

Imagined power and abuse of administrative power in education in South Africa*

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JUSTUS PRINSLOO***

1 Introduction

In this article we use the concept “imagined power”, first used in the field of education law in South Africa by Hattingh J in the *Suid-Afrikaanse Onderwysersunie* case,¹ to facilitate a discussion of the abuse of administrative power by educational authorities. We briefly define the rule of law, and the location of legislative and administrative power in education in terms of the South African constitution and other law. We then analyse a few seminal cases relating to the location and exercise of power, before turning our attention to possible constitutional and legal remedies of problems and some conclusions. The cases in the field of education have been selected to highlight power issues relating to the appointment of educators and the powers of school governing bodies in connection with such appointment, as well as financial accountability and the disciplining of learners or students. In order to save space we omitted certain cases that could have been selected for scrutiny.²

2 Some concepts

2.1 Imagined power or “abuse” of power

At the outset it should be emphasised that the rule of law requires *inter alia* that “laws should, for example, be clear and prospective. In terms of the enforcement of laws, government officials must act strictly in accordance with law, enforcement should be procedurally fair”.³

In the *SA Onderwysersunie* case, Hattingh J castigated the officials of the Free State provincial department of education for the way in which they treated certain educators employed at the Louis Botha High School in Bloemfontein. There was an agreement (in the form of a resolution in the provincial chamber of the education labour relations council) between certain trade unions and the Free State provincial government (including the Free State department of education) which, *inter alia*, provided that where schools had an

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¹ *Suid-Afrikaanse Onderwysersunie v Departementshoof, Department van Onderwys, Vrystaat* 2001 3 SA 100 (O).

² See eg *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 2 BCLR 151 (CC); *Governing Body of Mikro Primary School v Western Cape Minister of Education* 2005 2 All SA 37 (C).

³ Lewis “Executive-mindedness re-invented?” 2005 *SAJHR* 127 128.

excess of educators, those educators would be regarded as surplus and redeployed. It was agreed that the department of education would fill vacancies at other schools with surplus educators, taking into account the profile of the educator and the requirements of the post. If an educator unreasonably refused to be redeployed in this manner, he or she would be deemed to have resigned.

Some educators at Louis Botha High School received letters from the department which obliged them to apply for posts advertised in a vacancy list. An offer was made to them to accept an unspecified post at a particular school within three days of receipt of the letter, otherwise the department would consider terminating their service contracts. They were also given three days in which to provide a written motivation as to why their services should not be terminated (instead of the 90 days provided for in the relevant legislation). The union to which the affected educators belonged to applied to the high court for urgent relief. The court held:

“[T]he first respondent had designed a procedure to *orchestrate dismissals* which had been, *at best, a scandalous display of imagined power*. The motive for the first respondent sending the letters *had been, to put it softly, utterly shocking and it testified of scandalous and condescending conduct. It had been done unambiguously mala fide and was an utterly unsuitable manner of behaving towards employees.*

[A]ccordingly, that the respondents clearly had *shamefully disregarded* the provisions of the Constitution of the Republic of South Africa Act 108 of 1996 and had acted *mala fide and ultra vires* and the application had to be granted.”⁴

Clearly, when the judge referred to the term or phrase “imagined power”, he referred to actions on the part of officials who thought they had the power to perform certain acts although the legal position was clearly contrary to what they believed. He also referred to acts that were patently *mala fide* (where they knew they did not have the power, yet still chose to act).

2.2 The rule of law

It is difficult to provide a brief, uncontroversial or precise definition of the “rule of law”. Still, the barest outline may be discerned from the following general observations. The legitimacy of states that govern through law is derived from the fact that their laws are promulgated and enforced in an acceptable manner. More specifically, laws should be promulgated in such a way and be of such a nature, that those governed by them are enabled to plan and live their lives in accordance with them. Laws should, for example, be clear and prospective. In terms of the enforcement of laws, government officials must act strictly in accordance with law, enforcement should be procedurally fair and citizens should never be denied access to the legal system.⁵ Against this background, we look at officials exercising powers which they imagine are at their disposal.

3 *The constitutional context and location of power*

Dwelling on possible reasons why abuses of power by governments and gov-

⁴ 107H-I, 107J-108B, 108I-J – italics added.

⁵ Lewis (n 3) 127.

ernment officials occur might produce interesting speculative perspectives, but are not helpful in suggesting how this phenomenon is or should be handled by the legislature and judiciary in an emerging democracy such as South Africa. Although tempting to speculate on, we consider such reasons to be mostly of a capacity (human resources) nature, which is probably common to most developing countries, and we concentrate instead on constitutional and other legal problems, specifically the issue of power.

South Africa may share the democratic label with other countries, but this does not mean that these countries' constitutional systems are identical. Some of the characteristics of the South African constitutional dispensation are listed below to facilitate an understanding of the uniquely South African features of the problems under discussion, as well as of the possible solutions.

- (i) The constitution contains an entrenched bill of rights.⁶
- (ii) The right to education is a fundamental right entrenched in the constitution.⁷
- (iii) Education (excluding higher education) is a functional area of concurrent national and provincial legislative competence.⁸ There are provisions in the constitution dealing with conflicts between national and provincial legislation on concurrent matters. National legislation does not automatically prevail over provincial legislation.⁹
- (iv) The common notion of hierarchically-structured levels of government does not fit the South African constitutional dispensation. In South Africa, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.¹⁰ Even a very superficial reading of this provision reveals the possibility of disputes and contestations of power among the various spheres of government.
- (v) Section 41 of the constitution provides for a system of so-called co-operative government and spells out, inter alia, the following principles of such government:¹¹

“(1) All spheres of government and all organs of state within each sphere must-

...

- (h) co-operate with one another in mutual trust and good faith by –
 - (i) fostering friendly relations;
 - (ii) assisting and supporting one another;
 - (iii) informing one another of, and consulting one another on, matters of common interest;
 - (iv) co-ordinating their actions and legislation with one another;
 - (v) adhering to agreed procedures; and
 - (vi) avoiding legal proceedings against one another.

...

- (3) An organ of state involved in an intergovernmental dispute must make every reasonable

⁶ ch 2 of the Constitution of the Republic of South Africa, 1996.

⁷ s 29.

⁸ sch 4 of the constitution.

⁹ The relevant provision, s 146, was also scrutinised by the court in the *Maritzburg College* case discussed below.

¹⁰ s 40(1) of the constitution.

¹¹ The relevance of this section to the *Maritzburg College* case below is quite clear.

effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.”

The case law discussed below has been selected to illustrate disputes over the location of power and or obligations regarding:

- (a) financial accountability in a school (the *Schoonbee* case);
- (b) the recommendation for appointment and the actual appointment of a school principal (the *Limpopo* case); and
- (c) the suspension and/or expulsion of learners as disciplinary measures (the *Maritzburg College* case).

4 *Recent case law*

One can discern an ongoing change in the attitude of South African courts to the incidents of imagined power brought before them. We now attempt to outline the changing view of the courts on the issue of imagined power through a discussion of the three cases.

4.1 *Schoonbee v MEC for Education, Mpumalanga*¹²

The *Schoonbee* case concerns the unlawful exercise of power by the head of the education department of the Mpumalanga provincial government who believed that he had the power to take the principal of the school in question to task as accounting officer on matters regarding the school fund (which in terms of the South African Schools Act falls under the jurisdiction of the school governing body).¹³ It also concerns aspects of the exercise of statutory executive power.

The facts of the case are that the member of the executive council for education of the Mpumalanga Province requested the provincial auditor-general to carry out a forensic audit at Ermelo High School. On 3 September 2001 the provincial auditor-general handed the school a “management letter” to which they had to respond by 15 October. However, on 25 September the head of department required the principal of the said school to show reason why he should not be suspended. On 15 October the school governing body responded to the auditor-general’s management letter and the final forensic report was made available to the head of department on 11 December. On the very next day the head of department dissolved the school governing body and suspended the principal and deputy-principal of the school. In his judgment Mosenke J¹⁴ revisited the “quite settled” tests for evaluating administrative actions in South African law. He recited, inter alia, the requirements that

- i the action has to fall within the parameters of the law, *ie* the official taking the administrative action is obliged to have regard to any material procedure or condition which the law prescribes;
- ii administrative action should be procedurally fair;
- iii the action should not be undermined by an error of understanding or of application of the law;

¹² 2002 4 SA 877 (T).

¹³ Act 84 of 1996.

¹⁴ now the deputy president of the constitutional court.

- iv the official who takes the administrative action should not be persuaded by matters other than those relevant for the purpose of the decision. Such official should not have regard to or be persuaded by or moved by some ulterior purpose or motive or irrelevant consideration. He or she must act honestly and rationally, and not arbitrarily or capriciously;
- v administrative action has to be supported by reasons;
- vi the intended administrative action has to be disclosed timeously to the affected parties to allow them to make such representations as might be appropriate.

The judge examined the actions of the head of department and came to the conclusion that there was no valid reason why the deputy-principal should have been suspended. In regard to the suspension of the principal, he found that there had been a misappreciation of the duality of the role of the principal as *ex officio* member of the school governing body and as employee of the head of department and the member of the executive council.¹⁵ It was not legally permissible for the head to hold the principal and deputy-principal responsible for the statutory obligations of the school governing body. The judge also found

“no proportionality between the acts or conduct of the SGB [school governing body – as pointed out in the report of the auditor-general] which in the view of the second respondent [the head of department] compelled him to take certain administrative action . . . and the administrative action which was actually taken; the action of the wielder of power [the head of department] in dissolving the SGB is disproportionate to the conduct which was intended to be corrected or the result aimed at”.¹⁶

He also criticised the head of department for not giving the school governing body “the slightest opportunity” to deal with the intended actions of the head of department.

The court set aside the suspensions and dissolution and ordered the respondents (the member of the executive council and the head of department) to pay the costs of the application on a party and party scale, not on an attorney and client costs basis. This was the judge’s way of expressing displeasure at the respondents’ action which undermined efforts to create a constitutional state characterised among others by just administrative action, “rationality, reasonableness, fairness and openness”.

From the South African Schools Act, it is evident that the school governing body of a public school has to open a bank account for the purposes of running a school fund and that it has to administer such fund.¹⁷ It is also clear that although the principal is an *ex officio* member of the school governing body, he is not the school governing body, and that it was therefore wrong of the head of department to expect the principal to be accountable for the management of the school fund. It may be argued that the issue of the location of power is rendered less transparent by section 19(2) of the Schools Act, which provides that the head of department must ensure that principals and other officers of the education department render all necessary assistance to governing bodies in

¹⁵ Respectively in terms of s 23 of the South African Schools Act 84 of 1996 and s 3 of the Employment of Educators Act 76 of 1998.

¹⁶ 885D-E.

¹⁷ ch 4 of Act 84 of 1996.

the performance of their functions in terms of the act. The view of the court was, however, quite unambiguous in this regard:

“On a careful look at the provisions of the Act, which are by no means replete or comprehensive, no specific duties relating to assets, liabilities, property, financial management are entrusted to or vested in the principal. In my view, the proper interpretation is to regard the principal as having a duty to facilitate, support and assist the SGB [school governing body] in the execution of its statutory functions relating to assets, liabilities, property, financial management of the public school and also as a person upon whom specified parts of the SGB’s duties can properly be delegated. On any of these interpretations the principal would be accountable to the SGB. It is the SGB that would hold the principal accountable for financial and property matters which are not specifically entrusted upon the principal by the statute.”¹⁸

Moseneke J also gave his own translation of the term “imagined power” when he evaluated the conduct of wielders of statutory executive power:

“In a society such as ours where we seek to create a constitutional State, rationality, reasonableness, fairness and openness are very important considerations in evaluating the conduct of wielders of statutory executive power when under judicial review. One would readily find these principles in the Promotion of Administrative Justice Act 3 of 2000. Such administrative actions have to be supported by reasons. The intended administrative action has to be disclosed timeously to the affected party to allow him or her to make such representation as he or she may find to be appropriate. Failure to do so by an official acting within the ambit of a statute, wielding power entrusted to him in advancement of one or other public purpose, is fatal to that administrative act. These statutory injunctions must be observed and failure to do so of necessity leads to abortive administrative action.”¹⁹

4.2 *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School*²⁰

In a recent contribution Sachs J of the constitutional court recollects the essence of the case as follows:

“We [the constitutional court] received a case a little bit earlier than that, from Limpopo province. . . . The local school board (the governing board) had recommended that a white male be appointed as principal of the school. . . . The department of education said, ‘No, we want a black female,’ and appointed a black woman. The governing board body went to the High Court and succeeded in overturning the department’s decision. The judge said he had looked at the merits of the applicants; the white male had been chosen by the governing body, and there was no justification for overturning their decision. He stayed on and the matter rested there until a similar case was heard in Kimberley, and the division of the High Court there took a different position. So now the Limpopo education department said, ‘Aha, we’re coming back to this’ and they asked for a very late appeal to our court. We responded that it was too late, the school had been functioning for over a year with the principal in place. It would have been too destabilising for the children, for the teachers, for the tranquillity that a school needs to function, to hear an appeal then, months after the time for noting the appeal has passed.”²¹

¹⁸ 884B-D.

¹⁹ 885F-G.

²⁰ 2003 11 BCLR 1212 (CC).

²¹ Sachs “Equal educational opportunities and the constitutional court” in Russo, Beckmann and Jansen (eds) *Equal Educational Opportunities. Comparative Perspectives in Education Law. Brown v Board of Education at 50 and Democratic South Africa at 10* (2005) 11.

Sachs J adds: “So we did not face up to the question of how to approach a matter of conflict between the autonomy that a school governing body needs and the direction that the department of education must give.” Comments on the specific issue of balancing autonomy and the need for direction in terms of, among other things, the constitution are offered in the concluding paragraph of this article. Suffice it to state here that the latest amendment to the act in the Education Laws Amendment Act 24 of 2005²² amends dramatically the statutory provisions under which the above case was decided, and it is likely that if a similar case were to be brought before the courts under the new provisions, a totally different judgment might result. This suggests that amendment of legislation is an avenue that may be explored to solve some of the abuse of power issues questions that have presented themselves.

When the *Settlers* case was brought before the courts, the Employment of Educators Act still provided that educators employed by a provincial department of education were appointed by the provincial head of department of education on the recommendation of the school governing body.²³ The head of department could only appoint or promote an educator at a public school on the recommendation of a school governing body,²⁴ which was not at issue in the case as it merely limited to two months the time a school governing body could spend on making a recommendation after having been requested to do so. Section 6(3)(b) of the Employment of Educators Act provided that the head of department could only decline the recommendation by the school governing body if —

- (i) the school governing body did not follow collective procedures or procedures determined by the national minister;
- (ii) the candidate did not meet agreed requirements;
- (iii) the candidate was not registered with or did not qualify for registration with the South African council for educators (the professional board for the registration of educators in South Africa);
- (iv) there was sufficient evidence that the recommendation of the school governing body was based on improper influencing; and
- (v) the school governing body did not consider the democratic principles and values contemplated in section 7(1) in the Employment of Educators Act.

Section 6(3)(c) of the Employment of Educators Act provided that if a head of department declined a recommendation in terms of section 6(3)(c), the school governing body had to provide him or her with another recommendation in terms of section 6(3)(a). Section 7(1) provided that equality, equity and the other democratic values and principles contemplated in the constitution,²⁵ had to be properly considered together with a number of factors including the competence of the candidate and the need to redress the imbalances of the past in order to ensure broad representivity.

When the matter was brought before the high court, Bertelsmann J found that the school governing body had complied with the provisions of the Em-

²² Act 24 of 2005 adopted by parliament in Sept 2005.

²³ s 6 of Act 76 of 1998.

²⁴ s 6(3)(a) subject to s 6(3)(d) of Act 76 of 1998.

²⁵ s 195(1).

ployment of Educators Act. He therefore set aside the head of department's decision. A further reason for setting aside the decision was the fact that the head of department was not authorised *mero motu* to make another appointment but was merely empowered to refer the recommendation back to the school governing body to make another recommendation. The head of department's action to appoint somebody the school governing body had not recommended was therefore clearly *ultra vires*. When considering a comparable set of facts,²⁶ the high court in the *Kimberley* case found otherwise (as Sachs J indicates).²⁷ In the *Kimberley* case, the court emphasised that misplaced reliance has been placed before on procedural guidelines, norms, criteria, regulations and prescripts in the selection process and that the entire exercise is rendered completely futile if the constitutional and legislative imperatives contained in section 6(3)(c) read with section 7(1) of the Employment of Educators Act, and section 195(1) of the constitution, are overlooked. In this regard Lewis echoes the sentiments of the two judges, albeit in a different constitutional context:

"The introduction of a constitutional democracy in South Africa in 1994, and the provisions of the Constitution require judges to have regard to the underlying principles and values of the Constitution. These values – particularly the primary values of equality, dignity and freedom, and the accountability of the state to its citizens – must now inform all decisions"²⁸

Both cases turned on sections 6 and 7 of the Employment of Educators Act, provisions that leave scope for different interpretations. The Education Laws Amendment Act 24 of 2005 now makes it easier for provincial heads of department to act like the head of the Limpopo department of education intended to do, namely to ignore school governing body recommendations in order to give better effect to constitutional and transformational principles as they understand them. After amendment and promulgation certain subsections of section 6(3) of the Employment of Educators Act 76 of 1998 will read as follows:²⁹

- "(c) The governing body or the council, as the case may be, must submit a list of
 - (i) at least three names of recommended candidates; or
 - (ii) fewer than three candidates in consultation with the Head of Department, in order of preference to the Head of Department.
- (d) When the Head of Department considers the recommendation contemplated in paragraph (c), he or she must, before making an appointment, ensure that the governing body or council, as the case may be, has met the requirements in paragraph (b).
- (e) If the governing body or council, as the case may be, has not met the requirements in paragraph (b), the Head of Department must decline the recommendation.
- (f) Despite the order of preference in paragraph (c) and subject to paragraph (d), the Head of Department may appoint any suitable candidate on the list."

It begs the question whether this amendment solves Sachs J's question regarding the balancing of the autonomy of the school and the need of heads of department to oversee and direct the human resource provisioning of schools in the light of an interpretation of values and principles of the constitution. It could be argued that powers now given to heads of department are too ex-

²⁶ *Kimberley Girl's High School v The Head of the Department of Education, Northern Cape Province* case no 32/2003 (NC) (unreported).

²⁷ n 19 at 11.

²⁸ Lewis (n 3) 127.

²⁹ At the time of writing the amendments had not yet been promulgated.

tensive and may signal the beginning of the end for the democratic devolution of power to school governing bodies. Only time will tell.

What does the *Limpopo* case mean within the exploration of the theme of “imagined power”? Before issuing its order in this case, the constitutional court felt constrained to comment on the following issue:

“The respondents mentioned in their affidavit that despite frequent requests, three costs orders of the High Court have not been responded to by the applicant. If the applicant has indeed ignored the order for costs made against him in the earlier proceedings that would indicate an unacceptable lack of respect for court orders. If a structure of government is unhappy with a decision of a court it has its legal remedies; refusal to pay orders for costs is not amongst them. The Constitution [section 165(5)] provides that an order of court ‘binds all persons to whom and organs of state to which it applies’. It also requires organs of State to protect the dignity and effectiveness of courts [section 265(4)].

If governments do not obey the court, they cannot expect citizens to do so. Nothing could be more demeaning of the dignity and effectiveness of courts than to have government structures ignore their orders. The applicant has not had an opportunity of replying to the averments made in this regard. There is no need to delay the matter by calling for a reply before handing down this judgment. The matter cannot, however, pass without the issue being investigated at the highest level within the Province. It is important that steps be taken to establish whether or not the orders for costs have been paid, and if not, to ensure that the court orders are complied with without further delay. The Registrar of this Court is requested to forward this judgment to the Member of the Executive Council of the Limpopo Province responsible for education, with a request that a report be made to this Court on this issue by 16 October 2003. The Registrar is also requested to forward a copy of this judgment to the Premier of the Limpopo Province.”³⁰

If the head of the department of education of Limpopo Province indeed chose to ignore court orders, it indicates a very alarming exercise of “imagined power” by the department in that they may appear to view themselves as being above the law, *ie* the rule of law laid down in the constitution. The court correctly points out that if government structures do not obey the courts, they cannot expect ordinary citizens to do so. More time is devoted below to the implications of such disregard of the courts. This case also illustrates a lack of clarity on the exact location of power in regard to the appointment of a principal and the question is whether the school’s democratic right to recommend a person should weigh more strongly than the obligation of the head of department to implement constitutional provisions regarding the civil service that enjoins him to consider issues such as redress and representivity.

4.3 *Maritzburg College v CR Dlamini NO*³¹

This case confirms the dictum that truth is sometimes stranger than fiction. During October 2003 three learners at Maritzburg College, a public secondary school in Pietermaritzburg, were involved in an incident in which a window of a hired bus was smashed. The school instituted disciplinary action against the learners and on 11 January 2004 the school governing body decided to suspend two of the students pending their expulsion by the head of department. It also decided not to re-admit them to the school on its re-opening for the 2004

³⁰ par 14.

³¹ case no 2089/2004 (N) (unreported). Also see Visser “Suspension of learners – failure by head of education department to act timeously and to interpret the law correctly” 2005 *THRHR* 698.

school year. On 19 January 2004 the school governing body advised the head of department by letter of its decision. As the South African Schools Act obliges school governing bodies to consult with the head of education regarding suspension of learners with a view to their expulsion, the school tried telephonically to establish which official they should consult. On 26 January 2004 an official from the department contacted the school and informed the principal that the school had to consult with the head of department, who was at that stage out of the country. The judge commented that the school “foolishly” believed that “the first respondent [the head of department] would have delegated his powers to another official in his absence” and wrote a letter on 26 January 2004, enquiring who they were to consult in the absence of the first respondent. On 16 February the school wrote another letter chronicling its unsuccessful attempts to establish the name of the official they had to consult. The school also pointed out that the situation had led to an unsatisfactory situation in the school and gave the head of department notice in terms of section 6(3) of the Promotion of Administrative Justice Act³² to make a decision regarding the interim suspension of the two learners within one week from the date of dispatch of the letter. The school also stated that if the head of department did not comply with its request, it would consider approaching the high court.

Over the weekend of 21 and 22 February 2004 the head of department telephonically advised the school that he could see them for half an hour on 24 February 2004 on the steps of the legislature building in the town of Ulundi, seat of the legislature of KwaZulu-Natal (so far away from Pietermaritzburg that the representatives of the school governing body had to go there by air). In a letter dated 24 February 2004 the school recorded that the meeting had taken place and expressed the hope that the head of department would revert to them within one week. On 17 March the school still had not heard from the him and wrote a letter notifying him that they would proceed to court if he had not discharged his duty to consult with them by no later than 24 March 2004.

The judge records that the head of department addressed “what can only be described as an astonishing letter” to the school on 24 March 2004. Part of it reads as follows:

“As regards the issue of suspension of learners in terms of section 9(2) of the Schools Act, the provision makes it clear that this has to take place ‘in consultation’ with the Head of Department. It is not that I had to consult you but that you had to consult me. Moreover, I was supposed to concur with the suspension. It is not a question of your suspending the learner and I have to automatically concur with that. I do appreciate that you could not get me at the time you wanted to contact me. But I am not persuaded that your decision to suspend the learners before consulting me was in accordance with the provisions of the Act. For this reason I regard the suspension as illegal, and consequently the learners have to be reinstated pending the decision on their expulsion.”

On 1 April 2004 the school proceeded to launch an urgent application that the head of department’s decision be set aside. The head of department indicated that he intended to oppose the matter and the matter was adjourned to 21 May 2004.

On 5 April 2005 the head of department changed his decision and upheld the

³² 3 of 2000.

suspensions recommended by the school. He then contended in an answering affidavit that the relief sought by the school had become academic and that there was therefore no issue between the two parties. According to the judgment, the head of department “nevertheless felt constrained” to depose the following paragraph:

“However, it is necessary to record that before making such a decision, although this application had been made, there was no obligation on me to expeditiously make a decision on expulsion as a number of issues had to be considered by me. The Governing Body of the applicant itself had had to adjourn its proceedings before making recommendations to me. To have expected me to decide the issue within two months was utterly unreasonable.”

The judge decided to issue a declaratory order in the circumstances of the case and in terms of the Supreme Court Act³³ and the common law. He advanced the following reasons for his decision:

“It is of vital importance to the applicant to know whether it acted legally when it suspended the pupils because it will affect the procedure it adopts in all future suspensions and expulsions. Where a public official maintains that his interpretation of the law and consequently the procedure to be adopted in cases of suspension and expulsion is the correct one it is a duty of the Court to step in and determine the rights and obligations of the parties, more particularly so when it regards the public official’s interpretation of the law to be manifestly wrong.”

The court found that the school had correctly applied the provisions of the provincial education law and regulations in question. The judge felt obliged to comment as follows:

“I find it disturbing (to put it mildly) that a public official had to be galvanised into action to do his duty only when served with a Court application. Even more disturbing is his attitude as spelt out in paragraph 11 of his answering affidavit, quoted earlier in this judgment, that there is ‘. . . no obligation on me to expeditiously make a decision on expulsion as a number of issues had to be considered by me’. He then goes on in the paragraph to state that to expect him to make a decision within 2 months was ‘utterly unreasonable’. This attitude not only ignores the obligations on the Governing Bodies to maintain discipline and good standards at the schools, but more importantly totally disregards the rights of the pupils who stand in the shadow of expulsion. They have a right to know expeditiously whether they are going to be expelled so that they may be taken up in another school.”

After expressing his shock at the fact that, according to submissions by the school, some learners had had to wait 21 months for a decision by the head of department on their expulsion, the judge went on to frame his displeasure at the exercise of imagined power in even stronger terms than those used by the judges in the two previous cases:

“Consideration must be given in future, in my view, where litigants are forced to come to court to compel public servants to carry out their duties where they have failed to do so, that such officials be ordered to pay the costs incurred, personally. There is no justification for taxpayers’ money being used to pay legal costs incurred consequent upon a public servant failing to carry out the duties he is obliged to by virtue of his office. As it is, I consider, in my discretion, that I should reflect the displeasure of this Court in the conduct of the first respondent by making a punitive order of costs.”

³³ s 19(1)(a)(iii) of Act 59 of 1959.

The judge accordingly ordered the head of department to pay the school's costs on the scale as between attorney and own client.

The *Maritzburg* case underscores the ill effects of disputes and uncertainties about the location of power and obligations on a school in general and on specific learners in particular. It also illustrates the difficulty associated with administering a system of co-operative government that locates exclusive powers and concurrent powers at different points. If we assume that there was no ill intent on the part of any of the stakeholders, the case provides evidence of at least the following vexing issues:

- (i) The rights and responsibilities of both school governing bodies and heads of departments regarding the disciplining of learners – in particular punishment for serious misconduct which could in a sense limit learners' right to education. The head of department's statement that the school governing body was supposed to consult with him and that he was not supposed to consult with them, may point to a great deal of uncertainty as to the meaning of a phrase in a law but also about who has the power to raise matters and to expect action.
- (ii) The relationship between the various provincial school education laws and the South African Schools Act. The head of department believed that he had to follow the South African Schools Act, whereas the judge pointed out that the South African Schools Act was clear that decisions regarding suspensions were subject to provincial laws and that he therefore had to be guided by the school education law of KwaZulu-Natal. This brings into sharp relief the issues of concurrent legislative authority over education in public schools.

5 *Implications of the use of imagined power*

5.1 The role of the courts

The courts may in future have to deal with a never-ending stream of litigation on issues of power location, issues that are important to provincial and national education departments, schools, school governing bodies, parents and even the community at large. If clarity is not provided and if government officials keep on ignoring court orders, courts will devote much of their time to managing education systems, admonishing officials and educating administrators instead of focusing on their primary task of adjudicating disputes and reviewing decisions. It would be cause for serious concern if courts had to run an education system by remote control, as it were, and worse still *ex post facto*. That might jeopardise the long-standing tradition of courts deferring to the reasonable exercise of professional judgment by school administrators and professional educators.

5.2 Achieving the ideals of the constitution

If the use of imagined power by education and other government officials persists, the values of the constitution, and in particular section 1(c) which articulates the supremacy of the constitution and the rule of law as founding values of the Republic, are not going to be achieved easily. We agree with the constitutional court's observation in the *Settlers* case³⁴ that the government

³⁴ n 18.

cannot expect ordinary citizens to respect the law and the courts if government structures themselves do not do so. Whereas one could argue that adults are, to some extent at least, able to distinguish between lawful and unlawful action by government officials, it is not fair to place this responsibility on the shoulders of children who learn to a large degree from observing the models that adults hold up to them.

5.3 Fulfilling and protecting the rights of children

Even from a superficial reflection on the three cases discussed above it is apparent that the rights of children are seriously jeopardised if not violated by the quoted instances of the exercise of imagined power. In the *Suid-Afrikaanse Onderwysersunie* case, it is clear that, had the department succeeded in its attempts to redeploy educators, the learners could have lost the services of experienced teachers and would have had to complete their school year with new teachers. In the *Settlers* case the school could have lost the principal who had the confidence of the school governing body and could have experienced turbulence if a new principal had been appointed more than nine months after the school governing body's first choice had assumed duties. The tension thus created would not have created conditions conducive to good learning and teaching, at least not in the short to medium term. The *Maritzburg College* case provides the starkest illustration of the negative results of the exercise of imagined power, depriving learners for up to 21 months of certainty regarding their future education if not of education itself (as happened in the circumstances which gave rise to the case).

Apart from these obvious negative results and those pointed out by the courts, one could also surmise that there would be more subtle and perhaps even more destructive results. One could argue that educators' work would be affected by lack of legal certainty, through exposure to capricious actions and a legitimate perception that they were being treated unfairly. It is difficult to contemplate how schools could succeed in teaching national values if one of them, namely fairness and just treatment, was flagrantly violated by the government. Children still have more need of models than of instructions.

5.4 Possible remedies

The problem of the exercise of imagined power, as it presents itself, suggests at least three possible remedies:

- (i) Through sound human resources practices, including appointments and capacity building aimed at educational officials. This is in part a political issue with which this contribution cannot concern itself.
- (ii) Through constitutional change. In South Africa, the ruling party, the African National Congress, enjoys a huge majority in parliament, and it could foreseeably bring about changes of the constitution more easily than, for example, in the USA, where this is a cumbersome, protracted and very difficult matter. Even the bill of rights, which requires a two-thirds majority in the national assembly and the votes 6 of the 9 provinces in the national council of provinces to be amended, is not beyond the reach of the ruling party. Not even the founding provisions of the constitution in section 1, which is protected by a 75% majority in the national assembly plus 6 of the 9 provinces in the NCOP, is beyond amendment.

Constitutional changes could affect the notion of co-operative government and could provide more clarity on where responsibilities and rights regarding education in, for example, public schools lie.

- (iii) Through ordinary legislative change. Changes to the South African Schools Act and the Employment of Educators Act could easily be made through ordinary voting majorities in parliament as has indeed happened regularly since 1997, the last time being September 2005.

Of course, we do not suggest that the government should exercise its majority to bring about changes that will, on the one hand, bring clarity on issues of power and authority, but will also, on the other hand, give rise to intense debates on the founding values of the country. Any amendments contemplated should comply with the values underlying the constitution.

6 Conclusion

This contribution has attempted to trace the path of the phenomenon of imagined power in an emerging democratic state as it appears in litigation. It suggests that the phenomenon challenges assumptions in more settled legal systems regarding the rule of law and constitutionalism. It also seems to imply a protracted period of contestation developing from the need to balance, on one hand, broad values and principles arrived at fairly comfortably and easily through negotiations based on good faith and a will to make negotiations succeed and, on the other hand, more precise translations of the values in terms of law that may not enjoy popular or universal acceptance. An inevitable conclusion is that democratic governments that take over from other dispensations must have a definite human resources strategy (including capacity building) that will create a competent public service able to support and not undermine the achievement of new and democratic ideals.

We suggest, though, that constitutional and legislative change may appear to be relatively easy to effect in South Africa. Such change could have a beneficial influence on the exercise of powers and could result in better adherence to the rule of law and respect for the supremacy of the constitution. The repercussions of such change for even more fundamental issues such as democratic representation and the rights of communities are, however, another matter on which we, like Sachs J, will not touch for now.

SAMEVATTING

GEWAANDE MAG EN DIE MISBRUIK VAN ADMINISTRATIEWE GESAG IN DIE ONDERWYS IN SUID-AFRIKA

In hierdie artikel gebruik ons die begrip "gewaande mag" wat deur regter Hattingh in *Suid-Afrikaanse Onderwysersunie v Departementshoof, Department van Onderwys, Vrystaat* 2001 3 SA 100 (O) benut is om die optrede van amptenare van die Vrystaatse onderwysdepartement te karakteriseer in 'n bespreking van die misbruik van administratiewe gesag deur Suid-Afrikaanse onderwysowerhede. Ons bespreek kortliks die plasing van wetgewende en uitvoerende gesag in die Suid-Afrikaanse onderwysstelsel en bespreek daarna 'n keur van sake oor die lokalisering en uitoefening van gesag rakende die bevoegdheids van skoolbeheerliggame, finansiële verantwoordingspligtigheid en leerderdisipline. Ten slotte bespreek ons kortliks moontlike implikasies van die uitoefening van gewaande mag en moontlike remedies daarvoor.