CHAPTER 3

SCHOOL GOVERNANCE

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BACKGROUND

Under apartheid, South Africa was governed autocratically; the majority of people were not allowed to participate in the decision-making that affected their lives. South African schools were governed similarly. Government divided schools along racial lines and deliberately underfunded education for black and other non-white students, providing them with a substandard education in order to use the educational system as a tool in the apartheid government's mission to perpetuate a system of white supremacy.

When South Africa became a democracy in 1994, significant changes were made to our education system to try to remedy the unequal education system we inherited from apartheid.

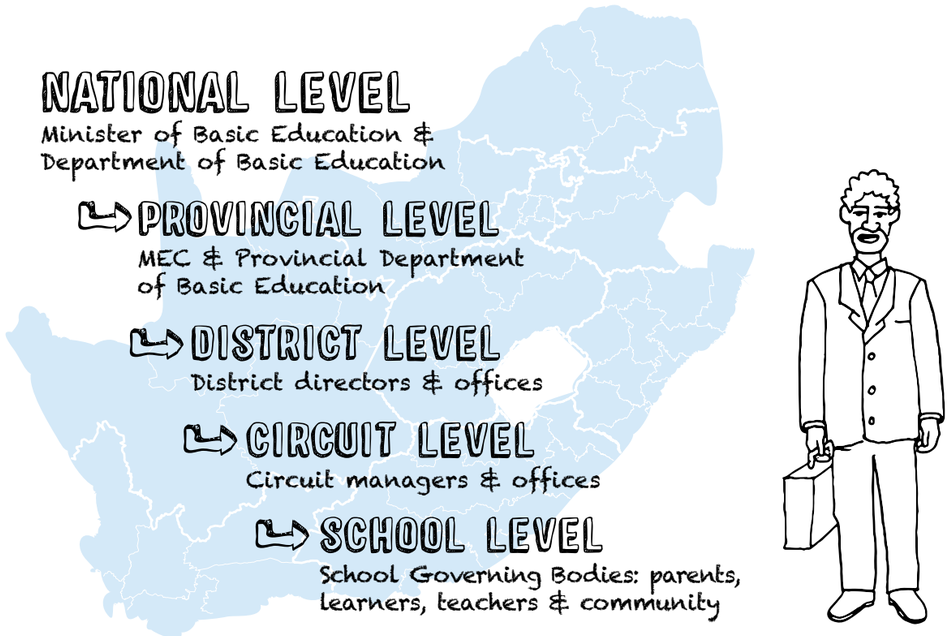
Certain values were embedded into education law, with the aim of improving the quality of education for all learners and using education as a tool for transformation for a more just and democratic South Africa. One such value was to run schools democratically, so that parents, educators and community members could all get involved. Another value is the idea that the people and groups who run a school should work in co-operation with each other and avoid power struggles.

School rules and policies are required to meet basic minimum standards established by national laws and policies. Further – and importantly, as it is the supreme source of law in democratic South Africa – both the minimum standards and all school rules and policies must conform to the Constitution of the Republic of South Africa, 1996.

The details of how the various groups and tiers of government in education should work together is set out in laws on school governance, such as the South African Schools Act 84 of 1996 (the Schools Act). The Basic Education Laws Amendment Bill (BELA), which is discussed later in this chapter, sets out impending amendments to the school governance provisions in the Schools Act. The Schools Act lays down important rules concerning who is involved in the operations of the school, and for what they are responsible. Further, BELA seeks to elaborate on and make amendments to the Schools Act regarding how different actors and the tiers of government must co-operate in school governance.

This chapter explains how the case law has transformed school governance.

The chapter will outline the role players in school governance, with an emphasis on the functions of school governing bodies. Further, the chapter discusses policymaking functions and key concepts in governance.



ROLE PLAYERS IN SCHOOL GOVERNANCE

There are a number of different groups of people responsible for governing a public school.

Different levels of government have responsibilities regarding school governance at national, provincial, district and circuit level, while school governing bodies (SGBs) govern at school level.

SGBs are made up of parents of learners, the learners themselves, educators at the school and community members where the school is located.

The Minister of Basic Education, representing the Department of Basic Education (DBE), is responsible for governing schools at national level.

The Member of the Executive Council (MEC) of the Department of Education is the official responsible for governing schools at provincial level.

The head of the provincial department of basic education (HOD) in each province is responsible for carrying out school governance at provincial level.

Each province is divided into a number of education districts, run by district directors based at the district office.

Education districts are themselves divided into a number of education circuits, which are areas run by circuit officers and headed by circuit managers. Circuit officers perform functions assigned to them by each district office, and play a key role in connecting schools with district offices and provincial DBEs.

RESPONSIBILITIES OF THE ROLE PLAYERS

All of these role players must work together to achieve every learner's right to a basic education. The different jobs that these role players have are set out in the law, in acts such as the Schools Act and its regulations.

The SGB for each school is responsible for the everyday management of that school. The SGB must decide on and carry out school policies that are suitable for the school. Having fair policies about admissions to and exclusions from school helps to protect children's right to education.

The work done by SGBs also aims to protect the rights of children in schools by facilitating the fair implementation of school rules. SGBs are required to formulate policies that protect and promote learners' rights to language, culture and religion.

In addition to the functions described above, the SGB also has a supportive role to play in the school. It must make sure that the school is governed in the best interests of all the stakeholders. The SGB must not interfere in the professional management of the school, but should support the academic staff in executing their duties.

The SGB should also encourage partnerships with people with expertise to assist the school. Fundraising is another supportive duty; the SGB can raise funds to supplement the school's income.

The role of the Minister of Basic Education is to create basic standards that all schools should meet in order to provide adequate education for everyone. For example, the Minister published the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, to which all provincial governments are required to adhere.

The provincial DBE has a duty to create enough schools for all the learners in the province. They must meet the standards that are set by the Minister. They also have other responsibilities, which will be described in more detail below.

District offices do not create any policies, but they support the provincial DBE by carrying out delegated functions. For example, district offices have the authority to dissolve ineffective SGBs, and can allocate or withdraw certain functions of the SGB, on reasonable grounds.

MEMBERS OF SGBs AND HOW THEY ARE ELECTED

An SGB is made up of automatic members, elected members and co-opted members. The school principal is automatically a member of the SGB. People who can be elected to the SGB include parents of learners at the school, teachers at the school, certain learners at the school, and members of staff who are not educators. Members of the community can also form part of the SGB, as they can assist the school with various kinds of special knowledge or skill. They may include people such as doctors, accountants or lawyers.

An SGB is expected to elect office-bearers from among its members, including a chairperson, a treasurer and a secretary. The chairperson should be a parent member. An SGB election follows a specific procedure, as set out in the provincial gazette as provided for in Section 28 of the Schools Act. The school's electoral officer, as appointed by the District Director, must send out notices announcing the nomination meeting and the election meeting. A school electoral officer is a principal from another school.

The date, time and place of a meeting must be stated on the notice. The notices should be sent out at least 14 days before the meeting; a hard copy should be handed to every learner, which they must give to their parents. Other methods of communication (such as SMS) can be used, as long as they do not disadvantage any member of the school community.

A person who is willing to be a member of the SGB may only be nominated and seconded by a person belonging to the same SGB membership category. A nomination form, completed by the nominator, the candidate (the person who is willing to be a member of the SGB) and a seconder must be handed to the electoral officer not more than seven days and not less than 24 hours before the election meeting.

A member can be proposed during the nomination section of the meeting, provided that another person from the same category seconds the nomination on the relevant template.

A quorum of 15 per cent of parents on the voters' roll is needed for the election and nomination meeting to proceed. If this quorum is not present, the meeting must be set for another day.

Voting happens on ballot papers. Each ballot paper must have the school stamp on it, or some other distinguishing feature, to prevent tampering. A person with the right to vote must record their vote secretly and deposit it into the ballot box. After the votes have been counted, each chosen SGB member must be informed of their election in writing.

The school principal must organise the first meeting of the SGB within 14 days of the election, so that the new SGB members may be elected. Once they have been chosen, the principal must inform the district manager in writing of the people who have been elected.

BRIEF OVERVIEW OF THE LEGAL FRAMEWORK

The Constitution guides all laws in South Africa. Laws on school governance must be consistent with the Bill of Rights in the Constitution.

Section 29 of the constitution is the overarching provision that protects and ensures the standards for school governance. Section 29 states:

1. Everyone has the right –
   a. to a basic education, including adult basic education; and
   b. to further education, which the state, through reasonable measures, must make progressively available and accessible.
2. Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single-medium institutions, taking into account –
   a. equity;
   b. practicability; and
   c. the need to redress the results of past racially discriminatory laws and practices.
3. Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –
   a. do not discriminate on the basis of race;
   b. are registered with the state; and
   c. maintain standards that are not inferior to standards at comparable public educational institutions.
   d. Subsection (3) does not preclude state subsidies for independent educational institutions.

Section 29(1)(a) provides the right to basic education, which is the foundation of all education cases concerning basic education. It sets the premise for courts to ensure that learners' rights will be protected, and that all learners are granted access to basic education.

Section 29(2) has been subject to interpretation in the various cases concerning language policies. The section is the empowering provision to the language policy function at schools. *Head of Department: Mpumalanga Department of Education v Hoerskool Ermelo* (known as *Ermelo*) is a case that highlighted the importance and practicalities of an equitable language policy. Interestingly, the precedent set in this case has since influenced the approach of the courts in higher education matters concerning language policies. While the jurisprudence on language policies in schools is discussed further in Chapter 12, it may be useful to give a brief overview of the higher education cases concerning this subject that follow the principles established by *Ermelo*.

In the higher education cases, the question before the courts was whether various universities followed fair processes in introducing dual or parallel languages of instruction.

CASE STUDIES

THE AFRIFORUM CASES

In *Afriforum v University of the Free State* (*Afriforum*), the University adopted a policy to phase out teaching in Afrikaans as a "co-equal medium of instruction with English". The Constitutional Court pointed out that language forms part of a transformative tool in ensuring equal access to education. It also noted the disadvantages of the past, and that black learners – who make up the majority, in institutions of higher learning – would be disadvantaged if Afrikaans was an official language of instruction.

In *Afriforum*, the Court interrogated whether the language policies were 'reasonably practicable'. The Court stated:

> Reasonable practicability therefore requires not only that the practicability test be met, but also that considerations of reasonableness that extend to equity and the need to cure the ills of our shameful apartheid past, be appropriately accommodated. And that is achievable only if the exercise of the right to be taught in a language of choice does not pose a threat to racial harmony or inadvertently nurture racial supremacy. That goes to practicability. The question then is, has the use of Afrikaans as a medium of instruction at the University had a comfortable co-existence with our collective aspiration to heal the divisions of the past or has it impeded the prospects of our unity in our diversity? [Have] race relations, particularly among students, improved or degenerated as a consequence of the University's 2003 language policy? If not, would it be 'reasonably practicable' for the University to relegate Afrikaans to low-key utilisation in a constitutionally permissible way?

Following this, after considering the evidence before the court, the Constitutional Court held that the University was justified in amending its policies.

In *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* (*Gelyke Kanse*), the Constitutional Court found once again that the University was justified in adopting a policy that gave preference to instruction in English over Afrikaans. The Constitutional Court noted that nearly all students were capable of being taught in English, but that a 'significant minority' of students were unable to learn in Afrikaans.

In both *Gelyke Kanse* and *Afriforum*, the courts took into account the remedial function of the section that sought to redress the injustices of the past, and that it was 'reasonably practicable' to implement the policies. In *Gelyke Kanse,* the Constitutional Court noted that most black students entering the University were not fluent enough to be taught in Afrikaans, and that this overwhelmingly disadvantaged black students over other races. The Court noted that deciding what was reasonably practicable was partially a question of cost, and also a "judgment about value". In this regard, the Court stated that while it recognised that there is a need to mitigate against English "jeopardising the precious value of our entire indigenous linguistic heritage", ultimately the need to ensure greater inclusion and accommodation of black students is more important for the University in devising its language policy.

On the other hand, in *Chairperson of the Council of UNISA v AfriForum NPC* the Constitutional Court adopted a different stance. In this case the University adopted a policy to remove the guarantee that courses would be offered in Afrikaans as well as English, and to promote the status of indigenous African languages. The Court held that the previous two cases were not an endorsement for the removal of Afrikaans as a language of instruction, and pointed out that Afrikaans was not only a white language, but developed as a combination of different languages from different races. The Court noted that the very perception of Afrikaans as a 'white' language is a result of white supremacist propaganda taught during apartheid. The Court ordered that UNISA's policy did not comply with Section 29(2), on the basis that there was insufficient evidence showing that the policy was reasonably practicable or equitable or that UNISA had considered these factors. Thus, the case was decided on the issue of a lack of evidence rather than on principle.

Section 29(3) deals with the regulation of independent schools. Independent schools are not absolved from governance structures such as school boards; and although they are not under the same level of governmental scrutiny, they are bound by the Constitution and legislation. The relationships between independent schools, government and the law are discussed in more detail in Chapter 22 of this handbook.

Another important provision in the Constitution is Section 41(1)(h), on cooperative governance. This sets out how the various parties involved in governing schools should interact together:

All spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith, by –

i. fostering friendly relations;
ii. assisting and supporting one another;
iii. informing one another of, and consulting one another on, matters of common interest;
iv. coordinating their actions and legislation with one another;
v. adhering to agreed procedures; and
vi. avoiding legal proceedings against one another.

Then there are specific pieces of legislation that concern school governance and give content to the Constitution. The Schools Act sets out the roles that different parties play in governing schools. The National Education Policy Act regulates the policy function of government.

These Acts are supported by regulations made by the DBE. These regulations provide further guidance as to how each of these laws work. The laws and regulations apply to all schools in the country. Provincial governments create their own laws or rules, which apply to their province only. These are called provincial circulars and regulations.

CASE STUDY

THE *RIVIONA* CASE

In the *Rivonia* case, there was a debate between the SGB of Rivonia Primary School and the Gauteng Department of Education. The HOD wanted to admit a single learner to the school. However, the SGB had decided on their own capacity policy, and had determined that their classes were full. But the capacity set by the SGB was lower than that of the national average in terms of the government's norms and standards; and so, according to the HOD, there was still space for that particular learner. The result was that the HOD removed the power to decide on school capacity and admissions from the SGB, and changed their admission policy.

The Constitutional Court decided that the way in which the HOD had changed the SGB's admission policy was not done fairly or reasonably. Despite this, the Court decided that the school could not be completely inflexible in their policies when deciding the fate of an individual learner, and that the MEC did have the final say in such a decision.

While the Court declared that the HOD did not act in a procedurally fair manner by placing the learner in the school, it ruled that the HOD did have the power to order that the principal should admit the learner despite the SGB's admission policy.

POLICY-MAKING FUNCTIONS

This section sets out who is responsible for what in terms of the different policies under school governance laws.

ADMISSIONS POLICY

The SGB of a school can decide on the admissions policy for their school. However, this policy must conform to the standards set in the Constitution.

The Constitution stipulates that there must be no unfair discrimination against anyone on any of the following grounds: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religious conscience, belief, culture, language or birth. Equality and unfair discrimination are discussed further in Chapter 5.

The SGB's policy must also conform with Section 5 of the Schools Act, the relevant regulations and any other relevant provincial law. The policy must also be flexible enough to allow for the MEC to intervene when this is a reasonable course of action.

When deciding on the admission of a particular learner, the principal of the school will only make such a decision provisionally on behalf of the provincial HOD. The MEC, who is the political head of the provincial education department, has the final say in admission decisions, and has the power to overturn decisions. It has been noted in court cases – such as in *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* (*Rivonia*) – that even though MECs have this power as a matter of course, it must be exercised in a fair and reasonable manner.

The DBE sets national norms and standards for admissions. Details about this can be found in regulations on the DBE's website called 'Admission Policy for Ordinary Public Schools'. The MEC and the HOD must ensure that each SGB's admission policy complies with national norms and standards.

The challenge of admissions and capacity became apparent in a recent case. The Gauteng Department of Education's (GDE) Admission Plan of 2021 was introduced to alleviate the pressures of the GDE admission system. The two-phased process that opened for Grade 8 learners was seen to disadvantage learners attending independent primary schools and wanting to enter the public school system for secondary school. The challenge faced by the GDE was capacity in schools. The GDE has reiterated its approach that placements would comply with the Schools Act and the Regulations. Although this matter did not result in litigation, it confirmed the importance of compliance with the regulations.

Schools may not discriminate unfairly when deciding on a learner's admission; therefore, admission policies must also be non-discriminatory. For this reason, schools may not administer any tests in order to determine the admission of learners (as stated in Section 5(2) of the Schools Act). This is because schools have the obligation to assist all learners, and not only the learners who will make their school results look impressive. This is especially important in light of South Africa's legacy of apartheid, and the current reality of unequal access to education. It is important that admission policies help achieve universal and non-discriminatory access to education.

CASE STUDY

THE FEDSAS CASE

In *FEDSAS v Member of the Executive Council for Education, Gauteng*, the Constitutional Court had to determine whether new regulations promulgated by the MEC relating to learner admission in Gauteng conflicted with national and provincial legislation or not, and therefore whether these regulations were invalid or not.

The Constitutional Court agreed with the Supreme Court of Appeal, which had previously decided that FEDSAS had failed to consider the need for reform in the education system due to the legacy of apartheid. The Court found that regulation 3(7), which protects the learner from unfair discrimination when being considered for admission, was a fair regulation. The Court also found that the MEC could determine feeder zones for schools; and until the MEC had done so, the appropriate school for a learner to be considered for admission was the school closest to where the learner lived, or a school within a five-kilometre radius of a learner's parent's workplace. The Court therefore dismissed the appeal against the validity of the regulations, and ordered that the MEC was to determine feeder zones for public schools within 12 months of the date of judgment. Subsequent to this ruling, regulations relating to the admission of learners to public schools were passed. These provide for learners to be enrolled in schools that are within their feeder zones. Section 7 of the regulations states that the learner's residence must be within 30km of the school.

CASE STUDY

PRETORIA GIRLS HIGH

In August 2016, black learners at Pretoria Girls High School received nationwide attention for protesting against institutional racism at the school. The major complaint of the learners was about the implementation by the school of its Code of Conduct – in particular, its policy on hairstyles.

Following the protest, many other schools have sought to pre-empt similar protests by revising their own codes of conduct.

Pretoria Girls High School's Code of Conduct describes 'ubuntu' and 'equality and inclusivity' as the school's core values. These must be used to interpret the code. It then stated that "all hair must be brushed", and that "all styles should be conservative, neat and in keeping with the school uniform".

According to the learners, this hair policy has been interpreted by the school in such a way as to prevent black learners from wearing their hair in an Afro, because this type of hairstyle was viewed as 'exotic'. black learners argued that the prohibition against Afros amounted to racial discrimination. The learners stated that for a black girl, an Afro was just one of the many ways in which natural 'black' hair could be treated, and it should be up to them to decide how to wear their hair. The girls therefore wanted to be allowed to wear an Afro if they chose to do so.

These learners also noted some of the prejudicial statements that had been made about 'black' hair. In previous years, learners had been told they would not be allowed to write exams if they didn't 'fix' their hair. Learners say comments were made by staff about black girls' hair. These included "[Your hair] looks like a bird's nest", "Comb your hair, it looks terrible", and "[Your dreadlocks are] dirty old braids"; and a learner alleged that in two separate incidents, teachers had referred to her hair as 'kaffir hair'.

Learners at the school also reported that they had been reprimanded for wearing 'doeks', which they consider to be culturally significant, and told to "stop making those funny noises" when speaking isiXhosa at school. (The chapter in this handbook on religion and education in schools covers in detail learners' religious and cultural rights in terms of dress, hair and practices.)

Following the protests at the school, the Gauteng MEC for Education intervened and suspended the provision in the Code of Conduct dealing with hairstyles. He instructed the SGB to develop a new hair policy, which he said had to be workshopped before being introduced.

The DBE's 1998 *Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners* acknowledges that "freedom of expression includes the right to seek, hear, read and wear. The freedom of expression is extended to forms of outward expression, as seen in clothing selection and hairstyles".

CODE OF CONDUCT

The SGB is responsible for creating and adopting a code of conduct. However, as stated in Section 8 of the Schools Act, the SGB should only do so after consulting with learners, parents and educators. This gives effect to the principle of participatory democracy, by including the various rights-holders in the process.

The code of conduct must also conform to the Constitution, which means it may not infringe on any of the rights in the Bill of Rights. When creating the code of conduct, schools can be guided by guidelines that have been developed by the DBE at national level. These are called the 'Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners'. The code of conduct must specify the conduct that is permissible and the conduct that is prohibited, as well as the procedure for disciplinary procedures, including suspensions, expulsions and the appeals process.

With regard to suspensions and expulsions, the SGB has the authority to impose suspension on a learner. While the SGB may recommend the expulsion of a learner to the HOD, it is only the latter who can make the decision to expel a learner. The learner has the right to appeal the decision to expel them by appealing to the MEC of the provincial DBE.

In *A v Governing Body, The Settlers High School and Others* the High Court indicated that the values entrenched in the Department's Guidelines and schools' codes of conduct must be used in interpreting codes of conduct.

It is therefore important for all SGBs, when developing codes of conduct, to consider the religious, cultural and racial diversity of the school populations they serve, and then – after proper consultation with these different groupings – develop rules that are inclusive, and which accommodate and reflect this diversity. This is because what is considered 'neat' cannot be based on the subjective views of one particular group. What is considered 'neat' must be negotiated and discussed with the entire school population.

LANGUAGE POLICY

SGBs have the power to determine a school's language policy. This is set out in Section 6 of the Schools Act, and has been confirmed in case law in the Constitutional Court. Chapter 12 of this handbook deals with language in schools in detail.

Like all the other powers of the SGB, this power is not absolute, but is subject to the Constitution and the Bill of Rights.

The courts have also held that the HOD can intervene in the language policy of a school, on reasonable grounds, in order to uphold learners' right to education.

Section 29(2) of the Bill of Rights provides that everyone has the right to receive education in the language of their choice where reasonably practical, taking into account the need for historical redress because of past racially discriminatory laws under apartheid. In addition to this, the language policy of the school **must take into account the broader needs of the community in which the school is located.** This was affirmed strongly in the *Ermelo* case (described in detail on the right) and subsequent cases dealing with tertiary-institution language policies.

PREGNANCY POLICY

SGBs can make pregnancy policies. The courts have recognised that SGBs are better suited than the provincial or national DBEs to make policies for their individual schools. Again, as with all the other policy-making functions of the SGB, this ability to make policy on pregnancy is not absolute. Chapter 9 of this handbook deals in greater detail with issues around learner pregnancy.

CASE STUDY

THE ERMELO CASE

Ermelo High School was an Afrikaans-medium school which was not filled to capacity according to the national average. The HOD of the Mpumalanga provincial education department requested that the school admit English-speaking learners to the school, as other schools in the area were filled beyond capacity.

The SGB of Ermelo High refused to admit the learners for tuition in English, as it was the school's policy to provide education in Afrikaans. The HOD subsequently tried to remove the power of the SGB to determine language policy, and appointed an interim committee that altered the school's language policy to be dual medium.

The matter was eventually heard in the Constitutional Court. The Court decided that the HOD had not acted procedurally when trying to resolve the dispute. However, the learners who were subject to the proceedings were permitted to complete their studies. The Constitutional Court ordered the school to revise its language policy to take cognisance of the broader community in which the school was based:

> It is correct, as counsel for the school emphasised, that section 20(1) compels a governing body to promote the best interests of the school and of all learners at the school. Counsel also emphasised, rightly, that the statute places the governing body in a fiduciary relation to the school. However, a school cannot be seen as a static and insular entity. Good leaders recognise that institutions must adapt and develop. Their fiduciary duty, then, is to the institution as a dynamic part of an evolving society. The governing body of a public school must in addition recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time, but also in the interests of the broader community in which the school is located, and in the light of the values of our Constitution.

In addition, the Court ordered that the SGB take reasonable steps to satisfy the probable demand for English places in the following year, and file a report in that regard.

CASE STUDY

THE WELKOM CASE

An example of a clash between SGB and HOD when it comes to the pregnancy policy can be seen in the case of *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another (Welkom)*. This case concerned two schools, namely Welkom High School and Harmony High School. Both schools had adopted pregnancy policies that provided that any learner who became pregnant was automatically excluded from the school, and could not return until at least one year after the birth of the baby.

The conflict in the case centred on whether the HOD of the Free State provincial education department had followed the correct procedure in trying to remedy the policies, not on the content of the policies themselves. Therefore the Constitutional Court could not make a formal decision on whether the pregnancy policies went against the Constitution. However, the Court did acknowledge that at face value, the policies infringed on the constitutional rights of pregnant learners to education, dignity, privacy and bodily and psychological integrity. The Court ordered that the schools review their policies, in light of constitutional values and of the guidelines set out by the head of the Free State provincial education department.

The policy must be consistent with the Bill of Rights, and in particular the policy must ensure that the learner's right to education is upheld, and that there is no unfair discrimination against the learner based on their pregnancy status. The policy seeks to protect pregnant learners from stigmatisation and bullying, to provide counselling and sex education, and to accommodate learners in terms of the short-, medium- and long-term needs of the pregnancy. The policy ensures that learners are able to return to school after they give birth, and are provided with the necessary assistance in relation to learning, health and maternal needs.

In the Department of Basic Education Policy of 2021 on the Prevention and Management of Learner Pregnancy in Schools, the policy ensures the provision of sexual and reproductive health services – which includes access to contraceptive technologies – to enable learners to make informed choices, avoid unintended pregnancies and ensure safe abortions. Further, the policy ensures the return and retention of learners following childbirth, facilitates access for pregnant learners to antenatal care, and ensures that schools provide a stigma-free, non-discriminatory and non-judgemental environment for pregnant learners.

RELIGIOUS POLICY

Religion and culture in schools is dealt with in detail in Chapter 11 of this handbook.

SGBs can make rules regarding religious observance; but these rules must also be consistent with the Constitution, which protects everyone's right to freedom of thought, conscience, religion and opinion. This means that the religious policies of individual schools must be in accordance with Section 8 of the Schools Act and the DBE's National Policy on Religion in Education, and must promote understanding and respect for South Africa's diverse religious beliefs.

In addition, attendance at a school's religious observances should be done on a free and voluntary basis. The DBE has drawn up a policy that provides some guidelines in this regard, called the National Policy on Religion and Education. The mandatory practice of religion at schools was challenged in the *Organisasie vir Godsdienste-Onderrig (OGOD)* matter, which challenged a school's policy of imposing a particular religion. A discussion of this case can also be found in Chapter 11.

SCHOOL FEES

School fees supplement funding provided by government. School fees are determined at a public school by a resolution adopted by a majority of parents at a general meeting. The SGB must implement the resolution as determined at this meeting. This is set out in Section 39 of the Schools Act.

Schools may be either designated fee-paying schools or no-fee schools. A fee-paying school is required to inform parents of the school-fee exemption policy. The school-fee exemption policy provides that parents who earn less than a certain income can receive a full or partial exemption from school fees. Parents must apply for such an exemption in the required manner.

Other exemptions apply automatically. Caregivers of children in foster care and caregivers who receive the child-support grant are exempted from paying fees. Such caregivers do not have to apply specifically for this.

No-fee schools are certain schools where fees are abolished for learners from Grade R to Grade 9. No-fee schools are chosen from the poorest schools in the country.

CASE STUDY

THE PILLAY CASE

A school's code of conduct may at times conflict with a learner's religious belief or cultural practices. In such a case, the school is required by the Constitution to take positive steps to make a reasonable accommodation for the learner concerned. For example, in *MEC for Education: KwaZulu-Natal and Others v Pillay* (the *Pillay* case), a learner wore a nose stud to school as part of her religion and culture. However, wearing jewellery other than that permitted by the rules was against the school's code of conduct, and so the learner was punished. The matter went to court, and the Constitutional Court found that the learner's cultural and religious practices should have been reasonably accommodated, and that an exemption should have been made for that learner.

CASE STUDY

THE OGOD CASE

In 2017, a group of parents concerned with religious practice instituted an application challenging a religious policy. The application was sought against six schools that had imposed stringent religious practices for all learners; in particular, imposing conduct in line with the Christian faith. The applicants contested the operation and activities imposed on learners. These included "endorsing the school as having a Christian character; recording that its school badge represents the Holy Trinity; recording as part of its mission statement that 'we believe'; having religious instruction and singing; handing out Bibles; opening the school day with scripture and explicit prayer dedicated to a particular God; referring to any deity in a school song; having a value that includes learners [striving] towards faith; working with learners to understand and self-discover in what relationship they stood with Jesus; teaching creationism; and having children draw pictures depicting Bible stories".

The applicants sought an interdict and formulated three points of interrogation: "First, there is the question whether a public school may hold itself out as a Christian school, and if so to what extent; second, there is the issue of religious observances at public schools – whether a public school itself may conduct these, and the extent to which these may be religion-specific; and third, there is the issue whether a learner may be asked to convey whether or not she adheres to a particular (religious) faith."

In its analysis the court set out the obligations of SGBs under the Constitution, the Schools Act and the policies. The High Court decided that the policy of the school was unlawful for not taking into consideration the diversity of the country, and for not embracing the multiracial and multireligious society we live in. The Court concluded that the Constitution, legislation and policies do not provide an SGB with the power to impose one religion on all learners. The Court stated that:

> …neither the Constitution nor the Schools Act confers on a public school or SGB the right to adopt the ethos of one single religion to the exclusion of others. Rather, the Constitution authorises and the subsidiary laws to which we have referred provides for appropriately representative bodies that are required to make rules that provide for religious policies and for religious observances that are to be conducted on a *"free and voluntary"* and on an *"equitable" basis. And, as we have seen, "this requirement of equity demands the State act even-handedly in relation to different religions".*

The court thus found that the schools had contravened the Schools Act. The case is dealt with in more detail in Chapter 11.

KEY PRINCIPLES EMANATING FROM THE COURTS

PARTICIPATORY DEMOCRACY

Participatory democracy means that people can be involved in a meaningful way in the decisions which affect them. Previously, education was seen as a benefit provided thanks to the state's generosity. Now education is viewed as a right that can be claimed from the state, and the state has a duty to provide it.

The Schools Act states that representatives of parents, learners and educators must all have a say in the learners' right to education. This is done through the SGB. The Constitutional Court has referred to SGBs as an example of 'grassroots democracy', because they allow the people who are directly affected by the right to education to be involved in achieving this right.

DEMOCRATISATION OF EDUCATION

School governance is now seen as a democratic process. This is to counter the legacy from apartheid based on authoritarian rule; there is a requirement for people to fix and change past inequalities.

The Schools Act ensures that SGBs are involved in making decisions for schools. They must do so in a democratic manner, by consulting with everyone whose needs are affected. In addition, the SGB is elected using a democratic process, in which people are voted onto the SGB by the parents of the children at the school.

The Schools Act was designed to allow parents, learners and the community to have a greater role in managing the right to education. This is also linked to the idea of participatory democracy, which means that people can be involved in a meaningful way in the decisions that affect them.

COOPERATIVE GOVERNANCE

Cooperative governance means that all the parties involved in governing schools must work with each other in a supportive and collaborative way. This is a key feature of participatory democracy, because it ensures that all the parties are involved in achieving the right to education.

The Schools Act sets out how the parties must work together. Various cases in the Constitutional Court have elaborated on the concept of cooperative governance. In the *Ermelo* case, the Constitutional Court explained:

> An overarching design of the [Schools] Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education, whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education, who bears the obligation to establish and provide public schools, and together with the Head of the Provincial Department of Education exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body, which exercises defined autonomy over some of the domestic affairs of the school.

In the *Welkom* case, the Constitutional Court elaborates on how the various role players in school governance should work together:

> Cooperative governance is a foundational tenet of our constitutional order and has been incorporated into the Schools Act through the provisions of section 22. It is incumbent upon HODs and governing bodies to act as partners in the pursuit of the objects of the Schools Act. In *Schoonbee and Others v MEC for Education, Mpumalanga and Another*, the cooperative mandate contained within the Schools Act was described as follows:
>
> > Having read the Act again, it seems to me that the new education regime introduced by the Schools Act, which came into operation on 1 January 1996, contemplates an education system in which all the stakeholders, and there are four major stakeholders – the State, the parents, educators and learners – enter into a partnership in order to advance specified objectives around schooling and education. It was intended, it appears, to be a migration from a system where schools are entirely dependent on the largesse of the State to a system where a greater responsibility and accountability is assumed, not just by the learners and teachers, but also by parents.

The different role players in school governance must work together in good faith and with mutual trust. They must provide support to one another and consult with each other on various issues. The aim is to ensure that the right to education is achieved, and that the learners' best interests come first.

However, there are occasionally disputes between the various parties. While parties can go to court to resolve their disagreements, the law prefers this to be the last option. The courts prefer the parties to use all the internal processes available to resolve any disputes before turning to litigation.

MEANINGFUL ENGAGEMENT

Meaningful engagement forms part of cooperative governance. Courts have referred to meaningful engagement as a process used to resolve issues or disagreements that the parties may have with each other. The parties are encouraged to talk with each other – and to do so in a constructive way – in order to provide clarity on a certain policy or issue. This is seen as the most effective way to resolve a dispute, as the parties are better suited to resolving the issue than the courts, whose area of expertise is not necessarily school governance. This is what courts have acknowledged as the practical value of meaningful engagement. In addition to this, the courts acknowledge the symbolic value of the parties working together, which is a means of exercising participatory democracy.

For example, in the *Welkom* case, the court ordered that the Welkom SGB engage meaningfully with the HOD when revising their pregnancy policies. The SGB had created a policy that was not constitutional and did not conform to provincial DBE guidelines. In order to resolve the issue, and to make use of the expertise of the various parties, they were encouraged to work together to create a better policy for the learners.

BELA AND ITS IMPACT ON GOVERNANCE

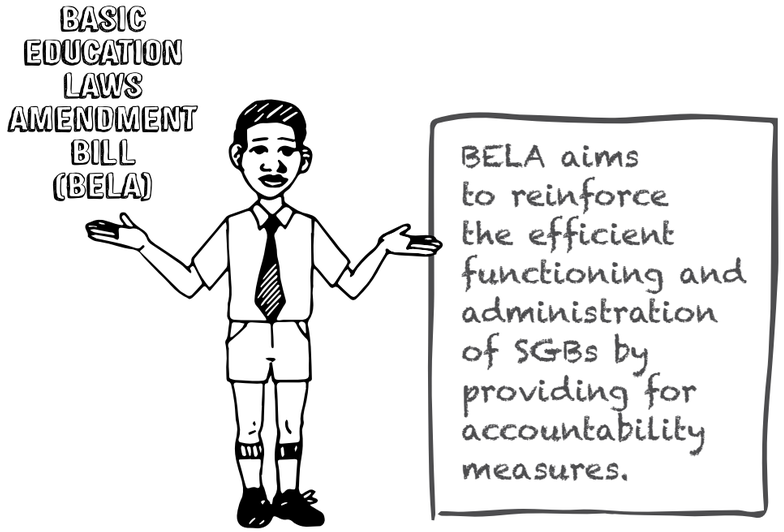
In 2017, the DBE introduced the Basic Education Laws Amendment Bill, or BELA. Among other matters, it includes amendments to many of the school governance provisions.

The passage of the Bill has been slow, and this appears to be because some of the school governance provisions are not supported by SGB organisations that are concerned that the amendments give too much power to provincial education departments. BELA appears to incorporate the jurisprudential developments in respect of school governance through the proposed amendments. In December 2021, BELA was presented to Parliament, who must comply with its processes in terms of section 76 of the Constitution, to have it passed. A section 76 Bill must be discussed at both the National Assembly and the National Council of Provinces, as the Bill affects the functioning of government at both national and provincial levels.

BELA aims to reinforce the efficient functioning and administration of SGBs by providing for accountability measures.

- Clause 14 of BELA seeks to amend section 18A of the Schools Act, which prevents members of SGBs or their families from materially benefiting from their relationship to the school.
- Clause 23 of BELA seeks to amend section 27(2) of the Schools Act to prevent SGB members from receiving any form of remuneration from the school, and section 29, which seeks to ensure that only a parent who is not an employee at a school may serve as the chairperson of the financial committee.
- Clause 28 of BELA seeks to amend section 36 of the Schools Act to introduce measures requiring the approval of the Member of the Executive Council where schools enter into loan or lease agreements.
- Clause 30 of BELA seeks to amend section 38 of the Schools Act to introduce new oversight measures where a budget is adapted during a financial year, or where a quorum cannot be reached for an annual general meeting.
- Clause 31 of BELA seeks to amend section 38A, which provides for processes in paying state employees. The section seeks to ensure greater financial oversight measures into the financial affairs of the schools. These clauses impact governance at a local level to curb corruption.

Regarding admissions policies, clause 4 of BELA seeks to amend Section 5 of the



Schools Act by providing that admission policies must be sent to the HOD for approval. In deciding whether or not to approve the admissions policy the HOD must consider the best interests of the child, equality and availability of resources and accessibility of schools. These considerations must be weighed up against capacity in schools.

In terms of language policy, clause 5 of BELA seeks to amend Section 6 of the Schools Act. According to BELA, when approving the language policy the HOD must consider the best interests of the learner, the dwindling number of learners who speak the language, the effective use of school resources and the language needs of the broader community. It empowers the HOD to adopt more than one language of instruction following protocol.

Clause 7 of BELA seeks to amend section 8 of the Schools Act to allow for learners exemption from certain rules of the school if they impact the learners' religious and cultural beliefs. The proposed amendments would be in line with the Constitutional Court's decision on the reasonable accommodation of someone's religion in *Pillay* and *OGOD*.

BELA also proposes amendments regarding the criteria for obtaining a fee exemption. Clause 32 of BELA seeks to amend section 41 of the Schools Act, which states that an application for a fee exemption must be supported by documentary evidence by way of an affidavit from a parent and supported by a confirmatory affidavit from a social worker or another competent authority. In line with the objective to promote cooperative governance and participatory democracy, clause 39 seeks to amend section 59A of the Schools Act requiring meaningful engagement. It states that in disputes between the SGB and HOD, the parties should meaningfully engage to resolve the dispute. If they are unable to resolve the dispute the matter should be escalated to the MEC.

Clauses 17 and 21 of BELA amends section 22 and 25 of the Schools Act, dealing with withdrawal and dissolution of the SGB respectively. The sections hold that an HOD, on 'reasonable grounds', may completely withdraw and dissolve the functions of an SGB and replace an SGB for a period of three months, which period may be extended for up to a year. The section requires that the HOD provide reasons for the withdrawal and/or dissolution. If a person is aggrieved by the decision, they could approach the MEC on appeal.

RESOLVING DISPUTES BETWEEN THE VARIOUS STAKEHOLDERS

The Schools Act makes provision for various methods of resolving disputes that might arise between people involved in the running of a school.

Cooperative governance, a key principle in school governance, requires parties to resolve matters in good faith, and to engage meaningfully with each other. They must also go through all the internal processes provided for resolving disputes before turning to the court. Court action must be a last resort. As confirmed in case law (such as the *Rivonia* case), the starting point for resolving disputes is the best interests of the learner.

The internal processes that are provided in the Schools Act include, for example, learners or parents being able to appeal decisions of suspension to the provincial head of education, and decisions of expulsion to the education MEC. The process for these procedures is set out in a school's code of conduct, which must also be constitutional.

CONCLUSION

While there are a number of different role players in school governance, their roles are intertwined, and cooperation between them is required to put learners' best interests first.

There has been criticism of the various judgments concerning school governance, particularly that they have been too focused on procedure and power struggles between the parties and less on the violations of the rights of learners. This was apparent in both the *Ermelo* and the *Welkom* cases, in which the Court interrogated the relationship between schools and the departments establishing and pronouncing the principles of cooperative governance and finding that provincial education departments had acted unlawfully in respect of the SGBs. While in these cases the Constitutional Court did not make findings of violations of the rights of learners at a remedy stage, the Court sought to promote the learners best interests. In *Ermelo,* the Court ordered the SGB to develop a plan to accommodate English learners the following year; and in *Welkom*, the Court ordered that the schools review their pregnancy policies to ensure they do not discriminate against pregnant learners.

The introduction of amendments as provided for in BELA could result in progressive processes to avoid conflict, strengthen governance and ensure accountability within the education structures. At the same time the amendments must respect the different tiers of governance. As much as BELA seeks to align law and jurisprudence to ensure that SGBs act in the interests of the wider community, the DBE must be mindful that it does not provide too much power to provincial education departments, thereby undermining the principle of cooperative governance.

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