears that applicant's fears that there might have been tampering with his cv, was based on the fact the fact that his union representative was advised by a representative of first respondent that applicant had not been shortlisted, because his cv was incomplete. Semantically, the statement that applicant's cv was incomplete, could obviously have meant one of two things. It could either mean that there were pages missing from applicant's cv or it could mean that the cv did not contained sufficient detail.

[57] For some or the other reason, applicant merely assumed that this statement meant that pages were missing from his cv. He knew that his cv was complete when he posted it and since he personally saw that the envelope containing the cv's was torn, he assumed that there was tampering with the cv in that somebody removed some of the pages from his cv.

[58] During this arbitration, it became clear that applicant completely misunderstood the statement of first respondent's representative when it was said that applicant's cv was incomplete. With reference to applicant's original cv which he submitted, which is still in possession of first respondent, and a copy of which had been handed in during this hearing forming part of exhibit "A", it is clear that no pages are missing from applicant's cv. It is clear to me that it is and always had been first respondent's position that applicant's cv was incomplete in the sense that it did not contain sufficient information and that it was drafted in a sloppy manner.

[59] It is not surprising then that in her written closing heads of argument, Ms Kwazi did not even pursue this argument and did not refer to this issue of alleged tampering with applicant's curriculum vitae, which was initially, in the referral form, the only basis upon which the fairness of the process was attacked. Instead, completely new issues, not even raised in the referral form, formed the basis of Ms. Kwazi's attack on the process during closing argument.

[60] I am satisfied that there is no basis for finding that there was any tampering with applicant's cv. His fears in this regard were based on a mistaken interpretation of the statement made by first respondent's representative to applicant's union representative. I am satisfied that nobody had tampered with applicant's cv. What was meant when applicant's union representative was advised that he was not shortlisted because his cv was incomplete, was that he did not put sufficient details in his cv when he compiled it.

The mysterious disappearance of the envelope

[61] It is common cause that at some stage, after Galant confiscated the envelope from applicant, after applicant reported that it had been torn when re received it, and after Galant handed it to Mr. Anthony, its whereabouts were unknown for a certain period and it later, prior to shortlisting, resurfaced at first respondent's head office in Cape Town. Ms Kwazi argued that nobody could give clarity as to how the envelope landed up in Cape Town. She also argued that she finds it rather strange that somebody would have sent it back to Cape Town. Accordingly she submitted that the envelope must have passed through many hands and that in the process people, who were not supposed to have knowledge of the contents of the envelope and who might have an interest in the process, might have become aware of its contents.

[62] The problem with these arguments, are that they amount to nothing more than speculation. Courts and tribunals may not base their findings on speculation and conjecture.[24] Furthermore, the onus rests on applicant to prove that an irregularity which prejudiced him, occurred. It is not for any of the respondents to show that this did not occur. Applicant presented no evidence that somebody did actually tamper with the envelope during the period when its whereabouts are unknown or during any other period. At best for applicant, one could possibly argue that the speculative arguments raised by Ms Kwazi, amount to circumstantial evidence. In *Onderlinge Assuransie-Assosiasie Bpk v De Beer*[25] it was held that when dealing with circumstantial evidence, and if more than one inference can be drawn from the evidence, then the court must select the most plausible inference which is not inconsistent with all the proved facts. There are many inferences that one can draw from the fact that the whereabouts of the envelope, for a certain period, is unknown and from the questions and arguments raised by Ms. Kwazi.

[63] The possibility that somebody could have tampered with the envelope and leaked the contents to the members of the SGB is merely one assumption which one could make, with the aid of a lively imagination. There are however also many other reasonable inferences that one can draw from these facts. It is quite possible, as Gunter testified, that

---

[24] *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 777; *S v Steynberg* 1983 (2) SA 140 (A)

[25] 1982 (2) SA 603 (A) at 614E-H; See also *Santam Bpk v Potgieter* 1997 (3) SA 415 (O) at 423A-B; *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) at 1028A-B; *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* 2000 (4) SA 21 (SCA) at 26G.

the envelope could have been sent back to cape Town by somebody who thought that the process was finalised. It cannot be said that the arguments raised by Ms. Kwazi on this aspect and her suggestion that something sinister might have happened, is the most plausible inference which can be drawn from the proved facts. This necessarily means that the test as set out in *Onderlinge Assuransie-Assosiasie Bpk v De Beer supra* has not been satisfied and that applicant has not discharged his onus on this aspect and has failed to prove that it is more probable than not that somebody did indeed tamper with the envelope during the period that its whereabouts were unknown and that in the process its contents was leaked out to persons with an interest in the process, such as for example members of the SGB of second respondent.[26]

[64] A Court or tribunal is not allowed to draw the worst possible inference against the respondent in a civil case which ingenuity may suggest from circumstantial evidence. This would fly in the face of the rule in *Onderlinge Assuransie-Assosiasie Bpk v De Beer supra.* This is exactly what Ms. Kwazi is by implication asking me do. On the available evidence, I am satisfied that applicant has not succeeded in proving any irregularities in this regard.

Alleged prior knowledge of the SGB of the contents of the curriculum vitae

[65] It is common cause that after the first shortlisting meeting, there was a complaint about the fairness of the process and it was decided to repeat the process. Ms. Kwazi submits that in these circumstances, it cannot be said that the SGB could have been objective when they set the criteria at the final shortlisting meeting because they already knew who had applied as well as the contents of their cv's.

[66] Once again, this argument amounts to no more than speculation.[27] There is no evidence to support a finding that the SGB was actually biased or prejudiced against or in favour of any specific candidate when it set the criteria for the second shortlisting process. Having regard to the criteria which were used, I am satisfied that the criteria which were agreed to and used, are fair, objective and rational and not drafted in order to favour or prejudice any particular candidate.

---

[26] Also relevant here is the presumption that all acts performed by the SGB and the first respondent have been done lawfully, correctly, honestly, properly and without irregularities. It is for applicant to rebut this presumption. See footnotes 8 and 9 regarding the maxim *omnia praesumuntur rite esse acta*

[27] In addition the onus is on applicant to rebut, through evidence, the presumption that all acts performed by the SGB and the first respondent have been done lawfully, correctly, honestly properly and that there were no irregularities. See footnotes 8 and 9 regarding the maxim *omnia praesumuntur rite esse acta*

[67] If there was any merit in Ms Kwazi's argument, it would mean that a process can never be repeated as from setting the criteria, and must always be repeated as from advertising, because in all cases it would be open for dissatisfied unsuccessful candidates to argue that the process was unfair because at the second shortlisting meeting the members of the SGB were already aware of the identities of the candidates and the contents of their cv's. This would be absurd. One simply cannot re-advertise each and every time when a process needs to be repeated. It would lead to immense delays and inconvenience. If Ms. Kwazi could prove that there were radical differences between the criteria which were used at the first shortlisting meeting and the criteria used at the second shortlisting meeting and that these new criteria were specifically designed to prejudice applicant and/or favour second respondent, I might have had more understanding and sympathy for her arguments. On the available evidence however and as her arguments are framed at present, it amounts to no more than speculation and clutching at straws.

Alleged prevention of learner representatives to take part in the process

[68] The only evidence which was led by applicant in support of the allegation that learner members of the school governing body were prevented from taking part in the process concerning the recommendation for appointment of a new school principal, is that of Faiek Valtyn, a boy aged 14 years who was a learner representative on the school governing body during 2005.

[69] His evidence in this regard is confusing and puzzling, to put it mildly. Initially during examination in chief, his evidence was that Mrs. Kroukamp, an educator at the school and the wife of Pastor Kroukamp, approached him at the school and told him to make a statement saying that he did not want to take part in the process regarding the election of a school principal. He also testified that Kroukamp then dictated to him and the other learner representatives on the school governing body what to write in these letters where they confirmed that they did not want to take part in the process regarding the election of the school principal.

[70] Later during cross-examination, he conceded that even before Mrs. Kroukamp approached him and asked him to write the letter, he already decided that he did not want to take part in the process and wanted nothing to do with the election of a new school principal. He in fact discussed this with his mother as well. When asked during cross-examination how he knew what to write in the letter which he wrote to say that he did not

want to take part in the process, he testified that he asked his mother and she had told him what to write.

[71] When Valtyn was confronted with the contradiction in his evidence on this aspect in that he first said that Mrs. Kroukamp told him what to write in the letter whereas he later said that his mother told him what to write, he could not really give an explanation.

[72] According to Pastor Kroukamp's evidence the SGB did indeed approach the learner representatives on the SGB with a request that they should write and sign letters saying that they did not want to take part in the process. This he said was however done on recommendation from the first respondent only after the learner representatives had already indicated at a SGB meeting that they wanted nothing to do with the process and did not want to take part in it.

[73] I have had the unique opportunity of seeing and hearing all the witnesses testify before me. Based on the probabilities and the manner in which they fared during cross-examination, I was able to make certain factual and credibility findings. These factual findings were reinforced by the demeanour of the respective witnesses. I was impressed with the evidence and demeanour of Kroukamp. His evidence was clear and satisfactory in every material aspect. He was taken under intensive and extensive cross-examination by respondent's representative but did not deviate in any material respect from his evidence-in-chief. His version was consistent with the probabilities.

[74] Valtyn however, did not make a good impression on me in the witness box. I was not impressed with the contents of his evidence or the manner in which it was given. In my 16 years of practice, especially during my years in the regional court when I was in the Department of Justice, I have seen many young children, some of them even younger than 7 years, testify. Many of them were the victims of sexual molestation and severely traumatized. I am therefore not unfamiliar with evidence given by young children and the manner in which they give it.

[75] Compared to many other young children, including those who had been severely traumatized due to sexual molestation, I have seen giving evidence, Valtyn made an exceptionally poor impression on me. He did not impress me as a credible and reliable witness. He was extremely hesitant and unsure of himself. He contradicted himself on important aspects. He was evasive in answering certain straightforward questions. He was hesitant in answering other questions. Several question had to be repeated. He retracted important testimony he had already given. He adapted his own version from time to time. In addition he was unable to explain discrepancies and contradictions in his evidence. I

am however mindful that demeanor can never be used as the sole tool in making a credibility finding. Demeanor should only be allowed to reinforce a conclusion reached by an objective assessment of the probabilities and I am indeed approaching the issue of demeanor in this manner, mindful that demeanor can often be very misleading.

[76] Whilst there is no statutory requirement that a child's evidence must be corroborated, it had long been accepted that the evidence of young children should be treated with caution.[28] As remarked by Schreiner JA:

> "The imaginativeness and suggestibility of young children are only two of a number of elements that require their evidence to be scrutinized with care amounting, perhaps to suspicion..The trial court must fully appreciate the dangers inherent in the acceptance of such evidence"[29]

[77] Given the contradictions in Valtyn's evidence, his poor demeanour and other unsatisfactory aspects in his evidence, I am indeed treating his evidence with extreme caution and suspicion. Insofar as it is necessary to chose between the version of Pastor Kroukamp and Valtyn, I have no hesitation in accepting the version of Kroukamp where it conflicts with that of Valtyn and rejecting the version of Valtyn.

[78] Coincidentally, Valtyn corroborated Kroukamp's version that he(Valtyn) did not want to take part in the process in any event even before Mrs. Kroukamp assisted him in writing a letter stating that he did not want to take part in the process. Even on Valtyn's own version, the intervention of Mrs. Kroukamp therefore appears to be of not much importance.

[79] I find that the learner representatives on the SGB decided on their own that they did not want to take part in the process regarding the election of a new school principal and that they confirmed this during an SGB meeting. I find that although Mrs. Kroukamp assisted the learner representatives on the SGB in writing letters advising that they did not want to take part in the process, this was only after the learners had already indicated at a SGB meeting that they did not want to take part in the process.

---

[28] *R v Mandla* 1951 3 SA 158 (A) at 163C; *Woji v Santam Insurance* 1981 1 SA 1020 (A) at 1028B-D; *S v Viveiros* 2000 2 All SA 86 (A) at 88c-d

[29] *R v Mandla* 1951 3 SA 158 (A) 163 per Schreiner JA

[80] I find that there was nothing wrong or irregular with the fact that Mrs. Kroukamp assisted the learner representatives to write these letters since it merely confirmed in writing a decision which the learner representatives had already made during a SGB meeting.

[81] I must confess that I do not understand all the fuss which was made about the alleged prevention of the learner representatives to take part in the process. Even if I could find that the learner representatives were prevented against their will from taking part in the process[30], I seriously cannot understand how this could have affected the overall fairness and legality of the process. Having seen Valtyn in action during his evidence before me, I cannot understand how a child of 14 years who is so uncertain of himself and so confused, can actually take part in a process which concerns the election of a principal of a school. What constructive contribution any child of 14 years could possibly make in the appointment of a school principal, is beyond my understanding. In my view such young children have no business in being part of such processes because they simply do not yet have enough wisdom and life skills to make any constructive contribution to such an important process.

[82] In fact, a child of 14 years is not even allowed by law to enter into the simplest forms of contracts(without the assistance of his parents), make a will or insure his own life. To allow such young children to take part in a process in which an adult's career and future is at stake, would in my view simply be absurd. Such young children do not have the insight to understand the gravity of the issues which are at stake.

[83] I want to make one further last remark regarding Valtyn. Precisely because young children are so easily suggestible, I find it quite disturbing and inappropriate that applicant personally paid a visit to Valtyn about this case, asking him to be a witness in this case, one week prior to Valtyn having given evidence in this matter.

[84] Applicant as a former educator of Valtyn and in his position as a respected community leader by virtue of his roll as educator, deputy principal and former acting school principal, would be looked up to by Valtyn and his parents. Under such circumstances where applicant was represented by SADTU, it would have been more appropriate that applicant's representative asked Valtyn to be a witness and not applicant himself. Applicant is an educator and I find it hard to believe that he is not aware of the suggestibility of young children and the inappropriateness of his visit to Valtyn. It is not acceptable that young children should be placed in a compromising position where they may feel obliged to testify on behalf of adults in matters which do not directly concern

[30] I in fact already found that they were not prevented but freely chose not to be part of the proceedings

them. Applicant's visit to Valtyn, probably had exactly this effect, as a result of applicant's respected position in the community. In addition his personal visit to Valtyn also raises serious ethical questions regarding the possibility of having influenced Valtyn to testify in a certain manner. Valtyn's contradictions regarding certain issues, certainly raises suspicions in this regard. I trust that applicant will in future, if he is ever involved in litigation again, be more sensitive about these issues and not pay personal visits to young children with the aim of convincing them to testify on his behalf, where a professional person, such as for instance his union representative, can do so.

The alleged undue influence

[85] In support of the allegation that there was undue influence in the process, two witnesses were called by applicant, namely Adams and Smith.

[86] Smith's evidence did not assist me. His evidence that Kroukamp allegedly said from the altar in church that the "home boy" has come home and that the congregation must pray for him means absolutely nothing because he did not tell us who the "home boy" is that Kroukamp referred to. In fact when he was asked whether Kroukamp mentioned second respondent by name, he replied that Kroukamp did not.

[87] Smith's evidence that Kroukamp came to his house with a document regarding the new school principal which he had to sign, also did not take the matter any further. Smith could not tell me what the document said; just that it had something to do with the school principal. Even if the document did concern the school principal, this means nothing because Smith was not a member of the SGB and had no influence over the process. Furthermore he could not tell us what the document said about the school principal.

[88] Against Smith's very vague evidence, I have the evidence of Kroukamp who concedes that he did approach Smith with a document but that it was concerning the integrity of the SGB and had nothing to do with the appointment of a school principal.

[89] Concerning this aspect, I am therefore faced with two mutually destructive versions as to what the document which Kroukamp asked Smith to sign, was about. According to Smith it was about the school principal and according to Kroukamp it was about the integrity of the SGB. There are no probabilities indicating which of these versions is the correct version. At the most I can therefore say that the probabilities in this regard are evenly balanced. The onus of proof however is on applicant and not on respondent.

[90] Our law is very clear in this regard. 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 story of the party upon whom the onus rests is true and the other is false.[31] There is no reason for me to find that Kroukamp is lying. Since the onus is on applicant, this necessarily means that I must accept the evidence of Kroukamp that the document which he asked Smith to sign was with regard to the integrity of the SGB and did not concern the appointment of a school principal.

[91] The evidence of Adams was that Kroukamp had influenced other members of the SGB in that he was domineering and made negative remarks about almost each and every candidate who had applied for the position, including applicant. Kroukamp denied this during his evidence and Gunter also denied this. Once again I am faced with two mutually destructive versions in this regard. There are no probabilities to assist me in finding which of these versions is the truth. Once again the probabilities are evenly balance and the onus is on applicant. This necessarily means that I must accept the evidence of Kroukamp that he did not influence members of the SGB or made negative remarks about candidates.

[92] Even if I could find that Kroukamp acted in a domineering manner and made negative remarks about candidates[32], this could not affect the legality of the process. Adams conceded that although Kroukamp was domineering, the members of the SGB were indeed allowed and asked to make an input, but declined to say anything. As regards the alleged negative comments which Kroukamp made about applicant, Adams conceded that Kroukamp was quite evenhanded in this regard and made negative comments about most of the candidates.

[93] Members of an SGB should be allowed to freely discuss issues and candidates amongst themselves when they are involved in the process of shortlisting and electing an educator for recommendation for appointment. Juries, the members of tribunals, Courts and committees act together as a panel when they make decisions. Before making their final decision, it is necessary that members should be able to say whatever is on their mind. It is inevitable that some of these members will have strong domineering personalities whereas others would have weak personalities, may be shy and unwilling to speak out and air their views. This simply reflects the demographics in society where some people have strong personalities and others do not.

[94] This does not mean that the members who have domineering personalities have unduly influenced those members who have weak personalities and who prefer not to say anything. This is part of the realities of everyday life and to suggest that a process should

[31] *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 189

be declared invalid on such a basis is with all due respect really absurd. The whole purpose of a panel is that the members of the panel must exchange thoughts. All of them will bring different experience and talents to the meeting and to suggest that any of them should not be allowed to express their views simply because they may be domineering, is really silly. Other arbitrators have expressed similar views in this tribunal. One example is the following remarks by Ms. S Christie who made the following remarks in this regard:

> "The point of a panel is that the panel should share their observations. The value of a committee is that the members of the panel have different experiences"[33]

[95] In order for conduct to qualify as undue influence which could lead to the setting aside of the decision of a decision maker, our common law requires that it needs to be shown that (i) a party exercised influence over the decision maker (ii) this influence weakened the powers of resistance of the decision maker and made his will pliable (iii) the party exercised this influence in an unscrupulous manner in order to induce the decision maker to agree to a prejudicial decision which the decision maker would normally not have entered into of his own free will.[34] Even if I accept Adams' evidence, I cannot on Adams' version find that Kroukamp's actions had weakened the powers of resistance of the other members of the SGB and made their wills pliable. I can also not find on Adams' evidence that the other SGB members agreed to decisions which they would not normally have agreed to of their own free will, had it not been for the influence of Kroukamp. Accordingly, even on Adams' version, the test as set out in *Patel v Grobbelaar* supra for undue influence, had not been satisfied and I cannot find that on his version, there was any undue influence. The same would apply to the version of Smith.

Alleged failure of the SGB to follow its own criteria

[96] During cross-examination of Kroukamp great emphasis was placed on the fact that the items mentioned on page 140 of exhibit "A"[35] did not exactly correspondent with the actual items used in the grid on page 138 of exhibit "A".[36] I have compared these two documents. I am satisfied that although each and every item mentioned on page 140 is not duplicated

---

[32]which I already found he did not do
[33]per Christie A in *Parker v Western Cape Education Department*, Case No PSES 6063WC, unreported ELRC arbitration award, delivered on 11/09/2002
[34] *Patel v Grobbelaar* 1974 (1) SA 532 (A) at 490F; *Preller v Jordaan* 1956 (1) SA 483 (A) at 492H
[35]which according to Kroukamp contained the shortlisting criteria and according to Gunter, who drafted this document was merely a guideline
[36]which was used to allocate marks to the candidates during shortlisting

in the grid contained on page 138, the two documents correspondent in broad terms. Practically all the items mentioned on page 140, which were not specifically mentioned on page 138, can be categorized under one of the items on page 138. So for example knowledge of the curriculum on page 140 could be categorized under the item dealing with administrative experience on page 138.

[97] The issues which I would have expected the SGB to take into account during shortlisting for this position, namely, administrative ability, managerial experience, computer literacy, employment equity, language proficiency, academic qualifications and extra mural activities, have all been taken into account on page 138. I do not agree that the criteria used on page 138 is a deviation from the initial criteria as contained on page 140. I am satisfied that in taking into account the factors as listed in the grid on page 138 of exhibit A, which did not in all respects correspondent with the items mentioned on page 140, the SGB did not act irrationally, capriciously or arbitrarily. I am also satisfied that no other recognized ground of review is present and that I am not entitled to interfere in the SGB's decision in this regard.

[98] In addition it should be borne in mind that page 140 was drafted by Gunter and according to his evidence which I accept, this was only a guideline to setting the criteria and not a prescript.

[99] I also do not believe that it was unfair of the SGB to require candidates to have a minimum qualification of M + 4 in order to receive any points on the grid for qualifications during the shortlisting. I agree with Gunter that by doing this applicant was not excluded from being shortlisted. SGB's are fully entitled to require higher qualifications during the shortlisting process than the minimum requirements specified in the advertisement.

[100] In the circumstances there is no merit in Ms Kwazi's arguments in support of her attack on the criteria which were used by the SGB.

The argument that second respondent should not have been allocated points for certain issues

[101] It was argued that the SGB should not have allocated any points for managerial experience to second respondent. This argument was based on the fact that second respondent in his cv only indicated that he had acted as deputy principal without stating

for how long he had acted in such a capacity and because the “criteria” on page 140 refers to “years” of experience as a manager.

[102] To argue, that by referring to “years” of experience on page 140, the SGB intended the candidate to have “many years” of managerial experience and that one does not know whether second respondent has “many years” experience because he did not stipulate in his cv how much experience he has in this regard, with all due respect amounts to playing with semantics and really being extremely petty and technical.

[103] I accept the evidence of Kroukamp that the emphasis was never on “years” of experience, but on “experience” and that any exposure to managerial experience would be taken into account. Just by perusing second respondent’s cv it is clear that he does have managerial experience. Not only did he indicate that he had acted as deputy principal, but also that he had been the deputy superintendent of a school hostel.

[104] It appears that Kroukamp in any event completely misunderstood the purpose of page 140, which according to Gunter, who drafted this document is merely a guideline and not the actual criteria which were used. Accordingly there is also no merit in the argument that second respondent should not have received points for indicating that he has acted as a deputy school principal.

Alleged misleading of first respondent by the SGB

[105] It is common cause that when the SGB motivated their decision to recommend second respondent for appointment in the position, they wrote a letter to first respondent and mentioned, as one of the reasons why second respondent was nominated, the fact that one of his subjects was “science”. It is also common cause that applicant does not offer science as a subject. In his cv he stated that he offers “Ekonomiese en Bestuurswetenskappe”. These subjects, although described as a “science” are of course not synonymous with the school subject science, which is generally understood to include physics and chemistry. I do however not believe that it was the intention of the SGB to mislead first respondent. The confusion is understandable due to the fact that applicant does offer “science” as a subject; it is just not physics and chemistry but economics and management.

[106] For the following reasons, non of this is very important or significant. Firstly, the reason why second respondent was recommended was simply because he scored the highest during interviews. Irrespective of whether second respondent offered science or not, it was

indeed rational of the SGB to recommend him and nobody else for appointment based on the fact that he indeed scored the highest.

[107] Secondly, the first respondent could not possibly have been misled by the statement of the SGB that second respondent offered science as a subject. The reason why I say this, stems from the very limited powers, first respondent had prior to January 2006, to decline to appoint a SGB's first choice candidate. Prior to its amendment during January 2006, Section 6(3)(b) of the Employment of Educators Act No 76 of 1998, used to read as follows:

> "The head of department may only decline the recommendation of the governing body of the public school or the council of the further education and training institution, if -
> (i) any procedure collectively agreed upon or determined by the Minister for the appointment, promotion or transfer has not been followed;
> (ii) the candidate does not comply with any requirement collectively agreed upon or determined by the Minister for the appointment, promotion or transfer;
> (iii) the candidate is not registered, or does not qualify for registration, as an educator with the South African Council for Educators;
> (iv) sufficient proof exists that the recommendation of the said governing body or council, as the case may be, was based on undue influence; or
> (v) the recommendation of the said governing body or council, as the case may be, did not have regard to the democratic values and principles referred to in section 7(1)."

[108] Section 7(1) of the Employment of Educators Act 78 of 1998 in turn stipulates that when making appointments, equality and the need to redress the imbalances of the past in order to achieve broad representation, must be taken into account. In essence section 7(1) refers to the need to apply affirmative action policies when making appointments.

[109] As section 6 and 7 of the Employment of Educators Act 78 of 1998 was formulated prior to January 2006, a school governing body was permitted to only recommend one candidate. The High Court held that it is irregular and unlawful for first respondent to decline to appoint that candidate, being the school governing body's first choice candidate, unless any of the limited grounds as set out in section 6(3)(b) (i) to (v) of the Employment of Educators Act, are present.[37] None of the grounds set out in section 6(3)(b) (i) to (v) were present when first respondent appointed second respondent. The mere fact that the SGB

[37] *Laerskool Gaffie Maree v MEC for Education, Training, Arts & Culture: Northern Cape Province* [2002] 12 BLLR 1228 (NC) at 1231-1233

mentioned the ability of the second respondent to teach "science", could not have any bearing on the question whether any of the grounds in section 6(3)(b) (i) to (v) were present or not.

[110] Even if first respondent knew that second respondent could not teach science in the form of physics or chemistry, it would not have been allowed to decline the recommendation of the SGB for that reason, simply because section 6(3)(b) (i) to (v) does not allow it to decline to accept the nomination on that ground. In the circumstances, and since none of the grounds listed in section 6(3)(b) (i) to (v) were present, it would have been unlawful and irregular for first respondent to have declined to appoint second respondent. It simply had no choice. The SGB was satisfied that second respondent scored the highest during the interview process and based on that reason alone, first respondent had no right not to appoint second respondent. Hence, this argument which Ms. Kwazi submitted on behalf of applicant, must also be rejected.

Conclusion concerning the applicant's attack on the procedure

[111] I have already pointed out that 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.[38] Having regard to the evidence as a whole, I could not find evidence of any irrational, capricious or arbitrary conduct in the SGB's decision not to shortlist applicant and to shortlist and appoint second respondent. Nor could I find that there are any other grounds of review in terms of the common law or Constitution, which would entitle me to interfere with the decision of the SGB.

[112] In the circumstances, I am satisfied that there is no merit in any of the grounds relied on by applicant in support of his argument that the SGB acted unfairly. Accordingly his claim must be dismissed.

THE EFFECT OF ALLEGED PROCEDURAL IRREGULARITIES

[113] As I have already rejected the version of applicant and his witnesses regarding the alleged procedural irregularities and found that first respondent's version is accepted where it conflicts with that of applicant, I need not make any further findings and can reject applicant's claim. However, for the following reasons, even if I am wrong in my factual

[38] PAWC (Department of Health & Social Services) v Bikwani & others (2002) 23 ILJ 761 (LC) 771 per Jammy AJ

findings, as set out hereinbefore, applicant's claim should be dismissed, even if the evidence of applicant and his witnesses could be accepted.

[114] There are only two of the grounds upon which applicant chose to attack the process, which could, if successful, have resulted in an order that the process must be repeated, irrespective of whether applicant was the best candidate for the position. These are the allegation that there was undue influence and the allegation that somebody had tampered with applicant's cv and removed a page. As pointed out hereinbefore, applicant could not even prove these allegations on his own version, let alone on the version of fist respondent. There was simply no factual basis for the first ground and the second ground, even on the version of applicant's own witnesses, did not satisfy the test in *Patel v Grobbelaar supra* and could therefore not possibly constitute undue influence.

[115] Given the fact that applicant did not even attempt to prove that he was better qualified and suited for the position than all the other candidates who applied, including second respondent, and given the fact that I am satisfied that on the available evidence it is a foregone conclusion that second respondent is better qualified and suited for the position than applicant, the remainder of the grounds upon which the process was attacked, could not, even if they were proved, possibly have led to an order that the process must be repeated. These are my reasons for saying so.

[116] It is inevitable that in most cases there will always be some form of technical procedural irregularity when a SGB is required to shortlist, interview and recommend an educator for appointment in a certain position. These procedural irregularities may relate to certain procedures prescribed by ELRC Resolution 5 of 1998 or Western Cape ELRC Resolution 1 of 2002 or it may relate to other procedures not contained in these Resolutions. The reason why I say that there will in most cases be some technical procedural irregularities is because SGB's consists of laymen who do not occupy their position as SGB members in a professional capacity on a fully time basis. They perform these functions after hours on a voluntary basis as part of their service to their local communities.

[117] To expect such laymen to act like High Court Judges or Magistrates in performing their functions, is simply unrealistic. In fact when reviewing the decisions of Magistrates, Judges do not regard each and every procedural irregularity as fatal and as sufficient ground to interfere with the magistrate's decision. I will shortly revert to this issue. Surely the decisions of SGB's cannot be tested against a stricter test than the decisions of Magistrates.

[118] If there should be a distinction between the test applied to reviewing the decisions of magistrates and the decisions of SGB's, the decisions of Magistrates, who are after all learned legal practitioners, should be subjected to much stricter scrutiny. Other arbitrators in this tribunal, have made similar remarks:

> "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"[39]

[119] Since the early days of Roman Dutch Law it has been recognized that substance should not be sacrificed to form.[40] Invalidity cannot always follow upon non-compliance with procedures. In this regard Baxter makes the following remarks:

> "Administrative action based on formal or procedural defects is not always invalid. Technicality in law is not an end in itself. Legal validity is concerned not merely with technical but also with substantial correctness. Substance should not always be sacrificed to form; in special circumstances **greater good might be achieved by overlooking technical defects**".[41] (emphasis added)

[120] Unless it is clear that the procedural irregularity was of a serious nature resulting in a failure of justice per se, unless a recognised ground of review is present or unless the irregularity affected the end result of the process in that the best candidate had not been appointed, an arbitrator should not easily interfere. A selection process cannot be regarded as such a fragile process that even the most technical procedural irregularity would result in the whole process being set aside. One cannot on the basis of the each and every procedural irregularity during a promotion process simply set aside the decision of the SGB and thereby inconvenience the SGB, provincial education department, school, learners at the school as well as the candidate who had been nominated for appointment or already appointed. If this was not so, it would mean that any dissatisfied educator who

---

[39] per D Woolfrey in *Bell v Western Cape Education Department*, Case Number PSES 240-03/04 WC, unreported ELRC arbitration award, paragraph 8.
[40] Johannes Voet *Commentarius ad Pandectas* 1.3.16
[41] Baxter *Administrative Law* at 446 and the authorities referred to by the learned author at footnotes 377 to 379

had not been successful in a promotion, could out of spite derail the whole process by applying for an order that the whole process be repeated on the basis of some technicality, despite the fact that he by reason of his experience and qualifications never stood any chance of being appointed in the position when one compares his qualifications and experience to that of other candidates. I cannot believe that this could ever have been the intention of the legislature or the drafters of the two applicable ELRC resolutions. It is also for this reason that our common law writers are of the opinion that greater good may be achieved by overlooking purely technical defects.[42]

[121] In spite of proof of the existence of a ground of review where procedural requirements have not been met, courts and tribunals will not grant relief if the complainant had not suffered any prejudice or adverse effects.[43] In this regard it is well recognised in our criminal law that even if there are procedural irregularities in a criminal trial, the conviction of an accused will not be set aside on review if despite the procedural irregularities committed by the magistrate, the conviction is nevertheless supported by the evidence.[44] Only where the procedural irregularity is so gross that it resulted in a failure of justice per se, will the decision of the magistrate be set aside despite the fact that there is sufficient evidence to find that the accused is nevertheless guilty.[45]

[122] The same principle seems to be applicable in civil cases as well.[46] Similarly it is recognised in our election law that even if there were procedural irregularities during a political election, this will not affect the validity of the outcome, if the irregularities did not substantially affect the outcome of the election.[47] A similar approach was recently adopted by the Labour Court[48] when it was held by Musi J that in order for an applicant in a promotion dispute to be entitled to any relief where there were procedural irregularities during a promotion process, an applicant must not only show that he was better qualified

---

[42] Johannes Voet *Commentarius ad Pandectas* 1.3.16(iv), approved in *Standard Bank v Estate Van Rhyn* 1925 AD 266

[43] *Jockey Club of South Africa v Feldman* 1942 AD 340 at 359; Baxter *Administrative Law* page 718

[44] see for example *S v Tuge* 1966 (4) SA 565 (AD) at p. 568, where it was said: '. . . the test is simply whether the Court hearing the appeal considers, on the evidence (and credibility findings if any) unaffected by the irregularity or defect, that there is proof of guilt beyond reasonable doubt'.

[45] *S v Shikunga* 1997 (9) BCLR 1321 (NmS); *S v Maseko* 1990 (1) SACR 107 (A)

[46] *Twigger v Starweave* (Pty) LTD 1969 (4) SA 369 (N) at 373 where the Court held that the finding of a lower court will not be set aside on review, if despite irregularities there was proof on a substantial preponderance of probability which would have caused the court to have come to the same conclusion as did the court a quo; see also *Take and Save Trading CC v Standard Bank* 2004 (4) SA 1 (SCA) para 4

[47] *Scott and others v Hanekom and others* 1980 (3) SA 1182 (C); *Mota v Moloantoa* 1984 (4) SA 761 (O)

[48] *National Commissioner of the SA Police Service v Safety and Security Bargaining Council and others* (2005) 26 ILJ 903 (LC) para 10-12,19

than the successful candidate for the position but also better qualified than all the other candidates who applied for the position.

[123] The existence of procedural irregularities therefore seems to be extrinsically bound up with the merits of the case. Unless the decision of the body is wrong on the merits, a court of review will not interfere merely because of some technical procedural irregularity, unless the irregularity was of such a gross nature that it resulted in a failure of justice per se. The rationale for this is that the complainant had suffered no prejudice and is therefore not entitled to any relief.

[124]The only grounds on which applicant attacked this process and which could, if proved, constitute a failure of justice per se, were the allegation of undue influence and the allegation that an unauthorised person had removed pages from applicant's cv. As pointed out hereinbefore, applicant never had any hope of proving these allegations, even on his own version.

[125] The remainder of the grounds upon which the process was attacked, were all merely procedural in nature. None of them involved elements of bias or malice. None of those grounds were so grossly serious in nature, that had they been proved, it would have resulted in a failure of justice per se. None of those grounds could, if proved, have affected the correctness of the decision of the SGB in selecting the best candidate for the position. Hence, even if applicant could prove any of those grounds, he would still not have been entitled to any relief. The reason for this is that applicant could not possibly have been prejudiced since second respondent is by far superior to applicant with regard to his qualifications and suitability for the position. Even if the process were to be repeated, it appears to be a foregone conclusion that second respondent should and will be selected for the position and not applicant. Under such circumstances, it would really be silly to make an order that the process must be repeated on the mere basis of some technicality or procedural defect or merely because the process was not conducted by the SGB in a "perfect manner".

[126] I have no doubt that applicant is a good educator and is passionate about his career. He must however accept his limitations and accept that second respondent is better qualified than him for the position. In my view, the overall impression left by assessing the formal tertiary qualifications, extra-mural activities, computer literacy, experience of the respective candidates, as well as employment equity, which I am of the view are essentially the most important criteria to take into account for assessing the suitability of the successful candidate in this position, is that second respondent is much better

qualified for the position than applicant. This conclusion is based on information obtained from their curriculum vitae which were contained in exhibit “A” and can be summarised as follows:

Formal Tertiary Qualifications

126.1 Formal tertiary qualifications are always one of the most important factors which should be taken into account when a professional person is selected for appointment or promotion. As regards tertiary qualifications, applicant unfortunately only holds a three year diploma in Education. This would probably make it very difficult for him to get promotion, especially if he competes with other candidates form his designated group.[49] From perusing pages 145 and 170 of exhibit A it is clear that all the shortlisted candidates either had a Higher Education Diploma and/or a University Degree. Second respondent holds the Higher Education Diploma as well as the Baccalaureus Educationis degree and is in this regard therefore superiorly qualified compared to applicant. Before one could even look at experience for such an important position as a school principal, tertiary qualifications should be taken into account.

126.2 Merely having the minimum qualifications, is not necessarily sufficient anymore in these days where there are so many educators with excellent academic credentials. It seems that this was also the approach of the SGB and I fully agree with them in this regard.

Extra-mural activities

126.3 As regards extramural activities which could be of practical use at a rural school, second respondent is also better qualified than applicant. Not only is second respondent able to coach both rugby as well as cricket, but he is also a qualified umpire in both these sports. Applicant according to his curriculum vitae does not coach any sport. The ability of an educator to coach sport is extremely important especially at rural schools where children often have limited resources to engage in extra mural activities. Concerning extra-mural activities a school principal at a rural school should be able to set the example to other educators and in this regard second respondent is also better equipped than applicant.

126.4 In addition second respondent seems to be well balanced because he is also involved in other extramural activities such as choir singing. I have taken note of applicant's extra-mural activities, but I am nevertheless satisfied that second respondent's qualifications in this regard are more relevant than and superior to applicant's qualifications.

Computer Literacy

126.5 I do not think that it is possible these days anymore to occupy any managerial position if one is not computer literate. Applicant is not computer literate. This unfortunately presents an enormous obstacle to promotion into a more senior managerial position. It would probably remain a permanent obstacle preventing applicant from being promoted into a more senior managerial position unless applicant qualifies himself in this regard.

126.6 The importance of computer literacy is unfortunately one of the realities of our modern world. Second respondent, as opposed to applicant, is very computer literate and according to his cv he has various qualifications in this regard. In this respect as well second respondent is simply superior to applicant as regards his suitability for the position.

Practical Experience

126.7 With regard to practical experience, applicant and second respondent are equally well qualified. Although applicant has been a deputy school principal and has acted as school principal, this in itself does not make up for his lack in tertiary qualifications, ability to coach sports and computer illiteracy. Second respondent in any event also has managerial experience as an acting deputy school principal and deputy superintendent of a school hostel. Although applicant has 20 years teaching experience and second respondent only 12 years teaching experience, second respondent has much wider experience than applicant in that he had also taught at high schools to grades 8 to 11 and seems to have experience in teaching a wider range of subjects. Consequently I am satisfied that by virtue of practical experience, the two candidates seem to be equally well qualified and that the SGB was correct in allocating 2 points to both of them in this regard.

---

[49] i.e with other black men and especially with black women. The term "black" is used here to refer to people of African, Coloured and Indian decent as defined in the Employment Equity Act No 55 of 1998

Employment Equity

126.8 Employment equity is one of the most important factors to take into account when the rationality of a SGB's decision to recommend a particular candidate, is reviewed. This factor will in many cases be the decisive factor in deciding which candidate should be appointed. Applicant and second respondent are both black men as defined in the Employment Equity Act and in this regard none of them has any benefit over the other as regards appointment or promotion;

[127] Accordingly, and by virtue of the fact that second respondent is better qualified and suited for the position than applicant, applicant would not have been successful in the relief he is seeking, even if he did succeed in proving the grounds upon which he chose to attack the process. [50]

FINAL REMARKS AND COSTS

[128] I am not impressed with applicant's conduct in this matter. The overall impression I am left with is that applicant simply cannot accept the fact that after he has acted as school principal of Oker P/School, prior to second respondent's promotion, the SGB selected second respondent for appointment in that position and not him. He also cannot accept the reality that second respondent is better qualified for the position. In the circumstances, he attempted to have the appointment of second respondent set aside by clutching at straws.

[129] Instead of alleging one cause of action in his referral form and sticking to that throughout the arbitration hearing, the following approach was adopted:

129.1 In applicant's referral form he attacked the process on one ground only and that is the allegation that some unauthorised person had removed some pages from his cv. I will refer to this as "plan A". When it became clear to applicant[51] that no pages were in fact removed from his cv, he realised that "plan A" will not be successful in this arbitration.

---

[50] I am not referring here to the allegation of undue influence and the allegation that a page from applicant's cv was removed by an unauthorized person. These two grounds could, if proved, have resulted in an order that the process must be repeated, because they are so serious in nature and had the potential of affecting the correctness of the SGB's ultimate decision. However, for the reasons set out hereinbefore, these two grounds were both simply unfounded in the sense that applicant never had any prima facie evidence to support them and dealing with them constituted a complete waste of this tribunal's time.

[51] after conciliation and prior to the arbitration hearing when first respondent made available applicant's original curriculum vitae which was used during the shortlisting and which is contained in exhibit "A"

129.2 He then resorted to what I will refer to as “plan B” in that all of a sudden for the first time, he raised additional new issues such as the alleged undue influence by Kroukamp and the alleged prevention of the SGB to allow the learner representatives to be part of the process.

129.3 During cross-examination of Kroukamp, “plan C” was eventually resorted to in that the manner in which the SGB applied shortlisting criteria were also attacked, for the very first time at that stage.

[130] The main grounds upon which the process was attacked in this matter, were not even raised in the referral form. None of the issues raised by Ms. Kwazi in her closing heads of argument, were raised in the referral form. Raising new issues during a trial which had not been raised in the pleadings or other formal statements which were made prior to the commencement of the hearing[52] always makes a very poor impression and generally warrants the drawing of a negative inference regarding credibility against that party. The grounds on which the fairness of a promotion are attacked should be clearly set out in the referral form. New grounds not raised in the referral form should only be raised in the arbitration hearing when there are good reasons for doing so and then a full and complete explanation should be offered why such new issues were not mentioned in the referral form. That was never done in this case and therefore leaves many unanswered questions.

[131] The issues raised on behalf of applicant, except for the two issues referred to in footnote 50, could not possibly have affected the fairness of the process, because they could not affect the correctness of the SGB’s ultimate decision that second respondent was the best and strongest candidate. The issues referred to in footnote 50, were in turn completely unfounded. Unless an applicant can prove the existence of a recognised ground of review,[53] or unless he can prove prejudice[54] or unless an irregularity is so gross and extremely serious that it constitutes a failure of justice per se, promotions should not be attacked on the basis of technicalities or because a SGB followed procedures which were less than perfect, where the applicant cannot prove that he was indeed better qualified

---

[52] such as the referral form

[53] for example bias, malice, fraud, corruption or some other ulterior motive; irrational, capricious or arbitrary conduct; failure by the SGB to apply its mind; infringement of a fundamental right guaranteed in the Constitution.

[54] for example where the irregularity substantially impaired the chances of a candidate who had a **realistic** chance, given his qualifications and experience, of being appointed

than all the other candidates who applied for the position[55]. Doing so merely constitutes a waste of this tribunal's time and resources and could not possibly result in an order that the process must be repeated.

[132] The mere fact that educators have the right to refer disputes to this tribunal does not mean that they may simply refer any dispute, no matter how weak the prospects of success. That constitutes an abuse of the free dispute resolution services of this tribunal and may lead to costs orders being made against such applicants, should they be unsuccessful.

[133] In the circumstances I have carefully considered whether I should not order applicant to pay the costs of both respondents as well as the ELRC. Costs is a matter of discretion which should be approached in a fair manner.[56] Costs orders against unsuccessful parties are generally not made in labour disputes because parties should not be discouraged from enforcing or defending their rights under social legislation by the possibility of facing cost orders should they loose.[57] This however does not mean that costs orders may never be made against an unsuccessful party. Rule 64 of the new ELRC rules now makes it much easier for arbitrators to award costs against an unsuccessful party, which could include not only the costs of the successful party but also the ELRC's costs. After careful consideration, I am not prepared to make a finding that applicant should be ordered to pay the costs of the ELRC or respondents. The new ELRC rules which make it easier for arbitrators to award costs against unsuccessful parties, only came into operation on 1 May 2006. I feel that it would be unfair to use these rules to award costs against applicant since his dispute was referred early during November 2005. In future, I will however be applying these rules more strictly in promotion disputes, and will order costs against unsuccessful parties in cases such as this, where it is clear that there were never any prospects of success. Such referrals are simply without reasonable cause, as contemplated in ELRC Rule 64.4.2 and there is no reason why costs should not be ordered in such cases.

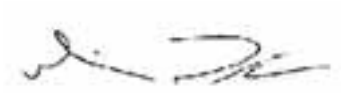
---

[55] including the successful candidate
[56] *Kruger Bros and Wasserman v Ruskin* 1918 AD 63 at 69
[57] *Chevron Engineering (Pty) Ltd v Nkambule* 2004 (3) SA 495 (SCA) at 512 para 42

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 process followed by the School Governing Body of Oker Primary School in Albertinia in shortlisting candidates, interviewing candidates and making a recommendation to first respondent as regards the filling of the post of school principal, advertised as post number 0228 in Vacancy List No 1 of 2004.
2. The recommendation by the school governing body to appoint second respondent and the subsequent appointment of second respondent by first respondent, is declared to be fair, lawful and valid and is hereby confirmed.
3. No order as to costs is made.



adv D P Van Tonder BA LLB LLM
Arbitrator/Panellist: ELRC