IN THE EDUCATION LABOUR RELATIONS COUNCIL HELD AT CAPE TOWN

Case No PSES 71-06/07WC
Case No PSES 72-06/07WC
Case No PSES 73-06/07WC

In the matter between

L MLONYENI First Applicant
L NGWAYI Second Applicant
M KOMANE Third Applicant

and

DEPARTMENT OF EDUCATION WESTERN CAPE First Respondent
L MAHLASELA Second Respondent
L MATSOLO Third Respondent
A MANELI Fourth Respondent

ARBITRATOR: Adv D P Van Tonder

HEARD: 26 JULY 2006; 7 SEPTEMBER 2006

DELIVERED: 26 SEPTEMBER 2006

Labour Relations Act 66 of 1995 – Section 186(2)(a) - Alleged Unfair Labour Practice relating to promotion – Whether unfair conduct proved

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ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

[1] This dispute concerns alleged unfair labour practices relating to promotion as well as the interpretation and application of a collective agreement being ELRC Resolution 5 of 1998. The arbitration hearing in this matter took place in Cape Town on 26 July 2006 and 7 September 2006. Applicants were represented by Mr. D Meyer of SADTU(South African Democratic Teachers Union), a registered trade union of which applicant is a member.

First respondent was represented by Ms. Z Mazosiwe, an employee of its Labour Relations Department in Cape Town. On 26 July 2006, Second, Third and Fourth respondents were all present and represented themselves. On 7 September 2006 they were all absent and neither did a representative appear on their behalf. Since I was satisfied that they had been notified of the hearing, I proceeded with the hearing in their absence. The evidence was mechanically recorded on six cassette tapes. The proceedings were only concluded on 22 September 2006 when the final written heads of argument were received.

THE ISSUES IN DISPUTE

[2] I have to decide whether any unfair labour practices relating to promotion were committed in respect of applicants and/or whether Resolution 5 of 1998 had been breached, and if so, the appropriate relief.

THE BACKGROUND TO THE DISPUTE

[3] During 2005, applicants were all teaching at Kayamandi High School in Stellenbosch. They were all appointed on a temporary basis in fixed term contract or vacant substantive positions on post level 1. When Vacancy list 2 of 2005 was published, each of them applied to be appointed on a permanent basis in different positions at Kayamandi High School. First applicant applied for appointment in post number 2953, second applicant for appointment in post number 2948 and third applicant for appointment in post number 2952. All these posts which applicants applied for, are also on post level 1.

[4] All the applicants were shortlisted and interviewed. None of them however, were appointed. In post number 2953, the position which is being contested by first applicant, third respondent was nominated for appointment by the School Governing Body[1], which nomination was subsequently accepted by first respondent, who had as from January 2006, appointed third respondent in the position. In post number 2948, the position which is being contested by second applicant, second respondent was nominated for appointment by the SGB, which nomination was subsequently accepted by first respondent, who had as from January 2006, appointed second respondent in the position. In post number 2952, the position which is being contested by third applicant, fourth respondent was nominated for appointment by the SGB, which nomination was

[1] hereinafter also referred to as the SGB

subsequently accepted by first respondent, who had as from January 2006, appointed fourth respondent in the position.

[5] Applicants are contending that the processes leading up to the nomination and appointment of second to fourth respondents, were irregular and unfair in various respects. The reason why the three disputes have been consolidated, is because the same allegations of irregularity and unfairness have been made in respect of all the disputes. Setting of the criteria and shortlisting in respect of all three positions occurred on the same evening and was performed by the same SGB. Similarly interviews in respect of all three positions took place on the same evening and were performed by the same SGB. The same procedural irregularities are alleged to have occurred in respect of all three posts. The only additional procedural irregularity which is alleged in only one of these disputes and not in the others, is the fact that it is alleged that in addition to all the procedural irregularities which all the disputes have in common, third respondent was not registered with the South African Council of Educators[2] or alternatively did not submit such proof when she was shortlisted, interviewed, recommended for appointment and appointed.

[6] The remainder of the procedural irregularities which all the disputes have in common and which were raised during opening statements, can be summarised as follows:

6.1 It is alleged that two members of the Shortlisting and Interview committee, were appointed illegally in that they were not at the time, the parents of legal guardians of learners at Kayamandi High School;

6.2 It is alleged that the minutes of the shortlisting and interview meetings are not accurate and complete;

6.3 It is alleged that because the minutes were not accurate and complete it was impossible for first respondent to have satisfied itself that the processes were conducted in accordance with prescribed procedures;

6.4 It is alleged that irrelevant questions were asked during the interviews whereas relevant questions which should have been asked, were not asked;

[2] hereinafter referred to as “SACE”

6.5 It is alleged that when the School Governing Body ratified the decision of the Interview Committee, all the members were not present

[7] It is against this background that each of the applicants are contesting the respective positions which each of them have applied for. Each of the applicants is asking for the process to be repeated as from shortlisting and that compensation must be awarded.

[8] First Respondent is contesting the above request, alleged that there were no irregularities in the process and asked for the nominations and appointments of the second, third and fourth respondents to be confirmed. The same requests were made by second, third and fourth respondents during opening statements.

SUMMARY OF EVIDENCE AND ARGUMENT

Evidence on behalf of applicants

[9] ***Lamuel Mlonyeni*** is the first applicant. He has been teaching at Kayamandi High School in a vacant substantive position, on fixed term contracts at post level 1 since August 2004. He has never held a permanent appointment at this school. He is teaching English to grade 9 and life orientation to grade 8. When post number 2953 was advertised at Kayamandi High School in Vacancy list 2 of 2005 for permanent filling, he applied for the position. This position was on post level 1 and was for an educator to teach Life orientation and English to grade 8 and 9, through the medium of English. The advertisement further required candidates to state other subjects offered as well as extracurricular activities offered.

[10] He considers himself to be a very good educator who goes the extra mile. He has never been disciplined. The education department has acknowledged that his work is of a high standard, he has introduced after classes at the school as well as informal counseling sessions for learners with social and emotional problems. He assists with sport and offered his week-ends in this regard.

[11] At the interviews, no questions were asked about others subjects offered and extra mural activities. Had these questions been asked he would indeed have been able to tell the

interview committee about other subjects(such as Afrikaans and History) which he had taught and which he offered. He would also have been able to tell them about the extra mural activities which he can offer. Accordingly he feels that he was prejudiced.

[12] To the best of his knowledge two of the members of the SGB who were on the interviewing committee, being Mr Myataza and Reverend Ngcama are not parents or guardians of any learners at the school. Although he had requested reasons from the SGB as to why he was not recommended for appointment, he had not received a reply to this request yet.

[13] ***Likhaya Claude Ngwayi*** is the second applicant. He has been teaching at Kayamandi High School in a vacant substantive position, on fixed term contracts at post level 1 since February 2004. He has never held a permanent appointment at this school. He is teaching History, Arts and Culture and Geography. He is also qualified to teach Xhosa although he has never taught it. When post number 2948 was advertised at Kayamandi High School in Vacancy list 2 of 2005 for permanent filling, he applied for the position. This position was on post level 1 and was for an educator to teach Human and Social Sciences and History to grades 8 to 10 through the medium of English. The advertisement further required candidates to state other subjects offered as well as extracurricular activities offered.

[14] He considers himself to be a very good educator. He has never been disciplined. He was first the assistant soccer coach at the school and last year became the head soccer coach. Last year he also became a sports coordinator and also assisted with athletics.

[15] At the interviews, no questions were asked about others subjects offered and extra mural activities. Had these questions been asked he would indeed have been able to tell the interview committee about other additional subjects which he could offer. He would also have been able to tell them about the extra mural activities which he are involved in. Accordingly he feels that he was prejudiced.

[16] ***Mxolisi Kenneth Komane*** is the third applicant. He taught at Kayamandi High School in fixed term contract positions at post level 1 between February 2004 and March 2006. He has never held a permanent appointment at this school. He taught Science and Technology, Social Science and Arts and Culture. He has also taught History and Xhosa.

In fact, he majored in Xhosa in that he passed Xhosa III as part of the subjects he offered for his BA degree.

[17] When post number 2952 was advertised at Kayamandi High School in Vacancy list 2 of 2005 for permanent filling, he applied for the position. This position was on post level 1 and was for an educator to teach Xhosa to grades 8 and 9 through the medium of English. The advertisement further required candidates to state other subjects offered as well as extracurricular activities offered.

[18] He considers himself as a very good educator. He has never been disciplined. At the interviews, no questions were asked about others subjects offered and extra mural activities. Had these questions been asked he would indeed have been able to tell the interview committee about other additional subjects which he could offer. He would also have been able to tell them about the extra mural activities which he are involved in. Accordingly he feels that he was prejudiced.

[19] ***Khaykhazi Bani*** is employed at Kayamandi High School as an educator. She was elected by the educators as an educator representative on the SGB. Mr Ndlebe has also been elected by the educators as an educator representative on the SGB. During 2005 she was also the sports coordinator at the school. Lately she had not been attending SGB meetings anymore, because some of the members of the SGB do not want her around anymore. For this reason she was not part of the shortlisting and interview committee. In fact the SGB simply do not inform her of SGB meetings. She knows the three applicants. They are all very good educators and were very active in extra mural activities. On a scale of 1 to 10 she would give then 10. She was surprised to hear that they were not appointed in the positions they had applied for.

[20] Since she is involved in SADTU, she was asked earlier this year to conduct an investigation and ascertain whether two of the members on the SGB, being Mr. Myataza and Reverend Ngcama are actually the legal guardians or parents of learners at the school or not. Up to that stage she never knew that it was a requirement that parent SGB members, who are not educators, must be a parent or guardian of a learner at the school.

According to the best of her knowledge none of these gentlemen are parents or guardians of learners at the school.

[21] There was an allegation that Reverend Ngcama is the parent or guardian of Babalwa Simayile. This is not correct. She teaches computer science to Babalwa Simayile. When she asked Babalwa whether she knows Reverend Ngacama, the child replied that she did not. She then described the reverend to Babalwa at which stage Babalwas recalled that he had been at their house and told her mother to say that he is her guardian. On 29 May 2006, Babalwa the wrote the following letter, contained in exhibit "A6G":

> *"I am Babalwa Simayile, I stay with my mother and father. My address is No 43 Chris Hani Street Kayamandi…My mother pay my school fees. My date of birth is 1988 24 07. I don't know Mr Ngcama"*

[22] She then phoned Babalwa's mother who confirmed that she and nobody else was Babalwa's parent and that she pays her school fees. Later at 18:00 that same day Babalwa's mother came to her house and was furious about the telephone call earlier that day. She then said that Reverend Ngcama pays her children's school fees.

[23] There was also an allegation that Mr Myataza is the parent or guardian of Mphunzi Mntamni. This is not correct. She has known Mr Myataza for many years and in fact grew up next to him since he was her mother's neighbour. His last borne child left school in 1998. She also spoke to Mphunzi, who wrote the following letter, contained in exhibit "A6F":

> *"My name is Mphunzi Mntumni, I am doing grade 9 at Kayamandi. I stay with my aunt at …Kayamndi. My aunt pays my school fees"*

[24] During cross-examination she denied that she was the one who simply dictated to Mphunzi and Babalwa what to write in the letters, contained in exhibit A. She conceded however that although the letters were written in English, she normally spoke Xhosa to these children and they normally spoke Xhosa to her as well. She was however adamant that the children themselves preferred to write in English. She did not have the permission of their parents before she interviewed the children.

[25] ***Vuysile Victor Myataza*** was chairman of the SGB, shortlisting and interview committee at Kayamandi High School during 2005. He was therefore involved in the processes leading up to the nomination of second, third and fourth respondents for the positions, which are

being contested by applicants. At present he is still on the SGB but is presently just an ordinary member of the SGB. At all relevant times when he was on the SGB, as ordinary member or chairman, he was duly elected and did not elect or appoint himself.

[26] The last year which he had a biological child of his own who attended Kayamandi High School, was 2003 and his name is Ncebisi Morgan Myataza. As from 2004, he fulfilled the parental obligations for his biological grandson Sontho, who was a learner at Kayamandi High School until December 2005. Sontho stayed with him and he took care of him by paying his school fees, buying clothes and food. The reason for this is that Sontho's mother is a single parent. He did not bring receipt to the arbitration to prove this, but was never told to bring receipts. Kayamandi High School in any event took the school fees receipts for auditing purposes. This year Sontho is no longer at Kayamandi High School and now he is fulfilling the parental obligations for an orphan child.

[27] When referred to a letter written by the school principal of Kayamandi High School on 17 March 2006, stating that he(Myataza) does have a learner at the school and that his name is Mphunzi Mntumni, he stated that it is correct that this year he is in fact caring for Mphunzi. He works on an empowerment project and they paid the school fees of 27 learners at the school. Currently he is paying for Mphunzi's school fees, clothes and food. He did not bring documentary proof of this to the arbitration, because he was not told to bring such proof along. When asked why he did not bring Sontho along on the previous occasion when the hearing was postponed but only Mphunzi, he said that the reason for that was that the notification which he received specifically instructed him to bring Mphunzi along. No mention was made of Sontho.

[28] When it was put to him that applicants all asked for reasons why they were not nominated for appointment in the respective positions they had applied for, but never received any response from the SGB, he answered that to the best of his knowledge, the SGB did reply. The reason why applicants were not nominated, is simple. The SGB worked with a score system. The candidate who scored the highest in respect of each post, was nominated for that post. None of the applicants scored the highest for the respective posts they applied for and accordingly they were not nominated. Instead the best candidates who scored most for the respective posts were nominated and they were Second, Third

and Fourth respondents, who respectively scored the highest for post numbers 2948, 2953 and 2952.

[29] He conceded that the manner in which the questions which were asked during interviews, were drafted, candidates were not directly asked to explain about additional subjects which they offered or extra mural activities. When asked why detailed minutes of the shortlisting and interview proceedings were not kept, he explained that the secretary is responsible for keeping minutes.

[30] When referred to the minutes he conceded that there were mistakes in the minutes. So for example there was a date which was incorrect. He also conceded that he added up third respondent's final score incorrectly in that he indicated on her score sheet that her final score was 30 whereas it is actually 31. The final score of another candidate, whose score sheet identifies him as Lamwel, and who appears to be first applicant, has also been incorrectly calculated because his final score should actually be 28 whereas it was calculated to be 26.

[31] He was referred to exhibit "H" being third respondent's original application which she submitted when she originally applied for appointment in the post. When perusing this application he conceded that there is no proof that third respondent is registered with SACE or had applied for registration with SACE.

[32] During cross-examination by third respondent, he was referred to exhibit J, which according to third respondent is proof that she did apply for registration with SACE prior to submitting her application to the SGB. This document, third respondent stated was part of the documents she submitted when applying for the post as proof of her SACE application for registration with SACE. The witness said that if this is what third respondent says, this document must have been included in the documents submitted by third respondent.

[33] ***Nicholas John Bailey*** is employed by respondent. The Head of Department has delegated powers to him to appoint educators. He was specifically called to testify about the appointment of third respondent. He confirmed that he did in fact appoint third respondent in post number 2953 at Kayamandi High School. Although this appointment

was only made during March 2006, it was done retrospectively as from January 2006. He agreed that it is statutory requirement that no educator may be appointed in a permanent position unless there is proof that she is registered with SACE. After perusing third respondent's personnel file during his evidence in chief, he referred to a file note made by him on 2 March 2006. According to this file note he personally phoned SACE on 2 March 2006 and they confirmed that third respondent was at that stage indeed registered with SACE.

[34] When referred to a letter from SACE dated 21 June 2006, stating that third respondent is not registered with SACE yet and that an evaluation report on PTC obtained in Lesotho is awaited, he said that this information is contradictory to the information he received form SACE. He was then referred to clause 3.2.1 in the preface to vacancy list 2 of 2005, which requires candidates to either submit a SACE certificate with their application or if they are not in possession of one, acknowledgement of SACE certifying that the candidate has applied for her SACE certificate prior to the closing date for the applications, any other proof from SACE that she is registered or a salary slip on which the SACE registration number is indicated.

[35] When it was put to him that as there was no proof when the shortlisting and interviews took place that third respondent was registered with SACE, she should never have been shortlisted or appointed, he stated that the preface to the vacancy list is not a prescript and merely a guideline. According to him a SGB can consider and recommend a candidate without proof of the formal requirements such as SACE registration being available at the time. It is the first respondent's duty to confirm that the candidate is in possession of all the required certificates such as SACE registration, before confirming a nomination and appointing the candidate. This he did before appointing third respondent.

[36] When asked how he could possibly have verified that the correct procedures were followed during shortlisting and interviews when the minutes are so incomplete, he replied that it is not his duty to personally verify that this had been done. He would not be able to get to all his work if he had to do this as well. Other departmental officials attend to this. In the particular case of third respondent, there is indeed a memorandum in her file certifying that a departmental official did indeed verify that all the correct procedures were indeed

followed. This was sufficient to enable him to be satisfied that the correct procedures were indeed followed.

[37] ***Mark Williams*** is the school principal of Maccassar Primary School. He was not involved in any manner in the matters at hand. He has extensive experience in training School Governing Bodies in the procedures which they need to follow in filling vacant posts. Having perused the minutes kept by the SGB, the witness expressed the opinion that the minutes were incomplete in the sense that it did not contain information as to what actually happened before the process started. There were also a few other minor aspects in the minutes which according to him caused them to be incomplete. He expressed personal opinions as to what questions should have been asked by the SGB during the interviews, and was for example of the view that only questions which related to the core criteria, should have been asked. He also expressed his views on when a person would qualify to be elected as a member of a School Governing Body and when not. He was of the view that proof of registration with SACE should accompany application forms.

[38] Most of what this witness said during his evidence, concerns his personal interpretation and understanding of certain aspects of education law.[3] I therefore do not intend to summarise his evidence in detail because it cannot possibly assist me in any manner and is in fact completely irrelevant and inadmissible.

Evidence on behalf of first respondent

[39] ***Mmekelo Ngcama*** is a minister of religion. He has been a member of the school governing body of Kayamandi High School for 10 years and is the treasurer. He was duly

[3] The opinion of an expert is admissible only if it is relevant. It will be relevant if the witness's skill, training or experience enables him to materially assist the court on matters in which the court itself does not usually have the necessary knowledge to decide. Where the topic is one in which the ordinary judicial officer or arbitrator could be expected to be able, unassisted, to draw an inference, expert evidence is supererogatory and therefore irrelevant and inadmissible. *Cf R v Makeip* 1948 1 SA 947 (A); *S v Nkosiyani* 1970 2 PH H170 (T). Thus, expert testimony is inadmissible to prove South African law. Witnesses, no matter how eminent or highly qualified they are, are not allowed to express an opinion which entails a conclusion of law or which requires the application of a standard of law to the facts, or which relates to the meaning of words in a statute, or which relates to the interpretation of documents. *Cf* Schmidt and Zeffert in *LAWSA on Evidence* para 506; Schwikkard et al *Principles of Evidence* (2nd ed) 85; *R v Van Tonder* 1929 TPD 365; *Metro Transport (Pty) Ltd v National Transport Commission* 1981 3 SA 114 (W) 120A; *IBM SA v CIR* 1985 (4) SA 852 (A); *South Atlantic Islands Development Corp Ltd v Buchan* 1971 1 SA 234 (C). Such issues relate to the ultimate issues which the court or tribunal must decide and witnesses are not allowed to usurp the functions of the trier of fact. *Cf* Carter *Cases and Statutes on Evidence* (1981) 503. Williams is in any event not a professor in law and neither is he legally qualified. His opinion regarding the interpretation of legislation cannot possibly be worth anything. There is absolutely nothing which he can teach me about the interpretation of Statutes.

elected as a member of the school governing body by the parents and has been re-elected every year when elections were held.

[40] He is the guardian of Babalwa Simayile, who is a pupil at Kayamandi High School. He is not her biological parent or legal guardian, but pays her school fees, as well as her school uniform. The child does not stay with him, but stays with her biological mother. In support of his version that he has undertaken to fulfill the functions of Babalwa's guardian, he handed in an affidavit from Bisisiwe Simayile, the mother of Babalwa, which confirms under oath that due to financial difficulties which she experiences, there has been an agreement between herself and Reverend Ngcama since 2004 that he would be responsible for her school expenses until grade 12 . He does not have prove that he pays Babalwa's school fees and uniform, because he hands over the money to Babalwa's mother.

[41] He does not know why Babalwa stated in exhibit A6G that she does not know him. He never really speaks to her. He hands the money for her school fees to her mother. During 2003 he was the guardian for Lindiwe Mgoma, in respect of whom he undertook to fulfill the functions of her guardian. At some stage however during 2003, she fell pregnant and he then sent her home to King Williamstown.

[42] He was a member of the shortlisting and interview committee who interviewed candidates in respect of the three posts, which are being contested in this arbitration. They used a point system in order to decide who are the best candidates. In order to score the candidates, the used the criteria. The candidate who scored highest in respect of each post, was ranked first and recommended for appointment. There were seven members on the Interview committee and all the members of the interview committee unanimously decided as to who should be ranked first in respect of each post. Asked what their motivation was for ranking the candidates, he said that the candidates who scored the highest was ranked first. After interviews, the interview committee also took into account the information contained in the curriculum vitae of the candidates, in order to decide who should be ranked first in respect of each post.

[43] He does not know why Mrs. Bani was not present at the final ratification meeting of the School Governing Body when the Interview Committee's recommendation as to who should be recommended for appointment in the three posts, were ratified and approved.

[44] ***Maphelo Ntshanga*** is the school principal of Kayamandi High School. Reverend Ngcama is presently the guardian for Babalwa, whereas Mr. Myataza is presently the guardian for Mphumzi. Both these children are learners at Kayamandi High School. Mphumzi was however not a learner at the school last year and he made a *bona fide* mistake earlier this year when he stated that she was. Last year Mr. Myataza was the guardian for Sontho. He believes that the funds for the project which Mr. Myataza runs in Kayamandi, comes from oversees.

[45] Mr. Myataza's biological son Ncebisi completed matric at the school in 2001 and not 2003. The reason why Reverend Ngcama and Mr. Myataza have been re-elected so many times for such a lengthy period by the parents to be members of the School Governing Body is because it is difficult to get parents in that area who are willing to be elected to the SGB and because parents know that these two gentlemen have experience as members of the SGB and are respected in the community.

[46] He was on the Interview committee when it was decided who will be recommended for appointment in the three contested posts. They used the point system and whoever scored highest, was ranked first and recommended for appointment. That is the motivation for ranking the successful candidates first.

[47] When asked why questions were not asked during the interviews regarding extra mural activities and other subjects offered, which were also part of the advertised criteria, he said that these issues were actually covered in the general question which was asked to candidates to tell the committee more about themselves. In any event, these issues were not the main criteria and the focus fell on issues such as life orientation skills and English

[48] According to him, it is the responsibility of the WCED and not the School Governing Body to verify that candidates are registered with SACE or in the process of being registered.

CLOSING ARGUMENTS

[49] Written heads of argument were handed in on behalf of applicants and first respondent. I do not intend to repeat these arguments here in detail and will refer to them during my analysis of the evidence, where relevant.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

THE UNFAIR LABOUR PRACTICE DEFINITION

[50] Unlike the High Court, which has inherent and practically unlimited jurisdiction, employments tribunals such as the CCMA and the ELRC are creatures of statute whose powers are only those set out in the relevant legislation.[4] As a creature of statute the ELRC is not capable of doing anything or performing any act without being expressly empowered thereto by legislation.[5]

[51] The only 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,[6] which defines unfair labour practices with regard to promotion as follows:

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

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

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

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

[4]The only statutes conferring jurisdiction on the ELRC are the Labour Relations Act No 66 of 1995(hereinafter referred to as the "LRA"), the Basic Conditions of Employment Act No 75 of 1997 and the Employment Equity Act No 55 of 1998. In addition the new ELRC Constitution, contained in ELRC Resolution 1 of 2006, extends the jurisdiction of the ELRC in certain respects.

[5]*Department of Justice v CCMA & others* [2004] 4 BLLR 297 (LAC) par 97; *Bezuidenhout v Ellerine Holdings* [2003] 3 BLLR 304 (EC) 308; *Norman Tsie Taxis v Pooe NO & others* [2004] 3 BLLR 258 (LC) 263

[6] hereinafter referred to as "the LRA"

WHETHER THE DISPUTE IS INDEED A DISPUTE RELATING TO PROMOTION

[53] For two reasons I have grave reservations as to whether the disputes which applicants referred to this tribunal, could truly be classified as disputes relating to promotion, as contemplated in section 186(2)(a) of the LRA.

Would applicant have been "elevated" if they were successful?

[54] In *Mashegoane and another v University of the North*[7] "promotion" was defined as being elevated to a position that carries greater authority and status than the current position an employee is in. At the time when applicants applied for appointment in the posts, they were all appointed in fixed term contract positions on a temporary basis on post level 1 and the posts which they applied for were also on post level 1. Had they been successful in their applications, this would not have been an elevation to positions that carries greater authority and status than the positions they were in, because it was on exactly the same post level. For this reason alone, the ELRC does not have jurisdiction in terms of section 186(2)(a) of the LRA, because the disputes which referred are not disputes relating to promotion. I may just add that it has been argued before me on numerous occasions, that where an employee is a temporary employee, it would indeed be a "promotion" for him or her, if he or she is appointed permanently, even if it is on the same salary scale and with the same responsibilities. I have consistently rejected this argument in the past and am still of the firm believe that there is no merit in this argument. This argument is absurd, as it makes a mockery of the whole concept of promotion as contemplated in the LRA and as defined in dictionaries.

Can temporary employees be promoted?

[55] There is a further reason why none of the disputes referred by applicants to this tribunal can be classified as disputes relating to promotion. That directly relates to the fact that none of the applicants were permanent employees of first respondent when they applied for the posts and were interviewed, They were merely acting in fixed term contract posts or vacant substantive positions.

[56] It is trite law that there is a difference between "promotion" and "appointment". Employees may only refer disputes relating to promotion to this tribunal, but not disputes concerning appointment. External applicants are "appointed" whereas internal applicants are "promoted". Aggrieved internal applicants may refer their claims regarding unhappiness

[7] [1998] 1 BLLR 73 (LC)

about their non-promotion to the employment tribunals such as the CCMA and the ELRC as a promotion dispute in terms of section 186(2)(a), whereas external applicants with similar concerns, cannot approach the employment tribunals but must approach the High Court.[8] I am not aware of any Labour Court or High Court judgement in which a decision was made as to whether temporary employees on fixed term contracts could be "promoted" as intended in section 186(2)(a). In my view, they cannot and fall in the same category as external applicants. Before an employee can be promoted, which in essence is the process of climbing through the ranks to the top or climbing the corporate ladder, he must at least first be appointed by the company on a permanent basis. Being permanently appointed, is the very first step on the corporate ladder which cannot be skipped. A temporary employee, is not even on that first step of the corporate ladder yet and can therefore not climb his way to the top by being promoted as is the case with permanent employees.

[57] A temporary employee who is appointed on a fixed term contract is in a precarious position. On termination of the fixed term contract, the employment relationship is terminated by operation of law and no dismissal takes place unless he can prove a reasonable expectation of renewal in terms of section 186(1)(b) of the LRA. Even in such a case, it has been held that such a reasonable expectation can never be for permanent employment and can only be that the next period of renewal will endure for the same period as the previous fixed term contract.[9]

[58] Where such an employee does not even have job security yet and has no idea what exactly the future holds for him, I cannot see how it could be argued that he is promoted when he obtains a permanent position with the same employer, even if that position is on a higher post level than the post in which he is employed on a fixed term contract. If he successfully applies for the permanent position, he is not promoted, but actually appointed in that company for the first time. Only thereafter can he be promoted if he applies for a higher position again, after having been permanently appointed. To the extent that other arbitrators have made different findings in this regard in other awards, I

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[8] *Du Toit et al* Labour Law through the cases at LRA 8-17 and the authorities cited by the learned authors; *Grogan* Dismissal Discrimination & Unfair Labour Practices (August 2005) 49 - 51).

[9] See Oosthuizen AJ in *Dierks v University of South Africa* (1999) ILJ 20 1227 (LC) para 134 – 144; *Marius Olivier* "Legal Constraints on the Termination of Fixed Term Contracts of Employment: An Enquiry into Recent Developments" (1996) 17 ILJ 1001 and further; *Auf der Heyde v University of Cape Town* [2000] 8 BLLR 877 (LC); contra *McInnes v Technikon Natal* [2000] 6 BLLR 701 (LC) contra)

am of the view that those findings were plainly wrong and I respectfully disagree with them and decline to follow those awards. Being merely temporary employees who can only be job applicants, and who could not be "promoted", applicants cannot prove a dispute relating to "promotion" and for this reason as well this tribunal does not have jurisdiction in terms of section 186(2)(a) of the LRA.

Final remarks on jurisdiction

[59] It should however be borne in mind that even where an educator cannot prove that he has referred a promotion dispute to the ELRC as contemplated in section 186(2)(a) of the LRA, the ELRC is nevertheless entitled to enquire into the fairness of his non-appointment, but then only to the extent that it relates to non-compliance with Resolution 5 of 1998.[10] Not all of the grounds upon which applicants attack the fairness of their non-appointment, relate to non-compliance with Resolution 5 of 1998. So for example the allegations that one of the successful candidates did not comply with SACE and the allegation that some members of the School Governing Body were not qualified to sit as members of the SGB, do not relate to issues concerning non-compliance with Resolution 5 of 1998.

[60] Strictly speaking I therefore do not have jurisdiction to deal with those issues at all, this not being a dispute concerning promotion as contemplated in section 186(2)(a) of the LRA and therefore only have jurisdiction to deal with the grounds which do relate to alleged non-compliance with Resolution 5 of 1998.

[61] However, in case I am wrong with regard to my finding on jurisdiction, and in order not to prejudice applicants, I will nevertheless, since I have heard all the evidence, consider all the grounds upon which applicants chose to attack the fairness of their non-appointments on its merits, as if the disputes indeed relate to a dispute concerning non-promotion.

WHETHER ANY UNFAIR CONDUCT WAS PROVED

[10] ELRC Resolution 5 of 1998 is applicable to all appointment disputes and not only to disputes which would qualify as promotion disputes in terms of section 186(2)(a) of the LRA. All educators, irrespective of whether they are permanent or temporary employees, are entitled to protection under the Resolution. Because it is a collective agreement relating to appointment, the ELRC has jurisdiction to enquire whether the Resolution has been complied with when the applicant has indicated in his referral form, as applicants did, that the dispute relates to appointment/promotion.

[62] An employee who alleges that he or she is the victim of an unfair labour practice bears the onus of proving the claim on a balance of probabilities. The employee must prove not only the existence of the labour practice, if it is disputed, but also that it is unfair.[11] Mere unhappiness or a perception of unfairness does not establish unfair conduct.[12] What is fair depends upon the circumstances of a particular case and essentially involves a value judgement.[13] 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.[14] 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.[15]

[63] In the education sector, regard should also be had to the procedures prescribed in ELRC Resolution 5 of 1998,[16] [17] 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,[18] they are merely procedural guidelines and not mandatory,[19] and need only be substantially complied with and not strictly.[20]

[64] 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.[21] In addition there is a presumption of regularity, expressed by the Latin maxim *omnia praesumuntur rite esse acta*[22] in terms of which it is

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[11] 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

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

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

[14] *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

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

[16] 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

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

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

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

[20] *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

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

[22] translated as "all acts are presumed to have been lawfully done"

presumed, in the absence of evidence to the contrary, that all the necessary procedural formalities pertaining to an official act have been complied with.[23]

[65] 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….."[24]

> " ..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).."[25]

[66] 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

[23] 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
[24] P A K Le Roux in *Cheadle Landman Le Roux & Thompson* Current Labour Law 1991/1992 at 17
[25] *Cullen v Distell (Pty) Ltd* [2001] 8 BALR 834 (CCMA)

> interest. Indeed, the court should not be perceived as having assumed the role of a higher executive or administrative authority, to which all duly authorised executive or administrative decisions must always be referred for ratification prior to their implementation. Otherwise, the authority of the executive or other public functionaries, conferred on it by the law and/or the Constitution, would virtually become meaningless and irrelevant, and be undermined in the public eye. This would also cause undue disruptions in the state's administrative machinery." [26]

[67] 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.

[68] There may be reasons for preferring one employee to another apart from formal qualifications and experience.[27] The employer may attach more weight to one reason than another,[28] may take into account subjective considerations such as performance at an interview[29] and life skills[30]:

> "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"[31]

[69] 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.[32] 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

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[26] *Basson v Provincial Commissioner (Eastern Cape) Department of Correctional Services* (2003) 24 ILJ 803 (LC) at 820C–F
[27] *PSA obo Badenhorst v Department of Justice* [1998] 10 BALR 1293 (CCMA)
[28] *Rafferty v Department of the Premier* [1998] 8 BALR 1077 (CCMA)
[29] *PSA obo Dalton and another v Department of Public Works* [1998] 9 BALR 1177 (CCMA)
[30] *PSA obo Badenhorst v Department of Justice* [1998] 10 BALR 1293 (CCMA)
[31] *Goliath v Medscheme (Pty) Ltd* (1996) 17 ILJ 760 (IC) 768
[32] *PAWC (Department of Health & Social Services) v Bikwani & others* (2002) 23 ILJ 761 (LC) 771

irrationally, capriciously or arbitrarily, was actuated by bias, malice or fraud, failed to apply its mind or discriminated.[33]

[70] As long as the decision of an employer during a promotion process was taken in good faith, and was not unreasonable,[34] irrational,[35] capricious,[36] or arbitrary,[37] an employment tribunal such as the ELRC, may not interfere with the decision of the employer, even if the tribunal does not agree with the decision.[38]

[71] 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

[33] *Ndlovu v CCMA & others* (2000) 21 ILJ 1653 (LC); Grogan *Dismissal, Discrimination and Unfair Labour Practices* (August 2005) Juta page 41; *SA Municipal Workers Union on behalf of Damon v Cape Metropolitan Council* (1999) 20 ILJ 714 (CCMA) 718; *Benjamin v University of Cape Town* [2003] 12 BLLR 1209 (LC) at 1223-1224; *Marra v Telkom SA LTD* (1999) 20 ILJ 1964 (CCMA) 1968 per Christie C; *Public Servants Association on behalf of Williams v Department of Correctional Services* (1999) 20 ILJ 1146 (CCMA); *Rafferty v Department of the Premier* [1998] 8 BALR 1017 (CCMA); *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC) para 23 and 24; *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC); *Goliath v Medscheme (Pty) Ltd* (1996) 17 ILJ 760 (IC) at 768; *Communication Workers Union obo Starck v Telkom* 2005 26 ILJ 353 (CCMA); *Mbatha v Durban Institute* 2005 26 ILJ 2455 (CCMA)

[34] To act unreasonable means to take a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 408

[35] To act rational means to act in a manner "based on reason or logic". Cf Oxford English Dictionary. With regard to rationality, Chaskalson P held, as follows, in *Pharmaceutical Manufacturers' Association of SA: In re ex parte President of the Republic of SA & others* 2000 (2) SA 674 (CC) at paras 85 and 90

> *"As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely"*

[36] Acting capriciously was defined *in Mail, Trotter & Co v Licensing Board, Estcourt* (1903) 24 NLR 447 at 452 as being the opposite of exercising it reasonably

[37] The word "arbitrary" was defined in *Beckingham v Boksburg Licensing Board* 1931 TPD 280 at 282 by Tindall J as meaning "capricious or proceeding merely from the will and not based on reason or principle".

[38] see authorities referred to in footnote 33 above

> 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)".[39]

APPLICANTS' CAUSES OF ACTION

[72] Applicants are not contending that they were the best of all the candidates who applied for the positions, or that they are better qualified than the successful candidates for the positions or that they should in fact have been appointed in the positions. Their causes of action are solely based on alleged procedural irregularities, which allegedly occurred during the process leading up to the School governing body's decision to recommend the successful candidates for appointment in post Numbers 2953, 2948 and 2952. I will deal with each of these attacks on the procedural fairness of the process under different subheadings.

THE ALLEGATION THAT THE INTERVIEW COMMITTEE WAS NOT PROPERLY CONSTITUTED

[73] It is contended by applicants that two members of the Shortlisting and Interview Committee, namely Reverend Ngcama and Mr. Myataza were not qualified to be members of the SGB, since they were not parents of learners at Kayamandi High School at the relevant times when selection processes were conducted.

[74] In terms of section 23 of the South African Schools Act No 84 of 1996, as well as section 2 of the Measures Relating to Governing Bodies for Public Schools[40], a school governing body of a public school must comprise of members of several categories, one of these categories being parents of learners at the school, who must be elected. In both these statutes, a parent is defined as follows:

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

[40] promulgated on 31 January 2003 in Notice No 370 in Provincial Gazette No 5946 by the MEC for Education in the Province of the Western Cape in terms of sections 11 and 28 of the South African Schools Act on 31 January 2003

> "parent" means -
>
> (a) the parent or guardian of a learner;
>
> (b) the person legally entitled to custody of a learner; or
>
> (c) the person who undertakes to fulfill the obligations of a person referred to in paragraphs (a) and (b) towards the learner's education at the school;

[75] It is in dispute whether Reverend Ngcama and Mr. Myataza are indeed parents, as defined hereinbefore. First respondent contends that the two gentlemen do in fact qualify as parents in terms of subsection (c) in that they each undertook to fulfill the obligations of the parents of a learner at the school. Applicants dispute this. It is common cause that these learners do not reside with Mr. Ngcama and Mr. Myataza and that they, according to their evidence, only pay for their school fees and school uniforms. Williams testified that in his opinion, the two gentlemen could only qualify as parents if they fulfill all the core functions of the biological parent including providing food, housing. I doubt whether this interpretation is correct. Subsection (c) specifically refers to the obligations of the parent "towards the learner's education at the school". This cannot possibly include housing and food because these things have nothing to do with the learner's "education at the school". It would however include things such as payment of school fees, buying school uniforms and books and ensuring that the learner does his or her homework.

[76] Unfortunately the section has been drafted in such a vague manner that it is not certain whether a person needs to fulfill all the duties towards the learner's education at the school, or only some of them, in order to qualify as a parent. The onus is on applicants to prove on a balance of probabilities that the evidence of Myataza and Ngcama is either false or alternatively that even if their evidence is correct, they do not qualify as parents in terms of subsection (c). If I accept the evidence of Myataza and Ngcama, I do not believe that I can find that they do not qualify as parents in terms of subsection (c). As already indicated the section is so poorly drafted that the legislature may well have intended that where only the most crucial aspects of a parent's duties towards the learner's education at the school, such as payment of school fees, are undertaken by a person, he may possibly well qualify as a parent for purposes of subsection (c). As to whether the evidence of Myataza and Ngcama that they did undertake to fulfill the obligations of the parents of

learners towards the learners' education at the school, can indeed be accepted, I have suspicions that their evidence may not be the truth.

[77] These however are merely suspicions and I may be wrong. On the available evidence, I am not prepared to make a finding that they did indeed lie in this regard. To my mind the probabilities as to whether they told the truth in this regard, are merely evenly balanced, which means that I cannot reject their versions in this regard as false for the onus is on applicants. Due to the approach I intend to adopt, it is however not important to finally determine during these proceedings whether Myataza and Ngcama did indeed tell the truth in this regard.

[78] For purposes of applicants' argument that Myataza and Ngcama did not qualify as "parents", I will assume, merely for purposes of this award that Myataza and Ngcama were in fact not "parents" as defined in section 23 of the South African Schools Act No 84 of 1996, as well as section 2 of the Measures Relating to Governing Bodies for Public Schools. I will now proceed to analyze what the consequences of this would be. Even if Myataza and Ngcama were not parents, as defined in the Act, when the school governing body performed their functions in terms of Resolution 5 of 1998 in shortlisting and interviewing candidates for appointment in post numbers 2948, 2952 and 2953, and recommending candidates to first respondent for appointment in the respective positions, this, for the following reasons does not affect the legality or fairness of the process.

[79] It is common cause that Myataza and Ngcama were indeed duly elected as members of the SGB and did not appoint themselves. The only question to be answered, is what the effect is, of the fact that they did not qualify to be elected as members of the SGB in that they were not parents. Where a SGB was not properly constituted, this may in certain circumstances have the effect that decisions which it took, are unlawful and invalid.[41] However, not every case 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 22 of the Western Cape Provincial School Education Act

[41] 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 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

[80] On 9 December 1996, the Western Cape Provincial Legislature enacted the Western Cape Provincial School Education Act.[42] 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)

[81] This section will only be applicable if one more than half of the members of the SGB members present at the Interview meeting (excluding Myataza and Ngcama) took the decision to recommend second, third and fourth respondents for appointment in the respective positions. The undisputed evidence of Ngcama is that all the members of the Interview committee, which consisted of 7 members, took that decision. This means that if one exclude the votes of Myataza and Ngcama, 5 of the seven members of the Interview committee, made the decision to recommend second, third and fourth respondents for appointment. This means that at least more than half of the members of the SGB members present at the Interview meeting (excluding Myataza and Ngcama) took the decision and as such that decision falls squarely within the ambit of section 22(4). The effect of section 22(4) is that the presence of Myataza and Ngcama on the interview committee, irrespective of the fact that they took part in the decision, is of no consequence and that the decision of the Interview committee was nevertheless valid.

The so-called de facto doctrine

[82] Apart from section 22(4), there is yet a further reason why the presence of Myataza and Ngcama on the Interview Committee, even if they did not qualify as parents, and even if their election as SGB members were therefore invalid, did not cause the decision of the Interview Committee to be invalid. A similar scenario was present in the recent case of

[42] No 9 of 1997

Mgoqi v City of Cape Town.[43] 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.

[83] The court commenced its analysis by referring to *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[44] 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[45], 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):
>
> > '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 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:

[43] 2006 (4) SA 355 (C); (2006) 27 ILJ 1422 (C)
[44] 2004 (6) SA 222 (SCA) para 26 at 242A
[45] 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

> '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 or has expired 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."

[84] 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[46] all acts performed by him whilst performing his duties in that capacity, are considered to be valid, even though his appointment is in law invalid due to some flaw in his appointment. The same rule applies where an official who was initially duly elected, simply remained in office after his 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 he is not validly

[46] as opposed to an usurper of power who had merely appointed himself

appointed and that it would lead to disastrous consequences if all acts performed by him, is considered to be invalid.

[85] If the acts performed by a SGB are invalid merely because an elected member of a SGB, did not have the necessary qualification when he was elected, 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 and participation of Myataza and Ngcama at the Interview meeting and on the SGB, did not cause the decision of the SGB to be invalid. In the circumstances, it cannot be said that the presence of Myataza and Ngcama constituted unfair conduct in relation to applicant. If Myataza and Ngcama are in actual fact not qualified to be members of the SGB, the correct remedy would be for parties who have an interest such as trade unions and first respondent to approach the High Court to obtain an order that these gentlemen must be removed from their offices as members of the SGB. Their membership of the SGB cannot be collaterally challenged in proceedings before this tribunal, which has no review powers to interfere with their appointment as members of the SGB.

Prejudice

[86] How the presence and participation of Myataza and Ngcama in the interviews and activities of the SGB, even if they did not qualify to be members of the SGB, could possibly have prejudiced applicants, is in any event beyond my understanding. There is no evidence and there was indeed no argument to the effect that either Myataza or Ngcama are incompetent or that they are biased against the applicants or biased in favour of second, third and fourth respondents. Their presence on the SGB could therefore not have prejudiced applicants. Without prejudice or potential prejudice, there cannot be any unfair conduct. In spite of proof of irregularities, courts and tribunals will never interfere or grant any relief if the complainant had not suffered any prejudice or

adverse effects.[47] For this reason as well, the presence and participation of Myataza and Ngcama is of no consequence.

THE ALLEGATION THAT THE SGB WAS NOT PROPERLY CONSTITUTED AT THE RATIFICATION MEETING

[87] It is common cause that Bani was not present when the full SGB convened in order to ratify the decision of the Interview committee relating to the recommendation that second, third and fourth respondents should be recommended for appointment in the respective posts. The remainder of the members were however present. Clause 3.9 of Schedule 1 to Resolution 5 of 1998 provides that at the conclusion of the interviews the interview committee must rank the candidates in order of preference, and then submit this to the school governing body for their recommendation to the relevant employing department. Clause 3.9 does not stipulate that each and every member of the SGB must be present at the ratification meeting. In terms of section 20(4) of the Measures Relating to Governing Bodies for Public Schools in the Western Cape, the majority of the enfranchised members of a SGB shall constitute a quorum for any meeting of the SGB. Since, according to exhibit A4E, there were indeed 12 of the 13 members of the SGB present at the ratification meeting, there was indeed a quorum as required. Hence the absence of Bani was of no consequence.

THE MINUTES

[88] 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

[47] *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

[89] Mr. Meyer also referred me to WCED circular 11/4/1/5, which contains a similar instruction. The circular does not take the position any further, as it merely confirms what Clause 5 stipulates. Furthermore, a School Governing Body is a separate, autonomous, legal entity, completely separate from the Provincial Department of Education.[48] There is no statutory provision of which I am aware, which authorizes the WCED to dictate to School governing bodies how they must perform their functions, bestowed on them by the legislature. The WCED is a creature of statute, whose powers are only those set out in legislation. As a creature of statute it is not capable of doing anything or performing any act without being expressly empowered thereto by legislation. The WCED circular is therefore an internal circular, which cannot bind School Governing Bodies. They can follow it as a guideline, but it has no status in law and is not binding on them.

[90] 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 vacancy.

[91] 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.[49] 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;

[48] See South African Schools Act No 84 of 1996
[49] *Laerskool Gaffie Maree v MEC for Education, Training, Arts & Culture: Northern Cape Province* [2002] 12 BLLR 1228 (NC) at 1231-1233

(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).”

[92] On behalf of applicants, Mr. Meyer submitted that the minutes kept by the SGB during the shortlistings, interviews and motivation which they submitted to first respondent for their recommendation that certain candidates must be appointed, were incomplete and contained mistakes. He submitted that in the circumstances clause 5 was not complied with. He further argued that as the minutes were not complete and accurate, 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 make an informed decision as to whether the recommended candidates should indeed be appointed or not.

Can incomplete minutes per se render the process unfair?

[93] 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.

[94] 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.[50] Since the early days of Roman Dutch Law it has been recognized that substance should not be sacrificed to form.[51] 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

[50]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

[51]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

technical procedural irregularity when a SGB is required to shortlist, interview and recommend an educator for appointment.

[95] The reason why I say that there will in most cases be some technical procedural irregularity is because School governing bodies 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.

[96] 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 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"[52]

[97] 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".[53]

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

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

[98] The High Court itself, when referring to paragraph 3 of Chapter B of PAM,[54] has held that strict compliance with PAM is not necessary, that form must not be elevated above substance and that:

> **"One does not go digging to find points to stymie the process of appointing suitable candidates to teaching positions"**[55] (emphasis added)

[99] 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 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.

[100] 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 she by reason of her experience and qualifications never stood any realistic chance of being appointed in the position when one compares her 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.

[101] 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.[56]

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

[55] *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 guidelines which are not mandatory.

Only if the incompleteness of minutes covers up bias, fraud, corruption, nepotism 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 relevant and material.

Did the alleged incompleteness of the minutes cover up fraud or other improper conduct?

[102] It is not sufficient for educators to simply rely on the absence of detailed minutes and then ask this tribunal to find that because of the absence of detailed minutes it is not possible to determine whether the SGB performed its functions properly, correctly and honestly, and therefore a finding must be made that they did not perform their functions properly and correctly. There is no allegation of dishonesty, nepotism, discrimination, bias, fraud, corruption, undue influence, irrational, capricious, or arbitrary conduct or discrimination. Neither is there any basis in the evidence to find that the SGB had acted improperly. I have already referred to the Latin maxim *omnia praesumuntur rite esse acta.*[57] 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.[58] An authority or official cannot therefore be put to proof of facts or conditions on which the validity of its decision must depend.[59] The onus rests on the person challenging the regularity and validity of the action, to produce evidence and proof such irregularity and invalidity.[60]

[103] The onus therefore rests on applicants to prove that at the time when first respondent made the appointments in respect of the positions which are being contested by applicants, there existed facts which, in terms of section 6(3)(b) precluded first respondent from making the appointments and that the SGB and first respondent acted irregularly.

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

[57] 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"

[58] 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

[59] Wade *supra* at 293

[60] Wade *supra* at 293

[104]I am satisfied that no improper or irregular conduct on the part of the SGB was proved by applicants. Neither can I on the available evidence find that the relative incompleteness of the minutes covered up any improper conduct on the part of the SGB or any other issues which would have in terms of section 6(3)(b) precluded first respondent from making the appointments.

Did the alleged incompleteness of the minutes make it impossible for first respondent to carry out its duties?

[105] 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.

[106] If incomplete minutes make 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.

[107] 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.[61] Even in the absence of minutes, the procedure can be transparent and fair if a departmental representative and/or 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 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.

[108] It was not contended on behalf of applicants that the trade unions were not invited to attend the interviews or that there was no departmental representative present at the Interview meeting. On a proper construction of clause 3.2.1 of Schedule 1 to Resolution 5 of 1998, it seems that there must always be a departmental representative on an Interview Committee and that the meeting cannot proceed in the absence a departmental representative. The mere presence of a 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 and the fact that trade unions could attend the meeting, is sufficient to find that the process was transparent. Accordingly the incompleteness of the minutes is of no consequence. For these reasons, I do not regard the alleged 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.

[109] 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 the circumstances, I am of the view that even if I can find that the minutes were incomplete, this *per se* could not possibly cause any prejudice to applicant. Where alleged irregular conduct has not caused any prejudice to a complainant, such conduct could not be perceived to constitute unfair conduct.[62]

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[61] *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.

[62] see footnote 47

Were the minutes indeed too incomplete and inaccurate?

[110] It is common cause that the minutes contained mistakes. Mr. Meyer could only point out a few mistakes. I have given careful consideration to all these mistakes, and am satisfied that they were of such a minor nature and so immaterial, that they are of no consequence and could not possibly have caused any prejudice to the applicants. I do not intend to deal with all of them here, but will mention three. One mistake related to a date in minutes of the SGB which was incorrect, whereas two further mistakes concern the score cards.

[111] On the score card kept during interviews, Mr. Myataza, the chairman of the SGB added the final score of Ms Matsolo, the third respondent, incorrectly in that he indicated on her score sheet that her final score was 30 whereas it is actually 31. He made a similar mistake in respect of first applicant, whose final score should actually be 28 whereas it was calculated to be 26. None of these mistakes are material. None of these mistakes could possibly prejudice any of the applicants. The incorrect date is really no more than a triviality. The incorrect scores only had the potential to affect first applicant, but did not because even on the correct final scores, third respondent still outscored first applicant by 3 points, as opposed to the 4 points with which she outscored him when the final scores were incorrectly calculated. It is therefore completely insignificant.

[112] Concerning the allegation that the minutes were too incomplete for first respondent to make an informed decision, one of applicants' own witnesses namely Bailey, gave evidence. Bailey, an employee of first respondent, is the person to whom the Head of Department has delegated his powers to appoint educators. Bailey was handed the personnel file of third respondent during his evidence in the arbitration hearing. On being asked how he satisfied himself before appointing third respondent that section 6(3)(b) was complied with, he testified that an official of first respondent did indeed apply his mind to all the issues as set out in section 6(3)(b) and has filed a verifications document to that effect in the departmental file, certifying that all these issues had been complied with. Bailey testified that he had studied this document prior to appointing third respondent in the position which is being contested.

[113] Although Bailey was not handed the personnel files of the second and fourth respondent whilst he testified, I gained the impression from his evidence that this procedure is followed in all appointments and that he satisfies himself in this regard by studying the internal verification document compiled by a departmental official who has satisfied himself that all the aspects as set out in section 6(3)(b) has been complied with. I see nothing wrong with this approach, because as Bailey put it, if he was expected to personally investigate all processes by SGB's to ensure that the statutory requirements have been met, he will take years before he can make appointments due to the workload. It is therefore perfectly in order for him to entrust this task of checking that statutory requirement have been met, to another departmental official as he had done in this case.

[114] It is common cause that the minutes could have been more complete. Completeness is however a relative concept. There are various degrees of completeness. 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 and that it cannot be said that the minutes were too incomplete to serve the purpose it was intended for:

114.1 The names of the members of the SGB who were present at meetings are reflected in the minutes;

114.2 The method used by the SGB in order to identify the best candidates, was noted. That is that the point system would be used in order to shortlist candidates, that the point system would also be used during both shortlisting as well as interviews and that the candidate who scored highest in respect of each post, should be nominated;

114.3 The names of the candidates who were shortlisted were reflected in the minutes and the successful candidates who were nominated for each post are identified and the ranking order of the first few candidates in respect of each post for purposes of nomination, is reflected in the minutes, containing the full names of all these candidates and the points allocated to each candidate;

114.4 The questions which were asked to the candidates, are reflected in the minutes and the points allocated in respect of different candidates are reflected;

114.5 The departmental representative completed and submitted verification documents which normally contains minute detail with regard to each and every step of the process which was followed as from advertising, right through to shortlisting, setting of the criteria, interviewing and nomination.

[115]During cross-examination, Mr. Meyer criticized the incompleteness of the Departmental Verification Document.[63] Only two pages of the Departmental Verification document[64] were handed in as an exhibit[65]. The answers to only three questions on these pages, could be criticized.[66] One of these issues relate to the fact that the departmental representative did not indicate the method of evaluation which was decided on. This is of no consequence because the minutes clearly reflect that the point system was used and that the candidate who scored the highest would be nominated. The answer to the question on the verification document which asks whether a motivation accompanies each candidate's ranking, was also left blank. Once again I am satisfied that this is of no consequence. Exhibit A4A contains a lists of the ranking order of the first 5 candidates in respect of each post together with the points allocated to each candidate. From this document, it is evident that the motivation for the ranking of candidates in a particular order, was because of the points they scored.

[63] The departmental verification document has no status in law. It is not prescribed in terms of any legislation, regulation or collective agreement. It is a purely an internal departmental checklist, developed by the WCED in order to facilitate the report which the departmental representative must pass on to first respondent. The fact that some questions on this checklist were therefore not answered, answered incorrectly or answered in a certain manner, can therefore not influence the fairness and transparency of the process. One needs to determine whether the process viewed holistically, is such that it can be said that it seems fair and transparent.
[64] which normally consists of 5 pages
[65] Exhibit A2I-J
[66] it is to be noted that there are approximately 41 questions on this form which the Departmental Representative needs to answer.

[116] I do not believe that there is any merit in Mr. Meyer's argument that the SGB did not motivate its recommendation in respect of the successful candidates. Their motivation is simple and that is that the candidates which they recommended outscored the other candidates. Where a SGB makes a recommendation based on scores, I can see no reason why it is necessary for them to give any further motivation for their choice apart from saying that the candidates outscored the other candidates.

[117] In fact, where an SGB has used a point system and has kept score cards and has submitted those score cards to first respondent together with their recommendation, as the SGB had done in this case, and where it appears from those score cards that the candidate who they ranked as their first choice outscored other candidates, I do not believe that it is even necessary for the SGB to say anything further. Anybody who can read and who has some intelligence will be able to see for himself, from reading the score cards, that the candidate was recommended because he outscored other candidates.

[118] What more applicants expect the minutes to have recorded to justify the ranking of candidates, and why more is required, is beyond my understanding. Bearing in mind that a 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.

[119] 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.

[120] School Governing Bodies 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 reality and realize that arbitrators are not there to second-guess the decisions of SGB's on the basis of technicalities.

[121] Where dissatisfied educators, who were unsuccessful in their application for promotion are unable to prove that they were the best of all the candidates, including the successful candidate, who applied for the position, it does not assist them to clutch at straws by nitpicking and digging for technicalities and rely on that as a ground to have the whole selection process set aside and repeated. It is not a difficult concept to understand that where a person has been selected through a democratic process, that decision should be respected, irrespective of whether other parties agree with it or like it. The SGB was of the opinion that the three applicants were simply not the best candidates. Not a shred of evidence has been presented to justify a finding that they were wrong. One cannot on the basis of technicalities set aside a decision which was not wrong, unless, proper grounds for review[67] are present.

[122] For these reasons, I do not regard the relative incompleteness of minutes to be material. That they were incomplete in the sense that not each and every word spoken was written down is true, but they were certainly not too incomplete to serve the purpose they were intended to serve. 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. In a perfect world it would be the ideal that every word spoken at a school governing body meeting is recorded by the SGB. However, we are not living in a perfect world and it would be unrealistic to expect processes conducted by laymen such as members of School governing bodies to be perfect in all respects. If this is expected, then the whole notion of allowing ordinary parents and educators who offer their spare time for free for the benefit of the community by serving as members of a SGB to select educators for appointment, is extremely unrealistic.

[67] See footnote 33

[123] I am satisfied that there is no merit in the argument that the minutes were too incomplete for first respondent to have made an informed decision.

THE ALLEGATION THAT IRRELEVANT QUESTIONS WERE ASKED AND THAT CORE CRITERIA WERE NOT TESTED DURING SHORTLISTING

[124] The applicants feel aggrieved that certain aspects of the advertised criteria such as extra mural activities and extra subjects offered, were not tested through questions during the interviews and they feel that irrelevant questions were asked.

Is it necessary for all the questions to directly relate to the advertised criteria for the posts?

[125] Clause 3.7 of Schedule A to ELRC Resolution 5 of 1998 provides that the interview committee shall conduct interviews according to agreed upon guidelines, which guidelines must be jointly agreed upon in the provincial chambers of the ELRC. In the Western Cape Province, these guidelines, are contained in Annexure B to ELRC Resolution 1 of 2002, adopted in the Western Cape Provincial Chamber of the ELRC on 22 April 2002. Clause B(i) of Annexure B of the this Provincial Resolution reads as follows:

> Finalise and adopt the questions to be asked. (Please note that the questions should be in accordance with the criteria/requirements for the post)

[126] These guidelines are exactly what it purport to be – merely guidelines, and not rigid rules. If the parties to the collective agreements intended these guidelines to be rigid rules, they would not have called them "guidelines".[68]

[127] Non-compliance with the guidelines contained in the provincial resolution, will not necessarily mean that that the SGB has therefore acted unfairly. Rigid guidelines negate the objectives of the LRA[69].

[128] Although these guidelines should be taken into account by a SGB and although it is desirable that these guidelines should be substantially complied with as far as is

[68] Compare *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 guidelines which are not mandatory

[69] see Du Toit et al *Labour Law through the Cases* Sch8-2

practically possible, they need not be slavishly followed.[70] A similar finding was made with regard to the Code of Good Practice on Dismissal contained in Schedule 8 of the LRA, when it was held that the Code is not law in itself but merely guidelines, that these guidelines do not give rise to rights and can therefore not give rise to an independent action,[71] and that they should not be slavishly followed but merely taken into account.[72]

[129] As long as a SGB acts rationally and reasonably during interviews and as long as the questions which it asks are rational and reasonable, an arbitrator may not interfere with its decision, merely because some of the questions may not directly relate to the requirements for the post. By this I am not saying that when a SGB interview educators, they may ask questions which have nothing to do with education or which are not even remotely relevant to the vacant post. That would be irrational. As long however as the questions are relevant to some extent, and not irrational, nobody has the right to dictate to a SGB that all the questions must necessarily directly relate to the core criteria as advertised.

Were the advertised criteria reflected in the questions?

[130] Panellists should not do all the talking during a job interview. Instead the job applicant should do most of the talking and sell himself to the panel, by conveying relevant information and impressing the panel whenever he has the opportunity to do so. If other candidates are better at this than a particular job applicant, this will be to their advantage. A job interview is not an aptitude test. It is impossible to test whether a job applicant actually does have the skills which are required for the job during an interview which lasts 20 minutes.

[131] Whether a job applicant actually does have the skills which are required for the job is to a great extent determined by perusing a candidate's curriculum vitae, qualifications, and references. The purpose of an interview is mostly to see which candidate makes the best

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[70] Compare *Observatory Girls Primary School & another v Head of Dept: Dept of Education, Province of Gauteng,* Case No 02 / 15349, [2006] JOL 17802 (W) where Horwitz AJ held that strict compliance with paragraph 3 of Chapter B of PAM(which is a replica of Resolution 5 of 1998) is not necessary

[71] *Maropane v Gilbeys Distillers and Vintners (Pty) Ltd & another* [1997] 10 BLLR 1320 (LC) at 1325E; *BIAWU v Mutual & Federal Insurance Co Ltd* [2002] 7 BLLR 609 (LC)

[72] *Komane v Fedsure* [1998] 2 BLLR 215 (CCMA).

impression.[73] To think that an interview can achieve much more than this, especially testing the aptitude and skills of a candidate, is really naïve.

[132] In respect of all the posts, question 9, which reads as follows, was so-open-ended that it gives the interviewee the perfect opportunity to sell himself to the panel by emphasising all his skills, which are related to the advertised criteria:

> "*Why do you think we should consider you above other candidates that have applied?"*

[133] By having asked this question, it is impossible for any candidate to argue that he or she was not given an opportunity to discuss his or her qualities which are related to the advertised criteria. Each and every skill referred to in the advertisement could have been addressed in the answer to this question. In the light of this question the allegation of applicants that they were not given the opportunity to impress the panel relating to their extra-mural activities and other subjects offered, is simply utter non-sense.

[134] There is a further reason why there is no merit in applicants' claim that they were prejudiced because they were not asked questions relating to extra-mural activities and other subjects offered during the interview. This relates to the fact that the Interview committee did take into account the curriculum vitae of the candidates during interviews. The uncontested evidence of Ngcama is that the committee took into account the information contained in the curriculum vitae when they made their decision after the interviews as to who should be ranked first.

[135] One must assume that the members of the SGB can all read and did read the curriculum vitae of all the job applicants. The applicants were supposed to put all the relevant information in their cv's. They should have ensured that their cv's were drafted in such a manner that they covered the advertised criteria in detail in their cv's. Therefore, the relevant information relating to for instance their extra mural activities and other subjects offered, should have been contained in their cv's and the members of the interview committee would indeed have had that information before them prior to ranking the candidates. Merely asking candidates to repeat information which is already contained in

[73] Subjective considerations such as performance at an interview and life skills, may indeed be taken into account by the employer during a promotion process and is indeed a very important aspect of the interview process - *PSA obo Dalton and another v Department of Public Works* [1998] 9 BALR 1177 (CCMA); *PSA obo Badenhorst v Department of Justice* [1998] 10 BALR 1293 (CCMA)

the curriculum vitae serves no purpose and merely wastes everybody's time. Where a SGB takes into account a candidate's curriculum vitae during an interviewing process, it would be very difficult for a job applicant to argue that he was prejudiced through unfair conduct, merely because all the advertised criteria were not covered in questions which were asked during interviews. It is the duty of a job applicant to ensure that all the advertised criteria are covered in his curriculum vitae. As long as the candidate's curriculum vitae is taken into account during the interview process before a particular candidate is selected, it makes no difference whether not one single question was asked which related to the advertised criteria, because the criteria will necessarily be taken into account as it is contained in the curriculum vitae.

[136] For the record, I may just mention that in respect of all the posts being contested, I have compared the 10 questions which were asked to the advertised criteria. The questions are certainly not irrelevant or irrational and definitely relate to the advertised criteria, except to the extent that no direct questions were asked regarding extra subjects offered and in the case of posts numbers 2952 and 2953, no direct question were asked regarding extra mural activities. Mr Meyer's argument that certain questions should not have been asked because it did not directly relate to the core criteria as advertised, has no merit. There is nothing irrational about asking questions about criteria, which are not core criteria. As long as the questions are relevant to some degree, they may be asked.

[137] It may be that I might have asked different questions had I been on the interviewing panel. Applicants also seem to have their own views as to how questions should have been framed and I will accept that had they been on the interviewing committee different questions would in all probability have been asked. Whether I, applicants, Mr Meyer or Mr Williams would have asked different and even "better" questions, is however not the test. It is not for me, the applicants, applicants' trade union or even first respondent to dictate to a SGB what questions they should ask during the interview process. The Constitutional Court has confirmed that tribunals and Courts must be slow to interfere with rational decisions taken in good faith by bodies whose responsibility it is to deal with such matters.[74] As long as the decision of an employer[75] during a promotion process was taken

[74] *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC)
[75] in this case the SGB

in good faith, and was not unreasonable,[76] irrational,[77] capricious,[78] or arbitrary,[79] an employment tribunal such as the ELRC, may not interfere with the decision of the employer, even if the tribunal does not agree with the decision.[80]

[138] When assessing the reasonableness or rationality of a decision which was taken by a decision maker, such as a SGB, it should be borne in mind that rationality and reasonableness are very wide concepts. There is a wide band of reasonableness and rationality, within which there is ample room for radical differences of opinion amongst reasonable people and where different reasonable people, based on the same facts, may come to very different reasonable and rational conclusions in which case neither of them can be said to have acted unreasonably or irrationally.

[139] There may be many different logical and rational methods and processes of reasoning in reaching a decision, and the task of a court or tribunal is merely to determine whether the decision was within this wide band or range of rational and reasonable decisions:[81]

> The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred.[82]

[140] For these reasons it is irrelevant whether applicants or I, can suggest different, "better" or more relevant questions, which the SGB could or should have asked during interviews. The mere fact that we may believe that our questions might have been more relevant or correct, does not mean that our approach would have been more rational or reasonable than that followed by the SGB. There is nothing in the approach of the SGB which

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[76] To act unreasonable means to take a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 408

[77] To act rational means to act in a manner "based on reason or logic" – see Oxford English Dictionary

[78] Acting capriciously was defined *in Mail, Trotter & Co v Licensing Board, Estcourt* (1903) 24 NLR 447 at 452 as being the opposite of exercising it reasonably

[79] The word "arbitrary" was defined in *Beckingham v Boksburg Licensing Board* 1931 TPD 280 at 282 by Tindall J as meaning "capricious or proceeding merely from the will and not based on reason or principle".

[80] see authorities referred to in footnote 33 above

[81] Wade *Administrative Law* (9th ed) 364-367

[82] per Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC at 1014 at 1064

suggests that their actions were defiant of logic or not based on reason. The SGB acted reasonably, rationally and logically in asking the questions they did. Based on the evidence, I cannot find anything irrational, unreasonable, capricious or arbitrary in the type of questions which the SGB asked during interviews. I am also satisfied that applicants' chances of being properly considered on their merits, were not impaired through the questions which were asked. Accordingly the argument that the SGB acted unfairly through the questions which were asked, is without merit and rejected.

THE ALLEGATION REGARDING THIRD RESPONDENT'S SACE QUALIFICATIONS

[141] It is alleged that third respondent was not in possession of a SACE certificate at the time when the SGB considered her for appointment or at the time when first respondent appointed her in post number 2953. It is also alleged that when she applied for the post, she submitted no documentary proof that she was registered with SACE or had applied for registration with SACE.

[142] Section 21 of the South African Council of Educators Act No 31 of 2000,[83] provides as follows:

> (1) A person who qualifies for registration in terms of this Act, must register with the Council prior to being appointed as an educator.
>
> (2) No person may be employed as an educator by any employer unless the person is registered with the council.[84]

[143] The Preface to the Vacancy List, which contained the advertisement for the posts, like all vacancy lists of the WCED, contained the following stipulations in paragraph 3.2, regarding SACE registration:

> *3.2 Registration with the SACE is compulsory and a certified copy of the applicant's SACE registration certificate <u>must</u> accompany his or her application.*
>
> *3.2.1 Where the applicant is not in possession of a certified copy of a SACE certificate, one of the following will be accepted:*

[83] hereinafter also referred to as SACEA
[84] The word "Council" refers to the South African Council of Educators.

> *(a) Acknowledgement of receipt from SACE to indicate that the applicant applied fro his or her SACE certificate prior to the closing date for applications*
> *(b) Any other proof obtained from SACE that the applicant is registered*
> *(c) The inclusion of a certified copy of the applicant's latest salary slip on which is indicated a salary deduction for SACE registration and the applicant's SACE registration number.*
>
> *3.2.2 Failure to comply with the above requirements will result in the application not being considered.*

[144] It is common cause that at the time when third respondent applied for appointment in post number 2953, she was an educator in Lesotho and that educators in Lesotho are not registered with SACE. On the first day of the arbitration hearing when third respondent was present, she handed in exhibit "J", and said that this was the document which she submitted with her application as proof that she had applied for registration with SACE.

[145] Exhibit "J" is merely a receipt issued by the South African Post Office to the effect that third applicant has send a document together with a postal order for R60,00 to SACE. There can be no doubt that exhibit "J" does not comply with paragraph 3.2 of the Preface to the Vacancy List. It is merely a document issued by the post office. It must therefore be accepted that at the time when third respondent applied for the position and at the time when she was recommended for appointment, she did not submit any of the documents referred to in paragraph 3.2.1 of the Preface to the Vacancy List. The question to be answered here, is what the effect of this would be on the SGB's decision to consider third respondent for appointment, recommend her for appointment and first respondent's decision to actually appoint third respondent based on the recommendation of the SGB.

[146] Mr. Meyer on behalf of applicants, submitted that paragraph 3.2 of the Preface, is mandatory and must be complied with, that it was the duty of the SGB to have ensured that paragraph 3.2 had been complied with, that third respondent's application could not even have be considered and that non-compliance with paragraph 3.2 resulted in the recommendation of the SGB being invalid. Bailey, who made the appointment of third respondent on behalf of the Head of Department, was of the view that it is ultimately the duty of the WCED to ensure that paragraph 3.2 of the Preface and section 21(2) of the SACEA have been complied with and that this could be done after the recommendation by the SGB has been received but prior to the successful candidate being appointed.

[147] It is important to realise that paragraph 3.2 of the Preface to the Vacancy list is not law and has no status in law. Nowhere in any statute, regulation, or collective agreement, does it stipulate that the application of an educator may not be considered for appointment, unless she is registered with SACE or unless she submits any of the documents referred to in paragraph 3.2. Section 21(2) of the South African Council of Educators Act No 31 of 2000, merely stipulates that an educator may not be employed unless she is registered with SACE. It does not compel or authorise the employer or a SGB to refuse to consider the application of an educator, merely because she is not registered with SACE.

[148] I am therefore satisfied that a SGB is quite entitled to consider the application of an educator, even though no proof has been submitted that the educator is registered with SACE. The SGB may also recommend such an educator for appointment. It is ultimately the duty of the WCED as employer, to ensure that the educator is registered with SACE, prior to making the appointment.

[149] On the other hand a SGB will be fully entitled to refuse to shortlist and interview a candidate who did not submit proof in terms paragraph 3.2, because the SGB could argue that a candidate who does not even ensure that such proof is submitted, does not make a good impression. I can see no reason why a SGB would however be compelled to do so. The choice is that of the SGB. The only requirement is that the SGB must be consistent.

[150] As long as a SGB is consistent in this regard, they cannot be faulted for either requiring compliance with paragraph 3.2 or not requiring compliance with paragraph 3.2. What I mean with consistency is that the SGB must not discriminate between candidates on account of documents submitted or not submitted. Should the SGB for example decide to consider the application of a particular candidate, who did not submit proof in terms of section 3.2, it cannot refuse to consider the applications of other candidates who also did not submit such documents. The same would apply to certified copies of qualifications. These are all administrative formalities, which are ultimately the duty of the WCED as employer to check and verify before an appointment is made.

[151] The members of School governing bodies offer their spare time and services for free for the benefit of the community. They are not employment agencies and cannot be expected to verify qualifications and registration with SACE. If a SGB is prepared to check up on

these things, and incorporate it into the shortlisting criteria, they are welcome to do so, but they are not compelled to do so. Provided that they act consistently and rationally, they are free to choose which approach they prefer to adopt.

[152] Not much should be made of the fact that it is stated in paragraph 3.2 of the preface that applications which do not contain the documents required in terms of subparagraph 3.2.1 "will not be considered". I suppose that this was inserted by the WCED in order to scare educators into submitting the relevant documents with their applications in order to reduce unnecessary work for the WCED when appointments need to be made, so that officials such as Bailey who make appointments need not go looking for documents each and every time before he can make an appointment.

[153] There is however a further even more compelling consideration, which leads me to the conclusion that non-compliance with paragraph 3.2. in this particular case, was of no consequence. That relates to the fact that it is clear beyond any doubt that paragraph 3.2. was inserted in the preface by the WCED for the sole benefit of the WCED. It is trite law that where a condition or requirement operates solely for the benefit of one specific party, that party may waive compliance with that condition, stipulation or requirement.[85] Hence the WCED is fully entitled, at any time, with respect to any vacancy, to waive compliance with paragraph 3.2. of the preface.[86] It is common cause that all applications are first send to the WCED for sifting, which then sends it on to the SGB for consideration. The only reasonable inference which one can draw from the fact that the WCED has sent an application to the SGB, which did not comply with paragraph 3.2 of the preface, is that the WCED has waived compliance with the requirements set out in paragraph 3.2. of the preface.

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[85] *Margo v Seegers* 1980 3 SA 708 (W); *Meyer v Barnardo* 1984 2 SA 580 (N); *Phillips v Townsend* 1983 3 SA 403 (C); Christie *The Law of contracts in South Africa* (5th ed) 440

[86] I want to make it very clear that the conditions and requirements which I am referring to here which the WCED can waive, are the conditions as stipulated in paragraph 3.2 of the Preface to the Vacancy List namely that certain documentary proof concerning SACE must be submitted by candidates with their applications and that applications without this proof will not be considered. I am not referring here to the requirement contained in section 21 of SACEA itself which stipulates that an educator cannot be appointed unless she is registered with SACE. Section 21 of SACEA is a statutory requirement inserted for the benefit or the general public and learners, which the WCED cannot waive.

[154] Where the WCED itself has waived compliance with the requirements contained in paragraph 3.2 of the Preface, it cannot possibly be argued that it is then the duty of the SGB to ignore the application because of paragraph 3.2 of the Preface. Paragraph 3.2 has not been drafted and inserted in the Preface by the SGB but by the WCED. The law does not permit either the National Department of Education or the WCED to dictate to a SGB what criteria it should apply when considering and rejecting applications. Hence, the final choice remains with the SGB as to whether it will require compliance with paragraph 3.2 or whether it will leave it up to the WCED to ensure that section 21 of the SACEA has been complied with before making an appointment. The only reasonable inference which one can draw from the fact that first respondent has sent the application of third respondent to the SGB, even though she did not submit the required proof, is that first respondent has waived compliance with paragraph 3.2. of the Preface. Since there is no evidence before me that the WCED acted inconsistently when it did so, or that the SGB acted inconsistently in any manner when it decided to consider the application of third respondent, I cannot find any fault with the WCED's decision to send third respondent's application to the SGB or with the decision of the SGB to consider third respondent's application and recommend her for appointment.

[155] As to whether third respondent was registered with SACE when she was appointed, I have conflicting versions before me. One of applicants' own witnesses, namely Bailey, testified that before he appointed third respondent, he contacted SACE and was advised that third respondent was indeed registered with SACE. When Mr. Meyer confronted Bailey during his evidence, with a letter from SACE dated 21 June 2006, handed in as exhibit C, stating that third applicant is not registered with SACE, Bailey said that he cannot accept the correctness of this letter, because it conflicts with the information he obtained from SACE. There is no possible way in which I can find which of the two versions, namely the version given to Bailey by SACE or the version set out by SACE in exhibit C, is more correct than the other. Inasmuch as the representative from SACE who gave Bailey information could have been mistaken, the representative form SACE who drafted exhibit C could have made a mistake.

[156] None of these versions were given under oath. Neither the person who telephonically gave the information to Bailey, nor the person who drafted and signed exhibit C was cross-examined before me. The mere fact that a statement is contained in a document, does not mean, that it therefore carries more weight than any other hearsay evidence.

Hearsay evidence remains hearsay evidence, irrespective of whether it is contained in a document or whether it is contained in a verbal statement. The weight in both cases remains the same, and the reliability or unreliability also remains the same in both cases. Moreover, where the other party to a dispute does not admit the contents of a document, the contents of a document cannot even be proved in a court of law or tribunal, unless the authenticity of the document is proved by leading evidence of the maker, signatory or a person who witnessed the signing or who knows and can identify the signature of the author.[87] No such evidence was presented in this case with reference to exhibit C. However, even if one can get past the authenticity of exhibit C, the contents of exhibit C, merely remains hearsay evidence, which is worth as little or as much as the statement made to Bailey by an official of SACE.

[157] There are no probabilities which can assist me in deciding which of these versions are correct. Having presented two conflicting versions, applicants on who the onus rests, cannot expect me to find that the version of Bailey is necessarily wrong and the version set out in exhibit C is necessarily correct. At the most I can say that the probabilities are evenly balanced. Our law is very clear in this regard. Where there are two mutually destructive versions, as we have in this case, and where the probabilities are evenly balanced, a court or tribunal may only find for the party upon whom the onus rests, if it is satisfied on a balance of probabilities that the story of the party upon whom the onus rests is true and the other is false.[88] I cannot make such a finding in this case.

[158] Furthermore, the Latin maxim *omnia praesumuntur rite esse acta,* which principle has been explained hereinbefore, is relevant here once again. Having regard to this maxim, I must presume until the contrary is proved by applicants, that first respondent has complied with all formal requirements before appointing third respondent, and that all statutory requirements (including registration with SACE) has been complied with prior to third respondent having been appointed. Since the onus is on applicants to rebut this presumption, they should have presented evidence which would have enabled me to find that it is more probable than not, that third respondent was not registered with SACE when the appointment was made. Instead of doing this, applicants have placed two conflicting versions before me, namely the evidence of Bailey and Exhibit C. I cannot on the basis of

[87] *Policansky Bros v L and H Policansky* 1935 AD 89; *Knouwds v Administrateur, Kaap* 1981 (1) SA 544 (C)
[88] See *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 189

this evidence find that applicants have proved that third respondent did not qualify for appointment in terms of section 21 of the South African Council of Educators Act No 31 of 2000. Making such a finding, will in the light of the conflicting versions presented to me, be completely irrational. There is no basis for making such a finding.

[159] Should it however be established through credible proof that third respondent is currently still not registered with SACE or was not registered when she was appointed, first respondent will have the right to revoke her appointment. Should it refuse to do so, first applicant may attempt to obtain an interdict in the High Court to compel first respondent to revoke third respondent's appointment. Due to the lack of evidence before me, my hands are tied and I am unable to grant any relief in this regard. Furthermore, there is the aspect of jurisdiction which I have already referred to. The dispute which applicants have referred, is not a dispute relating to promotion, with the result that I can only grant relief based on substantial non-compliance with Resolution 5 of 1998. Not being registered with SACE, does not fall within the scope of Resolution 5 of 1998. Hence, even if applicants could prove to me that third respondent was not registered with SACE when she was appointed,[89] I would for this reason also, not have been able to grant any relief.

[160] Accordingly even if first applicant can succeed in obtaining sufficient proof that third respondent is still or was not registered with SACE when she was appointed, this forum should not be approached for relief because it does not have jurisdiction to deal with this issue. The correct forum to approach for relief, is the High Court.

CONCLUSION

[161] I have no doubt that applicants are all good educators, who are passionate about their profession. That is commendable. However, the statutory powers to interview candidates and select the best candidate, were entrusted by the legislature to school governing bodies alone. As long as these powers are exercised in good faith in a rational and reasonable manner, it is not permissible or proper for the ELRC and even Courts of Law, to dictate to a SGB how these powers should be exercised, because doing so would be to infringe on the democratic rights of parents who have elected those members to perform the functions which the legislature has entrusted to school governing bodies. A process of selecting the best candidate for a job cannot be regarded as so fragile, that even the slightest criticism which can be levelled against the process, can render it unfair. I am

[89] which they did not prove

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 applicants' claims, their claims must be dismissed.

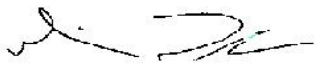
AWARD

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 Kayamandi High School in Stellenbosch in shortlisting candidates, interviewing candidates and making a recommendation to first respondent as regards the filling of the posts numbers 2948, 2952 and 2953, advertised in Vacancy List No 2 of 2005.
2. The recommendations by the School governing body to appoint second respondent in post number 2948, third respondent in post number 2953 and fourth respondent in post number 2952 and the subsequent appointments made by first respondent in respect of these posts, are declared to be fair and are confirmed.[90]

3. Applicants' claims are dismissed.

4. No order as to costs is made.



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

[90] This order does not affect the right of first respondent to revoke third respondent's appointment should it be proved that she is indeed not registered with SACE or was not registered when she was appointed. It also does not affect the right of SADTU or first applicant to approach the High Court for relief in this regard.