IN THE EDUCATION LABOUR RELATIONS COUNCIL HELD AT CAPE TOWN

Case No PSES 581-05/06WC

In the matter between

Y BASSON Applicant

and

DEPARTMENT OF EDUCATION WESTERN CAPE First Respondent

C WHITE Second Respondent

T DILGEE Third Respondent

ARBITRATOR: Adv D P Van Tonder

HEARD: 24 AUGUST 2006

DELIVERED: 18 SEPTEMBER 2006

SUMMARY: Labour Relations Act 66 of 1995 – Section 186(2)(a) - Alleged Unfair Labour Practice relating to promotion – Whether unfair conduct proved - Arbitrators should not go digging to find technical points to interfere with the decisions of School Governing Bodies;
Incompleteness of minutes kept by School Governing Body –Circumstances under which this would constitute unfair conduct;
Persons not entitled to be on School Governing Body - Presence of such persons at Interview meeting – Circumstances under which this would constitute unfair conduct;
Employment Equity – not to be raised as a surprise at the arbitration hearing for the first time – Onus on employee to lead evidence to substantiate claims based on Employment Equity;

ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

[1] This dispute concerns an alleged unfair labour practice relating to promotion. The arbitration hearing in this matter took place in Cape Town on 24 August 2006. Applicant was represented by Mr. C Le Roux of SADTU, a registered trade union of which applicant

is a member. First respondent was represented by Ms. S Hans, an employee of its Labour Relations Department in Cape Town. Second and Third respondents were both represented by Ms. S Smart of NUE, a registered trade union of which they are members. The proceedings were mechanically recorded and finally concluded on 11 September 2006 when the written heads of argument were submitted.

THE ISSUE IN DISPUTE

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

THE BACKGROUND TO THE DISPUTE

[3] During 2005, two vacancies for educators on post level 2 arose at Woodlands High School in Mitchells Plain. Both posts were for the position of Head of Department. Both positions were advertised in Vacancy list 2 of 2005 as post numbers 1724 and 1725.

[4] Various candidates applied for appointment in the posts. Amongst the candidates, were applicant as well as both second and third respondents who all applied for appointment in both positions. Applicant, second respondent and third respondent were all shortlisted and interviewed by the School Governing Body for both positions. The interviews for both posts 1724 and 1725 were conducted during the same session on 25 October 2005 by the same members of the School Governing Body[1]

[5] The SGB recommended second respondent for appointment in post number 1725 and third respondent for appointment in post number 1724, which recommendations were confirmed by first respondent on 15 November 2005, when second and third respondents were appointed in the respective positions as from 1 January 2006. Applicant was ranked second by the school governing body in respect of both positions and was accordingly not nominated for appointment in respect of any of the posts.

[6] Applicant felt aggrieved and lodged an internal grievance. The grievance meeting was held on 8 December 2005 by Ms. Rhoxo, a circuit manager, employed by first respondent.

[1] hereinafter also referred to as the SGB

After hearing the parties, Ms Rhoxo indicated that she would recommend to first respondent that the processes in respect of both posts had to be repeated from shortlisting.

[7] Since the letters of appointment had already been sent out to second and third respondent on 15 November 2005, Ms Rhoxo's recommendation could not be implemented. Accordingly applicant referred a dispute to this tribunal in respect of both post numbers 1724 and 1725 asking for the processes to be repeated.

[8] Applicant's cause of action as explained by Mr. Le Roux at the arbitration hearing, in respect of both posts, are based on alleged procedural irregularities, which allegedly occurred during the selection process leading up to the recommendation and appointment of second and third respondents in the respective positions. Applicant relies on the following alleged procedural irregularities:

8.1 It is alleged that the SGB was not properly constituted during the selection process in that a certain Ms L Fredericks, was not a lawful member of the SGB at that stage;

8.2 It is alleged that the minutes kept by the SGB during the selection process are incomplete;

8.3 It is alleged that since Ms Rhoxo recommended that the processes had to be repeated, it was irregular and unfair for first respondent not to have withdrawn the letters of appointment in respect of second and third respondents;

<u>FACTS WHICH ARE COMMON CAUSE & ORAL ARGUMENTS PRESENTED</u>

[9] At the commencement of the arbitration hearing, I endeavoured to limit the issues which were in dispute in order to avoid the calling of unnecessary witnesses. After a lengthy session during which all the relevant issues were fully canvassed and limited, it transpired that the facts which I needed in order to make an award, were all common cause. In respect of the few issues which were in dispute, none of the parties were able to present oral evidence. Hence, none of the parties presented any oral evidence at the arbitration hearing. After numerous documents, marked as exhibits A1-32, B1-14, C1-40 and D, were handed in by agreement and after the issues were limited, all the parties closed their

cases and the matter was postponed to enable the representatives to prepare and submit written heads of argument.

[10] Applicant holds the BA degree as well as the HDE diploma. She has 14 years experience as an educator and has managerial experience in the sense that she has acted as subject head for several years. At the time when she applied for the advertised posts, she was employed by first respondent on a permanent basis on post level 1 as an educator at Woodlands High School.

[11] Second respondent holds the degrees BA, BA Honours, B.Ed, MA in African languages as well as the HDE diploma. He has 25 years teaching experience. He has been acting for several years in the post which was advertised for filling in 2005, namely post number 1725, which post was a managerial position as head of department.

[12] Third respondent holds the degree BSc as well as the HDE diploma. He has 11 years teaching experience. He also has managerial experience in that he has acted as subject head in the past.

The allegation that the school governing body was not properly constituted

[13] According to exhibit A13, being minutes kept by the SGB of the interview meeting, the following persons were present at the meeting:

1. F Petersen (chairperson of the SGB and parent member)
2. E Abdol (school principal of Woodlands High)
3. S Hattas (parent member of the SGB)
4. B Louw (parent member of the SGB)
5. F Janodien (non-educator member of the SGB)
6. L Fredericks (parent member of the SGB, acting as secretary of the SGB)
7. C Lambert (parent member of the SGB)
8. G Engle (Principal of Highlands Primary and Departmental representative)
9. J Reitz (union representative of NUE)

[14] It is common cause that the full SGB of a High School consists of 13 members. It is also common cause that a member of the SGB, Mr. Ryklief recused himself as he was also a

candidate. It is also common cause that although all the unions were invited to attend the process, only J Reitz of NUE attended the process and was satisfied that the process was fair. The parties were also in agreement that since the member of the SGB who normally acted as secretary for the SGB, was one of the candidates, he recused himself and Ms L Fredericks acted as secretary and signed the minutes in that capacity.

[15] Mr. Le Roux on behalf of applicant, conceded that he does not know whether Ms Fredericks actually took part in voting for the respective candidates during the interviews, or whether she merely acted as secretary of the SGB and scribe.

[16] It is common cause that Ms L Fredericks was co-opted as a member of the SGB during 2003. It is common cause that after she had been in that position for 90 days, no by-election was ever held to elect her to the SGB on a permanent basis as required in terms of section 23(11) of the South African Schools Act No 84 of 1996[2].

[17] Mr. Le Roux argued that Ms Fredericks was never co-opted in terms of section 23(10) of SASA and that even if she was, it was unlawful for her to have taken part in the interview meeting since she was nor elected to that position in terms of section 23(11) of SASA. On behalf of respondents it was denied that Ms Fredericks was not co-opted in terms of section 23(10) of SASA. Ms Hans stated that Fredericks was never co-opted for her expertise but simply to replace another parent. Ms Smart further argued that since there is no proof that Ms Fredericks actually took part in the voting, applicant could not possibly have been prejudiced. Ms Hans argued that even if Ms Fredericks did take part in the voting process, there is no evidence that her vote was the determining vote or that she had influenced other members of the SGB to vote for certain candidates. Finally Ms Smart argued that even if Ms Fredericks did take part in the voting process, and even if she was not entitled to sit on the SGB as a member, the decision of the SGB is despite that, nevertheless valid in terms of section 22 of the Western Cape Provincial School Education Act No 12 of 1997.

The allegation relating to incomplete minutes

[18] The minutes of the interviews and recommendations were handed in as exhibits A13-31.

[2] hereinafter referred to as SASA

[19] On behalf of applicant, Mr. Le Roux submitted that the minutes kept by the SGB were incomplete. In developing his argument, he *inter alia* relied on a comment made on the departmental verification document for post number 1725, where it was stated that the minutes are incomplete.

[20] Mr. Le Roux argued that keeping incomplete minutes, was a contravention of Resolution 5 of 1998, which stipulates that first respondent must ensure that accurate minutes are kept of proceedings dealing with interviews, decisions and motivations during a selection process for the appointment of a candidates. In addition he argued, it was impossible for the first respondent to comply with its statutory obligations in terms of section 6 and 7 of the Employment of Educators Act No 76 of 1998 if there are incomplete minutes. The reason for this he argued, was because prior to appointing an educator, first respondent must satisfy itself that correct and fair procedures were followed by the SGB. It was impossible to do so without complete minutes.

[21] Ms Hans and Ms Smart both argued that although the minutes may not have been as detailed as applicant would have liked it to be, it were complete enough for first respondent to have applied its mind and make appointments.

THE WRITTEN HEADS OF ARGUMENT

[22] For sake of brevity, I do not intend to repeat the contents of the written heads of arguments here in detail. I have carefully considered all arguments raised by the parties in the written heads of arguments as well as the oral arguments presented at the hearing, and will refer to it where necessary and relevant during my analysis. In short, it was argued on behalf of applicant that the processes were unfair and should be repeated whereas respondents argued that the processes were fair and should not be interfered with.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

THE UNFAIR LABOUR PRACTICE DEFINITION

[23] The statutory provision, in terms of which this tribunal may arbitrate promotion disputes, is to be found in section 186(2)(a) of the Labour Relations Act No 66 of 1995,[3] which defines unfair labour practices with regard to promotion as follows:

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[3] hereinafter referred to as "the LRA"

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

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

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

24.2 That there was unfair conduct on the part of the employer during the promotion process.

<u>WHETHER THE DISPUTE IS INDEED A DISPUTE RELATING TO PROMOTION</u>

[25] In *Mashegoane and another v University of the North*[4] "promotion" was defined as being elevated to a position that carries greater authority and status than the current position and employee is in. At the time when applicant applied for appointment in the positions as well as at the time when she was interviewed, she was a permanent employee of first respondent, appointed on post level 1. The posts which she applied for were both on post level 2. If applicant was successful in either of her applications, she would indeed have been elevated to a higher position, which would have entailed more responsibilities and a higher salary.

[26] Hence applicant would have been "promoted" as contemplated in terms of section 186(2)(a) of the LRA, had she been successful. Accordingly I am satisfied that the dispute which was referred does indeed concern a dispute relating to promotion.

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<u>WHETHER ANY UNFAIR CONDUCT WAS PROVED</u>

[27] 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

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[4] [1998] 1 BLLR 73 (LC)

only the existence of the labour practice, if it is disputed, but also that it is unfair.[5] Mere unhappiness or a perception of unfairness does not establish unfair conduct.[6]

[28] What is fair depends upon the circumstances of a particular case and essentially involves a value judgement.[7] 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.[8] According to Professor 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.[9]

[29] In the education sector, regard should also be had to the procedures prescribed in ELRC Resolution 5 of 1998,[10] [11] in order to determine whether a fair procedure was followed in promoting a certain candidate as opposed to another. Although these procedures need to be followed,[12] they are merely procedural guidelines and not mandatory,[13] and need only be substantially complied with and not strictly.[14]

[30] 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.[15] In addition there is a presumption of regularity, expressed by the Latin maxim *omnia praesumuntur rite esse acta*[16] in terms of which it is presumed, in the absence of evidence to the contrary, that all the necessary procedural

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[5] 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

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

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

[8] *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

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

[10] which have been duplicated in paragraph 3 of Chapter B of the Personnel Administrative Measures ("PAM"), 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

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

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

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

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

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

formalities pertaining to an official act have been complied with.[17] An arbitrator should exercise deference to an employer's discretion in selecting candidates for promotion. The function of an arbitrator is not to second-guess the commercial or business efficacy of the employer's ultimate decision. Nor is it an arbitrator's function to determine whether the best decision was taken. The test should rather be whether the ultimate decision arrived at by the employer was a reasonable decision in the sense that it was operationally and commercially justifiable on rational grounds:

> "The court should be careful not to intervene too readily in disputes regarding promotion, especially to senior management positions, and should regard this an area where managerial prerogative should be respected unless bad faith or improper motives such as discrimination are present….."[18]

> " ..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).."[19]

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

> "The courts are, generally, wary and reluctant to interfere with the executive or other administrative decisions taken by executive organs of government or other public functionaries, who are statutorily vested with executive or administrative power to make such decisions, for the smooth and efficient running of their administrations or otherwise in the public interest. Indeed, the court should not be perceived as having assumed the role of a higher executive or administrative authority, to which all duly authorised executive or administrative decisions must always be referred

[16] translated as "all acts are presumed to have been lawfully done"
[17] 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
[18] P A K Le Roux in *Cheadle Landman Le Roux & Thompson* Current Labour Law 1991/1992 at 17
[19] *Cullen v Distell (Pty) Ltd* [2001] 8 BALR 834 (CCMA)

> 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." [20]

[32] Arbitrators must bear in mind that they are not qualified as employment agencies and do not have practical experience as managers in a corporate environment or in the civil service. Accordingly arbitrators are loath to prescribe to employers how they should go about in selecting a candidate for promotion. There may be reasons for preferring one employee to another apart from formal qualifications and experience.[21] The employer may attach more weight to one reason than another,[22] may take into account subjective considerations such as performance at an interview[23] and life skills[24]:

> "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"[25]

[33] 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.[26] Therefore in order to show unfairness relating to promotion, an employee needs to show that the employer, in not appointing him or her and appointing another candidate, acted in a manner which would ordinarily allow a court of law to interfere with the decisions of a functionary by proving for example that the employer had acted irrationally, capriciously or arbitrarily, was actuated by bias, malice or fraud, failed to apply its mind or discriminated.[27]

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

[21] *PSA obo Badenhorst v Department of Justice* [1998] 10 BALR 1293 (CCMA)

[22] *Rafferty v Department of the Premier* [1998] 8 BALR 1077 (CCMA)

[23] *PSA obo Dalton and another v Department of Public Works* [1998] 9 BALR 1177 (CCMA)

[24] *PSA obo Badenhorst v Department of Justice* [1998] 10 BALR 1293 (CCMA)

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

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

[27] *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*

[34] That this is the correct approach in promotion disputes, has been confirmed by the High Court, when Miller J remarked as follows:

> "The Promotion Committee was tasked with assessing all the applications and had to exercise a discretion in selecting the best candidate. A court of review has no jurisdiction to enquire into the correctness of the conclusion arrived at by a body or functionary lawfully vested with a discretion (see *Davies v Chairman*, *Committee of the Johannesburg Stock Exchange* 1991 (4) SA 43 (W) at 46H–J and *Ferreira v Premier*, *Free State and others* 2000 (1) SA 241 (O) at 251I–J). It will only be entitled to interfere with the decision taken by such a body or functionary if it is shown that it failed to properly apply its mind to the relevant issues and such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or mala fide, or as a result of unwarranted adherence to a fixed principle, or in order to further an ulterior or improper purpose, or that it misconceived the nature of the discretion conferred, or that the decision was so grossly unreasonable as to warrant the inference that it failed to properly apply its mind to the matter (see *Johannesburg Stock Exchange and another v Witwatersrand Nigel Ltd and another* 1988 (3) SA 132 (A) at 152A–E), or if there is such a material misdirection of fact that it is clear that it failed to exercise its discretion (see *Ferreira v Premier*, *Free State and others* (*supra*) at 251J–252A)".[28]

APPLICANT'S CAUSES OF ACTION

[35] Applicant is not contending that she was the best of all the candidates who applied for the positions, or that she is better qualified than second and third respondents for the positions or that she should in fact have been appointed on her merits in the positions. Applicant's causes of action, are purely based on alleged procedural irregularities, which I have already referred to and which I will now discuss under separate subheadings.

THE ALLEGATION THAT THE SGB WAS NOT PROPERLY CONSTITUTED

[36] Where a SGB was not properly constituted, this may in certain circumstances have the effect that decisions which it took, are unlawful and invalid.[29] However, not every case

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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

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

[29] Examples would be where there was no quorum when the decision was taken or where a member, such as the school principal who is compelled to be present in terms of collective agreements, absents himself - see my award in *Williams v DOE Western Cape*(Case Number PSES281-05/06WC, delivered

where a SGB is not properly constituted will necessarily have such an effect. In each case it is necessary to have regard to the facts and the applicable statutory provisions. Section 23 of the South African Schools Act determines the manner in which a SGB must be constituted. For purposes of this arbitration the following subjections are relevant:

> **23 Membership of governing body of ordinary public school**
> (1) Subject to *this Act*, the membership of the *governing body* of an ordinary *public school* comprises-
> *(a)* elected members;
> *(b)* the *principal*, in his or her official capacity;
> *(c)* co-opted members.
> (2) Elected members of the *governing body* shall comprise a member or members of each of the following categories:
> *(a)* Parents of *learners* at the *school*;
> *(b)* educators at the *school*;
> *(c)* members of staff at the *school* who are not *educators*; and
> *(d)* learners in the eighth *grade* or higher at the *school*.
> (6) A *governing body* may co-opt a member or members of the community to assist it in discharging its functions.
> (8)Subject to subsection (10), co-opted members do not have voting rights on the governing body.
> (9)The number of parent members must comprise one more than the combined total of other members of a governing body who have voting rights.
> (10)If the number of parents at any stage is not more than the combined total of other members with voting rights, the governing body must temporarily co-opt parents with voting rights.
> (11)If a parent is co-opted with voting rights as contemplated in subsection (10), the co-option ceases when the vacancy has been filled through a by-election which must be held according to a procedure determined in terms of section 28(d) within 90 days after the vacancy has occurred.

[37] A member of a SGB can only be co-opted in one of two ways, namely in terms of section 23(6) for his or her skills or expertise[30], or in terms of section 23(10) where the parent members no longer comprise the majority of members. There is no evidence before me that Ms Fredericks ever possessed any special skills or expertise when she was co-opted during 2003. In fact Mr. Le Roux could not contest the statement by Ms Hans, that Ms Fredericks was co-opted in order to replace another parent. I find myself in agreement with Ms Smart that the probabilities favour the inference that Fredericks had no special skills or expertise and that she must accordingly have been co-opted in terms of section 23(10) of the SASA. Since the onus is on applicant, since all the respondents disputed

in this tribunal on 14 December 2005). Under such circumstances the body acts *ultra vires* and its decision is simply null and void. Where a body acts *ultra vires*, the issue of prejudice is irrelevant.

[30] such as for example accounting skills or legal expertise

that Fredericks was not initially co-opted in terms of section 23(10) of SASA, and since applicant presented no evidence in this regard, I must necessarily find that Ms Fredericks was initially, when she was co-opted during 2003, co-opted in terms of section 23(10), which would have entitled her to vote for a period of 90 days.[31]

[38] Applicant's attack on the presence of Ms Fredericks on the SGB, is however based on the fact that after the expiry of 90 days after she was co-opted during 2003, no by-election was ever held and she simply remained on the SGB as a member. The respondents all conceded that no by-election was ever held and that Fredericks simply remained on the SGB after she was co-opted. *Prima facie* this appears to constitute a contravention of section 23(11) of SASA. This in itself does however not mean that any unfair conduct was proved. There are indeed three factors which in my view present insurmountable obstacles to applicant's claim that Fredericks' presence on the SGB constituted unlawful or unfair conduct.

Did Fredericks ever take part in the voting process?

[39] If Fredericks never took part in the voting process, or alternatively unless she had unduly influenced the other members of the SGB to vote in a certain manner, her presence on the Interviewing committee could not possibly have prejudiced applicant. Without prejudice or potential prejudice, there cannot be any unfair conduct. In spite of proof of procedural irregularities, courts and tribunals will not interfere and not grant any relief if the complainant had not suffered any prejudice or adverse effects.[32] Ms. Smart correctly pointed out that on perusal of the minutes of the Interview meeting, it is not clear whether Fredericks only acted as scribe and secretary or whether she also took part in the voting process. Mr Le Roux, on behalf of applicant, could also not take this issue further and conceded that applicant simply does not know whether Fredericks actually took part in voting or merely acted as secretary and scribe. There is no evidence before me to enable me to find that Fredericks had in any manner influenced the members of the SGB to vote for certain candidates. Since the onus is on applicant, it was her duty to prove facts from which I could draw inferences and make factual findings. On the available information which was placed before me, I am unable to determine whether Fredericks actually took

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[31] section 23(8), (10) and (11) of SASA
[32] *Jockey Club of South Africa v Feldman* 1942 AD 340 at 359; *Rajah & Rajah (Pty) Ltd and Others v Ventersdorp Municipality and Others* 1961 (4) SA 402 (A) Baxter *Administrative Law* page 718

part in the voting process or not. If she did, it is impossible to argue that this necessarily prejudiced applicant, because she might even have voted in favour of applicant.

[40] Everything and anything is possible in theory, and it is not impossible that Fredericks did actually take part in the voting process and did vote against applicant. However, I am not allowed to speculate and simply assume in favour of applicant that Fredericks did indeed take part in the voting process or that if she did, she voted against applicant. In order for me to make a factual finding, the evidence must at least justify an inference that it is more probable than not[33] that Fredericks actually took part in the voting process and that she voted against applicant.

[41] If there are no positive proved facts from which an inference can be made, the method of inference fails and what is left is mere speculation or conjecture. In *Macleod v Rens*[34] the High Court held:

> "The evidence must justify the possibility. Without a firm basis founded in the evidence, it will be no more than a *speculative* possibility; a court can have regard only to *reasonable* possibilities. In such regard, the following comment from an English case has often been quoted with approval by our Courts (see *Cooper* (*op cit* at 426 fn 128)):
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> > 'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive, proved facts from which the inference can be made the method of inference fails and what is left is mere speculation or conjecture.'" (*Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 (HL) at 169; [1939] 3 All ER 722 at 733E-G)

[42] Since there is no firm basis for me in the evidence to find that Fredericks did indeed cast a vote as opposed to merely acting as scribe and secretary, or that if she did, she voted against applicant, the conclusion seems to be inescapable that I am bound to find that applicant has failed to discharge her onus in this regard. In the circumstances no prejudice or potential prejudice was proved, which in turn means that applicant has failed to prove

[33] *Ocean Accident & Guarantee Corporation Ltd v Kock* 1963 (4) SA 147 (A) at 157D

[34] 1997 (3) SA 1039 (E) 1048

any unfair conduct which was perpetrated in relation to her on the basis of the mere presence of Fredericks on the Interview Committee during the interviews. Even if I am wrong in this regard, there are two further reasons why I must find that the presence of Fredericks on the Interview Committee was not unlawful and unfair.

Section 22 of the Western Cape Provincial School Education Act

[43] On 9 December 1996, the Western Cape Provincial Legislature enacted the Western Cape Provincial School Education Act.[35] This Act extends the law in the Western Cape relating to public schools and more especially certain aspects pertaining to School Governing Bodies. Section 22(4) is of particular importance in this case and the relevant parts of it reads as follows:

> No decision taken by a [school] governing body…shall be invalid merely…because a person who was not entitled to sit as a member of that governing body sat on that governing body as such a member, at the time when the decision was taken…, if the decision was taken… by one more than half of the members of the governing body who were then present and entitled to sit as members.(emphasis added)

[44] Ms Smart argued that the effect of section 22(4) is that the presence of Fredericks on the SGB, irrespective of whether she voted or not, was that the decision of the SGB was nevertheless valid. What makes it particularly difficult in this case to decide whether section 22(4) is applicable or not, is the fact that one does not know how many members of the SGB decided that second and third respondents were the strongest members. This section will only be applicable if one more than half of the members of the SGB members present at the Interview meeting (excluding Fredericks) voted in favour of second and third respondents. If for example only half of the members present plus one (including Fredericks) voted in favour of second and third respondents, this section will not be applicable. Once again I am faced with the situation where I simply do not know whether Fredericks voted or not and if so whether the votes including her vote, merely constituted

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the minimum vote required in terms of the last phrase in section 22(4), being 50% of the votes plus one. There are no probabilities which can assist me to indicate whether section 22(4) is applicable or not.

[45] Once again, it should be borne in mind that the onus is on applicant to prove facts which will enable me to find whether section 22(4) is applicable or not. In addition there is the Latin maxim *omnia praesumuntur rite esse acta.*[36] In terms of this maxim, which is part of our common law, 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, that the decision of an official is properly and validly made, that an official had acted with honesty and discretion and that statutory duties are duly, correctly and properly performed.[37] An authority or official cannot therefore be put to proof of facts or conditions on which the validity of its decision must depend.[38] The onus rests on the person challenging the regularity and validity of the action, to produce evidence and proof such irregularity and invalidity.[39]

[46] Bearing in mind the onus which rests on applicant to prove unfair conduct, I am of the view that the onus was on applicant to place facts before me from which I could draw the inference that section 22(4) was not applicable. In the absence of such evidence, I must in the light of the *omnia praesumuntur rite esse acta* - rule accept that the SGB acted validly in terms of section 22(4) and that no unfair conduct was therefore proved on the basis of the presence of Fredericks at the Interview Committee. Even if I am wrong in this regard and even if section 22(4) is not applicable, there is yet a further even more compelling reason why the presence of Fredericks of on the Interview Committee and SGB did not cause the decision of the SGB to be invalid and unfair, even if she did vote during the process. In fact, when regard is had to the *de facto* doctrine, which I will now discuss, it is not even necessary to rely on section 22(4).

[36] The full and correct quotation of this maxim is *omnia praesumuntur rite et solemnitur esse acta, donec probetur in contrarium* and it is translated in Hiemstra and Gonin *Trilingual Dictionary* as follows: “all acts are presumed to have been lawfully done (or duly performed) until proof to the contrary be adduced”

[37] Wade *Administrative Law* (9th edition, 2004, by H W R Wade and C F Forsyth) at 292-293; De Ville *Judicial Review of Administrative Action in South Africa* (Revised 1st ed, 2005) 321 – 323; Baxter *Administrative Law* (1st ed, 1984 Juta) 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

[38] Wade *supra* at 293

The so-called *de facto* doctrine

[47] I have already held that it must be assumed that Fredericks was initially co-opted in terms of section 23(10) of the SASA and did initially during the first 90 days after she was co-opted, have voting powers.[40] The question then arises whether the fact that she remained on the SGB after the expiry of the 90 day period without being elected at a by-election, caused decisions of the SGB, in which she took part by casting a vote, to be invalid.

[48] A similar scenario was present in the recent case of *Mgoqi v City of Cape Town.*[41] The facts of that case can briefly be summarised as follows: In proceedings instituted by the newly elected mayor of the City of Cape Town against the city manager Dr Mgoqi, where the court was asked by the mayor to declare the appointment of Dr Mgoqi to be invalid, Dr Mgoqi argued that if his appointment were invalid, so was the inauguration of the mayor over which he presided. A full bench of the High Court in Cape Town, consisting of three Judges rejected Dr Mgoqi's argument.

[49] The court commenced its analysis by referring to *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[42] where the Supreme Court of Appeal considered the consequences of an invalid administrative action and held that, until it was set aside by a court in proceedings for judicial review,[43] it remained in existence and had legal consequences that could not simply be overlooked. The Court then proceeded to find as follows at para 124 - 127:

> "A case in which a collateral challenge is not permissible relates to the so-called *de facto* doctrine discussed, under the heading "Officers and judges de facto", in Wade *Administrative Law* (9th edition, 2004, by H W R Wade and C F Forsyth) at 285-288. The learned authors introduce the topic by saying (at 285-286):
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>> 'In one class of case there is a long-standing doctrine that collateral challenge is not to be allowed: where there is some unknown flaw in the appointment or authority of some officer or judge. The acts of the officer or judge may be held to be valid in law even though his own appointment is invalid and in truth he has no legal power at all. The logic of annulling all his acts has to yield to the desirability of

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[39] Wade *supra* at 293
[40] Sections 23(8), (10) and (11) of SASA
[41] 2006 (4) SA 355 (C); (2006) 27 ILJ 1422 (C)
[42] 2004 (6) SA 222 (SCA) para 26 at 242A
[43] It is to be noted that only the High Court has jurisdiction to set aside proceedings on review. This tribunal has no jurisdiction to set aside an invalid and unlawful administrative action

> upholding them where he has acted in the office under a general supposition of his competence to do so. In such a case he is called an officer or judge de facto, as opposed to an officer or judge de jure.'

They point out, however, that the *facto* doctrine applies only where the office bearer ("office holder") has "colourable authority", in the sense of "some colour of title to the appointment" (at 286).

This *dictum* was cited with approval by Lady Justice Hale in *Fawdry & Co (a firm) v Murfitt* [2002] EWCA Civ 643 par 18. See also *MacCarron v Coles Supermarkets Australia Pty Ltd t/a Coles Supermarkets & Ors* [2001] WASCA 61, in which the doctrine was applied in respect of a Commissioner for Occupational Health, Safety and Welfare who, at the time he signed an instrument of delegation, had not been formally apointed. In par 80 Kennedy J stated as follows:

> 'It has been decided that the rule concerning *de facto* officers operates where, through mistake, an office holder holds over after his term of office has expired.'

The learned judge relied (in par 83) for this proposition on the *dictum* of McHugh JA in *G J Coles & Co Ltd v Retail Trade Industrial Tribunal* (1987) 7 NSWLR 503 at 525:

> 'The acts of a *de facto* public officer done in apparent execution of his office cannot be challenged on the ground that he has no title to the office. **It matters not that his appointment to the office was defective <u>or has expired</u> or in some cases even that he is a usurper**.'

It would appear (par 86-87) that the rationale for this doctrine was public policy or public interest, in the sense of the protection which it affords the public.

In the present matter Dr Mgoqi presided over the inaugural meeting of the Council on 15 March 2006, some two weeks after his contract, and hence his term of office, had already expired. At that stage he and all the members of the Council were probably under the mistaken impression that he was empowered to chair the meeting, even though his re-appointment on 16 February 2006 had been questioned. It could be argued that the fact that a defect attached to his re-appointment had no bearing on the validity or otherwise of the proceedings of 15 March 2006. He was, to all intents and purposes, the ostensible, *de facto* municipal manager and was carrying out his duties and obligations as such.
For present purposes it is not necessary to decide this issue. Neither Dr Mgoqi, nor any other person, has to date challenged the election of the Mayor or Speaker. Mr Arendse mentioned this issue in his heads of argument but at no stage was a judicial challenge brought before this court. In the circumstances this seems to be an impermissible collateral challenge in the sense explained in the *Oudekraal* decision and other authorities cited

> above. If and when these questions are properly challenged, they may be considered by a court dealing therewith."

[50] For purposes of this arbitration, the following principle can be extracted from the case of *Mgoqi v City of Cape Town supra*. Where an official has been duly elected (as opposed to an usurper of power who had merely appointed herself) all acts performed by her whilst performing her duties in that capacity, are considered to be valid, even though her appointment is in law invalid due to some flaw in her appointment. The same rule applies where an official who was initially duly elected, simply remained in office after her term has expired. The logic behind this principle is that the public must be able to rely on the acts of an official as long as there is no reason to suppose that she is not validly appointed and that it would lead to disastrous consequences if all acts performed by her, are considered to be invalid. If the acts performed by a SGB are invalid merely because a duly co-opted member of a SGB has remained in office after the expiry of her term, it would mean that each and every contract entered into by the SGB, each and every appointment of a governing body educator made by it, each and every recommendation for the appointment of an educator made by the SGB, would be invalid. This would be absurd and it is precisely to prevent this form of absurdity that the *de facto* doctrine, which was applied in *Mgoqi v City of Cape Town*, was developed by our Courts. I am satisfied that in terms of this doctrine, the presence of Fredericks at the Interview meeting and on the SGB, irrespective of whether she took part in the voting process, did not cause the decision of the SGB to be invalid. In the circumstances, it cannot be said that the presence of Fredericks constituted unfair conduct in relation to applicant. If the legality of Fredericks' presence on the SGB is to be challenged, it should be done by instituting proceedings in the High Court and not by collaterally challenging her standing in this forum, which has no jurisdiction to review and set aside her appointment on the SGB.

THE ALLEGATION THAT THE MINUTES WERE INCOMPLETE

[51] Before dealing with the attack on the minutes which were kept by the SGB, it is necessary to refer to the statutory framework, which sets out the relevance of the minutes which a SGB is required to keep when performing their duties in selecting a candidate for appointment or promotion. Clause 5 of Schedule 1 of ELRC Resolution 5 of 1998 provides as follows:

> **Records**

> The employer must ensure that accurate records are kept of proceedings dealing with the interviews, decisions and motivations relating to the preference list submitted by school governing bodies and other such structures

[52] After a SGB has made a recommendation to first respondent, first respondent must then decide whether the recommended candidate will be appointed or not. 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 in respect of each post. The High Court has 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.[44] 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)."

[53] On behalf of applicants, Mr. Le Roux submitted that the minutes kept by the SGB during the shortlistings, interviews and motivation which the SGB submitted to first respondent for its recommendation that certain candidates must be appointed, were incomplete. He submitted that in the circumstances clause 5 was not complied with. He further argued that as the minutes were not complete, it was impossible for first respondent to determine whether any of the grounds as set out in section 6(3)(b) (i) to (v) of the Employment of Educators Act were present and that consequently it could not apply its mind properly and

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

make an informed decision as to whether the recommended candidates should indeed be appointed or not.

[54] It is common cause that the minutes could have been more complete. However, a recommendation of a SGB cannot simply be set aside because of the fact that the minutes kept by a SGB are incomplete. Even where no minutes were kept, it would be absurd to hold that for that reason alone, the decision of the SGB must be set aside and the whole process must be repeated. The aim of Resolution 5 of 1998 and this arbitration, is not to asses the SGB's ability to comply with procedures. The aim is to ensure fairness and transparency.

[55] 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.[45] Since the early days of Roman Dutch Law it has been recognized that substance should not be sacrificed to form.[46] 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 and fair. 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.

[56] The reason why I say that there will in most cases be some technical procedural irregularity is because SGB's consist of laymen who do not occupy their positions as SGB members in a professional capacity on a full time basis. They perform these functions free of charge after hours on a voluntary basis as part of their service to their local communities. 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 even regard each and every procedural irregularity as fatal and as sufficient ground to interfere with the Magistrate's decision. Surely the decisions of SGB's cannot be tested against a stricter test than the decisions of Magistrates. If there should be a distinction between the test applied to review the decisions of Magistrates and the decisions of SGB's, the decisions of Magistrates, who are after all learned legal

[45] 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

[46] 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

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"[47]

[57] 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".[48]

[58] The High Court itself, when referring to paragraph 3 of Chapter B of PAM,[49] has held that strict compliance with PAM is not necessary, that form must not be elevated above substance and that:

> **"One does <u>not go digging</u> to find points to stymie the process of appointing suitable candidates to teaching positions**"[50] (emphasis added)

[59] A selection process cannot be regarded as such a fragile process that even the most technical procedural irregularity and slightest criticism would result in the whole process being set aside. Unless it is clear that a procedural irregularity was of an extremely gross nature so as to cause a failure of justice *per se* or unless the irregularity affected the end result of the process in that the best candidate had not been appointed or unless the

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[47] per D Woolfrey in *Bell v Western Cape Education Department*, Case Number PSES 240-03/04 WC, unreported ELRC arbitration award, paragraph 8.

[48] Baxter *Administrative Law* at 446 and the authorities referred to by the learned author at footnotes 377 to 379

[49] which is a replica of Resolution 5 of 1998

[50] *Observatory Girls Primary School & another v Head of Dept: Dept of Education, Province of Gauteng,* Case No 02 / 15349, [2006] JOL 17802 (W) per Horwitz AJ; see also *Douglas Hoërskool & 'n ander v Premier, Noord-Kaap & andere* 1999 (4) SA 1131 (NC) at 1144I–1145I where it was held that paragraph 3 of Chapter B of PAM contains procedural <u>guidelines</u> which are not mandatory.

irregularity had caused some prejudice to an applicant in that her reasonable and realistic chances of being properly considered on her merits, were substantially impaired, the process should not be interfered with by an arbitrator merely because there was a procedural irregularity.

[60] One cannot on the basis of each and every technical 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 appointed. If this was not so, it would mean that any dissatisfied educator who is not successful in a promotion application, 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 realistic chance of being appointed in the position when one compares his qualifications and experience to that of the successful candidate. I cannot believe that this could ever have been the intention of the drafters of ELRC Resolution 5 of 1998 or PAM.

[61] It is precisely in order to avoid such absurdity that our common law writers are of the opinion that greater good may be achieved by overlooking purely technical defects.[51] Apart from the allegation that the SGB was not properly constituted, and the allegation that the minutes were incomplete, there is no suggestion that the SGB acted improperly in any manner. There is no allegation of nepotism, discrimination, bias, fraud, corruption, undue influence, irrational, capricious, or arbitrary conduct. Only if the incompleteness of minutes covers up bias, fraud, corruption or other improper conduct, or makes it impossible for first respondent to apply its mind in terms of section 6(3)(b) of the EEA, can its incompleteness be said to be material. Once again the *omnia praesumuntur rite esse acta*- rule[52] is relevant. In the absence of allegations and evidence to the contrary, I must find that irrespective of the alleged incompleteness of the minutes, the processes followed by the SGB were substantially in compliance with Resolution 5 of 1998 and procedurally correct and free from irregularities and that first respondent has discharged its responsibilities in terms of section 6(3)(b) of the Employment of Educators Act, before appointing second and third respondents. In the circumstances, I am of the view that even if I can find that the minutes were incomplete, this could not possibly cause any prejudice

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

[52] see footnotes 36 to 39 for a discussion of this rule

to applicant. Where alleged irregular conduct has not caused any prejudice to a complainant, such conduct could not be perceived to constitute unfair conduct.[53]

[62] It is indeed correct that there is a statutory duty on first respondent to satisfy itself that the requirements as set out in section 6(3)(b) (i) to (v) of the Employment of Educators Act, have been complied with before making an appointment on the recommendation of a SGB. It is against this background which, clause 5 of Resolution 5 of 1998, which requires that accurate minutes must be kept, must be interpreted.

[63] If incomplete minutes makes it impossible for first respondent to comply with section 6(3)(b) of the Employment of Educators Act, a contravention of clause 5 will be material and relevant. However, even if no minutes are kept by a SGB, first respondent will still be in a position to make an informed decision regarding the issues as set out in section 6(3)(b) of the EEA, because in terms of clause 3.2.1 of Schedule 1 of Resolution 5 of 1998, there will always be a departmental representative on the Interview committee. He or she will be in a position to give to first respondent a first hand account of what transpired during the process. If there were any irregularities in the process, the departmental representative will be in a position to immediately bring this to the attention of first respondent, who will then be able to act in terms of section 6(3)(b) and decline to make an appointment. If the first respondent feels that there are certain aspects which are not clear from the minutes and want clarity one such issues, it can liaise with the departmental representative. That surely, must be one of the main purposes of having a departmental representative on the Interview Committee.

[64] Moreover the High Court has held that the purpose of the procedural requirements laid down in the Employment of Educators Act, PAM and Resolution 5 of 1998, is merely to ensure that there is a fair and transparent procedure in place for appointing educators, so that nepotism, corruption and fraud can be eschewed.[54] Even in the absence of minutes, the procedure can be transparent and fair if a departmental representative and the trade unions are present during the process to monitor it. Complete and accurate minutes can therefore never be an absolute necessity to achieve the primary objectives of Resolution 5 of 1998. Complete and accurate minutes, can merely be described as a tool, together with

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[53] see footnote 32

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

many other tools such as the presence of a departmental representative and trade unions, to ensure that the process is transparent and fair. Only if all those tools are absent, can one argue that the primary objective of the procedural guidelines laid down in Resolution 5 of 1998, has not been attained.

[65] In this particular case, a completely impartial person, being Mr. G Engle, the principal of a different school acted as departmental representative. The mere fact that he was present, completely impartial, and acted as departmental representative, causes the argument that first respondent could not discharge its obligations in terms of section 6(3)(b) because of the alleged incomplete minutes, to be without any merit. His presence is also sufficient to find that the process was transparent and accordingly, the incompleteness of the minutes is of no consequence.

[66] For these reasons, I do not regard the incompleteness of minutes to be material. Even if no minutes were kept, this would still not affect the transparency, fairness and validity of the process. Clause 5 of Schedule 1 of ELRC Resolution 5 of 1998 is merely a guideline. Non-compliance with it, cannot *per se* render the subsequent nomination of a candidate unlawful or unfair. In any event, I do not believe that there is merit in Mr. Le Roux's contention that the minutes were too incomplete to have enabled first respondent to apply its mind to the relevant issues before making a decision and appointing second and third respondents. There is no doubt that the minutes could have been more complete, but there are varying degrees of completeness and I do not believe that it is necessary that each and every word spoken by a SGB need to be recorded in order for first respondent to be in a position to determine whether the factors set out in section 6(3)(b) have been complied with. It would be unrealistic to expect processes conducted by laymen such as members of a SGB to be perfect in all respects. If this is expected, then the whole concept of allowing ordinary parents and educators with no legal qualifications to nominate a candidate for appointment, is unrealistic.

[67] On perusal of the minutes, it appears to me that the basic information which first respondent needed in order to make an informed decision, was indeed contained in the minutes:

67.1 The names of the members of the SGB who were present are reflected in the minutes;

67.2 The method used by the SGB in order to identify the best candidates, was noted. That is that scoring would be used as a guideline and that the final nomination will be made by reaching consensus;

67.3 The questions which were asked to the candidates, are reflected in the minutes;

67.4 The successful candidates are identified and the ranking order of the first five candidates in respect of each post, is reflected in the minutes, containing the full names of all these candidates;

[68] In addition to the actual minutes of the interview meeting contained in Exhibit A13-14, there are further documents which were dispatched to first respondent and which would have placed it in a very good position to have made an informed decision:

68.1 The departmental representative completed and submitted verification documents which were very complete and contained minute detail with regard to each an every step of the process which was followed as from advertising, right through to shortlisting, setting of the criteria, interviewing and nomination. From perusal of these documents contained in exhibits A16-22 and A 25-A26, it is clear that the process followed by the SGB was procedurally correct and fair and free from irregularities;

68.2 The checklists containing a list of the documents which were sent to first respondent, indicate that first respondent was supplied with the minutes, proof of invitation to the unions to attend the meeting, shortlisting criteria, score sheets of candidates, letters of nomination, letters of acceptance, departmental forms and all applications.

[69] Under these circumstances, I do not believe that there is merit in the argument that the minutes were too incomplete for first respondent to have made an informed decision. The verification documents specifically deals with each an every aspect which first respondent needs to verify in order to make an informed decision in terms of section 6(3)(b).

[70] It is common cause that the ranking was different for the two posts. In respect of post 1724, the preference list was as follows: 1.T Dilgee; 2.Y Basson; 3.C White; 4.S Ryklief; 5.D Assure. In respect of post 1725, the preference list was as follows: 1.C White; 2.Y Basson; 3.S Ryklief; 4.T Dilgee; 5.A Stanley. In his heads of argument, Mr. Le Roux argues that it is illogical that third respondent Mr. Dilgee, is ranked first in respect of post 1724 and fourth in post 1725. He argues that the minutes do not explain how the top scorer in the first post became the fourth on the preference list in the second post and that the minutes do not indicate that the SGB has applied its mind. He also stated that since the interview processes in respect of posts 1724 and 1725 were conducted as one, “it is only logical the scoring should have been duplicated”.

[71] The fundamental flaw in Mr. Le Roux’s argument is that he assumes that the scoring for the two posts should have been exactly the same. He bases his whole argument on this premise. I do not follow this logic. Posts 1724 and 1725 are different posts. Irrespective of whether the interviews for the two posts were combined, the skills required for the two positions, may not necessarily have been the same and if that is so, it is quite understandable that a person who is ranked first for the one post, was ranked fourth for the second post. Very little information was placed before me at the arbitration hearing regarding the requirements and criteria for the two posts. I was not supplied with copies of the advertisements for the two posts and the advertised criteria were not placed before me. If Mr. Le Roux wanted to argue that the ranking should have been the same for both posts, then it was his duty to have placed information before me which made it clear that the criteria and requirements for both posts were so similar, that the ranking in respect of both posts must necessarily have been the same.

[72] In the absence of such evidence, Mr. Le Roux’s argument is in essence a request that I must speculate and make findings favourable to applicant, based on such speculation. That I am not entitled to do. On the face of it, there is therefore nothing irrational or illogical about the fact that Dilgee was scored first for the one post and fourth for the second. The minutes make it clear that scoring is used as a guide only and that the final nomination will be reached by consensus. This necessarily implies that the reason why Dilgee was ranked first in respect of post 1724 and fourth in respect of post 1725 was based on the decision of the majority.

[73] What more applicant expects the minutes to have recorded to justify the ranking of candidates, is not clear. Bearing in mind that the selection process is not a mathematical process or science and that panelists are entitled to take into account subjective considerations such as performance at an interview, the whole notion of requiring a SGB to provide reasons for their decision to rank candidates, is actually something which is almost impossible to do. How does one ever justify that one candidate subjectively made a better impression on you than the next one and yet, employers are allowed to take this into account when selecting the candidate of their choice for a job.

[74] The requirement that the SGB must give reasons for its decision to nominate certain candidates, in my view therefore requires no more than to record that the decision was taken through consensus, majority vote or scoring, whichever is applicable. Requiring more than this, would mean that a selection process is elevated to an exact science or mathematical process, which it clearly is not. SGB's have been entrusted with the power to determine who they want as educators at their schools and who they believe will be best suited for the post. Educators should accept that and realize that arbitrators are not there to second-guess the decisions of SGB's on the basis of technicalities.

[75] Mr. Le Roux advanced a further argument in his attempt to persuade me to find that the applicant was prejudiced through incomplete minutes. It is common cause that SADTU timeously requested all the necessary documents used during the processes by the SGB, to enable them to prepare for this arbitration. It is also common cause that no score sheets were ever supplied by first respondent to SADTU. During the arbitration hearing, Ms Hans indicated that there were actually score sheets, but that she did not have it in her possession and must still obtain it from the SGB. She in fact requested that she be granted leave to hand in this document at a later stage. All parties, including SADTU objected to allowing Ms Hans to hand in these score sheets at a later stage. In his heads of argument, Mr. Le Roux now argues that first respondent acted in bad faith by not having furnished copies of the score sheets, that this is grossly unfair and that it definitely hampered the preparation of SADTU in the arbitration. He submits that the scoring sheets could have assisted in proving that applicant was prejudiced.

[76] I am not impressed by this argument. Firstly, it cannot simply be stated as a fact that first respondent deliberately withheld the documents. The impression I gained at the arbitration hearing, is that first respondent was not even in possession of the document, but assumes it exists because the verification checklist states that it exists. If Mr. Le roux believed that the document could assist his client, it was his duty to do what every legal practitioner would under such circumstances do in a court of law, namely, to request a postponement so that he could obtain the document from first respondent and ask me to order first respondent to pay the wasted costs of the postponement. To argue at this stage that the document could probably have assisted SADTU in proving that applicant was prejudiced, not only amounts to speculation, but is also extremely improper bearing in mind that SADTU at the arbitration hearing objected to allowing first applicant to produce this document at a later stage. Had the parties all asked me to postpone the matter in order to allow first applicant to submit the document and allow all the parties to thereafter present evidence and arguments in this regard, I would have done so.

[77] There is a further reason why this argument is completely without merit. It does not assist an applicant in a promotion dispute to attempt to prove that the employer has acted unfairly in the arbitration hearing[55] as opposed to the promotion process itself. Unfair conduct during or prior to the arbitration hearing which hampers the applicant's preparation for the arbitration, cannot necessarily prove unfair conduct during the promotion process. The request by SADTU to furnish documents, was made after the SGB has finalized their recommendation to appoint second and third respondents. I cannot on the basis of first respondent's failure to provide the required documents, which is something which occurred *ex post facto* after the promotion dispute already existed, find that therefore, the applicant was treated unfairly in her application to be promoted. There will be no logic in such a finding.

[78] If a party acts unfairly during an arbitration process, by for example withholding vital documents which could assist the other side, the remedy is either to bring an application to compel the party to provide that information or alternatively to ask the arbitrator for a postponement until such time as the defaulting part has provided that information and order the defaulting part to pay the wasted costs of the postponement. These are the

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[55] for example by withholding documents which could have assisted the applicant in proving its case

remedies in case an employer fails to produce the necessary documents to enable an employee to prepare for arbitration. The remedy is not to argue that the promotion process itself is therefore unfair – that is simply defiant of all logic and amounts to clutching at straws.

[79] For these reasons I am satisfied that applicant has failed to prove that the minutes were too incomplete to serve the purpose for which it was intended. Even if I am wrong in this regard, I am satisfied, for the reasons as set out hereinbefore, that the alleged incompleteness of the minutes, did not cause any prejudice to applicant and that no unfair conduct was accordingly committed in relation to her on account of the mere fact that the minutes were not as complete as applicant may have liked it to be.

THE CIRCUIT MANAGER'S RULING

[80] The fact that the circuit manager was of the view that the process followed by the SGB was irregular and that it had to be repeated, was also raised. It is common cause that the circuit manager had indeed expressed these views on 8 December 2005 at a grievance meeting where she presided. It is also common cause that at the time the letters of appointment had already been sent out.

[81] Not much turns on the fact that the circuit manager was of the view that the process was unfair and had to be repeated. That was her opinion and neither the Head of Department who makes appointments, nor I am bound by her opinions. Unless the circuit manager was in possession of additional information which was not placed before me, I am in any event satisfied that her conclusion that the process was not fair and should be repeated, was simply wrong. It is rather unlikely that Mr. Le Roux would not have placed all the relevant information which he placed before the circuit manager, before me. In the circumstances, I think that it would be safe to assume that given the information which the circuit manager had when she made her decision, which information was more probably than not the same information which was placed before me, her decision and recommendation was simply wrong. This is understandable because circuit managers are not legally qualified and do not have the necessary knowledge and expertise in order to determine in all cases whether a process which was followed, was really procedurally flawed and if so whether such procedural irregularity should result in the process being

repeated or not. Some cases may be easy to determine[56] whereas other cases, such as this case, may be much more difficult to determine. As can be seen from the motivations which I have given for finding that the process was fair, numerous legal principles and considerable legal expertise is required, in order to have arrived at the conclusion which I have reached.

[82] A person who does not have knowledge of the law, would not necessarily be aware of these legal principles. There is a real risk that he or she will make an incorrect finding when deciding whether the process should be repeated. It is not surprising therefore that the circuit manager made an incorrect finding. Fortunately however, first respondent did not accept her recommendation and did not withdraw the letters of appointment of second and third respondents, because had it done so, a great injustice would certainly have been done.

EMPLOYMENT EQUITY

[83] It is common cause that applicant is a coloured female, whereas the two successful candidates, being second and third respondents, are both coloured males. In his heads of argument, Mr. Le Roux submitted that section 7 of the Employment of Educators No 76 of 1998 imposes a duty on the SGB to have considered employment equity in order to redress imbalances of the past in order to achieve broader representation. He argued that the SGB failed to give regard to employment equity and referred me to a recent award of my colleague on this tribunal, Mrs. Bhoopchand, who ruled that the WCED has an obligation to give consideration to Employment Equity.[57] I completely agree with Mrs. Bhoopchand's finding and wish to add that it may in principle indeed constitute unfair conduct[58] for a SGB and first respondent to completely ignore the issue of employment equity when selecting candidates for promotion and making appointments.

[84] The issue of employment equity was however never raised on behalf of applicant in her referral form. This issue was also not raised at conciliation. At no stage was notice given on behalf of applicant to the ELRC or any of the parties, that employment equity would be raised at the arbitration. At the arbitration, Mr. Le Roux, briefly referred to the issue of

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[56] for example where it is clear that there was fraud, bias or corruption
[57] *Williams v WCE*D, case no PSES 529-05/06WC
[58] as contemplated in section 186(2)(a) of the LRA

employment equity. Ms Smart, on behalf of second and third respondents, immediately objected and indicated that since there was no notice that this issue would be raised, she was not prepared to deal with the issue of employment equity.

[85] I then enquired from Mr. Le Roux whether I should postpone the matter in order for the other parties to prepare themselves on the issue of employment equity. Mr. Le Roux then indicated that he is abandoning the argument relating to employment equity. As a result the issue of employment equity was never canvassed at the arbitration hearing.

[86] There are certain basic rules of fairness, equity, reasonableness and common sense which govern the manner in which an arbitration hearing should be conducted. Some of these are relevant here and can be summarised as follows: The grounds on which the fairness of a promotion dispute 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. Where an applicant intends to raise new grounds at the arbitration, not raised in the referral form, timeous notice should be given to the other parties so that they can prepare. An arbitration hearing is not a tactical game where parties are allowed to ambush each other by unexpectedly raising new issues at the hearing, so that their opponents can be caught unaware. Where new issues are raised for the first time at an arbitration hearing, without prior notice, it would be completely unfair to allow the hearing to proceed on that basis where the opposing party indicates that she is not prepared to deal with that issue. Under such circumstances, the issue may only be canvassed if the matter is postponed so that the opposing party can prepare on that issue. Since the party who raises that issue without prior notice is responsible for the postponement through his or her negligence, it would also only be fair that she pays the wasted costs of the day of all other parties including the ELRC.

[87] If Mr Le Roux wanted me to consider the issue of employment equity, he should have said so at the arbitration hearing, which would then have resulted in the matter being postponed and applicant being ordered to pay the wasted costs of the ELRC and all the other parties, occasioned as a result of the postponement and the additional day required to complete the arbitration.

[88] Instead he chose to abandon the issue of employment equity and it is manifestly unfair to raise this very same issue once again during closing argument, expecting me to deal with it. It would be extremely unfair and prejudicial to second and third respondents to consider the issue of employment equity at this stage, because had Mr Le Roux indicated at the arbitration that he wanted to pursue this issue, Ms Smart might have wanted to present evidence on this aspect. The issue of employment equity was never even an issue during the arbitration hearing. It is trite law that it is grossly unfair for an arbitrator to base his award on an issue which was never even in dispute during an arbitration hearing.[59] Under these circumstances I cannot be expected to make a finding based on employment equity. It would be completely unfair, irregular and inappropriate to do so. There are however further reasons why I cannot base a finding on employment equity.

[89] Due to the fact that none of the members of the SGB testified at the arbitration hearing, it would in any event be impossible to find that the SGB never considered employment equity when making their decision. Without having heard any of the members of the SGB, it is impossible to say whether they have considered this issue or not. It may well be that they may have considered the issue but decided that it does not carry sufficient weight to appoint applicant.[60] Without having heard the SGB on this issue, we can only speculate as to what were in their minds and what not, when they made their decision.

[90] There is a further factor which prevents me from making any finding regarding the issue of employment equity. That is the fact that no statistics were placed before me to enable me to establish whether coloured females are underrepresented in the WCED compared to coloured males and whether preference should therefore be given to them when they compete with coloured males.[61]

[91] I do not even know whether the demographics at the school, in the Mitchells Plain area and the Western Cape Education Department are of such a nature that coloured female educators are currently underrepresented, compared to their representation in the general population. For all that I know, there may already be too many coloured females and still too few coloured males at Woodlands High School, the Mitchells Plain area and

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[59] *East Cape Agricultural Cooperative v Du Plessis & others* [2000] 9 BLLR 1027 (LC) para 4

[60] The mere fact that an employee belongs to a designated previously disadvantaged group does not mean the she must necessarily be shortlisted, interviewed and appointed; other factors are also relevant. *Cf FAGWUSA & another v Hibiscus Coast Municipality & others* [2003] JOL 11396 (LC) per Pillay J

[61] One cannot hope to succeed in employment equity cases unless statistical evidence is presented. See for example *Ntai & others v SA Breweries LTD* (2001) 22 ILJ 214 (LC)

the Western Cape Department of Education, compared to their representation in the general population. In the absence of evidence in this regard, I would not know whether the issue of race and gender should have played any roll in making the appointments.

[92] Affirmative action is remedial in nature. Its purpose is to normalize the labour market in the sense that the under representation of certain segments of the population, caused through discriminatory practices in the past, should be eliminated. Its purpose is not to reward or compensate people for belonging to a certain segment of the population, which was discriminated against in the past.[62] Given the objectives of affirmative action, a time may never come where a particular segment of the population, which was previously underrepresented in the labour market, is now excessively over represented due to application of affirmative action measures.[63] Once that situation is reached, corrective measures may once again be required to reduce the representation of that group in the labour market. Once a particular segment of the population, which was previously under represented, is adequately represented in the labour market, there is no further need or constitutional justification to give preference to that group when making appointments. Giving preference to such persons when making appointments, would simply amount to unfair discrimination, which is not sanctioned by section 9 of the Constitution.[64]

[93] In the absence of credible evidence of discrimination related under-representation, an employer who gives preference to certain employees,[65] merely on the basis of their race and gender, when making appointments, acts arbitrarily.[66] The dilemma which I am faced with in this case, is therefore obvious. In order for me to find that employment equity should have been taken into account in making the appointment, I must first find that the particular segment of the population to which applicant belongs, is still under represented in the Western Cape Education Department. I cannot make such a finding because no evidence had been presented to me in that regard. Should I therefore simply find that the SGB and first respondent had acted unfairly by not having taken into account employment

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[62] see *Canadian Railway Co v Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114 at 11143

[63] see for example the remarks of the Industrial Court in *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC) 593-594, where it was held that affirmative action will only be applied until such time as “a state of general equality “ or the “normalization of our society” has been achieved

[64] Affirmative action measures need to comply with the requirements of rationality, fairness and proportionality in order to pass Constitutional muster. See the discussion in Pretorius, Klinck & Ngwena *Employment Equity Law* Chapter 9 – Affirmative Action

[65] for example coloured females

[66] See Pretorius, Klinck & Ngwena *Employment Equity Law* 9-13 footnote 48

equity, I would be acting completely irrationally and arbitrarily, because I do not even have any idea whether employment equity should indeed have played a roll in favour of applicant. Without statistics, having been placed before me, it is impossible to argue employment equity or make a finding based on employment equity. Once again it was applicant's duty to have placed such evidence before me and cannot now expect me to speculate.

[94] Finally, the issue of employment equity, is extremely complex. Apart from the fact that it involves complex constitutional arguments, and is always of a contentious nature, there are conflicting decisions in the Labour Court on various aspects. So for example, there are conflicting decisions as to whether employment equity may be applied where the employer has no employment equity plan in place,[67] and there are also conflicting decisions on the question whether employment equity may only be raised as a defence by an employer or whether an employee may indeed rely on employment equity as a cause of action.[68]

[95] None of these issues were argued before me. These however are merely some of the complex issues involved in dealing with employment equity. There are many more complex legal issues pertaining to employment equity and it is unnecessary to refer to them at this stage, save to say that many involve complex constitutional issues, which require a sound knowledge of Constitutional jurisprudence. For these reasons employment equity cannot simply be thrown in as an afterthought as Mr Le Roux had done. One cannot present half-baked arguments in respect of employment equity in a written argument which does not even consist of half a page as was attempted in this case. Employment equity is far too important, and complex to do that.

[96] Representatives, irrespective of whether they are lay representatives, advocates or attorneys, should ensure that if they decide to represent employees in employment equity

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[67] It is well known that first respondent's employment equity plan for educators was only implemented during January 2006. In *Public Servants Association of SA & others v Minister of Justice & others* (1997) 18 ILJ 241 (T) it was held that an employment equity plan is indeed a requirement, whereas in *Gordon v Department of Health, KwaZulu-Natal*[2004] 7 BLLR 708 (LC) it was held that the existence of such a plan is not necessary.

[68] In *Cupido v GlaxoSmithKline South Africa (Pty) Ltd* [2005] 6 BLLR 555 (LC) it was held that an employee can never base her cause of action on employment equity and that her only remedy would be to lodge a complaint with the Department of Labour should her employer not implement employment equity. The same was held in *Dudley v City of Cape Town & another* [2004] 5 BLLR 413 (LC). In *Harmse v City of Cape Town* [2003] 6 BLLR 557 (LC) however, it was held that an employee may indeed base her cause of action on employment equity.

disputes, they are adequately trained and have a sound knowledge and understanding, not only of the Employment Equity Act No 55 of 1998, but also of local and foreign employment equity jurisprudence as well as Constitutional equality jurisprudence. Attempting to represent employees in employment equity cases without such knowledge, would invariably have the result that the employee is prejudiced because of the lack of knowledge on the part of the representative which could in turn expose the representative to civil claims for professional negligence. Employment equity litigation is an expert field and is completely different from ordinary labour disputes. Being trained in labour law does not necessarily equip one to deal with employment equity disputes. There is a duty on representatives to ensure that when they do decide to represent employees in employment equity disputes, they are completely *au fait* with all the relevant legal and Constitutional aspects so that they know what the law requires them to prove and what evidence should be presented. Without such knowledge, it is a futile exercise to get involved in employment equity disputes.

CONCLUSION

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

AWARD

In the premises I make the following order:

1. No unfair conduct or any other legally recognized ground of review to justify interference with the decision of the School Governing Body, was proved with regard to the processes followed by the School Governing Body of Woodlands High School in Mitchells Plain in shortlisting candidates, interviewing candidates and making a recommendation to first respondent as regards the filling of the posts numbers 1724 and 1725, advertised in Vacancy List No 2 of 2005.

2. The recommendation by the School governing body to appoint second respondent in post number 1725 and third respondent in post number 1724 and the subsequent appointments of second and third respondents by first respondent in these positions, are declared to be fair, lawful and valid and are hereby confirmed.

3. Applicant's claim is dismissed.

4. No order as to costs is made.

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