

## Legislation on school governors' power to appoint educators: friend or foe?

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*The establishment of school governing bodies represents a significant decentralisation of power in the South African school system. The South African Schools Act (Act 84 of 1996) plays an important role in encouraging the principle of partnership in and mutual responsibility for education. With the institution of school governing bodies (SGBs), SASA was aimed to give effect to the principle of the democratisation of schooling by affording meaningful power over their schools to the school-level stakeholders including the governors serving on SGBs. While such decentralisation could well be expected to mean an increase in democratic participation in the governance of schools, this is not necessarily the case. The picture that emerges from the analysis made in this article is that of the state encouraging participation but cautioning against too much involvement and even taking steps to limit the involvement and powers of stakeholders in the appointment of staff. Governors may well view what has happened since 1994 as a promise first fulfilled but later disappointed and frustrated.*

### Introduction

For many years South Africa had been rejected nationally and internationally for its gross violations of human rights, its inequality laws and discriminatory policies (Bray, 2004:1). The passing of the Constitution of the Republic of South Africa, Act 108 of 1996 (hereafter the Constitution) brought about a legal revolution in South Africa. It committed the nation to a set of values and principles that were the very antithesis of the apartheid order. The new order as contained in the Constitution unequivocally commits itself to the attainment of an open and democratic society based on human dignity, equality and freedom (Govender, 2004:4).

According to Currie & De Waal, (2006:2) the Constitution brought about a number of fundamental changes:

- For the first time in South Africa's history, the franchise and associated political and civil rights were accorded to all citizens irrespective of their race.
- The doctrine of parliamentary sovereignty was replaced by the doctrine of constitutional supremacy. A Bill of Rights was put in place to safeguard human rights, ending centuries of state-sanctioned abuse. The courts were given the power to declare invalid any law or conduct inconsistent with the Bill of Rights and the Constitution.
- The strong central government of the past was replaced by a system of government in which legislative and executive power was divided among national, provincial and local spheres of government.

The Constitution protects the fundamental rights of everyone in our country. Since 1994 much has been done by means of original national and subor-

dinate legislation to give effect to the fundamental rights of all partners in education. The South African Schools Act, Act 84 of 1996 (SASA) is a good example of national legislation that affirms a number of rights such as those of school governing bodies (SGBs) to develop and adopt admission policies, language policies, rules regarding religious observances, a code of conduct for learners, etc. SASA also deals with the function of SGBs regarding the appointment of educators in public schools, which issue will provide a point of entry into, and illustration of, the problem suggested by the title, namely, that the law can turn from a friend into a foe for public school governors serving on SGBs.

In terms of section 15 of SASA, a public school is a legal person (“juristic person”) with legal capacity to perform its functions under the Act. In terms of its legal personality, the school is a legal subject and has the capacity to be a bearer of rights and obligations. As a juristic body, the public school cannot participate in the law in the same manner and to the same extent as a natural person. It has to act through its duly appointed agent, and in section 16(1) SASA makes provision for the governance of a public school to be vested in its governing body. According to Davies (1999:61), the question often arises as to the extent of a governing body’s original powers — i.e. the extent to which it has the right to act on its own outside the provisions of legislation that govern its activities. It may be concluded that since the public school is an “organ of state”, the governing body acts as its functionary to perform its functions in terms of SASA. Thus, although the governing body has no original power to act on its own outside the provisions in SASA, it has original power to perform its functions in terms of SASA.

SASA furthermore plays an important role in encouraging the principle of partnership in, and mutual responsibility for, education. With the institution of school governing bodies, SASA aimed to give effect to the principle of the democratisation of schooling by affording meaningful power over their schools to the school-level stakeholders including the governors serving on SGBs (CEPD, 2002:134).

### **Problem statement, objectives and concept clarification**

The establishment of school governing bodies represents a significant decentralisation of power in the South African school system. While such decentralisation may well mean an increase in democratic participation in the governance of schools, this is not necessarily the case. However, if one considers the picture that has emerged during the past few years that the state has encouraged participation but cautioned against too much involvement and has even taken steps to limit the involvement and powers of stakeholders in the appointment of staff, the obvious question that comes to mind is:

What powers were originally given to SGBs regarding the appointment of educators and how have these powers been modified since SASA came into effect?

## Objectives

Our objectives in this article are to

- determine the powers of SGBs related to the rights, obligations and functions of parents regarding the governance of a public school; and
- investigate the apparent inclination of the state to question and doubt the authority and capabilities of governing bodies to the extent of taking steps to limit the involvement and powers of stakeholders concerning the appointment of educators

## Concept clarification

### *Power*

The power of a school governing body refers to its legal capacity to perform its functions and obligations in terms of section 16 of the South African Schools Act (SASA). The power of a governing body is not delegated power but original power, in terms of the Schools Act (SASA), to act as the duly appointed agent of a public school.

### *School Governing Body (SGB)*

The SGB is the body functioning in terms of section 16 of SASA and also constituted in terms of that Act. It exercises the functions accorded to it in terms of the decentralisation of power to school communities.

### *Educator*

An educator is a person defined as follows in SASA (section 1):

... any person, excluding a person who is appointed to exclusively perform extracurricular duties, who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at a school.

## **Brief overview of the origin and development of school governing bodies**

Before 1994 education in South Africa was provided to different learners in 16 race-based education systems. School governance was subject to central regulation and was by and large in the hands of school-level educators and bureaucrats.

In most of the 16 systems stakeholders, other than educators and bureaucrats, had virtually no involvement in school governance. In the few systems where there was provision for lawful participation in school governance by stakeholders other than educators and bureaucrats, the participation was limited to parents who had limited influence restricted to advice on a small number of prescribed issues (Beckmann, 2003:11).

According to Beckmann (2003:12) parents had to exercise their limited powers through school management councils. In some of the other systems parents, learners and community representatives attempted to snatch participatory powers by forming groups like Parents-Teachers-Students Associations (PTSAs) which exercised powers they did not legally have. They

formed part of the struggle against apartheid and did things like chasing principals away from schools, burning text books and installing Students' Representative Councils (SRCs).

Starting with the 1981 Human Sciences Research Council (HSRC) Report, the state and the democratic movement, led by African National Congress (ANC) — now the government — entered the debate on changing the education system from a race-based one to a non-racial and democratic one and offered various policy options. There was a vigorous debate on the question of how much power should be distributed and to which levels of the system. However, the issue of decentralising powers of governance was never questioned. Neither was the notion of meaningful powers of governance at school level ever seriously contested (Beckmann, 2003:12).

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

The governing body consists of a majority of parents (the representatives of the parent community), a number of educators, administrative staff and, in the case of secondary schools, also learners. It is responsible for the governance of the school (section 16 of SASA). In terms of section 23(9) of SASA, the number of parent members must comprise one more than the combined total of the other members of the governing body who have voting rights. The fact that parents make up the majority (section 23(9)) of the governing body demonstrates the importance of their involvement and constitutes the principle of partnership and mutual responsibility for a public school. This partnership is based on the democratic principle of decentralisation and the distribution of authority from the national and provincial spheres of government to the school community itself. The preamble of SASA further recognises the need to protect the diversity of language, culture and religion in education, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility of the organisation, governance and funding of schools in partnership with the state. The parent majority in the school governing body implies that parents have a strong and decisive voice, e.g. in,

- **Religious matters at school:** Section 15(1) of the Constitution determines that everyone has the right to freedom of conscience, religion, thought and opinion. According to section 15(2), religious observances (assembly) may take place at public schools, provided that they are conducted on an equitable basis and attendance is free and voluntary;. These provisions are amplified in section 7 of SASA.
- **The language policy of the school:** In terms of section 29(2) of the Constitution everybody 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 and the State has an obligation to consider all reasonable educational alternatives (including single-medium institutions) when it decides how to provide education in the language of parents' choice (Bray, 2000:79). According to SASA (section 6), the Minister of Education may determine norms and standards

for language policy in public schools. The governing body may, however, determine the language policy of a school, provided that no form of unfair discrimination is practised. In *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006 (1) SA1 (SCA) the Supreme Court of Appeal judges Streicher, Cameron, Brand and Mlambo found: “There could be no doubt that governing bodies were entrusted with the power to determine a language and admission policy, but that did not detract from the fact that it was their function to determine these policies (paragraphs [38] – [39] at 21D – H.)

- **The adoption of a code of conduct for learners:** SASA (section 8(1)) places a duty on the governing body of every public school to adopt a code of conduct for its learners following consultations with the learners, parents and educators of the school. Disciplinary proceedings (Section 8(5)(6)(7)(8) and (9) of SASA) should at least comply with the following requirements:
  - The existence of a valid reason for disciplining the learner (e.g. transgression of the code of conduct or any other legislation).
  - To be given adequate notice of the hearing.
  - To have access to support, protection and representation in line with the learners’ legal status, where necessary.
  - To ensure sufficient proof of misconduct and that the evidence is valid and permissible.
  - To ensure an impartial decision the person responsible for the preliminary investigation (principal or senior staff member) should not be involved in any decision regarding the incident.
- **Recommendations to the Head of Department regarding the appointment of educators:** The governing body of a school has to recommend to the Head of Department the appointment of educators at the school (section 20(i) of SASA), as well as the appointment of non-educator staff (section 20(j)).
- **The financial affairs of the school:** In terms of SASA a governing body of a public school must take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners (section 36). SASA further makes provision in section 37(1) that the governing body of a public school must establish a school fund and administer it in accordance with directions issued by the Head of Education (Prinsloo, 2006: 357). In terms of section 39 of SASA school fees may be determined by a governing body of a public school, section 40(1) makes provision for parents’ liability for the payment of school fees and section 41 for the enforcement of the payment of school fees.

In the next section we consider the appointment of staff and the role that local stakeholders play in this process. We trace the waxing and waning (mostly the latter) of the powers of governors regarding the appointment of public school educators.

### **The case of human resources management in public schools: Powers of public school SGBs regarding the appointment of educator staff**

Charles Glenn (2000:178) comments that the degree of decision-making authority that institutions enjoy regarding the appointment of staff can be regarded as the canary in the coal mine of autonomy. We agree with Glenn that powers regarding the appointment of staff are major indicators of the power of self-governance residing in an institution. Next we will therefore explore the powers of SGBs regarding the appointment of staff and changes that have taken place in this regard since 1994.

As indicated earlier, most parents (governors) had little input into the governance of public schools, including the appointment of educators, in the apartheid era. The only clear exception was the “white” system where governing boards for a limited time actually were the employers of educators even if they were remunerated by the state (see the Education Affairs Act (House of Assembly), No. 70 of 1988). It goes without saying that they could also appoint educators and that the state merely confirmed and honoured such appointments. It was also to be expected that the incoming government of 1994 (the African National Congress) would not favour such a system for fear of continued racial discrimination by governing bodies or boards. However, parents were certainly entitled to expect that they would receive significant powers regarding the appointment of public educator staff.

The ANC Policy Framework for Education and Training of 1994 makes only two references to staffing and employment. One is that affirmative action and retraining will apply to bureaucrats and to leadership and the other is that teachers will be employed by provincial education departments. The latter statement was probably included to avoid any misunderstanding, as the management councils (boards) of some schools (“white” schools) were regarded as the employers of educators before 1994.

The Education Renewal Strategy (ERS) of the then government (1992) (par 18.3) refers to the powers that management councils at school level should have to appoint teaching staff for extra-mural activities. This also seems to accept that the state will employ all educators at schools. The same paragraph introduces the notion of the subvention of educators’ salaries by management councils which will be discussed in greater detail.

Paragraph 12 of the White Paper on Education and Training of 1995 echoes the sentiments of the Policy Framework regarding affirmative action. In paragraph 13 the White Paper alludes to the imperatives of the Constitution regarding public administration and the appointment of staff by the state. The relevant provisions of the Constitution are therefore a suitable place at which to start a discussion of the appointment of staff at public schools.

#### **The Constitution of 1996**

Section 195(1)(i) of the Constitution provides that public administration (including of course education) must be broadly representative of the South African people, with employment and personnel management practices based

on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation. Section 195(2) stipulates that the previous subsection applies to organs of state. In terms of section 239 of the Constitution SGBs of public schools are organs of state.

#### The South African Schools Act, No 84 of 1996 (SASA)

Although the Constitution is the supreme law of the country and all laws and acts that are inconsistent with it are invalid, SASA is the primary source for a discussion of the powers of SGBs regarding staff appointment. Section 12(1) of SASA provides that the Member of the Executive Council [MEC (Minister) for Education of each province] must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature. It follows that the specific provincial education department has to be the employer of educators in the schools of the province and this assumption is borne out by section 1 of the Employment of Educators Act, Act 76 of 1998 (EEA).

SASA provides for the functions of SGBs. It provides, among other things, that:

- Subject to subsection [37](3), all money received by a public school including school fees and voluntary contributions must be paid into the school fund (section 37(2)).
- The school fund, all proceeds thereof and any other assets of the public school must be used only for
  - (a) educational purposes, at or in connection with such school;
  - (b) educational purposes, at or in connection with another public school, by agreement with such other public school and with the consent of the Head of Department;
  - (c) the performance of the functions of the governing body; or
  - (d) another educational purpose agreed between the governing body and the Head of Department (section 37(6)).

Section 20(1)(i) of SASA contains a crucial staff appointment provision. It provides that SGBs must recommend, to the Head of Department, the appointment of educators at the school, subject to the Educators Employment Act, 1994 (now EEA).

This provision adopts the point of departure that the provincial Head of Department (HOD) is the employer of all educators and that, if they want educators and non-educators employed, SGBs must make recommendations to the provincial Head of Department (HOD). It does not accord SGBs real power regarding staffing decisions apart from making recommendations that must be given attention in accordance with the common law and labour law provisions.

Section 6(3) of EEA sets a limitation in this regard in that the recommendation must be made within 2 months of the date when the SGB was requested to make a recommendation. If the SGB does not make a recommendation within the 2 months, the HOD will make the appointment without a recommendation.

The Education Laws Amendment Act, Act 100 of 1997 added a subsection to section 20 of SASA namely, subsection 20(4)), which assigns a discretion to SGBs, namely:

- (4) Subject to this Act, the Labour Relations Act, 1995 (Act 66 of 1995), and any other applicable law, a public school may establish posts for educators and employ educators additional to the establishment determined by the Member of the Executive Council in terms of section 3 (1) of the Educators' Employment Act, 1994.

At face value this additional discretion adds considerably to the powers of SGBs in this regard.

The only source of revenue that SGBs could use to exercise this discretion is school funds and it appears that section 36(6) of SASA allows such use of school funds. SGBs began using this discretion to the effect that between 33–50% of the educator staff of some schools are now “SGB appointments”. To put this figure into perspective, it is necessary to note that currently, according to Blaser (2008:367), 24 276 educators are paid by SGBs. When the number of SGB appointments is compared with the total number of 373 122 educators in South Africa, it represents a small percentage of South African educators and therefore an even smaller number of schools from the 27 000 have the benefit of smaller classes. However, if the figure is expressed in monetary terms those parents’ contribution to education is about R2.4 billion a year. Of course this has led to a widening of the gap between poorer and richer schools and some SGBs have also begun subventing (supplementing) educators’ salaries in order to be able to recruit the best staff for their schools with a view to offering quality education. Naturally, these developments would make it very difficult for provincial departments to exercise their functions as guardians of equality and equity in the respective school systems. It is also possible that SGBs could use these provisions to put their schools beyond the reach of affirmative action and other requirements.

The Education Laws Amendment Act, Act 100 of 1997, duly responded to these problems by adding subsections 20(6) – (11) to SASA. Subsection 20(6) provides that an educator employed in a post established in terms of subsection (4) must comply with the requirements set for employment in public schools in terms of this Act, the Labour Relations Act, 1995 (Act 66 of 1995), and any other applicable law. These “other laws” naturally include the provisions of the Constitution referred to above. This provision may be seen to be limiting the discretion but it can be argued that it has been added to protect children from SGB appointments, which may not have been made in their best interests. Section 20(7) also provides that educators appointed additionally to the official staff complement must be registered with the South African Council for Educators (SACE). SACE is a statutory council for the teaching profession established in terms of the South African Council for Educators Act (Act 31 of 2000) to exercise, among other things, a professional registration function and a disciplinary function in terms of a code of conduct for educators and to advise on teacher education. Formally at least this places education on the same footing as the other recognised professions.



The powers accorded to SGBs in terms of subsection 4 are limited further by subsection 20(8) and (9) of SASA:

Subsection (8) provides that the staff contemplated in subsections (4) and (5) must be employed in compliance with the basic values and principles referred to in section 195 of the Constitution, and the factors to be taken into account when making appointments include, but are not limited to

- (a) the ability of the candidate;
- (b) the principle of equity;
- (c) the need to redress past injustices; and
- (d) the need for representivity.

Subsection 9 provides that, when presenting the annual budget contemplated in section 38, the governing body of a public school must provide sufficient details of any posts envisaged in terms of subsections (4), including the estimated costs relating to the employment of staff in such posts and the manner in which it is proposed such costs will be met. These two subsections have the effect of limiting the choices available to SGBs when making appointments.

Further impediments are contained in subsections 10 and 11. Subsection 10 states very clearly that the state is not liable for any act or omission by the public school relating to its contractual responsibility as the employer in respect of staff employed in terms of subsections (4). Subsection 11 cautions that, after consultation as contemplated in section 5 of the National Education Policy Act, 1996 (Act 27 of 1996), the Minister may determine norms and standards by notice in the Gazette regarding the funds used for the employment of staff referred to in subsections (4), but such norms and standards may not be interpreted so as to make the State a joint employer of such staff.

It is clear that the Minister may for example cap the number of such appointments at a school in terms of equity requirements and that the state does not want to accept possible liability on account of, for instance, the negligence of such educators. However, the state has already lost at least two cases in which it tried to invoke subsection 20(10) as a defence against liability for negligence of educators (see *In the Matter between the Member of the Executive Council of the Free State [Province] responsible for Education and Culture (appellant) and Manda Louw (first respondent) and Martin Lourens Oosthuizen (second respondent)*, case number 483/04 in the Supreme Court of Appeal of the Republic of South Africa (heard on 8 September 2005, judgment delivered on 23 September 2005), reportable case (reported in Afrikaans) and *MEC for Education v Strauss* [2007] SCA 155 (RSA)).

Whereas the state can afford to be its own insurer, SGBs will have to make special arrangements to insure their schools against claims for compensation arising from liability on account of negligence. Although SGBs have been given certain powers, it appears that the accompanying provisions caution them to be very careful about using these and impede them in the exercise of their power.

The Education Laws Amendment Act, Act 57 of 2001 places yet another restriction on schools and SGBs by inserting an additional subsection into SASA. It provides that a *governing body* of a public school may not collect any

money or contributions from parents to circumvent or manipulate the payment of compulsory school fees and must use such money or contributions to establish or fund a trust, and if such money or contributions of parents were paid into a trust, prior to 1 January 2002, the trust must pay such money or contributions into the school fund. This insertion has the effect of curtailing the powers of SGBs in raising money and thus being able to appoint staff.

We have already referred to the fact that the SGBs of many mainly former white schools have embraced the principle of subvention of educators' salaries to attract quality educators to their schools. However, on 29 April 2003 the Department of Education invited comments on a further set of proposed amendments to SASA concerning this very issue. The government proposed that a section 38A be inserted into SASA. The ANC has a huge majority in the national legislature and the amendment was carried and subsection 38A now reads as follows:

- (1) A school governing body may not pay, without prior approval from the employer, to the educator employed in terms of the Employment of Educators Act, 1998, any
  - a) benefit in kind;
  - b) other financial benefits, or
  - c) remuneration;
  - d) except for the payment of travel and subsistence expenses in amounts comparable to those paid for similar expenses incurred by public servants.
- (2) The travel and subsistence expenses contemplated in subsection (1) must be directly related to official school activities.
- (3) The payment contemplated in subsection (1) must be reflected in the school's budget.
- (4) If a school governing body or any other person without the authority of the school governing body pays any remuneration or gives any financial benefit contemplated in subsection (1) to an educator without prior approval of the employer, the amount of money paid must be recovered by the Head of Department on behalf of the school from:
  - (a) members of the school governing body who took that decision, excluding a member of the school governing body who is a minor; or
  - (b) any person who made such payment without the authorization of the school governing body.

If implemented like this, the insertion could effectively end all subvention of educators' salaries. However, the way is still open for the SGBs to get permission from the employer to provide benefits in kind to educators or to provide extra remuneration or financial benefits to them. However, this will have to be done within the parameters of the Labour Relations Act, Act 55 of 1995, the Employment of Educators Act, Act 76 of 1998 and the Public Finance Management Act, Act 1 of 1999 and will almost certainly expose all the school's funds to departmental scrutiny. All of this will probably be a huge disincentive to subventions and seriously set back SGB aspirations of contri-

buting to quality education. They may even lead to SGB members asking the question, “What is in it for us?” as this may appear to reduce incentives for their active participation in school governance to a large degree. Furthermore, the proposed subsection 4 introduces the issue of possible collective or individual liability for unlawful decisions in this regard.

### **The final nail?**

Chapter 3 of the Employment of Educators Act (EEA) deals with the appointments, promotions and transfers of educators (in public schools). It should be read with subsections 20(4) – (11) of SASA which were discussed above. At face value this chapter would appear to be in line with the expectation of parents, coming onto SGBs after 1997 (when SASA came into effect), that their democratic right to a bigger say in the education of their children through better control over who teaches their children would be respected.

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

- The parent representatives on the governing body, together with the principal and the school's management team, are in the best position to determine the specific employment needs of the school.
- The parents on the governing body have an obligation toward the school community to recommend the appointment of the best qualified, motivated, committed and competent educators to vacant posts, in order to ensure effective and quality teaching and learning for their children. According to Maree and Lowenherz (1998:36) international experience demonstrates that outstanding educators are the most important factor in the quality of education.
- Education is the conveyer of culture, of moral and normative attitudes, and of values. The school should be the extension of family life and should reflect the culture, norms and values of a specific school community. Parents could therefore expect educators who are appointed at their school to be bearers of the culture and religious norms and values that are peculiar to the local school community. This refers to the power of governing bodies to determine the admission (section 5), language (section 6), and religious (section 7) policies of the school.

Section 6(3)(a) of the Employment of Educators Act, Act 76 of 1998 provides that any appointment, promotion or transfer to any post on the educator establishment of a public school may only be made on the recommendation of the governing body of the public school. This seems to put governors in an extremely powerful position.

Section 6(3)(b) (as amended in 2006) enjoins SGBs, (in considering the applications, to ensure that the principles of equity, redress and representivity are complied with and to adhere to

- (i) the democratic values and principles referred to in section 7 (1);
- (ii) any procedure collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators;

- (iii) any requirement collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators which the candidate must meet;
- (iv) a procedure whereby it is established that the candidate is registered or qualifies for registration as an educator with the South African Council for Educators; and
- (v) procedures that would ensure that the recommendation is not obtained through undue influence on the members of the governing body.

This subsection should not concern governing bodies too much as it seems merely to confirm that the recommendation of staff by SGBs is subject to the Constitution and other law.

Subsection 6(3)(c) now provides that the governing body must submit, in order of preference, to the Head of Department, a list of

- (i) at least three names of recommended candidates; or
- (ii) fewer than three candidates in consultation with the Head of Department.

Subsection 6(3)(e) now provides, quite logically, that if the governing body has not met the requirements in paragraph (b), the Head of Department must decline the recommendation. A contravention of subsection 6(3)(b) entails a violation of constitutional principles and non-adherence to the law.

For our purposes in this article the new subsection 6(3)(f) (after amendment in 2006) contains the most far-reaching challenge to the powers of SGBs regarding the appointment of educators. It provides that, despite the order of preference in paragraph (c), ... the Head of Department may appoint *any suitable candidate* on the list (authors' italics). This is a dramatic power given to the HOD and could result in SGBs *de facto* losing all power regarding the recommendation and appointment of teaching staff. It could be viewed as the final removal of power from SGBs in this regard and a decisive re-centralisation of significant power delegated to the governors of schools. It could also be viewed as a serious violation of the democratic rights of parents (governors) to have a say in the education offered to their children.

However, judgment handed down in *The Point High School and others v the Head of Department of the Western Cape Department of Education* [2007] SCA 14188/06 (RSA) seems to suggest that the court is not necessarily of the opinion that subsection 6(3)(f) of EEA gives unfettered power to HODs to reject or approve SGB recommendations at will. In this case the Point High School in the Western Cape Province of South Africa and its SGB challenged a decision by the Western Cape Education Department not to approve their recommendations for appointment, as principal and deputy-principal, of the persons they believed to be the most suitable candidates having duly followed the procedures in EEA and other legislation.

The court reviewed and set aside the decisions of the HOD of the Western Cape [Province] Education Department to appoint the persons he did in fact appoint. The HOD was directed to appoint the persons viewed by the school and its SGB as the most suitable candidates. The HOD was ordered to pay the

costs of the application, including the cost occasioned by the employment of two counsel.

## Conclusion

The picture that emerges from our analysis is that of the state encouraging participation but cautioning against too much involvement and even taking steps to limit the involvement and powers of stakeholders in the appointment of staff. Governors may well view what has happened since 1994 as a promise fulfilled and then disappointed and frustrated.

It would seem that what appears to be a final nail in the coffin of governor participation in educator appointments has given rise to a court case that may well prompt a re-assessment of a number of aspects of the law governing public schools. The national Minister of Education, Ms Naledi Pandor, has indeed commissioned a review of educational laws and inputs have been requested. However, at this time there is no indication of what the fruits of the review might be.

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#### **Case law**

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