

**ALIGNING SCHOOL GOVERNANCE AND THE LAW: HANS VISSER ON  
EDUCATION CASES AND POLICY**

Paper read in memory of Prof PJ (Hans) Visser on 27 July 2007\*

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**1 Introduction**

The sudden passing away of Hans Visser was a huge shock and a loss to his wife and children, his family and friends and his colleagues. Hans cast a giant shadow over the landscapes of a number of academic disciplines and fields. It was an inestimable loss among others in terms of the development of education law as an academic discipline.

I am honoured to have been asked to read this paper in memory of an exceptionally gifted and richly blessed academic and human being whose legacy will present us with enormous challenges. He was a remarkable scholar and researcher and a productive writer to which his publications record attests eloquently.

I am intensely aware of the fact that the Faculty of Law could have chosen any number of people from any number of fields to honour Hans's memory today. It is an onerous responsibility that I have to discharge today. I am deeply aware of the fact that I am not a jurist and yet I am to speak to the work of one of the best of that profession.

One would hope that the invitation to me signals, among others, a degree of recognition of the standing of education law as field of inquiry within the legal fraternity and, more importantly, of the crucial leadership that Hans played in the development of this domain, both in the development of knowledge and in the making of strategic decisions in a changing legal environment, to which the excellent constitutions of the South African Education Law Association (SAELA), the Interuniversity Centre for Education Law and Education Policy (CELP) and the Education Management Association of South Africa (EMASA) and the Centre for Child Law in the Faculty of Law of the University of Pretoria bear persuasive

witness. I am sure that there will be other opportunities for people from other fields of inquiry to pay homage to Hans's prowess.<sup>1</sup>

## 2 Aim of the paper

The aim of the paper can obviously only be to explore selected themes and not to explore Hans Visser's phenomenal oeuvre in its entirety. According to Rassie Malherbe his "knowledge, insight, versatility and productivity put him in a in a class of his own."<sup>2</sup> According to Jan de Groof, President of the European Education Law Association, Hans gave concrete expression to European South African cooperation regarding education law and policy and the application of human rights in and through education.<sup>3</sup> He was a prolific writer and an acclaimed expert in the law of damages, law of delict, the law pertaining to the security industry, education law and other fields of law.<sup>4</sup>

I have already mentioned that I am not a jurist. The definition of a second level consumer<sup>5</sup> of education law in terms of a seminal article published by Ralph Mawdsley and Hans Visser in 2007 (see Mawdsley & Visser The development of education law as a separate field of law: The experience of the United States with some observations on South Africa. TSAR 2007 1: 153 – 161) fits my involvement with education law particularly well and I have to necessarily restrict my consideration of his work to his observations on education law. My involvement in education law is therefore that of a consumer of "applicable and relevant legal material".

## 3 Education law and its consumers

In the above article Mawdsley and Visser provide me with a lens for looking at Hans Visser's contribution to education law. They comment that determining whether a new field of law needs to be recognised depends on the convergence of at least four factors: (a) a critical mass of existing legal material that has a common core, (b) a sustainable rate of production of

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1 In this regard the national Department of Education (in particular the education management and governance development directorate) has asked me to convey their condolences to Hans's family and to convey their appreciation of the enormous work he did for them in interpreting legislation and providing guidelines for users when the new dispensation began.

2 *Sui Generis*, Vol 9, No 1, June 2007

3 Fn 1. Translation from the Dutch by the author.

4 See obituary by Johan Potgieter and Johan Beckmann in *Sui Generis* fn 1. I used a selection of 25 articles on education law published by Hans Visser since 1997 (including 2 published this year) in the preparation of this paper. In the light of the fact that he wrote extensively on at least three other fields his number of articles on education law is nothing but phenomenal. These contributions are in addition to many research projects, papers read at conferences, position papers and opinions. The reference list at the end of this paper is intended to provide a glimpse into his contributions.

5 Mawdsley and Visser do not use the term "second level" but in the context of the development and implementation of education law I find it conceptually useful.

material in the common core, (c) a recognition that failure to place the common core within its separate field could result in the conveying of fragmented, disjointed, and/or inaccurate information, and (d) “consumer” interest in, and demand for, a unified and separate source of information about the field (p 155). They conclude that, “for reasons of practical expediency” it makes “perfect sense” to acknowledge education law in South Africa (p 161). This conclusion has important implications to which I will return later.

However, I want to highlight their analysis of who the “consumers” are, as this guides my analysis of Hans Visser’s work. They distinguish two kinds or levels of “consumers”: law-trained persons who assimilate case and statutory law and distil principles and requirements from them and persons who operationalise the requirements and principles within the educational environment. To me the latter type represents second level consumers. They don’t view the partnership between the two types or levels of consumers as necessarily being a sequential partnership but believe that it has become more of a tandem partnership (in the United States in particular) (p 158). This conclusion also has implications to which I will return later.

#### **4 Approach to the analysis**

In scrutinising a modest selection of Hans Visser’s work on education law I will depart from the perspective of a second level of consumer as I am such a consumer. I will therefore ask the question, “What can second level consumers of education law learn from a discussion of a selection of issues emerging from Hans Visser’s work on education law?” For the sake of expedience I will explore Hans’s work on education law by reference, mainly, to his outputs in scholarly journals. I will confine myself as much as possible to his writing on the law and school governance.<sup>6</sup>

In responding to the question articulated above, I will have to select a small number of issues and I will therefore first consider the idea of the alignment of law and school governance and then proceed to his analysis of the misalignment between the law and school governance by presenting a “catalogue” of incidents Hans identified. Thereafter I will turn to his analyses of broad policy framework issues pertaining to laws and policies (in particular his insistence on clear and purposeful formulation). I will then focus on Hans’s examination of some of the issues with which he seemed to be preoccupied namely school governance, and the positions

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<sup>6</sup> In addition to the obvious meaning of “school governance” as functions allocated to School Governing Bodies (*governing* bodies) as contemplated in section 16(1) of the South African Schools Act 84 of 1996 (*Schools Act*), I also use the term in its connotation of “control over” for example funds, and the conduct of among others educators and education officials.

(rights and duties) of learners and parents respectively. This will be followed by a brief exposition of Hans's suggestions about possible legal reform before I conclude with some recommendations on how the education law community might pay further homage to Hans.

## 5 Alignment

The functions of the law include the regulation of relationships and activities so that harmony among the various role-players can result. In education law it is therefore logical that the objective of the legal framework will be to harmonise the roles (rights and duties and responsibilities) of among others the state, educators, learners and governing bodies to ensure that all the children of our country have access to quality education. The preamble of the *Schools Act* formulates the aims of the Act in inspiring terms:

... a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and ... lay a strong foundation for the development of all our people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State

In an article in the *Journal of Contemporary Roman-Dutch Law* (see Visser Suspension of learners - failure by Head of Education Department to act timeously and to interpret the law correctly *Maritzburg College v Dlamini, Mafa and Kondza* Case no 2089/2004 (N). 2005 (68) THRHR: 698 – 702) Hans comments that this case

is yet another example that, unless the quality of education management drastically improves on a provincial level, the high ideals voiced in the preamble of the South African Schools Act 84 of 1996 ("the Schools Act") will probably remain hopes and dreams that that cannot be realised fully ...

The unsatisfactory quality of education management at provincial level is only one of the causes of the misalignment between the law and school governance on which Hans comments. In an article in TSAR 2006 – 2 (Some thoughts on legality and legal reform in the public school sector. TSAR 2006 1: 359 – 366) Hans refers to two noteworthy features of the *Schools Act* namely that there "have been various amendments and talk of amendments" to it over the past few years and that there have been "many instances where it has been misconstrued or simply ignored by some of the various role-players". It is clear from a reading of Hans's articles that the misconstruction of the legal framework and the consequent misalignment of law and implementation in the form of, for instance, school governance can

result from, among others, ignorance, governors being misguided, unjustified trusting in other role-players and even *mala fide* use of “imagined” power (see in general Some thoughts on legality and legal reform in the public school sector. TSAR 2006 1: 359 – 366; Aspects of school fees at public schools. 2004 De Jure: 358 – 362; Suspension of learners - failure by Head of Education Department to act timeously and to interpret the law correctly *Maritzburg College v Dlamini, Mafa and Kondza* Case no 2089/2004 (N). 2005 (68) THRHR: 698 – 702).

The reference to alignment in the title therefore implies the need for law that clearly and effectively regulates aspects of school governance on one hand and, on the other hand, lawful and correct implementation of the law free of, among others, abuse of power. Hans commented on both.

## 6 Catalogue of misalignment

In his articles Hans presents a catalogue of instances of misalignment of the law and school governance (although he always refers to “some examples”). Metaphorically, this catalogue depicts the house that legislators and various levels of educators (and educational officers) as well as governance agencies need to get in order. The catalogue that follows is derived mainly from the three articles quoted in par 4 above:

### Causes of misalignment linked to education officials / authorities / departments<sup>7</sup>

- Neglect of duty and misinterpretation of education laws by provincial heads of education departments
- Corruption and incompetence regarding examinations including the leaking of examination powers
- Maladministration and deep-rooted problems in the education departments of the Eastern Cape and Mpumalanga
- The Constitutional Court stating that “nothing could be more demeaning of the dignity and effectiveness of courts than to have government structures ignore their orders” in response to the failure of the head of the Limpopo education department to comply with high court costs orders against him (see *Head of Department of Education, Limpopo Province v Settlers Agricultural High School* 2003 11 BCLR 1212 (CC) par 14)

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<sup>7</sup> Although I take the liberty of commenting and elaborating on Hans’s ideas in some instances, I do not examine the validity of his statements. Besides this being beyond my reach as a second level user of education law, the scope of this paper does not allow such an exercise. In general I agree with Hans’s observations.

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- The high court in the Free State describing the orchestration of dismissal by the head of education as “shocking”, “shameful” and “scandalous” (see *Suid-Afrikaanse Onderwysunie v Departementshoof Departement van Onderwys, Vrystaat* 2001 3 SA 100 (O))
- The high court setting aside irregular decisions by the Mpumalanga education department to suspend the school principal and deputy-principal and suspending the governing body (see *Schoonbee v MEC for Education, Mpumalanga* 2002 4 SA 877 (T))
- In *Despatch High School v Head of Department of Education, Eastern Cape* 2003 1 SA 246 (ChH) the Eastern Cape high court voiced its displeasure at the way in which the education department in that province had dealt with a complaint against a principal who had stolen a school cell-phone and had lied about it<sup>8</sup> (see Visser *Despatch High School v Head, Department of Education, Eastern Cape* 2003 1 SA 246 (ChK). 2004 De Jure: 150 – 154). The court specifically stated that the manner in which the respondent dealt with the concerns of the governing body regarding the continued presence of the principal at the school was far from satisfactory. The court faulted the respondent for not displaying more sensitivity to the “understandable concerns” of the governing body. Had the respondent done so, the need for the school to resort to litigation might well have been averted
- In KwaZulu-Natal the governing body had to struggle for months to establish meaningful contact with and obtain a proper reaction from the provincial head of department concerning the suspension of three learners on charges of serious misconduct (see *Maritzburg College v Dlamini, Mafu and Kondza* (case number 2089/2004, Natal Provincial Division, 2004-05-27)
- In *Western Cape Minister of Education v Mikro Primary School* 2005 10 BCLR 973 (SCA) the Supreme Court of Appeals confirmed the finding of the Cape high court that the Western Cape education department had among others issued illegal directions, ignored the school’s lawful admission policy, threatened the principal with disciplinary action, and relied on false and inaccurate statements in its affidavits. The Supreme Court of Appeal retained the order for costs against the department as a sign of the heavy public opprobrium the department deserved
- Instances of unnecessary disputes where education authorities were unwilling to appoint staff members recommended by governing bodies (see for example

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<sup>8</sup> The department found the principal guilty of misconduct and gave him a final written warning – the governing body wanted him charged with **serious** misconduct.

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*Observatory Girls Primary School v Head of Department of Education, Gauteng* 2003 4 SA 246 (W))

### Causes of misalignment linked to governing bodies

- A general ignorance on the part of governors of how education is supposed to be governed and managed in terms of the law
- Corruption, promotion of self-interest, nepotism and ethnic prejudice. These include illegal payments to themselves or others including educators, irregularities concerning the awarding of contracts for services, recommendations of “sons of the soil” for appointment to the disadvantage of better candidates, and misuse of school fees
- Governing bodies forfeiting or abdicating their independence and being used as rubber stamps by school management teams (also see Creese & Earley (1999) *Improving Schools and Governing Bodies. Making a Difference*. London. Routledge p 9; Roos in Department of Education (2004) *Review of School Governance. South African Public Schools. Report of the Ministerial Review Committee on School Governance* p 98) (also see *Some thoughts on legality and legal reform in the public school sector. TSAR 2006 1 : 359 – 366*)
- Gullibility in regard to information provided to them by the school management team and a failure to insist on being fully and timeously informed of everything relevant to their functioning (also see *Some thoughts on legality and legal reform in the public school sector. TSAR 2006 1 : 359 – 366*)
- Governing bodies acting *ultra vires* empowering legislation or condoning such actions (for example in respect to admission and the unlawful granting of exemption from school fees) and discriminatory practices (for example in regard to religious observances, freedom of expression and access to information regarding learner achievement) or threats to learners whose parents cannot or do not pay school fees or to such parents themselves (Also see *Some thoughts on legality and legal reform in the public school sector. TSAR 2006 1 : 359 – 366*)
- Interference or attempted interference in the professional duties of educators (for instance promotion of learners) and efforts to usurp the powers of employing authorities (regarding for example the dismissal of educators)
- Failure to detect irregular actions classified as “professional management” by “a wily school principal” (see *Some thoughts on legality and legal reform in the public school sector. TSAR 2006 1 : 359 – 366, p 364*)
- Illegal or incorrect conviction of learners of misconduct (see for example *Antonie v Governing Body Settlers High School* 2002 4 SA 738 (C); *Michiel Josias de Kock NO*

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*v Departementshoof van die Onderwys-departement, Provinsie Wes-Kaap saak 12533/98, 2.10.98).*<sup>9</sup>

### Misalignment relating to school fees

- Parents are informed that learners have to be admitted every year
- Parents are given discounts if they pay before a certain time
- Additional amounts are charged depending on the subjects taken by a learner
- Schools threaten to withhold reports of learners who have not paid school fees. They also threaten not to allocate such children to classes.

One has to ask what the implications of this catalogue of misalignments complied by Hans Visser are for second level users of education such as educators, education officials and governing bodies. I would venture to suggest the following for consideration:

- Urgent attention needs to be given to sensitising role-players at various levels (departmental officials (at head office and in regional and district offices), professional school management teams and governors) to the need to comply with the law in the execution of their duties and the exercising of their rights. I believe there is still very limited appreciation of this imperative in educational circles and that this lack of awareness of the importance of knowledge of education law rules can be ascribed among others to problems regarding the initial training of teachers (very few higher education institutions pay and are able to pay significant attention to education law and their teacher training programmes) and to the failure of education authorities to provide proper guidance to educators, governing bodies and to educators out of schools regarding the necessity of education law knowledge. Teacher professional development programmes are, by and large, ineffective in their contribution to improving educators' levels of performance in relation to the legal demands with which they have to comply (see in general Bush and Joubert (2005) Evaluation of school management development ad governance training in the Gauteng Province, South Africa. Johannesburg: Matthew Goniwe School of Leadership and Governance)
- The provisions of section 19 of the *Schools Act* regarding the provision of training to governing bodies at the beginning of their terms of office and afterwards need to be

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<sup>9</sup> In this regard the education fraternity is waiting with baited breath for the judgment of the Constitutional Court in the nose-stud case where Durban Girls' High School gave a girl ten days to remove a nose-stud she was wearing in contravention of the school's code of conduct.



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taken seriously and robust quality control needs to be exercised regarding the content and format of such training

- Governing body members need to be made aware of the onerous responsibilities they shoulder as well as of the serious risks to which they are exposed when they are elected (see in general Bertelsmann (2006) Governance and the South African Schools Act of 1996. In: Beckmann, Johan (ed.). (2006). Engaging the law and education in a transforming society: a critical chronicle of SAELPA. Pretoria: South African Education Law Association, pages 301 – 310)
- Governing body members as well as all educators need to become legally and policy “literate” in order to be able to execute their duties and exercise their rights in accordance with the applicable legal and policy frameworks. This implies that they should among others:
  - Apply their minds to the expectations they will have to meet and, in particular, the legal demands that will confront them
  - Seek advice when there is a lack of clarity on what they need to do
  - Perform their functions while focussing on the best interests of the child – the concept viewed in a legal sense and not only in an educational sense (see in general papers read at the international conference of the South African Education Law Association (SAELA) in 1996 among others by Malherbe, Robinson, Reynecke and others)
  - Strive to provide quality education to all learners
  - Strive to pursue national aims and values through the provision of education
  - Attempt to give expression to the values of the Constitution of 1996.

Next I will turn my attention to Hans Visser’s observations on how the general legal and policy framework regarding education could be associated with a misalignment of the law and governance.

### **7 General legal and policy framework**

In an article on the first Constitutional Court case regarding education Hans remarks that the outcome of the case was to him a foregone conclusion (see Public schools based on a common language, culture or religion not constitutionally sanctioned. *In re: The School Education Bill of 1995 (Gauteng)* 1996 4 BCLR 637 (CC). 1997 (60) THRHR: 341-348, p 342). He observes that he “would have been very surprised to learn that schools based on a common culture or language could exist in the public school system as this is simply not in line with the current policy of the government and the mistrust of cultural, language,

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collective or minority rights” (p 342). He also cautions that the “present case gives an idea of what may be expected in future regarding the new constitutional provisions (in the 1996 Constitution) on education, language and culture, which are unfortunately also susceptible to manipulation” (p 342).

To a degree the different outcomes of four “language” cases bear testimony not only to Hans’s extraordinary insight into legal texts but also to his strategic vision (see *Hoërskool Ermelo v Department van Onderwys* Saaknommer 3062/07, 02/02/2007; *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere* 2003 (4) SA 160 (T); *Seodin Primary School and Others v MEC of Education, Northern Cape and Others* 2006 (4) BCLR542 (NC); *Western Cape Minister of Education v Governing Body of Mikro Primary School* case 140/2005 (SCA)). One cannot help asking to which degree manipulation and mistrust may have played a role in the outcomes of the cases.

What Hans’s comments should say to second level users of education law is that the results of litigation are to some extent predictable. It is possible for them to minimise risk taking when making decisions. What is required in this regard is that such consumers be legally and policy literate (see par 6 above) and also that they be politically literate. I suggested in par 6 above that acquiring such literacy will require a concerted effort on the parts of the three main role-players: education officials, school management teams and school governors.

These comments also suggest that celebrations about perceived victories in court (such as those that followed the first *Hoërskool Ermelo* case) should be somewhat more restrained as the decisions of one court can easily be overturned by another. In this regard Hans’s references to the possibility of the manipulation of provisions that are not formulated very closely seem to have a prophetic ring about them. It seems that it may be a good idea for role-players to adopt the notion that it is better to stay out of court than having to litigate and that all dispute resolution must be explored before they turn to the courts for justice. The dictum that it is not the courts that should manage schools but professional educators still seems to hold true.

In order to facilitate the trouble-free implementation of education law and policy by almost 360 000 educators (of whom a significant number are still under-qualified for their task), governors at approximately 28 000 public schools and education officials in the national Department of Education and in the nine provincial departments with their head offices,

regions and districts such law and policy need to be simple and clear and accurately formulated.<sup>10</sup> Hans's writings repeatedly raise the concern that the poor quality of drafting (often by people who have no legal literacy or expertise) often contributes to the misalignment of the law and governance.

In an article (see Visser & Beckmann Some comments on the discussion paper by the South African Law Commission: "Aspects of the law regarding relating to AIDS: HIV/AIDS and discrimination in schools" 1998 (61) THRHR: 127 – 132) the authors comment that "... those drafting the policy [on HIV/AIDS and education] could not make up their minds about the real nature of the risk [of infection]. The statement about the "negligible risk" is, in any event, at odds with the earlier prediction in the policy that "increasing numbers" of learners at secondary schools might be infected on account of their early sexual activity. This reflects the incidence of inaccurate statements and insecure arguments in the policy framework.

In the same article the authors also comment that "... those involved with the formulation of a national policy for dealing with HIV/AIDS in schools will have to do some serious rethinking as far as certain aspects of the draft policy are concerned. Otherwise the document proposed by them may simply result in an inappropriate, impracticable and unrealistic policy that will not be able to make the transition from the drawing board to the school grounds." Such a policy can conceivably contribute to dissonance between law and policy and implementation.

Writing about the Education Laws Amendment Bill of 2005 Hans states that one "... may, of course, question some of the legal formulations used and point out that there are still areas in which the law may not be sufficient to promote legality and full accountability (eg. there should be more on the provision of information to parents and the appointment of auditors who are really independent). In addition, some of the provisions (on a macro financing level) may be too complex or vague. However, all this does not really detract from the positive value of the Bill as it stands" (see Some thoughts on legality and legal reform in the public school sector. TSAR 2006 1: 359 – 366). Again, this points to insufficient clarity because of flawed formulation leading to legal uncertainty.

Hans frequently refers to the fact that the language clause in the *Constitution* (in particular) as well as other education provisions can be seen as compromises at which negotiators arrived during the constitutional and later negotiations. This implies that a misalignment of law and

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<sup>10</sup> The need for simple language is emphasised by the fact that an overwhelming majority of the people that will have to implement law and policy will read the documents in their third or fourth languages. In addition, they are not familiar with the language used in legal documents.

implementation may result from different interpretations and expectations of compromises. Such conflict may be compounded by frequent legislative changes linked to emphasis shifts regarding compromises. In an article on the first education case before the Constitutional Court Hans is extremely critical of Judge Mahomed:

The whole argument of Mahomed DP seems to me to verge upon the fantastic. In view of the court's desire to strike down the political compromise in section 32(c), it had to find some ground to neutralise the qualification in section 32(c) which is opposed to its own dogmatic views. In my submission this is good illustration of the length to which the court may go in imposing its ideas on others regardless of the words actually used in the Constitution. All this does not inspire confidence in the way in which the court will interpret the relatively vague education provisions in the new constitutional text (see Public schools based on a common language, culture or religion not constitutionally sanctioned. *In re: The School Education Bill of 1995 (Gauteng)* 1996 4 BCLR 637 (CC). 1997 (60) THRHR: 341-348).

He seems to suggest that his may be an instance of manipulation of the compromise to match intended outcomes of cases.

In par 8 below I will turn to Hans's suggestions on how these problems that may lead to misalignment may be addressed in the process of legal reform.

## **8 Specific governance issues**

The scope of this paper means that they I will only be able to offer brief comments on three specific governance issues namely the functioning of governing bodies, the governance of learner and issues and the roles of parents in governance.

### **8.1 School governance (functioning of school governing bodies)**

In this regard Hans's work seems to point to two main concerns:

- The development of the compromise nature of provisions on governance functions
- The ineffectiveness of governing bodies

#### **The development of the compromise nature of provisions on governance functions**

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It is common knowledge that the language provisions of the Constitution are a result of a compromise reached shortly before the Codesa negotiations were due to finish (see among others Malherbe in De Groof *et al.* “The education clause in the South African Bill of Rights: Background and contents.” *Human Rights in South African Education. From the Constitutional drawing board to the chalkboard.* 1997. Acco, p 66). The compromises reflected in the *Schools Act* go beyond language policy and impact on, for example, the powers of governing bodies to recommend educators for appointment and to generate extra revenue for a school and reflect strong tensions between the powers of centralisation and decentralisation (see in general Sayed “Discourses of the policy of educational decentralisation in South Africa since 1994: An examination of the South African Schools Act.” 2000 *Compare* 141-152).

The future of compromises is always uncertain and they could develop in any number of directions. What concerned Hans though was that the way compromises were handled by the courts seemed to him to ring the death knell for the compromises that had been reached and the state seemed to be wresting back all the powers and functions that it had devolved in the negotiation process. In “Public schools based on a common language, culture or religion not constitutionally sanctioned. *In re: The School Education Bill of 1995 (Gauteng)* 1996 4 BCLR 637 (CC). 1997 (60)” THRHR: 341-348 Hans expresses a number of concerns forcefully:

- The *Matukane v Laerskool Potgietersrus* case nr 2436/96 cast a shadow over all negotiations and effectively prevented any thought of greater autonomy being given to governing bodies. To him this fairly isolated incident in a rural town in Limpopo sparked an unnecessary sustained bout of apartheid phobia that bedevilled the development of reconciliation, understanding and friendship among the people of South Africa
- This case did not inspire much confidence in Hans regarding the future of minority languages – a fear borne out among others by the *Ermelo*, *Seodin* and *Middelburg* cases
- His most telling statement is probably that compromise clauses should not be interpreted to destroy the very compromises they represent in light of the fact that “[R]ealism ... is the hallmark of a lasting and enlightened legal system.”

Many compromises regarding the powers of governing bodies have been significantly altered in an apparent reduction of powers of governing bodies through a series of amendments of the *Schools Act*. These suggest a recentralisation of powers of decision making concerning among others recommendations of staff for appointment (where the state is now at liberty to

ignore a governing body's recommendations), the levying of school fees and the utilisation of school funds. Governing bodies would be well advised to view their powers and functions with a degree of circumspection as amendments are likely to be effected as the government tries to imprint its will on the governance of schools.

### **The ineffectiveness of governing bodies**

I have already referred to some of Hans's concerns about the ineffectiveness of governing bodies. It seems that he was worried about the failure of governing bodies to protect the fundamental rights of parents and learners in particular. He never came to terms with the reality that governing bodies were ill-informed, were being misled by management teams and only acted as rubber stamps. He was disappointed that governing bodies seemed to be involved in corruption and illegal practices and felt that they were being treated unfairly and had to respond to unrealistic expectations.

To him they are at a considerable disadvantage vis-à-vis the professional management of the school. He also pointed out that to him the term "function" was merely a politically expedient term for "duties" and that governors had no real "powers". Certainly the increasing restrictions imposed on governing bodies seem to suggest that Hans's view was at least partially correct.

To remedy the ills that Hans has pointed out will require a fundamental re-examination of:

- The election of governing bodies and the guidance that they receive about the expectations of their work as governors
- The training given to governing bodies (including aspects of the law that pertains to their position as governors)
- The support available to governing bodies from official agencies in the process of making decisions that might put them or the school at risk

### **8.2 Learners**

In an article in *Obiter* (The rights and duties of pupils (learners): Some basic South African principles. 1997: 14 – 30) Hans examines the rights and duties of learners (pupils). He points out that the rights can be evaluated at various levels namely:

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- constitutional provisions (in the Bill of Rights) which enjoy supreme status over all laws and which are intended to provide the basis for the education system in general
- national legislation which lays down norms and standards for the country as a whole
- provincial legislation
- statutory regulations
- the common law

Although these sources seem to ensure access to a variety of rights at various levels, he is concerned about unlawful and unfair limitations of their rights. His misgivings have again been proved correct as is evident from among others:

- *Antonie v Governing Body Settlers High School* 2002 4 SA 738 (C) (which dealt with the infringement of a learner's freedom of expression. The learner wore dreadlocks to school (under a cap in the school colours) as an indication of her accepting the Rastfarian faith)
- *Michiel Josias de Kock NO v Departementshoof van die Onderwys-departement, Provinsie Wes-Kaap* saak 12533/98, 2.10.98 (where the school principal played the roles of *pro forma* complainant and member of the tribunal in a disciplinary hearing)
- *S v Zuba & 23 Similar Cases* [2003] JOL 11973 (E) (where the Eastern Cape education department failed to heed a court order to make provision for a child care school in the province)
- *Centre for Child Law and Others v MEC for Education (Gauteng) and Others* case no 19559/06 (TPD) 2006-06-30. The court found that the practices and conditions at the JW Luckhoff High School violated the following constitutional rights of the pupils: The children's right to appropriate alternative care when removed from their family environments (section 28(1)(b)); the children's right to basic nutrition, shelter, basic health care services and social services (section 28(1)(c)); their right that their best interests are of paramount importance (section 28(2)); their right to have their dignity respected and protected (section 10); their right to be free from all forms of violence (section 12(1)(c)) and their right not to be treated or punished in a cruel, inhuman or degrading way (section 12(1)(e)) (see Davel In: Beckmann, Johan (ed.). (2006). *Engaging the law and education in a transforming society: a critical chronicle of SAELPA*. Pretoria: South African Education Law Association).
- *The Centre for Child Law and Others v Minister of Justice and Others* unreported case no 8523/2005 (TPD) 10 May 2005. In this case the MEC for Education in Mpumalanga, in consultation with the MEC for Social Development, was ordered to

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make immediate arrangements for George Hofmeyr School to be subjected to a Developmental Quality Assurance (DQA) process. The DQA team provided a report on the return date to court and their recommendations about the management of the school was also made an order of court. These recommendations included inter alia that the management and staff of George Hofmeyr had to ensure that no child is locked up or isolated; that children were permitted contact with their family; their privacy respected by staff members and that the use of children to control discipline their peers shall cease with immediate effect (see Davel In: Beckmann, Johan (ed.). (2006). *Engaging the law and education in a transforming society: a critical chronicle of SAELPA*. Pretoria: South African Education Law Association).

- In *Maritzburg College v Dlamini, Mafu and Kondza* (case number 2089/2004, Natal Provincial Division, 2004-05-27) the court was extremely critical of the way in which the head of the KwaZulu-Natal education department discharged his responsibilities towards learners whose suspension had been recommended to him by the governing body. The court believed that the head had violated the right of learners to know as soon as possible about a decision as to where or not they were to be suspended
- Codes of conduct have a specific purpose in terms of the Schools Act and are not meant for example to engender a military kind of discipline and learners need to have space to exercise. Children need space (freedom and opportunity) to gain experience in the correct exercise of their fundamental rights (see *Religious attire in public schools. Antonie v Governing Body, Settlers High School* 2002 4 SA 379 (C). 2004 (67) THRHR: 335 – 339)

Although Hans agrees that learners' duties are "relatively unpopular" and that there seems to be "an obsession with rights" and viewing rights as the "embodiment of success itself" and an "effective answer to all the wrongdoing of the past", he cautions that it is "conceptually impossible to have rights without duties." Educators who fear the advances of the masses of learners armed with rights and with duties forgotten in the mists of the past should take courage of this concise exposition of the balance that need to be sought in a school and on which parents and educators alike should insist. They should educate learners to accept this view of rights and duties and also take cognisance of s 3(2)(b) of the Constitution which reads that all citizens (including learners, therefore) are equally subject to the duties and responsibilities of citizenship. If teachers needed convincing that learners still have legal duties, Hans has reminded them of this fundamental principle in passing as it were (although he admits that he is not sure how this will be applied).



I found the phrase “best interests’ (of the child) in 13 of the publications that I consulted. That should be proof enough of the fact that Hans’s primary and ultimate concern was with the best interests of the child (and, to a lesser degree, the school). All of the above enjoins second level users of education law to once more ensure that they are abreast of the right and duties of learners as set out by Hans and that they are able to interpret these in the light of the learners’ best interests.

### 8.3 *Parents*

The unenviable position of parents in the education system has been alluded to in the above paragraphs. Suffice it to recap some of the challenges faced by parents and, in particular, parent governors:

- They are extremely vulnerable being dependent on the support and guidance of the professional management team of the school
- The support they receive from educators at school level and at administrative levels in districts and above generally leaves much to be desired
- When assuming office they are generally not abreast of the expectations associated with their office as governors. They are also not fully aware of the risks of liability to which they have voluntarily exposed themselves.
- They are generally not given enough transparent information to enable them to deliver in terms of expectations.
- Principals and departmental officials sometimes usurp or attempt to usurp governing body powers.

Hans also traces the loss and reduction of power that parent governors are experiencing and warns that, for them to be willing to keep on making huge sacrifices (among others financial contributions) they need to be given sufficient say in school affairs. A constant erosion of their powers could lead to parents withdrawing themselves from school governance structures.

Now may be an opportune time for educators and the state alike to re-appraise the position of parents in education and to find better ways of recognising their position as primary educators and as partners in pursuing the lofty ideals expressed in for example the preamble of the Schools Act.

## 9 Legal reform

In a recent article (Some thoughts on legality and legal reform in the public school sector. TSAR 2006 1: 359 – 366) Hans notes that the Schools Act is clearly not perfect and some legislative reform should therefore not be regarded as remarkable or as undesirable in principle. However, there are at least three key role-players involved in exercising direct control (governance) over a public school, namely: (a) the officials of the responsible provincial education department; (b) the school principal and educators; and (c) the school governing body.

In par 5 above I discussed Hans's cataloguing of the ways in which these three sets of role-players may contribute to misalignment between the law and governance of schools. Hans also comments that the reason why legislation (and legal reform) is usually considered "a way out of many a dilemma is presumably because of the relative ease with which lawyers and legislatures can churn out new laws as opposed to the much more challenging and far-reaching task of actually changing the way statutory power is exercised or legal duties complied with in order to achieve good governance". He believes that as "far as public school education is concerned, it is clearly not possible to define the functions of the departments or education (and of school principals as their executive agents) with such legal precision as to avoid all future uncertainty or conflict".

He believes that the "rather complex, yet vaguely defined, system of co-responsibility and co-operation [between the principal and the governing body] in regard to school management in a wide sense is capable of working properly provided that certain basic conditions are met."

In listing these conditions Hans summarises neatly virtually all the lessons that the role-players in the education fraternity can glean from his work on education law:

- A need for a proper understanding of the legal powers in different spheres and levels of responsibility
- Improving the competency (qualifications, knowledge, skill, objectivity and integrity) of all decision-makers
- Inspiring confidence in others by establishing a track record of taking sound, objective and timeous decisions
- The development of a culture and practice of legality and of healthy respect for the powers and rights of others

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- The creation of proper checks and balances to avoid any decision-maker becoming too powerful and
- The implementation of mechanisms and systems to ensure accountability, visibility and transparency, as well as a credible audit of the exercise of all powers and functions, whether relating to policy-making or the execution of policy

Although he does not consider “wide-ranging changes to the [Schools Act]” necessary to achieve these conditions to the extent that may be necessary, he still suggests changes in the following respects:<sup>11</sup>

- The creation of an official, independent and professional forum for conciliation and arbitration in the case of certain disputes between school governing bodies and other officials (education officials, school principals or educators)
- The development of legal provisions, as well as improved structures capable of implementing such provisions, to better control the raising and spending of school fees and other income at public schools
- The establishment of an independent and competent national directorate to receive information on alleged irregularities at public schools and to deal with complaints by parents against school governing bodies, school principals and educators.
- An improvement in the reporting duties of school governing bodies to ensure improved accountability, visibility and transparency. These duties should not merely be in the area of finance, but should extend to the proper performance of all their functions.

In a letter to me (e-mail received 19 June 2006) Hans talked about how one should understand the Schools Act. I believe that, if everyone understood the way the aim of the Schools Act in this way, many of the causes of the misalignment of the law and governance may be minimised or may even disappear:

In the matrix of rights, obligations, functions, powers and competencies everybody pursues the same ultimate goal namely the realisation of the fundamental rights regarding education in the Constitution and other related rights in other applicable legislation (such as the Schools Act). Each power and competency must be exercised while respecting the competencies of others and the principles of the law (such as

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<sup>11</sup> In this regard the role of “consumers” would be to support and advocate the proposed changes as far as possible.

administrative justice) in general and law and with regard to the limitations to which all rights and powers are subject.

## 10 Conclusion

How can we (first and second levels of education law), who are aware of the phenomenal contribution that Hans Visser has made to education law, make sure that his legacy will live on? May I suggest that the Faculty of Law and others who will forever be indebted to Hans consider the following (if they have not already decided to do so):

- Prescribe a collection of Hans's texts in education law modules at LLB and other levels and in education management modules
- Dedicate an edition of a scholarly journal to which he contributed regularly to his memory
- Publish a special edition of a scholarly journal to which he contributed to examine and appraise and his contribution to education law
- Where applicable, support and advocate the changes to legislation proposed by Hans
- There must be concerted efforts to facilitate the drafting of better education law and policy texts
- Consider the establishment of an NRF Education Law Chair named after Hans Visser to give impetus to the development of education law and to sustain the momentum already there
- Consolidate and distil his contributions by commissioning the publication of a handbook of South African education law
- Annually present a Hans Visser memorial lecture to showcase some of the best recent scholarship in education law

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