

State interference in the governance of public schools

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The establishment of school governing bodies represents a significant decentralisation of power in the South African school system. Whilst such decentralisation could well be expected to mean an increase in democratic participation in the governance of schools, this is not necessarily the case. The State, its functionaries, and organs of the State have been endeavouring to assert themselves to an increasing extent by limiting or interfering in the real authority that can be exercised by school-level governance structures. Since 1996 parents have had no other option but to appeal to the court, in cases where provincial heads of education departments and their officials have taken illegal actions against schools, or where officials have failed to carry out their duties towards schools. The purpose of this article is to demonstrate how the rights of parents, to have a say in the governance of a public school, are being violated by interference of the State or by officials who jeopardise the smooth functioning of schools by failing to carry out their duties.

Introduction

The Constitution of the Republic of South Africa, Act 108 of 1996, protects the fundamental rights of everyone in our country. Since 1994 much has been done by means of 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 (hereafter referred to as the Schools Act) is a good example of national legislation that provides for a uniform education system. This Act also plays a major role in securing a number of rights, namely, those to basic education, equal access to schools, language preference, freedom of religion and culture, human dignity, freedom and security of the person, and just administrative action.

Davies (1999:60) states that although the Schools Act suggests a boundary between "professional management" and "governance", these two issues are, in practice, perhaps more intertwined than is recognised in the Act.

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. In terms of its legal personality, the school is a legal subject and has the capacity to be a bearer of rights and obligations. This means that a public school may enter into a contract with another legal subject (e.g. a company, in order to purchase textbooks), but it also assumes all the responsibilities and liabilities attached to such status (e.g. it is liable in the case of breach of contract) (Davies, 1999:59). As a juristic body, the public school cannot participate in the law in the same manner and to the same extent as a natural person. It has to act through its duly appointed agent, and in section 16(1) the Schools Act makes provision for the governance of a public school to be vested in its governing body. According to Davies (1999:61), the question often arises as to the extent of a governing body's original powers — that is to say, the extent to which it has the right to act on its own outside the provisions of legislation that govern its activities. It may be concluded that, since the public school is an "organ of state", the governing body acts as its functionary to perform its functions in terms of the Schools Act. Thus, although the governing body has no original power to act on its own outside the provisions in the Schools Act, it has

original power to perform its functions in terms of the Schools Act.

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 (CEPD, 2002:134).

Rationale

The establishment of school governing bodies represents a significant decentralisation of power in the South African school system. Whilst such decentralisation may well mean an increase in democratic participation in the governance of schools, this is not necessarily the case. The State, its functionaries, and organs of the State have been trying to assert themselves to an increasing extent by limiting or interfering in the real authority that can be exercised by school-level governance structures. Since 1996 there has been an increasing number of court cases in which provincial heads of education departments have been challenged for illegal actions against schools or where officials allegedly have failed to carry out their duties towards schools. Among these cases have been challenges to,

- the parents' right to determine the language policy of a public school — *Governing Body of Mikro Primary School & another v Western Cape Minister of Education & others* [2005] JOL 13716 (C) and *The Western Cape Minister of Education & Others v the Governing Body of Mikro Primary School* [2005] SCA 140/05;
- a governing body's legal duty to ensure a disciplined and purposeful school environment — *Maritzburg College v Head of Department and others* [2004] Case no. 2089 (SA);
- the right of parents to make recommendations regarding the appointment of educators or non-educator staff — *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School & others* [2003] JOL 11774 (CC) and *Douglas High School and Others v Premier, Northern Cape* 1999 (4) SA 1131; and
- the parents' right in the financial management of a public school — *Schoonbee and Others v MEC for Education, Mpumalanga and Another* 2002 (4) SA 877 (t).

Research question

Are the rights of parents to have a say in the governance of a public school being violated through interference of the State and/or through officials who jeopardise the smooth functioning of schools by failing to carry out their duties?

Research aims

The aims in this article are to

- determine the fundamental rights and duties of parents in the governance of a public school; and
- investigate the tendency by the State and its officials to question the authority of governing bodies and to interfere in the governance of public schools.

The right of parents to have a say in the governance of a public school

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 to the Schools Act further recognises the need to protect the diversity of language, culture and religion in education, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility of the organisation, governance and funding of schools in partnership with the state. The parent majority in the school governing body implies that parents have a strong and decisive voice in matters such as,

- religious matters at school;
- the language policy of the school;
- the adoption of a code of conduct for learners;
- recommendations to the Head of Department regarding the appointment of educators; and
- the financial affairs of the school.

Religious matters

Section 15(1) of the Constitution determines that everyone has the right to freedom of conscience, religion, thought, and opinion. According to section 15(2), religious observances (assembly) may take place at public schools, provided that they are conducted on an equitable basis and attendance is free and voluntary.

Section 7 of the Schools Act states that the governing body of a school may make rules regarding religious observances. As stated above, the only limitation that is prescribed is that staff and learners may not be forced to attend religious observances and that the observances must be conducted on an equitable basis. With regard to the religious observances of their children, parents have the right to make requests concerning dress, food, and participation in certain activities that are forbidden by a particular religion. According to Bray (2000:74), section 15 protects religious liberty in the sense that the State has to refrain from interfering in the belief in and practice of religion or irreligion by the individual. This also applies to a public school.

In August 2001 a document entitled *Manifesto on Values, Education and Democracy* was published by the Ministry of Education. The Manifesto refers to the constitutional provision in regard to religious observances and states that, according to the Constitution, schools may be made available for religious observance as long it is outside the school hours, association is free and voluntary rather than mandatory, and the facilities are made available on an equitable basis to all who apply. The National Policy on Religion and Education states that where a religious observance is organised as part of the official school day, it must accommodate and reflect the multi-religious nature of the country in an appropriate manner (Department of Education, 2003:26). Appropriate and equitable means of acknowledging the multi-

religious nature of a school community may include the following:

- The separation of learners according to religion, where the observances take place outside the context of a school assembly, with equitably supported opportunities for observance by all faiths and appropriate use of the time for those holding secular or humanist beliefs.
- Rotation of opportunities for observance, in proportion to the representation of different religions in the school.
- Selected readings from various texts emanating from different religions.
- The use of a universal prayer.
- A period of silence.

According to Beckmann (2003:18) it is clear that the conduct of religious observances in public schools as guaranteed in section 15(2) of the Constitution will be limited unconstitutionally by Government policy on religious observances in such schools as set out in the Manifesto on Values, Education and Democracy (2001:44-45) and the National Policy on Religion and Education. He states further that, apart from noting problems regarding the constitutionality of the proposed document and the final policy, one should not lose sight of the fact that the policy seriously threatens the decision-making authority of school governing bodies in that it forces governing bodies to only make school facilities available for religious observances. This means that the provisions made in the two above-named policy documents regarding religious observances are an infringement of the right of parents to make the rules to be followed by the school in conducting religious observances.

However, the provisions in section 15(2) of the Constitution and section 7 of the Schools Act refer to religious observances and not to religious instruction, which means that the religious instruction traditionally conducted in South African schools as a school subject is not protected by the Constitution. Religious instruction is therefore subject to section 15, and should such religious instruction impose any kind of limitation on the religious freedom of the individual (i.e. by imposing neutrality), such limitation must comply with the limitation provision in sections 36 and 15(2) of the Constitution. A further implication is that the Life Orientation Learning Area, in terms of the National Curriculum Statement, must include a study of the various religions of South Africa, but may still, as part of the exercise of the right to religious freedom, be presented from the point of view of a particular religion. Once again, the only condition in the educational context is that this should be done equitably, and be free and voluntary (Malherbe & Beckmann, 2002:35).

The language policy of the school

According to Bray (2000:79), the right to basic education in terms of section 29 of the Constitution belongs to everyone, including children. It is a socio-economic right and imposes a positive duty on the State to provide education or access to education. Some of the basic features of the right to education that could be claimed by parents are discussed briefly below.

Education in the official language of choice

In terms of this right, the State has an obligation to consider all reasonable educational alternatives (including single-medium institutions) when it decides how to provide education in the language of parents' choice. According to the Schools Act (section 6), the Minister of Education may determine norms and standards for language policy in public schools. The governing

body may, however, determine the language policy of a school, provided that no form of racial discrimination is practised.

Equal access to educational institutions

Educational institutions are not expressly mentioned in section 9 of the Constitution, but in section 9(2) the full and equal enjoyment of all rights and freedoms is guaranteed. This right is further protected by section 5(1) of the Schools Act, which states that a public school must admit learners and serve their educational requirements without unfairly discriminating in any way, and by section 5(2), which states that the governing body of a public school may not administer any test (i.e. language) related to the admission of learners to a public school. According to section 6 of the Schools Act the governing body of a public school may determine the language policy of a public school, provided that no form of racial discrimination may be practised in implementing the language policy.

In the court case *Governing Body of Mikro Primary School & another v Western Cape Minister of Education & others* [2005] JOL 13716 (C), the Department of Education instructed the Afrikaans-medium school on 2 December 2004 to admit and accommodate 40 Grade-1 learners at the school in January 2005, despite the availability of a parallel-medium school 1 200m away from Mikro. The Department required that the school teach the learners in English and advised the principal that failure to implement this directive might constitute grounds for disciplinary action.

On the morning of 19 January 2005 two officials from the Western Cape Education Department insisted that the 21 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 his judgement Judge Thring came to the conclusion that any perception that single-medium institutions obstructed the redress of past discrimination was unfounded. "Mother-tongue education is, as a matter of fact, a powerful tool to extend educational opportunities to all South Africans. Research has established the correlation between mother-tongue instruction and optimal educational progress. Furthermore, equal access to educational facilities is guaranteed by the equality principle, which implies that abuse of single-medium institutions to deny anyone equal access to education would not be consistent with section 9 of the Constitution".

The judge found further that the insistence by the Western Cape Department's officials, that the children and their parents attend the school assembly against the wishes of its principal and the chairperson of the Governing Body, constituted interference in the governance and professional management of the school. One of his concerns in this regard was the "value of legality", which refers to the simple principle of the State having to obey the law. Judge Thring stated that it is a principle that is so fundamental and so important in any civilised country that it must be only extremely rarely that the rule of law can be held hostage to the best interests of children. Indeed, he found it difficult to imagine how it could ever be in the best interest of

children, in the long term, to grow up in a country where the State and its organs and functionaries have been elevated to a position where they can regard themselves as being above the law, because the rule of law has been abrogated as far as they are concerned. Judge Thring ruled that the best interests of the children had to be taken into account in their placement at another suitable school.

Judge Thring also made the following remark regarding section 16(3) (the professional management of a public school) in his judgement: He said 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, to his mind, render the principal subservient to the Department in everything he does. He does not, thereby, become the Head of Department's lackey.

It is clear from this case that the Department of Education (the employer) is not entitled to impute to an employee (principal) and hold him/her liable for statutory functions vested in governing bodies. Although it is a function of the governing body of a public school to determine the language policy of a public school, departmental officials tried to threaten the principal into starting with an English medium class at the school.

The Western Cape Department of Education subsequently appealed to the Supreme Court of Appeal of South Africa 140/05 (SCA). On 27 June 2005 Appeal Judges P. Streicher, E. Cameron, C. Lewis, and D. Mlomo found that the MEC and the Head of Department had no right to interfere with the statutory function of a governing body to determine the language policy of a public school and the appeal was dismissed with costs (Beeld, 2005).

The adoption of a code of conduct for learners

Another major responsibility of the governing bodies of public schools in terms of section 8 of the Schools Act is to ensure that the learners' right to a safe school environment is realised. A primary role of school governing bodies is to develop school policy, *inter alia* policies dealing with safety and school discipline. The Schools Act (section 8(1)) places a duty on the governing body of every public school to adopt a code of conduct for its learners following consultations with the learners, parents, and educators of the school. The Act also illustrates the underlying reasons for adopting and enforcing a code of conduct. Section 8(2) of the Schools Act provides that a code of conduct must be aimed at establishing a disciplined and purposeful school environment that is dedicated to improving and maintaining the quality of the learning process.

A school's disciplinary code must provide for rules and a due process to be followed in the case of disciplinary proceedings. Put differently, it means that an allegation of misconduct must be inquired into and dealt with in a fair and reasonable manner, respecting the rights of all those involved in the process. The provisions made in section 8(5) state that a Code of Conduct must contain provisions of due process, thereby safeguarding the interests of the learner and any other party involved in the disciplinary proceedings. It should also ensure protection of the fundamental right in section 33 of the Constitution, namely, that everyone has the right to administrative action that is lawful, reasonable, and procedurally fair. Due process therefore includes both procedural due process (e.g. the rules of natural justice) which refers to fair procedure, and substantive due process, which refers to the appropriateness and fairness of rules (e.g. the reasonableness of the decision) (Squelch, 2000:36).

In terms of section 9(1) of the Schools Act, a governing body of a public school may, after

a fair hearing, suspend a learner from attending the school

- (a) as a correctional measure for a period not longer than one week; or
- (b) pending a decision as to whether the learner is to be expelled from the school by the Head of Department.

The Maritzburg College v Head of Department and others [2004] Case no. 2089 (SA), however, demonstrates how the attitude of a Department official ignored the obligations on the school's governing body to maintain discipline and good standards at the school.

During October 2003, three learners of Maritzburg College were involved in an incident in which a window of a hired bus was smashed. Two of them were found to be smelling of alcohol and a bottle of brandy was discovered in one learner's kitbag. A disciplinary committee was constituted in December 2003 and, at a hearing, the three learners were found guilty of misconduct and a recommendation was made that they be expelled from the school.

In terms of section 9(1)(b) of the Schools Act, a governing body is obliged to consult with the Head of the Department of Education regarding the suspension of a learner pending a decision on his/her expulsion. After many fruitless attempts by the Governing Body of Maritzburg College to make arrangements for an interview with the Head of the Department of Education and with other senior officials to find another school for two of the learners, nothing was done to resolve the situation.

On 20 January 2004 the full documentary record of the disciplinary proceedings was delivered by hand to a Director at the Department of Education. He had been informed in two earlier telephone conversations that the matter was one of extreme urgency and that it would be necessary to consult with the Head of Department concerning the decision to suspend the learners, pending the decision as to their expulsion. Unfortunately, due to the fact that the Head of Department was on an overseas trip, the Director took it upon himself to deal with the suspension and informed the parents of the learners that they should be returned to the school with immediate effect. He also instructed the principal to that effect. Only one learner turned up at the school but because of the Governing Body's decision, was made to sit in the conference room.

Despite numerous telephonic conversations with different departmental officials between 30 January and 12 February, nothing was done to facilitate meaningful consultations in terms of section 9(1)(b) of the Schools Act. On 16 February the Maritzburg College Governing Body sent a letter to the Head of Department, which concluded with an ultimatum that he consult with the Governing Body within one week of receipt of the letter. The Head of Department telephonically advised the Governing Body that he was prepared to set aside half an hour on Tuesday 24 February 2004 at the steps of the Legislator Building in Ulundi to discuss the matter with a delegation from the Governing Body. Following this meeting, the Head of Department promised the delegation of the Governing Body that he would contact them within a week. After no such response from the Head of Department, the governing body followed with another written ultimatum that unless he responded by 24 March 2004 in writing, they would be constrained to proceed to Court.

On 24 March 2004 the Head of Department wrote the following letter to the Governing Body: "As regards the issue of suspension of learners in terms of section 9(2) of the Schools Act, the provision makes it clear that this has to take place 'in consultation' with the Head of Department. It is not that I had to consult you but that you had to consult me. It is not a question of you suspend the learner and I have to automatically concur with that. I am not per-

sued that your decision to suspend the learners before consulting me was in accordance with the provisions of the Act. For this reason I regard the suspension as illegal, and consequently the learners have to be reinstated pending the decision on their expulsion."

As a consequence to the above letter, the Governing Body launched an urgent application to the Natal Provincial Division of the High Court on 1 April 2004 to resolve the matter. Regarding the argument of the Head of Education that the suspension was illegal in terms of section 9(2) because he had not been consulted, Judge Combrinck found that the Governing Body acted in terms of regulation 3 in terms of section 72(1) of the KwaZulu-Natal School Education Act, which reads as follows:

- (1) Suspension — a Governing Body may order the suspension of a learner —
 - (b) pending a decision by the Secretary on whether a learner is to be expelled from the school after being found guilty of misconduct and a recommendation to this effect had been forwarded to the Secretary.
- (2) A Governing Body may order the suspension of a learner before misconduct charges are put to a learner if the following requirements are met —
 - (a) the learner is accused of serious misconduct on or off the school premises which could lead, if the truth of the charge is established, to expulsion of the learner from the school; or
 - (b) it is the opinion of the Governing Body that the continued presence of the learner —
 - (i) endangers the maintenance of discipline or social well-being of such school; or
 - (ii) hinders or prevents the investigation into his/her conduct.

Other provinces have similar provisions as KwaZulu-Natal. Judge Combrinck found that the Head of Department was incorrect in relying on the provisions of section 9 of the Schools Act, which states clearly that subject to any applicable provincial law, a learner at a public school may only be expelled by the Head of Department. He stated further in his finding that he found it disturbing that a public official had to be galvanised into action to do his duty only with a Court application. Even more disturbing was the Head of Department's attitude as spelled out in his answering affidavit that there was "... no obligation on me to expeditiously make a decision on expulsion as a number of issues had to be considered by me". He then went on to state that to expect him to make a decision within two months was "utterly unreasonable". According to Judge Combrinck the Head of Department's attitude not only ignored the obligations on governing bodies to maintain discipline and good standards at the schools, but — more importantly — totally disregarded the rights of the learners who were standing in the shadow of expulsion. They had a right to know expeditiously whether they were going to be expelled so that they could be taken up at another school. The Judge stated further that it was idle of the Head of Department that because of his many other duties, he was not able to attend consultations with governing bodies on decisions of suspension and expulsion. He had the power to delegate and it would be a simple matter for him to appoint officials in his department to consider disciplinary records and make recommendations. Judge Combrinck stated lastly that he found it shocking that in three cases mentioned by the Governing Body, learners had to wait between a year and 21 months for a decision by the Head of Department on their expulsion.

As a result of the findings that emerged from this court case, the following two issues need to be stressed:

- Suspension and expulsion of learners are also determined by provisions in provincial education acts.
- Departmental officials have no right to give principals instructions regarding the disciplinary action against learners taken by their governing bodies.

The appointment of educators or non-educator staff

The governing body of a school has to recommend to the Head of Department the appointment of educators at the school (section 20(i) of the Schools Act), as well as the appointment of non-educator staff (section 20(j)). In recent years various cases have occurred where the Department of Education concerned rejected the recommendations of the governing body or failed to consult with the governing body concerned before an appointment was made.

The involvement of parents is important in the advertising of teaching posts, the search for and interviewing of good candidates, as well as in the identification of the right person for each position, for the following reasons:

- The parent representatives on the governing body, together with the principal and the school's management team, are in the best position to determine the specific employment needs of the school.
- The parents on the governing body have an obligation towards the school community to recommend the appointment of the best qualified, motivated, committed, and competent educators to vacant posts, in order to ensure effective and quality teaching and learning for their children. According to Maree and Lowenherz (1998:36), international experience demonstrates that outstanding educators are the most important factor in the quality of education.
- Education is the conveyer of culture, of moral and normative attitudes, and of values. The school should be the extension of family life and should reflect the culture, norms and values of a specific school community. Parents could therefore expect educators who are appointed at their school to be bearers of the culture and religious norms and values that are peculiar to the local school community.

In the case of *Douglas High School and Others v Premier, Northern Cape 1999 (4) SA 1131*, the post of principal became vacant at the school. The post was advertised and the Head of Department subsequently forwarded the names of a number of candidates to the governing body of the school. Only one of the candidates, N, complied with the minimum requirements and conditions for the post as advertised. The interview committee of the governing body consequently conducted no interviews with the unsuitable candidates and the governing body forwarded only N's name to the Head of the Department for appointment in the vacant post. However, because the Head of Department wanted to appoint another person who had not even applied for the post, he neglected to appoint N and continued with his attempts to persuade the other person to accept the position.

Judge Buys found that the Head of Department had neglected to make the appointment within a reasonable time and the Court determined that since any further delay in the appointment of N would lead to unjustifiable prejudice of the applicants and the learners at the school, the governing body was in as good a position as the Head of Department to make the appointment.

In *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School & others [2003] JOL 11774 (CC)*, the governing body of the school recom-

mended Mr V, a white male, for appointment as principal of the school, but the Head of Department of Education in Limpopo appointed Ms M, a black female. On 25 June 2002, the school and the school's governing body launched an urgent application in the Pretoria High Court for an order against the Head of Department. The application was to set aside the appointment made by the Head of Department and for a declaration that Mr V was entitled to be appointed as the principal of the school with effect from 1 July 2002 as recommended by the school's governing body.

On 27 June 2002, Judge Bertelsmann granted an order setting aside the Head of Department's decision to appoint Ms M as principal and declared that Mr V was entitled to be appointed to that position. The Head of Department was ordered to take all administrative steps necessary to give effect to Mr V's appointment with effect from 1 July 2002. He was also ordered to pay costs of the application proceedings. An application to the Pretoria High Court for leave to appeal against that decision was dismissed. A further application to the Supreme Court of Appeal (SCA) was dismissed on 19 November 2002. The Head of Department then approached the Constitutional Court for leave to appeal.

The Constitutional Court refused the application for condonation. Although the Court emphasised that such refusal was in no way related to the prospects of success on the question of the proper interpretation of the Act, it flowed from a determination that after so much water had flowed under the bridge, it was not in the interests of justice for the Court to entertain the appeal [2003] JOL 11774 (CC).

However, the Constitutional Court judges referred to one further matter that required attention. It related to the issue of costs awarded in the High Court. The Governing Body mentioned in their affidavit that despite frequent requests, three costs orders of the High Court had not been responded to by the Head of Department. It was found that if the Head of Department had indeed ignored the order for costs made against him in the earlier proceedings, this would indicate an unacceptable lack of respect for court orders. The judges found that if a structure of government is unhappy with a decision of a court, it has its legal remedies — however, refusal to pay orders for costs is not amongst them. The Constitution provides that an order of court "binds all persons to whom and organs of State to which it applies". If governments do not obey the court, they cannot expect citizens to do so. Nothing could be more demeaning of the dignity and effectiveness of courts than to have government structures ignore their orders.

Financial management of a public school

The principal of a school functions in two capacities, namely, as a governing body member and as the principal or departmental employee. In practice this means that he or she 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, 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 or her to ensure that what the governing body and the provincial department do is legal, fair, reasonable, and permissible (Beckmann, 2002:11).

In terms of the Schools Act 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 (section 36). The Schools Act further makes provision in section 37(1) that the governing body of a public school must

establish a school fund and administer it in accordance with directions issued by the Head of Education.

In *Schoonbee and Others v MEC for Education, Mpumalanga & Another* 2002 (4) SA 877 (t), the assumption was seemingly made that the principal is also the accounting officer of school funds. The principal and deputy principal of Ermelo High School were suspended by the Head of the Provincial Department of Education concerned on alleged charges of misusing school funds and the governing body was dissolved. In a landmark judgement in the Schoonbee case, Judge Moseneke treated the relationship between the school governing body and the principal in a way that should give direction to the way one thinks 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;
- the principal 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.

Beckmann (2002:11-12) states that the principal cannot be held accountable in cases as foreseen in section 16(3) of the Schools Act, but that the governing body as a collective body can. In terms of section 16(3), subject to the Schools Act and any provincial law, the professional management of a public school must be undertaken by the principal under authority of the Head of Department. If state revenue makes its way into school funds and there are certain conditions attached, it may be possible to make out a case why the principal as employee may be held accountable for how the money is used (e.g. bursaries earmarked for certain learners). However, even funds coming from the State in terms of the Norms and Standards for Funding become school funds ("governing body money") once paid into the school fund, and the governing body is therefore accountable for the way they are used. The principal may assist the governing body to make sure that the latter uses the funds for educational purposes as defined, but he or she does not become accountable for the way the school funds are used. If the governing body authorises the principal to use school funds, he or she is accountable to the governing body for the way such funds are used. Judge Moseneke's further findings can be summarised as follows:

- The Department (the employer) is not entitled to impute to 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 school governing body 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.
- The Governing Body was not afforded even the slightest opportunity to deal with the in-

tention of the Head of Department to dissolve them. Judge Moseneke stated that in a society such as ours where we seek to create a constitutional State, rationality, reasonableness, fairness, and openness are very important considerations in evaluating the conduct of wielders of statutory executive power when under judicial review. The intended administrative action has to be disclosed timeously to the affected party to allow him or her to make such representation as he or she may find to be appropriate. Failure to do so by an official acting within the ambit of a statute, wielding power entrusted to him in advancement of one or other public purpose, is fatal to that administrative act. These statutory injunctions must be observed and failure to do so of necessity leads to abortive administrative action.

In terms of section 33(1) of the Constitution, everyone has the right to administrative action that is lawful, reasonable, and procedurally fair. In the very next section, 33(2), provision is made that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. The Promotion of Administrative Justice Act (Act 3 of 2000) fulfils its constitutional duty in section 3. Section 3(1) makes provision that any administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Section 3(2)(b) states that in order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in section 3(1) —

- (a) adequate notice of the nature and purpose of the proposed administrative action;
- (b) a reasonable opportunity to make representations;
- (c) a clear statement of the administrative action;
- (d) adequate notice of any right of review or internal appeal, where applicable; and
- (e) adequate notice of the right to request reasons in terms of section 5.

It is important to note that the employer cannot take disciplinary action against the principal/deputy principal of a school for the way in which the governing body executes any of its statutory functions. It is furthermore clear that the dissolution of a governing body by the head of department concerned is not procedurally fair in terms of section 3(2)(b) of the Promotion of Administrative Justice Act.

Conclusion

It is a sorry state of affairs when school governing bodies are compelled to turn to the courts — at great monetary cost to themselves and to the taxpayer — to stop officials from committing unlawful actions and from jeopardising the smooth functioning of schools through failure to carry out their duty. Another disturbing trend that emerges from this article is of government officials abusing their power, unlawfully interfering in the management and governance of schools, neglecting their duty, showing no respect for the rule of law, and even ignoring court orders against them.

However, the most important element of the judgements in the court cases referred to is the emphasis on the status of governing bodies. In a constitutional democracy based on the rule of law, the legitimate exercising by school governing bodies of their rights, competencies, and functions is not something that can be ignored by governments and officials "in an unbridled effort to exercise power and authoritarian control" (FEDSAS, 2005).

The Minister of Education, Naledi Pandor, sees governing bodies and medium of instruction as two of the six "doors of learning and culture that are difficult to open or that offer restricted access to what lies within" (Education Budget Debate, 17 May 2005). It seems clear that the Minister has the intention of taking away some of the rights of parents, namely, their right to determine the admission and language policy of a school, to appoint educators recommended by the governing body and to determine the school fees of their schools. Single-medium Afrikaans schools were singled out by the Minister as institutions that obstruct the redress of past discriminatory practices, equal access, and transformation.

According to Malherbe (2004:27) there is an unrelenting pressure on Afrikaans-medium schools to become parallel-medium or dual-medium institutions; education in the indigenous languages is neglected; and policy seeks to impose on learners a one-sided humanistic view of religion. Policies that deny diversity and impose uniformity may now seem attractive for the sake of so-called equality, but will fail in the long run, because one cannot build a unified nation by rejecting the bricks needed in the building process.

The need recognised in the preamble of the South African Schools Act, namely, to protect the diversity of languages, culture and religion in school education, should be sustained. The important democratic principles of decentralisation, distribution of authority and partnership in and mutual responsibility for education must be promoted and respected within school communities. Any partnership must be built on mutual trust and respect.

References

- Beckmann JL 2002. The legal position of the principal as school governing body member and employee of the Department of Education. Paper read at the *Principals' Conference*, Oppenheimer Theatre, Welkom, 24 April.
- Beckmann JL 2003. Balancing the rights of Policy Makers and Policy Stakeholders in South Africa's emerging democratic education system. Paper read at the *ANZELA Conference*, Sydney, Australia, 2 October.
- Beeld 2005. Taalsege vir Afrikaanse Skole, 28 June.
- Bray W 2000. *Human Rights in Education*. Pretoria: Centre for Education Law and Policy (CELP).
- Centre for Education Policy Development, Evaluation and Management (CEPD) 2002. *Transformation of the South African Schooling System. Report from the third year of Education 2000 Plus*.
- Davies EH 1999. *Administration of the Education System and School Governance*. Pretoria: Centre for Education Law and Policy (CELP).
- Department of Education 2003. National Policy on Religion and Education. *Government Gazette*, Vol. 459, No. 25459.
- FEDSAS 2005. Media statement issued by the national chairman of FEDSAS, Paul Colditz, in Bloemfontein on 18 February.
- Malherbe EFJ & Beckmann JL 2002. *CELP Education Law Handbook*. (Unpublished.)
- Malherbe EFJ 2004. The constitutional framework for pursuing equal opportunities in education. *Perspectives in Education*, 22.
- Maree H & Lowenherz A 1998. Grove Primary: A response to Professor Jonathan Jansen. *Journal of Education*, 23:31-40.
- Pandor N 2005. Address by Naledi Pandor, MP, Minister of Education, introducing the debate on the education budget, vote 15, National Assembly, Cape Town.
- Republic of South Africa 1996. *The Constitution of the Republic of South Africa (Act 108 of 1996)*. Pretoria: Government Printer.
- Republic of South Africa 1996. *South African Schools Act (Act 84 of 1996)*. Pretoria: Government Printer.

Republic of South Africa 2000. *Promotion of Administrative Justice Act (Act 3 of 2000)*. Pretoria: Government Printer.

Squelch JM 2000. *Discipline*. Pretoria: Centre for Education Law and Policy (CELP).

Case Law:

Douglas High School & Others v Premier, Northern Cape [1999] (4) SA 1131.

Governing Body of Mikro Primary School & another v Western Cape Minister of Education & others [2005] JOL 13716 (C).

Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School & others [2003] JOL 11774 (CC).

Maritzburg College v Head of Department & others [2004] SA 2089.

Schoonbee & Others v MEC for Education, Mpumalanga & Another [2002] (4) SA 877 (t).

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