

# The constitutionality of section 16A of the South African Schools Act 84 of 1996

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## OPSOMMING

### Die Grondwetlikheid van Artikel 16A van die Suid-Afrikaanse Skolewet 84 van 1996

Die Wysigingswet op Onderwyswette 31 van 2007 het artikel 16A tot die Suid-Afrikaanse Skolewet 84 van 1996 toegevoeg. Hierdie artikel sal onder meer kyk na die implikasies van artikel 16A van die Skolewet op die rol van die skoolhoof as 'n lid van die beheerliggaam en as 'n werknemer van die Departement van Onderwys en die potensiële botsing van belange voortspuitend uit artikel 16A. Die grondwetlikheid van die betrokke artikel gaan deeglik ondersoek en bespreek word.

Artikel 16(2) van die Skolewet bepaal dat 'n beheerliggaam in 'n vertrouensposisie teenoor die skool staan. Hierdie bepaling geld ook vir die skoolhoof, as 'n lid van die beheerliggaam. Die gevolg van Artikel 16A is dat die skoolhoof 'n opdrag van die Departement kan ontvang om die Departement se belange in die beheerliggaam te verteenwoordig, maar dat hierdie belange dikwels in stryd is met die belange van beheerliggaam.

Artikel 23(1) van die Grondwet bepaal dat elkeen die reg tot billike arbeidspraktyke het. Billike arbeidspraktyke word nie in die Grondwet self omskryf nie.

Daar kan geargumenteer word dat die Departement die skoolhoof in 'n ongemaklike werksituasie plaas omdat daar ingevolge wetgewing, van die skoolhoof verwag word om twee teenstrydige opdragte uit te voer. Artikel 16A verwag van die skoolhoof om die Departement van Onderwys se belange eerste te stel terwyl artikel 16(2) die skoolhoof verplig om die skool se belange eerste te stel. Dit gee gevolg tot 'n onbillike arbeidspraktyk omdat die skoolhoof uit vrees vir 'n tugverhoor, sou hy nie sy opdrag van sy werkgewer navolg nie, 'n mandaat uitvoer wat strydig is met sy vertrouensposisie teenoor die skool ingevolge artikel 16(2); of sou hy ingevolge artikel 16(2) optree en die belange van die skool bo die belange van die Departement kies en dan sy plig as werknemer teenoor die Departement ingevolge artikel 16A nie nakom nie. In beide hierdie situasies sal dit die verhouding tussen die skoolhoof en Departement nadelig beïnvloed en op 'n onbillike arbeidspraktyk neerkom wat teenstrydig is met artikel 23 van die Grondwet.

## 1 Introduction

The Education Laws Amendment Act<sup>1</sup> added section 16A to the South African Schools Act<sup>2</sup> (SASA). Section 16A(1) and (3) provide as follows:

(1)(a) The principal of a public school represents the Head of Department in the governing body when acting in an official capacity as contemplated in sections 23(1)(b) and 24(1)(j).

(2) ...

(3) The principal must assist the governing body in the performance of its functions and responsibilities, but such assistance or participation may not be in conflict with any:

(a) instructions of the Head of Department;

(b) legislation or policy;

(c) obligation that he or she has towards the Head of Department, the Member of the Executive Council or the Minister; or

(d) provision of the Employment of Educators Act, 1998 (Act No. 76 of 1998), and the Personnel Administration Measures determined in terms thereof.

This article will look at the constitutionality of section 16A, its implications for the role of the principal as a member of the governing body as well as an employee of the Department of Education, and the potential conflict of interests arising from section 16A.

Firstly, I will discuss the different roles that the school governing body and the principal play, and point out the importance of a healthy relationship between the governing body and the principal. Secondly, I will explain how the state often unlawfully interferes in the business of the school, the governing body and the principal, and illustrate the detrimental effect of this interference. Lastly, I will give a thorough explanation of the unconstitutionality of section 16A, in that this section may enable the Department of Education, ie the employer, to act in a way that constitutes unfair labour practice. The concept “unfair labour practice” will also be defined and discussed.

## 2 The Role of the Governing Body and Principal

Good public school governance requires a flourishing partnership, based on mutual interest and mutual confidence, between the many constituencies that make up and support the school. The appropriate balance of different constituency rights and interests in the composition and operations of each school governing body is therefore vitally important.<sup>3</sup>

The different role players in education should respect each other and the roles they play. However, over the last few years, there seems to have

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1 31 of 2007.

2 84 of 1996.

3 *Education White Paper 2*, General Notice 130 of 1996.

been confusion (especially on the part of the Department of Education) about who really has the final say over public school governance and management.

SASA clearly states that the governance of a public school vests in the governing body of the school,<sup>4</sup> while the professional management of a school must be undertaken by the school's principal.<sup>5</sup> The Act also clearly provides that the Department's management function is limited to the professional management of the school through the principal as the employee.

But what is the difference, then, between governance and professional management? SASA itself does not define these concepts, and one has to look beyond the Act for proper explanations.

In terms of the definition or meaning of "governance", I will refer to the *King II Report on Governance in South Africa*. This report was compiled by the King Committee, headed by the former High Court judge Mervyn King. Many may argue, erroneously I might add, that one cannot apply the principles of the *King II Report*, which was developed for corporate entities and businesses, to schools. However, on closer inspection of SASA and other relevant documentation,<sup>6</sup> it becomes apparent that a school's setup is similar to that of a business. The revised *King Code and Report on Governance for South Africa (King III)* was launched on 1 September 2009, and clearly states that it applies to all entities, regardless of the manner and form of incorporation or establishment, whether in the public, private or non-profit sector. The report was drafted so that every entity can apply it, and, in so doing, achieve good governance.<sup>7</sup>

In good governance practices, it is generally accepted that a governance structure would determine policies and strategies for an organisation or a corporate entity, whereas the implementation of these policies and strategies is the function of the executives of that organisation or entity. In the school setup, the governing body is responsible for determining policies, while the principal and other educators must implement them.<sup>8</sup> Concepts specific to the business sector, such as "company", "board of directors" or "directors", "manager" and "shareowners", can easily be replaced with school-related terms, such as "school", "governing bodies" or "governing body

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4 S 16(1) SASA.

5 S 16 (3) SASA.

6 These include *Education White Paper 1 and 2*, various National Norms and Standards and Policies.

7 <http://african.ipapercms.dk/IOD/KINGIII/kingiiireport/> (accessed 2011-07-12).

8 Policies prescribed in SASA include a language policy, an admission policy, a code of Conduct and a religion policy. Policies implied include but is not limited to a financial policy, a safety policy, a drug policy and a pregnancy policy.

members”, “school principal”, and “parents, learners, staff and state” respectively.<sup>9</sup>

The *King II Report* mentions the following seven characteristics of good corporate governance:

- (1) Discipline – a commitment to behaviour that is universally recognised and accepted as correct and proper.
- (2) Transparency – the ease with which an outsider is able to analyse the actions of a company/school.
- (3) Independence – the mechanisms to avoid or manage conflict.
- (4) Accountability – the existence of mechanisms to ensure accountability.
- (5) Responsibility – processes that allow for corrective action and responsible conduct towards all stakeholders.
- (6) Fairness – balancing competing interests.
- (7) Social responsibility – to be aware of, and respond to, social issues.<sup>10</sup>

Sir Adrian Cadbury, Chairman of Cadbury and Cadbury Schweppes for 24 years, once described corporate governance as follows:

Corporate governance is concerned with holding the balance between economic and social goals and between individual and communal goals ... the aim is to align as nearly as possible the interests of individuals, corporations and society.

Precisely that is the function of a school governing body, as prescribed in the relevant sections of SASA.<sup>11</sup> It is the governing body’s duty to strike a balance between the interests of the different parties involved in education; to ensure that the school provides quality education, while also running a financially stable school.

According to section 16(3) of SASA, the professional management of a public school must be undertaken by the principal, under the authority of the Head of Department. The professional management must furthermore be undertaken subject to SASA itself and any applicable provincial law.

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9 Colditz “The Duties of the School Governing Body – Basic Principles of Good Governance” 2007 [www.fedsas.org.za](http://www.fedsas.org.za) (accessed 2011-07-12).

10 <https://www.saica.co.za/TechnicalInformation/LegalandGovernance/King/tabid/626/language/en-A/Default.aspx#king2> (accessed 2011-07-12).

11 S16(2) SASA provides: “A governing body stands in a position of trust towards the school.” According to s 20(1)(a) SASA “the governing body of a public school must promote the best interests of the school ...”. In terms of s 20(1)(e) SASA “the governing body of a public school must support the principal, educators and other staff of the school in the performance of their professional functions”, and, according to ss 20(1)(eA), (g) SASA, the governing body of a public school must adhere to certain actions taken by the Head of the Department, or may not exercise certain powers in a manner that interferes with a decision made by the MEC or Head of Department, in terms of any law or policy. With reference to the financial management of a school, ch 4 SASA contains numerous provisions regarding the governing body’s duties to establish and maintain a school fund, a school budget, etc.

It is particularly significant that the term “management” is not used in isolation, but that it is specifically called “professional management”. A justifiable conclusion is that the concept “professional management” refers to just that – “management of the profession”.<sup>12</sup>

When interpreted in this way, it means that the role of the principal, as representative of the education department, is limited to the management of that for which the professionals (educators) are responsible, which primarily entails curricular matters. An educator’s task is mainly to take care of the process of learning and teaching at the school. Put quite simply: The task of educators (the professionals) in the school is to provide classroom instruction. That is what they were trained for. “Professional management”, therefore, simply means “management of classroom instruction”.<sup>13</sup>

Therefore, all other activities related to a public school resort under the authority of the governing body.<sup>14</sup>

The principal of the school, who is made an ex officio member of the school governing body, represents the State. However, the principal is but one of many governors on the school governing body. He/she has but one vote, which is not a casting vote or a more important vote than that of any other member of the school governing body. He/she is the representative of the Department as a professional manager, and not as a governor.

Thus, the principal functions in two capacities: on the one hand, as a governing body member; on the other, as the principal or departmental employee. In practice, this means that he/she should implement the policies of the provincial education department when operating as a departmental employee, and, when dealing with the department in his/

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12 Colditz “The Role of the Principal in School Governance and Management” 2005 [www.fedsas.org.za](http://www.fedsas.org.za) (accessed 2011-07-12).

13 The function performed will determine the capacity in which the principal is acting. Everything that has to do with the classroom and teaching (the profession), like the management of the educators at a school, is carried out by the principal in terms of s 16(3) SASA, every function related to the governance of a school, like administrative affairs and the discipline of learners, is performed by the principal in terms of s 16(1) SASA.

14 Colditz “The Role of the Principal in School Governance and Management” 2005 [www.fedsas.org.za](http://www.fedsas.org.za) (accessed 2011-07-12). S 20 SASA lists the functions of all governing bodies. Some of these include: to promote the best interests of the school; adopt a mission statement; adopt a constitution; develop a mission statement of the school; adopt a code of conduct; support the principal and other staff; determine times of the school day; administer and control the school’s property and recommend to the Head of Department the appointment of staff. S 21 SASA contains allocated functions of governing bodies and includes: to maintain and improve school property, determine extra-mural curriculum; to purchase textbooks and other material and to pay for services to the school.

her capacity as governing body member, watch over the interests of the governing body, the school and the parent community.<sup>15</sup>

However, the fulfilment of this dualistic role of the principal is much easier said than done.

### 3 State Interference

In any governance and management environment, the role players need to know what is expected of them and that each other's functions are respected. Any conduct contrary to this will eventually lead to conflict, which is something we are all too familiar with in the context of the relationship between governing bodies and the education department. Much of this conflict can be explained against the backdrop of the reform and transformation that have been taking place in education since 1994.<sup>16</sup> This places the supposed trust between these two partners in school education in a very bad light.

Proper governance, control and management of a school make the difference between a functional and a dysfunctional school. The importance of the relationship between a principal and the governing body for the proper functioning of a school cannot be overemphasised. This relationship can often be impaired by interference from an education department acting as the principal's employer.

From the explanation of the two concepts "governance" and "management", it is evident that the function of a public school principal is twofold: On the one hand, he/she is accountable to the Head of Department as his/her employer; on the other, he/she reports to the school governing body as a member of the governing body.

Therefore, it is possible for the principal to receive one assignment from the Department, and another, contradictory assignment from the governing body.

As Prinsloo stated rightfully, a disturbing trend has emerged of government officials abusing their powers, unlawfully interfering in the management and governance of schools, neglecting their duties, showing no respect for the rule of law, and even ignoring court orders against them. One only has to study a few court cases to confirm this disturbing phenomenon.<sup>17</sup>

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15 Beckmann "The legal position of the principal as school governing body member and employee of the Department of Education" Paper read at the Principal's Conference, Openheimer Theatre, Welkom, 2002-04-14.

16 Clase *et al* "Tension between school governing bodies and education authorities in South Africa and proposed resolutions thereof" 2002 *SA J of Ed* 243-263.

17 Prinsloo "State interference in the governance of public schools" *SA J of Ed* 2006 355-368.

In the matter *Welkom High School v The Head of the Department: Department of Education: Free State Province*,<sup>18</sup> Rampai J expressed himself as follows regarding unlawful actions or interference by the Department in the governing body's power to determine the school's pregnancy policy:

Even if the learner pregnancy policies were substantively unfair, flawed and plagued by countless features of invalidity, the department had no administrative power to determine, amend, suspend or abolish (or to give instructions designed to attain any of these) the learner pregnancy policies for the schools. It follows from this reasoning that the directives issued by the first respondent late last year were unlawful. I am therefore inclined to declare them to be of no binding force and effect in law. To find otherwise would render the functioning of the school governing body ineffective and superfluous. The governance of the schools can fall into disarray.

When the institutional autonomy of a school governing body is compromised by instructive official interventions, the elementary norm and standards of teaching and learning might be seriously eroded ...

In the matter of *FEDSAS v MEC for Department of Basic Education Eastern Cape*,<sup>19</sup> Eksteen J made the very important statement that the structure of the system provided in SASA for the organisation, governance and funding of schools cannot be achieved unless the Head of Department complies with his obligations. If he fails to do so, the system breaks down.

Even though this matter was about the Department's failure to appoint temporary educators, the same principle applies to all of the Department's duties. Likewise, the Department must not overstep its boundaries in fulfilling its duties. If the Department fails to fulfil its duties or does so unlawfully, all the other stakeholders will be negatively affected, and, in the end, education as a whole will suffer.

Amendments to SASA are another means by which the state attempts to interfere in school governance. The state seeks to abuse the principal's position as a member of the governing body to gain some control over the governance of a school, by imposing certain duties on the principal as a departmental employee.

In reaction to the proposed amendments regarding the appointment of educators, Helen Zille, then DA spokesperson for education, commented that new legislation that limits governing bodies' powers proves once again that when the Department of Education is faced with a policy choice between ideology and quality, it will always choose ideology.<sup>20</sup> This also goes for the amendments to section 16 of SASA. The

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18 Unreported Free State High Court Cases ZAFSHC 5714/2010, ZAFSHC 5714/2010.

19 Eastern Cape High Court 60/2011.

20 *Volksblad* (2005-05-18) 1.

Department merely contributes to the existing tension between the respective parties, and uses the school principal as its instrument.

#### 4 Section 16A and its Implications

There can be no confusion about the relationship between a school principal and the education department. It is a clear-cut employer-employee relationship, regulated by SASA, the Employment of Educators Act; the Labour Relations Act<sup>21</sup> and, of course, the Constitution of the Republic of South Africa, 1996.

Section 16A(1) of SASA states that the principal represents the Head of Department on the governing body. In subsection 16(A)(3), SASA goes on to declare that the principal's assistance to, or participation in, the governing body may not be in conflict with instructions of the Head of Department; legislation or policy; an obligation towards the Head of Department, Member of the Executive Council (MEC) or the Minister, or a provision of the Employment of Educators Act.

Section 16(2) of SASA stipulates that a governing body stands in a position of trust towards the school. This provision applies equally to the principal, being a member of the governing body, as to the rest of the governing body members. The principal could thus receive conflicting assignments from the Department and the governing body because of their different goals and interests, which suddenly places the principal in a catch-22 situation.

In terms of section 20(1)(g) of SASA, the governing body of a school is responsible for the control and administration of the school's property, including hostels, and, according to chapter 4 of SASA, the governing body must, among other things, establish and administer the school fund,<sup>22</sup> and keep records of funds received and spent by the school.<sup>23</sup> In contrast, the Personnel Administration Measures (PAM)<sup>24</sup> determine that some of the core duties and responsibilities of the principal are to have various kinds of school accounts and records properly kept; to make the best use of funds for the benefit of the learners in consultation with the appropriate structures, and to be responsible for hostels, should they be attached to the school. These provisions create confusion, as, in terms of section 20(1)(g) and chapter 4 of SASA, the governing body has certain responsibilities, while PAM seems now to delegate these very same responsibilities to the principal. And remember, in terms of section 16A of SASA, the principal may not act in conflict with any instructions of the Head of Department; legislation or policies; obligations towards the Head

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21 66 of 1995.

22 S 37 SASA.

23 S 42 SASA.

24 Personnel Administration Measures (PAM) determined by the Minister of Education in terms of the Employment of Educators Act 76 of 1998.

of Department or MEC, or a provision of the Employment of Educators Act.

The Department may order the principal to act according to the provisions of PAM, and, in terms of section 16A, the principal may not go against these instructions. However, in terms of the provisions as set out above, the governing body is responsible for certain school matters (such as school hostel administration), and may order the principal not to get involved in these. Is this a fair position for the principal to be placed in by his/her employer?

Let me illustrate the problem further. The governing body of a public school determines the language policy of the school (as authorised by section 6(2) of SASA). The governing body decides that the school is an Afrikaans-medium school, and instructs the principal to give preference to learners who choose to be instructed in Afrikaans. On the first school day at the beginning of the year, departmental officials, delegated by the Head of Department, arrive at the school, and instruct the principal to admit learners who want to receive education in English, and consequently change the school into a dual-medium institution. The officials also state that, should the principal choose not to give effect to the instruction, disciplinary action will follow.

In terms of section 16A(3)(a), the principal may now not go against the Head of Department's instruction. However, at the same time, the principal still is a member of the governing body to whom a specific part of the governing body's duties has been delegated.

In the matter *Governing Body of Mikro Primary School v Western Cape Minister of Education*,<sup>25</sup> this actually happened. The Education Department instructed the Afrikaans-medium school to admit and accommodate 40 English-speaking Grade 1 learners at the school, despite the existence of a parallel-medium school in the same area. The Department required the school to teach in English, and advised the principal that failure to implement this directive may constitute grounds for disciplinary action.<sup>26</sup>

On the morning of the opening of the school, departmental officials insisted that the children together with their parents attend assembly in the school hall, despite objections by the chairperson of Mikro's governing body. The principal of the school did not process the application forms that had been completed by the parents under the supervision of the officials.<sup>27</sup>

In his judgment, Thring J found that the insistence by the departmental officials that the children and their parents attend school assembly

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25 *Governing Body of Mikro Primary School v Western Cape Minister of Education* 2005 JOL 13716 (C).

26 Prinsloo 2006 SAJ of Ed 355-368.

27 *Idem*.

against the wishes of the principal and the chairperson of the governing body constituted interference in the governance and professional management of the school.

With reference to section 16(3), the judge made the following remarks: The fact that a school principal, in terms of section 16(3) of the Schools Act, must undertake the professional management of his school 'under the authority of the Head of Department' does not, to my mind, render him subservient to the department in everything he does. He does not, thereby, become the second respondent's lackey.

The judge was also concerned about the legality of the officials' actions:

The principle of legality simply means that the state must obey the law. That is such a fundamental principle, and so important in any civilised country, that only in extremely rare cases, if ever, the rule of law may be "held hostage" if it proves to be in the children's best interests. Indeed, it is difficult to imagine how, in the long term, it could ever be in the best interests of children to grow up in a country where the state and its organs and functionaries have been elevated to a position where they regard themselves as being above the law, as, as far as they are concerned, the rule of law has been abrogated.<sup>28</sup>

In the matter *Schoonbee v MEC for Education, Mpumalanga*,<sup>29</sup> the Department assumed that the principal of the school is also the accounting officer of school funds, and suspended him for alleged misuse of school funds. In his judgment, Moseneke J gave certain guidelines on how the relationship between the school governing body and the principal should be dealt with. The judge found that the principal has a duty to facilitate, support and assist the governing body in the execution of its statutory functions relating to assets, liabilities, property and financial management of the public school; that the principal is accountable to the governing body, and that it is the governing body, and not the Department, that should hold the principal accountable for financial and property matters that are not specifically entrusted to the principal by the statute.<sup>30</sup>

The judge also stated that the Department (the employer) is not entitled to impute to employees, and hold them liable for, statutory functions vested in governing bodies with regard to assets, liabilities, property and the financial management of the school.<sup>31</sup>

I see no reason why this judgment cannot be applied equally to the other statutory functions of a governing body. If it is the function of a governing body to determine the school's language of instruction or

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28 *The Governing Body of Mikro Primary School v Western Cape Minister of Education* 2005 JOL 13716 (C).

29 *Schoonbee v MEC for Education, Mpumalanga* 2002 4 SA 877 (T).

30 Prinsloo 2006 SA J of Ed 355-368.

31 *Ibid.*

admission policy, the Department has no business instructing the principal to act in contradiction to the governing body's policies, as section 16A(3)(1) ostensibly determines.

## 5 The Effect of the Department's Interference

In a circular of the Gauteng Department of Education dated 2010 regarding the role and responsibilities of the principal relating to the admission of learners, the Department reminded principals of their duties in terms of section 16A. The issue with this circular, to name but one, is the way in which it is phrased – as if the Department is threatening principals should they not act accordingly. The Department uses bold font and capital letters to remind principals of their duties. Yes, they must assist the governing body in the performance of its functions, but beware ... Threats like these, disguised in departmental circulars, show how section 16A may lead to unfair labour practice. The principal is placed in a situation where he/she will have to act either according to the governing body's policies and face disciplinary action, or the circulars and commands of the Department and contravene section 16(2) of SASA. It is unfair to expect the principal to fulfil both roles at the same time, without prejudicing one of the parties involved.

Section 23(1) of the Constitution provides that “everyone has the right to fair labour practice”, but fails to define “fair labour practice”. In the matter *NEHAWU v University of Cape Town*, Ngcobo J examined section 23(1) of the Constitution, and came to the following conclusion:

The concept of fair labour practice is incapable of precise definition. This problem is confounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations.<sup>32</sup>

The definition of “unfair labour practise” that was in force when the Constitution was written, was incorporated into the Labour Relations Act in 1991 and provides as follows:

An unfair labour practice is defined as any act or omission, other than a strike or a lock-out, which has or may have the effect that:

- (a) an employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardised thereby;
- (b) the business of an employer or class of employers is or may be unfairly affected or disrupted thereby;
- (c) labour unrest is or may be created or promoted thereby; or
- (d) *the labour relationship between employer and employee is or may be detrimentally affected thereby* (own emphasis).

It may be argued that the legislature had this definition in mind when section 23(1) of the Constitution was drafted.

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32 *NEHAWU v University of Cape Town* 2003 24 ILJ 95 (CC).

Currently, section 186(2) of the amended Labour Relations Act contains a definition of the concept “unfair labour practise”, but in the matter *Ntlabezo v MEC of Education, Eastern Cape*,<sup>33</sup> the High Court concluded that the unfair labour practice from which employees are protected in terms of the Labour Relations Act, differs from the unfair labour practice as contemplated in the Constitution. The definition contained in the Labour Relations Act does not cover all instances of unfair labour practice, and, therefore, individuals cannot be denied the right to turn to the Constitution for protection.

Should the definition, as set out above, be accepted, one may argue that the Department is placing the principal in an impossible work situation, because, in terms of legislation, the principal is expected to obey two conflicting authorities’ conflicting commands. The principal will either give effect to the Department’s wishes out of fear for a disciplinary hearing should he/she not obey his/her employer, which goes against his/her obligation in terms of section 16(2), or the principal will choose to act in accordance with section 16(2) and place the interests of the school before the interests of the Department, and disregard his/her duty as a departmental employee. No matter the situation, either the relationship between the principal and Department or between the principal and the governing body will be adversely affected. If the principal goes against the wishes of the governing body, the governing body will be unhappy. If he/she disregards the Department’s instructions, “the labour relationship between employer and employee ... may be detrimentally affected”, causing an infringement of the principal’s right in terms of section 23(1) of the Constitution.

It is important to note that the Department cannot take disciplinary action against the principal of a public school for the way in which the governing body executes any of its statutory functions.<sup>34</sup> Any threat of this nature by an employer/the Department will be unfair. Fairness means more than lawfulness. Lawful conduct is not necessarily fair. In delivering the majority judgment in the matter *National Union of Metalworkers of SA v Vetsak Co-operative*, Nienaber J noted the following, the underlying principle of which I believe may be applied to the conduct of the Department of Education as well. He stated:

[T]here is no sure correspondence between lawfulness and fairness. While an unlawful dismissal would probably always be regarded as unfair, a lawful dismissal will not for that reason alone be fair.<sup>35</sup>

Such conduct would constitute unfair labour practice in breach of section 23(1) of the Constitution. Even though an employer has the right to take

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<sup>33</sup> *Ntlabezo v MEC of Education, Eastern Cape* 2002 3 BLLR 274 (Tk).

<sup>34</sup> Prinsloo 2006 SA J of Ed 355–368.

<sup>35</sup> *National Union of Metalworkers of SA v Vetsak Co-operative* 1996 17 ILJ 455 (A) 459H.

disciplinary action against his/her employee, it does not necessarily constitute fair labour practice.<sup>36</sup>

## 6 Conclusion

With regard to the Education Department, school principals and the demands of section 16A of SASA, one may argue that, if the Department mandates the principal to act in a certain way, and rely on section 16A as its empowering provision, the conduct of the Department constitutes unfair labour practice.

As mentioned earlier, “the concept of fair labour practice is incapable of precise definition”,<sup>37</sup> and the price for this flexibility is uncertainty. In this regard, Landman J stated: “The protection envisaged by the legislature in prohibiting unfair labour practices underpins the reality that human conduct cannot be legislated for in precise terms.”<sup>38</sup> This indeed holds true when it comes to the conduct of a school principal, and the attempt by section 16A to legislate the conduct of a school principal may very well constitute unfair labour practice.

The harm caused by the violation of constitutional rights is not merely harm to an individual applicant, but harm to society as a whole: The violation impedes the realisation of the constitutional project of creating a just and democratic society.<sup>39</sup> The harm caused by section 16A does not only affect a particular school principal in a particular circumstance, but all of the 24 451 principals of public schools in South Africa.

As expressed by Judge Kriegler in *Fose v Minister of Safety and Security*:<sup>40</sup>

The rights violator not only harms a particular person, but impedes the fuller realisation of our constitutional promise. Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further infringement. Deterrence speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to ‘defend against encroachment or interference’. It suggests that certain harms, if not addressed, diminish our faith in the Constitution.

When courts award a remedy (a declaration of invalidity of unconstitutional law) in constitutional cases, they “attempt to synchronise the real world with the ideal construct of a constitutional world created in the image of the supremacy of the Constitution”.<sup>41</sup>

The real world is the one in which the principal is placed in an unfair labour environment, and virtually impossible expectations are imposed

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<sup>36</sup> *Council of Mining Unions v Chamber of Mines of SA* 1985 6 ILJ 293 (IC) 295C.

<sup>37</sup> *NEHAWU v University of Cape Town* 2003 24 ILJ 95 (CC).

<sup>38</sup> *NEWU v CCMA* 2003 24 ILJ 2335 (LC).

<sup>39</sup> Curie & De Waal *The Bill of Rights Handbook* (2005) 196.

<sup>40</sup> *Fose v Minister of Safety and Security* 1997 3 SA 789 (CC) par 95–96.

<sup>41</sup> Curie & De Waal 194.

upon him by section 16A; the ideal constitutional world is the one in which the principal functions in a fair labour environment. As Curie and De Waal<sup>42</sup> put it, the object is to make the real world more consistent with the Bill of Rights.

Section 172(1)(a) of the Constitution provides that a law must be declared invalid in as far as it is inconsistent with the Constitution. This requires a court to declare invalid only those parts of the law that are unconstitutional.<sup>43</sup> This will entail striking out section 16A(3) of SASA, and leaving the rest of the section intact. Severance (separation) aims to cure legislation of any constitutional defects, and, in the matter *Coetzee v Government of the Republic of South Africa*,<sup>44</sup> it was determined that “if the good is not dependent on the bad, and can be separated from it, one gives effect to the good that remains after the separation, if it still gives effect to the main objective of the statute”. The rest of section 16A deals with the professional management functions of the principal and his duties towards the Head of Department, and elaborates on the provisions contained in section 16(3)<sup>45</sup> of SASA. However, section 16(A)(3) oversteps certain boundaries set by other sections of SASA that were promulgated prior to the commencement of the Amendment Act, and eventually interferes in school governance. As mentioned earlier, the underlying objective of section 16A(3) is to hold the principal responsible for the governing body’s actions.

Public school governance is part of the country’s new dispensation of democratic governance. It must be a genuine partnership between a local community and the provincial education department, with the latter’s role being restricted to the minimum required for legal accountability.

If the state has any real concerns regarding the way in which certain governing bodies govern schools, SASA provides multiple remedies to deal with these concerns. However, to promulgate legislation that will limit all governing bodies, even those functioning properly, and to place the principal in an unfair labour environment, will not solve the real problem. The dysfunctional governing bodies will continue to govern poorly; the functional governing bodies will continue to be frustrated by the state’s power struggle, and the principal will be caught in the middle, having to keep wicket on both sides.

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42 *Idem* 196.

43 *Idem* 200.

44 *Coetzee v Government of the Republic of South Africa* 1995 4 SA 631 (CC) par 16.

45 S16(3) SASA provides: “Subject to this Act and any applicable provincial law, the professional management of a public school must be undertaken by the principal under the authority of the Head of Department”.