

Aligning school governance and the law: Hans Visser on education cases and policy*

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OPSOMMING

Belyning van skoolbeheer en die reg: Hans Visser oor onderwysregspraak en -beleid

Die artikel is gebaseer op 'n huldigingslesing vir wyle professor PJ (Hans) Visser wat op 2007-07-27 by die Universiteit van Pretoria gelewer is. Professor Visser was 'n baanbreker in onderwysreg en die artikel neem slegs 'n gedeelte van sy werk oor onderwysreg in oënskou. Die bydrae toon aan dat sy werk dikwels oor die wanbelyning tussen die reg en skoolbeheer gehandel het. Ter aanvang word die konsep "belyning" omskryf waarna die oorsake van wanbelyning aan die orde gestel en 'n "katalogus" van voorbeelde van wanbelyning aangebied word. Visser se behandeling van wanbelyning voortspruitend uit algemene beleid oor die onderwys word daarna kortliks bespreek. Die bespreking word gevolg deur 'n ondersoek na sy analise van wanbelyning ten opsigte van skoolbeheer *per se* en ten opsigte van die rol van ouers en leerders in skoolbeheer in die besonder. Ten slotte, word sy voorstelle vir die hersiening van die Skolewet van 1996 onder die loep geneem, voordat enkele aanbevelings gemaak word oor hoe sy nalatenskap gedenk kan word.

1 Introduction

Professor Visser is respected in a large number of academic disciplines and fields.¹ His sudden passing away is an inestimable loss, among others, in terms of the development of education law as an academic discipline.

I was honoured to have been asked to read a paper in memory of an exceptionally gifted and richly blessed academic and human being whose legacy will present us with enormous challenges.

The invitation to me signalled, among others, a degree of recognition of the standing of education law as a field of inquiry within the legal

* This article is based on a paper read in memory of prof PJ (Hans) Visser at UP on 2007-07-27. Prof Visser was a pioneer of education law. He was the first person in SA to introduce an education law module in the curriculum of the LLB degree and was also a founder member of the South African Education Law Association (SAELA) and the Interuniversity Centre for Education law and Education Policy (CELP). At the time of his death he was vice-chairperson of CELP. Thanks are due to Mrs Schröder, Head: OR Tambo Law Library of UP, for her invaluable assistance in accessing publications by Visser and also to everybody who read and commented on earlier drafts of this article.

¹ See in this regard *in memoriam*, earlier in this edition by Davel.

fraternity and, more importantly, of the crucial role that Visser played in the development of this domain. This is so both in the development of knowledge as well as 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), 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 Visser's prowess.

2 Aim of Article

The aim of the article can obviously only be to explore selected themes and not to explore Visser's phenomenal oeuvre in its entirety.² According to Malherbe,³ his "knowledge, insight, versatility and productivity put him in a class of his own". According to De Groof, President of the European Education Law Association, Visser gave concrete expression to European South African cooperation regarding education law and policy and the application of human rights in and through education.⁴

The definition of a second-level consumer of education law in terms of a seminal article published by Mawdsley and Visser in 2007,⁵ fits my involvement with education law particularly well. I have to necessarily restrict my consideration of his work to his observations on education law. In terms of Mawdsley and Visser's exposition, my involvement in education law is that of a consumer of "applicable and relevant legal material".

3 Education Law and its Consumers

In the abovementioned article, Mawdsley and Visser provided me with a lens for looking at 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 material in the common core; (c) a recognition that failure

2 Potgieter and Beckmann "Obituary: Hans Visser" 2007 *Sui Generis* 4. I used a selection of 25 articles on education law published by Visser since 1997 (including 2 published this year) in the preparation of this article. 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, among others, many research projects, papers read at conferences, position papers and opinions.

3 "Hans Visser's contribution to education law" 2007 *Sui Generis* 5.

4 "Condolences, Hans Visser" 2007 *Sui Generis* 6. Translation from the Dutch by the author.

5 "The development of education law as a separate field of law: The experience of the United States with some observations on South Africa" 2007 *TSAR* 153-161. They do not use the term "second level" but in the context of the development and implementation of education law, I find it conceptually useful.

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.⁶ They conclude that, “for reasons of practical expediency” it makes “perfect sense” to acknowledge education law in South Africa.⁷ 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 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. Mawdsley and Visser do not view the partnership between the two types or levels of consumers as necessarily sequential but believe that it has become more of a tandem partnership (in the United States in particular).⁸

4 Approach to Analysis

In scrutinising a modest selection of Visser’s work on education law, I will depart from the perspective of a second-level 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 Visser’s work on education law?” For the sake of expedience, I will explore his work on education law by referring, mainly, to his outputs in scholarly journals. I will confine myself as much as possible to his writing on the law and school governance.⁹

In responding to the question articulated above, I will select a small number of issues and 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 he identified. Thereafter I will turn to his analysis of broad policy framework issues pertaining to laws and policies (in particular his insistence on clear and purposeful formulation). I will then focus on his examination of some of the issues with which he seemed to be preoccupied, namely school governance and the positions (rights and duties) of learners and parents, respectively. This will be followed by a brief exposition of his suggestions about possible legal reform before I conclude with some recommendations on how the education law community may pay further homage to Visser.

6 2007 TSAR 153 155.

7 *Idem* 161.

8 *Idem* 158.

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

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, 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,¹⁰ Visser comments that the case of *Maritzburg College v Dlamini, Mafa and Kondza*,

“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 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 Visser comments. He 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”.¹¹ It is clear from a reading of his 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 trust in other role-players and even *mala fide* use of “imagined power”.¹²

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

10 “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 *THRHR* 698–702.

11 Visser “Some thoughts on legality and legal reform in the public school sector” 2006 *TSAR* 359–366.

12 See n 10; Visser “Aspects of school fees at public schools” 2004 *De Jure* 358–362; Beckmann and Prinsloo “Imagined power and abuse of administrative power in education in South Africa” 2006 *TSAR* 483–496.

6 Catalogue of Misalignment

In his articles,¹⁵ Visser 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 following causes of misalignment linked to education officials, authorities or departments can be mentioned:¹⁴

- Neglect of duty and misinterpretation of education laws by provincial heads of education departments;
- corruption and incompetence regarding examinations including the leaking of examination papers;
- 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;¹⁵
- the Free State High Court¹⁶ described the orchestration of the dismissal by the head of education as “shocking”, “shameful” and “scandalous”;
- 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;¹⁷
- in *Despatch High School v Head of Department of Education, Eastern Cape*,¹⁸ 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.¹⁹ 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

15 See par 5 above.

14 Although I take the liberty of commenting and elaborating on his 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 article does not allow such an exercise. In general I agree with his observations.

15 *Head of Department of Education, Limpopo Province v Settlers Agricultural High School* 2003 11 BCLR 1212 (CC) par 14.

16 *Suid-Afrikaanse Onderwysunie v Departementshoof Departement van Onderwys, Vrystaat* 2001 3 SA 100 (O).

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

18 2003 1 SA 246 (ChH).

19 The department found the principal guilty of misconduct and gave him a final written warning – the governing body wanted him charged with serious misconduct. See also Visser “*Despatch High School v Head, Department of Education, Eastern Cape* 2003 1 SA 246 (ChK)” 2004 *De Jure* 150–154.

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 of a public school in Pietermaritzburg 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;²⁰
- in *Western Cape Minister of Education v Mikro Primary School*²¹ the Supreme Court of Appeal 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; and
- instances of unnecessary disputes where education authorities were unwilling to appoint staff members recommended by governing bodies.²²

The following causes of misalignment linked to governing bodies can be mentioned:

- 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;²³
- 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;²⁴
- 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, with regard to religious observances, freedom of expression and access to information regarding learner achievement) or

20 *Maritzburg College v Dlamini, Mafu and Kondza* case no 2089/2004 (NPD) of 2004-05-27.

21 2005 10 BCLR 973 (SCA).

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

23 Creese and Earley *Improving Schools and Governing Bodies. Making a Difference* (1999); Roos *Review of School Governance. South African Public Schools. Report of the Ministerial Review Committee on School Governance* (2004) 98; Visser 2006 TSAR 359–366.

24 Visser 2006 TSAR 359–366.

threats to learners whose parents cannot or do not pay school fees or to such parents;

- 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”;²⁵ and
- illegal or incorrect conviction of learners of misconduct.²⁶

The following misalignment relating to school fees can be noted:

- 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 compiled by 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 this can be ascribed, among others, to problems regarding the initial training of teachers (very few higher education institutions pay significant attention to education law in their teacher training programmes) as well as the failure of education authorities to provide proper guidance to educators and governing bodies, regarding the necessity of knowledge in education law. 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;²⁷
- 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

25 *Ibid.*

26 See eg *Antonie v Governing Body Settlers High School* 2002 4 SA 738 (C); *Michiel Josias de Kock NO v Departementshoof van die Onderwysdepartement, Provinsie Wes-Kaap* case no 12533/98 of 1998-10-02. In this regard the education fraternity is waiting with baited breath for the judgment of the CC 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.

27 See in general Bush and Joubert *Evaluation of school management development and governance training in the Gauteng Province* (2005).

and afterwards need to be 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;²⁸
- 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 other things,
 - 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 – this concept viewed in a legal sense and not only in an educational sense;²⁹
 - 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.

Next, I will turn my attention to 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, Visser³⁰ remarks that the outcome of the case was to him a “foregone conclusion”. 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, collective or minority rights”.³¹ He also warns 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”.³²

28 See in general Bertelsmann in Beckmann (ed) *Engaging the law and education in a transforming society: a critical chronicle of SAELPA 1996–2005* (2006) 301–310.

29 See eg papers read by Malherbe, Reynecke, Davel and Robinson at annual international conference of the South African education Law Association (SAELA) held at Mpekwene, Eastern Cape in Sept 2006.

30 “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 THRHR 342.

31 *Ibid.*

32 *Ibid.*

To a degree, the different outcomes of four “language” cases,³³ bear testimony not only to Visser’s extraordinary insight into legal texts but also to his strategic vision. One cannot help asking to what degree manipulation and mistrust may have played a role in the outcome of the cases.

What Visser’s comments intimate to second-level users of education law is that the result of litigation is, to some extent, predictable. It is possible for them to minimise decision-making risks. What is required in this regard is that such consumers be legally and policy literate (see paragraph 6) and also that they be politically literate. I suggested in paragraph 6 above that acquiring such literacy will require a concerted effort on the part of the three main role-players namely, 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 Visser’s reference 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 other dispute resolution mechanisms 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, by education officials in the national Department of Education and in nine provincial departments, regions and districts, such law and policy need to be simple, clear and accurately formulated.³⁴ Visser’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.

Visser and Beckmann³⁵ 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

33 *Hoërskool Ermelo v Departement van Onderwys* case no 3062/07 of 2007-02-02; *Laerskool Middelburg en ’n Ander v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T); *Seodin Primary School v MEC of Education, Northern Cape* 2006 4 BCLR 542 (NC); *Western Cape Minister of Education v Governing Body of Mikro Primary School* case no 140/2005 (SCA).

34 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 in education will have to contend with material written in their second, third or fourth languages. In addition, they are not familiar with the language used in legal documents.

35 “Some comments on the discussion paper by the South African Law Commission: “Aspects of the law relating to AIDS: HIV/AIDS and discrimination in schools” 1998 *THRHR* 127–132.

“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, Visser³⁶ 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 clarity 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”.

Again, this points to insufficient clarity because of flawed formulation, leading to legal uncertainty.

Visser 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 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 article³⁷ on the first education case before the Constitutional Court, Visser is extremely critical of Mahomed J:

“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 a 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.”

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

In paragraph 9, I will turn to Visser’s suggestions on how these problems, that can lead to misalignment, may be addressed in the process of legal reform.

³⁶ 2006 *TSAR* 359–366.

³⁷ 1997 *THRHR* 342.

8 Specific Governance Issues

Because of the scope of this contribution, I will only offer brief comments on three specific governance issues, namely, the functioning of governing bodies, the governance of learner issues and the role of parents in governance.

8.1 School Governance (Functioning of School Governing Bodies)

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

- The development of the compromise nature of provisions on governance; and
- the ineffectiveness of governing bodies.

8.2 Development of the Compromise Nature of Provisions on Governance

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.³⁸ 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 therefore reflect a strong tension between the powers of centralisation and decentralisation.³⁹

The future of compromises is always uncertain and they could develop in any number of directions. What concerned Visser though, was the way compromises were handled by the courts. The courts seemed to ring the death knell for compromises that had been reached. The state seemed to acquire all the powers and functions that it had devolved in the negotiation process. In an article published in 1997, Visser⁴⁰ expresses a number of concerns forcefully:

- The *Matukane v Laerskool Potgietersrus* case,⁴¹ casts 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;
- the *School Education Bill* case,⁴² did not inspire much confidence in Visser regarding the future of minority languages – a fear supported, among others, by the *Ermelo*, *Seodin* and *Middelburg* cases;⁴³

38 See among others Malherbe in De Groof *et al* *South African Education. From the Constitutional drawing board to the chalkboard* (1997) 66.

39 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.

40 1997 *THRHR* 342.

41 *Matukane and Others v Laerskool Potgietersrus* 1996 3 SA 223 (T).

42 *In re: The School Education Bill of 1995 (Gauteng)* 1996 4 BCLR 637 (CC).

43 See n 32.

- 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”.⁴⁴

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.⁴⁵ 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.

8 3 Ineffectiveness of Governing Bodies

I have already referred to some of Visser’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”.⁴⁶ Certainly the increasing restrictions imposed on governing bodies seem to suggest that Visser’s view was at least partially correct.

To remedy these ills, will require a fundamental re-examination of:

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

44 1997 THRHR 342.

45 See s 37, 38A and 39 of the Schools Act, as well as s 6(3)(f) of the Employment of Educators Act 76 of 1998.

46 “Some principles regarding the rights, duties and functions of parents in terms of the provisions of the South African Schools Act 84 of 1996 applicable to public schools” 1997 TSAR 626–636.

8 4 Learners

In an article⁴⁷ written in 1997, Visser examines the rights and duties of learners. He points out that these rights can be evaluated at various levels, namely 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; and 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 learners' rights. His misgivings have again been proved correct as is evident, from among others, the cases of:

- *Antonie v Governing Body Settlers High School*,⁴⁸ 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 and as indication of her accepting the Rastafarian faith) and was suspended in terms of the school's code of conduct. The court set aside the suspension.
- *Michiel Josias de Kock NO v Departementshoof van die Onderwysdepartement, Provinsie Wes-Kaap*,⁴⁹ where the school principal played the roles of *pro forma* complainant and member of the tribunal in a disciplinary hearing. In this case, too, the punishment imposed by the governing body was set aside by the court.
- *S v Zuba & 23 Similar Cases*,⁵⁰ 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 v MEC for Education (Gauteng)*,⁵¹ where the court found that 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)).⁵²
- *The Centre for Child Law v Minister of Justice*,⁵³ where the Member of the Executive Council (MEC) for Education in Mpumalanga, in consultation

47 "The rights and duties of pupils (learners): Some basic South African principles" 1997 *Obiter* 14-30.

48 2002 4 SA 738 (C).

49 Case no 12533/98 of 1998-10-02.

50 2003 JOL 11973 (E).

51 Case no 19559/06 (TPD) of 2006-06-30.

52 Davel in Beckmann (ed) *Engaging the law and education in a transforming society: a critical chronicle of SAELPA* (2006) 1165-1175.

53 Unreported case no 8523/2005 (TPD) of 2005-05-10.

with the MEC for Social Development, was ordered to 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 were 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 of their peers should be ceased with immediate effect.⁵⁴

- *Maritzburg College v Dlamini, Mafu and Kondza*,⁵⁵ where 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 whether 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. Children need space (freedom and opportunity) to gain experience in the correct exercise of their fundamental rights.⁵⁶

Although Visser agrees that learners' duties are "relatively unpopular" and that there seems to be "an obsession with rights", the viewing of rights as the "embodiment of success itself" and an "effective answer to all the wrongdoing of the past", he warns that it is "conceptually impossible to have rights without duties."⁵⁷ Educators who fear the advance of masses of learners armed with rights, with duties forgotten in the mists of the past, should take courage of this concise exposition of the balance that needs to be sought in a school and on which parents and educators alike should insist. They should educate learners to accept this view of balanced rights and duties and also take cognisance of section 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, Visser 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 thirteen of the 27 articles which I consulted in preparing this contribution. This should be proof enough of the fact that Visser's primary and ultimate concern was the best interests of the child (and, to a lesser degree, the school). All of the above enjoin second-level users of education law to once again ensure that they are abreast of the rights and duties of learners and that they should interpret these in the light of the learners' best interests.

54 *Ibid.*

55 Case no 2089/2004 (NPD) of 2004-05-27.

56 "Religious attire in public schools. *Antonie v Governing Body, Settlers High School* 2002 4 SA 379 (C)" 2004 *THRHR* 335-339.

57 1997 *Obiter* 14-30.

8.5 Parents

The unenviable position of parents in the education system has been alluded to in the above paragraphs. Suffice 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 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.

Visser 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.⁵⁸

Now may be an opportune time for educators and the state alike, to reappraise 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 article⁵⁹ Visser notes that the Schools Act is clearly not perfect and some legislative reform should not, therefore, 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.⁶⁰

Visser 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

58 2006 TSAR 359–366.

59 *Ibid.*

60 In par 5 I discussed Visser’s cataloguing of the ways in which these three sets of role-players may contribute to misalignment between the law and governance of schools.

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 of education (and of school principals as their executive agents) with such legal precision as to avoid all future uncertainty or conflict".⁶¹

He believes⁶² 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, Visser summarises the lessons that the role-players in the education fraternity can learn:

- A need for a proper understanding of their 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 rights of others;
- 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]" to achieve these conditions to the extent that may be necessary, he still suggests changes in the following respects:⁶³

- 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;

61 2006 TSAR 359–366.

62 *Ibid.*

63 In this regard the role of "consumers" would be to support and advocate the proposed changes as far as possible.

- 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 an electronic-mail letter to me⁶⁴ Visser talked about how one should understand the Schools Act. I believe that, if everyone understood 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 administrative justice) in general and with regard to the limitations to which all rights and powers are subject.”

10 Conclusion

How can we, who are aware of the phenomenal contribution that Visser made to education law, make sure that his legacy will live on? I suggest that the Faculty of Law, University of Pretoria, consider the following (if they have not already done so):

- Prescribe a collection of Visser’s texts in education law modules;
- publish a memorial journal containing contributions by authors on the different branches of law to which he contributed;
- support and advocate the changes to legislation proposed by him;
- make concerted efforts to facilitate the drafting of better education law and policy texts;
- consider the possibility of an Education Law Chair named after him to give impetus to the development of education law and to sustain momentum;
- consolidate and distil his contributions by commissioning the publication of a handbook on education law;
- annually present a Visser memorial seminar on recent developments in education law.

64 Received 2006-06-19.