

The power of the school governing body to determine admission policy:  
An analysis of recent case law

By

Zanele Fortunate Masango

Student Number: 04422147

Submitted in fulfilment of the requirements for the degree

LLM – Child Law

In the Faculty of Law,  
University of Pretoria

October 2017

Supervisor: Professor Ann Skelton

## **ACKNOWLEDGEMENTS**

I would like to thank God my Lord and Saviour for all that I am. Thank you to my family and friends who have always supported me. A Special thanks to my mother whose confidence in me I cannot fathom. To my beautiful children Cebelihle and Mbalenhle, thank you for being such amazing children, mommy loves you. To my partner Cebo Mahamba, I love and thank you for being a part of my life.

To my kind supervisor Professor Ann Skelton, thank you for all your guidance, patience and support.

## Contents

Acknowledgements.....	2
Contents.....	3
Chapter 1.....	4
1.1 Introduction and overview.....	4
1.2 The South African Schools Act and the Constitution.....	4
1.3 International Law.....	5
Chapter 2.....	9
The history of education in South Africa.....	9
2.1 Education during the Pre-colonial Era.....	9
2.2 Education during the colonial Era.....	9
2.3 Education during the Union years.....	11
2.4 Education during the Apartheid Era.....	11
2.5 Education in the Post – Apartheid Era.....	14
Chapter 3.....	18
3.1 The South African Schools Act in relation to admissions.....	18
3.2 Section 5(5) of the South African Schools Act.....	19
3.3 The role of School Governing Bodies.....	20
Chapter 4.....	25
4.1 The case law relating to admissions policy.....	25
4.2 Hoerskool Ermelo.....	25
4.3 Rivonia Primary School.....	29
4.4 Federation of Governing Bodies for South African school.....	34
Chapter 5.....	41
5.1 Conclusions and Recommendations.....	41
Bibliography.....	45
Books .....	45
Journal Articles.....	45
South African case law.....	47
Foreign case law.....	48
South African legislation.....	48
International Instruments.....	48
Reports.....	49

# Chapter 1

## 1.1 Introduction and overview

“Teaching and learning are as old as human beings have lived.”<sup>1</sup> There is no underestimating the value of education. Education is rated as the number one investment that a country can make.<sup>2</sup> “There is also no denying that education is the engine of any society.”<sup>3</sup> This is the reason why the right to basic education as provided by the Constitution is of great importance.<sup>4</sup> The power of the school governing body (SGB) to determine admission policy has a vital effect on a learner’s right to receive a basic education, this is because the Schools Act makes it the school governing bodies’ duty to determine admission policies in the particular school they require admission in, in order to receive a basic education. The power of determining admission policies has a vital influence on the capacity/number of learners that can be admitted to the particular school. The power of the SGB to determine admission policies is a power that is derived from the South African Schools Act (SASA) which came into effect in 1996. The Act was developed in order to transform the past education system which was based on racial inequality and segregation.<sup>5</sup>

## 1.2 The South African Schools Act and Constitution

Section 5(5) of the SASA provides that:

*“Subject to this Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school.”*<sup>6</sup>

The SASA makes it mandatory that SGBs take into consideration other laws in the country when exercising their power to determine admission policies. The most significant law to be taken into consideration is the supreme law of the country which is the Constitution, as any law which is contrary to the Constitution can be declared

---

<sup>1</sup> Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another 2016 ZACC 14 paragraph 1.

<sup>2</sup> The United Nations Convention on Economic, Social and Cultural Rights, adopted on 16 December 1966, ratified by South African Government on 12 January 2015 and entered into force 12 April 2015, General Comment 13.

<sup>3</sup> The Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 2 SA 415 (CC) paragraph 2.

<sup>4</sup> The Constitution of the Republic of South Africa 1996 section 29(1)(a).

<sup>5</sup> The South African Schools Act, No 84 of 1996 (the preamble).

<sup>6</sup> The South African Schools Act section 5(5).

invalid.<sup>7</sup> The Constitution of the Republic of South Africa is the supreme law of our country and as such all legislation enacted in this country must be in line with the values of the Constitution, which among others are to promote equality and to redress the past of unjust laws.<sup>8</sup> The Court in *Hoërskool Ermelo* found that the Main purpose of the Schools Act is to give effect to the Constitutional right to education.<sup>9</sup>

Section 39(1) of the Constitution provides that:

*“When interpreting the bill of Rights a court, tribunal or forum-*

- (a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
- (b) Must consider international law; and*
- (c) May consider foreign law.”<sup>10</sup>*

### **1.3 International Law**

When executing their powers as provided for by the SASA, SGBs have a duty to make certain that the admission policy they have written are not only in line with the Constitution but are also in line with the international laws that South Africa has ratified. The international laws which South Africa has ratified that protect and promote the right to education and thus require our internal laws to be in line with are: The United Nations Committee on the Economic, Social and Cultural Rights (CESCR), The African Charter on the Rights and Welfare of the Child (ACRWC), The United Convention on the Rights and Welfare of the Child (CRC).

The CESCR under general comment No 13 deals with the right to education which provides that:

*“Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights*

---

<sup>7</sup> The Constitution section 2.

<sup>8</sup> The Constitution the preamble.

<sup>9</sup> *Hoërskool Ermelo* paragraph 55.

<sup>10</sup> The Constitution section 39(1)

*and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments states can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.”<sup>11</sup>*

The CESCR has emphasised that education in all spheres must have the following interrelated and essential features known as the 4A-s, which are availability, accessibility, acceptability and adaptability.<sup>12</sup>

- (1) Availability- relates to the fact that educational institutions must be available in order for children to receive an education, this responsibility squarely falls within the remit of the Minister of Education for Basic Education.<sup>13</sup> What a functioning educational institution requires to function includes, but is not limited to buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries and teaching materials.<sup>14</sup>
- (2) Accessibility- means that the educational institutions must be accessible to all children so that they can receive an education. This is an essential feature in the power vested in the SGB to determine admission policies, as the policies they make must ensure that all children who require admission to the school will be able to have access to the school by being able to enrol and attend the school without discrimination. Educational institutions must be within a reasonable distance for learners to reach. Accessibility also requires that education be affordable to all and not just certain individuals within a certain class or race.
- (3) Acceptability- with regards to the power of the SGB means that the policies they make must be of an acceptable nature, meaning that they must be in line with the SASA, the Constitution and the international laws that South Africa has ratified. The policies cannot be discriminatory in nature and in conflict with

---

<sup>11</sup> CESCR Committee's General Comment 13.

<sup>12</sup> Tomasevski K "Human rights obligations: making education available, accessible, acceptable and adaptable (2001) page 13. Also CESCR Committee's General Comment 13.

<sup>13</sup> Ibid.

<sup>14</sup> Franklin, S and McLaren, D 'Realising the Right to Basic Education: An analysis of the content, policy effort, resource allocation and enjoyment of the Constitutional right to a basic education (2015) Studies in Poverty and Inequality Institute, Working Paper 10, page 6.

the values of the SASA, the Constitution and the international laws that have been ratified by South Africa.<sup>15</sup>

(4) Adaptability- this means that the admission policies that the SGB's determine must be flexible in nature in order to adapt to the educational needs of all children to allow them access to their right to receive a basic education. The policies must adapt to the changing needs of the communities and the learners they serve. The admission policies created by SGBs cannot be stagnant in nature.<sup>16</sup> In the words of Deputy Chief Justice Moseneke in *Hoërskool Ermelo* "Good leaders recognise that institutions must adapt and develop".<sup>17</sup> For instance if a school's admission policy with regards to language is that it only admits Afrikaans speaking children into the school, the SGB must be able to adapt to change and be flexible enough to cater for the needs of English speaking learners should they require admission to the school where Afrikaans is a medium of instruction where it is reasonably practicable in order to meet the educational needs of the children concerned. This would be in line with section 28(2) and section 29 of the Constitution.

The ACRWC under article 11(1) provides that:

*"Every child shall have the right to an education"*.<sup>18</sup>

Article 11(2) (e) provides further that:

*"The organs of state must take special measures in ensuring equal access to education for all sections of the community"*.<sup>19</sup>

With regards to the power of the SGB's in determining admission policies they should ensure that the policies they determine are in line with the ACRWC in that they make equal access to education for all sections of the community and not just the community they are located. Lastly another international law that South Africa has ratified is the CRC which provides under article 28 that:

*"All children have the right to a primary education, which should be free"*.<sup>20</sup>

---

<sup>15</sup> Ibid.

<sup>16</sup> Tomasevski 2001 page 15.

<sup>17</sup> Hoërskool Ermelo paragraph 80.

<sup>18</sup> The African Charter on the Rights and Welfare of the Child, ratified by South Africa on 7 January 2000 Article 11(1).

<sup>19</sup> The ACRWC Article 11(2) (e).

In South Africa under the leadership of the African National Congress which has been in power for over 20 years, there have been commendable improvements with regards to access to educational institutions. Some schools in South Africa have been declared non fee-paying schools for those who are unable to pay, and a child cannot be excluded from school due to a failure to pay fees. To a certain extent one can concede to the fact that our government is to a certain extent upholding the values of the CRC.

Overall, this study will extensively look at whether the SASA, Constitution and all the international laws that have been ratified by South Africa, provide any meaningful guidelines to SGB's in their power to determine admission policy in South African Public Schools. A power which was entrusted by the SASA for SGBs to use for the democratic good of all learners.

In chapter 2 the history of the South African educational system will be analysed. After having seen where the history of education originates and having seen the impact that the old education system had and to a great extent still has to this very day, the writer will look at whether any change has been achieved with the current education system. In chapter 3 the writer will focus on the SASA and the Constitution in order to understand if the relevant sections provide valuable guidelines in assisting the SGB to best perform the powers entrusted in them. In chapter 4 an in-depth discussion will focus on three cases which have reached the Constitutional Court and dealt with admission policies in public educational institutions, focusing on what long term effects or solutions are provided by them, and whether any effects or solutions are provided.<sup>21</sup> In chapter 5 the writer will conclude and make recommendations how in future SGBs and HODs should cooperate and engage with each other in good faith, in order to avoid litigation and ultimately give effect to the immediately realisable right to a basic education.

---

<sup>20</sup> The convention on the Rights of the Child adopted by the General Assembly Resolution 44 of 20 November 1988, South Africa ratified the document on 15 December 2015, Article 28.

<sup>21</sup> The writer will not include an in-depth discussion on the Head of Department, Department of Education, Free State Province v Welkom High School judgment as the case dealt more with exclusion policy than admission policy although it also dealt with some of the same tensions between the SGB and the HOD.



## Chapter 2

### The history of education in South Africa

#### 2.1 Education during the Pre-colonial Era

The history of education in South Africa dates back to the time when communalism formed the basis of life among Africans and education was conducted informally in a manner that benefited the extended family.<sup>22</sup> During the pre-colonial times no formal schooling was attended by the African communities.<sup>23</sup> But knowledge was passed on to the younger children from older members of the community.<sup>24</sup> So although children did not attend formal schooling, they learned through their seniors the traditions of life.

#### 2.2 Education during the colonial Era

This was followed by the colonial era when missionaries had a leading role in providing education for Africans.<sup>25</sup> Education was given more consideration by the British authorities than by the Dutch.<sup>26</sup> They used education as a means for social control and to introduce their language and traditions.<sup>27</sup> Education was established along social class, rich parents could afford to send their children to private schools.<sup>28</sup> Many children did not receive education as schooling was not compulsory.<sup>29</sup> Education for Africans was provided for by mission schools aimed at teaching them the western traditions of life regarding certain work values.<sup>30</sup> During the colonial times we see that formal education was more established as it was of significance to the British authorities, they saw that by educating Africans they could direct them to do and be as they needed them for their interests.

The discovery of gold and diamonds in the 1860s transformed South Africa from a rural-agricultural to an urban-based industrialized complex, which influenced the

---

<sup>22</sup> Farrant J S *Principles and practices of education* (2006) 30.

<sup>23</sup> Christie P *The right to learn: The struggle for education in South Africa* (1986) 30.

<sup>24</sup> Ibid.

<sup>25</sup> Christie P 1986 10.

<sup>26</sup> Christie P 1986 34.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Christie P 1986 36.

curricular issues profoundly.<sup>31</sup> South Africa became more urban and was not only rural, this brought about political, economic and social changes.<sup>32</sup> Afrikaners felt their status threatened on two fronts, on the one hand they feared that they would be forced into subservience by the more sophisticated British settlers and secondly, they feared that blacks would compete with them for employment.<sup>33</sup> This rapid industrialization accompanied by a devastating drought in the 1880s intensified the need among Afrikaners for an educational system that would provide them with an improved economic and political status over the blacks.<sup>34</sup> Afrikaners felt threatened that they would be on the same level as black people competing on an equal footing, they saw the need to create a plan that would make them superior to black people, and what better way than to come up with an educational curriculum that would make any competition between the two non-existent. A decision was made to only teach black people sufficient to do manual labour so they would be used as the labourers of the country and never to have a leading role in the economy.

In 1889 Dale Langham who was a Superintendent General of Education argued in the Cape Parliament for a differentiated education system that would ensure that whites would maintain their supremacy, while the mass of Africans would be confined to humbler positions.<sup>35</sup> Dale formed the view that in order to maintain white supremacy there had to be a calculated opposition to the development of black schooling from within the dominant classes on the grounds that it could be politically and economically dangerous and disadvantageous to the capitalist interest if blacks received the same education as white people.<sup>36</sup> He was further of the view that if a system was introduced that would make school attendance compulsory for black people, this would lead to mischief and social disturbance for the white people because an educated black person would then want to break free from the tribal customs and savage life he knew before he was educated.<sup>37</sup> Educating black people would provide them with knowledge and since knowledge is power, this power for

---

<sup>31</sup> Jansen JD "Curriculum as a political phenomenon: Historical reflections on black South African Education" (1990) 198.

<sup>32</sup> Christie P 1986 44.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Jansen JD 1990 198.

<sup>36</sup> Moltano F *Part one: The origins of Black Education, The Historical Foundations of the schooling of Black South Africans* (1984) 73.

<sup>37</sup> Ibid.

black people would be of ill for white people if they would want to be a part of the political and economic capitalist interest.<sup>38</sup>

By denying black people a chance to be educated white people were eliminating any chance of their position of supremacy from being threatened because if black people knew that education could improve their living conditions they certainly would want to be educated. Therefore white people had to work hard to come up with an education system that would always allow them to be superior to black people. Black people and white people could according to the white regime never be in the same position as they felt they always were to be the leaders and black people would just do as they were told.

### **2.3 Education during the union years**

During the late 1920s and early 1930s the Dutch Reformed Church made the connection between white poverty and education, and particularly the failure of poor Afrikaner children to master the dual mediums of instruction, as English was introduced by Britain as the sole official language in the ex-republics.<sup>39</sup> Afrikaner children were not performing to their utmost as they found it difficult to learn in a language that was not their home language, and this had the negative effect for them as they could not do well in school and as such there was no chance of them improving their economic status through education so they could escape poverty.

### **2.4 Education during the Apartheid Era**

After the National Party won the national elections in 1948, the harsh policies of apartheid were introduced in South Africa.<sup>40</sup> Apartheid epitomised a harsh scheme of enforced segregation, racial discrimination, inequality and political oppression.<sup>41</sup> It was during the era of apartheid that discrimination in the provision of education was

---

<sup>38</sup> Ibid.

<sup>39</sup> Woolman & Fleisch *The Constitution in the classroom: Law and Education in South Africa 1994-2008* (2009)

46.

<sup>40</sup> Nekhuvevha F "Transformation education: The education crisis and suggested solutions", a paper delivered to the Association for Sociology in Southern Africa in June- July 1987 at the Conference held in the Western Cape 1987 15.

<sup>41</sup> Smith M H "Fundamentals of human rights and democracy in education- A South African perspective" 2011 47.

legalised.<sup>42</sup> The separation of black and white peoples development was the purpose behind the system of apartheid and it ensured that the distribution of education opportunities in South Africa were unequal.<sup>43</sup> The education system was racist and unequal in social and economic levels.<sup>44</sup> Education was divided to serve four races, blacks, Indians, Coloureds and whites with different legislation and curricula that governed each race.<sup>45</sup> Discriminatory legislation included the Coloured Persons Act 1963, the Indian Education Act 1965 and the Bantu Education Act 1953 which regulated education for the South Africans of African origin who were referred to as natives.<sup>46</sup>

The then Minister of Native education Dr Hendrik F Verwoerd explained the main purpose for Bantu education stating that:

*“There is no place for him in the European community above the level of certain forms of labour.... For that reason it is of no avail for him to receive a training which has as its aim absorption in the European community, where he cannot be absorbed. Until now he has been subjected to a schooling system which drew him away from his own community and mislead him by showing him green pastures of European society in which he was not allowed to graze”.*<sup>47</sup> Education for black South Africans had an inferior design as it was still aimed at teaching them to read and write in order to be employable only as servants.<sup>48</sup> The unequal education system which has been inherited by our society is one that preserved seats in schools, places in the economy and jobs in government for a white elite, while it denied the majority of black South Africans the training to be anything more than “hewers of wood and drawers of water”.<sup>49</sup>

The apartheid mission was to promote the Afrikaner culture, language and economic interests and in the process suppress any sense of human rights as well as economic interest of the population’s majority, that being African people.<sup>50</sup> There was

---

<sup>42</sup> Simbo C “The right to basic education, the South African Constitution and the Juma Masjid case: An unqualified human right and a minimum core standard” 2013 17 Law Democracy & Development 479.

<sup>43</sup> Christie P 1986 56-57.

<sup>44</sup> Nekhuwevha F 1987 15.

<sup>45</sup> Molteno F “The historical foundations of the schooling of Black South Africans” in Kallaway P Apartheid and Education: Education of Black South Africans 1984 88-89.

<sup>46</sup> Ibid.

<sup>47</sup> Kallaway P 2002 176.

<sup>48</sup> Simbo C 2012 168.

<sup>49</sup> Woolman S & Fleisch B 2009 109.

<sup>50</sup> Kallaway P 2002 1.

a lack of funding in black schools, there was no quality education provided among black people and unemployment rose among the black community.<sup>51</sup> As a result, apartheid had a massive negative influence on education in South Africa especially for African learners. African learners were not provided with an education that could help them to better their lives and to break away from the cycle of poverty. They were never to participate in the growth of the economy or to have any say in the countries politics. The education provided for them was designed so that they would always be inferior to white people, theirs was to be submissive and never authoritative. They were only to be employable as servants.

“Apartheid ushered in a new set of linguistic, cultural, and political imperatives”.<sup>52</sup> No mission was more important than the using of all state machinery to privilege Afrikaans in Afrikaner communities and to place Afrikaans on an equal footing with its historical rival English.<sup>53</sup> Language policy was used for political purposes to control black learners by separating them into multiple ethnolinguistic groups, and also to separate Afrikaners from English speakers in schools.<sup>54</sup> Prior to 1948 white schools offered instruction in both Afrikaans and English, but the apartheid government separated these schools, offering English instructions in some and Afrikaans in others so as to reinforce and preserve Afrikaner culture and identity.<sup>55</sup> In 1953 when the Bantu Education Act 47 of 1953 came into effect mother-tongue education was mostly used in primary schools but English and in some part of the country Afrikaans remained the language of instruction in schools throughout the apartheid era.<sup>56</sup>

Most schools for black learners were underfunded and overcrowded, they did not have trained teachers, enough classrooms, and black teachers were under paid.<sup>57</sup> On the other hand, schools for white learners had well trained teachers, they had their own special curriculums yet schools for black learners had curriculums that made it almost impossible for them to go beyond matric or to qualify for admission in any higher education institution.<sup>58</sup> Unfortunately until this very day black schools in

---

<sup>51</sup> Simbo C 2012 168.

<sup>52</sup> Woolman S & Fleisch B 2009 48.

<sup>53</sup> Woolman S & Fleisch B 2009 16.

<sup>54</sup> Fiske EB & Ladd HF “Equity: Education reform in post- apartheid South Africa” (2005) 43.

<sup>55</sup> Fiske EB & Ladd HF 2005 23.

<sup>56</sup> Kallaway P 2002 2.

<sup>57</sup> Simbo C 2012 168.

<sup>58</sup> Simbo C 2012 169.

some townships and rural areas are overcrowded with untrained teachers and as such the education system for black learners has not changed much.

It was in 1976 that African learners took to the streets of Soweto in order to protest and fight against the Bantu Education Act which they believed and saw as designed for their failure and inferiority. The Bantu Education Act was constructed for black people's education, its purpose was to limit black people socially and economically by providing them with an education that restricted their position in society to being servants only. The Act also provided that Afrikaans be used as a medium of instruction for half of all the classes in secondary school.<sup>59</sup> On the 16<sup>th</sup> of June in 1976 an estimated 15000 school children took to the streets of Soweto to protest an aggressive education system which only limited them to be labourers of the white man and required that half of all classes in secondary schools be taught in Afrikaans.<sup>60</sup> Despite the cautions of their teachers and parents the students launched the demonstrations to fight the education system they were subjected to.<sup>61</sup> This was a direct resistance to Bantu education as students contended that they wanted an education that could empower them.<sup>62</sup>

Around 1920 to 1930s when the British introduced English as a medium of instruction, Afrikaner people found it hard to be educated in a language that was not their mother tongue and that had the impact that they did not do well in school and therefore they could not be equipped educationally with the skills needed in order to escape the harsh cycle of poverty. So by introducing a non-mother tongue language for instruction for black people Afrikaners were consciously limiting the future of black people.

## **2.5 Education in the Post-Apartheid Era**

In 1994 South Africa became a democratic country which was now free of unequal treatment based on race, especially concerning education. In 1996 the Department of Education published Education White Paper 2 in view of the new democratic values that the state sought to move forward with.<sup>63</sup> White Paper 2 was introduced in

---

<sup>59</sup> The Bantu Education Act 47 of 1953.

<sup>60</sup> Kallaway P 2002 2.

<sup>61</sup> Ibid.

<sup>62</sup> Simbo C 2012 169.

<sup>63</sup> Notice 130 of 1996 Education White Paper 2.

order to transform the education system in South Africa from a legacy of apartheid to one that is in accordance with democratic values and practises that are in line with the Constitution.<sup>64</sup> The new government sought to transform the education system in accordance with democratic values and practices which are in line with the founding values of the Constitution.<sup>65</sup> It further sought to improve the quality and effectiveness of schools in order for them to be financially sustainable.<sup>66</sup> Finally White Paper 2 promoted the prohibition of unfair discrimination and the elimination of racial criteria being used in admissions in educational provision.<sup>67</sup>

After the legacy of apartheid had been abolished there was a need for the education system in our country to change and to be in line with the supreme law, that being the Constitution of the Republic of South Africa and also the South Africans Schools Act “*as it is trite that education is the engine of any society*”.<sup>68</sup> As such it is of utmost significance that the right to education, such an essential right in the development of any society, be provided equally without discriminating in any manner.

The post-apartheid government inherited a highly unequal education system, this inequality was more prevalent in the racial difference in spending per child.<sup>69</sup> The post-apartheid government immediately began equalising educational expenditures which are now relatively equitably distributed across all nine provinces in the country.<sup>70</sup>

Although access to receiving a basic education has improved and reached high levels in the post-apartheid era, the quality of the basic education in most South African schools is of great concern as it is still too low, and this is proven by the fact that South Africa performs worse than many poorer African countries academically.<sup>71</sup> Jansen is of the view that with its openly racist overtones, Bantu education continues in similar forms just under different labels to this very day.<sup>72</sup>

---

<sup>64</sup> Notice 130 introduction.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Hoërskool Ermelo paragraph 2.

<sup>69</sup> Spaul N “Education in SA: A tale of two systems” 2012 2.

<sup>70</sup> Ibid.

<sup>71</sup> Spaul N 2012 3.

<sup>72</sup> Jansen JD 1990 196.

Spaull observes that some people think that there have been vast improvements since 1994 while others believe that much of the system is worse than the Bantu education of the apartheid regime.<sup>73</sup> He says this is caused by the fact that in South Africa there is a minority of learners (roughly 25%) who attend mostly functional schools and perform acceptably on local and international tests while the majority of learners (roughly 75%) who attend dysfunctional schools perform extremely poorly on these tests.<sup>74</sup> He further is of the view that due to the stratified nature of South African society, parents who are in the top end of the labour market will send their children to good schools, while those in the bottom end of the labour market will send their children to the dysfunctional part of the education system; the very same system that they came through two decades ago.<sup>75</sup> This cycle of inequality perpetuates the current patterns of poverty and privilege, which is why he believes that in South Africa we have two schooling systems.<sup>76</sup>

Jansen also believes that little has changed over the years since the apartheid era.<sup>77</sup> Although changes have been implemented that result in the same curricula being provided for black and white schools in South Africa, this he says has had no impact in changing or challenging the broader social and political structures that were created by the apartheid government for white power.<sup>78</sup> This is evident as like in the past during the era of apartheid black schools had overcrowded classrooms, dilapidated buildings, inadequate facilities and unqualified teachers these conditions are still similar to this present day.<sup>79</sup> If such conditions are still the same it is clear that no tangible change has taken place and as such we are still in the same position as we were two decades ago. So although on paper apartheid no longer exists, its ideology lives on and is felt daily. We are still trapped in a succession of poverty and inequality and this will not change unless learners are provided with a meaningful education that has the ability to change their circumstances.

Bloch like Spaull is also of the view that there are two unequal school systems in South Africa.<sup>80</sup> He is of the view that a majority of the South African schools are

---

<sup>73</sup> Spaull N 2012 1.

<sup>74</sup> Spaull N 2012 2.

<sup>75</sup> Spaull N 2012 7.

<sup>76</sup> Ibid.

<sup>77</sup> Jansen JD 1990 202.

<sup>78</sup> Jansen JD 1990 202.

<sup>79</sup> Ibid.

<sup>80</sup> Bloch G "The toxic mix: What's wrong with South Africa's schools and how to fix it" (2009) 59.



dysfunctional and are producing learners who can't read, write or do simple maths.<sup>81</sup> These schools he says are township and rural schools which mostly are attended by poor black South Africans.<sup>82</sup> The formerly white model C schools which are attended by mostly middle class learners are producing better results unlike the rural and township schools where only an insignificant number of black students acquire an education of any meaningful quality.<sup>83</sup> This he says has the effect that black learners who attend these dysfunctional schools are confined from participating effectively in the economy of the country as they are trapped in a cycle of unemployment and poverty.<sup>84</sup>

This cycle is due to the simple reason that the education which is provided in the majority of black schools is just not of any meaningful quality to enable these learners an opportunity to attend higher educational institutions so they can acquire employment which could provide them with a chance to break the ideologies of apartheid. Unfortunately if you are black in South Africa and your parents cannot afford to send you to the former model C schools that are situated in towns or to a private school you are unlikely to receive an education that will have any meaningful contribution or change in your life.

In the following chapter I will concentrate on the South Africans Schools Act and the Constitution, showing how they have attempted to transform the apartheid legacy of unequal education system and also focus on the role of SGB's in determining admission policies.

---

<sup>81</sup> Bloch G 2009 58-59.

<sup>82</sup> Bloch G 2009 59.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

## Chapter 3

### 3.1 The South African Schools Act in relation to admissions

In the previous chapter I have shown the history of education in South Africa, how it was meant to impact on the lives and well-being of the majority of the citizens in our country and how it has impacted on the lives of our people and what the effects thereof are today. In this chapter I will now concentrate on the powers of the SGB in relation to admissions as provided for by the SASA.

The past laws of our education system were discriminatory in nature and offered unequal opportunities to citizens in our society.<sup>85</sup> In keeping with the values of the Constitution the preamble of the SASA is significant in providing guidance to SGB's when executing their powers as provided in section 5(5) of the SASA. The preamble lays the objectives of the Act by providing that:

*“Whereas the achievement of democracy in South Africa has consigned to history the past system of education which was based on racial inequality and segregation; and*

*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 and well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the state: and*

*Whereas it is necessary to set uniform norms and standards for the education of learners at the schools and the organisation, governance and funding of schools throughout the Republic of South Africa”.*<sup>86</sup>

---

<sup>85</sup> The South African Schools Act, No84 of 1996 the preamble.

<sup>86</sup> Ibid.

### 3.2 Section 5(5) of the South African Schools Act

The power of the SGB to determine admission policies is a power that is derived from Section 5(5) of the SASA. Visser observes that the power given to the SGB in section 5(5) is a clear indication that this function by the SGB could be used to limit a learner's right to access a particular school, this therefore has the consequence that the right of access to a school is not guaranteed and can be limited.<sup>87</sup> He further goes on to say that although it may seem that SGBs have wide powers as provided by section 5(5) of the SASA, these powers do not however allow them to include whatever requirements they please in their admission policies even if the policy does not discriminate unfairly.<sup>88</sup> The admission policies they determine must be directed by their duty not to unfairly discriminate, they must be based on the law and on sound considerations that are relevant educationally.<sup>89</sup>

It is clear from the SASA that the powers entrusted with the SGB of public educational institutions are of great significance and as such this requires SGBs to use such powers to better the lives of all learners who require admission to a school because they seek admission in order to receive an education in that school, an education which they believe and hope will transform their lives for the better. Our foreign law which may be considered when interpreting section 39 of the Constitution, in the landmark judgement of *Oliver Brown v Board of Education Topeka* informs us that; "*In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education*".<sup>90</sup>

The SASA was developed in order to transform the past education system which was based on racial inequality and segregation.<sup>91</sup> Section 5(5) makes it clear that the SASA requires SGB's to take into consideration other laws in the country when determining admission policies. The SGB is recognised as an organ of state.<sup>92</sup> Section 7(2) of the Constitution provides that:

---

<sup>87</sup> PJ Visser "The admission of learners to public schools: who makes the decisions?" 1998 (61) *THRHR* 488.

<sup>88</sup> Visser 1998 490.

<sup>89</sup> *Ibid.*

<sup>90</sup> Section 39(1)(c) provides that when interpreting the Bill of Rights, a court, tribunal or forum- (c) may consider foreign law. et al 347 United States 483 1954

<sup>91</sup> The South African Schools Act the preamble.

<sup>92</sup> Head of Department, Department of education, Free State Province v Welkom High School 2013 (9) BCLR 989 (CC) paragraph 141.

*“The state must respect, protect, promote and fulfil the rights in the bill of rights”.*<sup>93</sup>

As an organ of state the SGB must, when applying admission policies in public schools, respect the right of learners to receive education, it must protect, promote and fulfil the right by considering what is best for the learners in the school they serve and potential learners requiring admission to the school. In *Hoërskool Ermelo* the court found that a governing body is democratically composed and is intended to function in a democratic manner.<sup>94</sup> The primary function of the SGB the court found is to look after the interest of the school and its learners, it is meant to be a beacon of grassroots democracy in the local affairs of the school.<sup>95</sup>

In order to do what is in the best interests for all learners who require admission in a public educational institutional SGBs are required to be objective which in turn will make the right to a basic education a reality for all who seek admission. All SGBs must determine what is in the best interest of the school and learners who are currently enrolled and also the interest of the community they are located when determining language and admission policies.

### **3.3 The role of School Governing Bodies**

SGBs were created within the parameters of the principles regarding the decentralisation of power, to govern schools in partnership with the state.<sup>96</sup> This was done by the drafters of the SASA in order to uphold the rights of all learners, parents/caregivers and educators and promoting their acceptance of responsibility for the organisation, governance and funding of schools as equal educational partners.<sup>97</sup> Woolman and Fleisch are of the view that SGBs are not mere extensions of PDoEs but that they are rather unique establishments governing public schools as self-governing institutions without undue influence by government, in contrast with the duty of principals to manage schools as a direct delegate of the various heads of department.<sup>98</sup> The functions of SGBs can be altered and even eliminated by the state

---

<sup>93</sup>The Constitution section 7(2).

<sup>94</sup> *Hoërskool Ermelo* paragraph 57.

<sup>95</sup> *Ibid.*

<sup>96</sup> Erika M Serfontein & Elda de Waal “The effectiveness of legal remedies in education: school governing body perspective” (2013) 3.

<sup>97</sup> *Ibid.*

<sup>98</sup> Woolman S & Fleisch B 2009

through the promulgation of legislation.<sup>99</sup> Public education is the primary responsibility of the state, the state has to then guard against SGBs misusing their statutory powers by, for example, unfairly discriminating against learners by way of their language policies.<sup>100</sup>

SGBs and PDoEs all have different functions to perform in order for schools to operate in accordance with the preamble of the SASA. The government is responsible for providing a basic education as provided by section 29(1) of the Constitution to all learners, SGBs are responsible for admitting learners to public educational institutions so as to enable them to receive a basic education. It is therefore clear that PDoEs and SGBs should work together in a spirit of trust in order to look after the best interests of all learners, PDoEs should also be able to intervene and protect against SGBs misusing their public power because they have the sole responsibility to provide a basic education. But allowing PDoEs power to intervene in decisions made by SGBs does not mean that PDoEs can use whatever means they wish in order to reach an outcome they desire. The rule of law requires them to at all-time act in accordance with the correct legal process.<sup>101</sup>

Woolman & Fleisch further observe that the state placed a great amount of power in the hands of the SGB in determining admission policies as the state was of the view that parents having a lot to gain or lose regarding their children's education should be given most of the power in determining admission policies as they would do what is in the best interest of their children.<sup>102</sup>

The idea was to give significant power to parents to determine admission and language policies because clearly parents have an interest in their children's education and as such they will at all times strive to come up with policies that would be in the best interest of their children as this is what is to be expected of them. It goes without saying that it is correct to assume that all parents want their children to be educated and as such they will create policies that promote accessibility to public educational institutions for all learners. The division of power among all interested parties regarding education was the new governments' way of finding a compromise

---

<sup>99</sup> The South African Schools Act section 22.

<sup>100</sup> Serfontein EM & De Waal E 2013 4.

<sup>101</sup> Welkom High School paragraph 86.

<sup>102</sup> Woolman S & Fleisch B 2009 21&22.

to get everybody involved in order to contribute meaningfully to the growing success of our new education system.

Section 5(1) of the SASA provides that:

*“A public school must admit learners and serve their educational requirements without unfairly discriminating in any way.”*<sup>103</sup>

The power to determine admission and language policies rests with the SGB, but in so doing the SGB must remember that it has a duty to serve the educational needs of all learners and not just learners who are already admitted in the school. The role exercised by the SGB is crucial as it impacts on the learners right to receive a basic education, a right which is guaranteed immediately by section 29(1) (a) of the Constitution.

So when exercising its powers in determining a language policy as provided in section 6(2) of the SASA the governing body of a public school may determine the language policy of the school subject to the Constitution, the SASA and any applicable provincial law.<sup>104</sup> It further goes on to emphasise in section 6(3) that no form of racial discrimination may be practised in implementing policy determined under this section.<sup>105</sup>

The powers vested within the SGBs of public educational institutions to determine admission policies and language policies are of great significance as they affect the right to a basic education for that certain learner who applies at the given institution. These powers vested with the SGBs are crucial because they affect a learner’s right to receive a basic education. In the past education system the former model C schools were only accessible to white learners. Black learners could not access admission to schools attended by white learners and are still denied admission till this very day from the former model C schools based on language and admission policies as will be discussed in the case law more in depth in chapter 4.

The need to eliminate all forms of discrimination is emphasised in the Promotion of Equality and Prevention of Unfair Discrimination Act which was enacted in order to

---

<sup>103</sup> The South African Schools Act section 5(1).

<sup>104</sup> The South African Schools Act section 6(2).

<sup>105</sup> The South African Schools Act section 6(3).

ensure that all actions taken by the state and all organs of the state are in line with the values of the Constitution by eradicating all social and economic inequality.<sup>106</sup>

SGBs should therefore guard against creating admission policies and language policies that have the effect of excluding certain individuals whether based on race, class or geographical zones. They must not create barriers that make accessing a particular school impossible.

Ntshoe is of the view that while it is possible to prohibit obvious discrimination by creating legislation that prohibits it, unfortunately the more hidden and subtle discrimination experienced by learners in public schools are more challenging and not easily identifiable hence it is correct to argue that South African society is still divided along racial lines and that schools also largely reflect the geopolitical boundaries of the past and this will be the norm for a long time to come.<sup>107</sup> This is why he further goes to say that the admission policies created by SGBs leave the majority of black parents with limited choices when it comes to choosing a school for their children and that this is the same position they were in before democracy.<sup>108</sup>

Black children from the townships are unable to access the former Model C schools because like in the previous regime they are denied access because of geographical school zones, school fees and language barriers, this has the result that such children are denied educational opportunities that may be available in privileged schools because of their race, class, language and place of residence.<sup>109</sup> The government needs to create a public education system that provides a good quality education that empowers all learners to be able to have the same opportunities provided by a good quality education. Squeezing all children in the former model C schools which makes up only 10% of the whole public education system is not sustainable.

The conflict that is an everyday reality between SGBs and PDOEs persists to a large extent because of our country's heritage of institutionalised racial discrimination.<sup>110</sup> It also persists to a large extent because as much as access to education has

---

<sup>106</sup> The Promotion of Equality and Prevention of unfair discrimination Act 4 of 2000 the preamble.

<sup>107</sup> Ntshoe I "Hidden and subtle effects of racism in law and school policy in post-apartheid South Africa" (2009) 15(2) *Southern African Review of Education* 86&96.

<sup>108</sup> Ntshoe I 2009 86.

<sup>109</sup> Ntshoe I 2009 87.

<sup>110</sup> Van der Vyver JD 2012 342.

improved, the ANC since it has been in power has to a great extent failed in providing a quality basic education for all. Research and case law has proven that the conflict is mainly with black learners trying to get admission to the former model C schools which are based in towns and not townships. These schools charge high school fees. The conflict is for the simple reason that the former model C schools are being put under pressure to admit a large number of black students from the townships because their parents know better and are now seeking a better education for their children which to a large extent is only offered in the former model C schools, so they seek admission to these schools in order to give their children a chance to escape the cycle of poverty which is perpetuated by the inferior basic education received in some of the township schools. The status quo will not change unless government sees the need to or is forced to provide the same basic quality education for all learners regardless of class, race or geographical zones. It is unfortunately a well-known fact in South Africa that about 80% of the public schools are dysfunctional and do not provide an effective quality education.<sup>111</sup>

Smith is of the view that the high demand for quality public education which is mostly only offered in the model C schools forces these schools to create restrictive admission policies which enables them to maintain a high quality of education, this is done to manage their capacity as a result in migration of black learners away from township schools.<sup>112</sup> He is also of the view that the reason for the conflict between SGBs and PDoEs is not based on equal access to schools, but rather on access to schools that offer a quality education for all learners.<sup>113</sup> This is supported by the fact that you do not find white learners seeking admission in township schools and this is because most township schools do not offer quality education.

---

<sup>111</sup> Smith M “Ambivalent adjudication of admission and access to schools – striking a reasonable balance between equality, quality and legality” (2014) 29 *South African Public Law* 38.

<sup>112</sup> Smith M 2014 39.

<sup>113</sup> Smith M 2014 41.



## Chapter 4

### 4.1 The case law relating to admission policy

In this chapter the three most recent cases relating to admission policies in public educational institutions in South Africa will be discussed. With the introduction of the SASA which was brought to bring democratic change in the education system, the state placed a great amount of power in the hands of SGBs in determining admission policies as the state was of the view that parents, having a lot to gain or lose regarding their children's education, should be given most of the power in determining admission policies as they will do what is in the best interest of their children.<sup>114</sup>

The differences in opinion between the HOD and the SGB in determining admission policy have caused uncertainty as to who has the last say when it comes to determining admission policies. The following court cases address in detail the issues of conflict between the SGB and the PDOE in public educational institutions, what the SGB ought to consider when determining admission policies, who has the power to determine if a school has reached its full capacity and how they should resolve issues of conflict in future.

### 4.2 Hoërskool Ermelo

In *Head of Department v Hoërskool Ermelo* the dispute arose from the school's language policy, which stipulated Afrikaans as the only medium of instruction.<sup>115</sup> At the beginning of 2006, the department approached the school requesting that it admit 27 grade 8 learners who could not be accommodated at any of the English medium schools in Ermelo because they were already full to capacity.<sup>116</sup>

In January 2007 departmental officials handed a letter to the principal of *Hoërskool Ermelo* instructing him to admit the 113 learners who choose to be taught in English as it was not possible to accommodate them in any other English medium school in

---

<sup>114</sup>Woolman S & Fleisch B 2009 22.

<sup>115</sup> Hoërskool Ermelo paragraph 1.

<sup>116</sup> Hoërskool Ermelo paragraph 12.

Ermelo as they were all full to capacity.<sup>117</sup> The chairperson of the SGB then wrote back to the acting regional director and to the principal of the school and instructed the principal to admit learners only in accordance with the school's admission policy, and that all grade 8 learners were welcome provided that they submit to the school's Afrikaans language policy.<sup>118</sup>

The HOD formed the view that the SGB acted unreasonably in refusing, despite repeated requests, and given its excess classroom space, to alter its language policy in order to facilitate the admission of the stranded grade 8 pupils from the Ermelo neighbourhood.<sup>119</sup> The HOD then decided to withdraw the function of the SGB in determining the school's language policy.<sup>120</sup> The HOD decided to appoint an interim committee for three months in order to perform the function of the SGB in determining a language policy that would ensure that the stranded English learners were admitted to the school.<sup>121</sup> The court had to determine if the HOD had the power under section 22 to revoke the language policy the governing body adopted in terms of section 6(2) of the Schools Act. It also considered whether the HOD withdrew the function on reasonable grounds and in a procedurally fair manner.

The court held that the right to receive education in the official language of one's choice in a public education institution under section 29(2) of the Constitution imposes a duty on the state to consider all reasonable educational alternatives, including single medium institutions, taking into account what is equitable, practicable and addresses the results of past racially discriminatory laws and practices in order to give effect to the rights of learners.<sup>122</sup>

The court also held that a governing body is democratically composed and is intended to function in a democratic manner.<sup>123</sup> Its primary function is to look after the interest of the school and its learners, it is meant to be a beacon of grassroots democracy in the local affairs of the school.<sup>124</sup> The court further held that this does not mean that the function to decide on a medium of instruction of a public school is

---

<sup>117</sup> Hoërskool Ermelo paragraph 16.

<sup>118</sup> Hoërskool Ermelo paragraph 17.

<sup>119</sup> Hoërskool Ermelo paragraph 20.

<sup>120</sup> Ibid.

<sup>121</sup> Hoërskool Ermelo paragraph 21.

<sup>122</sup> Hoërskool Ermelo paragraph 42.

<sup>123</sup> Hoërskool Ermelo paragraph 57.

<sup>124</sup> Ibid.

absolute or is the exclusive preserve of the governing body.<sup>125</sup> Nor does it mean that the only relevant consideration in setting a medium of tuition is the exclusive needs or interests of the school and its current learners or their parents.<sup>126</sup> The court was in this matter alive to making substantive pronouncements on whether or not the SGB has absolute control in determining the medium of instruction for a school. The court also exercised its duty to provide substantive judicial reasoning. This role of the court takes into account the public's interest in the matter, which provides for protection of Constitutional rights.

The court held that a HOD does not have untrammelled power to rescind a function properly conferred on the SGB.<sup>127</sup> The court further held that the power to revoke a function properly conferred on a SGB will have to be exercised on reasonable grounds.<sup>128</sup> The fact that the HOD bears certain Constitutional and statutory duty to provide a basic education does not entitle the HOD to take unlawful steps in order to achieve his Constitutional duties.<sup>129</sup>

The HOD was concerned about the schools language policy which had the effect that learners who choose English as a medium of instruction could not be accommodated to the school which had ample space to accommodate them. The HOD thus had no choice but to intervene and request the SGB to consider changing its language policy. That being said in his duty to assist the stranded learners, this does not make the HOD immune to the rule of law that binds everyone. Although the HOD sought to act in order to assist the stranded learners the court found that the manner in which the HOD acted was not in line with the rule of law. In *Welkom High School* the Constitutional Court held that "*The rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means*".<sup>130</sup> On the contrary, the rule of law obliges an organ of state to use the correct legal process. Where internal remedies are available, an organ of state must use them. The rule of law does not authorise self-help."<sup>131</sup> Whatever steps that are taken by the HOD must be steps that are lawful.

---

<sup>125</sup> Hoërskool Ermelo paragraph 58.

<sup>126</sup> Ibid.

<sup>127</sup> Hoërskool Ermelo paragraph 73.

<sup>128</sup> Ibid.

<sup>129</sup> Hoërskool Ermelo paragraph 101.

<sup>130</sup> Welkom High School paragraph 86.

<sup>131</sup> Welkom High School paragraph 86.

The cause of tension between the SGB and the HOD in Hoërskool Ermelo was the fact that the HOD instructed the SGB to admit the learners without the parties actually fully and fairly participating with each other in order to come up with a remedy that will suit all that are involved in the dispute. Liebenberg observes that meaningful engagement between parties can be achieved when all the parties in the litigation as well as those who have a substantial interest in the matter have full and fair participation in order to allow them to have an opportunity to participate in the remedial process.<sup>132</sup> SGBs and HODs must come together and engage with each other on how best to resolve their dispute in order to make sure that they each play their different roles in order to give effect to the best interest of each and every learner. SGBs and HODs both derive their powers from the SASA, and the SASA makes it clear that the aim of the act is for parents, educators and the state to work in partnership with each other in order to be responsible for the organisation, governance and funding of schools.<sup>133</sup>

Fredman observes that the theme for Justice Moseneke's judgement in *Hoërskool Ermelo* was one of consultation and co-operation.<sup>134</sup> Perhaps if the parties had consulted fully and fairly with each other in the spirit of treating the interests of the learners concerned as being of paramount importance, they would have been able to resolve their issues and avoid litigation. However, Liebenberg questions the effect of participation between parties in a dispute in an attempt to come to an agreement in order to avoid litigation.<sup>135</sup> She observes that perhaps it could be better to litigate in certain Constitutional rights disputes for the broader public good, this she observes is because sometimes disputes are not only significant for the parties involved but are also significant for the public in general which may not have the means to litigate.<sup>136</sup> In disputes which address significant issues such as the ones in *Hoërskool Ermelo* perhaps the best remedy was for the parties to litigate as the issues litigated upon undeniably benefit the public as a whole. The right to access public educational institutions is a universally recognised right which carries significant opportunities for all.

---

<sup>132</sup> Liebenberg S "Remedial Principles and Meaningful Engagement in Education Rights Disputes" 2016 (9) PER

<sup>133</sup> The Schools Act the preamble.

<sup>134</sup> Fredman S "Procedure or Principle: The Role of Adjudication in Achieving the Right to Education" (2016) 6 Constitutional Court Review

<sup>135</sup> Liebenberg S 2016 page 7.

<sup>136</sup> Liebenberg S 2016 page 8.

Liebenberg further observes that judicial intervention is also important as it allows all the parties that are affected in the dispute to not only be heard but to also suggest a remedy for the dispute.<sup>137</sup> Judges are also given the opportunity to deliver transparent and substantive reasoning for their judgements which is vital for South Africa's Constitutional development.<sup>138</sup>

The court correctly emphasised that good leaders such as those in the position of the SGB must recognise that institutions must adapt and develop.<sup>139</sup> That is why the court in this matter found it just and equitable to all concerned that the SGB be directed to reconsider the schools language policy as the current policy was not consistent with the relevant provisions of the Constitution and the Schools Act.<sup>140</sup> One can commend the court in this case for being aware and further giving attention to the substantive issues that brought the dispute to life.

In all matters before the Constitutional Court section 38 and 172(1) of the Constitution empowers the court to grant appropriate relief and it permits the court to grant any order that is just and equitable.<sup>141</sup> The fact that the court has the powers to make any order it deems appropriate, just and equitable does not entitle the court to encroach on the role of the legislative, executive or the administration of the functions of other government branches.<sup>142</sup> The court in this matter could therefore direct the school to reconsider its language policy, but because of the separation of powers doctrine it could not dictate what the new language policy should be.

### 4.3 Rivonia Primary School

In *MEC of Education v Governing Body of Rivonia* in 2010, a prospective grade 1 learner residing within the feeder-area of *Rivonia Primary* was unsuccessful in finding placement at that school for the academic year starting in 2011.<sup>143</sup> According to the school, it had reached its stated capacity of 120 learners for the grade, as provided

---

<sup>137</sup> Liebenberg S 2016 page 9.

<sup>138</sup> Liebenberg S 2016 page 7.

<sup>139</sup> Hoërskool Ermelo paragraph 80.

<sup>140</sup> Hoërskool Ermelo paragraph 98&99.

<sup>141</sup> The Constitution section 172(1)(a) and (b), and section 38.

<sup>142</sup> Liebenberg S 2016

<sup>143</sup> MEC for Education v Governing body of the Rivonia Primary School 2013 (6) SA 582.

for in its admission policy.<sup>144</sup> The learner was accordingly placed on the waiting list.<sup>145</sup> The mother of the learner dissatisfied with the admission processes, complained to the department.<sup>146</sup> Her complaints set off a range of meetings and correspondence involving the department, the parents and the school from September to November 2010.<sup>147</sup> By late November 2010, the department and the school had seemingly settled on the view that the learner had been properly placed on the waiting list and would simply have to wait her turn.<sup>148</sup> The mother of the learner lodged an appeal with the Gauteng MEC, the MEC then referred the matter to the Gauteng HOD.<sup>149</sup>

When the Gauteng HOD eventually considered the matter, in February 2011, the school year was well underway.<sup>150</sup> It was conveyed to the Gauteng HOD that, according to the tenth-day statistics, the school had admitted 124 learners and had five grade 1 classes.<sup>151</sup> The Gauteng HOD took the view that the tenth-day statistics demonstrated that, notwithstanding the provisions of its admission policy which purported to restrict grade 1 enrolment to 120 learners, *Rivonia Primary* had the capacity to admit the additional learner in one of its five grade 1 classes.<sup>152</sup> Purporting to exercise his powers in terms of provincial regulations, the Gauteng HOD proceeded to overturn the refusal of the learner's application and issued an instruction to the school that the learner be admitted immediately.<sup>153</sup>

As a result of the HODs decision the mother of the learner then took her daughter in full uniform to *Rivonia Primary*, she insisted that the child be admitted to the school.<sup>154</sup> The principal refused and explained that an urgent meeting of the *Rivonia Governing* Body had been called to resolve the issue.<sup>155</sup> The Gauteng HOD then purported to withdraw the principal's admission function by delegating it to another official.<sup>156</sup> The department's representatives proceeded to take control of the

---

<sup>144</sup> Rivonia Primary School paragraph 9

<sup>145</sup> Ibid.

<sup>146</sup> Rivonia Primary School paragraph 10.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

<sup>149</sup> Rivonia Primary School paragraph 11.

<sup>150</sup> Rivonia Primary School paragraph 12.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Rivonia Primary School paragraph 13.

<sup>155</sup> Ibid.

<sup>156</sup> Rivonia Primary School paragraph 14.

situation and physically placed the learner in one of the school's grade 1 classrooms.<sup>157</sup>

The School approached the South Gauteng High Court, on an urgent basis for declaratory and interdictory relief aimed at the Department's decision to override the school's admission policy, the forced admission of the learner and the withdrawal of the principal's admission function.<sup>158</sup> The matter proceeded all the way to the Constitutional Court where the court had to determine first whether the Gauteng HOD was vested with decision-making power in relation to the admission of learners to public schools.<sup>159</sup> If so, the second question is whether the Gauteng HOD was empowered to depart from the admission policy of the Rivonia Governing Body and admit the learner contrary to the capacity determined in that policy.<sup>160</sup> And if so, the third question is whether the Gauteng HOD's exercise of that power to admit the learner was reasonable and procedurally fair.<sup>161</sup>

The court held that admission decisions do not squarely lie in the hands of Rivonia Governing Body and that the Gauteng HOD could override the admission policy of the SGB of Rivonia.<sup>162</sup> This is because a decision made by the SGB is not absolute as the HOD has the power to supervise the decisions made by SGBs in public educational institutions. This power is entrusted upon the MEC and HOD as they have a duty under the SASA to ensure that there are enough school places so that every child who lives in their province can attend school as required by subsection (1) and (2).<sup>163</sup> The HOD must have powers that match his or her obligations as without such powers he or she would be unable to fulfil his responsibilities. However, a decision to overturn an admission decision of a principal, or the departure from a school's admission policy, must be exercised reasonably in a procedurally fair manner.<sup>164</sup> The rule of law requires that where a HOD departs from the SGBs policy and wants to intervene, he must do so only in terms of powers entrusted upon him. This ensures that HODs do not use whatever means they please in order to do what they desire.

---

<sup>157</sup> Ibid.

<sup>158</sup> Rivonia Primary School paragraph 16.

<sup>159</sup> Rivonia Primary School paragraph 33.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Rivonia Primary School paragraph 57.

<sup>163</sup> The South African Schools Act section 3 (3).

<sup>164</sup> Rivonia Primary School paragraph 58.

The court found that with the last question of procedural fairness, that the decision of the Gauteng HOD to admit the learner in terms of Regulation 13 (1) (a) constituted an administration action and as such the department has a duty to act fairly.<sup>165</sup> The Gauteng HOD should have afforded the school an opportunity to make representations and respond to the tenth-day statistics report, before the learner was forcefully placed in the school.<sup>166</sup> And as such, such a failure by the Gauteng HOD means that the decision by the Gauteng HOD was not exercised in a procedurally fair manner.<sup>167</sup> The court importantly emphasised that in disputes between SGB's and national or provincial government, cooperation is the required norm as such cooperation fulfils the shared goal between the parties of ensuring that the best interests of learners are furthered and the right to a basic education is realised.<sup>168</sup> Co-operation and meaningful engagement may be the best way to deal with disputes between SGBs and HODs. Both parties are organs of state and are duty bound to respect, protect and promote the rights in the Bill of Rights. This includes the right to education and the right to receive education in a language of choice where this is reasonably practicable.

In the case of *Rivonia Primary School* the Constitutional Court rightly emphasised that SGB's in exercising their powers to determine admission policies have a duty to cooperate with the HOD in an attempt to reach an amicable solution as this process will ultimately give effect to the best interest of the child.<sup>169</sup> The best interest of any child who seeks admission to a school is that he or she be admitted when possible so he or she can receive a basic education.

Van Leeve observes that *Rivonia Primary School* has a relatively well-off SGB.<sup>170</sup> The SGB because of its resources could afford to use litigation in order to protect their powers by way of judicial intervention. This supports Liebenberg's view that perhaps at times parties must litigate not only for their interest but for the public at large as not everyone can afford to litigate.

---

<sup>165</sup> Rivonia Primary School paragraph 60.

<sup>166</sup> Rivonia Primary School paragraph 68.

<sup>167</sup> Ibid.

<sup>168</sup> Rivonia Primary School paragraph 69.

<sup>169</sup> Rivonia Primary School paragraph 77.

<sup>170</sup> Van Leeve Y" Executive Heavy Handedness and the Right to Basic Education A reply to Sandra Fredman" (2016) Constitutional Court review page 203.



Fredman questions the willingness of the Constitutional Court to tackle the real issues that were behind the dispute between SGBs and HODs, she is of the view that the court was more interested in the procedures that must be followed, instead of the real issues that gave rise to the dispute at hand.<sup>171</sup> In *Rivonia Primary School* the school itself had bent its admission policy by admitting more grade one learners to the school than its admission policy allowed. Clearly admitting one more learner to one of the grade 1 classes was not going to bear any detrimental effect to the school nor the learners already admitted to the school by perhaps causing overcrowding and compromising the quality of education for the learners. This case is a clear example of what Van Leeve observes as a well- resourced public school with an educated SGB that is essentially only concerned with controlling their school only for the benefit of those already admitted to the school and not the community at large.<sup>172</sup> Such SGBs are the reason why HODs are given powers to intervene in the admission policies of SGBs so as to guard against unfair discrimination.

Fredman observes that the Constitutional Court in this case was mostly concerned with procedure as opposed to the substantive issues underlying the tensions between the parties, thereby placing emphases on the rule of law which required the HOD to consult with the SGB before physically placing the learner to the school.<sup>173</sup> The truth is that the school consulted with the SGB in its attempt to get them to accommodate the learner and the SGB saw no need to use its extra capacity in the school to accommodate the learner. What then was the HOD to do? Leave the SGB to promote and protect the interests of the learners who are already admitted to the school only? Surely not as this is contrary the spirit of the Constitution and the SASA. The Constitutional Court in this case correctly held that the HOD was empowered to issue an instruction to the principal of a public school to admit a learner in excess of the limit set in its admission policy.<sup>174</sup>

The Constitutional Court is bound by its decisions unless they were wrong in law. The Constitutional Court in *Fose V Minister of Safety and Security* the court found that courts have a responsibility to draft effective remedies when the legal process establishes an infringement of the Constitutional rights, particularly in a context

---

<sup>171</sup> Fredman S 2016 page 166.

<sup>172</sup> Van Leeve S 2016 page 203.

<sup>173</sup> Fredman S 2016 185

<sup>174</sup> Rivonia Primary School paragraph 81.

where so few have the means to enforce their rights through the courts.<sup>175</sup> In the case of *Rivonia Primary School* the court had a duty to draft effective remedies that HODs are to follow when faced with a difficult SGB which is not willing to use its resources for the good of the community as a whole and not just its immediate learners. By upholding that the HOD has the final power to determine admission policies the court put to rest any uncertainty which may occur between SGBs and HODs when faced with any dispute in future.

#### **4.4 Federation of Governing Bodies for South African Schools**

In this case the dispute arose about the validity of the amendments to the Regulations Relating to the Admission of learners to Public Schools in Gauteng which were published in 2012.<sup>176</sup> The Gauteng School Education Act 6 of 1995 gave the MEC the power to formulate regulations relating to admission of learners to public schools. An appeal was brought to the Constitutional Court by the Federation of Governing Bodies for South African Schools (FEDSAS) against the Supreme Court of Appeal's decision upholding the validity of some of the regulations that were published by the MEC.<sup>177</sup> The main dispute was whether the Regulations were inconsistent with the SASA or with the applicable provincial law, or whether they were invalid because they are irrational or not reasonable nor justifiable.<sup>178</sup>

The amendments were as follows:

Regulation 3(7) provides that:

*"When a learner has applied for admission to a school, neither the governing body of that school nor any person employed at that school may request the learner's current school or any person employed at that school, to furnish it with a confidential report in relation to that learner."*<sup>179</sup>

FEDSAS was of the view that the definition of confidential report was too broad in that it could include any information that may be used to fairly discriminate against a

---

<sup>175</sup>1997 3 SA 786 (CC) paragraph 69.

<sup>176</sup> Federation of Governing Bodies for the South African Schools v Member of the Executive Council for Education, Gauteng and Another (2016) ZACC 14 paragraph 6.

<sup>177</sup>Federation of Governing Bodies for South African Schools Paragraph 6.

<sup>178</sup> Ibid.

<sup>179</sup> Regulations on Admission of Learners to Public Schools, 2012 As amended by General Notice 1160 of 2012, Regulation 3(7).

learner, and as such the regulation was irrational, unreasonable and not justifiable because it stood in the way of the school's right to discriminate fairly.<sup>180</sup> The court found that since the regulation was designed to prevent unfair discrimination against a learner during the admission phase and thereafter the school may call for the information on a learner it has already admitted to the school, the regulation serves a legitimate purpose.<sup>181</sup> The Court found that the attack on regulation 3(7) was without merit and therefore had to fail.<sup>182</sup> The fact that the regulation allowed the school to ask the learner for the report after the school has admitted the learner ensures that schools know what kind of a learner they are dealing with and how best they should cater for that learners needs. The provisional limit that is placed on the school at the admission phase period is justified as there is always the possibility of the school to discriminate unfairly during the admission phase based on the learners report.

Regulation 4(1) provided that:

*“Subject to National Education Policy Act No. 27 of 1996 and other applicable laws the MEC may, by notice in the Provincial Gazette, determine the Feeder zone for any school in the Province, after consultation with the relevant stakeholders have been conducted.”<sup>183</sup>*

Regulation 4(2) provided that:

*“Until such a time as the MEC has determined a feeder zone for a particular school, in relation to a learner applying for admission to that school, the feeder zone for that school will be deemed to have been determined so that a place of residence or work falls within the feeder zone; if:*

*(a) relative to that place of residence or place of work, the school is the closet school which the learner is eligible to attend; or*

*(b) that place of residence or place of work for that parent is within a 5 km radius of the school.”<sup>184</sup>*

---

<sup>180</sup> Federation of Governing Bodies for South African Schools paragraph 30.

<sup>181</sup> Federation of Governing Bodies for South African Schools paragraph 31 and 33.

<sup>182</sup> Federation of Governing Bodies for South African Schools paragraph 33.

<sup>183</sup> Regulation on admission of learners to public schools 2012 Regulation 4(1).

<sup>184</sup> Regulation on admission of learners to public schools 2012 Regulation 4(2).

Equal Education, which was an amicus in the matter, along with FEDSAS were unhappy about the default feeder zones set by the MEC in regulation 4(2).<sup>185</sup> FEDSAS like Equal Education wanted the court to compel the MEC to exercise his or her power to determine feeder zones in terms of regulation 4(1) by a predetermined date or in accordance with a published timetable.<sup>186</sup> The applicants also wanted the word “may” in Regulation 4(1) to read instead that the MEC “must” determine feeder zones only after consultation with the relevant stakeholders.<sup>187</sup> This situation desired by the applicants and the amicus would have a favourable impact for the parties as the MEC would have to engage with the affected parties before determining the feeder zones. This is in keeping with the required norm in the public education system which requires relevant parties to meaningfully engage with each other in order to resolve whatever issues that are in dispute. The Courts must bear in mind that although parties in a dispute are required to co-operate and engage with each other this does not guarantee that parties will be able to reach an appropriate solution.<sup>188</sup>

The rule of law places emphasis to a great extent to the importance of engagement and cooperation between parties in order to resolve disputes. The Court was in agreement with the applicant’s that the setting of default feeder zones by the MEC without consultation with the relevant stakeholders materially affects the schools.<sup>189</sup> Taking a decision that will affect certain parties is contrary to the spirit of democracy as relevant parties and stakeholders are to be given an opportunity to be heard before a decision that affects them is taken. This is why the Court appreciated the applicant’s suggestion that the MEC must be directed to set feeder zones required by regulation 4(1) within a reasonable time and not later than 12 months from the date of the order by the court.<sup>190</sup>

The applicants were also unhappy with Regulation 5(8) which provides that:

---

<sup>185</sup> Federation of South African Schools Governing Bodies paragraph 35. Equal Education is an organization of learners, parents, and teachers striving for quality and equality in South African education through analysis and activism. Accessed on <https://equaleducation.org.za/our-movement/> on 02/03/2017.

<sup>186</sup> Ibid.

<sup>187</sup> Federation of Governing Bodies for South African Schools paragraph 34 & 37.

<sup>188</sup> Fredman S 2016 page 197.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

*“Notwithstanding the provisions of any school admission policy, in the case of a learner who has not been placed at any school 30 school days after the end of the admission period, the District Director may place that learner at any school-*

*(a) Which has not been declared full in terms of Regulation 8, and*

*(b) In respect of which there are no remaining unplaced learners on a waiting list”.*<sup>191</sup>

Regulation 8 further provides that:

*“Notwithstanding the provisions of the admission policy of a school, or the provisions of any national or provincial delegated legislation or any determination made in terms thereof, for the purpose of placing learners whose applications for admission have not been accepted at any school in the public schooling system, until such time as norms and standards contemplated in section 5A(2)(b) of the South African Schools Act are in force the objective entry level learner enrolment capacity of a school shall be determined by the Head of Department”.*<sup>192</sup>

The applicant complained that regulations 5 and 8 are irrational and not justifiable because they cannot be read harmoniously with section 5(1) and (3) of the Schools Act. The respondents however contended that the powers were narrow, defined and rational as their purpose is to ensure that all learners are placed as required by the Constitution and the Schools Act.<sup>193</sup> The Court found that Regulations 5 and 8 are rational, reasonable and justifiable and that they are not at odds with section 5(5) of the Schools Act.<sup>194</sup> The Court found that the MEC’s duty to ensure that every unplaced learner is placed and that there are enough school places so that every child can attend a school would be impossible if the MEC and HOD had no statutory power enabling them to do so.<sup>195</sup> The court also found in this case like it did in *Hoërskool Ermelo* that schools are public assets which must be utilised to cater for the needs of all learners and not just learners who are already admitted to the school.<sup>196</sup> This the Court rightly found can only be achieved if SGBs and HODs work

---

<sup>191</sup> Regulations on admission of learners to public schools 2012, Regulation 5(8).

<sup>192</sup> Regulations on admission of learners to public schools 2012, Regulation 8(1).

<sup>193</sup> Federation of Governing Bodies for South African Schools paragraph 41.

<sup>194</sup> Federation of Governing Bodies for South African Schools paragraph 46.

<sup>195</sup> Federation of Governing Bodies for South African Schools paragraph 45.

<sup>196</sup> Federation of Governing Bodies for South African Schools paragraph 44.

together in order to make a reality the universal right to education and non-discriminatory to all.

Regulation 11(5) provides that:

*“In making a decision in terms of sub-regulation (3) to admit a learner to a particular school, the District Director shall have regard to –*

- (a) The reasons of the learner for applying to leave the school at which he or she is currently enrolled,*
- (b) Whether the learner would have qualified for the waiting list for the school to which he or she seeks admission if he or she were to have applied as an entry phase learner; and*
- (c) The capacity of the school to which the learner seeks admission relative to the capacity of –*
  - (i) any other school in respect of which the learner would have qualified for the waiting list if he or she were to have applied as an entry phase learner; and*
  - (ii) other schools in the District.”<sup>197</sup>*

The applicant’s argued that this regulation was vague and inoperable.<sup>198</sup> The Court found that the attack on regulation 11(5) that it was irrational or unreasonable or unjustifiable had no merit.<sup>199</sup> The court found that the role of the SGB is not only limited to the particular school it serves but however that the HOD’s role is larger as he must cater for the educational rights of all the learners in his province.<sup>200</sup> If the MEC is restricted from having a supervisory power in all the public schools in his province he will be hindered from fulfilling his duty to among others ensure that every unplaced learner in his province is placed in a school.<sup>201</sup> The court also emphasised that one should always bear in mind that the powers of SGBs should not be exercised as if they exist in a vacuum, but rather be exercised in accordance with the applicable provincial law.<sup>202</sup> *“The power to determine learner enrolment capacity and to declare a school full or not, in the absence of norms and standards required by the*

---

<sup>197</sup> Regulation on admission of learners to public schools 2012, regulation 8(1).

<sup>198</sup> Federation of Governing Bodies for South African Schools paragraph 48

<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

<sup>201</sup> The South African Schools Act section 3(3).

<sup>202</sup> Federation of Governing Bodies for South African Schools paragraph 16.

*Schools Act that are in force, rightly falls on the HOD. Absent this power the statutory task of the MEC and HOD to place unplaced learners may come to naught*.<sup>203</sup> This is rightly so as the HOD has a bigger responsibility than that of the SGB in that he has a duty to ensure that all learners in his Province have been placed at a school, while the SGB is to a great extent only concerned with the immediate needs of the learners that are already admitted to the school. The HOD has to have powers that match his responsibilities otherwise giving the SGBs ultimate control over their schools may have a negative impact in that only certain learners may be preferred by SGBs.

Regulation 16(2) which deals with objections and appeals provides that:

*“A parent of a learner, who wishes to lodge an objection against a decision contemplated in Regulation 5(7)(c)(iii) may object to the Head of Department within 7 school days of being provided with the documents listed in Regulation 5(7)(c)(iii) and (iv)”*.<sup>204</sup>

The applicant’s argued that the objection process envisaged by regulation 16 infringes on the right of the parent of a learner to appeal directly to the MEC.<sup>205</sup> This objection is raised by the fact that the amendment to the regulation provides for an extra layer of objection by a parent first to the HOD.<sup>206</sup> The Court found that the extra layer provided for in the appealing process does not amount to a delegation by the MEC to the HOD to decide an appeal.<sup>207</sup> The Court further found it unnecessary to enquire whether a delegation of this kind was permissible in terms of section 105 of the Gauteng School Education Act which regulates delegation of power and assignment of duties.<sup>208</sup>

The Court made the following order:

- (1) *“Leave to appeal was granted.*
- (2) *It dismissed the appeal against the order of the Supreme Court of Appeal, subject to paragraph 3.*

---

<sup>203</sup> Federation of Governing Bodies for South African Schools paragraph 45.

<sup>204</sup> Regulation on admission of learners to public schools 2012 regulation 16(2).

<sup>205</sup> Federation of Governing Bodies for South African Schools paragraph 49.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

(3) *The Court directed that the MEC for Education in Gauteng determine feeder zones for public schools in the Gauteng province in a manner required by regulation 4(1) of the Regulations Relating to the Admission of Learners to Public Schools within a reasonable time but not later than 12 months from the date of this judgement*.<sup>209</sup>

In this case from the outset the court recognises that the dispute between the parties concerns equitable access to quality basic education and the great public importance of the right.<sup>210</sup> The court also recognised that admission policies have a vital role in determining the number of learners that schools admit. The role of SGB to determine admission policies is of great significance as access to learning and teaching has not always been accessible to all people. SGBs must always remember that *“public schools are not only spaces for the bright, well-mannered and financially well-heeled learners. They are public assets which must advance not only the parochial interest of its immediate learners but may, by law, also be required to help achieve universal and non-discriminatory access to education”*.<sup>211</sup>

The court in this case was alive to the substantive issues between the parties and realised its significant role to provide substantial judicial reasons for its findings. The rule of law was also important in the judgement because as much as the court found in favour of the MEC with regards to the regulations made, the court also saw it fit to say that the MEC must consult with the affected parties before making any decisions regarding determined feeder zones as he cannot just do as he pleases without consulting with the affected parties.

## Chapter 5

---

<sup>209</sup> Federation of Governing Bodies for the South African Schools paragraph 51.

<sup>210</sup> Federation of Governing Bodies for the South African Schools paragraph 23.

<sup>211</sup> Federation of Governing Bodies for South African Schools paragraph 44.



## 5.1 Conclusions and Recommendations

Xaba observes that training of SGBs may go a long way in eliminating challenges that SGBs face in executing their functions.<sup>212</sup> The power of the SGB to determine admission policies is a significant function that requires an in-depth understanding and training. The power entrusted with the SGB to determine a school's admission policy is a power provided by the SASA and as such it is vital to bear in mind that the sole purpose of the Schools Act is to give effect to the Constitutional right to a basic education.<sup>213</sup>

With a young democracy like South Africa, it comes as no surprise that tensions are often found in issues of addressing uneven access to education.<sup>214</sup> SGBs and HODs have different roles to play in making the right to education as envisioned by section 29(1)(a) of the SASA a reality for all children. The writer agrees with Justice Mhlantla that although tensions are inevitable between the different stakeholders because their interests may overlap and sometimes differ, the disagreements between them are not necessarily a bad thing.<sup>215</sup> What is important is for each stakeholder to remember that their duty as organs of state are to always respect, protect and promote the rights entrenched in the Bill of Rights.<sup>216</sup> Maybe disagreements are needed in order to enable the judiciary to create valuable guidelines in assisting the different SGBs and HODs in what manner they should conduct themselves when executing the powers given to them by the SASA and the Constitution.

It is common knowledge that over the years there have been a number of disputes between different SGBs and HODs, some have ended up in our lower courts while a few have ended up in our highest court, the Constitutional Court. Fredman observes that the fact that a dispute gets to court is a clear indication that within the local democratic system there are deep conflicts, conflicts which cannot be resolved by the parties themselves but can only be resolved by getting guidance from external parties to intervene.<sup>217</sup> A factor that contributes to this state of affairs is the lack of trust among the different stakeholders and their continued failure to meaningfully

---

<sup>212</sup> Xaba M The possible cause of school governance challenges in *South Africa South African Journal of Education* 2011 page 201.

<sup>213</sup> Hoërskool Ermelo paragraph 55.

<sup>214</sup> Rivonia Primary School paragraph 2.

<sup>215</sup> Ibid.

<sup>216</sup> The Constitution section 7(2).

<sup>217</sup> Fredman S 2016 page 188.

engage with each other in good faith so that the best interests of all learners can be given effect to.

Now one may ask, if so many disputes have been brought to the Constitutional Court time and time again, does this mean that the court has failed to provide meaningful guidelines to the different stakeholders as to how they should resolve disputes between themselves every time a matter has been brought before the Constitutional Court? I think not. From the outset it is significant to remember that HODs and SGBs are both given their powers by the SASA. And the act makes it clear that the main purpose of the Schools Act is to give effect to the Constitutional right to education.<sup>218</sup> The court *in Hoërskool Ermelo* was clear when it said that in partnership with the state, parents and educators assume responsibility for the governance of schooling institutions.<sup>219</sup> This is a clear indication that SGBs and HODs are partners in the schooling institutions. They have no choice but to work hand in hand with each other. There should be no power struggle between the different stakeholders because as organs of state they are under the duty to respect, protect, promote and fulfil the rights in the Bill of rights.<sup>220</sup> They have a duty to ensure that the best interests of all children is of paramount importance in their educational needs.

Justice Mhlantla rightfully points out that the general position is that admission policies must be applied in a flexible manner by SGBs.<sup>221</sup> A SGB should not be rigid in its mandate to determine admission policies and only concentrate on what is best for the learners which are currently enrolled in their school. In *Rivonia Primary School* Justice Mhlantla further went on to emphasise that “*in disputes between school governing bodies and national or provincial government, cooperation is the required norm*”.<sup>222</sup> This is because such cooperation is rooted in their shared goal of ensuring that the best interests of learners are furthered and the right to a basic education is realised.<sup>223</sup>

The author is of the view that the Constitutional Court has provided valuable guidelines and made it clear how the powers entrusted in SGBs and HODs are to be

---

<sup>218</sup> The South African Schools Act the preamble.

<sup>219</sup> Hoërskool Ermelo paragraph 57.

<sup>220</sup> The Constitution section 7(2).

<sup>221</sup> Rivonia Primary School paragraph 56.

<sup>222</sup> Rivonia Primary School paragraph 69.

<sup>223</sup> Ibid.

exercised in order to avoid disputes. The core principles that have been laid down by the Constitutional Court are as follows:

- (a) The general position is that admission policies must be applied in a flexible manner.
- (b) In disputes between school governing bodies and national or provincial government, cooperation is the required norm. Such cooperation is rooted in the shared goal of ensuring that the best interests of learners are furthered and the right to a basic education is realised.
- (c) The powers of the SGB are not absolute, the HOD may intervene if it is of the view that the policies are contrary to the SASA and the Constitution.
- (d) The rule of law requires that a HOD only intervene in a policy they are unhappy with, only in terms of powers given by the SASA and any other relevant legislation. The HOD is duty bound to achieve Constitutional obligations by taking lawful steps.
- (e) A functionary who intervenes in the policy-making function of a SGB must do so in a reasonable and procedurally fair manner.
- (f) SGBs and HODs are partners in terms of the SASA and are under a duty to engage with each other in good faith on any disputes they encounter. The engagement must be directed by the parties towards furthering the interests' of all learners.
- (g) The partnership between the SGB and HOD must be informed by close cooperation, a cooperation which recognises the partners' distinct but yet inter-related functions. They should consult with each other in cooperation with mutual trust and good faith.
- (h) The HOD and MEC have the powers to place unplaced learners in a public school, determine enrolment capacity, and to declare that a school has reached its capacity.

The above mentioned cases by the Constitutional Court have to a certain extent provided sustainable answers to the roles of the SGBs and HODs in setting admission policies. The court has guided the SGBs and HODs as to how they should manage actual or potential conflict, the court has reiterated that co-operation and meaningful engagement should be the norm between the parties as they have a duty to fulfil the rights in section 29(1) and (2) of the Constitution. The HOD and the MEC

are bound by the rule of law and as such they are obliged to take lawful action in all they do. The court in *Federation of Governing Bodies for South African School* has made it clear that admission policies and the power to determine the capacity of the school do not lie solely with the SGBs, this is in line with entrusting HODs with powers that match their obligations as a lack thereof would make such obligations impossible to achieve. In the Judgements the court has pronounced on the importance of the right to education for all learners in public educational institutions.

## **Bibliography**

### **Books**

EB Fiske & HF Ladd *Equity: Education reform in post- apartheid South Africa* HSRC Press: Cape Town (2005).

F Molteno *Part one: The origins of black education, The historical foundations of the schooling of Black South Africans.* (1984).

G Bloch *The toxic mix, what's wrong with South Africa's schools and how to fix it:* NB Publisher: Cape Town (2009).

I Tabata *Education for barbarism in South Africa.* Pall Mall Press: London (1960).

J S Farrant *Principles and practices of education* (2006)

P Christie *The right to learn: The struggle for education in South Africa* S.A: Ravan Press Johannesburg (1986)

P Kallaway *The history of education under apartheid, 1984-1994: the doors of learning and culture shall be opened* (2002).

S Woolman & Fleisch *The Constitution in the Classroom: Law and Education in South Africa:* PULP: Pretoria (2009).

### **Journal articles**

A Skelton "The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law" (2013) De Jure.

C Simba "The right to basic education, the South African Constitution and the Juma Musjid case: An unqualified human right and a minimum core standard" (2013) (17) Law Democracy and Development.

C McConnachie & C McConnachie "Concretising the right to a basic education" (2012) 129 The South African Law Journal.

EB Fiske & HF Ladd "Equity: Education reform in post –apartheid South Africa" (2005) 43.

E M Serfontein & E de Waal “The effectiveness of legal remedies in education: A school governing body perspective” (2013) De Jure.

I Ntshoe “Hidden and subtle effects of racism in law and school policy in post-apartheid South Africa” (2009) 15(2) Southern African Review of Education.

J D Jansen “Curriculum as a political phenomenon: Historical reflections on black South African Education” The Journal of Negro Education Vol.59, No.2 (1990).

J D Van der Vyver “Constitutional protection of the right to education” (2012) 27 South African Public Law.

L Arendse “Beyond Rivonia: Transformative Constitutionalism and the public education system” (2014) 29 South African Public Law.

M H Smith “Fundamentals of human rights and democracy in education – A South African perspective” (2011).

M Smith “Ambivalent adjudication of admission and access to schools – striking a reasonable balance between equality, quality and legality” (2014) 24 South African Public Law.

M Swart “The Constitutionalisation of diversity: An examination of language rights in South Africa after the Mikro case” (2008) 68 ZaoRV.

M Xaba “The possible cause of school governance challenges in South Africa” (2011) 31 South African Journal of Education.

R Joubert “The Constitution as a limitation on government power in educational contexts” (2012) 27 South African Public Law.

P J Visser “The admission of learners to public schools: who makes the decisions?”(1998) 61 THRHR.

S Liebenberg “Remedial principles and meaningful engagement in education rights disputes” PER/PELJ (2016) (19) – DOI.

S Fredman “Procedure or Principle: The role of adjudication in achieving the right to education” (2016) 6 Constitutional Court Review.

S Van der Merwe “How ‘basic’ is basic education as enshrined in section 29 of the Constitution of South Africa?” (2012) 27 South African Public Law.

S Woolman & B Fleisch “South Africa’s education, quasi-markets and de facto school choice” (2006) 24(2) Perspectives in Education.

Y Van Leeve “Executive heavy handedness and the right to basic education A reply to Sandra Fredman” (2016) 6 Constitutional Court Review.

### **South African case law**

Fose v Minister of safety and security 1997 (3) BCLR 736 (CC).

High School Ermelo v Head of Department of Education, Mpumalanga and Others High Court Case No 3062/07 2007-10-27.

Hoërskool Ermelo and Another v Head, Department of Education, Mpumalanga, and Others 2009(3) SA 422 (SCA).

Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 2 SA 415 (CC).

Welkom High School v Head, Department Free State case no 5714.

The Head of Department: Department of education, Free State Province V Welkom High School & Harmony High School (766&767) 2013 (2012) ZASCA 150.

Head of Department, Department of Education, Free State Province v Welkom High School 2013 (9) BCLR 989 (CC).

Governing Body of Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others Case No 11/08340 2012 ZAGPJHC.

Governing Body, Rivonia Primary School and another V MEC for Education, Gauteng Province and Others 2013 (1) 632 SCA.

MEC for Education v Governing Body of the Rivonia Primary School (2013) (6) SA 582 (CC).

The Governing Body of the Juma Masjid Primary School V Essay 2011 7 BCLR 651 (CC).

Member of the Executive Council for Education, Gauteng and Another v Federation of Governing Bodies for South African Schools 2015 149 ZASCA.

Federation of Governing Bodies for South African Schools v Member of the Executives Council for Education, Gauteng and Another 2016 (14) ZACC.

### **Foreign Case law**

Brown v Board of Education, (1954)349 US 294.

### **South African Legislation**

The Bantu Education Act 47 of 1953.

Notice 130 Of 1996 Education white paper 2.

The Constitution of the Republic of South Africa Act, 1996.

The South Africans Schools Act 84 of 1996.

The Promotion of Equality and Prevention of unfair discrimination Act 4 of 2000.

### **International Instruments**

The United Nations Committee on Economic, Social and Cultural Rights.

The United Nations convention on the Rights of the Child.

The African Charter on the Rights and Welfare of the Child.

### **Reports**



F Nekhuwevha “Transformation education: The education crisis and suggested solutions” , a paper delivered to the Association for Sociology in Southern Africa in June- July 1987 at the Conference held in the Western Cape 1987 15.

N Spaul “Education in SA: A tale of two systems”  
<http://www.politicsweb.co.za/opinion/education-in-sa-a-tale-of-two-systems> accessed 2015/11/06.

S Franklin, D and McLaren “Realising the Right to basic Education: An analysis of the content, policy effort, resource allocation and enjoyment of the constitutional right to a basic education (2015) Studies in Poverty and Inequality Institute, Working Paper 10.

K Tomasevski “Human rights obligations: making education available, accessible, acceptable and adaptable (2001), Human Rights obligations: 4 –A scheme (2006).