LEGITIMACY OF LANGUAGE POLICIES IN SOUTH AFRICAN PUBLIC SCHOOLS:

A CASE LAW PERSPECTIVE

David Daniël Peens

Content

Title Page ii

Declaration iii

Clearance Certificate iv

Language Editing v

Dedication vi

Acknowledgements vii

Summary viii

Key Words x

Chapters

- Chapter 1 1
- Chapter 2 20
- Chapter 3 36
- Chapter 4 43
- Chapter 5 86
- Bibliography 92

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

Legitimacy of language policies in South African public schools:

A case law perspective

BY

DAVID DANIËL PEENS

Submitted in partial fulfilment of the requirements for the degree

MAGISTER EDUCATIONIS

In

Education Management and Policy Studies

In the Faculty of Education

University of Pretoria

Supervisor: Prof. H.J. Joubert

August 2009

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

DECLARATION

I, David Daniël Peens, declare that this study titled

LEGITIMACY OF LANGUAGE POLICIES IN SOUTH AFRICAN PUBLIC SCHOOLS:

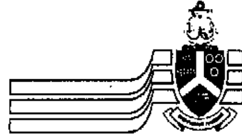
A CASE LAW PERSPECTIVE

is my own work. This dissertation has never been submitted for any degree at any university. All sources that I have used or quoted have been indicated and acknowledged by means of complete references. I further declare that I made use of real court cases as well as legislation and used some of the testimonies in order to complete this research study.

Signed **Date**

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

ANNEXURE D



UNIVERSITY OF PRETORIA

FACULTY OF EDUCATION

RESEARCH ETHICS COMMITTEE

CLEARANCE CERTIFICATE	**CLEARANCE NUMBER : EM08/09/01**
DEGREE AND PROJECT	MEd Educational Leadership Legitimacy of language policies in South African public schools: A case law perspective
INVESTIGATOR(S)	David D. Peens - 98324072
DEPARTMENT	Educational Management and Policy Studies
DATE CONSIDERED	12 September 2008
DECISION OF THE COMMITTEE	APPROVED

This ethical clearance is valid for 2 *years from the date of consideration and may be renewed upon application*

CHAIRPERSON OF ETHICS COMMITTEE

Dr S Human-Vogel

12 September 2008

CC

Dr R Joubert
Mrs Jeannie Beukes

This ethical clearance certificate is issued subject to the following conditions:

1. A signed personal declaration of responsibility
2. If the research question changes significantly so as to alter the nature of the study, a new application for ethical clearance must be submitted
3. It remains the students' responsibility to ensure that all the necessary forms for informed consent are kept for future queries.

Please quote the clearance number in all enquiries.

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

Declaration in regard to language editing

I, Carol Noêla van der Westhuizen, hereby confirm that I have language-edited the MEd dissertation entitled: **Legitimacy of language policies in South African public schools: A case law perspective**.

31 August 2009

DEDICATION

I dedicate this dissertation to

my beloved wife

Sugnét

For her endless love, inspiration, motivation and patience

Acknowledgements

Our heavenly father for giving me the perseverance and strength to complete this study

Prof. Rika Joubert, my supervisor, for her proficient guidance, expertise, patience and support during this research study

Sugnét Peens, my wife, for her love and support

Maroné Peens, my daughter, for understanding

Gert and Rhona Peens, my parents, for their everlasting support

Marinus de Feijter for his encouragement and for proofreading this dissertation

Dr. Carol van der Westhuizen for editing my work

The University of Pretoria for this opportunity

All of my friends and family inquiring about my progress, every time we met

Hoërskool Ermelo, Laerskool Seodin, Hoërskool Kalahari, Noord-Kaapland Landbouskool, Laerskool Mikro and Laerskool Middelburg for their support

On 15 February 2007, the previous Minister of Education, Mrs Naledi Pandor reacted to a Democratic Alliance press release by stating that she strongly supported the use of Afrikaans and other native languages as media of instruction in schools. In the same speech she said that Section 29(2) of the Constitution does not see single-medium schools as a right, but as an educational alternative that, together with other alternatives, including double and parallel medium, should be explored in giving effect to the right to education in a language of choice, taking into account fairness, feasibility and the need to restore the injustices of the past (Pandor, 2007).

If we look at four recent court cases, we are getting a totally different picture. In all four cases, the Department of Education tried to change single medium schools to double or parallel medium schools. These cases are:

- *Hoërskool Ermelo v Department van Onderwys*;
- *Seodin Primary School and Others v MEC of Education*;
- *Western Cape Minister of Education v Governing Body of Mikro Primary School;*
- *Laerskool Middelburg en 'n Ander v Departementshoof*;

What happened to getting educated in a language of choice, and what about the right of the direct community, through the Governing Body's decision on that language? Does a school policy, adopted by a School Governing Body, have legality? In line with these questions we may ask; do judges properly decide on rulings in these matters?

The purpose of my study is to investigate how schools may establish a well written language policy that will be in line with legal requirements, ensuring that a school can exercise its language policy and medium of teaching in the school.

With the ministry propagating one thing, but doing something else, certain duties, delegated to the Governing Body, but very easily taken away, and judges not always being consistent, feeling is that matters should be investigated.

The Education Management, Law and Policy Studies provides us with a framework, in order to investigate the legitimacy of language policies in South Africa. This framework articulates that law forms the building blocks for educational management. This research takes its departing point in legal positivism, which holds that everything should be done as closely as prescribed by the law.

Section 29(2) of the Constitution reads:

"Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account:

- equity;
- practicability; and
- the need to redress the results of past racially discriminatory laws and practices."

In this study an in depth investigation is conducted into the four recent court cases, where the situations of those schools were more or less similar. Two of the schools were allowed to continue as single medium Afrikaans schools, but the others were forced to change their language policy to either dual or parallel medium Afrikaans-English schools.

The main aim of this study is to provide a better understanding as to why the judgements in the above mentioned court cases differ and to investigate the measures schools can take to prevent confrontation with similar situations.

Key Words

1. Case
2. Court
3. Education
4. Governing body
5. Judgment
6. Language
7. Law
8. Multilingualism
9. Policy
10. School

Table of Contents

Chapter 1: Contextualisation and problem statement ... 1

1.1 Introduction ... 1

1.2 Problem Statement ... 3

1.3 Statement of Purpose ... 4

1.4 Rationale ... 4

1.5 Research Questions ... 5

1.6 Theoretical Framework ... 5

1.6.1 Legal positivism ... 7

1.6.2 Philosophy of law and jurisprudence (case law) ... 8

1.6.3 Common law – natural justice ... 9

1.6.4 Case law / judgment ... 10

1.6.5 Language in education ... 10

1.6.6 Right to education ... 11

1.6.7 Language policy of public schools ... 11

1.7 Research design ... 12

1.8 Background on the four cases ... 12

1.8.1 *Hoërskool Ermelo v Departement van Onderwys, Saaknommer 3062/07, 02/02/2007* ... 12

1.8.2 *Seodin Primary School and Others v MEC of Education, Northern Cape Department and Another, 2006 (4) BCLR542 (NC*) ... 14

1.8.3 *Western Cape Minister of Education v the Governing Body of Mikro Primary School, case 140/2005 (SCA)* ... 15

1.8.4 *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere, 2003 (4) SA 160 (T)* ... 16

1.9 Exposition of Chapters ... 17

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

1.9.1 Chapter 1: Contextualisation and problem statement 17

1.9.2 Chapter 2: Literature study 17

1.9.3 Chapter 3: Research design and methodology 17

1.9.4 Chapter 4: Findings and analysis 18

1.9.5 Chapter 5: Conclusions and recommendations 18

1.10 Conclusion 18

Chapter 2: Literature study 20

2.1 Introduction 20

2.2 Legislation 20

2.2.1 The Constitution of the Republic of South Africa 21

2.2.2 The South African Schools Act 22

2.2.3 The National Education Policy Act 23

2.2.4 Language legislation 23

2.2.5 Language policy 24

2.3 Multicultural education 25

2.4 Mother tongue education 26

2.5 Dual medium instruction 28

2.6 Multilingualism 31

2.7 Governance of public schools in South Africa 32

2.8 Legal reasoning 33

2.9 Conclusion 35

Chapter 3: Research design and methodology 36

3.1 Introduction 36

3.2 Qualitative research approach 37

3.3 Data collection 39

3.4 Data analysis 39

3.5 Trustworthiness and reliability 40

3.6 Limitations and delimitations of the study 41

3.7 Ethical considerations 41

3.8 Conclusion 42

Chapter 4: Findings and analysis 43

4.1 Introduction 43

4.2 The four cases 43

4.2.1 *Hoërskool Ermelo v Departement van Onderwys, Saaknommer 3062/07, 02/02/2005* 43

4.2.2 *Seodin Primary School and Others v MEC of Education, Northern Cape and Others 2006 (4) BCLR542 (NC)* 53

4.2.3 *Western Cape Minister of Education v Governing Body of Mikro Primary School, case 140/2005 (SCA)* 77

4.2.4 *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere 2002 (4) SA 160 (T);* 80

4.3 Conclusion 85

Chapter 5: Conclusion and recommendations 86

5.1 Government obligations 86

5.2 Aims of the Ministry of Education Policy for Language in Education 87

5.3 Conditions considered while setting up a school language policy 88

5.4 Promote multilingualism 90

5.5 Judgments 91

Bibliography 92

Chapter 1: Contextualisation and problem statement

1.1 Introduction

"Daar is bevind leerlinge wat in Afrikaans of Engels as moedertaal onderrig word, het beter gevaar as ander moedertaalsprekers wat in Engels onderrig word" (Rademeyer, 2008).

In an introduction adapted from the National Language Policy Framework, Final Draft on 13 November 2002, Dr. B. S. Ngubane, the then Minister of Arts, Culture, Science and Technology said that a mother-tongue is in many ways a "second skin". It is a natural possession of every normal human being, which we use to utter our hopes and ideals, express our thoughts and values, discover our experience and traditions and build our society and the laws that govern it. It is through language that we function as human beings in an ever-changing world and therefore the right to use the official languages of our choice has therefore been recognised in South Africa's Bill of Rights, and the Constitution of the Republic of South Africa, 1996 (hereafter Constitution), acknowledges that the languages of our people are a resource that should be exploited (Ngubane, 2002).

In the South African Schools' Act, No. 84 of 1996 (hereafter Schools' Act) it is stated in Chapter 2, Language policy of public schools, that the governing body of a public school may determine the language policy of the school subject to the Constitution, the Schools' Act and any applicable provincial law (Section 6(2)). Section 29(2) of the Constitution reads: "Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable".

The above-mentioned two acts, together with the foreword by Ngubane, emphasize the importance of language.

On 15 February 2007, the erstwhile Minister of Education, Mrs Naledi Pandor, reacted to a Democratic Alliance press release by stating that she strongly

supported the use of Afrikaans and other native languages as media of instruction in schools. In the same speech she said that Section 29(2) of the Constitution does not see single-medium schools as a right, but as an educational alternative that, together with other alternatives, including double and parallel medium schools, should be explored in giving effect to the right to education in a language of choice, taking into account fairness, feasibility and the need to restore the injustices of the past (Pandor, 2007).

Four recent court cases, however, offer a totally different picture. In all four cases, the Department of Education tried to change single medium schools to double or parallel medium schools. The four cases are:

- *Hoërskool Ermelo v Departement van Onderwys,* Saaknommer 3062/07, 02/02/2007;

- *Seodin Primary School and Others v MEC of Education, Northern Cape and Others,* 2006 (4) BCLR542 (NC);

- *Western Cape Minister of Education v Governing Body of Mikro Primary School,* case 140/2005 (SCA), and

- *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere,* 2003 (4) SA 160 (T);

What happened to the right to be educated in a language of choice, and what about the rights of the direct community, through the Governing Body's decision on that language?

In an address by the Deputy Minister of Education at the PANSALB (the Pan South African Language Board) Multilingualism Awards Ceremony, Mr. Mosibudi Mangena described the importance of language as follows:

"We pass information and skills from one person to another and from one generation to the next. Heritage, culture, norms, standards, laws, etc., are crafted and

transmitted through the power of words and other signs of communication. Our country is a multilingual and multicultural society. Every one of our languages, culture and traditions define who we are as a nation. Our constitution guarantees everyone the right to use a language or languages of their choice. Government has the responsibility to ensure that all official languages enjoy the "parity of esteem" and are treated equally by ensuring that the relevant legislative measures concerning the use of official languages are adhered to. Language rights are among the fundamental democratic rights guaranteed by the constitution. Accordingly, citizens have the right to use their languages of choice; languages that are dearest to them and in which they are best able to express themselves spontaneously and comfortably. The constitutional provision for linguistic rights is the way in which our cultural diversity is recognised and respected. Our policy gives School Governing Bodies the responsibility of selecting their schools language policies that are appropriate for their circumstances but are also in line with the policy of additive multilingualism. Sadly, this provision is not having the desired effect on the ground, largely because people do not yet understand the educational benefits of learning initial skills and concepts through the home language. The biggest challenge here is to convince the parents and governing bodies to implement mother-tongue education, as well as to show them that African languages can be languages of science and technology. Perhaps the desirability of establishing a university dedicated to the use of African Languages that was recently mooted by the Minister of Education would begin to persuade the majority of our society to adopt a different attitude concerning mother-tongue instruction in our schools. In reality, the majority of our people lack the necessary linguistic agility in English or Afrikaans to conduct their day-to-day affairs in these languages (2002)."

1.2 Problem Statement

The family environment, educational and religious institutions, the state and the occupational milieu are seen as representatives of norms and values (Ritzer, 1996:86). According to Parsons, norms and standards are transferred from one generation to another, and in a successful socialization process these norms and

standards become part of a person's way of living (Ritzer, 1996:242). Kronman states that Weber defines law as a body of norms that is seen as a conscience for individuals and their thoughts and actions (cited in Ritzer, 1996:142).

Knowing right from wrong and how we are allowed to act, provides security. As early as from birth, humans need security to be able to develop stability. When children are very young, the only way to provide security is by fulfilling their needs. When children are older, the parent should be consistent and should do what s/he says s/he will do (Petropulos, 2005:217).

As mentioned above, the provision of certain rights by the state brings security to our lives. Any person would feel confused if it is stated that they are allowed certain privileges, but they are in effect *not* allowed said privileges.

This study focuses on four similar court cases, but with four different rulings. What do these rulings mean for education and what do they say about the value of school policies, e.g. for research purposes and language policy. Does a school policy adopted by a School Governing Body (hereafter Governing Body), have legality? In line with these questions we may further ask whether judges decide properly on rulings in such matters?

1.3 Statement of Purpose

The purpose of my study is to investigate how schools may establish a well written language policy in line with legal requirements, to ensure that a school can exercise its language policy and medium of instruction in the school.

1.4 Rationale

With the ministry propagating one procedure, but following another, certain duties, are delegated to the Governing Body, but they are also easily taken away. This, coupled with the fact that judges' decisions are not consistent, result in a preference for matters to be investigated. It puzzled me that during some court cases schools had to change their single medium status and others did not. Furthermore, when a

school is forced to change its status to double medium, the Department of Education should appoint sufficient additional teachers, but that did not happen in any instance of which I am aware, and resulted rather in a doubling of already employed teachers' workload. I therefore feel compelled to conduct this research to gain a better understanding of the rulings in the court cases mentioned in the introduction.

1.5 Research Questions

Why do court rulings in similar court cases dealing with language in schools differ?

1.5.1 Why are the powers of the School Governing Body to develop their language policy, sometimes retracted by the courts (if not de jure, then at least de facto)?

1.5.2 What can School Governing Bodies do to ensure that their language policies are legitimate?

1.6 Theoretical Framework

Vithal and Jansen (2004:17) state that a theory or theoretical framework could be described as a well-developed, logical description for an incident.

A theoretical framework is a set of interconnected concepts which guide your study, shaping what will be measured and what relationships will be examined. It shows how we look and think about a topic, guides us to formulate important questions and make basic assumptions. A theoretical framework also provides us with concepts and ways to make sense of data. Through a theoretical framework, we will be able to see the bigger picture and connect a particular study to the enormous base of knowledge to which other researchers contribute (Neuman, 1997: 123). For this study, judicature (verdicts in South African courts) will be the main focus.

The law consists of rules that prescribe the way in which we have to act as members of society (Rautenbach & Malherbe cited in Joubert 2004:4). Nobody is above the law and all the rules of the law apply to every member of society, including the government (S 15 of the Schools' Act).

The following universally accepted education rights will form part of this study:

- the right to education;
- equal access to educational facilities;
- freedom of choice; and
- education in the language of one's choice (see Schools' Act).

Education Management, Law and Policy Studies provide us with a framework according to which to investigate the legitimacy of language policies in South Africa. This framework articulates that law forms the building blocks for educational management, and this research uses legal positivism, which holds that everything should be done as closely as prescribed by the law, as its point of departure. This means that the way in which we regard language policy, the way the policy is executed and the way the law interprets the policy, should be exactly as the law prescribes. Legal positivists answer the question about what law is by referring to that which is and not that which ought to be. According to this approach, law is what is set down in law books and in rules applicable in court verdicts. This approach is positivist because only those rules that are given positive content can be regarded as law (Kleyn & Viljoen, 2007:11). This means that the principal claim of legal positivism is that law is a body of rules made, whether intentionally or inadvertently, by human beings.

In all four the court cases under scrutiny here, the schools went to court because they believed their language policies to be in line with the regulations drawn up by the government. Judges drew their conclusions by looking at the law, government policy and arguments made during the court case. Firstly to establish a language policy, different sources of law should be consulted. The whole cyclic process should comply with the law. If the law is not considered during the process, negative effects will be encountered during the cyclic process (Thompson, Arora & Sharp 1994:63), which includes:

• identifying a need for policy development;

• the policy development process;

• implementing the policy; and

• the continual evaluation of the policy.

For this study I have consulted legislation and court judgments and focused upon the implications for education.

Certain definitions and/or explanations of some of applicable and vital concepts are included below to ensure correct understanding.

1.6.1 Legal positivism

Some legal realists believe that a judge is able to manipulate court rulings based on personal preference (Grove, 2006: 2). Apart from the "realist-formalist" view, there is a debate on the appropriate sources of law between positivist and natural law. Positivists believe that there should be no connection between law and morality, and that the only sources of law are rules that have been drawn up by a government or a court of law. At the opposite end are the Naturalists who believe that laws endorsed by a government are not the only sources of law, and that moral philosophy, religion, human reason and individual conscience are also integral parts of the law (Grove, 2006: 2).

Legal positivism can be divided into three categories: the conventionality thesis, the social fact thesis and the "separability" thesis (Himma, 2008:4).

According to the conventionality thesis, the theoretical legitimacy regarding law is that legal validity can eventually be explained in terms of reliable criteria of good quality influenced by some kind of social standard (Himma, 2008:4). Hart, citied by Himma (2008:4), feels that the criteria of legality are contained in a rule of acknowledgment that sets out rules for creating laws, changing laws and delivering judgment.

Similarly to the conventionality thesis, the social fact thesis states that certain social facts play the ultimate role in legal validity. Austen (cited in Himma, 2008:4) says that the primary characteristic of a legal system is the presence of a leader who is usually obeyed by most people in a particular society in which the public is threatened with sanctions for not obeying the rules.

The "separability" thesis is the most common category of legal positivism. It states that law and morality are theoretically two separate concepts. βer (1996) who claims that law must be completely free of moral thoughts views law, which is influenced by moral philosophy, as inconsistent with the "separability" thesis (cited in Himma, 2008:5).

In my opinion, based on multiple theories and points of view, actions and decisions should be based on regulations and rules, including the interpretation and execution of the law. The third category of legal positivism, the "separability" thesis, has therefore guided this investigation.

1.6.2 Philosophy of law and jurisprudence (case law)

According to Grove, the word *jurisprudence* is derived from the Latin term *juris prudentia*, which means "the study, knowledge, or science of law". In the United States of America (USA) jurisprudence commonly refers to the philosophy of law. Legal philosophy has many aspects, but four of the universally most recognised aspects are that the:

- most common form of jurisprudence endeavours to analyse, explain, classify, and criticise entire bodies of law;

- second type of jurisprudence compares and contrasts law with other fields of knowledge such as literature, economics, religion and the social sciences;

- third type of jurisprudence seeks to reveal the historical, moral and cultural basis of a particular legal concept; and

• fourth body of jurisprudence focuses on finding the answers to abstract questions such as what law is and how judges (properly) decide cases (Grove, 2006:2).

Analytic jurisprudence will constitute the basic viewpoint for the purpose of this research. As early as 1832 Austen claimed that the process tries to examine the concepts of law and the legal system (Himma, 2008:5). Dworkin's view on conceptual theories of law is that sometimes there is a relation between law and morality, and sometimes not (cited in Himma, 2008:6).

1.6.3 Common law – natural justice

Common law refers to the rules of behaviour that have developed over years and have attained such acknowledgment that they are regarded by the courts as compulsory rules (Hosten, Edwards, Bosman & Church, cited in Joubert, 2004:8). From natural law theory, we learn that there is a strong correlation between law and morality and that the theory of law cannot be fully expressed without reference to moral philosophy (Himma, 2008:9).

Fuller postulates (cited in Himma, 2008:11-12) that law is subject to technical principles comprised of eight main beliefs and maintains that no system that does not comply with these principles can be legally successful, i.e. rules have to be:

1. articulated in common terms;
2. publicly circulated;
3. potential in outcome;
4. expressed in understandable terms;
5. consistent with one another; and rules must not;
6. require behaviour beyond the control of the parties involved;
7. be changed so regularly that the subject matter cannot rely on them; and

8. rules must be managed in a manner consistent with the phrasing.

1.6.4 Case law / judgment

Case law refers to the rulings of judges. Whenever a court hands down a judgment in an argument, either when interpreting a piece of legislation, or when recognising or applying a regulation of common law, courts are bound by the judgment. This is called the principle of standards or *stare decisis* (Hahlo & Kahn, cited in Joubert, 2004:8). Joubert and Prinsloo also refer to case law as preceding judgments on cases by courts (2009:20). A case study is a category of non-experimental research, where the researcher investigates an existing situation that has drawn his/her interest (McBurney, 1994:169).

1.6.5 Language in education

The word language is defined as the use of words in an agreed way or method of human communication (Rundell, Fox & Hoey 2002:798). According to Gascoigne all animals in a community communicate with each other, but only humans have developed languages as a way of communication that form part of their culture. Language is considered to be a way of communication used by humans only. Gascoigne states that people have been using language for a million years and about 5000 languages are spoken around the world (http://www.historyworld.net/).

For the purpose of this study, language will refer to the medium in which tuition takes place in the school environment (All official languages recognised in the Constitution of South Africa).

Plug, Louw, Gouws and Meyer define education as the development of knowledge, behaviour, habits and personality through formal training, and it can also refer to informal guidance by parents (1997: 259).

Webster (1990:119), in his book, *Introduction to the sociology of development*, states that education is a vital issue for the development of a child because it

encourages economic development and enables the socialisation of people in political and cultural value structures of a society.

1.6.6 Right to education

The right to education is one of the most important basic rights of every person in South Africa. It is a legal right which means that it is the right that forms part of the rules of the legal structure.

Section 29(2) of the Constitution reads:

"Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account:

(a) equity;

(b) practicability; and

(c) the need to redress the results of past racially discriminatory laws and practices".

1.6.7 Language policy of public schools

Policy is the course of action or set of plans adopted or agreed on by a government, business, individual, etc. (Rundell, Fox & Hoey, 2002:1090). Policy can also be seen as a set of proposals helping to structure knowledge, justification and prediction in social life (Ritzer, 1996: 4).

For the purposes of this study, policy will refer to the stipulated way of action set firstly by the Governing Body, and secondly by the government. In other words, the policy is the set of rules and regulations stipulating how language is used in a public school.

(1) *Subject to the Constitution and the Schools' Act, the Minister may, by notice in the Government Gazette, after consultation with the Council of Education Ministers, determine norms and standards for language policy in public schools*.

(2) *The governing body of a public school may determine the language policy of the school subject to the Constitution, this Act and any applicable provincial law*.

(3) *No form of racial discrimination may be practised in implementing policy determined under this section*.

(4) *A recognised sign language has the status of an official language for purposes of learning at a public school*.

1.7 Research design

For the purpose of this study, the main research method will be an in-depth document analysis. As mentioned, complete court cases will be studied, analysed and compared and various policies and related documents will assist the investigation. A detailed description of the research methodology will be included in Chapter 3.

1.8 Background on the four cases

1.8.1 *Hoërskool Ermelo v Departement van Onderwys, Saaknommer 3062/07, 02/02/2007*

In 1914 reverend Paul Nel, four teachers and 78 learners started a school that is situated on the banks of the Petdam in Ermelo, namely Hoërskool Ermelo, which grew into a top-class South African school (History of Hoërskool Ermelo).

In February 2005, Hoërskool Ermelo went to court for the first time to attempt to retain its Afrikaans-only character. On 2 February 2005 Judge Bill Prinsloo approved a temporary court order suspending a decision by a Mpumalanga Department of Education committee compelling the school to admit learners who would be taught through the medium of English, thus changing it into a dual medium school, until a

full hearing on the matter could be held. Lawyers involved in the case said they expected a full hearing to be held in April 2005.

A full bench of the high court later allowed the then Minister of Education, Naledi Pandor, together with Ncane Elizabeth Masilela a mother of one of the English learners to become involved. Pandor clearly felt that was too long to wait. She said her department had filed papers the previous week highlighting that apart from children's right to be taught in the language of their choice, her department's ability to provide schools was being hindered by SA's cement shortage. The minister's view was supported by Masilela, the mother of one of the 113 ousted learners. Masilela said that her child's constitutional right to education in the language of her choice, was being infringed by the school's language policy as it excluded learners who were not prepared to be taught in Afrikaans.

The temporary order was set aside and the school was required to enrol the 113 English learners. Only 19 eventually enrolled and remained in the school, but the school was trying to avoid the enrolment of 150 additional learners, longing to be educated in English, the following year (The Citizen, 13 July 2007). From the same article, it was evident that the school's lawyer, Colin van Onselen, felt that the language medium of a school could not be decided by the minister, but by the head of the province's education department. He said that children had a right to education in the language of their choice, but could not enforce that right against a particular school, even if that school had empty classrooms. Further was reported that Ngoepe said during the judgement that children would end up on the streets if they were not allowed into schools, and that the tax payer would then have to spend money to provide them with place to stay.

Van Onselen said that the school was in a "shaky" situation and needed to stop a "flood" of learners who might be removed from the school.

Regent Tokota, SC, counsel for the minister, said the minister did not have the right to determine a language policy, but had a responsibility to provide quality education and to protect a child's right to education (The Citizen, 13 July 2007).

The case continued in the Supreme Court of Appeal in Bloemfontein, and on Friday 22 March 2009, the decision of the court lead to a major turnabout in favour of Hoërskool Ermelo. The school was allowed to remain a single medium Afrikaans school.

1.8.2 *Seodin Primary School and Others v MEC of Education, Northern Cape Department and Another, 2006 (4) BCLR542 (NC)*

Northern Cape police reported that a stun grenade was used to break up a group of 200 citizens at the Wrenchville Primary School in Kuruman, on Thursday 20 January 2005.

Police spokesperson superintendent Mashay Gamieldien said the group started to gather at the school which at that time had been experiencing registration problems since the day before, around 07:00. On the Wednesday Northern Cape education chief director André Joemat was escorted away by police after a meeting with parents at the school became unpleasant.

Departmental spokesperson Lazi Motsage said that the parents were unhappy because about 150 learners at Wrenchville had been transferred to two other schools in Kuruman. He said the children were transferred to Laerskool Kuruman and Laerskool Seodin to ease the over-crowding at Wrenchville (ANC Daily News briefing, 20 January 2005).

The Member of the Executive Council for Education, hereafter MEC for Education, in the Northern Cape Province made a decision that from January 2005 none of six schools, in the Kuruman district, he had addressed in a letter would maintain their Afrikaans only status, as a single medium of instruction - they were all to become dual medium English/Afrikaans schools.

After failed discussions between the department and the schools, Hoërskool Kalahari and Laerskool Seodin in Kuruman and the Noord-Kaapland Landbouskool (Agricultural High School) in Jan Kempdorp unanimously decided to take the department to court to dispute the decision to introduce dual medium instruction in

February 2005. The Governing Bodies argued that it was their constitutional right to teach in the language of their choice. They also said that they did not have enough resources, e.g. teachers, classrooms and money to execute dual medium education successfully.

On 24 October 2005 the Kimberley High court delivered judgement in favour of the Northern Cape Department of Education. In its judgement, the Kimberley High court ruled that the affected schools had no language policies and that the department had no malicious intent when the medium was introduced.

When Northern Cape Judge President Frans Kgomo delivered judgment, he said that it would be a sad day if some children remained illiterate just to protect the status of some schools (Seodin Primary School and Others v Northern Cape Department of Education and Another 2006 (1) SA 154 (NC)).

1.8.3 *Western Cape Minister of Education v the Governing Body of Mikro Primary School, case 140/2005 (SCA)*

Laerskool Mikro is an Afrikaans medium public school in Kuils River whose governing body refused to agree to a request by the Western Cape Education Department to change the language policy of the school and to convert it into a parallel medium school.

A subsequent instruction by the Head of Education, Western Cape Education Department, to the principal of Laerskool Mikro to admit certain learners, and to have them educated in English, the dismissal of an appeal against the command to the Western Cape Minister of Education, and the resultant admission of 21 learners for education in English gave rise to an urgent application by the respondents to the Cape High Court for an order setting aside the directive and the decision on appeal, as well as for additional relief.

The Cape High Court judge, Wilfrid Thring, criticised Education MEC, Cameron Dugmore and his head of department, Ron Swartz, for their conduct in the Mikro-

case and ruled in favour of the school. On 18 February 2005, the application succeeded and the Cape High Court:

- set aside the original directive to Mikro to admit 40 learners and to teach them in English;

- interdicted Dugmore and Swartz from compelling Laerskool Mikro or its principal to admit learners other than in accordance with its language policy, and from "unlawfully interfering" with the school's government or professional management;

- interdicted the Western Cape Minister of Education and the Head of Education, Western Cape Education Department from instructing or permitting officials of the department to unlawfully interfere with the government or the professional management of Laerskool Mikro;

- ordered that the 21 learners who had already been admitted to the school be placed at another suitable school.

The court also made it clear that the relocation of the children should be done considering their "best interests" (Western Cape Minister of Education v the Governing Body of Mikro Primary School 2005 (3) SA 436 (SCA))

1.8.4 *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere, 2003 (4) SA 160 (T)*

Until the end of 2001 Laerskool Middelburg was an exclusively Afrikaans-medium school. A member of the Mpumalanga Department of Education instructed the school in November 2001, to admit 20 learners in January 2002, and further stipulated that they were to be taught in English. In January 2002, after the school's power to admit learners was withdrawn, eight learners were admitted to the school, to be taught in English. The school refused to become a dual medium school and instituted proceedings against the Mpumalanga Department of Education.

In his judgment, Judge Bertelsmann rejected the application of the school to set aside the decision of the Mpumalanga Department of Education to declare the school a dual medium school. In his judgment he stressed section 28(2) of the Constitution, Act no. 108 of 1996, which states that a child's best interest is of vital importance in every matter. If the learners were turned away, their best interests would be affected. These interests included the fact that the school concerned is regarded as the best school in Middelburg, academically, as well as in respect of its sport and cultural activities. Forced removal could have a negative impact on the learners, because they might feel rejected, and also because close friendships with classmates had already been formed. Furthermore, the school is the closest school to the learners' homes (*Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere, 2003 (4) SA 160 (T))*.

1.9 Exposition of Chapters

The study consists of the following chapters:

1.9.1 Chapter 1: Contextualisation and problem statement

This chapter forms the foundation of the study through the introduction, problem statement, statement of purpose, rationale, research questions and theoretical framework.

1.9.2 Chapter 2: Literature study

Chapter two comprises an in-depth literature study, including an overview of the Constitution of the Republic of South Africa, the South African Schools' Act and the national policy documents.

1.9.3 Chapter 3: Research design and methodology

This chapter includes a description of the approach, paradigm, research design and methodology for this qualitative research study.

1.9.4 Chapter 4: Findings and analysis

The case judgements will be analysed in this chapter, through comparison to what the law instructs. The background on the cases will be used in the process of analysis and the school language policies of the schools mentioned earlier will be compared to legislation in order to gain an understanding of the judgments and to provide other schools with advice so that similar situations may be avoided.

1.9.5 Chapter 5: Conclusions and recommendations

Conclusions will be drawn from the data analysis on the court cases, legislation and language policies. Recommendations will be made based on interpretations derived from the analysis of the data.

1.10 Conclusion

It is necessary to realise the importance of law in South Africa. Laws not only guide us in our proceedings as teachers, but also ensure peace and safety, as well as provide parents and children with security in their expectations of children's right to education. Because educators are in contact with different parties that all have an interest in education, it is vital that order and harmony be maintained at all times so that quality education can be provided (Joubert and Prinsloo, 2009:24).

Language is one of the vital components that can ensure quality education. To receive education in one's preferred language is not a privilege, but a constitutional right. When parents enrol their children in schools, the language status of the school is one of the crucial factors to consider when selecting a school. One of the tasks of the Governing Body is to decide on a specific language through which instruction will take place.

In this study an in depth investigation will be conducted into four recent court cases, involving schools in more or less similar situations. Two of the schools were allowed to continue as single medium Afrikaans schools, but the others were forced to

change their language policy to either dual medium or parallel medium Afrikaans-English schools.

The main aim of this study is to understand why the judgments in the above-mentioned court cases differ and to investigate measures schools can take to prevent similar situations.

Chapter 2: Literature study

2.1 Introduction

Due to the nature of this study, legislation, especially regarding language, is the framework use for answering questions. Other sources include articles, handbooks, policy documents, textbooks, reports on court cases and newspaper articles.

Knowledge derived from the literature is used to state the significance of the problem, develop the research design, relate the results of the study to previous knowledge and to suggest further research (McMillan & Schumacher, 2001:108). According to Neumann (1997:89), the literature review forms the basis of our knowledge on the specific study, because one learns from and builds on what has been written on the subject by others.

2.2 Legislation

According to the Macmillan English Dictionary, legislation is a collection of laws or set of rules officially accepted by the government (Rundell, Fox & Hoey, 2002:814). Just like a soccer game requires rules to prevent chaos on the field, other aspects of life require rules. We need rules, or in context laws, to control interaction in the world. Bray states that law ensures peace, order and justice in society (2008:1). She further states (2008:1) that the Constitution is the most important law in South Africa and that education law has also, through the years, become a very important part of the law, which is why the Constitution and the Schools Act form the basis of this study. The law not only forbids us certain actions, but also provides a natural or legal person with rights, e.g. the right to basic education. Chapter 2 of the Constitution contains the legal rights of natural or legal persons of South Africa. A natural person is any human being, e.g. a child (learner), and a legal person is an institution, e.g. a school (Bray, 2008:9-12).

According to Bray (2008:10) the law is part of every person's daily life and it includes the following characteristics:

• it is a set of norms and rules that administers public and private behaviour as well as interactions;

• every person (natural and legal) must accept these norms and rules as the law;

• the law must create order, assurance and justice in a country;

• the law is drawn up and implemented by legal institutions and instructed by the state, through courts and government departments; and

• nobody is above the law and it must be obeyed by all in a society, including the government (Bray, 2008:10).

Not all norms and standards in a society are regarded as laws because they do not bind the whole community. Bray (2008:10) uses the fact that adultery is against the norms of many in South Africa, but that it is not against the law, as an example. It is for this reason that policies are formulated to represent other norms and standards which indicate what society believes is right.

2.2.1 The Constitution of the Republic of South Africa

The Constitution is the supreme law of South Africa, and contains the most important provisions that control the relationship between the state, also referred to as a nation or country, and those living in it (Bray, 2008:25). Bray defines the Constitution as a set of rules that stipulates how the state will be governed, i.e. it determines the functions and powers of the government (2008:27).

On 8 May 1996, the Final Constitution (Act no. 108 of 1996) was approved by the Constitutional Assembly (Bray, 2008:6). An important aspect for this study is section 6 of the Constitution in which language-related matters are addressed. The Constitution of South Africa is considered to be the base of South African democracy, and recognises eleven official languages (Bray, 2008:28-29).

The 1961 Constitution began to make provision for official status for the so-called African languages in certain black areas - the homelands, from which the Transkei,

Bophuthatswana, Venda and Ciskei (the so-called TBVC-states) developed. After 1961, up to and including the coming into effect of each TBVC state's own constitution, Afrikaans and English, plus an African language for each black area, were the official languages of South Africa. More recently, as in 1910, the language issue once again became a controversial matter during the transition in 1994 to a fully democratic form of government. The Transitional Constitution of 1993, Act no. 200 of 1993, declared eleven main languages to be official languages at national level (section 3(1)).

Through investigation, Weber (in Ritzer 1996) identified several stages in the development of a rational legal system (law). The early stage involves a captivating legal exposure through the eyes of predictors of law (those who foresee the need for legislation in a specific area). The second stage comprises the practical creation of law by voluntary representatives of the law. The third stage is influenced by religious authority. In modern days, laws are set up by people who have undergone formal legal training, in order to create a gapless system (Ritzer, 1996:143).

Not all laws in South Africa are incorporated in the Constitution, and other sources of law need to be used if certain subjects are not included, or are not clearly discussed in the Constitution; some examples include the South African Schools Act, the National Education Policy Act and certain policies drawn up by parties authorised by the government (Bray, 2008:27).

2.2.2 The South African Schools Act

There is no difference between the Schools Act and any other legislation in regard to the main purpose, i.e. to maintain order and harmony between all concerned parties. As regards education, "all parties" include those who have some interest in education (Joubert & Prinsloo, 2009:25).

Because of the history of unfair discrimination towards race, colour and ethnological descent in education, the Schools' Act aims to guide all towards a system of

government that offers quality education for everyone to develop their talents to the fullest (Joubert & Prinsloo, 2009:25).

2.2.3 The National Education Policy Act

This Act provides the necessary guidance for drawing up and implementing a school- based policy within the legislative framework of the Schools Act. Its purpose is to facilitate the smooth progress of democratic transformation in South Africa in order to serve the needs and welfare of everyone and to support their basic rights (Shaba, Campher, Du Preez, Grobler & Loock, 2003:17).

Although a school may determine some of its own policies, it should still consult the National Education Policy Act and the Schools Act for guidance to ensure the legitimacy of its policies. Policy development should also regarded in a national context, because global forces influence education, and a complete natural balance of change needs to be well thought-out to oppose this global influence (Bottery, 2000:215).

According to Bottery, when developing a school policy, it must be kept in mind that it is for society and not for the government, but it is the foundation of the development of a country (2000:216) He uses the following metaphor as an explanation: *A society's soil needs nourishing – and by those who have the power of destroying it* (2000:216).

2.2.4 Language legislation

Language legislation in South Africa can be traced to 1803, when Commissioner-General De Mist introduced the principle of mother-tongue education (Malherbe, 1925:49-52). Lord Charles Somerset stipulated that only English and Latin were allowed to be taught in government schools, and Dutch, the primary mother tongue, was relegated to the background (Malherbe, 1925:58). In 1910, when South Africa became a Union, the language question was one of the thorniest issues. Ultimately, two official languages, English and Dutch, were entrenched in the Constitution (section 137 of the South Africa Act of 1909). Act no. 8 of 1925 by definition,

included Afrikaans with Dutch. The entrenched protection of English and Afrikaans was retained respectively by the Constitutions of 1961 and 1983.

Awarding official language status to different languages confirms the multicultural nature of the state. Recognition of the multicultural nature of the state should therefore sensitise the government to the preferential treatment of any language (or languages) (Lubbe, Du Plessis, Truter & Wiegand, 2004:21).

On Wednesday, 20 May 2009, Mr. Cornelus Lourens, one of the founders of the Union of Jurists for Afrikaans, submitted an application to Chief Justice Langa, in which the Constitutional Court was asked to force the government to accept a national law regarding languages. Lourens said that the Cabinet decided in 2007 that it had to be determined whether the state had the capacity to implement such a law. The delay resulted in a single-medium language policy in contradiction of the Constitution and that the application should not be seen as an anti-English campaign, but that all eleven official languages should be treated equally, as required by law (De Bruyn, 2009).

2.2.5 Language policy

According to the advisory panel on language policy to the minister of arts, culture, science and technology, the South African Language Policy is a structured outline designed to promote the diversity of languages in South Africa and encourage respect towards language rights.

The strategic goals of the Language Policy include:

• ensuring that all South Africans have the freedom to exercise their language rights by using the official language of their choice;

• developing and promoting all the official languages of South Africa, including sign language; and

• promoting national unity, multilingualism and multiculturalism (Language Policy and Plan for South Africa (Final Draft), 6 November 2000).

2.3 Multicultural education

Multicultural education does not refer mainly to the diversity of culture groups in a classroom, but rather the way in which the diversity of cultures is addressed in the curriculum. Le Roux (1997:33-36) explains multicultural education as an educational approach aimed at educating all the learners in a multicultural society. It is an education programme with numerous ramifications, which aims to develop the cognitive, emotional and social being of the learner. In the first instance it wants to broaden the learners' knowledge regarding their own cultures, and in the second, it focuses on broadening their knowledge of the traditions, habits and characteristics of other cultures. Mutual respect, acknowledgement and a change in attitude are prerequisites for living harmoniously in a multicultural society. Multicultural education wants to prepare learners for multicultural society so that when they reach adulthood, they will be able to function to their full potential in a multicultural society (Le Roux 1997:33-36).

If only the dominant language is used in a classroom, for example English, then some learners will be unable to express their ideas or ask questions, and may feel that their knowledge of another language is of little value. Learners will, however, maintain their self-confidence if they are allowed to use a language of their choice to speak and to demonstrate their expertise in the chosen language. One of the most important conditions for successful learning is that learners should feel valued and have self-confidence (Language development in every learning area, 2007).

Section 29(2) of the Constitution reads:

Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this

right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account:

(a) equity;

(b) practicability; and

(c) the need to redress the results of past racially discriminatory laws and practices.

2.4 Mother tongue education

Blaine states that research done by the University of the Western Cape showed that learners who were trained in their mother tongue, especially in the primary school, achieved well. The research therefore shows that mother tongue education ensures greater comprehension and cognitive growth, particularly during the primary school years. According to Blaine, Desai, who conducted the research, found that it takes at least seven years to become fluent in a second language and to be successful when taught in a second language medium. Her research found that Xhosa children performed much better when taught by Xhosa-speaking educators (2004:3).

Horne refers to South African, African-language users whose preferred language of learning is English, as SAAL-E learners or “transferees”. *SAAL-E* is an acronym for the concept, **S**outh **A**frican, **A**frican-**L**anguage users whose preferred language of learning is **E**nglish. They are learners who transfer daily from their mother tongue environment to a formal education environment, where lessons are presented in another language. According to Horne, transferees can be divided into two groups, namely co-ordinate and compound bilinguals. Co-ordinate bilinguals are learners who find learning in and through the English medium of instruction relatively easy. These learners form only 2% of the transferee group. Compound bilinguals are also divided into two groups, i.e. learners who apply their mother tongue as a negotiator and learn English symbols as mother tongue counterparts - they form 8% of the transferee group; and learners who find learning in and through English very

difficult, constitute 90%, who are poorly motivated, exposed to inadequate models and hardly competent or even incompetent (Horne, 2001:2).

During a conference on language policies in Africa, held in Harare in 1997, it was stated clearly that the trend in Africa is to move away from favouring historically colonial languages. One of the main obstacles is that people marginalise their own languages and regard the historically colonial language as a language of empowerment. This motivates them to favour the historically colonial language as language of learning and teaching for their children. The marginalisation of own languages-issue needs to be addressed, because even if people accept the historically colonial language as a language of empowerment, it need not be the language of learning and teaching for their children, it could be studied as a subject (Van Tonder, 1999:3).

In order to address this problem the South African National Department of Education held a conference in 1998 to encourage the use of home languages as languages of learning and teaching. The following aspects were emphasised:

- the current trend of favouring English as official language;

- considering the view of many parents, that English as language of learning and teaching, will empower their children;

- the advantages of the use of the home language as language of learning and teaching;

- the development of definite measures (as well as timetables for implementation), to promote and enable the use of the home language as language of learning and teaching; and

- curriculum development should not be construed in narrow economic goals, but rather in a culturally valued way of living together and the diversity of South African society needs to be regarded as resource for development and progress (Van Tonder, 1999:6).

De Varennes (2004:1) wrote that to deny learners access to certain benefits, like being taught in their mother tongue, is not automatically a violation of their human rights, because of practicality and costs, but it is unreasonable or unjustified, and that makes it unfair. The government is obliged to provide minority language-groups with a certain amount of service in their language if the concentration of speakers reaches an adequate number, and mother tongue instruction is the most effective method to teach learners, since being taught in another language, especially at foundation level, disadvantages them (2004:2). Learners with limited proficiency in the language used as the medium of instruction will suffer severe disadvantage and eventually fall behind (2004:3).

Beckmann & Prinsloo (2004:1) contend that not only schools, but also government should promote multilingualism. Regulations for the promotion of multilingualism are clearly set out in the Constitution, but the South African government tends to accept English as the only language of government, as well as the favoured language of instruction.

Beckmann is of the opinion that schools that use Afrikaans as their sole medium of instruction are being targeted and forced to change their status to either dual medium or parallel medium. This raises serious concerns regarding educational outcomes and the correctness and fairness of the legal system. Although quality education is withdrawn from one language group, the other language group does not necessarily benefit. Teachers also find the situation problematic, because learners are not on the same linguistic level and work needs to be repeated, most likely resulting in extra support and remedial work. The government should rather work toward providing mother tongue education for all, than favouring one language, and in the process excluding another language group from quality education (Beckmann & Prinsloo, 2004:7).

2.5 Dual medium instruction

Davies, the chief Executive Officer of the South African Foundation for Education and Training, wrote an affidavit for the applicant schools in the case, *Seodin Primary*

School and Others v Northern Cape Department of Education and Another 2006 (1) SA 154 (NC), in which he gave his opinion on the practical implications of the applicant schools being transformed to Afrikaans-English dual medium schools. In his opinion, where two or more languages are used during a lesson the teacher and the learners must be equally capable in all the languages used. The teacher and learners can apply code switching to switch from one language to another to eliminate the need for repetition. The teacher should not only competent in the morphology and grammar of the languages being used, but also the lexical matters regarding the lesson. To ensure that the lesson is beneficial to the learners, they too should have aforementioned skills. Most learning and teaching support material (LTSM) is usually written in one language. The learner should have the choice of study material, and be able to follow during a dual medium lesson. Although institutions responsible for teacher education train educators through a number of different languages, no institutions prepare student teachers to teach in a dual medium milieu (Davies, 2004:6).

Davies (2004:9) envisages the relocation of single-medium English school learners to a parallel medium or a dual medium school as a major potential problem regarding quality education, as learners are used to being taught in one language. Learners should be evaluated to see whether they are competent to succeed in a given learning environment and learners from grades one to three should receive monolingual instruction, preferably in their mother tongue. A grade one learner whose mother tongue is not either of the languages at school, will start off behind fellow learners. Dual medium teaching could be introduced in the higher grades. Davies refers to the application of systematic assessment at grade three level in the Western Cape and the related findings released by the then Minister of Education in 2003. The systematic assessment showed that grade three learners who were not taught in their mother tongue were far behind international standards (Davies, 2004:13).

If dual medium and parallel medium are to be combined, every lesson would be repeated twice (first in the one language and the in the other) to one class. The fact

that set timeframes have been designed for instruction and tasks in each learning programme, learning area and subject, would entail doubling the timeframe and extending the number of hours in a school day (Davies, 2004:11).

All assessment material, additional learning material and written interaction with either the learners or the parents would need to be available in the chosen language, and teachers will be confronted with a much larger workload. The tendency is to cater for the majority and to do all the administration in that language or to decide to use English as the administrative language. It would then not take long for the language of instruction to eventually be the language of the majority or English as such (Davies, 2004:13).

According to Beckmann & Prinsloo, single medium class sizes should not exceed 25 and dual medium classes should be even smaller in order to ensure high quality teaching and learning, although, because of financial limitations, this is not possible in South Africa. Beckmann & Prinsloo regards single medium instruction as the most suitable and least complex option, and acknowledges that mother tongue instruction is widely accepted as the best method because it offers an excellent foundation for the conceptual development of the child (2004:5).

Dual medium instruction is perhaps the most complicated option and Beckmann & Prinsloo (2004:6) highlights the following challenges:

• allocating equal time to each language in class;

• teachers' ability to switch from one language to another without disadvantaging any group of learners;

• fair and accurate assessment;

• controllable learner-teacher ratios;

• preventing the domination of one language group over another; and

• preventing the intimidation of one language group by another.

2.6 Multilingualism

A great deal of research has been done on language-related issues in education world wide. Many researchers in multilingual countries focus on the link between learning, cognitive development and language. Without exception these researchers have proved that learners learn and develop best when using mother tongue languages for learning and when using another language for learning, sustaining their main language (Van Tonder, 1999:7).

Urgent transformation is necessary, notably in the case of certain provincial education departments, to ensure effective schooling. Public officials who undertake the macro management of school education should develop a culture of acting strictly in terms of the law and respecting the legal powers and functions of others in the sphere of education. They should further develop a better appreciation of their duty to serve all the people of South Africa fairly (s195 (1) of the Constitution) and protect, promote and fulfil the fundamental human rights of everyone (s7) (Beckmann, 2007:3).

According to Beckmann (2007) the aims of the Schools Act are formulated in the introduction in inspiring terms. The aims are:

- to restore past injustices in educational provision;
- provide increasingly high quality of education for all learners;
- lay a strong basis for the development of people's talents and capabilities;
- advance the democratic transformation of society;
- fight racism and sexism and all other forms of unfair discrimination;
- contribute to the suppression of poverty and the economic well-being of society;
- protect and advance different 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 government (Beckmann, 2007:4).

2.7 Governance of public schools in South Africa

Governing bodies and school principals are legally entrusted to act as representatives for educational departments. This does not mean that they should have almost unlimited powers and operate outside guidelines provided by legislation or act without proper accountability. Furthermore, turning irregular actions by education officials into new legislation or new policies at the expense of governing bodies or to neutralise the powers of governing bodies is inappropriate (Malherbe, 2006:7).

Section 20(1) of the Schools Act, states that the governing body has a number of duties: "It must, *inter alia*, adopt a constitution (subsection (b)), develop the mission statement of the school (subsection (c)), adopt a code of conduct for learners at the school (subsection (d)) and discharge all other functions imposed upon the governing body by or under the Act (subsection I)".

Two more pertinent functions of governing bodies are:

• *the admission policy of a public school is determined by the governing body* (Schools' Act, s 5(5)); and

• *The governing body of a public school may determine the language policy of the school* (Schools' Act s 6(2)).

Although the governing body is delegated the duty to determine certain policies, it should still be done in accordance with regulations set by the government and the Constitution. The most important factor regarding policy development is that no form of discrimination, as contemplated in the equality clause of the Constitution, is allowed (Shaba, Campher, Du Preez, Grobler & Loock, 2003:24).

Many changes regarding the powers of governing bodies have been altered (reduced) through a series of amendments of the Schools' Act, for example:

• the recommendations of staff for appointment (in which regard the government is now at liberty to ignore a Governing Body's recommendations);

• the levying of school fees; and

• the use of school funds.

Governing bodies should cautiously examine their powers and functions due to the fact that government attempts to influence the governance of schools (Beckmann, 2007:14).

Beckmann says that education officials, school management teams and school governors should be legally, politically and policy-literate, because of the degree of manipulation and mistrust that may play a role in the outcomes of court cases (refer to the first case of Hoërskool Ermelo, *Hoërskool Ermelo v Departement van Onderwys Saaknommer 3062/05, 02/02/2005*) and the decisions of one court can easily be reversed by another. It is therefore better for role-players to avoid legal action and to settle matters out of court (2007:10).

2.8 Legal reasoning

Dickson (2005:2) believes that the question as to the meaning of legal reasoning, is difficult to answer. When judges decide cases, it is quite evident that their version of law and settlement are not altogether the same. The concern of judges is much wider than simply trying to find what the law requires when they consider the case at hand. During court cases judges may have prudence to adjust existing law or to fill in gaps where existing law is vague. It may even happen that a judge does not even consider the law when matters in a case seem ethically flawed.

In the case, *Seodin Primary School and Others v MEC of Education, Northern Cape and Others 2006 (4) BCLR542 (NC)*, the MEC for education said that he based his

decision on the lack of resources at some disadvantaged schools. In Malherbe's (2004:7-9) opinion restrictions on the right to basic education should closely be examined and government should not be allowed to simply validate restrictions based on the argument that there is a lack of resources. Government is responsible for public schools, owes every child access to quality education and is required to present equal opportunities to all. Higher and further education are also every person's right, but government must make these available and accessible through reasonable measures. Such rights depend mostly on the availability of resources, and especially on the financial position of the government. Another way for creating equal educational opportunities is the right of all to be taught in any of the eleven official languages. While this right applies not only to basic education, but to all phases of education it must be reasonably practicable. It is this right that includes mother tongue education, not only to protect language rights, but because it has been verified repeatedly that the mother tongue is the preferred medium of instruction. Government therefore has to fulfil this requirement, unless it is not reasonably feasible to do so. Reasonable limitations (as in the case of universities) could be the number of learners, expenses, accessibility to facilities, availability of teachers/lecturers, distance from the closest comparable institution and the chosen medium of instruction.

Section 29 of the 1996 Constitution offers citizens several educational rights, including the right to education in the official language or chosen language, as long it is an official language. In regard to further or higher education, this right can be fulfilled only if it is reasonably practicable. This is, however, not so in regard to basic education - education in a chosen language, without any "but", is everybody's right. Although education in a chosen language in the phases other than basic education is not a guaranteed right, the government has to consider all reasonable alternatives, including single medium institutions, and these alternatives must be taken into account as stated in the Constitution. Malherbe (2004:12) points out that equal educational opportunities will only realise fully in years to come, because there are currently too many restrictions, for example the lack of education in indigenous languages.

Lucas (Opposing Affidavit G.A. Lucas, MEC for Education, Northern Cape, 2006:5) explained Malherbe's statement in an opposing affidavit (16 Dec. 2004) during the Seodin case by describing the language position in South Africa as very complex, since there are eleven official languages and every language group wishes to be taught in their mother tongue. There is no comparable situation anywhere in the world. Section 6(2) of the Constitution stipulates that practicable and positive measures should be taken to raise the status and advance the use of indigenous languages, and in the process achieve equality between the languages (Law Reports: Seodin Primary School and Others v MEC of Education, Northern Cape and Others 2006 (4) BCLR542 (NC)).

Education plays a determining role in the much discussed human rights issue in South Africa. Education provides people with dignity and self-confidence and in the process "cures" people from the lack of knowledge, false notion and trepidation (Devenish, 1998:224).

2.9 Conclusion

The legal system aims to create an environment in which members of a society that serves it will be able to live in harmony with one another through acceptable rules and uses of law (Bray, Van Wyk & Oosthuizen, 1989:3). In other words, citizens of a country are not punished by laws, but rather protected by them.

Education has become a vital component in modern society, because the future of any country depends on the youth. Law in education aims to ensure quality education for all and legislation directly involved with education includes the Constitution, the Schools' Act, the Education Policy Act and policies created by schools' governing bodies.

It is evident in the literature that language plays a major role in education and creates conflict, especially in South African public schools.

Chapter 3: Research design and methodology

3.1 Introduction

Babbie (1992:17) contends that we live in a world that can be divided into experimental and agreement reality. Experimental reality consists of what you come to know from the results of your own experiences, while agreement reality pertains to the collection of what is true and real to you because of what you have been told by someone, and also because everybody else feels that it is real (the experiences of others). Social research, or what Babbie refers to as human inquiry and science, is a combination of these two realities. Inquiry is a natural human action and all people search for general understanding about the world around them at some point in their lives (Babbie 1992:37).

Three of the most important purposes of research are: exploration, description and explanation (1992:90), i.e.:

• most research is done in an attempt to explore unstudied fields or if the researcher is not completely satisfied with research already conducted. This purpose of research aims to satisfy the researcher's interest and gain a clearer understanding on the topic of research;

• descriptions of situations and events are very important in a research study, to provide not only the researcher, but also the reader with a general idea on the research study; and

• explain what has been observed (Babbie, 1992:90-92).

A research study is a project dedicated to finding answers to certain questions, or finding out about something about specific matters. If someone feels the need to find out about something, there are many ways in which to conduct the enquiry. These ways or strategies for finding out about something constitute the research design, which deals with the preparation for conducting a research study (Babbie, 1992:89).

Although this study is based on a qualitative research approach, methods traditionally used in such an approach will not be used here. Throughout this research study legal issues will be investigated and brought into context with specific situations. Legal research is a systematic investigation involving the understanding and justification of laws that can be described as a form of historical-legal research. It cannot really be seen as qualitative or quantitative research (Permuth & Mawdsley, 2006:6), but rather as a combination between a legal case study and a theoretical study, in line with McBurney's description of a case study as a situation, for example a court case, that allows itself to be investigated (1994:179). Bak (2008:25) states that the majority of research conducted in regard to law-related studies takes place through literature and policy investigation.

3.2 Qualitative research approach

According to Neuman (1997:328) qualitative researchers work entirely with real aspects, such as examining proceedings, writing down what people say (verbally and non-verbally), and studying behaviours, literature and visual images, to try to generate new concepts rather than test existing ones. Qualitative researchers could have different concerns and interpretations regarding the data and could find it necessary to adapt the research focus due to unexpected events (Neuman 1997:334). The vital concerns are not how to use numbers and statistics to present data, but rather to be concerned with the social aspects of life, and to present findings in the form of concepts (Halfpenny as cited in Neuman, 1997:328). Qualitative research presents data in words as a narrative (McMillan and Schumacher, 2001:15). My choice of this approach is based on the fact that qualitative research will assist me in understanding the research problem. Qualitative research is characterised by:

- capturing and discovering meaning once the researcher is immersed in the data;
- concepts in the form of themes, motifs, generalizations and taxonomies;

• measures created in an ad hoc manner and often specific to an individual setting or researcher;

• data in the form of words from documents, observations or transcripts;

• casual or non-casual, often inductive theory;

• particular research procedures and hardly any replication;

• analysis through extracting themes or generalizations from evidence and organizing data into a coherent, consistent picture (Neuman,1997:329).

According to Cohen, Manion and Morrison (2000:44), method refers to "the range of approaches used in educational research to gather data which are to be used as a basis for inference and interpretation, for explanation and prediction". Furthermore, "the aim of methodology is to help us to understand, in the broadest possible terms, not the products of scientific inquiry, but the process itself".

Because of the close relationship between education and legislation in this investigation, the three categories of research sources of legislation should be considered:

• primary sources (the law);

• secondary sources (writings about the law); and

• research tools (court cases) (Permuth & Mawdsley, 2006:8-21).

Chesterman, Chan, and Hampton state in a report on the influence on trials, that one should never look diminutively at case study research. It involves the investigation of one or more real trials, to confine the compound issues that influence judges' decisions. Research by means of a case study is built up by a sequence of tests in real life and should not be seen as a research study with a small sample size. Future case studies can use hypotheses formulated by previous case studies (2000:26).

3.3 Data collection

For the purpose of this study, the main research method is an in-depth document analysis. Complete court cases of the four schools as mentioned, were obtained, studied, analysed and compared to one another. The Constitution of South Africa and the South African Schools Act were studied and used to contextualise the court judgments. Language policies of the schools forming part of this study (Hoërskool Ermelo, Laerskool Seodin, Hoërskool Kalahari, Noord-Kaapland Landbouskool, Laerskool Mikro and Laerskool Middelburg), were obtained, studied and compared to identify well structured and well written policies (according to government and legislative regulations). Examples of language policies and set acts by government provided regulations on writing a good language policy and include the:

- National Education Policy Act 27 of 1996; and
- Norms and Standards for Language Policy in Public Schools (South African Schools Act 84 of 1996)

3.4 Data analysis

The data analysis was qualitative and the following methods recommended by Permuth and Maudsley (2006:46) were used to analyse the court cases. I:

- used *MSWord* to gather and categorise facts and information through a coding process. The coding process included different online *MSWord* reference functions e.g. Styles, Footnotes, Citations, Comments and the Highlighter.
- identified and arranged the legal issues in a logical order; and
- prioritised the work so that I researched the most crucial issues first.

According to Nieuwenhuis it was important to change my mindset from merely reading to a critical understanding of why situations were what they seemed to be. I brought the data into context with related literature to determine how it built on

existing information or brought forth new understanding of the topic (cited in Maree, 2007:111).

Language policies were compared to determine what was included in one policy, but not in antoher and the policies were compared to the guidelines and rules set by government for establishing a well written policy in line with legislation (Barnett & Barnett, 2007:4).

3.5 Trustworthiness and reliability

A number of methods were used to assess the trustworthiness of this study in regard to the data gathering and the analysis of the material used.

Research was done primarily on the basis of real case judgments and the set language policies of public schools, which enhanced the validity and reliability of the research. The following three principles were applied in an endeavour to increase the reliability of the study:

- clearly conceptualisation of constructs;
- a precise level of measurement;
- multiple indicators (Neuman, 1997:140).

Validity is the term used, if the indicators used in a study are valid for a particular purpose and definition and it refers to how well the conceptual and operational definitions interconnect with each other (Neuman, 1997:141).

The credibility of this study is established by the detailed description and discussion of the actual court cases. Readers would be able to construct a clear background on the cases and, to an extent, experience the events during the court cases through the data analysis.

As a result of the sheer bulk of research material and complete court cases comprised of sworn statements and letters to applicants and respondents, not

everything could be included in the dissertation, but such documentation could be made available on request.

3.6 Limitations and delimitations of the study

I have acknowledged limitations regarding constraints imposed on the study and to make understandable the context in which the research claims are set (Vithal & Jansen, 2004:35). Some limitations include access, time, resources, availability of school policies and credibility. Because of the fact that this is a research study of limited scope, the situation in South Africa could not be presented in this study in its totality. Due to the limitations of this study only the most applicable affidavits and crucial proceedings of the court cases could be discussed. Another limitation is the time frame for this research study. The *Hoërskool Ermelo v Department van Onderwys*-court case for example, only concluded a few days prior to the writing of the dissertation, and not much has as yet been written about the case.

3.7 Ethical considerations

I applied to the University of Pretoria for permission to conduct research and wrote letters of application to the schools' governing bodies (Hoërskool Ermelo, Laerskool Seodin, Hoërskool Kalahari, Noord-Kaapland Landbouskool, Laerskool Mikro and Laerskool Middelburg) to study their language policies. A letter of informed consent from the governing bodies was used for individuals to indicate their willingness to participate in the investigation after they had been informed of facts that were likely to influence their decisions (Diener & Crandall as cited in Cohen *et al.,* 2000:50).

Consent thus protects and respects the right of free will and places some of the responsibility on a participant, should anything go awry in the research (Cohen *et al.,* 2000:50). All Governing body-members and schools were offered the opportunity to remain anonymous; all information was treated with strictest confidentiality; governing bodies have been offered a copy of the final report; this report will benefit the school and those who participated, because the research was an attempt to explore educational management in practice (Bell as cited in Cohen *et al.,* 2000:56).

Governing bodies and their schools were also given an assurance that they would not be placed at risk of harm of any kind.

All the schools mentioned above issued letters of permission allowing me to use their language policies and names for research purposes. Letters of application and relevant replies are available on request.

3.8 Conclusion

This chapter dealt with the research design and methodology adopted in this study to address the research questions related to the legitimacy of language policies in South African public schools.

This case study of the four court cases mentioned above, was designed to explore and understand the outcomes of the cases and how they could differ to such an extent, although they were so similar in some respects.

The research study was conducted within a positivist approach, believing that there should be no connection between law and morality, and that the only sources of law are rules drawn up by a government or a court of law. Analytic jurisprudence formed the basic viewpoint in this qualitative research study.

The following chapter will comprise a close examination of the proceedings of the court cases to gain a better understanding of how judgments were reached and what role language policies played in the cases under scrutiny.

Chapter 4: Findings and analysis

4.1 Introduction

This chapter deals with the exact proceedings and judgments of the four court cases, mentioned before. Judgments will be analysed against stipulations in the law and the schools' language policies will be compared to regulations set by government.

4.2 The four cases

4.2.1 *Hoërskool Ermelo v Departement van Onderwys, Saaknommer 3062/07, 02/02/2005*

In early February 2005, Hoërskool Ermelo went to court for the first time in an attempt to retain its Afrikaans-only character[1]. On the 2nd of February 2005 Judge Bill Prinsloo issued a temporary court order to suspend an earlier decision by a Mpumalanga Education Department committee, which ruled that the school should admit learners who want be taught in English, thus making the single medium school a dual medium school[2], until a full hearing could be held. Lawyers involved in the case said they expected a full hearing to be held some time during April (*Hoërskool Ermelo v Departement van Onderwys, Saaknommer 3062/07, 02/02/2007*) (hereafter *Hoërskool Ermelo v Departement van Onderwys*).

The Mpumalanga Department of Education ascribed its decision to a purported shortage of space for learners from the area, who preferred to be educated in English[3]. In January 2007 Mrs. Masango, the then MEC for Education in

[1] S6(2) of the Schools Act: *The governing body of a public school may determine the language policy of the school, subject to the Constitution …*

[2] Dual medium education occurs when the same lesson is offered in two or more languages during the same lesson period.

[3] S3(3) of the Schools Act: *Every member of the Executive Council must ensure that there are enough school places so that every child who lives in his or her province can attend school …*

Mpumalanga, withdrew right of the Governing body of Hoërskool Ermelo to determine the school's language policy[4]. A committee appointed[5] by her decided that the school[6] would be obliged to admit English-speaking learners and to teach them in their preferred language[7]. On 2 February 2007, the school was granted a temporary court order, delaying the resultant new language policy. On 12 February 2007, Masango commenced an urgent application to withdraw the temporary court order. She argued that a provincial education department had the right to withdraw the functions of a governing body, if the school refused to admit learners and teach them in their preferred language[8] (Nggengele, 2007).

The applicants rested their case on 5 grounds:

• the supposed invalidity of the elimination of the governing body's power to determine the language policy of the school;

[4] S22(1) of the Schools Act: *The Head of Department* (the law does not mention the MEC on this matter) *may, on reasonable grounds, withdraw a function of a governing body.*

[5] S22(2) of the Schools Act: *The Head of Department may not take action under subsection (1) unless he or she has:* (a) *informed the governing body of his or her intention so to act and the reasons therefore*; (b) *granted the governing body a reasonable opportunity to make representations to him or her relating to such intention*; and (c) *given due consideration to any such representation received*.

[6] School refers to a public school or an independent school which enrols learners in one or more grades from grade R (Reception) to grade twelve (South African Schools Act, 1996). This research takes into account both primary and secondary public schools.

[7] S22(3) of the Schools Act: *In cases of urgency, the Head of Department May act in terms of subsection (1) without prior communication to such governing body, if the Head of Department thereafter*: (a) *furnishes the governing body with reasons for his or her actions*; (b) *gives the governing body a reasonable opportunity to make representations relating to such actions*; and (c) *duly considers any such representations received*.

[8] S29(2) of the Schools Act: *Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable … the state must consider all reasonable educational alternatives, including single medium institutions …*

• the ensuing, supposedly unfounded appointment of a temporary committee to perform that function;

• the supposed invalidity of the language policy determined by that committee;

• the supposed lack of space at the school; and

• the supposed availability of another location (*De Havilland, 2008:2*).

A full bench of the high court later allowed the then Education Minister, Naledi Pandor and the mother of one of the English learners at the school to get involved. Pandor clearly felt that it would be too long to wait for the court's decision. She said her department had filed papers the previous week highlighting that, apart from learners's right to be taught in the language of their choice, her department's ability to provide schools was being hindered by South Africa's alleged cement shortage. Pandor's views were supported by Ncane Elizabeth Masilela, the mother of one of the 113 ousted learners. Masilela said that her child's[9] constitutional right to education in the language of her choice, was being infringed by the school's language policy as it denied access to learners who were not prepared to be taught in Afrikaans (*Hoërskool Ermelo v Departement van Onderwys*).

The State and Masilela, who had not previously joined, subsequently filed a combined application asking the court to withdraw Prinsloo's order and to disapprove the application. The temporary relief order by Prinsloo was re-opened, re-argued and re-considered by the court. After the court took a number of factors into account, including the desire for a temporary court order and the stability of convenience, the court decided to withdraw Prinsloo's previous order. It was found that the applicants had an extremely low learner-teacher ratio, and that the school had extended the curriculum, resulting in the full occupation of all the classrooms.

[9] Child/learner: Any person under the age of eighteen is, by law, deemed to be a child. A learner is any person who is compelled by law to follow basic education or any person who is registered for education at any academic institution providing education. For the purpose of this study, it would be any child who has registered at a primary or secondary school, or who wants to register, or is lawfully required to register.

The court also found, in view of the school enrolments having significantly dropped through the years, that the applicants could not satisfactorily explain why there was no space available for additional learners. The alleged lack of space was simply a concealment to disguise the real reason for not admitting the learners, namely to prevent the school from becoming a parallel medium school[10] (*Hoërskool Ermelo v Departement van Onderwys*).

The High Court then further ruled that Hoërskool Ermelo would not be allowed to appeal its decision to the full bench, consequently forcing the school to become parallel medium, i.e. Afrikaans-English, and to admit learners who want to be taught through the medium of English. It was also decided that no reasons needed to be given for the court ruling (Afrikaans school can't appeal, 2007).

Following this ruling by two members of the court, J. Seriti (Judge of the High Court) and A. Ranchod (Acting Judge of the High Court), in the absence of B. M. Ngoepe, the Judge President of the High Court of South Africa, the applicants formally requested recourse to the Supreme Court of Appeal, but they were referred back to the High Court. The applicants then filed an application for condoning[11] (*Hoërskool Ermelo v Departement van Onderwys*).

Ngoepe had a meeting with the parties involved and said that they were expending too much time and too many resources. He also claimed that the parties had done nothing to bring the major application to trial and finalization. The parties agreed on a timetable for the exchange of affidavits, and that the finalised order would be heard on 4 September 2007 (*Hoërskool Ermelo v Departement van Onderwys*).

[10] Parallel medium school: The school offers instruction in two or more languages, but the instruction takes place in separate lesson periods to separate language groups.

[11] Condone: *To approve of behavior that most people think is wrong* (Rundell, et al. 2002:288).

The temporary order was thus set aside and the school was required to enrol the 113 English learners[12]. Only 19 eventually enrolled and remained in the school (during 2007), but the school tried to avoid the enrolment of 150 more in the following year. In the process, Mr. Koos Kruger, the headmaster of the school, was also relieved of his duties, due to alleged misconduct (Ermelo language battle in court, 2007).

This same newspaper also reported the school's lawyer, Colin van Onselen, as saying that the language medium of a school could not be decided by the Minister, but by the Head of the Provincial Education Department. He said that learners had a right to education in the language of their choice, but nobody could enforce that right in regard to a particular school, even if that school had empty classrooms. In answer to this dispute, Judge Ngoepe said that learners would end up on the streets if they were not allowed into schools, and that the taxpayer would then have to spend money to provide them with a place to stay. Van Onselen said that the school was in a "shaky" situation and needed to stop a "flood" of learners who might be removed from the school at a later stage. Regent Tokota, counsel for the Minister, said the Minister indeed did not have the right to determine a school's language policy, but had a responsibility to provide quality education and to protect learners' right to education. No other reasons were advanced for the transformation of Hoërskool Ermelo (Judgment was retained, 2007).

Judge President, B.M. Ngoepe concluded by saying that it would cost government R30 million to build new schools, while empty classrooms were available. He said that he could not allow the spending of such an amount in a country where learners go to bed hungry. The following court orders were issued by the Judge President:

• the applicants' application for condoning the late filing of notice of application for leave to appeal against the original orders made by the court on 13 February 2007, was dismissed;

[12] S5(1) of the Schools Act: *A public school must admit learners and serve their educational requirements without unfairly discriminating in any way.*

• the applicants' application for leave to appeal, filed on 14 February 2007, was struck from the roll; and

• the applicants were ordered to pay the costs of the two applications, as well as the costs of 18 June 2007, and such costs were to include costs consequent upon the employment of two counsel members (*Hoërskool Ermelo v Departement van Onderwys*).

In an article, *Campaign to keep Ermelo Afrikaans*, on the AfriForum website, Mr. Kallie Kriel, the CEO of AfriForum, together with Solidarity, issued a statement on 29 January 2008, announcing that AfriForum and Hoërskool Ermelo parents had started a united movement of objection, i.e. they required government to let the school maintain its status as a single medium Afrikaans school. A petition form was published on the website as part of the campaign, enabling members of the public to express their feelings regarding the case and other related matters. Another focus of the campaign was to generate funds to help the school to pay legal costs. According to Kriel, education authorities were targeting Afrikaans schools because there was no instance in South Africa where the Minister of Education and the authorities changed the status of an English medium school. He also mentioned that only 19 of the 150 graduate courses at the University of Pretoria were still available in Afrikaans (Kriel, 2008).

The case continued in the Supreme Court of Appeal in Bloemfontein[13], and on Friday 27 March 2009, the decision of the court lead to a major turnabout in favour of Hoërskool Ermelo, and the school was allowed to retain its single medium Afrikaans status. The court determined that the HOD, Mpumalanga Department of Education had not complied with the principles of legality in pursuance of the Schools Act. It was further stated that the HOD had also violated the principles of the Act on the promotion of administrative justice (Rademeyer, 2009).

[13] Hoërskool Ermelo v The Head of Department of Education: Mpumalanga (219/08) [2009] ZASCA 22

The Supreme Court of Appeal determined that although Hoërskool Ermelo has the lowest class-learner ratio in the Ermelo region, it is not the school's duty to provide education in the preferred language (English), but a right against government (Paragraph 14 of the judgement[14]).

In light of the fact that it was stated that s6(2) of the Schools Act authorises only the governing body, and no-one else, to determine the language policy of an existing school, the power of the governing body could not in this matter, be withdrawn (Paragraph 21).

J.A. Snyders stated in her judgement:

"This case is not, as it at first blush appears, about language policy at schools, a highly emotive issue in the South African context, but rather about the principle of legality and the proper exercise of administrative power" (*Hoërskool Ermelo v The Head of Department of Education*).

This dispute between the Mpumalanga Department of Education and Hoërskool Ermelo started in 2005 and it seems as if it has not yet been settled. Due to the timeframe of this study, I have to conclude at this stage. I do not believe that the Department will accept defeat, although it, from the beginning of the disagreement, misinterpreted S20, S21 and S22 of the Schools Act and, according to the court, illegally withdrew the power of the school's governing body. S20 and S21 of the Schools Act delegate duties to the governing body and read as follows:

20. (1) Subject to this Act, the governing body of a public school must:

(a) promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at the school;

(b) adopt a constitution;

(c) develop the mission statement of the school;

[14] Hoërskool Ermelo v The Head of Department of Education: Mpumalanga (219/08) [2009] ZASCA 22

(d) adopt a code of conduct for learners at the school;

(e) support the principal, educators and other staff of the school in the performance of their professional functions;

(f) determine times of the school day consistent with any applicable conditions of employment of staff at the school;

(g) administer and control the school's property, and buildings and grounds occupied by the school, including school hostels, if applicable;

(h) encourage parents, learners, educators and other staff at the school to render voluntary services to the school;

(i) recommend to the Head of Department the appointment of educators at the school, subject to the Educators Employment Act, 1994 (Proclamation No. 138 of 1994), and the Labour Relations Act, 1995 (Act No. 66 of 1995);

(j) recommend to the Head of Department the appointment of non-educator staff at the school, subject to the Public Service Act, 1994 (Proclamation No. 103 of 1994), and the Labour Relations Act, 1995 (Act No. 66 of 1995);

(k) at the request of the Head of Department, allow the reasonable use under fair conditions of the facilities of the school for educational programs not conducted by the school;

(l) discharge all other functions imposed upon the governing body by or under this Act; and

(m) discharge other functions consistent with this Act as determined by the Minister by notice in the Government Gazette, or by the Member of the Executive Council by notice in the Provincial Gazette.

(2) The governing body may allow the reasonable use of the facilities of the school for community, social and school fund-raising purposes, subject to such

reasonable and equitable conditions as the governing body may determine, which may include the charging of a fee or tariff which accrues to the school.

(3) The governing body may join a voluntary association representing governing bodies of public schools.

Allocated functions of governing bodies

21. (1) Subject to this Act, a governing body may apply to the Head of Department in writing to be allocated any of the following functions:

(a) to maintain and improve the school's property, and buildings and grounds occupied by the school, including school hostels, if applicable;

(b) to determine the extra-mural curriculum of the school and the choice of subject options in terms of provincial curriculum policy;

(c) to purchase textbooks, educational materials or equipment for the school;

(d) to pay for services to the school; or

(e) other functions consistent with this Act and any applicable provincial law.

(2) The Head of Department may refuse an application contemplated in subsection (1) only if the governing body concerned does not have the capacity to perform such function effectively.

(3) The Head of Department may approve such application unconditionally or subject to conditions.

(4) The decision of the Head of Department on such application must be conveyed in writing to the governing body concerned, giving reasons.

(5) Any person aggrieved by a decision of the Head of Department in terms of this section may appeal to the Member of the Executive Council.

(6) The Member of the Executive Council may, by notice in the Provincial Gazette, determine that some governing bodies may exercise one or more functions without making an application contemplated in subsection (1), if:

(a) he or she is satisfied that the governing bodies concerned have the capacity to perform such function effectively; and

(b) there is a reasonable and equitable basis for doing so.

If the governing body does not fulfil its duties, the following section of the Schools' Act will be applicable:

Withdrawal of functions from governing bodies

22. (1) The Head of Department may, on reasonable grounds, withdraw a function of a governing body.

(2) The Head of Department may not take action under subsection (1) unless he or she has:

(a) informed the governing body of his or her intention so to act and the reasons therefore;

(b) granted the governing body a reasonable opportunity to make representations to him or her relating to such intention; and

(c) given due consideration to any such representations received.

(3) In cases of urgency, the Head of Department may act in terms of subsection (1) without prior communication to such governing body, if the Head of Department thereafter:

(a) furnishes the governing body with reasons for his or her actions;

(b) gives the governing body a reasonable opportunity to make representations relating to such actions; and

(c) duly considers any such representations received.

4. The Head of Department may for sufficient reasons reverse or suspend his or her action in terms of subsection (3).

5. Any person aggrieved by a decision of the Head of Department in terms of this section may appeal against the decision to the Member of the Executive Council.

According to the court, the department could not determine that any duties (S20 and S21) were not being carried out by the governing body, and therefore none of the criteria under S22 could apply to the withdrawal of the Hoërskool Ermelo governing body, nor could the court find any irregularities regarding the school's language policy.

4.2.2 *Seodin Primary School and Others v MEC of Education, Northern Cape and Others 2006 (4) BCLR542 (NC)*

Northern Cape police reported that a stun-grenade was used to break up a group of 200 citizens at the Wrenchville Primary School in Kuruman, on Thursday morning 20 January 2005. Police spokesperson, superintendent Mashay Gamieldien, said the group started to gather at the school which at the time was experiencing registration problems as it had on the previous day, at around 07:00. On the Wednesday Northern Cape education chief director André Joemat was escorted away by police after a meeting with parents at the school became unpleasant.

Departmental spokesperson Lazi Motsage said the parents were unhappy because about 150 learners at Wrenchville had been transferred to two other schools in Kuruman. He said the learners were transferred to the Laerskool Kuruman and Laerskool Seodin to ease the over-crowding at Wrenchville (Ncape police use stun grenade against parents at school, 2005).

Previously, on the first of June 2001, the Laerskool Seodin governing body had had a language policy meeting with officials from the Department. Subsequent to this

meeting, the Department wrote to corroborate the leading language policy of Seodin, and not only acknowledged Afrikaans as the only medium of instruction at the school, but also affirmed that the responsibility of the school's governing body in regard to the language policy, which had to be respected by all, including the Department. Mr. Buys (the then Circuit Manager of the Department) further acknowledged in his letter, dated 11 June 2001, that the school functioned within the set framework of the policy and that it was open to learners of all races, who might choose Afrikaans as the language of instruction (*Seodin Primary School and Others v MEC of Education, Northern Cape and Others, 2006 (4) BCLR542 (NC)*) (Hereafter *Seodin Primary School v MEC of Education*).

On the second of March 2004, The HOD of the Department, Mr. G.T. Pharasi, wrote a letter to Mr. G. P. Vermeulen of the Noord-Kaapland Landbouskool in Jan Kempdorp, to assist him to solve a problematic situation. Thirty learners had expressed the desire to be schooled through the medium of English at the Noord-Kaapland Landbouskool. On 15 March 2004, the governing body of Noord-Kaapland Landbouskool replied, stating their reasons for not being able to teach learners through English as a medium of instruction at that time (*Seodin Primary School v MEC of Education*).

In an undated budget speech (sometime during 2004) by Mr. G.A. Lucas, the MEC for Education, the latter noted the intrinsic bias towards Afrikaans, and Laerskool Seodin and Hoërskool Kalahari were particularly targeted as schools that had survived as so called "white lily schools"[15] (*Seodin Primary School v MEC of Education*).

On the third of June 2004, Mr. Motingoe (legal and labour advisor of the Department of Education) wrote a letter to the MEC and HOD in which a master plan was described to demolish the demographic combination of schools that had remained exclusively white (*Seodin Primary School v MEC of Education*).

[15] Lily-white schools: schools with exclusively white learners

Mr. Motingoe visited Kuruman on 2 August 2004 and on the following day he submitted recommendations to the MEC and the HOD, informing them of the situation in Kuruman (*Seodin Primary School v MEC of Education*).

On 11 August 2004 the MEC wrote a letter to the Seodin and Kalahari governing bodies, based on the dreadful circumstances in which some learners were educated at other schools. He invited the two schools to give input towards solving the problematic situation of overcrowding at Wrenchville Primary School and Bankara-Bodulong Combined School. He stated that their situation was a “serious attack” on the rights of the learners who were supposedly entitled to quality education[16]. He described the situation as a “continuing offence on the rights and interest of most of the learners who are enrolled in schools in and around Kuruman”. In a follow-up letter by the HOD, he warned schools that the MEC was going to make decisions that would directly impact on the admission of learners in schools (*Seodin Primary School v MEC of Education*).

For the applicant schools, this was not a problem that had appeared overnight, but now they were required to respond immediately regarding a solution to the problem. On the tenth day of each school year, every school has to submit statistics, in particular the total number of learners enrolled, to the Department. Only after six months had elapsed, the Department raised the numbers as a problem.

<u>Seodin’s</u> response to the MEC’s letter was that they could not give any input to solve the issue unless certain statistics were disclosed, in particular the language and cultural preferences of the learners involved. The MEC did not reply to the letter.

In their response, <u>Hoërskool Kalahari</u> explained that they had limited space. They noted that the Department provided the school with 15 teachers, but the governing body appointed 5 additional teachers whose salaries were provided by the parents, to prevent the overpopulation of learners in classes. Any attempt at transformation

[16] S34(1) of the Schools Act: *The State must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education …*

by the Department could jeopardise the parents' goodwill. In addition, they believed that double medium education would result in slower progress and that learners' concentration and discipline would deteriorate even further.

In a letter to the Noord-Kaapland Landbouskool, dated 2 March 2004, the HOD wrote that the school had not submitted its language policy for approval, and that he was going to allocate thirty learners, who desired English as medium of instruction, to the school. A sworn statement by the chairman of the governing body was thereupon sent to the HOD. The affidavit stated that a language policy had been sent to the Department in 2002, and that it was presented to the Circuit Manager. The HOD reneged on his stated intention of sending English learners to the school (*Seodin Primary School v MEC of Education*).

On 31 August 2004 the MEC for Education in the Northern Cape Province decided that, with effect from January 2005 none of the six schools he had addressed in his letter of 11 August 2004, would be allowed to maintain Afrikaans as a single medium of instruction, and that they were to become dual medium English-Afrikaans schools[17], except for Bankara-Bodulong Combined School, which would be allowed to remain a single medium English institution[18] (*Seodin Primary School v MEC of Education*).

Going back a few years, in the ANC Daily News Briefing of Wednesday 6 September 2000, in an article, *Pilot project allows learners to study in their own language*, Kader Asmal, the then Minister of Education, stated that a teacher's language competence determined the language of teaching in a classroom. From many research studies it was evident that learners learned and studied much better through the language they knew best. Research findings also indicated that teachers found it difficult to teach in a medium that was not too familiar to them, and had been able to support

[17] This is exactly the same situation as with the Hoërskool Ermelo court case.

S6(2) of the Schools Act: *The governing body of a public school may determine the language policy of the school, subject to the Constitution …*

[18] No reason was mentioned regarding the latter decision.

learners who had a different mother tongue than the medium of instruction. It was further stated that mother tongue teaching also enhanced the mastering of additional languages.

On 22 October 2004, five applicants (Laerskool Seodin, the Laerskool Seodin governing body, Hoërskool Kalahari, the Hoërskool Kalahari and Noord-Kaapland Landbouskool governing bodies), filed an application for the following rulings to be reviewed and/ or set aside:

• the decision by the MEC that all schools in the Kuruman District as well as the Noord-Kaapland Landbouskool should be converted to double medium (Afrikaans and English) schools;

• the decision by the HOD to follow the through on the decision;.

• the MEC did not act according to the stipulations in the Constitution of the Republic of South Africa, namely:

o not be influenced by concealed reasons to change the racial composition of the applicant schools and not to suspend or alter the governing body's view of the cultural ethos, milieu and traditions of the schools;

o to consider other possibilities, e.g. placing the learners at other schools, thus enabling the applicant schools to retain their status of single medium Afrikaans schools; and

o consider decisions of the learners, because government has an obligation to provide them with education.

• By not giving enough notice to the applicant the MEC failed to comply with the requirements of fair administrative action...

• The facts and statistics that caused the judge to reach his decision need to be considered.

- Factors that were measured and which influenced the consideration of alternative options as reflected in section 29(2) of the Constitution are those regarding:
  - the availability of funds;
  - the cost implication in providing the necessary facilities at schools that are overcrowded;
  - direct and hidden costs attached to alternative solutions;
  - further information requested reasonably by applicant schools; and
  - enabling applicant schools to give input to the MEC before any decision is made.
- That the MEC and HOD do not misuse their powers one-sidedly to set a language policy for the applicant schools tailored by their own decisions.
- The MEC and HOD are instructed to reconsider or modify their decisions:
  - to be free from their own intention;
  - by taking only learners living in the Northern Cape into consideration;
  - with the aim insofar as is realistically and probably feasible of reinstating the status of the applicant schools to single medium Afrikaans schools;
  - to force them to give complete and prior notice to the applicant schools, revealing the nature of choices that they are likely to take or will take in this regard, and to provide all valid facts and statistics at their disposal regarding the school work-related figures and the obtainable figures, and with the option to expand available facilities;
  - costs regarding the appointment of extra teachers, study material appropriate for the successful use of double medium instruction, as well as any other unforeseen costs; and

o estimates and budgets towards alternative solutions (*Seodin Primary School v MEC of Education*).

After failed discussions between the department and the schools, Laerskool Seodin, Hoërskool Kalahari in Kuruman and Noord-Kaapland Landbouskool in Jan Kempdorp, took the department to court to dispute the decision to introduce dual medium instruction. The governing bodies argued that it was their constitutional right to teach in the language of their choice[19]. They also said that they did not have enough resources, like teachers, classrooms and money to execute dual medium education successfully (ANC Daily News Briefing, 21 January 2005).

In a letter to the schools, the MEC said he was pleased that there had been sufficient government resources to fulfil the wishes of the learners in Kuruman, but the problem was that those resources were not divided fairly among the learners and their accessibility to the resources was unfairly restricted. He said that some learners with English as the medium of instruction would have no place in Kuruman to continue their next grade in their chosen language. It was more important to look after the best interest of the child, and Afrikaans, like any other language, should stand back in such a situation. He said that “Afrikaans” (meaning those who favour Afrikaans) had to understand that scarce public resources should be shared with other languages and cultures, and that everyone had equal claim to the pleasure of using government resources. He claimed that the primary intention of the policy is to encourage the multi-cultural and multi-lingual character of society, and that “Afrikaans” (again meaning those favouring Afrikaans), should learn to co-exist with other cultures, in particular in public. He ended the letter by saying that everyone who had the best interest of the child at heart would support him in his decision, and that he would have failed in his duty if he did not ensure an appropriate learning milieu and sufficient space in a school for every learner in Kuruman (*Seodin Primary School v MEC of Education*).

[19] S6(2) of the Schools Act: *The governing body of a public school may determine the language policy of the school, subject to the Constitution …*

The MEC proposed the admission to be dealt with as follows:

• learners in grade 7 at Kuruman Primary School would enrol at Hoërskool Kalahari for Grade 8;

• grade 7 learners at Wrenchville Primary School would be admitted to grade 8 at Hoërskool Wrenchville;

• 200 learners from Wrenchville Primary School would be relocated to Laerskool Seodin;

• 150 learners from Wrenchville Primary School would be relocated to Kuruman Primary School; and

• Bankhara-Bodulong School would no longer offer instruction to learners in Grades 10 to 12 and the latter would be moved to Hoërskool Kalahari.

The HOD requested schools to comment on the proposal by 8 September 2004. He did not give any detailed thought to alternative solutions with a view to preserving the language status of the schools involved, and made his final decision, as proposed, in a letter dated 17 September 2004 to the affected schools (*Seodin Primary School v MEC of Education*).

The applicants started their case by accusing the MEC and the HOD of being *mala fide*[20]. They said that the real reason behind their decision was merely the forced racial integration of the applicant schools, which the MEC saw as a leftover of *apartheid*, and that it was unreasonable to expect a school to make drastic changes, obtain the necessary resources and prepare to operate fully as a double medium school at such short notice (*Seodin Primary School v MEC of Education*). The conclusion by the MEC in his Budget Speech in May 2004, was quoted to substantiate their statements. The MEC said that their tactical goals were to fully "deracialise" schools and get rid of all forms of racial discrimination in education.

[20] Being untrustworthy.

Laerskool Seodin and Hoërskool Kalahari were mentioned by him, noting that their enrolment figures showed that they had deliberately been kept *lily-white*, and that there were formerly advantaged schools that used a range of ways to maintain and continue the old order. He found this unacceptable and said it could not be allowed. For the applicant schools it would also be very unproductive to change parallel medium schools to double medium schools as in the case of Kuruman Primary School and Wrenchville Primary School (*Seodin Primary School v MEC of Education*). Hoërskool Wrenchville also applied to the Department in two letters dated 24 May 2004 and 27 August 2004 to become a parallel medium school (*Seodin Primary School v MEC of Education*).

In their defence, Advocate Danzfuss, representing the MEC, said that all educational endeavours are built on the wellbeing of the child, and that their passion could be seen in the results of the previous senior examinations. Furthermore, he claimed that they had committed themselves to work together in circumstances of well-established democracy, respect for human rights, peace and solidarity to ensure that they would succeed in their task to ensure a comfortable learning culture for all (*Seodin Primary School v MEC of Education*).

The following was mentioned by Advocate Raath, representing Laerskool Seodin, et al.

• Since the opening of their doors at the beginning of the 20th century, Laerskool Seodin was considered to be mainly an educational asset to the Afrikaans-speaking community. The school is situated on the banks of one of the streams flowing from a huge spring, called “Die Oog” (translated as “The Eye’). *Seoding* is a Tswana word meaning “the piece of land in the elbow of the stream”. In 1821, Robert Moffat started a Mission Station there, and in 1876 he founded the Moffat Institute where he trained evangelists. The Kuruman municipality bought the land from the London Missionary Society in 1918, and sold it to the Dutch Reformed Church (N.G. Kerk, Kuruman) which started two church schools, the one being Seodin (without the “g”) (Laerskool Seodin, Ons ryke Geskiedenis). If Seodin loses its status as a single

medium Afrikaans school, it could also lose the financial support provided by the Afrikaans-speaking community.

• Until August 2004, Afrikaans had been the sole medium of instruction, and at no stage had the Department objected.

• In the meeting on 1 June 2001, between the Laerskool Seodin governing body and a delegation from the Department, including the regional Director, Mr. G Berends, and Circuit Manager, Mr. G.J. Buys, the following was contended:

○ Afrikaans should be kept as the medium of instruction;

○ the governing body would be responsible for drawing up a language policy for their school and the decision of the governing body should be respected. The Language policy was drawn up in collaboration with the general public that served the school;

○ the school would act according to requirements set by the language policy, and would be open to all who requested Afrikaans as medium of instruction;

○ the school could not be forced to implement English as a medium of instruction, because it is contradictory to the language policy, and the school is able to house only 350 learners;

○ a very high educational standard should be maintained at Laerskool Seodin, not only on an academic level, but also in sport and cultural activities;

○ no complaints of discrimination or refusal to be accepted at Laerskool Seodin had ever been reported;

○ the school was encouraged to support neighbouring schools by sharing their knowledge in various educational fields;

○ the Department thanked the governing body for their support and contribution towards education at Seodin (*Seodin Primary School v MEC of Education*).

Implicit approval was said to have been granted in regard to Hoërskool Kalahari to retain its status as a single medium school. The following was also noted:

• Kalahari was established during the same era as Seodin and operated under the same name. Each school developed its own character and the differentiation in school names occurred during the 1950s;

• education at Kalahari is for most of the attendant learners purely an addition to the education they receive at home. Quite a few learners are residents of the school's hostel and parents expect the school environment to be a home to their children, where they can practise their language and their culture during and after school hours;

• the school plays a fundamental part in the society of Kuruman. First of all, it uses Afrikaans, which is the dominant mother tongue of all the residents of the Northern Cape and Kuruman, as the medium of instruction;

• the school's language policy was submitted to the Department to promote Afrikaans as the exclusive medium of instruction. There had been no previous response to or interference with the school's language policy (*Seodin Primary School v MEC of Education*).

It was argued that the Noord-Kaapland Landbouskool had, as stipulated by law, adopted Afrikaans as the sole language of teaching. The primary aim of the school's language policy is to look after the best interest of the child. It was also said that the school was taking the necessary steps to point out the importance of multilingualism and the necessary respect towards other languages and cultures (*Seodin Primary School v MEC of Education*).

After Mr. Motingoe visited Wrenchville Primary School, he wrote in a report: "This is another sad case of frightening overcrowding. The school has a capacity for 800 learners, yet it currently has 1203 on its register … All its class ratios are far beyond the recognised norm …" (*Seodin Primary School v MEC of Education*).

The school has 35 classrooms, if you divide that into the number of learners the ratio is approximately 34 per class (Founding Affidavit, P.H.T. Colditz, attorney for the applicants), 2006). What Mr. Motingoe probably meant, was that the classrooms in use allowed for a capacity of 800 learners. Other classrooms however, were being occupied by the Department, Kwikstertjie Kindergarten, a church and a security company (*Seodin Primary School v MEC of Education*).

When registration figures from Bankara-Bodulong Combined School were considered, it showed that there was an overpopulation of only 128 learners (Founding Affidavit P.H.T. Colditz, attorney for the applicants), *Seodin Primary School v MEC of Education*). The applicant schools proposed that Afrikaans learners from Kuruman Primary School could be relocated to Laerskool Seodin, in turn allowing then learners from Bankara-Bodulong Combined School to go to Hoërskool Kalahari and Kuruman Primary School (*Seodin Primary School v MEC of Education*).

Mr. Danzfuss argued that according to the MEC none of the affected schools had submitted a language policy in agreement with section 6(1) of the Northern Cape Schools Act or section 6(2) of the South African Schools Act, which states that the governing body of the school may determine the language policy with accordance to regulations set by the Constitution, the Schools Act or any relevant provincial law. It was further alleged that none of the above-mentioned documents (language policy of the school and the outcome of the meeting held on 1 June 2001), had been approved by the MEC because they had been contradictory to constituting a language policy (*Seodin Primary School v MEC of Education*).

Mr. Raath countered that the MEC and the Department agreed to the use of Afrikaans as the sole medium of instruction because they did not react to the proposed language policy discussed in the above mentioned meeting between Laerskool Seodin and the Department. Mr. Berends and Mr. Buys had given their blessing to the proposed language policy (*Seodin Primary School v MEC of Education*).

Mr. Berends denied the previous statement on the basis that Mr. Buys, as a junior official, was not competent to agree to this matter, and that the statements made during the meeting were in contradiction to the policy of transformation by the Department. Mr. Buys stated that the minutes of the meeting held had been compiled clumsily, that they provided a twisted understanding and did not represent the views of the Department of Education (*Seodin Primary School v MEC of Education*).

The Northern Cape Department of Sport, Art and Culture said that it discouraged the use of Afrikaans as a single medium of instruction in public schools, as this served as a deterrent to potential learners using other languages (Van Wyk, 2004). According to Van Wyk, Mr. David Mdutyana, the spokesperson of the Department of Sport, Art and Culture, said that Afrikaans is only one of the official languages, not the only one, and that his Department supported the decision of the Department of Education. He claimed that structures like the governing body must fulfil a role as facilitator and developer only, and not interfere by promoting only one language to their own advantage. He added that all learners are entitled to quality education, and the advancement of a language to prevent learners from enjoying the privilege of quality education is not lawful. According to him the decision by the Department of Education was not meant to degrade any language, but only to solve the overpopulation problem at schools (2004).

The MEC said in a sworn statement on 7 March 2005 that his decision was not based on the overcrowding of the schools, but on the lack of resources. He added that the Department had not indicated to the applicants that overcrowded classrooms were the reason. He stated further that it was a fact that the governing body rented the classrooms in the old school building to different tenants, but the Department did not have any say or control over it because the building did not belong to them, but to the school (Opposing Affidavit, G.A. Lucas, MEC for Education), *Seodin Primary School v MEC of Education*).

Some of the responses by Mr. G.A. Lucas, in his opposing affidavit on 16 December 2004: *Seodin Primary School and Others v MEC of Education, Northern Cape and Others:*

• *The process of transformation puts a lot of pressure on all resources including human resources. There are simply not enough resources available for the transition process. The result is that the government has no alternative but to restructure existing schools to accommodate all children in dire need of education (paragraph 10).*

• *For a successful transition process it is therefore imperative to concentrate on existing schools and naturally attention will be directed to Afrikaans medium schools[21]. That has nothing to do with racial politics or any hidden agenda. It is simply a matter of shortage of resources and utilising existing available resources to the optimum[22] (11).*

• *It must always be kept in mind that the effect of the decisions taken on review if implemented is only to make available education in medium Afrikaans and English. The decisions do not address the need of African language speakers to be instructed in their mother tongue languages[23] (13).*

• *We have to try to the best of our ability to administer the education process within the statuary framework and within the prevailing financial constraints (14).*

• *The first and second respondents[24] have to ensure effective access to the right to receive education in the official language of their choice in public educational*

[21] Are there no other existing English medium schools?

[22] Extra temporary classrooms could help to solve the problem. Wrenchville Primary School for example has enough space on a large unused area.

[23] The aim of the South African Schools Act 84 of 1996 on Language Policy (3) to promote and develop all the official languages.

[24] The MEC and HOD of the Northern Cape Education Department.

institutions, and are obliged to consider all reasonable educational alternatives (15.2).

- *In terms of section 28(2) of the Constitution children's best interests are of paramount importance in every matter concerning the child. This section refers to all children and the respondents are therefore bound to make decisions which promote the best interest of all children*[25] *in need of education (17).*

- *In terms of section 195(1) of the Constitution the public administration must be governed by the democratic values and principles enshrined in the constitution. These principles include the efficient economic and effective use of resources*[26] *(19).*

- *The admission policy of schools determent by the governing bodies in terms of section 5(5) of the South African Schools Act must be consistent with the Constitution, the South African Schools Act and Provincial law (21.3).*

- *The aim of the norms and standards regarding language policy is the promotion, fulfilment and development of the State's overarching language goals in school education in compliance with the Constitution namely:*

  - *the protection, etc. of individual language rights*[27]*;*

  - *the promotion of bi- or multilingualism through cost efficient and effective mechanisms*[28]*; and*

---

[25] Including Afrikaans speaking learners?

[26] For example classrooms, restrooms and huge vacant grounds that are not being used at Wrenchville Primary School.

[27] The right to quality education in a chosen language.

[28] To change a single medium school to dual or parallel medium school, for example Afrikaans and English, does not necessarily promote multilingualism.

○ *to redress the neglect of the historically disadvantaged languages in school education*[29] *(24.1).*

• *Subject to any law dealing with languages in education and the Constitutional rights of learners, in determining the language policy of the school, the governing body should stipulate how the school will promote multilingualism through using more than one language of learning and teaching and/or applying special-immersion on language maintenance programs, etc. (24.2).*

• *Section 16(1) of the Northern Cape Schools Act stipulates that the governing body of a public school may determine the language policy of the school after consultation with the Department subject to the Constitution, the South African Schools Act and the approval of the member of the Executive Council (25.3).*

• *No form of racial discrimination shall be practised by the governing body of a public school in exercising its language policy (25.4.3).*

• *The strategic objectives of the Northern Cape include the following:*

○ *to "de-racialise" and get rid of all forms of prejudice in education in the Province;*

○ *to ensure our institutions are safe, accessible, relevant, functional and of high quality*[30]*;*

○ *to mobilise and utilise resources effectively and efficiently;*

○ *to accelerate change, delivery and transformation; and.*

○ *to enhance quality in education.*

• *It must be observed that the focus point of education in the Northern Cape is the quality of the education (26.5).*

[29] By forcing those learners into traditional Afrikaans schools?

[30] The primary focus should, according to the Constitution, be to build up schools to ensure quality education.

- *Not one of the applicant schools has submitted a language policy in accordance with section 16(1) of the Northern Cape Schools Act and section 6(2) of the South African Schools Act*[31] *(27).*

- *It is clear that the letter*[32] *does not reflect the views of the department but the views of the representatives of Laerskool Seodin (35.3).*

- *Nobody, not even I have the authority to approve of such a system. It is in contradiction with the entire language policy of the Government and in particular with the Department of Education (36.2).*

- *There is, however, at present a <u>serious demand for accommodation</u> of previously disadvantaged individuals (40.5).*

- *There is an acute <u>shortage of accommodation</u> for prospective learners and that causes serious overcrowding in some of the schools*[33] *(40.8).*

- *The Department considers each and every <u>overcrowding</u> as a serious <u>attack on quality education</u>. Quality education is simply not possible in an overcrowded situation (41.5).*

- *The response by the schools make it clear that the applicant schools have only <u>one motive</u> and that is to keep their schools single medium Afrikaans. They were not prepared to consider any solution for the problem with an open mind (44.2).*

- *It was therefore clear that further consultation would not have any positive result (44.3).*

---

[31] After the court case, all the applicant schools only changed their language policies to providing education by dual medium instruction, and the MEC recognised all to be legitimate.

[32] By the Circuit Manager of the Department on the Seodin Language policy

[33] This was not the reason why the applicant schools had to change their single medium status.

- *This is also clearly the attitudes of the applicants in the application papers. They are only fighting for their schools to remain single medium Afrikaans. The dire need for accommodation for previously disadvantaged individuals in educational institutions is considered as a problem of the MEC and none of the applicants' problem (44.4).*

- *It is a well-known fact in Kuruman that the respondents ten and twelve*[34] *are seriously overcrowded (45).*

- *The Department was at all relevant times prepared to discuss the transformation plan… The transformation plan offers no solution for the present problems. The fact of the matter is that the situation in Kuruman overtook the transformation plan in order of priority (51.3).*

- *The problems advanced by the applicants are not fundamental problems, when compared with the problem of overcrowding. I in any case deny that the effect of the decisions taken was a compromise on quality. The first and second respondents have an intimate knowledge of the position at dual medium schools. The mere fact of dual medium instruction does not have any negative effect on the performance of the school (51.5).*

- *In other schools the situation is far worse. There is no money available for any other solution (56).*

- *I must emphasize that the department received many complaints since the beginning of the year about the lack of accommodation in educational institutions in the province. I never realised the seriousness of the problem that existed in Kuruman in particular (58.9).*

- *The Department has a responsibility to supply the facilities for accommodation of English speaking learners in an agricultural school. To close the doors of*

[34] Hoërskool Wrenchville and Bankara-Bodulong Combined School.

agricultural schools to English speaking learners[35] *and therefore to most of the black learners will have a very great negative impact on education as well as on agriculture in the province*[36] *(64.5).*

- *Agricultural schools are equipped with specialised and extremely expensive equipment* [37]*(64.7).*

- *The problem at the Northern Cape Agricultural School is not overcrowding, but a problem of access to the school by any one who is not Afrikaans speaking (71).*

- *These learners*[38] *with several others are still hoping for an opportunity to be accommodated in an agricultural school, sharing that privilege with their white co-learners (75.3).*

- *According to Davies, dual medium implies instruction in two languages without repetition of notions or concepts. That is not how the Department of Education understands or practices dual medium schooling. In Northern Cape schools the concept of dual medium implies repetition of each and everything said in one language in the other language*[39] *(88.4).*

- *First and second respondent did in fact consider all alternatives within the framework already mentioned and also the financial constraints and lack of resources (91.2).*

---

[35] First language users in the Northern Cape: Afrikaans – 69.3%, Setswana – 19.9%, IsiXhoza – 6.3% (www.info.gov.za/yearbook/2002)

[36] Close to The Noord-Kaapland Landbouskool is P.H. Moketsi Agricultural School (English medium).

[37] Two very old tractors and a 1981 pickup truck, very basic agricultural implements and a sprinkler system (all maintained with contributions by the parents).

[38] The Noord-Kaapland Landbouskool agreed to accommodate thirty learners, but they did not arrive.

[39] Contact time with learners should then be doubled.

- *… ten extra classrooms will be required at Bankhara-Bodulong School and twelve at Wrenchville Primary School*[40]*. The cost would amount to R2, 640,000.00*[41]*. … the mere addition of further classrooms would in no way be a suitable solution (91.3).*

- *There simply are not sufficient financial and other resources to provide a learner with adequate facilities and other recourses to provide a learner with adequate facilities. It will also result in the current physical resources at the schools to continue to suffer from overuse (91.4).*

- *Other models will also result in the Kuruman community continuing to be polarised (91.5).*

- *To resort to parallel medium tuition will necessarily mean duplication of the facilities (91.6).*

- *The aim of the Constitution is to bring <u>equality and respect for human dignity</u> (91.7).*

- *… <u>dual medium tuition is not the final answer</u>, because it does not totally eliminate the imbalances, but at least it goes some way if we succeed in providing the learners at Wrenchville Primary School and Bankara-Bodulong Combined School <u>access to better facilities and quality education</u>*[42] *(91.8).*

- *The <u>problem of overcrowding</u> and lack of accommodation for learners worsens every year. It is compelling that a solution is implemented urgently*[43] *(98.2).*

---

[40] 22 Classrooms = approximately 700 learners.

[41] Temporary classrooms would be a fraction of the cost.

[42] What about the rest of the learners staying behind?

[43] What about the following years?

- *… everything said in the classroom in one language, shall be repeated in the other*[44] *(103.4).*

- *On 26 May 2004 I held a road show at Kuruman, where I learnt about the many complaints and the seriousness of the overcrowding (121.4).*

- *I fail to understand the applicants' persistence in their accusations pertaining to some kind of conspiracy against them within the Department (123.3).*

- *… not only the Department but the entire system, including Government and to some extent the legal team of the respondents. This actually borders on corruption (123.4).*

- *It must be remembered that the applicants are referring to the most senior officials in the Department of Education*[45] *(123.6).*

- *I did in fact make this statement*[46] *during the sitting of the Northern Cape Legislature (123.7).*

- *This was a political address and the statement therefore a political statement… (127.2).*

- *I do not allow my political preferences to interfere with official decisions in my capacity as MEC. All my decisions are formed by the Constitution*[47] *and the rest of the statutory framework … (127.3).*

- *I deny that I did not consider single medium as a possibility. In fact I did consider all models and all possibilities within the financial and resource constraints. The*

[44] Time?

[45] MEC and HOD of the Northern Cape Education Department.

[46] "Schools like Laerskool Seodin and Hoërskool Kalahari, where the learner enrolment is still largely and deliberately kept lily-white as shown by their enrolment figures. This is clearly unacceptable and cannot be allowed to continue."

[47] Including the statement?

existing single medium Afrikaans models did not offer any solution for the acute problem at other schools. The financial and resource constraints dictated that single medium is not practicable as a solution for the problem (127.5).

- *The respondents have been acting in the best interest of the learners, which include all learners and not just some of them (128.4)*
- *… it remains a fact that the two schools referred to are seriously overcrowded, which makes quality education impossible (129.7).*
- *Whether Afrikaans will be under pressure will depend on the educator. If he performs according to what the Department prescribes and what he is expected to do, there can be no question of pressure on Afrikaans (131.4).*
- *The Department always endeavoured to supply adequate temporary classrooms so as to eliminate the overcrowding in classrooms as such. That does not mean that all overcrowding is something of the past because of additional temporary classrooms. Overcrowding still exists in facilities such as toilets, libraries, the principle, etc. (136.2).*
- *A very important reason for the decision that Seodin Primary School must become a dual medium school is the fact that provision has to be made for the future (144.2).*
- *The existing character of any school is not a factor that I have to consider in terms of the legislative framework (147.2).*
- *I repeat that parallel medium is a very expensive alternative (151.3).*
- *Also for that reason the Department was unable to approve Wrenchville High School's application to become a parallel medium school (151.4).*
- *Should this Honourable Court set the relevant decision aside, the disruption resulting from reversal of the interim implementation thereof, will be severe (172).*

• *Admission of learners has now been concluded with the only matter outstanding being the processing of appeals by parents to the MEC (175).*

• *Reversal would imply that every parent would have to re-apply for admission or re-registration – given that learners have already been admitted at schools and parents have formal letters to this effect. Schools will then have to process new applications and re-issue admission letters. The impossibility of this task within the available time in this school year is obvious. The schools have already closed (176).*

• *One could predict with total certainty that schools like Wrenchville Primary School and Bankhara Bodulong School will once again be grossly over enrolled. Alternatively many learners would have to be turned away and be denied access to education (178).*

(Quoted from the Opposing Affidavit by the MEC for Education in the Northern Cape (*Seodin Primary School v MEC of Education*)).

The chief of Umalusi asked in a Parliamentary session whether the Department had considered the fact that their decision might influence the performance of learners" (*Seodin Primary School v MEC of Education*).

J.C. Theron, the chairman of the Governing Body of Laerskool Seodin, declared in his affidavit that according to the national policy, instruction in the mother tongue is compulsory for foundation phase learners. The Department did not make any provision towards that right to education. He also stated that parents at Wrenchwille Primary School were heavily against the decisions of the Department, regarding the forced enrolments of learners at other schools in the Kuruman district (*Seodin Primary School v MEC of Education*).

According to Mrs. Cecilia Griqua, the mother of one of the learners at Wrenchville Primary School, who also completed her primary school education at the same school, she had to re-apply for admission for her child at Wrenchville Primary School. On 26 November 2004, she received confIrmation that her child had been placed at Laerskool Seodin as well as at Kuruman Primary School. This meant that

her child had to travel to a school, about eight kilometres further from home than Wrenchville Primary School. She said that although Laerskool Seodin and Kuruman Primary School had always been open schools, she had not enrolled her child at one of those schools because Wrenchville Primary School had always been a very good institution and the other two schools were too far from home. She filed an appeal to the MEC, together with other concerned parents, but on 18 January 2005, the day before the reopening of the school, they were informed that their appeal had failed. Mr. May of the district office called her in and tried to convince her that it was in the best interests of her child, and that Kuruman Primary School would be a much better proposition than Wrenchville Primary School, and that free transport would be arrranged, but he did not say for how long. She had also expressed her grievances due to the fact that her child would no longer be able to participate in extra mural activities. On 19 January 2005, the parents locked the gates of Wrenchville Primary School in protest against the reallocation of learners. The school was closed until 31 January 2005, and at a school meeting that evening it was decided that all the learners allocated elsewhere would be allowed back to Wrenchville Primary School (Affidavit, C. Griqua, *Seodin Primary School v MEC of Education*).

On 24 October 2005 the Kimberley High Court delivered judgment in favour of the Northern Cape Department of Education. In its judgment, the Kimberley High Court ruled that the affected schools had no stated language policies, and that the department had had no malicious intent when dual medium instruction was introduced.

Delivering judgement, Northern Cape Judge President Frans Kgomo said that it would be a sad day if some learners remained illiterate, only to protect the status of some schools (*Seodin Primary School v MEC of Education*).

According to the judgement of this case, it seems that the court's decision was based primarily on S6(2) of the Schools Act:

The governing body of a public school may determine the language policy of the school subject to the Constitution, this Act and any applicable provincial law.

I do not think that the judgement was reasonable towards the schools, if we look at S22(1) of the Schools Act:

The Head of Department may, on reasonable grounds, withdraw a function of a governing body.

and S29(2) of the Bill of Rights:

Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account

a. equity;

b. practicability; and

c. the need to redress the results of past racially discriminatory laws and practices.

The schools affected provided the Department with possible solutions regarding the overcrowding of some schools, but he did not react to the matter. The schools also stated under oath that they had language policies in place and that they had supplied the Department with copies of the policies. It was the schools' word against that of the MEC.

4.2.3 *Western Cape Minister of Education v Governing Body of Mikro Primary School, case 140/2005 (SCA)*

School doors at Laerskool Mikro were opened for the first time in January 1972, with 12 teachers and 296 learners. The school was named after the writer C.H. Kühn, who used 'Mikro" as a nom de plume. Mr. Kühn had also been a resident and principal at Kuils River in the Western Cape.

Laerskool Mikro is an Afrikaans medium public school in Kuils River whose governing body refused to agree to a request by the Western Cape Education Department to change the language policy of the school, converting it into a parallel medium school. The principal of Laerskool Mikro was then ordered by the Head of Department for Education in the Western Cape, to admit learners who preferred to be educated in English (*Western Cape Minister of Education v Governing Body of Mikro Primary School, case 140/2005 (SCA)*) (Hereafter *Western Cape Minister of Education v Governing Body of Mikro Primary School*).

The discharge of an appeal against this order of the Head of Department, to the Western Cape Minister of Education, and the resulting admission of 21 learners for education through the medium of English, resulted in an urgent application by the respondents to the Cape High Court for an order setting aside the ruling and the decision on appeal, as well as for additional relief. Mr. Erhard Wolf, the chairman of the Laerskool Mikro governing body, said that they were very proud of the high level of education that the school had achieved throughout its existence, but this could not be maintained if changes to crucial elements were to be made. He stated further that the school tried to maintain a learner-teacher ratio of 33:1, but that would be increased to 45:1 if English medium learners were to be accommodated in addition to Afrikaans-medium learners. He said that he was aware of the fact that some learners could not be accommodated at De Kuilen Primary School, the English medium school close to Laerskool Mikro, but it was the responsibility of the Department to find accommodation for them. Determining the school language policy is up to the governing body (*Western Cape Minister of Education v Governing Body of Mikro Primary School*).

The Cape High Court judge, Wilfrid Thring, criticised Education MEC, Cameron Dugmore and his HOD, Ron Swartz, for their conduct in the Laerskool Mikro-affair and ruled in favour of the school. On 18 February 2005, the application of the Laerskool Mikro governing body succeeded, and the Cape High Court:

• set aside the original directive to Mikro to admit 40 learners and to have them taught in English;

• interdicted Dugmore and Swartz from compelling Laerskool Mikro or its principal to admit learners other than in accordance with its language policy, and from "unlawfully interfering" with the school's governance or professional management;

• interdicted the Western Cape Minister of Education and the HOD, Western Cape Education Department, from instructing or permitting officials of the Department to unlawfully interfere with the government or the professional management of Laerskool Mikro; and

• ordered that the 21 learners who had already been admitted to the school be placed at another suitable school.

The court also made it clear that the relocation of the learners should take cognisancse of their "best interests" (*Western Cape Minister of Education v Governing Body of Mikro Primary School*).

Both the MEC and HOD lodged an appeal against the ruling of the court with the Supreme Court of Appeal. The latter Court ruled that, although the Department has an obligation towards the democratic transformation of the education system; to combat racism; fight sexism; battle all forms of discrimination; protect indigenous languages and cultures; and uphold the rights of all people in the country, this cannot be done by withdrawing anyone's rights. One of the functions of the governing body is to determine the admission and language policy, and this function can only be withdrawn by the Department if a school underperforms or if its actions do not correlate with national or provincial legislature. This was clearly not the case at Laerskool Mikro (*Western Cape Minister of Education v Governing Body of Mikro Primary School*).

From the judgement of this case it is evident that the court took into account the exact same legislature (S22 of the Schools Act and S29(2) of the Bill of Rights), as with the Seodin court case, but the judgement turned out to be the exact opposite.

4.2.4 *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere 2002 (4) SA 160 (T);*

Laerskool Middelburg is situated in Middelburg in the Mpumalanga Province. Since 1906, when the school was established, until the end of 2001 it had been an exclusively Afrikaans medium school. Departmental officials had had discussions with the Laerskoo Middelburg governing body in 1996, trying to persuade them to change their status to parallel medium, Afrikaans and English. The governing body argued that classrooms were fully occupied, and that seven extra classrooms would be needed to launch such a project successfully. The Department had "buried" the idea and allowed the school to continue as a single medium school. In 1999, during a school visit, Departmental officials instructed the principal to change the school to a parallel medium school. According to the governing body, it is responsible for the school's language policy, and the order by the Department was considered as victimising and legally unjust.

The governing body requested a meeting with the Department at the Magistrate's office in Middelburg on 5 November 1999. The meeting was adjourned when no settlement was reached. At a subsequent meeting requested by the Department, the officials argued that the school was not full. The governing body replied that the school's facilities were being used to the maximum. After an audit by the Department, a third meeting took place. During this meeting the officials stated that enrolments at the school had increased by a mere 20 learners during recent years, and that only teachers employed by the Department were entitled to classrooms, in other words, teachers employed by the governing body were not entitled to have their own classrooms. On 28 November 2001, while the principal was on official leave, Mr. Zwane, a member of the Mpumalanga Department of Education instructed the school to admit 20 learners for the year 2002, stipulating that the learners were to be taught in English. Mr. Zwane threatened Mr. Erasmus, the deputy principal of the school with dismissal if he did not obey departmental instructions. To avoid disciplinary action, Mr. Erasmus facilitated the enrolment of the 20 learners. The parents of those learners were informed at a later stage that

their children could not be accepted because the medium of instruction was Afrikaans single medium only ((Founding Affidavit of J. J. Meiring, chairman of the governing body of Laerskool Middelburg) (Laerskool Middelburg en 'n ander v Departementshoof, Mpumalanga Departement van Onderwys en andere) (Hereafter Laerskool Middelburg v Departementshoof)).

In January 2002, after the school's power to admit learners was withdrawn, eight learners were admitted to the school to be taught in English. The school refused to become a dual medium school and took the Mpumalanga Department of Education to court, based on the following:

• according to S5(5) and S6(2) of the Schools Act, the governing body of a school is entitled to develop their own admission and language policies;

• their school's policy correlated fully with regulations set by the Constitution, the Schools Act and the Provincial Law;

• the Department is not allowed to ignore any national policy or the school policy in order to enforce its will;

• there are English and parallel medium schools in the direct vicinity, with ample space and facilities to accommodate the group of learners;

• the multicultural composition of the school showed that there was no form of racial discrimination regarding the admission of learners;

• it is very difficult for a school to handle additional applications at the beginning of a school year, in particular if those learners require a medium of instruction not previously offered by the school. Everything needs to be planned before the start of a new school year, for example the school budget, study material, various allocations, additional teachers, etc.;

• proceedings by the Department are against all regulations and as such, illegal;

• the parents of the school, having enrolled their children in an Afrikaans medium school (the medium of instruction on which they have the right to decide), will not be pleased if they do not have any say in the transformation; and

• the school can not afford to lose loyal parents who carry the school financially, due to this or any other dispute (Laerskool Middelburg v Departementshoof).

Mr. John Sikhosana (also known as Skhosana), the HOD for Education in Mpumalanga in his affidavit, stated that although two other primary schools, Kanonkop and Dennesig, in the same district, accepted the need for converting into parallel medium schools, Laerskool Middelburg rejected the requirement. An incursion of workers in the feeding area resulted in a higher demand for education, especially in English. Numbers of learners grew to such an extent, that other schools like Laerskool Middelburg, also had to provide accommodation for some of the learners. He said that his actions were in line with the Department's policy of using existing facilities to the full, before starting the building of new schools. He added that the Department had acted correctly by allowing the school to continue as normal in 1996, but they presently had to prohibit the school from admitting learners due to its informal language and admission policy. The reason was that neither the school nor its governing body had, to date, submitted any form of admission policy for approval to the Department (Laerskool Middelburg v Departementshoof).

In regard the school's alleged space problems, the HOD said that there were fewer than 40 learners per classroom and according to him, a ratio of 40:1 was the norm. That ratio would provide ample space for additional enrolments and should this cause the school to run into space problems, the Department would provide extra classrooms (Laerskool Middelburg v Departementshoof).

Laerskool Middelburg asked the Court to:

• set aside the decision by the Department to declare the school a parallel medium school;

• forbid the HOD to handle the school administratively as if it were a parallel medium institution;

• that the principal, in collaboration with the governing body of the school, retain responsibility for the admission of learners in accordance with the school policy;

• forbid the HOD to give orders to the principal of the school, and to stop interfering with the language and admission policy of the school, because it is in contradiction with the regulations in the Constitution, the Schools Act, Provincial Law and other national and provincial policies; and

• hold the Department responsible for all costs regarding the court case (Laerskool Middelburg v Departementshoof).

The following is the juridical framework set by the school, against which the actions of the HOD and the Department of Education needed to be reviewed:

• regarding the stipulations of S29(1) of the Constitution, every person has the right to basic education;

• S29(2) of the Constitution stipulates that every person has the fundamental right to be educated at a public institution in the official language of his/her choice, where it is reasonably possible. In order to guarantee the successful admission to, and execution of this right, government must consider all logical educational alternatives, including single medium institutions, regarding equity, practicability, and the need to restore any form of discrimination in law and in practice;

• S2(2) of the Schools Act instructs that the power of the HOD and Education Department has to be acted out in accordance with the National Policy of Education;

• according to S5 of the Schools Act:

○ a public school has to admit learners and fulfil their needs without any form of discrimination (S5(1));

○ the governing body of a school has the right to develop its own admission and language policies (S5(5));

• the Mpumalanga Schools Act is not always in accordance with the National Schools Act and is sometimes contradictory to the Schools Act;

• according to regulations set in Government notice R1701 of 19 December 1997 by the Minister of Education:

○ the school is only compelled to admit a learner whose chosen medium of instruction is the same as the language of the school;

○ the school is only compelled to admit a learner if the school is not full;

○ if there is no school in the district that can provide the learner with education in the chosen language, he or she may direct a request to the Department to provide education in that language;

• S16(1) determines that the governing body of the school must take responsibility for the general management of the school, including legal aspects, while the principal and the school management team are accountable for the professional management of the school (S19(2)) (Laerskool Middelburg v Departementshoof).

In his judgment, Judge Bertelsmann rejected the application of the school to set aside the decision of the Mpumalanga Department of Education to declare the school a parallel medium school. In his judgment he stressed section 28(2) of the Constitution, Act no. 108 of 1996, which states that:

A child's best interests are of paramount importance in every matter concerning the child.

If learners were turned away, their best interests would be affected. These interests include the fact that the concerned school is the best school in Middelburg, academically as well as in respect of sport and cultural activities. Forced removal could have a negative impact on the learners, because they might feel rejected, and

also because close friendships with classmates may already have been formed. Furthermore, the school is the school closest to their homes (Laerskool Middelburg v Departementshoof).

4.3 Conclusion

One might think that the outcomes from the judgments are all in the best interest of the child, but the article of 26 January 2005, *NCAPE police use stun grenade against parents at school*, shows that parents at Wrenchville Primary School threatened to take the Education Department to court after their children were transferred to the nearby, Afrikaans-only schools and Wrenchville Primary School had to be temporarily closed by the Department after the parents had decided to keep their children at home (2005).

Chapter 5: Conclusion and recommendations

There are very few countries where a classroom is filled with learners of only one race or culture. Because of this situation, language policy in education is a very sensitive matter that sometimes provokes tension between different parties. There are 11 official languages in South Africa, and to keep every language group satisfied that it is not discriminated against is a huge and challenging task for government. Legislation confirming this task is enclosed in the Bill of Rights:

5.1 Government obligations

7. Rights

1. This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

2. Government must respect, protect, promote and fulfil the rights in the Bill of Rights.

9. Equality

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.

2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination, may be taken.

3. Government may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

As the Constitution states, we must also recognise our cultural diversity as a national asset. Government, through the Language in Education policy, aims to build a non-racial nation in South Africa.

Another primary focus of the Department is to build up and restore previously disadvantaged schools, so that every public school in South Africa will be more or less on the same, high standard to ensure quality education. Any learner also needs to be proud of his/her school and the ethos should include a safe, learner-friendly environment:

From the preamble of the Schools Act:

Whereas this country requires 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 in so doing, 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 organization, governance and funding of schools in partnership with the State.

5.2 Aims of the Ministry of Education Policy for Language in Education

The main aims of the Ministry of Education Policy for Language in Education are:

- *to promote full participation in society and the economy through equitable and meaningful access to education;*

- *to pursue the language policy most supportive of general conceptual growth amongst learners, and hence to establish additive multilingualism as an approach to language in education;*

- *to promote and develop all the official languages;*

- *to support the teaching and learning of all other languages required by learners or used by communities in South Africa, including languages used for religious purposes, languages which are important for international trade and communication, and South African Sign Language, as well as Alternative and Augmentative Communication;*

- *to counter disadvantages resulting from different kinds of mismatches between home languages and languages of learning and teaching; and*

- *to develop programmes for the redress of previously disadvantaged languages* (Language in Education Policy, 1997).

All language policies must be written in accordance with the Constitution, the South African Schools Act, as well as the Provincial Schools Act. Crucial stipulations by law are encapsulated in the legislation specified below.

5.3 Conditions considered while setting up a school language policy

S9(4) of the Bill of Rights:

No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. National legislation must be enacted to prevent or prohibit unfair discrimination.

S28(2) of the Bill of Rights:

A child's best interests are of paramount importance in every matter concerning the child.

S29(2) of the Bill of Rights:

Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account

a. equity;

b. practicability; and

c. the need to redress the results of past racially discriminatory laws and practices.

S30 of the Bill of Rights:

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

S31(1) of the Bill of Rights:

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community:

a. to enjoy their culture, practise their religion and use their language; and

b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

S5(1) of the Schools Act:

A public school must admit learners and serve their educational requirements without unfairly discriminating in any way.

S6(2) & (3) of the Schools Act:

(2) The governing body of a public school may determine the language policy of the school subject to the Constitution, this Act and any applicable provincial law.

(3) No form of racial discrimination may be practised in implementing policy determined under this section.

SC(1) The rights and duties of the school within the norms and standards regarding language policy, under the Norms and Standards for Language Policy in Public Schools in the Schools Act:

Subject to any law dealing with language in education and the Constitutional rights of learners, in determining the language policy of the school, the governing body must stipulate how the school will promote multilingualism through using more than one language of learning and teaching, and/or by offering additional languages as fully-fledged subjects, and/or applying special immersion or language maintenance programmes, or through other means approved by the Head of the Provincial Education Department.

The process of setting up a school policy includes consultations with the Department of Education and the school must make sure that its policy is signed off by at least the MEC of Education for the particular province.

5.4 Promote multilingualism

Although the language section in the Schools Act prescribes the promotion of multilingualism by using only two languages in a school, I feel that a third language must be brought back as a compulsory subject for every learner in South Africa (at least until grade 9), in order for learners to communicate effectively and live in harmony in our rainbow society and to engender basic respect for one another. The isiZulu word, *ubuntu* combines this vision of coalition in the isiZulu saying, *umuntu ngumuntu ngabantu*, that literally means that a person is a person through other people, and is evidenced through basic respect and empathy for your fellow human being. For post-*apartheid* South Africa with its diversity of cultures, *ubuntu* instructs us to acknowledge the true differences between ourselves and our fellow citizens.

This means that we must acknowledge the diversity of languages, norm, habits and every other aspect that constitutes the South African nation.

5.5 Judgments

There is a reason why court cases settled based on arguments by the different parties involved. If a person has an illness for example, it is better to cure the illness than only to suppress the symptoms. Sometimes, in order to do that, the knowledge of a specialist could provide answers, but even then, they could miss vital matters and the diagnosis could be wrong. Every person is therefore entitled to a second opinion.

All judges are human beings, and the fact that judgments on court cases could be based on a naturalistic view, i.e. the belief that laws endorsed by a government are not the only sources of law, and that moral philosophy, religion, human reason and individual conscience are also integral parts of the law (Grove, 2006: 2), can not be excluded.

As indicated in the problem statement of this study the focus is on the four cases, similar cases. Although the facts of the cases seem similar, the issues before the court were totally different, and therefore the judgments differ, as seen from the findings of the study.

If these cases could have been presented by mathematical functions, understanding the outcomes could have been relatively clearer from the beginning. Each case dealt with a number of variables and limited constant values. These put together, an outcome was reached. In the four cases, the constant values were the learner and the language, but the variables differed accordingly. Any mathematician would be able to foresee the different outcome because of the variables within.

Ermelo managed to swing judgment in their favour, because they were able to work with the variables and use it to change the outcome of the case in their favour.

Bibliography

Afrikaans school can't appeal. 19/02/2007. [online]. Available: http://www.news24.com/News24/South_Africa/News/0,9294,2-7-1442_2068738,00.html. Sapa [26 March 2009]

Pilot Project allows learners to study in their own language, ANC Daily News Briefing, 6/9/2000. [online]. Available: http://70.84.171.10/~etools/newsbrief/2000/news0906.txt. Sapa [27 March 2009]

Kuruman, ANC Daily News briefing, 20/1/2005. [online]. Available: http://70.84.171.10/~etools/newsbrief/2005/news0121.txt. Sapa [16 February 2008]

Babbie, E. 1992. The practice of social research, Sixth edition, California: Wadsworth, Inc.

Bak, N. 2008. Completing your thesis, South Africa (Pretoria): Van Schaik Publishers

Barnett, G. and Barnett, M. 2007. A research guide for law students and beginning attorneys. [online]. Available: http://law.usc.edu/library/assets/docs/ResearchGuide2007.pdf. [16February 2008]

Beckmann, J.L., 2007. Aligning school governance and the law: Hans Visser on education cases and policy, [online] Available: www.up.ac.za/dspace/bitstream/2263/3256/3/Beckmann_Aligning. [26 August 2008]

Beckmann, J.L., Prinsloo, J. 2004. Towards an analytical framework for accountability regarding equal educational opportunities. Perspectives in Education, Volume 22(3), September 2004

Blaine, S. 2004. Mother tongue learning will raise standard, say experts. Sunday Times (Business Day), 18 September 2004.

Borgatti, S. P. 1999. Elements of Research, Theoretical Framework, [online], Available: http://www.analytictech.com/mb313/elements. [16 February 2008]

Bottery, M., 2000. Education, Policy and Ethics, London: Wellington House

Bray, W. 2008. Foundations of Law and Education Law, Pretoria: CELP

Chesterman, M. Chan, J. and Hampton, S. 2000. Managing prejudicial publicity, [online], Available: http://www.lawfoundation.net.au/report/prejudicialpublicity/172F9AAA86787F94CA257060007D13B0.html. [16 February 2008]

Cohen, L., Manion, L. and Morrison, K. 2000. Research methods in education, New York: Routledge Falmer.

Devenish G.E., 1998. A commentary on the South African Constitution, Charlottesville, Va.: Butterworths

Davies, E.H., 2004. Expressing his opinion on the practical implications of instruction in dual-medium schools (*Seodin Primary School and Others v MEC of Education, Northern Cape and Others, 2006 (4) BCLR542 (NC)*)

De Bruyn, P., Regsman wil wet hê om tale te beskerm, Die Beeld, 21/05/2008

De Havilland, N. 2008, The fate of Afrikaans-medium schools, [online], Available: http://www.cfcr.org.za/?p=398. [26 March 2009]

De Varennes, F. 2004. The right to education and minority language, [online], Available: http://www.eumap.org/journal/features/2004/minority_education/edminlang. [25 July 2008]

Dickson, J. 2005. Interpretation and Coherence in Legal Reasoning, Encyclopaedia of Philosophy, [online], Available: http://plato.stanford.edu/entries/legal-reas-interpret. [20 January 2009]

Gascoigne, B. Sa, History of Language, [online]. Available: http://www.historyworld.net/ [28 January 2009]

Grove, T. 2006, Jurisprudence, [online], Available: http://www.law.cornell.edu/wex/index.php/Jurisprudence. [16 February 2008]

Himma, K.E. 2008, Law and Language, Stanford Encyclopaedia of Philosophy, [online], Available: http://plato.stanford.edu/entries/law-language. [20 January 2009]

Hoërskool Ermelo, Ons Geskiedenis, [online], Available: http://www.erries.co.za. [23 March 2008]

Horne, T.J. 2001, Education and Language Transferees. The Education African Forum

Joubert, R. 2004, Education Law reading material and Study Guide, Pretoria: University of Pretoria.

Joubert, R. and Prinsloo, S. 2009. The Law of Education in South Africa, Pretoria: Van Schaik Publishers.

Kleyn, D. and Viljoen, F. 2007. Beginner's guide for law students, Lansdowne: Juta Publishers.

Kriel, K. 2008. Campaign to keep Ermelo Afrikaans, [online], Available: http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=85727&sn=Detail [26 March 2009]

Laerskool Seodin, Ons ryke Geskiedenis, Historiese oorsig van Laerskool Seodin vanaf 1920, [online], Available: http://laerskoolseodin.jjsfreelancing.co.za/html/geskiedenis.html. [23 March 2007]

Language in Education Policy, Department of Education, 14 July 1997, [online], Available: www.polity.org.za. [16 February 2008]

Language development in every learning area, Sa, [online], Available: http://www.heinemann.co.za/Schools/TeachingTips. [16 February 2008]

Le Roux, J. 1997. Multikulturele Onderwys, Wat elke onderwyser moet weet, Pretoria: Kagiso

Lubbe, J. Du Plessis, T. Truter, E. and Wiegand, C. 2004. Final report on the first South African Language Rights Monitor Project, [online], Available: http://www.uovs.ac.za/faculties/documents/01/153/D025/12840-2002.pdf. [16 February 2008]

Malherbe, R. 2004. The constitutional framework for pursuing equal opportunities in education. Perspectives in Education v22 n2, South Africa: University of Pretoria

Malherbe, R. 2006. Some thoughts on legality and legal reform in the public school sector, [online], Available: https://www.up.ac.za/dspace/bitstream/2263/3294/1/Visser_Some(2006).pdf. [28 July 2008]

Mangena, M. 2002. Address by the Deputy Minister of Education at the PANSALB Multilingualism awards ceremony, CSIR Conference Centre. 22 November 2002, [online], Available: http://www.search.gov.za/info. [24 May 2008]

Maree, K. 2007. First steps in research. South Africa: Van Schaik publishers

McBurney, D.H. 1994. Research Methods, Belmont: Wadsworth, Inc.

McMillan, J.H. and Schumacher, S. 2001, Research in education. Cape Town: Longman.

National Language Policy Framework, Final Draft, 13 November 2002, [online], Available: http://www.info.gov.za/otherdocs/2002/langpolframe.pdf. [28 February 2008]

Neuman, W.L. 1997, Social Research Methods. Needham Heights: Allyn and Bacon

Nggengele, L. 2007. Minister of Education, Naledi Pandor, supports mother-tongue education, [online], Available: http://www.education.gov.za/dynamic/dynamic.aspx?pageid=310&id=2485. [26 March 2009]

Ngubane, B.S. 2002. National Language Policy Framework: Foreword by the minister of arts, culture, science and technology, [online], Available: http://www.info.gov.za/otherdocs/2002/langpolframe.pdf. [26 May 2008]

Pandor, N. G. 2007. Government speeches: Minister Pandor supports mother-tongue education, [online], Available: http://www.info.gov.za/speeches/2007/07021517151001.htm. [16 June 2008]

Permuth, S and Mawdsley R.D., 2006, Research Methods for Studying Legal Issues in Education, Ohio: Education Law Association

Petropulos, M. 2005. Baba - en Kindersorg. Paarl, South Africa: Paarl Print

Rademeyer, A., Gr. 3's presteer beter, Die Beeld, 7/11/2008

Rademeyer, A., Skool mag eie taal kies, Die Beeld, 28/03/2009

Ritzer, G. 1996, Sociological Theory, Singapore: McGraw-Hill Book Co.

Shaba, S., Campher, T., Du Preez, P., Grobler, B. & Loock, C. 2003. Effective Education Management Series, Module 4 South African Law in Education, Sandown: Heinemann Publishers (Pty) Ltd

The Citizen, 7/13/2007, Ermelo language battle in court, [online], Available: http://www.citizen.co.za/index/article.aspx?pDesc=43318,1,22. [16 February 2008]

The Citizen, 7/13/2007, Judgment was retained, [online], Available: http://www.citizen.co.za/index/article.aspx?pDesc=43318,1,22. [16 February 2008]

Thompson, D., Arora, T. & Sharp, S. 2002, Bullying: effective strategies for long-term improvement, London: Routledgefalmer

Rundell, M., Fox, G., & Hoey, M. 2002, The Macmillan English Dictionary, Oxford: Macmillan Publishers Limited

Van Tonder, W. 1999, Language-in-Education in South Africa: the process, [online], Available: http://www.und.ac.za/und/ling/archive/vton-01.html. [28 August 2008]

Van Wyk, J. 2004. Openbare skole moet alle gemeenskappe dien, Die Volksblad, 28/9/2004

Vithal, R and Jansen, J. 2004. Designing your first research proposal. Lansdowne: Juta and Co. Ltd.

Webster, A., 1990. Introduction to the Sociology of Development, London: The Macmillan Press Ltd.

Legal Authorities:

Hoërskool Ermelo v Departement van Onderwys, Saaknommer 3062/07, 02/02/2007, [online], Available: http://www.sabinet.co.za/sabinetlaw/congenz/HighSchoolErmeloCasesAug07. [28 April 2007] &

Hoërskool Ermelo v The Head of Department of Education: Mpumalanga (219/08) [2009] ZASCA 22, [online], Available: www.fedsas.org.za. [28 July 2009]

Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys, en Andere, 2003 (4) SA 160 (T), [online], Available: http://www.uovs.ac.za/faculties/documents/01/153/D025/12840-LRM_2002.pdf, Final report on the first South African Language Rights Monitor Project. [23 March 2007]

Seodin Primary School and Others v MEC of Education, Northern Cape and Others, 2006 (4) BCLR542 (NC), [online], Available: http://www.ncedu.gov.za/index.php?option=com_docman&task=doc_view&gid=494, Seodin Primary School and Others v MEC and Others 1177/2004. [23 March 2007]

&
http://www.ncedu.gov.za/index.php?option=com_docman&task=doc_view&gid=494. [18 May 2008]

Western Cape Minister of Education v Governing Body of Mikro Primary School, case 140/2005 (SCA)), [online], Available: http://www.law.wits.ac.za/sca/summary.phpcase_id=13073. [23 March 2007]

Legislation:

Language policy and plan for South Africa (Final Draft), The advisory Panel on Language Policy to the Minister of Arts, Culture, Science and Technology, 6 November 2000, [online], Available: http://curriculum.pgwc.gov.za/php/circular_docs/language_policy_and_plan_for_sa.htm. [5 August 2009]

South Africa (Republic of). 1996. Constitution of the Republic of South Africa. Pretoria: Government Printers.

South Africa (Republic of). 1996. South African Schools Act 84 of 1996. Pretoria: Government Printers.