

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 4218/2010

In the matter between:-

<u>DIPHETOHO SCHOOL GOVERNING BODY</u>	First Applicant
<u>LOREME PETRUS MASENGA</u>	Second Applicant
<u>THULOANA MAJOE</u>	Third Applicant

and

<u>THE DEPARTMENT OF EDUCATION</u>	First Respondent
<u>THE MEC: DEPARTMENT OF EDUCATION</u>	Second Respondent
<u>HEAD OF DEPARTMENT</u>	Third Respondent
<u>LEJWELEPUTSOA DISTRICT OFFICE</u>	Fourth Respondent
<u>LESLEY GAPE LEGOPO</u>	Fifth Respondent

HEARD ON: 8 DECEMBER 2011

JUDGMENT BY: VAN DER MERWE, J

DELIVERED ON: 12 JANUARY 2012

[1] This is an application to review and set aside the decisions of the third respondent to:

- (i) appoint the fifth respondent as the principal of the Diphethoho Secondary School (the school);

- (ii) withdraw the functions of the governing body of the school.

[2] The school is a public school in terms of the South African Schools Act 84 of 1996. The first applicant is the governing body of the school and the second applicant is the chairperson thereof. The third applicant (Mr. Majoe) is an educator at the school who apparently during February 2010 was appointed as acting principal of the school, pending the appointment of a permanent principal. At the hearing of the application the applicants abandoned the claim that the head of the department be directed to appoint Mr. Majoe as acting principal.

[3] The first respondent is the Department of Education of the Free State (the department). The second respondent (the MEC) is the member of the executive council of the Free State responsible for the department. The third respondent is the head of the department. The fourth respondent is cited as the relevant district office of the department and the fifth respondent (Mr. Legopo) is presently the principal of the school.

- [4] The school had been without a permanent principal since 2006. After futile attempts to fill this post, it was re-advertised in terms of a notice dated 22 September 2009. The closing date for applications for the post was 23 October 2009 and the date of commencement of duty was 1 January 2010 or as soon as possible thereafter.
- [5] In terms of standard procedure the governing body established a panel for the purpose of shortlisting and interviewing of candidates in order to make a recommendation to the head of the department. A meeting of this panel took place on 1 December 2009. In terms of standard procedure this meeting was attended, as observers, by representatives of two recognised trade unions as well as an official of the department. The panel firstly set criteria for the shortlisting of candidates. The criteria so set were that only a person who had acted as the principal of the school and was from Bothaville would be shortlisted. This resulted therein that only Mr. Majoe met the criteria. These criteria were strenuously objected to by the representatives of the trade unions and cautioned against by the official of

the department. As a result, in the words of the chairperson of the governing body,

“... the processes was stopped and could not be proceeded with”.

- [6] On 19 February 2010 the head of the department directed a letter to the governing body. In this letter it was emphasised that it was critical to fill the post of principal of the school and that it was the duty of the governing body to promote the best interest of the school and to strive to ensure its development through the provision of quality education for all learners at the school. The letter continued to state that despite a request by an official of the department representing the head of the department to the governing body to make a recommendation to the head of the department in respect of the filling of the post of the principal of the school, made at a meeting held on 23 November 2009 at 08h00, the governing body failed to make such recommendation. The head of the department accordingly informed the governing body that he will proceed to make the appointment without the recommendation of the governing

body, in terms of section 6(3)(l) of the Employment of Educators Act 76 of 1998.

[7] The head of the department proceeded to appoint an independent panel to consider the candidates that applied for the post of principal of the school in response to the notice of 22 September 2009, to shortlist suitable candidates, to interview the shortlisted candidates and to make a recommendation to the head of the department. Six candidates were shortlisted. Mr. Majoe failed to make the shortlist. On 23 June 2010 interviews were conducted with the shortlisted candidates. The panel unanimously recommended Mr. Legopo for appointment as principal of the school and this recommendation was accepted by the head of the department. On 25 July 2010 Mr. Legopo assumed his duties as such.

[8] As a result of various complaints and reports indicating poor governance of the school, the head of the department (and the MEC) personally became involved in finding a solution. This eventually led to meetings held with the governing body and other stakeholders of the school on 11 May 2010 and 3

June 2010. However, by letter dated 21 July 2010 the head of the department informed the governing body as follows:

“Kindly be informed that owing to a litany of unsatisfactory conducts to discharge your fiduciary duties in respect of the above school and submissions received, I regrettably have to invoke the provisions of section 22 of the South African Schools Act (Act No. 84 of 1996) in withdrawing your school governing functions.

This has been necessitated by, including but not limited to:

1. your failure to adopt a constitution that was due on 31 April 2009 [section 20(1)(b)].
2. failure to develop a mission statement for the school [section 5(5)].
3. failure to adopt a code of conduct for learners at the school [section 8(1)].
4. poor administration and management of the school’s finances.
5. division amongst your ranks.
6. failure to make recommendations for the appointment of a permanent principal within given period [section 20(1)(l)].

Please be advised that the above withdrawal applies with **immediate effect.**”

An appeal to the MEC in terms of section 22(5) of the Schools Act against this decision, was dismissed on 30 July 2010.

WITHDRAWAL OF FUNCTIONS

[9] In terms of section 15 of the Schools Act every public school is a juristic person with legal capacity to perform its functions in terms of the Act. Section 16 provides that the governance of every public school is vested in its governing body and that the governing body may perform only such functions and obligations and exercise only such rights as prescribed by the Schools Act. In this manner governing bodies of public schools became important components of our participatory democracy.

[10] Section 20 deals with the functions of governing bodies. Section 20(1) provides as follows:

“(1) Subject to this Act, the governing body of a public school
must-

- (a) promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at the school;
- (b) adopt a constitution;
- (c) develop the mission statement of the school;
- (d) adopt a code of conduct for learners at the school;
- (e) support the principal, educators and other staff of the school in the performance of their professional functions;
- (eA) adhere to any actions taken by the Head of Department in terms of [section 16](#) of the Employment of Educators Act, 1998 ([Act 76 of 1998](#)), to address the incapacity of a principal or *educator* to carry out his or her duties effectively;
- (f) determine times of the school day consistent with any applicable conditions of employment of staff at the school;
- (g) administer and control the school's property, and buildings and grounds occupied by the school, including school hostels, but the exercise of this power must not in any manner interfere with or otherwise hamper the implementation of a decision made by the Member of the Executive Council or Head of Department in terms of any law or policy;
- (h) encourage parents, learners, educators and other staff at the school to render voluntary services to the school;

- (i) recommend to the Head of Department the appointment of educators at the school, subject to the Employment of Educators Act, 1998 (Act 76 of 1998), and the Labour Relations Act, 1995 (Act 66 of 1995);
- (j) recommend to the Head of Department the appointment of non-educator staff at the school, subject to the Public Service Act, 1994 (Proclamation 103 of 1994), and the Labour Relations Act, 1995 (Act 66 of 1995);
- (jA) make the recommendation contemplated in paragraph (j) within the time frames contemplated in section 6 (3) (l) of the Employment of Educators Act, 1998 (Act 76 of 1998).
- (k) at the request of the Head of Department, allow the reasonable use under fair conditions determined by the Head of Department of the facilities of the school for educational programmes not conducted by the school;
- (l) discharge all other functions imposed upon the governing body by or under this Act; and
- (m) discharge other functions consistent with this Act as determined by the Minister by notice in the *Government Gazette*, or by the Member of the Executive Council by notice in the *Provincial Gazette*.”

[11] The functions of the governing body referred to in section 20(1)(l) include to determine the admission policy of the school (section 5(5)), to determine the language policy of the

school (section 6(2)) and to issue rules for religious observances at the school (section 7). Section 21 provides that the head of the department may allocate additional functions to a governing body as stipulated therein. It does not appear from the papers that such additional functions were allocated to the governing body of the school.

[12] Section 22 provides as follows:

“22 Withdrawal of functions from governing bodies

- (1) The Head of Department may, on reasonable grounds, withdraw a function of a governing body.
- (2) The Head of Department may not take action under subsection (1) unless he or she has-
 - (a) informed the governing body of his or her intention so to act and the reasons therefor;
 - (b) granted the governing body a reasonable opportunity to make representations to him or her relating to such intention; and
 - (c) given due consideration to any such representations received.
- (3) In cases of urgency, the Head of Department may act in terms of subsection (1) without prior communication to such governing body, if the Head of Department thereafter-

- (a) furnishes the governing body with reasons for his or her actions;
 - (b) gives the governing body a reasonable opportunity to make representations relating to such actions; and
 - (c) duly considers any such representations received.
- (4) The Head of Department may for sufficient reasons reverse or suspend his or her action in terms of subsection (3).
- (5) Any person aggrieved by a decision of the Head of Department in terms of this section may appeal against the decision to the Member of the Executive Council.”

[13] The head of the department says that he orally granted the governing body a reasonable opportunity in terms of section 22(2)(b) at the meeting of 11 May 2010 and/or 3 June 2010 and that he acted on reasonable grounds. The applicants attack the decision of the head of the department to withdraw the functions of the governing body on two grounds, namely that the governing body was not granted a reasonable opportunity to make representations relating to the withdrawal of its functions and that the decision was not reasonable. (In respect of the last mentioned aspect the real test of course is whether the decision to withdraw the functions of the governing body was a decision that a

reasonable decisionmaker could not make.) To my mind however, the first question for decision is whether the head of the department was in the circumstances entitled to invoke the provisions of section 22 at all.

[14] In this regard it is necessary to also refer to the provisions of section 25 of the Schools Act which provides as follows:

“25 Failure by governing body to perform functions

- (1) If the Head of Department determines on reasonable grounds that a governing body has ceased to perform functions allocated to it in terms of this Act or has failed to perform one or more of such functions, he or she must appoint sufficient persons to perform all such functions or one or more of such functions, as the case may be, for a period not exceeding three months.
- (2) The Head of Department may extend the period referred to in subsection (1), by further periods not exceeding three months each, but the total period may not exceed one year.
- (3) If a governing body has ceased to perform its functions, the Head of Department must ensure that a governing body is elected in terms of this Act within a year after the appointment of persons contemplated in subsection (1).

- (4) If a governing body fails to perform any of its functions, the persons contemplated in subsection (1) must build the necessary capacity within the period of their appointment to ensure that the governing body performs its functions.”

[15] In **HEAD OF DEPARTMENT, MPUMALANGA DEPARTMENT OF EDUCATION AND ANOTHER v HOËRSKOOL ERMELO AND ANOTHER** 2010 (2) SA 415 (CC) three matters were decided that are important for the determination of this question. First, it was decided that any function of a governing body may be withdrawn in terms of section 22 of the Schools Act. Second, it was explained that there is no direct connection of interrelation between section 22 and section 25. Section 25 regulates failure by a governing body to perform its functions. The jurisdictional requirements or the invocation of section 25 are that the governing body must have ceased or failed to perform one or more of its allocated functions. The two provisions regulate unrelated situations and may not be selectively or collectively applied to achieve a purpose not authorised by the statute. (See p. 444 – 445, paras [84], [85] and [88].) Third, the following was said at 445 G – H in respect of section 22:

“Section 22 regulates the withdrawal of a function, but only on reasonable grounds. Its purpose is to leave the governing body intact, but to transfer the exercise of a specific function to the HoD for a remedial purpose. This means that the HoD must exercise the withdrawn function, but only for as long as, and in a manner that is necessary, to achieve the remedial purpose. That explains why s 22(3) (sic) provides that the HoD may, for sufficient reason, reverse or suspend the withdrawal. In my view, it is a power which may be exercised only to ensure that the peremptory requirements of the Constitution and the applicable legislation are complied with.”

[16] I accept that more than one function or even all functions of a governing body may be withdrawn in terms of section 22, provided that it is done on reasonable relevant grounds and for a remedial purpose, only for as long as and in a manner that is necessary to achieve the remedial purpose.

[17] It is clear that the head of the department came to the conclusion that the governing body failed to perform all or most of its functions. There appears to be reasonable grounds for such determination, but it is in the circumstances not necessary to make a finding in this regard. Points 1, 2, 3

and 6 of the letter of the head of the department of 21 July 2010 expressly refer to failures to perform specific functions. The reference to poor administration and management of the school's finances is just another way of saying that the governing body failed to properly administer and manage the finances of the school. Division amongst the members of the governing body on the one hand constitutes a reason for the failure to perform its functions and on the other hand amounts to a failure to perform its fiduciary duties in terms of section 16(1) of the Schools Act. A reading of the answering affidavit confirms that the decision to withdraw the functions of the governing body was essentially based on failure of the governing body to perform its functions.

[18] In my judgment, in such a case, the head of the department is obliged to invoke section 25 and cannot act in terms of section 22. Section 25 provides that if the head of department makes a determination that the governing body has ceased or failed to perform one or more of its functions, the head of department must appoint sufficient persons to perform all such functions for a period not exceeding three months. The head of department may extend the period of

three months by further periods not exceeding three months each, but the total period may not exceed one year. The express purpose hereof is to build the necessary capacity of the governing body. If a governing body has however ceased to perform its functions, the head of the department must ensure that a governing body is elected within a year after the appointment of the persons contemplated in subsection 25(1). Section 22 is intended to deal with situations other than cessation or failure to perform functions. It is not necessary or desirable to attempt to define the circumstances in which section 22 may be invoked. Essentially such decision can be based on any reasonable ground other than cessation or failure to perform functions by the governing body. A possible example of such instance is afforded by the **ERMELO**-case, namely the adoption by the governing body of an admission policy that is unconstitutional. The understandable frustration of the head of the department with the inaction of the governing body could therefore not form the basis of a decision to withdraw functions, but should have been dealt with in terms of section 25. My conclusion therefore is that the head of department

did not in the circumstances have the power to act in terms of section 22.

[19] But there is another ground for concluding that the head of the department could not exercise the power in terms of section 22. As mentioned already, the purpose of section 22 is the temporary withdrawal of a function of a governing body for a remedial purpose. The head of the department at no stage articulated that he withdrew the functions of the governing body temporarily or for a remedial purpose or what the remedial purpose would be. On the contrary, a close reading of the answering affidavit of the head of the department shows that the purpose of the head of the department was to dissolve or disband the governing body, permanently or indefinitely. (See especially paras 65 – 67, 69 – 71, 89 and 94.4 of the answering affidavit of the head of the department.) Counsel for the respondents also submitted:

“... that the third respondent was legally entitled to take away the functions of the first applicant and disband it as he did.”

[20] This is unlawful. The Schools Act contains no provision for the dissolution or disbandment of a governing body. A public power may not be used for a purpose other than that it was intended for. See section 6(2)(e)(i) of the Promotion of Administrative Justice Act 3 of 2000. Whilst I have no doubt that the head of the department was *bona fide*, his action was not authorised by section 22.

[21] The decision of the head of the department to withdraw the functions of the governing body must therefore be set aside. It follows that the same must apply to the confirmation of the decision by the MEC on appeal to him. It also follows that it is unnecessary to consider whether the governing body was afforded a reasonable opportunity to make representations in respect of the intention to withdraw its functions or whether the decision was one that a reasonable decisionmaker could not make in the circumstances.

APPOINTMENT OF PRINCIPAL

[22] Section 6(3)(a) of the Employment of Educators Act 76 of 1998, provides as follows:

“(3) (a) Subject to paragraph (m), any appointment, promotion or transfer to any post on the educator establishment of a public school may only be made on the recommendation of the governing body of the public school and, if there are educators in the provincial department of education concerned who are in excess of the educator establishment of a public school due to operational requirements, that recommendation may only be made from candidates identified by the Head of Department, who are in excess and suitable for the post concerned.”

[23] It is common cause that Mr. Legopo was appointed by the head of the department without the involvement of the governing body. The head of the department states that this was justified by section 6(3)(l) of the Employment of Educators Act. The section provides as follows:

“(l) A recommendation contemplated in paragraph (a) shall be made within two months from the date on which a governing body was requested to make a recommendation, failing which the Head of Department may, subject to paragraph (g), make an appointment without such recommendation.”

Section 6(3)(g) is not applicable in the circumstances.

[24] It is trite law that a real factual dispute in an application must be determined on the version of the respondent, unless that version can be rejected on the papers as farfetched or clearly untenable. The evidence of the respondents is that the governing body was requested to make a recommendation on 23 November 2009 and/or on 1 December 2009. This evidence can certainly not be rejected out of hand and must be accepted for present purposes.

[25] It is common cause that the governing body made no such recommendation within two months and had not made a recommendation by 19 February 2010. In this regard the governing body relies on what took place at the meeting of 1 December 2009 as well as a letter directed to the head of the department by the governing body, dated 3 December 2009.

[26] This is to no avail. The meeting of 1 December 2009 and the process for making a recommendation for the appointment of a principal failed either because the panel of the governing body did not have the capacity to handle a relatively simple

matter or because it insisted on criteria for shortlisting of candidates that were clearly objectionable. In neither case the governing body is provided with a lawful excuse for the failure to make a recommendation. The respondents deny that any of them received the letter of 3 December 2009 and that denial cannot be rejected on the papers. But this letter in any event constitutes no more than a helpless and vague call for the head of the department to intervene on the ground that the observers at the meeting

“... were no longer observers”.

[27] The subsequent use by the head of the department of an independent panel to make a recommendation to him cannot be faulted in the circumstances. In my judgment the decision to appoint Mr. Legopo as principal of the school is unassailable.

COSTS

[28] The applicants fail on the question of the appointment of the principal of the school. They succeed on the question of withdrawal of powers, but on a ground not relied upon. The

On behalf of respondents: Adv. M. Khoza SC
Instructed by:
The State Attorney
BLOEMFONTEIN

/sp