IN THE LABOUR COURT OF NAMIBIA

SUMMARY

CASE NO.: LC28/2006

LILYA KATRINA EILO AND ANOTHER

vs
THE PERMANENT SECRETARY OF EDUCATION AND OTHERS

2007 November 13

PARKER, P

Labour Law – under Labour Act (Act No. 6 of 1992) – Application in terms of s. 18 (1) (b) of Labour Act.

Labour Law – Review under Labour Act – Application for condonation for bringing review application out of time – In terms of Rule 15 of Labour Court Rules application for review should have been instituted within three months from date when grounds for application first arose – Court having discretion to condone delay – In exercising discretion Court to have regard to whether delay unreasonable, prejudice suffered or likely to be suffered by other parties, and reasonable time required to take all reasonable steps prior to and in order to initiate review proceedings – Additionally, Court should not allow decision to stand where decision is patently wrong, unfair and unreasonable even if there has been delay that occasions no prejudice to parties – Court condoning delay.

Labour Law – Review under Labour Act – Common law principles on review applicable – Additionally, where decision taker is an administrative body or administrative official Article 18 of Namibia Constitution applicable – Court finding that decision of 1st, 3rd and 5th respondents in making

appointment wrong, unfair and unreasonable – Court reviewing and setting aside decision – Circumstances under which decision that is reviewed and set aside may be corrected by Court without remitting such decision to decider for reconsideration.

CASE NO.: LC28/2006

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

LILYA KATRINA EILO	1ST APPLICANT
NAMIBIA NATIONAL TEACHERS' UNION	2ND APPLICANT

and

THE PERMANENT SECRETARY OF EDUCATION	1ST RESPONDENT
THOMAS AUPOKOLO	2ND RESPONDENT
THE PRIME MINISTER	3RD RESPONDENT
THE CHAIR OF THE SCHOOL BOARD OF OSHITAMHA JUNIOR PRIMARY SCHOOL	4TH RESPONDENT
THE CHAIR OF THE PUBLIC SERVICE COMMISSION	5TH RESPONDENT

CORAM: **PARKER, P**

HEARD ON: 2007 October 26

Delivered on: 2007 November 13

JUDGMENT

PARKER, P:

[1] This is a review application in which the applicants pray for an order in the following terms:

(1) Condoning the non-compliance of the rules of this Honourable Court as far as may be necessary.

(2) Setting aside the decision taken by the first respondent on or about 3 November 2005 not to appoint first applicant as Principal of Oshitamha Junior Primary School, Oshihau, district Onesi and to appoint second respondent.

(3) Ordering that first applicant is appointed as Principal of Oshitamha Junior Primary School, Oshihau, district Onesi with effect from 1 January 1997, alternatively 1 December 2005, alternatively, declaring that first applicant is deemed to have been Principal as from 1 January 1996.

(4) In the alternative to prayer 3, referring the matter back to first respondent, alternatively to the appropriate respondents, to reconsider the applications of the applicants interviewed by the School

Board of Oshitamha for the position of Principal of Oshitamha Junior Primary School, Oshihau, district Onesi, in compliance with the Law, Staff Rules and Recruitment Policies as applicable to the applicants at the time.

(5) Directing that the first respondent, and any other respondent that opposes this application, pay the costs of this application.

(6) Granting the applicants such further and/or alternative relief as this Honourable Court deems fit.

[2] As I see it, the application has been brought in terms of s. 18 (1) (b) of the Labour Act, 1992 (Act No. 6 of 1992) (the Labour Act), read with Rule 15 of the Rules of the Labour Court.

[3] The 1st applicant is a unionized teacher, and so she is supported in this application by her union, to wit, the Namibia National Teachers' Union (the 2nd applicant). It must be mentioned at this point that although all the respondents gave notice of their intention to oppose the application, only the 1st respondent filed an answering affidavit in which the 1st respondent states that he does so in his capacity as the Permanent Secretary of the Ministry of Education. I therefore find that the 2nd, 3rd, 4th and 5th respondents do not oppose the application and that they will abide by the decision of the Court.

[4] In her replying affidavit, the 1st applicant states that since no affidavit was forthcoming from the 2nd and 4th respondents, she took it upon herself to ascertain their stance to the application. She states that the 2nd respondent informed her that he had not been consulted, he had not given instructions to any person to oppose the application on his behalf, he would abide by the decision of the Court, and he was prepared to be transferred to another school. The 2nd respondent is the person who was appointed to the post of Principal (the post) of the Oshitamha Junior Primary School (the School) that is the subject of the present application.

[5] The 1st applicant states further that she spoke to the past and present chairpersons of the School Board of the School and both of them informed her that they were also not consulted and they did not instruct any one to oppose the application on their behalf. The School Board is the statutory body established under the Education Act, 2001 (Act No. 16 of 2001) (the Education Act), and is authorised to make first-level recommendations to the 1st respondent for the appointment of teachers and other staff of the School. The 3rd and 5th respondents also play a role in the recruitment and appointment processes in terms of the Public Service Act, 1995 (Act No. 13 of 1995) (the Public Service Act).

[6] I turn to deal with the point *in limine* raised by the respondents, and it is this. The

2nd respondent was appointed to the post in the School on 1 December 2005 and the applicants lodged the present review application on 1 November 2006. But in terms of Rule 15 (2) of the Labour Court Rules such an application must be made promptly and in any event within three months from the date when grounds for the application first arose. According to the 1st respondent, the grounds for the application first arose on 1 December 2005 when the 2nd respondent was appointed to the post, or at the latest 5 December 2005 when the 1st applicant says she became aware of the 2nd respondent's appointment. Furthermore, the 1st applicant has not advanced in her founding affidavit any explanation why she failed to launch the application within three months as required by the Labour Court Rules. The result, so says the 1st respondent, is that the applicants have unduly delayed in bringing this application and therefore on this ground the application should be dismissed with costs.

[7] The applicants, on the other hand, pray this Court to exercise its discretion and condone the applicants' failure to launch the review application within the three-month time limit.

[8] A number of authorities were referred to me on the point where there has been an inordinate delay in bringing such an application. I have made use of the relevant ones and others that were not referred to me. For instance, in *Namibia Grape Growers and Exporters Association and Others v The Ministry of Mines and Energy and Others* 2004 NR 194 at 214D, Strydom, ACJ (as he then was) states, "Where the point is raised that there has been unreasonable delay the Court must first determine whether the delay was unreasonable. This is a factual inquiry depending on the circumstances of each case."

[9] From the outset, I do not, with respect, accept the 1st respondent's averment that the applicants have not given any explanation why they failed to launch the review application within three months. The fact that the 1st applicant does not say specifically that she is giving an explanation for the delay does not, *ipso facto*, mean that she has not set out facts to explain the delay. In more than five paragraphs of her affidavit, she sets out facts to show why she did not act timeously.

[10] What explanations does the 1st applicant give? The first applicant came to know of the 2nd respondent's appointment on 5 December 2005: she did not go to sleep, so to speak, while her career prospects were in peril. She did what any reasonable unionized employee would do in the circumstances: two days later (i.e. on 7 December 2005), the 1st applicant wrote to her union (the 2nd applicant) for assistance. Six days after receiving their union member's call for assistance, the 2nd applicant, on 13 December 2005, wrote to the Regional Director of the Ministry of Education, who is responsible at the regional level for the School, to register the 2nd applicant's displeasure and calling upon the Regional Director to see to it that the 2nd respondent's appointment was withdrawn. Here, too, I do not see that by taking that route, the 2nd applicant was being dilatory in its search for justice for its member. When the 1st applicant realized that no response was forthcoming from the Regional Director, she approached a legal practitioner barely two days after

writing the Regional Director. A series of correspondence flowed between the legal practitioner and the 2nd respondent's Ministry.

[11] Realizing that the legal practitioners were not getting anywhere or any further, the 1st applicant terminated the services of the legal practitioners in around March 2006 and engaged the services of her present legal practitioners of record. In all this, it must be remembered that the 1st applicant lives in a far, remote part of northern Namibia. Therefore, up to this point, I cannot say the applicants have been remiss in pursuing the case.

[12] On 9 May 2006, the 1st applicant's new legal practitioners, on behalf of the 1st applicant, reported the 1st applicant's dispute with the Ministry of Education by notice in writing to the Labour Commissioner in terms of s. 74 (1) of the Labour Act. What the legal practitioners did is, in my opinion, in keeping with one of the objects of the Act, namely, the encouragement of employees and employers to solve industrial disputes outside the surrounds of the courts. Apart from abdicating his peremptory statutory responsibility under s. 75 (1) without reason, namely, that the Labour "Commissioner shall, upon the receipt of a notice referred to in section 74 (1), as soon as practicable after the date of such receipt, establish a conciliation board …," the Labour Commissioner took more than three months to respond in writing to the applicant's s. 74 notice on 21 March 2006. It is not explained by him why such was the case.

[13] On this point, Ms Bassingthwaighte for the 1st, 3rd, 4th and 5th respondents (the respondents) submits that as far back as December 2005, the applicants had legal representation, and by 2nd February 2006, the applicants knew what the 1st respondent's attitude was, and therefore, there was no need for the applicants' legal practitioners to have approached the Labour Commissioner. With respect, I think the argument is not well founded. An employee does not just rush to the Court without giving an alternative dispute resolution (ARD) mechanism a chance. And in terms of the Act, an ARD procedure begins with the Labour Commissioner setting up a conciliation board. And the procedure cannot, in my opinion, commence in earnest if the stance of the employer has not firmed in a clear manner. And from the papers, and Ms Bassingthwaighte agrees, it was on 2nd February 2006 that the 1st respondent's attitude to the 1st applicant's grievance became clear. And I do not find it amiss that that the legal practitioners pursued a s. 74 (1) procedure before coming to the court thereafter.

[14] That being the case, in my view, any consideration as to whether there has been an undue delay outside the three-month time limit for bringing such application must take into account the date on which the Labour Commissioner decided he would not set up a conciliation board, i.e. 21 August 2006. The reason is that "[W]hen considering what a reasonable time is to launch proceedings, one has to have regard to the reasonable time required to take all reasonable steps prior to and in order to initiate review proceedings." (*per* Booysen, J in *Radebe v Government of the Republic of South Africa and Others* 1995 (3) SA 787 (N) at 799B)

[15] Mr. Coleman, for the applicants, submits that the delays are entirely attributable to the legal practitioners. On that point it has been said that, generally, negligence on the

part of the litigant's legal practitioner will not necessarily exonerate the litigant. (*Swanepoel v Marais and Others* 1992 NR 1 (HC) at 3F) In my opinion, whether the sins of a legal practitioner should be visited upon the litigant must perforce depend upon all the facts and circumstances of the particular case. In the instant case, as soon as the applicant realized that the first legal practitioners were not acting expeditiously, she dispensed with their services and employed new legal practitioners. She therefore did not associate herself with the lack of diligence and expedition on the part of those legal practitioners.

[16] It is Ms Bassingthwaighte's further submission that in deciding whether there has been an unreasonable delay, the Court ought to consider whether the other parties to the proceedings will suffer prejudice and also take into account the principle that there must be finality of proceedings; and she referred to me in support of her submissions *Disposable Medical Products (Pty) v Tender Board of Namibia* 1997 NR 129 (HC). I lose no time in saying that, in my opinion, the second requirement is not pertinent to the present case; that requirement is more apropos to applications for postponements and adjournments in respect of matters that are pending or ongoing in the courts and appeals.

[17] Now to the fist requirement: In *Radebe*, *supra*, at 798D-F, Booysen, J stated:

> Other parties may be prejudiced by unreasonable delay where the delay is of such a nature that other parties or the person whose decision is being reviewed have either forgotten relevant facts, or the recollection of all concerned of the facts is not as clear as it would have been if the matters had been brought within a reasonable time (*Francis v Dutch Reformed Church, George, and Another* 1913 CPD 179 at 182; *Maseto and Others v Pleskus and Others* 1917 TPD 366 at 368; the *Kingsborough* case at 538; *Sampson v SA Railways & Harbours* 1933 CPD 152 at 154; *Schoultz v Voorsitter, Personeel-Advieskomitee van die Munisipale Raad van George, en 'n Ander* 1983 (4) SA 689 (C) at 698) and, in my view, where documentary or other forms of evidence are no longer available to support the respondents' case.

In my opinion, none of the instances mentioned by Booysen, J applies in the present case. And as Mr. Coleman correctly submitted, the only person who may be prejudiced is the 2nd respondent; but he has not filed any answering affidavit to indicate to the Court in what manner he says he may be prejudiced. I will return to the non-filing of an answering affidavit by the 2nd respondent in due course.

[18] For all the above, I am satisfied that the delay in bringing the application is not unreasonable, and *a priori*, I do not think any of the parties has been or will be prejudiced by the delay.

[19] Consequently, I exercise my discretion in favour of condoning the applicants' non-compliance with the Labour Court Rules when they delayed in bringing the present application. I must reiterate and signalize the point that in my view, this Court should not allow a decision of an administrative body or an administrative official to stand when it is patently irrefragably wrong, unfair and unreasonable, even if there has been a delay in approaching this Court, and the delay has occasioned no prejudice. (See *Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) at 157F where a similar statement was made by the Supreme Court in respect of a wrong decision of the Court below.) It

follows that in my judgment the respondents' point in limine is dismissed.

[20] I pass to deal with the merits of the review application. On the merits, both Mr. Coleman and Ms Bassingthwaighte referred to me a number of authorities in support of their individual submissions. I have consulted them in my determination of the review application.

[21] Mr. Coleman argued that this Court has jurisdiction to entertain a common law review relating to a labour matter; and therefore, the matter should be approached as a common law review making the normal review grounds applicable. I did not hear Ms Bassingthwaighte to contradict Mr. Coleman; and I accept the submission. Indeed, in *Frank and Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC) at 266A-C where the High Court was seized with reviewing and setting aside the decision of a pubic officer, that Court relied on the common-law principles relevant to such review and cited with approval *Federal Convention of Namibia v Speaker, National Assembly of Namibia and Others* 1991 NR 69 (HC) at 89C-E where the principles were set out thus:

> Where there is a statutory duty on a public officer and, in giving his decision or ruling in pursuance thereof, he acts *mala fide* or fails to apply his mind or takes into account irrelevant or extraneous facts or is prompted or influenced by improper or incorrect information or motives, the High Court of Namibia has inherent jurisdiction (see art 78 (4) of the Constitution of Namibia) to review the decision or ruling, to set it aside and to return the matter to the public officer or simply to correct it. *The Free Press of Namibia (Pty) Ltd v Cabinet of the Interim Government of South West Africa* 1987 (1) SA 614 (SWA) at 625A-D, 626B-I; *Shifidi v Administrator-General for South West Africa and* Others 1989 (4) SA 631 (SWA) at 646, 647-8; *Mweuhanga v Cabinet of the Interim Government of South West Africa* 1989 (I) SA 976 (SWA) at 990D-E; *Cabinet for the Interim Government of South West Africa v Bassinger and Others* 1989 (1) SA 618 (SWA) at 627.

[22] I will take matters further and say that since in my view, the 1st respondent is an administrative official and the 5th respondent's Commission is an administrative body the provisions of Article 18 of the Namibian Constitution apply to them in the exercise of their statutory powers and the performance of their statutory functions. In *Erastus Tjiundikua Kahuure and 10 Others v Mbanderu Traditional Authority and Others* Case No.: (P) A 114/2006 at pp. 20-22 (Unreported), I discussed in some detail the content and principles underlying the provisions of Article 18; and relying on Levy, AJ's dictum in *Frank and Another* (HC), *supra*, at 265E, I said in *Kahuure* that "Article 18 does not repeal the common law: it embraces it."

[23] Accordingly, I have no doubt whatsoever that in the present case the 1st respondent and the 5th respondent were obliged to act fairly and reasonably and to apply their minds, and could not take into account irrelevant or extraneous or irrelevant facts and could not allow themselves to be influenced by improper or incorrect information or motives. In addition, they were obliged to comply with the requirements imposed on them by legislation, namely, the Public Service Act, the Education Act, the Affirmative Action (Employment) Act, 1998 (Act No. 29 of 1998) (the Affirmative Action Act) and the Labour Act.

[24] I will now proceed to apply these principles and requirements to the facts and

conclusions I make thereon.

[25] The 1st applicant has been employed as a teacher by the 1st respondent's Ministry since 1989 and possesses the requisite academic qualification and teaching experience. In November 2003, she obtained a Basic Education Teachers Diploma (BETD), and is certified to teach in the lower primary school grades, i.e. Grades 1-4.

[26] The 1st applicant obtained funds from Oxfam Canada to build a proper two-room building for the school, including a storage-room for the community. She then acted as Principal of the School in January 1996-December 2005, i.e. a total period of eight years. She was confirmed in her post of Teacher Grade T2C Level 1 (now Grade T3A) with effect from 21 October 2004.

[27] The position of Principal of the School was advertised on 2 April 2004; a post the applicant had at that point in time been acting in for a total of about eight years, as I have said above. The 1st applicant and the 2nd respondent were the only interviewees at the interview for the post held on 23 June 1004. Neither of them met all the requirements of the post at the time of the advertisement; in particular, the 1st applicant was on probation and did not occupy a position of Deputy Principal or that of Head of Department, and the 2nd respondent did not occupy a position of Deputy Principal or that of Head of Department. Nevertheless, both of them had their applications considered and they were interviewed by the School Board. As I mentioned previously, the School Board is the only statutory body, in terms of s. 16, read with s. 17, of the Education Act, empowered, "subject to the Public Service Act, to recommend to the Permanent Secretary (the 1st respondent) the appointment of teachers and other staff at the school." At the interview, the 1st applicant gained a score value of 85 marks, and the 2nd respondent 63 marks.

[28] The 1st applicant is a woman, and the 2nd respondent a man. Therefore, both of them are in the designated group (a), i.e. in terms of s. 18 (1) (a) of the Affirmative Action Act, but the 1st applicant is additionally in group (b), i.e. in terms of s. 18 (1) (b) of the Affirmative Action Act. It may be said in parentheses that the third and final group is group (c), i.e. persons with disabilities (in terms of s. 18 (1) (c) of the Affirmative Action Act) and none of them is in that group. Thus, while the 2nd respondent belongs to one designated group, the 1st applicant belongs to more than one designated group within the meaning of the Affirmative Action Act.

[29] The School Board recommended the 1st applicant for the post; not only because, in my opinion, her marks were higher than the 2nd respondent's, but also because of her suitability to head a lower primary school. In its motivation, as required by para. 3.3.9, Part I of Revision of PSSR B.II, Parts I-IV, dated 20 November 2002 (November 2002 PSSR), the Board wrote:

> Eilo Katrina (i.e. 1st applicant) … answered all the questions satisfactory (sic) from the interview, and she impressed the panellists. She is also a B.E.T.D. holder, (having) specialised in lower primary phase. She has

served as a lower primary facilitator (circuit based) for (a) long time. She has (been) acting as a Principal (of the School) (for) eight years.

[30] The Omusati Education Personnel Advisory Committee (the Omusati Committee) without any hue of statutory authority overruled the statutory School Board's recommendation, and recommended the 2nd respondent to the post of Principal of the School. The recommendation of the Omusati Committee was simply this: the 2nd respondent suffered only "*one* impediment", namely, not being either a deputy principal or head of department, in contract to the 1st applicant suffering from "*two* impediments," namely, not being either a principal or head of department and being on probation at the time the advertisement was published on 2nd April 2004. Without applying his mind to all the facts and circumstances of the case, the 1st respondent relied on and accepted the recommendation of the Omusati Committee, which, in my respectful opinion, were indubitably usurpers of the statutory powers of the School Board.

[31] This conclusion is very crucial and significant as will become apparent in due course: both the 1st applicant and the 2nd respondent did not meet all the requirements for the post, and, therefore, they ought to have been informed accordingly when their applications were received. In my opinion, since the post was not re-advertised with relaxation of the requirements, and the 1st applicant's and the 2nd respondent's applications were considered and the 1st applicant and the 2nd respondent were interviewed, this meant that in terms of para. 2.8.1 of Part II of the November 2002 PSSR, the requirements in respect of both the 1st applicant and the 2nd respondent had been relaxed. It follows that, none of them did have any impediments at the time they were interviewed. In sum, in terms of the above-mentioned November 2002 PSSR, no impediment stood in the way of either the 1st applicant or the 2nd respondent when they were interviewed. Thus, the issue that the 1st applicant was on probation when the post was advertised was no longer an enforceable requirement against her during and after the interview.

[32] With the greatest respect, the 1st respondent, in my opinion, rode roughshod over very important and relevant recruitment and appointment policies of his Ministry in particular and the Public Service in general and certain relevant statutory provisions, taking the 3rd respondent and the 5th respondent with him on his unreasonable, unfair and arbitrary excursion. The instances I now turn to consider are apposite.

[33] First, in terms of para. 2.6 of the Recruitment for the Public Service of Namibia Issued in Terms of Par. 1.2.2 of PSSR BII/II, dated 17 February 2002 (the February 2002 PSSR), all actions (concerning recruitment and appointment) must be justified and reasonable. In my view, there is no justification for the 1st respondent accepting, and acting on, the recommendations of the Omusati Committee when the Committee has no statutory business making such recommendations. Moreover, the 1st respondent's decision not to recommend the 1st applicant, based primarily or solely on the recommendation of the Omusati Committee, was unreasonable and unjustifiable since in terms of the above-mentioned November 2002 PSSR, the requirement concerning probation was no longer relevant: the requirement had been relaxed, i.e. waived, in respect of the 1st applicant by operation of the said Rule when her application was considered and she was interviewed for the post, as I have said above.

[34] Second, in terms of para. 2.7 of the February 2002 PSSR, the practice of employing or promoting individuals in the Public Service ought to be sensitive to the needs of the communities. In my opinion, the establishment of the School Board, for instance, conduces to that policy. The School Board of the School is made up of community members – a fact which is not lost on the 1st respondent; therefore, their opinions and recommendations ought to have weighed not only heavily but also overwhelmingly in the recruitment and appointment processes on any reasonable public servant. The School is for Grades 1-3 pupils; and, therefore, in my view, the community, through the School Board, should have, within the limits of the law and applicable Rules, by far the greatest say in deciding who should head the School, especially when their role is sanctioned by the 1st respondent's administered statute. The 1st respondent's uncharitable comment that because the Board consists mostly of community members they may not have been familiar with the limitation of open competition policy contained in the Public Service Staff Code (must be Rules) is dismissed as unreasonable and unjustifiable and, therefore, irrelevant. It must be remember that one of the members of the School Board is an Inspector. *A fortiori*, the School Board is expected to take decisions based on a whole gamut of considerations, not just the PSSR, which they did if regard is had to their motivation (set out above).

[35] Third, in terms of para. 1.3 of Part IV of the November 2002 PSSR, the aim of interviewing and selection is to reach a considered decision concerning suitability of a candidate for a particular post: it must not be based on guesswork. And in terms of para. 2.4 thereof, the selection process aims to recruit the best candidate in terms of the employment criteria for the job to ensure as far as possible the recruitment of the person most able to do the job.

[36] Significantly, attached to Part IV of the November 2002 PSSR are "Annex A" and "Annex B", which are examples of "Interview Score Sheets", which enjoin interviewers to

"reach a considered decision" and "to recruit the best candidate" by giving marks to interviewees; the marks representing the weight value of performance by interviewees at interviews.

[37] As Mr. Coleman asked rhetorically, why request interviewees to give marks for the performance of interviewees if those scores do not count? In my opinion, in terms of the relevant PSSR, I reiterate that these scores and motivation by a body statutorily empowered to recommend to the 1st respondent the appointment of teachers and other staff members at the School must carry the greatest weight. More important, para 3.3.9 of Part IV of the 20 November PSSR requests interviewees that "[W]hen supplying motivation for the candidates, base this (i.e. the motivation) on the scores obtained." And that is exactly what the School Board did. Thus, the School Board was alive to this policy directive, and acted in accordance with it. And taking the marks scored (85 for the 1st applicant and 63 for the 2nd respondent), together with the job requirements and the relevant employment criteria, the School Board correctly recommended or nominated the 1st applicant for the post.

[38] That being the case, in my view, the 1st respondent must have a good reason to disregard the School Board's recommendation. I agree with Bassingthwaighte that the fact that the School Board recommended the 1st applicant does not follow that the 1st respondent must accept that recommendation. I have no quarrel with that. But as an administrative official, the 1st respondent is under a constitutional duty, in terms of Article 18 of the Namibian Constitution to act fairly and reasonably and to comply with the applicable legislation. (*Kahuure*, *supra*, at pp 21-22)

[39] In this connection, the 1st respondent was also obliged to give reasons for rejecting the recommendation of the School Board and for accepting and relying on the recommendation of the Omusati Committee (see *Frank and Another* (HC), *supra* at 265E). And what reasons does the 1st respondent give? The sole reason he gives is this: he says the 2nd respondent was recommended to (the Commission of) the 5th respondent because at the time the post was advertised, the 1st applicant was on probation. But, as I have shown above, the 1st respondent must be wrong in his assertion: that impediment had been waived by operation of the above-mentioned applicable PSSR.

[40] The result is that, in my opinion, not only did the 1st respondent act unfairly and unreasonably and acted outwith the applicable legislation, but also he took into account irrelevant or extraneous facts and allowed himself to be influenced by improper and incorrect information. Sadly, the 5th respondent fell into the same pit because his Commission accepted and acted upon the 1st respondent's wrong, unfair and unreasonable decision. The Commission, thus, recommended the 2nd respondent for the post solely because the "probation (of the 1st applicant) is not confirmed."

[41] Another issue related to the question of probation is this: between the date of the

advertisement (2 April 2004) and the date the 5th respondent's Commission made its recommendation in favour of the 2nd respondent (11 October 2005) both the 1st applicant and the 2nd respondent were teachers Grade T2C Level. 1. After noting "that competing for promotion is limited to one grade only in terms of paragraph 3 of the recruitment policy which was issued as PSM Circular o. 23 of 2003" (i.e. the November 2002 PSSR), the Commission recommended the 2nd respondent, "as a special case", to be promoted. But these facts were lost on the Commission. First, the 1st applicant and the 2nd respondent were in the same grade. Second, the issue of "probation" was no longer an impediment against the 1st applicant. Third, the 1st applicant scored 82 marks, i.e. 22 marks over the 2nd respondent's. Fourth, the 1st applicant was recommended with full motivation, by the School Board, the only statutory body below the level of the 1st respondent, empowered to do so by the Education Act.

[42] It follows ineluctably that the 5th respondent's Commission was not only wrong but it acted unreasonably and unfairly when, having relied on irrelevant or extraneous facts and influenced by improper and incorrect information, they chose the 2nd respondent over the 1st applicant and treated his case "as a special case" and promoted him out of turn. As I have said *ad nauseam*, the only reason for so doing is because the 1st respondent and the 5th respondent's Commission believed – wrongly, I have held – that the 1st applicant still suffered the "disability" of being on probation at the critical period, i.e. the time the interview took place.

[43] Yet another instance of unreasonableness, unfairness and disregard for the law and policy on the part of the 1st respondent, the 3rd respondent and the 5th respondent relates to the law and practice of affirmative action.

[44] In virtue of the Recruitment Values and Standards in para. 5.2 of Part I of the November 2002 PSSR, those involved in the recruitment and appointment processes respecting the Public Service are duty bound to consult the Affirmative Action Act in the exercise of their powers and in the performance of their functions. In this connection, those values and standards must be reflected in the selection criteria of all recruitment processes (para. 5.5). And what do the relevant parts of the Affirmative Action Act say? Section 19 of that Act provides:

> (1) In filling positions of employment a relevant employer shall give preferential treatment to suitably qualified persons of designated groups.
>
> (2) Where two or more suitably qualified candidates from designated groups qualify for a position of employment, the employer shall give priority –
>
> (a) to a candidate who is a Namibian citizen; or
>
> if all such candidates are Namibian citizens, to the candidate who belongs to more than one designated group.

[45] In this connection, it is stated in para. 1.4 of the above-mentioned November 2002 PSSR that Permanent Secretaries (including the 1st respondent) "have committed themselves to affirmative action plans," i.e. plans necessary to implement the relevant provisions of the Affirmative Action Act, including s. 19. Furthermore, the policy says, "Their (i.e. Permanent Secretaries') recruitment, for the foreseeable future, will have to be accounted for in terms of these plans" (*loc. cit.*). In short, the 1st respondent and all Permanent Secretaries "shall give priority – if all such candidates are Namibian citizens, to the candidate who belongs to more than one designated group." (See s. 19 (2) (b) of the Affirmative Action Act.) And as has been mentioned previously, between the 1st applicant and the 2nd respondent it is the former who belongs to more than one designated group.

[46] For all the above, I have come to this only reasonable conclusion: if the 1st respondent, 3rd respondent and 5th respondent had acted *intra vires* the Education Act, the Affirmative Action Act, and the Public Service Act (including the relevant and applicable PSSR) and had applied their minds properly to the mater at hand, had not taken into account irrelevant or extraneous facts, or were not prompted or influenced by improper or incorrect information or motives, they would have come to the inexorable conclusion that fairly and reasonably weighing the 1st applicant and the 2nd respondent in the same pan of scale, the 1st applicant had by far greater number of pluses in her favour regarding: knowledge, experience, suitability for the post and application of affirmative action.

[47] (1) <u>Knowledge</u>

The applicant is academically sufficiently prepared to teach and interact with pupils in junior primary school grades: she has "specialized in lower primary phase" (in the words of the School Board). She scored 85 marks, while the 2nd respondent scored 63 marks at the interview.

(2) <u>Experience</u>

The 1st applicant acted as Principal of the School (the post she was interviewed for) for a total period of about eight years. Ms. Bassingthwaighte submits that this aspect should not count much because the 1st applicant was aware that she was in an acting

position until a suitable candidate was found and she was paid for her services. With the greatest deference, this argument is weak and baseless in the extreme. The fact that one is paid for one's services rendered in a position does not mean that the experience one gained in rendering such services should count for nothing in respect of the same position. Compared with the 1st applicant, the 2nd respondent's experience in teaching in or managing a junior primary school was zero. As Mr. Coleman asked rhetorically, if the 1st applicant has been able to do the job well for some eight years, what evidence is there that she cannot continue to do equally well if she was appointed to the post on a permanent basis?

(3) Suitability

The 1st applicant was found to be suitable for the post by the School Board which consists of members of the community. The policy of the Public Service (referred to previously) is that the practice of employing or promoting individuals in the Public Service ought to be sensitive to the needs of local communities.

(4) Affirmative Action

The 1st applicant belongs to more than one designated group within the meaning of s. 19 (2) of the Affirmative Action Act.

[48] For the foregoing undisputed or proved facts, the considerations adverted to and the conclusions reached, I have not one iota of doubt that serious irregularities, illegalities, unfairness and unreasonableness – all rolled in one – were committed along the recruitment and appointment route after the recruitment process had left the hands of the School Board. The result is that I hold it established that in deciding not to recommend and appoint the 1st applicant to the post of Principal of the School, the 1st respondent, 3rd respondent and the 5th responded did not act fairly and reasonably and did not comply with the requirements imposed on them by the Education Act, the Public Service Act and the Affirmative Action Act. That being the case the 1st respondent's decision not to appoint the 1st applicant for the post of Principal of the School is reviewed and set aside.

[49] For the decision I have taken, it is otiose to engage in the debate by both counsel as to whether the 1st applicant had legitimate expectation that she would be appointed to the post. Suffice to say this: in my opinion, the administrative law principle of "legitimate expectation" can and should apply in labour matters so long as "legitimate expectation" has sufficiently developed in favour of a party. It may even arise in fixed-term contracts "where an expectation of tenure has developed." (See *Du Toit v The Office of the Prime Minister* 1996 NR 52 at 77.)

[50] Having reviewed and set aside the decision not to recommend and/or appoint the 1st applicant for the post of Principal of the School, the question that remains to be answered is this: should this Court correct the decision? I think this Court should do so, considering all the facts and circumstances of the case. This is not a case where it is fair to refer the matter back to the person who took the decision for reconsideration during which the 1st applicant would be given the opportunity to respond to certain matters in the

1st respondent's affidavit so as to comply, for instance, with the *audi alteram partem* rule of natural justice. (See, e.g., *Frank and Another* (SC), *supra*, at 120A-B, 121D, 121G-H.)

[51] *In casu*, all the facts and information required to correct the respondents' decision that I have reviewed and set aside are fully ventilated in the papers of the parties to the present application. Regard should also be had to my holding that that decision is patently wrong, unfair and unreasonable and the makers of the decision did not comply with certain statutory provisions. Having taken this conclusion into account, I am not persuaded that correcting the decision will cause prejudice to the respondents, as submitted by Ms. Bassingthwaighte. It will definitely not cause any prejudice to the 4th respondent. The only party that may be prejudiced is the 2nd respondent. But he has not presented any evidence to the Court regarding in what manner he would be prejudiced. Besides, we are not dealing with a small, one-person company whose staff compliment may be not more than five employees. The 1st respondent must be able to find another position within his Ministry to place the 2nd respondent, if so advised.

[52] It follows that the decision is corrected to the extent contained in the Order below.

[53] I now consider the issue of costs. Mr. Coleman submitted that the opposition to the applicants' application was frivolous and so the 1st respondent should be mulcted in costs. Ms. Bassingthwaighte argued contrariwise: she says that in opposing the application the respondents did not act frivolously or vexatiously within the meaning of s. 20 of the Labour Act**.** I respectfully accept Ms Bassingthwaighte's submission. The respondents' continued failure to see that they were wrong and that they had acted unfairly and unreasonably and that they did not comply with the relevant and applicable legislation puts them in a bad light. But I am not persuaded that in opposing the application they acted frivolously or vexatiously within the meaning of s. 20 of the Labour Act. That being the case, I think it is fair and just that the parties pay their own costs.

[54] In the result, I make the following orders:

(1) The applicants' non-compliance with the Rules of this Court is condoned.

(2) The decision taken by the 1st respondent on or about 3 November 2005 not to appoint the 1st applicant as Principal of the Oshitamha Junior Primary School, Oshihau, and to appoint the 2nd respondent Principal of that School instead is reviewed and set aside.

(3) The 1st, 3rd and 5th respondents are ordered, acting jointly or severally, to appoint within 14 days from the date of this Order, the 1st applicant as Principal of the Oshitamha Junior Primary School with effect from 21 December 2005.

(4) There is no order as to costs.

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Parker, J

ON BEHALF OF THE APPLICANTS:	Adv. G. Coleman
Instructed by:	LorentzAngula Inc
ON BEHALF OF THE RESPONDENTS:	Adv. N. Bassingthwaighte
Instructed by:	The Government Attorney