

IN THE EDUCATION LABOUR RELATIONS COUNCIL HELD IN CAPE TOWN

Panellist: J M Poggenpoel

Case No: PSES833-07/08

Date of Hearing: 17, 30 June & 4 July 2008

Date of Award: 25 August 2008

In the arbitration between:

SADTU obo J SIGUDLA

Applicant

and

WESTERN CAPE DEPARTMENT OF EDUCATION

Respondent

Applicant's Representative:

In person

Address:

114 Third Avenue

Belmont Park

Kraaifontein

Telephone Number:

021 9871540

Fax Number:

021 9889678

Respondent's Representative:

Shireen Karjiker

Address:

17th Floor Golden Acre

Sanlam Building

Adderley Street

Cape Town

8000

Telephone Number:

021 4672848

Fax Number:

021 4258612

1.DETAILS OF HEARING AND REPRESENTATION:

- 1) The Arbitration hearing took place on 17, 30 June & 4 July 2008, at the Western Cape Department of Education, Sanlam Building Adderley Street Cape Town. The Applicant, Mr. J Sigudla was represented in person. The Respondent was represented by Mrs. Shireen Karjiker from the Department of Education (WC). The second Respondent Mrs. Tomose was also present.
- 2) The Applicant and Respondent gave brief backgrounds to the matter.
- 3) The parties provided me with separate bundles and submitted their Heads of Argument to me by 15 July 2008.

2.ISSUE TO BE DECIDED:

- 1) The Applicant claimed an alleged unfair labour practice pertaining to him not being appointed to the position of Principal at Enkululekweni Primary School (after being nominated and recommended as the best candidate among three applicants, for the post), although he was recommended for the post by the School Governing Body (SGB). The Applicant also regards this process as unfair and claims that it is not in compliance with the Employment Equity Act. The Respondent does not deny that Applicant was the best candidate (qualifications and experience), was recommended by the SGB as the most suitable candidate for the post but submits that he was not appointed in terms of 3(f) of the Employment of Educators Act of 1995. The Respondent therefore, do not regard their decision to appoint Mrs. Tomose (as Principal of Enkululekweni Primary), as an unfair labour practice.
- 2) Therefore, the issue to be decided is whether or not the Respondent committed an unfair labour practice by not appointing the Applicant into the post. This being as the Applicant strongly feels he would have received the Principal post, had all his documents been submitted (recommendation letter and proper record of his academic qualifications) to the Head of Department. Furthermore, should it be found that an unfair labour practice had taken place the Applicant is seeking appointment as Principal at the school.

3. BACKGROUND TO THE ISSUE:

- 1) The Applicant applied for the position of Principal at the school, when the post was advertised in Vacancy List 2/2007 (post 1249). The Applicant was short-listed, interviewed on 16 October 2007 and was nominated as candidate one of the three nominated candidates. The Applicant was also selected as the best suitable candidate by the SGB. It is common cause that the Applicant was recommended by the SGB, as could be seen in the documents received by the Department. The Applicant (after receiving confirmation that Mrs. Tomose was appointed on 3 December 2007), lodged a dispute with the Department on 6 December 2007.
- 2) The Respondent submitted that, they have followed proper procedures in appointing Mrs. Tomose to the position of Principal at Enkululekweni Primary School. They do not believe that the Applicant was prejudiced (from obtaining the position) at any stage of

their process. The Respondent also admitted that there may have been errors with regard to the submission of the recommendation documents by Mrs. Tomose, at the time.

- 3) The Department had also not denied the fact that, Mrs. Tomose was responsible for transporting the documents to the Head of Department (alternatively the Department). There was also no denial on the part of Mrs. Tomose that she handed over the documents. The Department and Mrs. Tomose has however denied tampering with any of the documents (removing any of the originally submitted minutes, recommendation letters or any other documentary support) submitted, as alleged by the Applicant.

4.SURVEY OF EVIDENCE AND ARGUMENT:

4.1 The Applicant testified as follows:

- 1) **Mr. Sigudla**, Deputy Principal at Ekuthuleni Primary School testified that, he applied for the Principal post at the school but was not appointed. This was despite being nominated as the number one candidate for the post. The Applicant also testified that the supporting recommendation letter of the SGB and certain pages of the minutes, did not reach the Department. He also submitted that the fact that another education qualification (B. Ed Degree) was not included on his form also disadvantaged him. The Applicant then lodged a dispute with the Department regarding his non-appointment.
- 2) Mr. Sigudla further alleged that the Department had not complied with legislation (Employment of Educators Act) during the appointment process, and failed to consider the schools profile (only one male in the school management team), in making their appointment. Furthermore, the Applicant also submitted that the Department disadvantaged him by giving the female candidate double marks in the process and failed to accept the SGB's decision (that was based on the schools profile).
- 3) Mr. Sigudla also testified that in terms of clause 6.3(b) of the Employment of Educators Act, the Head of Department (HOD) may not decline the recommendations made by the SGB if the right procedures and legislation had been followed. The Applicant also submitted that he feels positive that (had the recommendation letter reached the Department) he would have been appointed to the post. Furthermore, the Applicant further testified (under cross examination) that in terms of 6.3 of the Act, the HOD has the right to send the nominations back to the school if the SGB did not comply with legislation. He is therefore of the opinion that the HOD's failure to do so, was a clear indication that the SGB had complied with legislative requirements.
- 4) The Applicant also testified that much credit should be given to the SGB who is competent in carry out their responsibilities when it comes to appointments within the school. He is therefore of the view that being competent, they had considered the provincial targets of the Department, in making their decision to recommend him.

4.2 The Applicant called the following witnesses who testified under oath:-

(a) **Ms. Mpapela (Secretary to the SGB)** testified that, she was present at the interview of candidates for the Principal post and that she was trained on the process. She also confirmed that Mr. Sigudla was the number one candidate and that two letters (one nomination and one

recommendation), where submitted by the SGB to the Department. Ms. Mpapela also submitted that she handed over the documents to the Deputy Principal Ms. Jongile for submission. She further submitted that she was aware that the Department makes the final decision.

Ms. Mpapela also testified that a dispute was lodged with the Department by Mr. Sigudla, after he became aware of the appointment, raised a grievance and had some discussion with the SGB, regarding the matter. She also confirmed that the Circuit Manager (Mr. Havenga) came out and had a meeting with them, after they raised their unhappiness with the decision on the non-appointment of their recommended candidate.

(b) Mr. Siswana (Treasurer of the SGB), testified and confirmed what was said by Ms. Mpapela regarding the recommendation and the letters submitted. Mr. Siswana also testified that as a signatory of cheques (when it comes to transport), he was aware that Mrs. Tomose should not have been in possession of the documents, and that this concern was conveyed to the secretary. Mr. Siswana however, submitted under cross-examination that he could not confirm who handed over the documents. He could also not confirm whether the Principal had removed documents from the submissions as argued by Mr. Sigudla.

(c) Ms. Mpande (Financial Clerk) testified that (although she was not on the SGB), she can confirm that Mrs. Tomose was the person who handed over the documents to the Department. This being as she was responsible for completing and dealing with claim forms which Mrs. Tomose handed to her for such a trip.

(d) Mr Sajini (Chairperson of the SGB) testified and confirmed the submissions made by witness one and two on the SGB's decision and letters submitted to the HOD. He also testified that after Mr. Sigudla was not appointed, they wrote a letter to the Department. Mr. Sajini also confirmed that they were addressed by Mr. Havenga who instructed them to set aside the matter and move on.

4.3 The Respondent testified as follows:

- 1) **Mrs. Shireen Karjiker, Labour Relations Officer at the Department of Education: Western Cape** testified that, the Department does not dispute the fact that Mr. Sigudla was the number one candidate, recommended by SGB. Mrs. Karjiker also testified that there was no doubt in the Department's mind that he was the best candidate of the three nominees.
- 2) Mrs. Karjiker also testified that the decision to appoint Mrs. Tomese was not based on qualification and experience alone, and that Mr. Sigudla was in no way prejudiced in this manner. This is especially so, as Mr. Sigudla alleged that he was prejudiced as the Department was not aware of his Degree in B. Education (supposed to be added on his form). Mrs. Karjiker also testified that the Department is also not disputing the fact that Mrs. Tomose was responsible for handing over the documents (of the three nominees) to the HOD.
- 3) The Respondent submitted that the decision to appoint was not based on consideration of a recommendation letter, knowledge of qualifications or experience, but was based on the need to acquire equity within the province. This is especially so,

as the provincial figures reflect that, women are substantially underrepresented within the Department. Mrs. Karjiker also testified that the decision to appoint Mrs. Tomose was not based on the figures reflected in the school. She also submitted that although these figures should be considered (in making appointments), the provincial figures takes precedence when making appointments (based on equity) within the region.

- 4) On whether the Department complied with the Employment of Educators Act and provisions of the Employment Equity Act, Mrs. Karjiker strongly feel that this was indeed the case. She especially highlighted the provisions in 3(f) of the Act that clearly stipulates that *"despite the order of preference in subsection (c) (which states that the SGB must submit the names of three recommended candidates), and subsection (d) (which states that when the HOD considers the recommendations he/she must, before making an appointment, ensure that the governing body or council, as the case may be, has met the requirements in paragraph (b))."*, the HOD may appoint any suitable candidate on the list. Mrs. Karjiker submitted that this was the bases of Mrs. Tomose's appointment.
- 5) Mrs. Karjiker also submitted that Mr. Sigudla's allegations, is baseless and unfounded. She also submitted that the evidence presented at the arbitration confirmed this fact overwhelmingly. She also believes that Mr. Sigudla's claim (that the WCED prejudiced him and unfairly discriminated against him) is futile. Mrs Karjiker also argued that the facts of the case are very forthright. Mrs. Karjiker also submitted that the Department was procedurally and substantively correct when it nominated Ms. Tomose. In doing so, the HRD has not failed to promote the values of the employment equity policy and the Head of Education was duty bound to make the necessary nomination. In conclusion, Mrs. Karjiker submitted that Mr. Sigudla's dispute is lacking in substance and futile. The process was procedurally and substantively correct and the WCED is satisfied that he was not unfairly discriminated against.

4.4 The Respondent called the following witness who testified under oath:-

(a) Mr. Meyer, the Head of Department representative who testified that the Employment Equity Act (EEA), Act of 1998 was passed to ensure that all employers adhere to the objectives set out by the Act. Mr. Meyer also testified that all departmental appointments are made after considering provincial statistics and confirmed that three employees where nominated for the post. Mr. Meyer also confirmed that all factors where considered in the filling of the post.

Mr. Meyer also confirmed that the Department is guided by legislation. He also submitted that they are responsible for monitoring equity in the promotion process and that the minutes as well as the documents submitted are checked. Mr. Meyer also submitted that the Department was impressed with the SGB's attempt to address employment equity in the school.

It was also further highlighted by Mr. Meyer that, the demographics of the school is a secondary concern when making an appointment. He also submitted that the Appointment Team has to look at a number of factors which include submission such as the minutes of the SGB and the school profile. Mr. Meyer also acknowledged that incomplete documents may also affect the final decision. He however conveyed that should this be the case, the Circuit Manager's presence (at the interview process), would make up for the exclusion of information.

Mr. Meyer also testified that the SGB is not required to write recommendation letters and submitted that short-listing and the appointment are two different processes.

5. CLOSING ARGUMENTS OF THE PARTIES

- 1) In deciding on the appropriate award, I have considered the testimonies of the Applicant, the Respondent and their witnesses. I have also considered the closing argument submitted by the Applicant, and the Respondent. This can be seen in attachments **"A"** and **"B"**, included in this award. I will therefore not deliberate on (by means of inclusion of all the information submitted) these submissions in this award.

6. ANALYSIS OF EVIDENCE AND ARGUMENT:

- 1) In concluding this analysis, enormous consideration should be given to the DET-WC's key argument that the decision to appoint Mrs. Tomose was not based on qualifications, motivational or recommendation letters from the SGB. In fact, Mrs. Karjiker argued throughout the arbitration hearing that, the decision was based on the Department's equity requirements. Justification for taking such an approach during instances of appointment was highlighted in Grogan, J, *"Dismissal, Discrimination and Unfair Labour Practice"* (2006) Juta at 55, where it was held that *"there seems no reason why, affirmative action or the particular requirements of the job should not be pleaded by employers in cases involving general allegations, of unfairness in relation to promotion"* As the Department had convincingly led evidence to support its suggestions that (in appointing Mrs. Tomose), it had, "aligned itself" with its provincial equity targets, I have no reason to believe that Mr. Sigudla's non-appointment was unfair.
- 2) The Department's representative (throughout the arbitration hearing) confirmed that there is no question on whether Mr. Sugudla was the best candidate for the post. Even if the excluded recommendation letter (including other documents, minutes or proper qualification confirmation) were included in the submitted documents to the Head of Department, the decision would still have been based on the department's provincial employment equity targets. This thought should be kept in mind throughout my analysis. Furthermore, in making a decision on whether an unfair labour practice had indeed taken place (in this instance) I wish to inform parties of my role as Arbitrator in this case. According to Grogan, *"A Commissioner's function is not to ensure that employer choose the best or worthy candidates for promotion, but to ensure that, when selecting the employees for promotion, employers do not act unfairly towards candidates."* Therefore it is generally accepted that there may be reasons for preferring one employee to another apart from qualifications and experience. In this instance the Department's provincial equity targets.
- 3) With this in mind, it is important to note that the unfair labour practice provisions set out in section 186 (2)(a) of the LRA, was not intended to provide arbitrators with the right to interfere in the decision of the employer (when dealing with promotion of employees) within their business. Therefore, the only instance which allows for some intervention by arbitrators, are when the employer conducted the promotion process in bad faith. From the testimonies of the Applicant and the Respondent (including their witnesses), I

could not find that the process of appointing Mrs. Tomose instead of Mr. Sigudla, was done in bad faith.

- 4) Mr. Sigudla testified that in terms of section 6.3(b) of the Employment of Educators Act, the Head of Department (HOD) may not decline the recommendations made by the SGB if the right procedures and legislation had been followed. There is no denial of whether this provision is included in the Act. The Applicant has however failed to consider, 6.3 (f) of the Act, which states that, "*despite the order of preference in subsection (c) (which states that the SGB must submit the names of three recommended candidates), and subsection (d) (which states that when the HOD considers the recommendations he/she must, before making an appointment, ensure that the governing body or council, as the case may be, has met the requirements in paragraph (b)).*", the HOD may appoint any suitable candidate on the list. Failure on the part of the Applicant (or any other employee, for that matter), to read and interpret the whole provision of the Act, does give rise to unnecessary claims of unfair labour practice relating to promotion. This is evident in this instance.
- 5) The Applicant's ignorance on the interpretation of the provisions in section 6.3 could once again be seen in his submission that the HOD's failure to apply 6.3(b) was a clear indication that the SGB had complied with legislative requirements. In the same tone, the Applicant suggests that the HOD does not have the overriding powers (to ignore the SGB recommendation) given to him by the Act. This is unacceptable, especially so as 6.3(f), clearly indicates otherwise. Furthermore, the Applicant also claims that the Department disadvantaged him, by giving the female candidate double marks in the process and failed to accept the SGB's decision taken by considering the schools statistics. This is despite the fact that 6.3(f) (regarding the final appointment decision) provides otherwise.
- 6) From the testimony, arguments and all the submissions made by the Applicant (throughout the arbitration hearing and in his closing arguments submitted), it is evident that the Applicant is of the opinion, that he was prejudiced by the Department. This argument stems primarily from the fact that had all the documents (recommendation letter, academic forms, the exclusion of certain pages of the minutes, and the fact that the appointed employee, had access to the documents prior to its submission to the HOD) been submitted, he would certainly have been appointed to the post of Principal at Ekuthuleni Primary School. In responding to the Applicant's submission, it is important to take cognisance of the fact that, being sufficiently qualified does not in any way give rights to any applicant to be appointed into a position and does not guarantee him or her, a successful unfair labour practice claim. This view was also highlighted in *PSA obo Dalton & another and Department of Public Works* (1998) 9 BALR 1177 (CCMA)), where it was held that, "the mere fact that an unsuccessful applicant or candidate for promotion received a higher rating (leading to recommendation for a position) from the selection committee or SGB (than the successful applicant) does not necessarily render the failure to appoint the former unfair"
- 7) I therefore, wish to differ from the Applicant and concur with the Respondent (and their witnesses), that although the submission and perusing of documents, the schools equity profile and qualifications may play a role in deciding who to appoint, it is not the determining factor. This view is legally supported by the legislative provisions in (and its interpretation) of section 6.3 (f), of the Employment of Educators Act. It can also not

be read and understood otherwise and I'm therefore of the opinion that (based on these provision) there is no guarantee that the Applicant would have be appointed into the post.

- 8) In conclusion, in *Arries v CCMA and Others* (2006) 11 BLLR 1062 (LC), the Labour Court held that an Arbitrator, when deciding whether or not to interfere with a decision taken by an employer not to promote an employee, should only do so if it is demonstrated that the employer's decision was capriciously or for insubstantial reasons or it was based upon wrong principles or was motivated by bias. I could however not find that (in this instance), this was the case and have decided not to come to the Applicant's aid, as (based on his testimony and that of his witnesses), I find that he has not discharge his onus of proof, and failed to show in what respects the promotion process was substantially and/or procedurally defective.
- 9) Applying this approach, I accept the Respondent's version of events and am not persuaded that the procedures followed by the Department (receiving the motivation letters, recommendation letters and all other supporting documents submitted by the SGB), was unfair in any manner. Although there might have been errors on the part of the SGB or the Department (in allowing the 2nd candidate to handle the Applicant's documents), I do not believe that this alone would support the Applicant's argument that the Department conducted the promotion process unfairly.
- 10) This is also in light of the legal provisions set out in section 6.3 (f) highlighted throughout this award. Accordingly, there is no evidence before me of any unfair promotion procedures (on the part of the Respondent), which showed that any procedural irregularities (disadvantaging the Applicant's application) had taken place. I'm therefore reluctant to interfere with the decision taken by the Respondent and find in their favour, that no unfair labour practice had taken place.

AWARD:

1. I find in favour of the Respondent that no unfair labour practice had taken place.

DATED at CAPE TOWN on this 25th day of AUGUST 2008



JEROME POGGENPOEL

Panellist for the ELRC