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Recent legislation regarding the appointment of public school educators: the end of the decentralisation debate in education?

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After 1994 it was generally expected that the decentralisation of powers would give parents in school governing bodies significant power regarding the governance of schools concerning the appointment of staff and recommendations for appointment. The South African Schools Act of 1996 appeared to meet these expectations. However, a number of amendments to the law since then have apparently diminished the powers of parents in this regard. This article analyses the powers parents received in this regard circa 1996 and the amendments effected since then, and argues that the recent changes do not necessarily mean an end to decentralisation.

Onlangse wetgewing ten opsigte van die aanstelling van opvoeders in openbare skole: die einde van die desentraliseringsdebat in die onderwys?

Na 1994 was daar 'n algemene verwagting dat desentralisering van magte ouers in skoolbeheerliggame aansienlike mag sou gee oor die beheer van skole betreffende die aanstelling en die aanbeveling van personeel vir aanstelling. Dit het gelyk of die Suid-Afrikaanse Skolewet van 1996 aan dié verwagtinge voldoen. 'n Reeks wetswysigings sedertdien het oënskynlik die gesag van ouers in dié verband afgetakel. Hierdie artikel analiseer die magte wat ouers circa 1996 in dié verband ontvang het, die veranderinge wat sedertdien aangebring is en voer aan dat die mees onlangse veranderinge nie noodwendig die einde van desentralisering beteken nie.

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In 1990 South Africa irrevocably turned away from the much-maligned apartheid system of government when Mr Nelson Mandela was released from prison and the African National Congress (ANC) was unbanned as a freedom cum political organisation. That year also marked the beginning of real negotiations to determine the nature of the future South African education system. The previous secret negotiations between the State and the broad democratic movement ended; articles, drawn up by those who knew that the end of apartheid was inevitable and who either looked forward to it or viewed it with a great deal of unease, became part of an open public debate on the future system. This debate ran concurrently with the so-called Codesa constitutional negotiations held in Kempton Park.

Documents such as the Human Sciences Research Council *Report on the Provision of Education in the RSA* (HSRC 1981), the *National Education Policy Investigation* (NEPI) (ANC 1993), the *Education Renewal Strategy* (ERS) (DoE 1992), the *Policy Framework for Education and Training* (ANC 1994) and the *Implementation Plan for Education and Training* (IPET) (ANC 1995) formed the basis of negotiations and led to two education (and training) White Papers (DoE 1995 & 1996) which were later translated into the South African Schools Act (SASA), No 84 of 1996, the Further Education and Training Act, Act 98 of 1998 (FETA), the South African Qualifications Authority Act, Act 58 of 1995 (SAQA), the Employment of Educators Act, Act 76 of 1998 (EEA) and the National Education Policy Act, Act 27 of 1997 (NEPA). It appears that, as far as school governance (among others the recommendation for appointment of state-paid public school educators) was concerned, the debate was dominated by among other things the issue of centralisation versus decentralisation of power.

1. Centralisation *versus* decentralisation

In the negotiations on the education governance model, the tension between centralisation (the concentration or merging of functions in one body, in particular the administrative and control function) (HSRC 1981) and decentralisation (the distribution, delegation and allocation of functions related to administration or management;

granting such functions to subsections of a whole) was prominent from the start. This tension has been recorded extensively by among others Beckmann (2002), Beckmann & Visser (1999), Fleisch (2002), Malherbe (1997) and Sayed (2000).

After 1994 documents emanating from both the state and its agencies and those deriving from the freedom and democratic movements (including the ANC and its allies) appeared to agree that something was fundamentally wrong in education. These documents addressed issues such as governance, representation and participation. In general, documents from the former regime insisted on a healthy balance between centralisation and decentralisation, and devolution of authority to the lowest possible level. They made some provision for increased participation by stakeholders at school level but seemed to confine themselves to a view of school communities as parent communities.

The fact that the negotiations led to one department and nine provincial departments as well as to the awarding of significant functions (powers, duties or responsibilities) to school governing bodies at the school level unambiguously signifies that, despite the tension between centralisation and decentralisation, there was at the very least an explicit attempt to decentralise the power of decision making to various levels of the education system.

2. Problem statement and methodology

This article explores the question as to what has happened to the explicit intentions to decentralise a significant degree of power regarding the appointment of public school educators to parents as represented by school governing bodies. Other powers, for example those regarding codes of conduct and school finances, will not be explored as the powers regarding the appointment of educators provide perhaps the best example of how tensions between centralisation and decentralisation could pan out in a young democratic dispensation.

This article focuses on the issue of appointment which is often, as Charles Glenn (2000: 176) aptly puts it, the canary in the coal mine regarding the autonomy of institutions. It appears that appointment

is a firm indicator of the degree of centralisation in a system and of the changes in this regard, especially when the degree of decentralisation is being abridged. It provides a reliable pointer to where the power of decision making is positioned in a system and is also sensitive to movement of the position.

This article seeks to provide an answer to the question posed in the title by analysing, in chronological order, the legislative provisions constituting the powers of parents regarding the appointment of educators in public schools since circa 1994. Where appropriate, reference is made to relevant policy documents and case law since policy often precedes law and case law often serves the purpose of clarifying and interpreting disputed provisions in both original and subordinate legislation.

3. Analysis

The ANC *Policy Framework for Education and Training* makes only two references to staffing and employment. One is that affirmative action and retraining will apply to bureaucrats and to leadership (ANC 1994: 7), and the other is that teachers will be employed by provincial education departments (ANC 1994: 20). The latter statement may have been included to avoid misunderstanding as the management councils of some schools were regarded as the employers of educators prior to 1994 in terms of the Education Affairs Act (House of Assembly), No 70 of 1988.

The ERS document (DoE 1992, par 18.3) refers to the powers that management councils at school level should have in order to appoint teaching staff for extramural activities. It appears that the state will employ all educators at schools. This paragraph also introduces the notion of the subvention of educators' salaries by management councils. Later, and in terms of section 37 of SASA, this became an important yet controversial part of governing bodies' strategies to attract the best educators to their schools. The differing levels of poverty or affluence in school communities obviously influence the ability of governing bodies to implement such subventions, and have implications for the principles of equity, redress and equality.

Paragraph 12 of White Paper 1 (DoE 1995) echoes the sentiments of the *Policy Framework* regarding affirmative action.

Although the Constitution is the supreme law of the country and all laws and acts that are inconsistent with it are invalid, SASA (RSA 1996b) is the primary source for a discussion of the powers of SGBs regarding staff appointment. Section 12(1) of SASA provides that the Member of the Executive Council (MEC for Education) of each province must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature. It follows that the specific provincial education department has to be the employer of educators in the schools of the province and this assumption is borne out by section 1 of the Employment of Educators Act, Act 76 of 1998 (RSA 1998a).

3.1 Functions of school governing bodies (SGBs)

SASA provides for functions of SGBs relevant to this article:

- A governing body of a public school must take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners at the school (section 36).
- The governing body of a public school must establish a school fund and administer it in accordance with directions issued by the Head of Department (section 37(1)).
- Subject to subsection (37)(3), all money received by a public school including school fees and voluntary contributions must be paid into the school fund (section 37(2)).
- The governing body of a public school must open and maintain a banking account (section 37(3)).
- Money or other goods donated or bequeathed to or received in trust by a public school must be applied in accordance with the conditions of such donation, bequest or trust (section 37(3)).
- The school fund, all proceeds thereof and any other assets of the public school must be used only for-
 - (a) educational purposes, at or in connection with such school;
 - (b) educational purposes, at or in connection with another public school, by agreement with such other public school and with the consent of the Head of Department;
 - (c) the performance of the functions of the governing body; or
 - (d) another educational purpose agreed between the governing body and the Head of Department (section 37(6)).

3.2 Section 20(1)(i) of SASA

Section 20(1)(i) of SASA contains a crucial provision regarding the appointment of educator staff. It provides that SGBs must recommend the appointment of educators at the school to the Head of Department, subject to the Employment of Educators Act (Act 76 of 1998) and the Labour Relations Act (Act 66 of 1995).

This subsection affirms that the provincial Head of Department (HOD) is the employer of all educators and that, if they want educators employed, SGBs must make recommendations to the HOD. It does not accord SGBs power regarding appointments apart from making recommendations that must be given attention in accordance with the provisions of common law and labour law.

3.3 Section 20(4) of SASA

The Education Laws Amendment Act, No 100 of 1997 (RSA 1997) added a subsection to section 20 of SASA, namely subsection 20(4) which assigns a discretion to SGBs:

Subject to this Act, the Labour Relations Act, 1995 (Act 66 of 1995), and any other applicable law, a public school may establish posts for educators and employ educators additional to the establishment determined by the Member of the Executive Council in terms of section 3(1) of the Educators' Employment Act, 1994.

On face value this additional discretion adds considerably to the powers of SGBs in this regard.

The only source of revenue that SGBs could use to exercise this discretion is the school funds and it appears that section 36(6) of SASA allows such use of school funds. SGBs began using this discretion to the effect that between 33% and 50% of the educator staff of some schools are now "SGB appointments". This widened the gap between poorer and richer schools and some SGBs also began subventing (supplementing) educators' salaries in order to be able to recruit the best staff for their schools with a view to offering quality education. Naturally, these developments would make it very difficult for provincial departments to exercise their functions as guardians of equality and equity in the respective school systems. SGBs could also use these

provisions to position their schools beyond the reach of affirmative action and other legislative requirements.

3.4 Sections 20(6-11) of SASA

The Education Laws Amendment Act, No 100 of 1997 (RSA 1997) added more provisions and conditions by adding subsections 20(6)-(11) to SASA:

- Subsection 20(6) provides that an educator employed in a post established in terms of subsection (4) must comply with the requirements set for employment in public schools in terms of this Act, the Labour Relations Act, 1995 (Act 66 of 1995), and any other applicable law. These “other laws” naturally include the provisions of the Constitution referred to above. This provision may be seen to be limiting the discretion but it can be argued that it has been added to protect children from SGB appointments that may not have been made in their best interests.
- Subsection 20(7) also provides that educators appointed additionally to the official staff complement must be registered with the South African Council for Educators (SACE) in terms of the South African Council for Educators Act, No 31 of 2000. Among others, this Council oversees the professional conduct of educators.
- Subsection (8) provides that the staff contemplated in subsections (4) and (5) must be employed in compliance with the basic values and principles referred to in section 195 of the Constitution, and the factors to be taken into account when making appointments include, but are not limited to -
 - (a) the ability of the candidate;
 - (b) the principle of equity;
 - (c) the need to redress past injustices; and
 - (d) the need for representivity.

While these provisions apparently aim to guarantee the quality of appointments, they may also be intended to discourage SGBs who would abuse this provision in order to “protect” their schools against democratic transformation.

- Subsection 9 provides that, when presenting the annual budget contemplated in section 38, the governing body of a public school must provide sufficient details of any posts envisaged in terms of subsection (4), including estimated costs relating to the employment of staff in such posts and the manner in which it is proposed that such costs will be met. These two subsections have the effect of regulating the choices available to SGBs when making appointments and also afford parents an opportunity to gain insight into precisely how school fees will be spent.

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- Subsection 10 states very clearly that the state is not liable for any act or omission by the public school relating to its contractual responsibility as the employer in respect of staff employed in terms of subsection (4).
- Subsection 11 cautions that, after consultation as contemplated in section 5 of NEPA, the Minister may determine norms and standards by notice in the Government Gazette regarding the funds used for the employment of staff referred to in subsection (4), but such norms and standards may not be interpreted so as to make the State a joint employer of such staff. It is clear that the Minister may, for example, cap the number of such appointments at a school in terms of equity requirements, and that the state does not want to accept possible liability on account of, for instance, the negligence of such educators. Although SGBs have been given certain powers, it appears that the accompanying provisions caution them to be extremely careful about using them.

It is worth noting that the courts have so far not found in favour of the departments in this respect. In the case *MEC for Education and Culture Free State v Louw*, for example, involving an “SGB appointment” the court found against a department of education which argued that it was not liable for an injury suffered by a learner in a swimming pool while being supervised by an educator appointed by the school.

3.5 Section 38A(1) of SASA

Reference was made earlier to the fact that the SGBs of many mainly former White schools embraced the principle of subvention of educators’ salaries to attract quality educators to their schools. Davies (2008: 3) indicates that there are approximately 12 000 “governing body appointments” in the education system and that some 18% of staff in the so-called quintile 4 and 5 schools, the “least poor” ones in terms of the Norms and Standards for School Funding (RSA 1998c), are such appointments. However, on 29 April 2003 the DoE invited comments on another set of proposed amendments to SASA concerning this very issue. The government proposed that a section 38A be inserted into SASA. The proposed subsection 38A(1) reads as follows:

- (1) A school governing body may not pay, without prior approval from the employer, to the educator employed in terms of the Employment of Educators Act, 1998, any-

- a) benefit in kind;
- b) other financial benefits, or
- c) remuneration;
except for the payment of travel and subsistence expenses in amounts comparable to those paid for similar expenses incurred by public servants.

The proposal was carried and was incorporated into the Schools Act, No 84 of 1996. It appeared that this insertion would effectively end all subventions of educators' salaries. However, the way is still open for SGBs to obtain permission from the employer to provide benefits in kind to educators or to provide extra remuneration or financial benefits to them. However, this will have to be done within the parameters of the Labour Relations Act, No 55 of 1995, the Employment of Educators Act, No 76 of 1998 and the Public Finance Management Act, No 1 of 1999, and will almost certainly expose all school funds to departmental scrutiny.

These considerable disincentives to subventions appear to seriously set back at least SGBs' aspirations of contributing to quality education by the appointment of educators.

4. The final curtailment?

Chapter 3 of the Employment of Educators Act, No 76 of 1998 (RSA 1998a) deals with the appointments, promotions and transfers of educators (in public schools). It should be read with subsections 20(4)-(11) of the Schools Act discussed earlier. At face value this chapter would seem to be in line with expectations of parents coming onto SGBs after 1997 (when the Schools Act came into effect) that their democratic right to a greater say in the education of their children through better control over who teaches their children would be respected.

Section 6(3)(a) of EEA provides that any appointment, promotion or transfer to any post on the educator establishment of a public school may only be made on the recommendation of the governing body of the public school. This places school governors in an extremely powerful position.

However, section 6(3)(b) of SASA (as amended in 2006 by the Education Laws Amendment Act, No 16 of 2006, RSA 2006) now enjoins SGBs, in considering applications, to ensure that the principles of equity, redress and representivity are complied with and to adhere to:

- (i) the democratic values and principles referred to in section 7(1);
- (ii) any procedure collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators;
- (iii) any requirement collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators which the candidate must meet;
- (iv) a procedure whereby it is established that the candidate is registered or qualifies for registration as an educator with the South African Council for Educators; and
- (v) procedures that would ensure that the recommendation is not obtained through undue influence on the members of the governing body.

This subsection should not concern governing bodies overly as it merely confirms that the recommendation of staff by SGBs is subject to the Constitution and other law. However, subsection 6(3)(c) now provides that the governing body must submit, in order of preference to the HoD, a list of:

- (i) at least three names of recommended candidates; or
- (ii) fewer than three candidates in consultation with the Head of Department.

Subsection 6(3)(e) provides, quite logically, that if the governing body has not met the requirements in paragraph subsection 6(3)(b), the HoD must decline the recommendation. A contravention of subsection 6(3)(b) entails a violation of constitutional principles and non-adherence to the law.

The new subsection 6(3)(f) (after amendment in 2006) contains the most far-reaching challenge to the powers of SGBs regarding the appointment of educators. It provides that, despite the order of preference in paragraph (c), the HoD may appoint *any suitable candidate* on the list (my italics, JB). This is a dramatic power given to the HoD and could result in SGBs *de facto* losing all power regarding

the recommendation and appointment of teaching staff. It could be viewed as the final removal of power in this regard from SGBs and a decisive re-centralisation of significant power that has been delegated to the governors of schools. This could also be viewed as a serious violation of the democratic rights of parents (governors) to a right to say in the education offered to their children by the appointment of educators.

Judgment handed down on 17 May 2007 in the reportable case No 14188/2006 in the matter between The Governing Body of the Point High School and the Head of the Western Cape Education Department heard in the High Court of South Africa (Cape of Good Hope) by Potgieter AJ seems to suggest, however, that the court is not necessarily of the opinion that subsection 6(3)(f) of EEA gives unfettered power to HoDs to reject or approve SGB recommendations at will. In this case the Point High School in the Western Province of South Africa and its SGB challenged a decision by the Western Cape Education Department (WCED) not to approve their recommendations for appointment as principal and deputy-principal of the persons they believed to be the most suitable candidates, having duly followed the procedures in EEA and other legislation. The WCED believed that they had the right to make the appointments they wished to make in order to promote employment equity (affirmative action) considerations.

The court reviewed and set aside the decisions of the HoD of the Western Cape Education Department to appoint the persons he did in fact appoint. The HoD was directed to appoint the persons regarded by the school and its SGB as the most suitable candidates. The HoD was ordered to pay the costs of the application, including the cost occasioned by the employment of two counsels.

The court was apparently concerned about the best interests of the children in terms of section 28(2) of the Constitution which provides that a child's best interests are of paramount importance in every matter concerning the child. It expressed its unease at the fact that the school had been placed in a position of great uncertainty regarding their leadership for a period of approximately 14

months following the dispute between the HOD and the school, and considered the HoD's decision to be unreasonable.

The case was taken on appeal by the Supreme Court of Appeals in Bloemfontein. On 31 March 2008 it handed down its decision in *Head of Western Cape Education Department v Governing Body of Point High School* and found again for the SGB. It ordered the Department to appoint the SGB's first preferences for the posts of principal and deputy-principal.

5. Conclusion

This article provides some insight into what happens in an emerging system trying to transform itself from a divided and illegitimate past into a democratic system of governance. It portrays the quest for a fair balance between the powers of a 14-year-old legitimate government trying to fulfil what it believes are its mandates and the efforts of citizens in decision-making positions at school governance level to assert their democratic power in relation to an activity in which they have a real stake. It has become apparent that the state may increasingly be trying to assert itself by limiting the real authority that can be exercised by school level governance structures.

It would appear that the amendments, as a final nail in the coffin of governor participation in educator appointments, may have given rise (through the Point High School case) to events that may well prompt a re-assessment of a number of aspects of the law governing public schools, and lead to a new series of initiatives that may be contested and may lead to unanticipated consequences. The former national Minister of Education, Ms Naledi Pandor, has indeed commissioned a review of educational laws and inputs have been requested. However, at present there is no indication of what the fruits of the review might be. One can assume that there will be some interesting and surprising new ideas which are likely to be contested as the centralisation-decentralisation battle continues.

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