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The dual role of the principal as employee of the Department of Education and ex officio member of the governing body

 Sakkie Prinsloo

Former Senior Lecturer Department of Education Management and Policy Studies, Faculty of Education, University of Pretoria, South Africa
izak.prinsloo@up.ac.za

In terms of section 15 of the Schools Act, a public school is a legal person ("juristic person") with legal capacity to perform its functions under the Act. The Schools Act distinguishes between governance and professional management, assigning the former to the governing body and the latter to the principal of the school (section 16(1) and 16(3)). The professional management of a public school must be undertaken by the principal under the authority of the Head of Department. Section 16(A) makes provision for the functions and responsibilities of principals of public schools. Section 16(A) lists the tasks and responsibilities for which the principal as employee of the Department of Education is accountable to the Head of Department. The principal is however also accountable to the governing body for the implementation of statutory functions or policies regarding admission, language, religion and school funds that are delegated to him or her by the governing body in terms of the Schools Act. Since 1996, an increasing number of court cases and disciplinary hearings took place in which provincial heads of education departments were challenged for unlawful actions against principals due to the latter's implementation of the statutory functions of governing bodies. Principals therefore seem to be caught between their role as employee of the Department of Education and ex officio member of the governing body of their public school.

Keywords: Accountability; Authority; Conflicting assignments; Juristic person/legal person; Mutual responsibility; Partnership; Professional management; Promote/protect; School governance; Statutory functions

Introduction

The Constitution of the Republic of South Africa (Republic of South Africa, 1996a) protects the fundamental rights of everyone in our country. Since 1994, much has been done by means of original national and subordinate legislation to give effect to the fundamental rights of all partners in education. The South African Schools Act, Act 84 of 1996 (Republic of South Africa, 1996b) is an example of national legislation that affirms the functions of school governing bodies regarding, *inter alia*, the development and adoption of admission policies, language policies, rules regarding religious observance, and a code of conduct for learners. The Schools Act furthermore plays an important role in encouraging the principle of partnership in and mutual responsibility for education. With the institution of school governing bodies, the Act has aimed to give effect to the principle of the democratisation of schooling by affording meaningful power over their schools to the school-level stakeholders. The governing body also aims at bringing together all the stakeholders in a forum where differences may be discussed and resolved for the purpose of developing an environment conducive to effective teaching and learning (Kgobe, 2002:134).

In terms of section 15 of the Schools Act, a public school is a legal person ("juristic person") with legal capacity to perform its functions under the Act. According to its legal personality, the school is a legal subject and has the capacity to be a bearer of rights and obligations. As a juristic body, the public school cannot participate in the same manner and to the same extent as a natural person, as it has to act through its duly appointed agent. Section 16(1) of the Schools Act, accordingly, makes provision for the governance of a public school to be vested in its governing body. The professional management of a public school, on the other hand, must be undertaken by the principal under the authority of the Head of Department (HOD) in accordance with section 16(3) of the Schools Act. The School's Act thus clearly provides that the Department's management function is limited to the professional management of the school through the principal as the employee (Van der Merwe, 2013:239).

The principal of the school is, however, in terms of section 23(1)(b) of the same Act, a member of the governing body of a public school in his or her official capacity (ex officio member), represents the Department of Education. The nature of the role of the principal in this context, is set out by Judge Moseneke, in the Schoonbee case. Section 16A of the SA Schools Act, describes the powers and functions of the principal as the representative of the HOD in the governing body, when acting in his official capacity as contemplated in sections 23(1)(b) and 24(1)(j) of the Act. This means that the principal as employee of the Provincial Education Department concerned has to execute departmental policy and be accountable to the Head of Education for the effective professional management of the school. He or she is, however, at once also a member of the governing body who, on the one hand, is required to give account to the governing body for tasks delegated by the governing body to the principal, but on the other hand, is also accountable to his/her employer in terms of section 16A of the Schools Act.

Despite this, the principal is but one of many governors on the school governing body (SGB). He or she is the representative of the Department as professional manager, and not as a governor. Thus, the principal functions in two capacities: first, as a governing body member; and then, as the principal (professional manager) or depart-

mental employee. In practice, this means that he or she should implement the policies of a given provincial education department when operating as departmental employee; and, when dealing with the Department in his or her capacity as governing body member, should watch over the interests of the governing body, the school and the parent community (Van der Merwe, 2013:241-242).

Problem Statement, Objectives and Concept Clarification

Problem statement

The Schools Act distinguishes between governance and professional management, assigning the former to the governing body and the latter to the principal of the school (sections 16(1) and 16(3)); (cf. Table 1). According to Davies (1999:60) it may be concluded that no active professional management role is foreseen for the governing body of a public school. This distinction may well give rise to conflicts between the governing body and the principal of the school, especially if there is any uncertainty about who is responsible for what and who is accountable to whom (Joubert & Prinsloo, 2009:236).

The principal is responsible for and accountable to the Head of Department for the functions and responsibilities set out in section 16A and also for the day-to-day professional management of a public school. This includes the management of staff affairs; the curriculum (instructional leadership); administrative affairs; physical facilities and school community relations (cf. Table 1). The principal is, however, also accountable to the governing body for the implementation of statutory functions delegated to him/her by the governing body in terms of the Schools Act. This article will thus look at

- The implications of Section 16A for the role of the principal as a member of the governing body as well as an employee of the Department of Education, and the potential conflict of interests arising from section 16A; and
- The interpretation and implementation of the provisions made in the Schools Act regarding the statutory functions of school governing bodies.

The question that arises from this is – are principals caught between their role as employee of the Department of Education and ex officio member of the governing body of their public school?

Concept clarification

Power

Power is the ability to execute authority and the manner in which it is done (Gerber, Nel & Van Dyk, 1998:301). The power of a SGB refers to its legal capacity to perform its functions and obligations in terms of section 16 of the Schools Act. The power of a governing body is not delegated power, but original power, in terms of the Schools Act, to act as the duly designated agent of a public school.

Authority

Smit and De J Cronjé (1997:117) maintain that every manager (principal), regardless of management level, is on occasion also a leader, who ensures that subordinates work together to achieve the stated objectives of the enterprise (school). No manager can manage without authority. Therefore, authority has to do with the right to enforce certain actions in accordance with specific guidelines (policy), and the right to take action against those who will not cooperate to achieve certain goals. The HOD in a given province, as the executive head of the Department of Education, is legally responsible for all actions in that department. He/she has the authority vested in his/her post to delegate authority to subordinates. In the school situation, the school principal, as the executive officer of the school, is given authority by the head of provincial education to enforce his/her authority in the school (Joubert & Prinsloo, 2009:229). The principal of a school has the authority to act on behalf of the HOD and to take independent decisions within the broad guidelines of relevant legislation and departmental policy.

Responsibility

Responsibility refers to a person's duties in terms of his/her post and the work allocated to him/her. The work does not necessarily need to be done by this person; some of it (with its attendant responsibility) may be delegated, however he/she is, in the final instance, responsible for the successful execution of the work.

Accountability

The Oxford Compact English Dictionary (Simpson & Weiner, 1991) explains that the expression *to give account of* means to *give a satisfactory record or explanation of*, while *accountable* as an adjective means *required or expected to justify actions or decisions*. Accountability thus refers to a person's duty to give an account of having executed his/her work in terms of set criteria and determined standards (Joubert & Prinsloo, 2009:231).

This means that if a task is delegated, allocated or assigned to a person with the authority and responsibility to execute it effectively, he/she is accountable to his/her head to complete such task satisfactorily (Van der Westhuizen, 1997:172-173). The principal of a school is accountable to the Head of Education in the province for the effective management of the school. The principal is also accountable to the governing body (parent community) for the correct handling, use and reporting of school finance, the implementation of governing policy regarding the admission, language and religion policies of the school (Joubert & Prinsloo, 2009:231).

According to Nieuwenhuis (2007:104) the thread that runs through all definitions is that ac-

countability places a duty or obligation on a person to act in accordance with a standard or expectation set for his/her behaviour. In other words, every person must be able to account for his/her actions in relation to the standard or expectation set for these actions in a specific situation.

The Principle of Partnership in and Mutual Responsibility for Education

The Schools Act plays an important role in encouraging the principle of partnership in and mutual responsibility for education. With the institution of school governing bodies, the Act has aimed to give effect to the principle of the democratisation of schooling by affording meaningful power over their schools to the school-level stakeholders. The governing body also aims at bringing together all the stakeholders in a forum where differences may be discussed and resolved for the purpose of developing an environment conducive to effective teaching and learning (Kgo-be, 2002:134).

The governing body consists of a majority of parents (the representatives of the parent community), a number of educators, administrative staff and, in the case of secondary schools, also learners. It is responsible for the governance of the school (section 16). In terms of section 23(9) of the Schools Act, the number of parent members must comprise one more than the combined total of the other members of the governing body who have voting rights. The fact that parents make up the majority (section 23(9)) on the governing body demonstrates the importance of their involvement and constitutes the principle of partnership and mutual responsibility in a public school. This partnership is based on the democratic principle of decentralisation and the distribution of authority from the national and provincial spheres of government to the school community itself. The preamble of the Schools Act further recognises the need to protect the diversity of language, culture and religion in education, uphold the rights for all learners, parents and educators, and promote their acceptance of responsibility of the organisation, governance and funding of schools in partnership with the state.

It is further important to state that in terms of section 16(2) of the Schools Act, the governing body stands in a position of trust towards the school and must promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners (section 20(1)(a)).

The Legal Framework within which Principals of Public Schools have to fulfil their Dual Role as Professional Managers and Ex Officio Governors

As previously indicated, the Schools Act distinguishes between governance and professional management. According to Davies (1999:60), it may be concluded that no active management role is

foreseen for the governing body of a public school. However, this distinction may well give rise to conflicts between the governing body and the principal of the school, especially if there is any uncertainty about who is responsible for what, and who is accountable to whom.

In the following table, a distinction is made between professional management and governance of a school.

Section 16(A)(1) accordingly makes provision that:

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

In terms of section 16(A)(2) the principal must:

- a) attend and participate in all meetings of the governing body;
 - b) assist the governing body with a report about the professional management relating to the public school;
 - c) assist the governing body in handling disciplinary matters pertaining to learners;
 - d) assist the Head of Department in handling matters pertaining to educators and support staff; and
 - e) inform the governing body about policy and legislation.
- 3) The principal must assist the governing body in the performance of its functions and responsibilities, but such assistance or participation may not be in conflict with:
 - a) instructions of the Head of Department;
 - b) legislation or policy;
 - c) an obligation that he or she has towards the Head of Department, the Member of the Executive Council or the Minister; or
 - d) a provision of the Employment of Educators Act, Act 76 of 1998 (Republic of South Africa, 1998), and the Personnel Administrative Measures determined in terms thereof.

In terms of Chapter C, paragraph 4.2 (e) (i) of the Personnel Administrative Measures, the principal is responsible for the professional management of a public school. Paragraph 4.2 (e) makes provision for:

(v) INTERACTION WITH STAKEHOLDERS

- To serve on the governing body of the school and render all necessary assistance to the governing body in the performance of their functions in terms of the SA Schools Act.

(vi) COMMUNICATION

- To co-operate with the school governing body with regard to all aspects as specified in the SA Schools Act.

The implementation of governing body policies regarding admission to the school (section 5), language (section 6), religion (section 7), the Code of Conduct for learners (section 8) and the administration and spending of schools fees (section 37), is delegated to the principal of the school.

The abovementioned provisions mean that the principal should implement the policy of the provincial Department of Education when operating as a departmental employee and, in his/her

capacity as governing body member, should watch over the interests of the governing body, the school and the parent community when dealing with the Department. As professional leader, the principal

should do everything that is expected of him/her to ensure that what the governing body and the provincial Department do is lawful, fair, reasonable and permissible (Beckmann, 2002:11).

Table 1 Professional management and governance of a public school

MANAGEMENT (the principal)	GOVERNANCE (the governing body)
<p>Directly responsible for the day-to-day professional management of the school</p> <ul style="list-style-type: none"> - management of staff affairs; learner affairs; school finance (keeping accounts and records of school funds); administrative affairs; physical facilities; school community relations - implementation of departmental policy - professional leadership regarding educator staff - being a member of the SGB (support and assistance) - liaising with the Department of Education - utilisation and development of staff and other resources that focus on effective teaching and learning - Works directly with staff - Works directly with learners (full time) - Direct decision making regarding all professional matters in the school (within the broad guidelines of education policy and law) - Direct responsibility (employer and governing body) - Directly accountable to the governing body in terms of assigned tasks (school finance) - Directly accountable to the employer for the professional management of the school 	<p>Responsible for the drafting of</p> <ul style="list-style-type: none"> - admission policy (section 5 and 5A) - language policy (section 6) - religion policy (section 7) - code of conduct for learners - disciplinary proceedings (section 8) <p>Responsible for</p> <ul style="list-style-type: none"> - recommending to the HOD the appointment of educators and non-educators (section 20(1)(i)) - school funds and assets - annual budget - enforcement of payment of school fees - financial records - auditing or examination of financial records and statements - safety of learners (buildings and school grounds) - Works with management - Works through management (part time) - Direct decision making in terms of its functions as determined in the Schools Act - Overarching responsibility - Directly accountable in terms of the legal functions as determined in the Schools Act (parent community and the Department of Education)

Source: Adapted from Joubert and Prinsloo (2009:236)

The problem is however, that if the principal fails to comply with the provisions made in section 16(A)(3)(a) of the Schools Act, disciplinary action can be taken against him/her. In other words if the assistance of the principal to the governing body for example, is in conflict with the instructions of the HOD (“any departmental official”) it may be used to formulate a charge of misconduct against the principal. In terms of section 18 of the Employment of Educators Act, Act 76 of 1998 (Republic of South Africa, 1998), misconduct refers to a breakdown in the employment relationship. The following definitions of misconduct may be used by the employer (Department of Education) to formulate a charge of misconduct against a principal:

- Failure to comply with or contravention of this Act or any other statute, regulation or legal obligation relating to education and the employment relationship;
- Wilful or negligent mismanagement of the finances of the State, a school, a further education and training institution or an adult learning centre; or
- Failure to carry out a lawful order or routine instruction without just or reasonable cause.

In practise this means that if the Head of Department instructs a principal of an Afrikaans medium school to enrol English speaking learners against the will of the governing body of the school and the principal refuses to follow the instruction, disciplinary action

can be taken against the principal. It may have the further implication that it may lead to a situation of conflict between the principal as ex officio member of the governing body and the representatives of the parent community on the governing body.

As was mentioned in the problem statement, there has since 1996 been a proliferation of court cases and disciplinary actions in which provincial Heads of Education Departments were challenged for having taken lawful action against principals.

Heads of Departments and Departmental Officials Interpretation and Implementation of the Schools Act

The following Case Law is used to demonstrate how Heads of Departments and officials interpret and implement the provisions made in the Schools Act regarding the statutory functions of school governing bodies:

Governing body of Mikro Primary School & another vs. Western Cape Minister of Education & others (2005) JOL 13716 (C)

On 2 December 2004, the Department of Education instructed Laerskool Mikro, an Afrikaans-medium school, to admit and accommodate 40 English-speaking Grade 1 learners at the school in January 2005, despite the availability of a parallel-medium school only 200m away from Mikro. The Depart-

ment required the school to teach these learners in English and advised the principal that failure to implement this directive may constitute grounds for disciplinary action.

On the morning of 19 January 2005, two officials from the Western Cape Education Department insisted that the 21 English-speaking children who turned up with their parents attend the assembly in the school hall, where the school was to be opened for the year. They brushed aside the protests of the chairperson of the Mikro Governing Body, namely that these children had not yet been admitted to the school. Application forms completed by the parents under the supervision of one of the officials from the Department of Education had not been processed by the principal of the school, nor had he applied his mind to matters such as whether each of the children fell within the required age group. One of the officials told the chairperson of the Governing Body that he was taking over the management of the school.

In the subsequent court case, Judge Thring found that the insistence by the Western Cape Department's officials that the children and their parents attend the school assembly against the wishes of the principal and chairperson of the Governing Body of Mikro Primary constituted interference in the governance and professional management of the school. One of his concerns in this regard was the "value of legality" (rule of law), which refers to the simple principle of the State having to obey the law. The Judge further stated that this principle is so fundamental and important in any civilised country that only in an extremely rare case could the rule of law be held hostage to the best interests of children. Indeed, he found it difficult to imagine how it could ever be in the long-term best interest of children to grow up in a country, where the State and its organs and functionaries have been elevated to a position in which they could regard themselves as being above the law, because the rule of law had been abrogated as far as they were concerned.

Judge Thring also remarked that, in his view, the fact that the school principal, in terms of section 16(3) of the Schools Act, must undertake the professional management of his school under the authority of the Head of Department does not, render the principal subservient to the Department in everything he does. He does not, thereby, become the Head of Department's lackey.

The Minister of Education took the matter on appeal to the Supreme Court of Appeal (SCA): *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* (2006) (1) SA 1 (SCA). The SCA ruled, *inter alia*, that:

... while section 6(1) of the Act authorised the Minister of Education to determine norms and standards for language policy in public schools, it

did not authorise the Minister him/herself to determine the language policy of a particular school, nor did it authorise him/her to authorise any other person or body to do so.

... it was, in terms of section 6(2) of the Act, the function of the governing body of a public school to determine the language policy of the school, subject to the Constitution, this Act, and any applicable provincial law. The admission and language policy determined by the first respondent was not contrary to any of the relevant provisions, and neither the Head of the Department nor the Minister had the right to impose a language policy in opposition with that already determined and adopted by the school.

... the Western Cape Provincial School Education Act, (Act 12 of 1997) (C) was subordinate to the Act, which provided that the professional management of a school had to be undertaken by the principal under the authority of the Head of the Department, in terms of s. 16(3). It was thus clear that the Head of the Department was required to exercise his or her authority through the principal of the school. He or she could not do so through officials of the Department, since the professional management of a school required a professional educator. The Court *a quo* had therefore correctly granted the declaratory order and interdict.

Although the governing body of a public school may determine the language policy of a public school, Departmental officials tried to force the principal of Mikro Primary to commence an English medium class at the school. As mentioned, one of the officials went so far as to tell the chairperson of the governing body of the school that he was taking over the management of the school.

The Mikro Primary School case demonstrates the difficult position of the principal as *ex officio* member of the governing body and as employee of the Department of Education. The parent members on the governing body may have the expectation that the principal must promote and protect, with them, the best interests of the school and the learners of the school, while officials of the Department of Education expect the principal to carry out their instructions, whether such instructions are lawful or not.

Schoonbee and others vs. MEC for Education, Mpumalanga and another (2002) (4) SA 877 (t)

Another example of an attempt by the Department to hold employees liable for statutory functions vested in the governing body is the case of *Schoonbee and Others v MEC for Education, Mpumalanga & Another* (2002) (4) SA 877 (T). In this case, the Department apparently assumed that the principal was also the accounting officer of school funds. The principal and deputy principal of Ermelo High School were suspended by the Head of the Mpumalanga Department of Education on alleged charges of misusing school funds and the governing body was dissolved. In a landmark judgement, Judge Dikgang Moseneke dealt with the relationship between the SGB and the principal in a way that

should give direction to the way we think about this relationship. The Judge found that the principal

- has a duty to facilitate, support and assist the governing body in the execution of its statutory functions relating to assets, liabilities, property and financial management of the public school and also as a person to whom specific parts of the governing body's duties can be delegated;
- is accountable to the governing body, and it is the governing body that should hold the principal accountable for financial and property matters that are not specifically entrusted to the principal by the statute.

Judge Moseneke's further findings can be summarised as follows:

- The Department of Education (as employer) is not entitled to impute to principals (as employees) and hold them liable for statutory functions vested in governing bodies with regard to assets, liabilities, property and the financial management of a school.

As to the dissolution of the governing body, the governing body was obliged to execute its statutory duties and manage the affairs of the school in a lawful manner. When, as in this instance, a forensic audit report suggested that there were several matters (concerning the expenditure of school funds or the use of school property by the principal) which the governing body could have handled differently, the Head of Education should have called upon the governing body for such explanations as might have been necessary. The judge held the view that at that stage it was not necessary to dissolve the entire SGB in order to be able to raise and deal with, as the Head of Department wanted to, the matters or accounting concerns raised by the report of the Auditor-General.

In the Schoonbee case the principal and deputy principal were suspended for having implemented certain parts of the financial policy of the Governing Body of Ermelo High School.

Gerrit Maritz Secondary School vs. Gauteng Department of Education (2004)

Gerrit Maritz Secondary School is and has since its establishment 30 years ago been an academic school with a technical field of study. In terms of Regulations Relating to the Admission of Learners to Public Schools of 13 July 2001, as published in the Provincial Gazette Extraordinary 129 (Provincial Notice 4138/2001), provision is made for the following:

- 7.1 The Head of Department, after consultation with representatives of school governing bodies, may determine feeder zones for schools, in order to control the learner numbers of schools and co-ordinate parental preferences. Such feeder zones need not be geographically adjacent to the school or each other.
- 7.3 A school with a specific field of study, e.g. a technical school, school of arts, must have larger zones to accommodate learners with specific aptitudes, interests or needs.

Due to its technical field of study, Gerrit Maritz Secondary School was used to accommodate

learners from a larger feeder zone north of the Magaliesberg. On 24 June 2004, the Gauteng Department of Education issued Circular 38 of 2004, entitled "Management of Admissions to Public Ordinary Schools". The circular demarcated temporary feeder zones for the purposes of admission for the 2005 school year, and prescribed that learners should attend the nearest school to the parents' home address or place of work in relation with the parents' choice of medium of instruction, after all due processes have been complied with.

Preference in respect of admission had to be given to the following learners in terms of paragraph 6.1 of Circular 38:

- a) Children of parents living in the area, including domestic employees;
- b) Children of parents working in the area; and
- c) Learners from the feeder primary schools.

The Circular prescribed that learners referred to in 6.1 had to be placed on an 'A' list. A learner who did not qualify in terms of the abovementioned criteria was not precluded from seeking admission at whichever school he/she chose, but would be placed on a waiting list 'B', and would be informed of the outcome of his/her placement no later than the end of November 2004.

According to the District Director concerned, clear instruction was given in August 2004 to principals of the three secondary schools concerned to come together and to map their feeder areas to avoid disputes between schools regarding the admission of learners.

In the meantime, learners from the larger feeder area interested in following a technical field of study, were placed on the A list of Gerrit Maritz Secondary School. A district official however instructed the school to remove from the A list all learners who lived in the larger feeder area, because those areas had not yet been mapped. This was immediately done.

After fruitless consultation between the principal of the school and members of the Governing Body to convince the district officials that the school was entitled to a larger feeder area, a group of parents of the affected learners and the governing body decided to prepare a lawsuit against the Gauteng Department of Education on the grounds that the governing bodies of the schools concerned were not consulted in the so-called mapping of the new feeder areas.

The following statements were taken from the written affidavit by the District Director concerned:

- *I wish to state that even if the principals had been requested to establish feeder zones in August 2004, the procedure followed may have been lawful for the simple reason that the principal is a member of the governing body. The principal indeed has the authority to sign letters and cheques on behalf of the school governing body. He can therefore act as representative of the school governing body.*

- *The First Respondent (the principal) has now filed an affidavit in which he is clearly in support of the Applicants (Governing Body and parents concerned). He does not state that he deposes to this affidavit in his official capacity. A cost order will be sought against the First Respondent in his personal capacity.*

The case was settled out of court and as from 2005 Gerrit Maritz Secondary School continued to admit learners from the school's traditional larger feeder zone. The principal, however, was charged with alleged misconduct in terms of section 18(1) of the Employment of Educators Act, namely "failure to carry out a lawful order or routine instruction without just or reasonable cause".

After many attempts by the principal concerned to convince the Department that it did not have any legitimate case against him, the Department eventually dropped the charges. An alarming factor in this case was the mistaken notion of the District Director that the principal of a public school as ex officio member of the governing body was in the position to take decisions on behalf of the governing body.

The Gerrit Maritz case presents a good example of a principal who was caught between the instruction of a district director, the best interests of the school, and the school community represented by the governing body. It was also not a surprise to find the Schools Act being amended to insert sections such as 16(A)(1)(a) and 16(A)(3)(a). Section 16(A)(1) of the Schools Act states that the principal represents the Head of Department on the governing body. In subsection 16(A)(3), the Act goes on to declare that the principal's assistance to, or participation in the governing body, may not be in conflict with instructions of the Head of Department; legislation or policy; an obligation towards the Head of Department. The problem is that if the principal fails to comply with the provisions made in section 16(A)(3)(a) of the Schools Act, disciplinary action may be taken against him/her. In other words, if the assistance of the principal to the governing body, for example, is in conflict with the instructions of the HOD ("any departmental official"), it may be used to formulate a charge of misconduct against the principal.

The Harmony High School and Welkom High School case (2010)

The governing bodies of the two public high schools in the Free State Province (Harmony High School and Welkom High School) adopted pregnancy policies that require the exclusion of pregnant learners from attending the school for a specific time. The Head of the Free State Education Department instructed the principals of the two schools to readmit two learners who had been excluded in terms of the schools' respective pregnancy policies. The two schools successfully obtained an order from the Free State High Court

preventing the Head of the Free State Education Department from interfering with the implementation of their respective pregnancy policies. Judge Rampai expressed himself as follows regarding unlawful actions or interference by the Department in the governing body's power to determine the school's pregnancy policy:

Even if the learner pregnancy policies were substantively unfair, flawed and plagued by countless features of invalidity, the Department had no administrative power to determine, amend, suspend or abolish (or give instructions designed to attain any of these) the learner pregnancy policies for the schools. It follows from this reasoning that the directives issued by the Department (first respondent) late last year were unlawful. I am therefore inclined to declare them to be of no binding force and effect in law. To find otherwise would render the functioning of the school governing body ineffective and superfluous. Governance of schools can fall into disarray. When the institutional autonomy of a school governing body is compromised by instructive official interventions, the elementary norm and standards of teaching and learning might be seriously eroded...

The decision of the Free State High Court was subsequently confirmed by the Supreme Court of Appeal and the Constitutional Court. The Constitutional Court confirmed that public schools are run by a partnership between the education authorities (provincial and national) and communities (represented through school governing bodies). The Constitutional Court held that the Head of a provincial Education Department cannot instruct the principal of a public school to contravene an existing policy adopted by the governing body of that school (Wilter, 2013:5-6).

The Governing Body of the Rivonia Primary School v MEC for Education: Gauteng Province (16/12) (2012) ZASCA 194 (30 November 2012)

Rivonia Primary School declined to admit a child to its Grade 1 class for the 2011 school year, because she was twentieth on the waiting list, despite the insistence of her mother. The mother insisted in her demand that the child be admitted and garnered the support in her cause of officials of the Gauteng Department of Education. Some weeks into the school year, the Head of the Department (HOD) instructed the Principal to admit the child. Before the governing body could meet to consider the instruction, officials of the Department arrived at the school and summarily deposited the child in a classroom. The officials told the principal and a member of the governing body that the admission function of the principal had been withdrawn and that the function had now been delegated to them as Departmental officials. Judge Cachalia found that this high-handed conduct of departmental officials can only be deprecated for reasons that was unlawful.

In respect of the number of learners a school can admit, the factors to be taken into account of setting those norms and standards are set out in section 5(A)(2)(b), and include the number of teachers and the class size; the quality of performance of a school; the curriculum and extra-curricular choices; the classroom size and the utilisation of available classrooms. In terms of section 5(A)(3) – a critical section – a governing body must, when compiling its admission policy, comply with these norms and standards. In the event that the school has an existing policy, it must, in terms of section 5(A)(4), within a period of 12 months after the Minister has prescribed the norms and standards, review its admission policy to ensure its consistency. That the governing body is enjoined to compile and review its admission policy in accordance with such norms and standards makes it clear beyond doubt that the admission policy contemplated by the Schools Act includes the capacity of the school.

The judge argued further that the Head of Department was quite entitled to ask the governing body to exercise the discretion embodied in the policy to exceed its capacity, so as to accommodate a learner who had not been placed, and the governing body would be obliged to consider such a request on reasonable and rational grounds. The Head of Department, however, issued an unlawful instruction to the principal to admit the child. Then the officials of the Department were told that the governing body would shortly be meeting to consider the case, but far from awaiting its decision they proceeded to deposit the child nonetheless. The judge found that it would not be out of place to observe that he finds the approach of the Department's officials in this case most disturbing. There was not one bit of evidence to suggest that the school had ever refused admission to a child – including this child who happens to be black – on grounds of race, or that it had unfairly discriminated against any child on this basis. The school's refusal to admit the learner in this case had nothing to do with her race or her background. It came about solely because her application was far down the waiting list. The Department's stated policy itself expressly requires admission to follow the chronological sequence of the applications and the mother in this case was obliged to stand in line, just as the parents of the other learners who had submitted late applications were obliged to do. She was not entitled to preferential treatment, from the school or the Department. However, instead of treating this matter as an ordinary dispute relating to the application of the school's admission policy, the Department opprobriously invoked the ugly spectre of race to obfuscate its unlawful conduct.

In the conclusion of his judgement, Judge Cachalia mentioned that the principal of Rivonia Primary School, Ms Drysdale, was sanctioned for

failing to comply with the Head of Department's unlawful instruction.

Although the sanctions imposed on Ms Drysdale are not before us, I am confident that the Department is sufficiently gracious to withdraw these sanctions in the light of this judgment.

Conclusion

The abovementioned cases demonstrate the difficult position of the principal as ex officio member of the governing body and as employee of the Department of Education. The parent members on the governing body may have the expectation that the principal must promote and protect with them the best interests of the school and the learners of the school while officials of the Department of Education expect the principal to carry out their instructions whether such instructions are lawful or not. The principal of a public school, who is an ex officio member of the SGB, represents the Head of Department. However, the principal is but one of many governors on the governing body. He/she has but one vote, which is not a casting vote or a more important vote than that of any other member of the governing body. He/she is the representative of the Department as a professional manager, and not as a governor.

Section 16(2) of the Schools Act stipulates that a governing body stands in a position of trust towards the school. The provision applies equally to the principal, being a member of the governing body, as to the rest of the governing body members. As demonstrated, in the abovementioned court cases the principals received conflicting assignments from the Department and the governing body, where due to their differing goals and interests, suddenly places the principal in a catch-22 situation (Van der Merwe, 2013:244).

Another disturbing trend that emerges from this discussion is that it seems as if sections 16(A)(1) and (3) of the Schools Act can be misused to target principals on account of the manner in which governing bodies execute or fail to execute their statutory functions. Section 16(A)(1) states that the principal of a public school represents the Head of Department in the governing body when acting in an official capacity, as contemplated in sections 23(1) and 24(1)(j). Section 16(A)(3)(a) states that the principal must assist the governing body in the performance of its functions and responsibilities, but that such assistance or participation may not be in conflict with instructions issued by the Head of Department. Not all instructions from Heads of Department or Departmental officials, however, fall within the ambit of their powers or are in the best interests of the learners, the school and the school community, as has been shown in the Mikro Primary, Rivonia Primary and Gerrit Maritz Secondary School cases. Section 16(A) thus stands

in contradiction with the original purpose of the South African School Act to play an important role in encouraging the principle of partnership in and mutual responsibility for education.

If the state has real concerns regarding the way in which certain governing bodies govern schools, the Schools Act provides many remedies to deal with these concerns. However, to promulgate legislation that will limit all governing bodies, even those functioning properly, and to place the principal in an unfair labour environment, will not solve the problem. The dysfunctional governing bodies will continue to govern poorly; the functional governing bodies will continue to be frustrated by the state's power struggle; and the principal will be caught in the middle, having to 'keep wicket' on both sides (Van der Merwe, 2013:250).

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