

SOME THOUGHTS ON LEGALITY AND LEGAL REFORM IN THE PUBLIC SCHOOL SECTOR

1 Implementing and amending the South African Schools Act: general observations

At least two noteworthy features of the implementation of the South African Schools Act 84 of 1996 (“the Schools Act”) over the past few years are that there have been various amendments and talk of amendments to this legislation, as well as many instances where it has been misconstrued or simply ignored by some of the various role-players (see generally on implementing

the legal framework, Visser “Educational rights in South Africa” 2004 *International Journal for Education Law and Policy* 84-94; also De Groof and Malherbe (eds) *Human Rights in South African Education* (1997) *passim*).

The Schools Act is clearly not perfect and some legislative reform should therefore not be regarded as remarkable or as undesirable in principle. However, the Schools Act does, if properly construed, provide a practical legal framework in terms of which school education may function and be managed in pursuit of the objects of section 29 of the constitution, which provides for certain rights (and expectations) in the field of education. The Schools Act in its current form must thus generally be seen as a progressive development for which the government, and especially the national department of education, may justly take credit.

A cornerstone of the Schools Act is the meaningful role it accords to democratic school governing bodies. This should be considered against the backdrop of democratisation in school education in general (which started partially even before the new constitutional dispensation commenced), and one of the central objects of the Schools Act, namely to uphold the rights of all learners, parents and educators and to promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the state (see the preamble to the Schools Act). Simply put, since the state cannot provide all the resources required to ensure properly functioning and high quality public schools, it cannot fairly expect parents to contribute financially unless they have some meaningful and direct say in the way public schools are governed and school fees employed.

Accordingly, one of the basic criteria for assessing the justification of amendments to the Schools Act that negatively impact on the functions and powers of school governing bodies is whether these governing bodies still retain a meaningful degree of parental involvement. However, there would in principle be nothing wrong with making school governing bodies more accountable regarding the performance of their statutory functions, or to control certain of their practices (eg, the payment of remuneration to state employees – see now s 38A of the Schools Act), or to devise a better legal framework within which they have to exercise their functions (see, eg, the suggestions to terminate the raising of school fees in irregular and even illegal ways – Visser “Aspects of school fees at public schools” 2004 *De Jure* 358 362; “Who is legally liable to pay school fees?” 2004 *THRHR* 533-537, as well as the welcome and incisive draft amendments to the Schools Act in this regard contained in the Education Laws Amendment Bill 2005; see further the suggestions in par 4 below).

2 *Illegal and irregular actions by education departments*

As is known, there are at least three key role-players involved in exercising direct control 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. There have recently been many official and unofficial public utterances and hints by important political and administrative role-players that it may be necessary to further curtail the statutory powers of school governing bodies and to go beyond what is already contained in the Education Laws Amendment Bill, 2005 (see, however, *Rapport* (2005-08-07) 19 where the newly appointed director-general of the national education depart-

ment is reported to have denied the existence of a plan to do away with governing body powers aimed at democratic school control).

From a policy perspective, any change to the powers of school governing bodies must obviously be evaluated against, inter alia, the basic aim of the Schools Act as referred to above (par 1). In addition, any reduction in the said powers will clearly have to be accompanied by a corresponding increase in the statutory powers allocated to officials of education departments. However, one may be forgiven for viewing with scepticism any such increase in powers in view of the generally poor track record of certain senior education officials and education departments. A few well-publicised examples may be cited:

- i The debacle regarding the large-scale leaking of examination papers of the 1996 matriculation examination, triggering an enquiry by the public protector, is still fresh in the public memory. Although the integrity of the matriculation assessment process has fortunately seen marked improvement since then, there are still too many instances of similar forms of corruption and incompetence (see generally *Beeld* (2005-08-16) on the relatively light punishment imposed on persons involved in the 2004 examination fraud in Mpumalanga).
- ii The deep-rooted problems and maladministration in the education departments in Mpumalanga and the Eastern Cape have caused serious embarrassment to the government and harm to the quality and image of public school education.
- iii The constitutional court has had to admonish the head of the Limpopo education department for his refusal or failure to comply with cost orders given against him by the high court (see *Head of Department of Education, Limpopo Province v Settlers Agricultural High School* 2003 11 BCLR 1212 (CC) par 14). The court stated that “nothing could be more demeaning of the dignity and effectiveness of courts than to have government structures ignore their orders”. It is disturbing that officials in executive positions have to be reminded of such basic principles.
- iv The high court (per Moseneke J) had to set aside irregular decisions by the Mpumalanga education department to suspend a school principal and to dissolve the school governing body (see *Schoonbee v MEC for Education, Mpumalanga* 2002 4 SA 877 (T)).
- v The high court described the orchestration of dismissals by the head of education in the Free State as “shocking”, “scandalous” and “shameful” (see *Afrikaanse Onderwysunie v Departementshoof, Department van Onderwys, Vrystaat* 2001 3 SA 100 (O)).
- vi The high court in the Eastern Cape voiced its displeasure at the way in which the provincial education department dealt with a serious complaint against a school principal (he had been convicted of stealing a cell-phone belonging to the school and then lied about it in an affidavit submitted for insurance purposes only to receive a “final written warning” from the education authorities as “punishment”), by refusing to give an order of costs in favour of the education department which was technically successful in its litigation against the school governing body (see *Dispatch High School v Head Department of Education, Eastern Cape* 2003 1 SA 246 (CkH); Visser 2004 *De Jure* 150 for a discussion).
- vii In KwaZulu-Natal the governing body of a school had to struggle for months to establish meaningful contact with and obtain a proper reaction

from the provincial head of the education department concerning the suspension of three learners on serious charges of misconduct relating to the causing of damage to a bus and the use of brandy (see *Maritzburg College v Dlamini, Mafu and Kondza* case 2089/2004 (NPD) 2004-05-27). *In casu* the education authorities were ordered, unsurprisingly, to pay legal costs on the scale of attorney and own client. The court was virtually contemptuous in its rejection of the ill-founded submission by the head of education that the applicant had incorrectly “rushed to court”:

“In the past the respondent has persistently failed to co-operate with the applicant and has failed dismally to carry out the duties imposed on him by his office. In the present matter, the applicant made telephone calls, wrote numerous letters, sent copies of the important letters to both the MEC for education in KwaZulu-Natal and to the national minister of education. It flew two members to Ulundi in an attempt to consult with the respondent. It eventually was compelled to give ultimatums. All efforts met with no response. It defies belief that in these circumstances the respondent can accuse the applicant of not adhering to the principles of co-operative government and maintain that it should have avoided legal proceedings.”

- viii The Western Cape education department, acting unilaterally and against the wishes of the Mikro Primary School, stubbornly wanted English learners admitted to this single-medium Afrikaans school. In pursuing its agenda the department, *inter alia*, issued illegal directions, ignored the lawful admission policy of the school, threatened the school principal with disciplinary action should he fail to carry out illegal directions, uttered threats that the learners in question would be placed in a school for severely mentally handicapped learners if they were not accepted at Mikro, physically forced the school to accept the learners to achieve a *fait accompli*, and placed reliance on false and inaccurate statements in their affidavits (see *Western Cape Minister of Education v Mikro Primary School* 2005 10 BCLR 973 (SCA)). Upon a proper interpretation of all the relevant laws, the appeal from the education authorities was dismissed while retaining the order of the court *a quo* for costs against the department on the scale of attorney and client as a sign of the heavy public opprobrium which the department deserved (see for an earlier example of a punitive cost order, *Laerskool Middelburg v Departementshoof, Mpumalanga* 2003 4 SA 160 (T) where the education authorities also acted in a high-handed manner and ignored regulations made in terms of the Schools Act).
- ix The Gauteng education department had to be ordered by the high court to effect the appointment of an educator recommended by the school governing body (see *Observatory Girls Primary School v Head of Department of Education, Gauteng* 2003 4 SA 246 (W); also *Laerskool Gaffie Maree v MEC for Education, Training, Arts and Culture, Northern Cape* 2003 5 SA 367 (NC)). There have been many other instances of unnecessary disputes because the education authorities, while apparently pursuing certain racially based policies, were unwilling to appoint staff members as recommended by school governing bodies.
- x There is a perception that certain officials in education departments are driven in their actions by purely political agendas instead of legal principles and sound education policies, or are without proper grounds hostile towards education conducted in Afrikaans or in principle against single-

- medium schools using Afrikaans. This results in a lack of trust and unnecessary politicisation of educational management and governance.
- xi A further perception is that too many education officials are, for mere political or other irrelevant reasons, antagonistic to traditionally white schools or democratic school governing bodies dominated by whites despite the fact that the constitution and the Schools Act realistically recognise the (permanent) diversity of South African society and provide for human rights and freedoms based upon such diversity and which necessarily have to function in a diverse society.
 - xii Instead of doing more to transform and develop traditionally black schools to achieve equality and quality education, some education authorities apparently attempt to divert attention from this onerous task by unnecessarily focusing on the relatively few former or traditionally white schools (see generally Visser “Equal educational opportunities defined and evaluated – some practical observations” 2004 *Perspectives in Education* 149-151).
 - xiii While the national department of education has, from a legal perspective, performed reasonably well in most functional areas, its actions have not always been beyond reproach. A well-known example is where the minister of education attempted to dictate the admission age of learners to independent schools without invoking the correct legal authority for such a step (see *Minister of Education v Harris* 2001 4 SA 1297 (CC)). There have also been serious questions about the language policies initially promulgated (see Visser “Some problems regarding the validity of the official language documents in public education” 1998 *De Jure* 367-372). In addition, a number of other education policies that have been published are probably invalid or unenforceable.

The bottom line is that some urgent transformation is necessary, notably in the case of certain provincial education departments. Public officials undertaking the macro management of school education should develop a culture of acting strictly in terms of the law and of respecting the legal powers and functions of others in the sphere of education. They should further develop a better appreciation of their duty to serve all the people of South Africa fairly (see s 195(1) of the constitution) and protect, promote and fulfil the fundamental human rights of everyone (s 7).

Without a proper reorientation towards strict legality, demands for more powers to be vested in education departments (or school principals as their representatives and who can be easily controlled), at the expense of school governing bodies, are inappropriate. Legitimate challenges to and criticism of the many illegal or irregular actions by education officials should thus not be met with new legislation or new policies merely aimed at usurping or neutralising the powers of other decision-makers.

3 *Problems with the functioning of school governing bodies*

The legislative policy of entrusting school governance to democratic governing bodies is obviously sound in principle. However, this does not mean that such bodies should have virtually unrestricted powers, be allowed to invest themselves with powers outside those provided for in legislation, or act without proper accountability.

There are clearly many problems regarding school governing bodies and individual members of school governing bodies:

- i They usually lack proper knowledge of and insight into their functions, or do not have the capacity or determination to devote themselves to their statutory functions or maintain an adequate standard. This is compounded by the fact that parents in general are unfortunately ignorant of how education is supposed to be managed in terms of law.
- ii They are involved in corruption, the promotion of self-interest or nepotism. This includes illegal payments to themselves or others (including irregular payments to school principals and educators), participation in corrupt or questionable schemes (eg, in the awarding of contracts for the supply of goods or the rendering of services to the school or to its learners and parents), the general misuse of school fees, as well as other questionable or fraudulent practices regarding school fees, school assets and other income derived in the name of the school.
- iii They lose their independence too easily and allow themselves to be manipulated by cynical school principals who merely use governing bodies to avoid personal responsibility in respect of difficult or unpopular issues or to rubber-stamp policies (financial, staff and otherwise) already decided upon by the school principal and the professional management team.
- iv They are too gullible regarding the information provided to them by the school principal and do not always insist on being fully and timeously informed of everything that is relevant regarding their functions.
- v They routinely act *ultra vires* the empowering legislation or condone such actions. These include the irregular raising of school fees and giving of exemptions from school fees (including unlawful exemptions to educator parents or others who do not qualify), as well as discriminatory practices and unlawful threats against learners whose parents cannot or do not pay school fees.
- vi They interfere or attempt to interfere in an unreasonable manner with educators in their purely professional functions.
- vii They approve unenforceable provisions in codes of conduct for learners and adopt unreasonable or ill-informed policies in the sphere of religion, admission or language. There are indeed some governing bodies that still pursue racist policies and thus deserve censure (see, eg, the well-known facts of *Matukane v Laerskool Potgietersrus* 1996 3 SA 223 (T)).
- viii They tolerate irregular actions by school principals or educators that are not in the best interest of the school or its learners, usually because they incorrectly believe that once something has been classified by a wily school principal as falling under “professional management” (see s 6(3) of the Schools Act), it must necessarily be so and thus falls outside their jurisdiction, or because they are generally fearful of the school principal and of his or her staff.
- ix They illegally or incorrectly convict learners of misconduct and order their suspension or demand their expulsion. For example, in *Antonie v Governing Body Settlers High School* (2002 4 SA 738 (C)) the court had to set aside the conviction of a fifteen year old female learner for “serious misconduct” who did no more than to wear dreadlocks for religious reasons. Van Zyl J observed that the governing body did not even properly consider the provisions of the code of conduct approved by it, had no idea

of what “serious misconduct” was and that, in any event, the code of conduct devised by them provided little evidence of an understanding of positive discipline under a system of human rights.

- x They lack sufficient power to ensure proper implementation of their valid policies and decisions by unwilling or obstructive school principals and can usually not count on meaningful assistance from education departments.

4 *Some recommendations on proper co-operation, legality and legal reform*

The popular notion in South African government circles that almost all problems can be solved through new legislation or changes to existing laws is obviously incorrect. The reason why legislation 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.

As far as public school education is concerned, it is clearly not possible to define the functions of the departments of education (and of school principals as their executive agents) with such legal precision as to avoid all future uncertainty or conflict. There is thus something to be said for the general provisions in the Schools Act that merely allocate responsibility for “governance” to the governing body (s 16(1)) and “professional management” to the principal, acting under the authority of the provincial head of education (s 16(3)). This rather complex, yet vaguely defined, system of co-responsibility and co-operation in regard to school management in a wide sense is capable of working properly, provided that certain basic conditions are met.

These conditions include: a proper understanding by everyone concerned 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 timely decisions; the development of a culture and practice of legality and of healthy respect for the powers and rights of others; eschewing purely political agendas; 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.

It is probably not necessary to consider wide-ranging changes to the act to achieve these conditions to the extent that may be necessary. What could be considered, for example, are amendments to the act in, inter alia, the following respects:

- i The creation of an official, independent and professional forum for achieving compulsory attempts at conciliation and offering arbitration in the case of certain disputes between school governing bodies and other officials (education officials, school principals or educators). Ideally, provincial departments of education should have been in a position to perform this function but this is probably not possible in view of the generally negative attitude or indifference towards (certain) school governing bodies, as well as the political agendas sometimes pursued by some state officials.

- ii 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 (see Visser 2004 *De Jure* 362; 2004 *THRHR* 533-537). In this regard, reference should be made to a number of clauses in the Education Laws Amendment Bill 2005 concerning the power to raise school fees. These provisions represent a welcome step forward in, inter alia, expressly banning certain practices that are in any event already unlawful or irregular in terms of the current provisions of the Schools Act. However, even these overdue and necessary provisions, if adopted and properly implemented, do not go far enough to address all actual malpractices, as well as the huge risk of corruption, manipulation and maladministration involving the fees and assets of public schools.
- iii 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. The existing possibilities in this regard are not adequate.
- iv 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. This could enable better auditing and evaluation of the manner in which governing bodies perform their functions and discharge their duties for the purposes of establishing what further action, if any, may be indicated.

PJ VISSER
University of Pretoria