

# The political economy of education management, law and policy in South Africa: who manages and governs the South African schools constitutionally speaking?

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## Keywords

Constitution; Democracy; Governance, Law; Learner; Management; Policy; Public School; SGBs.

## Abstract

*The issue of inter-relationships between the South African departments of education and the school governing bodies (SGBs) remains one of the controversial grey areas. When South Africa became a true democracy in 1994 the education authority in the country began a process of transforming the educational landscape. Part of this transformation included the apportionment of responsibilities to different stakeholders such as the SGBs. The SGBs which comprises of parents, learners, educators, non-teaching staff and school principal were bestowed different functions including: creating an environment conducive to teaching and learning, developing a mission statement for the school, promoting the best interests of the school, ensuring quality education for learners, safety and security of learners, deciding on school-uniform policy, disciplinary action and policies regarding language of learning, admission of learners, and determination of school fees. What was not properly and conclusively dealt with is the question of how and to what extent were the SGBs to prosecute their functions. This lacuna has let to controversies and uncertainties that engulfed the education environment in South Africa. This paper appraises some of these controversies; particularly speaking to striking a balance the most appropriate balance between the powers and responsibilities of the departments of education and the SGBs as far as school governance is concerned. To this end the paper looks at the 2013 decision of the Constitutional Court in the Rivonia Primary School case.*

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## 1. Introduction

The issue of inter-relationships between the South African departments of education and the school governing bodies (SGBs) remains one of the controversial grey areas. When South Africa became a true democracy in 1994 the education authority in the country began a process of transforming the educational landscape. Part of this transformation of this process was the democratisation of government departments, institutions and different section including education became a priority, through major policy and practice changes (Sayed, 1997; Sayed, 2000; Naidoo, 2005). Democracy, unity, non-discrimination, equity and equality are the fundamental principles on which the new system of education and training are based (Squelch, 2000:137). Thus, the government is committed to the development of a democratic education system that affords participation of all stakeholders with a vested interest in education (van Wyk, 2004). Democratic structures were mandated to be established by the SASA in all public schools for governance (SASA, section 16). The basis for this was to ensure active participation by all the stakeholders in the governance and management of schools “to provide a better teaching and learning environment” (van Wyk, 2004: 49). Governance of schools is concerned about determining focus, policy and strategy, while management deals with the execution

thereof (Joubert & Prinsloo, 2011). SASA 1996 mandates all public schools in South Africa to institute School Governing Bodies (SGB). According to van Wyk (2004), the rationale behind this is for better teaching and learning environment and for the decentralization of power by the Department of Basic Education (DoBE).

## 2. Background

### 2.1 Rationale for this paper

This paper appraises some of these controversies; particularly speaking to striking a balance the most appropriate balance between the powers and responsibilities of the departments of education and the SGBs as far as school governance is concerned. The writing of this paper premised specifically on the decision taken by the Constitutional Court of South Africa in the 2013 case of *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School* (Rivonia Primary School case), to nullify a decision taken by the SGB not to admit a learner in the school. Section 5 (1) of SASA stipulates that “a public school must admit learners and serve their educational requirements without unfairly discriminating in any way”. This paper appraises the Constitutional Court judgment addressing in particular the political economy of education management, law and policy in South Africa; and the question of *who manages and governs the South African schools*. Against the background of the chronology of cases and decision leading to *Rivonia* case ruling by the Constitutional Court there is considerable confusion as to who is responsible for the school governance. Is it the SGB or the Education Department? It is therefore important to determine whose responsibility it is with regards to the governance of the schools with respect to the admission of learners to schools.

It is instructive to note that South African schools have traditionally been classified as either independent (also known as “private”) or public schools. Public schools receive funding from the state. Independent schools may, according section 48 of the SASA, receive subsidy upon application to the Department of Education. Furthermore, independent schools charge exorbitant amount of school fees which makes it difficult for learners from poor background to enrol at these schools. In this paper reference is made to public schools, which by design are expected to be more inclusive and to cater for the majority of the population particularly from the previous disadvantaged group, and categorise in SASA (Joubert and Bray, 2007 p.17-17).

### 2.3 Conceptualisation

#### 2.3.1 School Governance

The concept of “school governance” derives authoritatively its meaning from the roles and functions as outlined in SASA. In particular section 20(1)(a) which states as the major role of the SGBs the promotion of “...the best interests of the school and to strive to ensure its development through the provision of quality education..” (Xaba, 2011 p.202). Integral to school governance is the concept of self-governance of school which, according to Bush and Heystek (2003), is in existence in other countries including England and Wales, Australia, Canada, Hong Kong, New Zealand, Portugal, Spain, and parts of the USA and South Africa, in their difference forms and shapes (p.127). And the practice of inclusivity, decentralisation of duties and responsibilities to SGB (Minnaar, 2009). *Inclusivity* is in the form of the participation of parents, educators, non-teaching staff, learners, and other people who are willing and able to make a contribution to the school, and *decentralisation* is in a form of making it possible for the SGBs making decisions regarding a numbers of school related issues given their proximity to the school environment (Motimele, 2005; Joubert and Bray, 2007 p.15)

As Mesrty (2006) observes, and correctly so, "The last ten years have seen major changes in the nature of governance of schools. As a result of new legislation in South Africa such as SASA, considerably more authority and responsibility for decision-making has been devolved to the school level than was previously the case. There is a move towards self-managing schools which can be described as one for which there has been significant and consistent decentralisation to the school level of authority and responsibility to make decisions related to the allocation of resources, in a system of education having centrally determined goals, priorities and frameworks for accountability (Caldwell & Spinks,1988:5)."

### 2.3.2 School Governing Body

From 2.1 above, it is clear that an SGB is a government of the school, established in terms of SASA. The SGB, constituted democratically mainly by lay people (Bush and Heystek, 2003) as opposed to the previous Apartheid school committed set up in Black schools (Quan-Baffour, 2006), is *mandated* to set policies and rules that govern the school, and to monitor the implementation of the rules. As a government of the school the SGB gets its *mandate* from the different members (learners, parents, teaching and nonteaching staff) of the school community through an election process; co-option process; or automatic membership in the case of the school principal. The legal standing of the SGB is that it exists independently of its members (SASA, section 15 and 16; Beckmann and Prinsloo, 2009 p.172; Joubert and Bray, 2007 p.17). Thus, the termination of membership by either resignation; expiry of term of office; and any other means does affect the continuum of responsibilities and accountabilities of the SGB.

## 2.4 Contextualising the Study

### 2.4.1 Current Studies

A lot has been written on SGBs in South Africa as evidence by numerous studies available (for example: Beckmann, 2002; Bush and Heystek, 2003; Tshifura, 2002; van Wyk, 2004). Sizeable research has been conducted on different aspects related to school governance and the different roles of SGBs (for instance Xaba, 2004; van Wyk, 2004; Karlsson, 2002; Xaba, 2011), including but not limited to the role of SGBs in improving performance in school (Quan-Baffour, 2006); the oversight role over school finances (Mbatasane, 2006); their role in the governance of section 21 schools (Myambi, 2004); role in the appointment of teachers (Gina, 2006; Beckmann and Prinsloo, 2009; Sigudla, 2002); and how they helped to transform the education landscape in South Africa (Mkentane, 2003). But, it would seem from the broad literature on organisational theory that in South Africa the issue of institutional dynamics in particular the governing structure and the real powers and authorities of the SGBs is yet to be addressed in empirical literature. The only remotely associated research in the context of this study is for instance that of Xaba (2011), which looks at the challenges facing SGBs in South Africa, in particular the "capacity to govern" (p.211). The only recent interrogation of this dynamic relationship evolved from the series of lower court judgement in the Rivonia school case, which culminated in the precedent setting decision by the Constitutional Court. However, other jurisdictions are step ahead in regulating this complex relationship through centralisation (Naidoo, 2005 p.17).

### 2.4.2 Legislative and Regulatory Framework for School Governance

The Constitution of 1996 as the supreme law of the land is the primary regulator of the governance of public education in South Africa (Joubert and Bray, 2007). Relevant legislation towards school governance is SASA; the National Education Policy Act No 27 of 1996 (NEPA).

As mentioned above, the function of the SGBs is, *inter alia*, to determine the admission policy of the school. This function is engrained in section 5 of SASA as the key legislative and regulatory framework of the basic schooling system in South Africa. Other instruments, relating to the admission of learners to a school or different grades at a school in particular include the Constitution; the NEPA, sections 3 (3)(4)(1); section 5 of NEPA; the Admission Policy for Ordinary Public Schools (APOPS), published by the Minister of Education in *Government gazette* No. 19377 dated 19 October 1998 (Notice No. 2432/98); and the Education Laws Amendment Act No. 50 of 2002.

### 2.4.3 Responsibilities and Functions of the SGBs

The functions of SGBs in South Africa are divided into *ordinary or general functions*, which all SGBs need to perform, and *allocated functions* (section 21 of SASA), which are performed by schools that have been granted permission by the Head of Department (HOD) to perform them (Motimele, 2005 p.7; Xaba, 2004). The general functions of the SGB include to adopt a constitution, adopt a code of conduct for learners at the school after consultation with learners, parents and educators of the school, and to determine the admission and language policy of the school within the framework laid down in the Constitution, the SASA, and any other applicable law. SASA is a key legislation espousing the duties and functions of SGBs (Beckmann and Prinsloo, 2009). Section 20 of SASA stipulates that SGB should promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at the school (Nyambi, 2005). Furthermore, the SGB must develop the mission statement of the school; support the principal, educators and other staff of the school in the performance of their professional functions. The SGB is also mandated with the responsibility of administering and controlling the school's property, and buildings and grounds occupied by the school, including school hostels, if applicable; recommend to the HOD the appointment of educators and non-educator staff at the school. The list of duties above are not exhaustive of the functions of the SGB (Nyambi, 2005), however it serves to illustrate "the pivotal role of the SGB and the indispensable link it forms between the school and the community it serve" (van Wyk, 2004: 51).

### 3. The Constitutional Court in *Rivonia* Case: A Brief Background

This case concerns a little girl who was refused admission by the Rivonia Primary School citing that the school has reached its full capacity, and that such an admission would be contrary to the admission policy that was adopted by the SGB of Rivonia Primary School "ostensibly to protect the interests of the school and its learners" (par.82). After the school has informed the parents of the child about the decision, the parent unhappy with the school's decision to refuse her child admission, took the school to court. The case was finally decided in the Constitutional Court.

Initially the South Gauteng High court ruled in favour of the department, which claimed it, had the final say in school admissions. Relevant to the declaratory and interdictory relief sought by the School in order to vitiate the Department's decision to override the school's admission policy, was section 5(5) SASA, which 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."

The High Court in particular ruled that SGBs in Gauteng do not have the unqualified power to determine admission policy at state schools. According to Judge Mbha, the ultimate arbiter of admission policies and capacity in public schools is the Department of Education, and not the SGB. In coming to this decision the High Court stated that providing "basic education across race and class requires government intervention in the preliminary power of SGBs to



determine admission policies," and that "leaving schools to determine their admission policy, including the power to determine their capacity... one unwittingly creates space privileged schools can use and manipulate that power to fortify rather than dismantle existing inequalities." However the Supreme Court of Appeal overturned this decision in favour of the SGB after which the department took the matter to the CC. The rationale for the overruling of the High Court by the Supreme Court of Appeal was that the conduct of the Department, in particular "the instruction given to the principal of the Rivonia Primary School to admit the learner contrary to the school's admission policy, and the placing of the learner in the school, were unlawful."

In a further twist of a series of South African courts overruling decisions of lower courts, the Constitutional Court ruled that the appeal court "erred in finding that the head of department could only exercise... power in accordance with the school admission policy". It should be noted that the application brought before the Constitutional Court took a different direction in that the Department took a middle approach on appeal by not contesting the view that the SGB is entitled to determine capacity as part of its admission policy, but, the power granted in section 5(5) of SASA to the SGB is not unfettered. And that the Department plays a critical role in confirming the decisions of the SGBs. (par.27)

The ruling of the Constitutional Court did not come without a tongue lashing to both parties to the dispute, particularly the manner in which they conducted themselves. The sensitivity of the matter in question, and the "stakeholders' constitutional and statutory obligation to engage in good faith before turning to the courts" expected a better handling of the matter, the Court stated concurring with the observation of an earlier Court. In particular, to appreciate the fact that "the partners in the governance and management of schools to engage with one another in mutual trust and good faith on all material matters relating to that endeavour." (par.73). The Court found that the HOD's actions were procedurally unfair by placing the child in the school and instructing his officials to go to the school and physically seat the child at an empty desk (par.68). The judge further stated that "a decision to overturn an admission decision of a principal, or depart from a school's admission policy, must be exercised reasonably and in a procedurally fair manner". On the other hand, the Court opined that the argument by the school is inherently in violation to the stipulations by the sections of the Constitution, in particular section 28 (2) providing that a child's best interests are of paramount importance in every matter concerning the child; and section 29 (1) (a) everyone has the right to a basic education, including adult basic education. The Rivonia SGB "[d]esiring to safeguard its own authority" patently failed to act in the best interest of the learner in question (par.76).

In its summary of the judgement, the Constitutional court said "...the school governing body may...determine capacity as part of its admissions policy. However, this power is subjected to other provisions... which states that the department maintains ultimate control over the implementation of the decisions", but, to carefully not to abuse its confirmatory powers. As part of this decision the Court emphasised the importance of co-operation between the school and the department in resolving these disputes (par.77); this in order to avoid going to court every time when disputes of this nature arise.

#### **4. The Way Forward – Who Governs the Schools?**

The ruling of the Constitutional Court confirmed, in the context of school admissions, is that SGBs have significant powers to determine their admissions policy (including the power to provisionally determine when their schools are full), but these powers are not unfettered. Moreover, the admissions policies of public schools must be applied in a flexible manner and

with reference to the broader constitutional need to ensure that education is progressively available and accessible to everyone. Provincial education authorities may intervene in a school governing body's policy-making role or depart from that school governing body's admissions policy where, for example, the law specifically empowers them to do so; where this is done in a reasonable and procedurally fair manner; and after meaningful consultation with the SGB, which consultation must be directed at protecting and promoting the best interests of learners. This implies that, the HOD may intervene in matters where a public school refuses admission of a learner on the basis that the school is full.

Following the decision of the Constitutional Court the question is: Who Manages and Governs the South African Schools Constitutionally Speaking? Perhaps one should reflect and go back to the question posed by Prof J Beckman in his seminal study published in *Education and the Law* in 2002 aptly entitled: "The emergence of self-managing schools in South Africa: devolution of authority or disguised centralism?" The correct interpretation of the decision of the Court simplistic is that the governance of the public schools remains with the SGB. Unfortunately, the alleged knee jerk reaction by the Basic Education Minister Angie Motshekga to influence government change of the law giving school governing bodies the powers to determine school admission policy further complicates the issues (Magome, 2013) has led to uncertainty in the interpretation of the Constitutional Court decision. Also contributing to this confusion and uncertainty is the alleged intentions of the Minister were used as a sword should the government fail to win the appeal on this matter in the Constitutional Court. The DoBE and HOD has only monitoring role and oversight responsibility over how the SGBs manages and governs their schools in terms of the general and allocated functions. The relationship is rather delicate requiring a very careful balancing act. There will be cases where the HOD withdraws the functions of the SGB its execution of duties and responsibilities if deemed not in the best interest of the school, and such withdrawal is appellable by the SGB if the latter considers the withdrawal of its functions by the HOD unreasonable and not fair (Motimele, 2005).

## 5. Conclusion

The SGBs which comprises of parents, learners, educators, non-teaching staff and school principal are bestowed different functions including: creating an environment conducive to teaching and learning, developing a mission statement for the school, promoting the best interests of the school, ensuring quality education for learners, safety and security of learners, deciding on school-uniform policy, disciplinary action and policies regarding language of learning, admission of learners, and determination of school fees. What was not properly and conclusively dealt with is the question of how and to what extent were the SGBs to prosecute their functions. This lacuna has led to controversies and uncertainties that engulfed the education environment in South Africa. The decentralisation of school governance, and empowering the SGBs with some critical decision-making and/or decision-influencing powers in the school environment created some expectations, which, to use loosely the dissenting judgment by Jafta J in *Rivonia Primary School* case, in certain cases began unruly Trojan horses. I agree with the sentiments by Jafta J who did not support the main judgement. It took several interventions by the country's Ministries of Education and the judicial processes to reign in the SGBs, which sought to implement a clearly unconstitutional admission policy. But that is where it should end – the intervention was necessary by the State education authorities. The Court's ruling in the *Rivonia Primary School* dispute is one of those that brought a sigh of relief to the poor and marginalised communities of South Africa (Gordon, 2012), albeit in part. The Constitutional Court clearly and authoritatively delineated the limits of the role of the SGBs (Dielens, and

Enslin, 2002), and that of the national and provincial education department. In particular, sending a clear message of the co-operative governance of schools which does not allow a system of unfettered powers.

Access to education has been, and remains a thorn on the side of the South African education authorities. It has, for years, been a major challenge. Central to this problem has been classrooms shortages and over-crowding. After *Rivonia School* decision it is hoped that all the stakeholders will set aside power-plays and collectively look for solutions that will be in the best interest of the learners. To quote *verbatim* the Court, “[t]he Constitution provides us with a reference point – the best interests of our children. The trouble begins when we lose sight of that reference point. When we become more absorbed in staking out the power to have the final say, rather than in fostering partnerships to meet the educational needs of children.” (par 2). As to the question of who really manages and governs the public school, the answer is that it is the collective with different roles to play. Also clear is that the political economy of education management, law and policy in South Africa is still in the embryonic stage and has not been settled yet.

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