Administration of the Education System and School Governance

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List of Acronyms and Abbreviations

ABET	Adult Basic Education and Training
AU	African Union
BSA	Business South Africa
CEM	Committee of Education Ministers
CHE	Council for Higher Education
CTU	Combined Trade Union
DANIDA	Danish International Development Agency
DBE	Department of Basic Education
DHET	Department of Higher Education and Training
DLA	District Labour Advisor
ECD	Early Childhood Development
EI	Education International
ELRC	Education Labour Relations Council
ETDP	Education and Training Development Practices
FFC	Fiscal and Financial Commission
GDE	Gauteng Department of Education
GENFETQA	General and Further Education and Training Quality Assurer
GETC	Gauteng Education and Training Council
GSSC	Gauteng Shared Services Centre
HEDCOM	Heads of Education DepartmentsCommittee
HESA	Higher Education South Africa
HRD	Human Resource Development

IEB	Independent Examinations Board
IIRA	International Industrial Relations Association
ILO	International Labour Organisation
JET	Joint Education Trust
MEC	Member of the Executive Council (provincial legislature)
MINMEC	Any committee comprising a Minister in the national sphere and provincial MECs responsible for a cognate function
MTEF	Medium Term Expenditure Framework
NDP	National Development Programme
NETC	National Education and Training Council
NGO	Non-governmental Organisation
NHIL	New Human Interest Library
NQF	National Qualifications Framework
NNSSF	National Norms and Standards for School Funding
PAM	Personnel Administration Measures
PPC	Parliamentary/Provincial Portfolio Committee
PSCBC	Public Service Co-ordinating Bargaining Council
SACAI	South African Comprehensive Assessement Institute
SACE	South African Council for Educators
SADEC	Southern African Development and Economic Community
SETA	Sectoral Education and Training Authority
SAQA	South African Qualifications Authority
USAID	United States Agency for International Development

How to Use this Monograph

This monograph avoids as far as possible any reference to secondary sources. The principal references are either Acts of Parliament or Acts of Provincial Legislatures and official publications such as White Papers, policy statements and publications of Parliament. Relevant court cases are also referred to. Consult the List of Sources at the end of this monograph for more information in this regard.

An essential tool for the student is Hansard, the verbatim account of debates which have taken place in a legislature, and which furnish the complete text of speeches delivered and of statements made in de- bate. In the national sphere of government, Hansard is available for both the National Assembly and the National Council of Provinces. In addition there are separate publications which give the interpellations, questions and answers in the National Assembly, and the questions and answers in the National Council of Provinces. Hansard can be viewed on line at www.parliament.gov.za/live/content.php .

A further useful website is the site of the Parliamentary Monitoring Group, www.pmg.org.za which furnishes the latest discussions of Par- liamentary Portfolio Committees, written responses to questions in Parliament, and other information of a similar kind.

Other websites which are useful are those of the Department of Basic Education www.education.gov.net which has links to the provinces, and the Human Sciences Research Council at www.hsrc.ac.za which lists a good deal of research into specific operational matters in education.

Chapter One

Introduction

Outline of this Chapter

In this Chapter you will become acquainted with some general issues relating to public administration in South Africa within the context of the South African constitutional dispensation. Some reference is made to the manner in which disputes between na- tional and provincial legislatures may be resolved. Reference is made to the role of the Public Service Act of 1994 in regulating the public service; the principles of co-operative government and concurrent powers are explained; and current imperatives under- pinning the approach to public administration are dealt with. The Chapter provides a context for the later discussion of structures related to the administration of education in the national and pro- vincial spheres of government.

1.1 Some General Issues Related to Public Administration

The administration of the education system does not take place in a vacuum, and in order to grasp the nature of the administration of the education system in South Africa, it is important to be aware of the provisions which relate to the way in which our country is po- litically structured, as well as of the main principles which underpin public administration in this country. Caiden (1988:232) quotes Dahl as stating that

A particular nation-state embodies the result of many historical epi-

sodes, traumas, failures and successes which have in turn created peculiar habits, mores, institutionalized patterns of behaviour . One cannot assume that public administration can escape the culture or social setting in which it develops.

South Africa is in some ways a unitary state, and in others not. However, the general perception is that we have a hybrid system of government which has some unitary as well as federal characteris- tics – see *paragraphs 1.2* and 1.3 below (Rautenbach and Mal- herbe, 1996:76-78; De Villiers, 1996:11-14). In the national sphere of government one finds a full range of political structures, such as the Cabinet, the National Assembly and the National Council of Provinces. In the provincial sphere of government each province has its own legislature which is empowered to make laws on mat- ters which fall within the competence of the province; each pro-
vince also has its own Premier and elected political representatives.

Public office bearers in the administration (Ministers of State in the national sphere; Members of the Executive Committee in the pro- vincial sphere; public officials employed in national or provincial administrations) derive their competencies (that is, the right to act in a particular capacity) from laws. These laws are passed either by Parliament or by provincial legislatures, and all of them are subject to the provisions of the *Constitution of the Republic of South Africa of 1996* (hereafter the *Constitution*) and to being tested in the courts of the land – usually in the High Court (formerly known as the Supreme Court), the Supreme Court of Appeal or the Constitu- tional Court itself.

Although little has been written on the changes taking place in pu-
blic administration in South Africa, it is clear that there are trends which suggest a move away from the traditional models of public administration, which were followed in South Africa prior to the general elections of 1994. Some of these trends include the following. First there is a growing and visible tendency of the dominant political party, outside of parliamentary structures, to impose decisions of the party on political functionaries in Government, whether those decisions have yet been framed in legislation or policy or not. Second there is a growing tendency for principles laid down in the Freedom Charter of 1955 to be invoked as the basis for bureaucratic action, without their necessarily being reference to the legal provisions which govern such action. Thirdly, and perhaps arising from the first two points made,

there is a growing desire on the part of cabinet ministers to have a more hands-on approach to what the bureaucrats in their departments do. Fourthly, there is a tendency on the part of some public servants to drive their own political agendas despite limitations in this regard which are imposed by section 195(1)(d) of the *Constitution*, discussed below. It might also be argued that especially in the case of education the Education Working Groups of the dominant political party exercise a major influence on the Parliamentary Portfolio Committees (PPC) for Basic Education and Higher Education respectively.

Public administration in South Africa is *hierarchically structured* and *bureaucratically controlled.* This means, first, that there are various levels of seniority within the public service, with one person at the head of each Department of State, and more numerous cate- gories of employee of lower status who report to the official of a higher (senior) status. Sometimes a hierarchical structure is known as a pyramidal structure. It means, secondly, that although politi- cians take the policy decisions, their actual implementation is the function of bureaucrats. Decisions that there shall be a Department of Posts and Telegraphs in a country and that it shall run a tele- phone system, for example, may be taken in the national sphere and the necessary enabling parliamentary legislation passed. But the politicians do not manufacture, procure, install or repair tele- phones. These functions are carried out at an entirely different level by persons trained and paid to perform those tasks.

The broad structure and functions of the Public Service in South Africa are set out in sections 195 and 197 of the *Constitution.* The last-mentioned section provides the following:

> 197(1) Within public administration there is a public service for the Republic which must function and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

One of the most important pieces of national legislation (mentioned in s 197) is the *Public Service Act, 1994 (Proclamation 103 of 1994* – hereafter *Public Service Act).* This Act regulates the way in which various departments of state come into being, the manner in which they are dissolved or amalgamated and, through the Office of the Public Service Commission, the manner in which they are to be staffed. The *Public Service Regulations, 1999* (subordinate legisla- tion issued in terms of the Act) also play a major role in determin- ing the manner in

which aspects of the public service function.

The public service education sector is an important sector in the broader public service. Apart from legislation that applies specifi- cally to the education sector (e.g. the *Employment of Educators Act 76 of 1998* among others), other general public service legislation (i.e. the *Public Service Act*) also applies to public education. An important development in the public education sector in South Africa has been the separation of the Department of Basic Education (which in the main deals with public schooling) and the Department of Higher Education and Training (which in the main deals with Higher Education Institutions, vocational training and various other matters which relate to the provision of skilled human resources in the country.

Certainly the most important provision regulating the functions of the public service is section 195 of the *Constitution.* It contains the *basic values and principles governing the public administration* and reads as follows:

> 195(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (a) A high standard of professional ethics must be promoted and maintained;
>
> (b) Efficient, economic and effective use of resources must be promoted.
>
> (c) Public administration must be development-orientated.
>
> (d) Services must be provided impartially, fairly, equitably and without bias.
>
> (e) People's needs must be responded to, and the public must be encouraged to participate in policy making.
>
> (f) Public administration must be accountable.
>
> (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
>
> (h) Good human-resources management and career-development practices, to maximize human potential, must be cultivated.
>
> (i) Public administration 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.

It is important to remember that the *Constitution* determines that these basic values and principles apply to –

195(2)(a) administration in every sphere of government;

(b) organs of state (as defined in s 239); and

(c) public enterprises

It is apparent that the public education sector is bound by the provisions of the *Constitution* discussed above. Before we explain how the functional area of education is administered between the national and provincial spheres of government, one should understand the relationship of co-operation which exists between (and amongst) the different spheres of government.

1.2 Co-operative Government

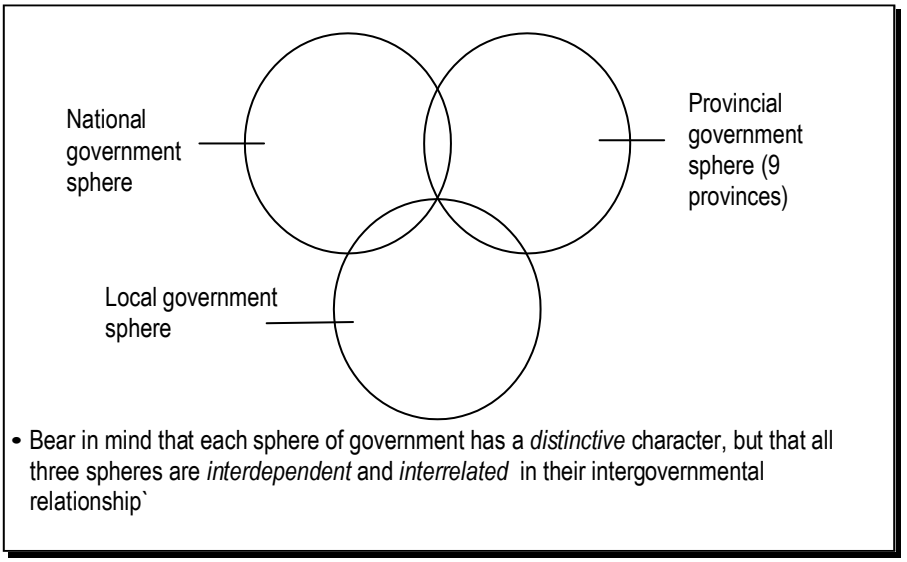
Chapter 3 of the *Constitution* deals with co-operative government (the relationship of co-operation in government). Sections 40 and 41 contain important information on the structure of government and the principles underlying intergovernmental relationships.

40(1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

(2) All spheres of government must observe and adhere to the principles in the Chapter and must conduct their activities within the parameters that the Chapter provides.

It is clear that each sphere of government has its own distinctive character but that they are interdependent and interrelated in their business of governing the country. Therefore, the relationship of co-operative government binds all spheres of government together and underscores the principle of participative decision-making. The notion of "spheres" of government also implies that the powers of the provincial and local authorities are not delegated or devolved powers, but original. In this sense the reference to "levels" or "tiers" of government cannot be used any longer because, in principle, we are not talking about a "hierarchy of powers" or a concentration of powers at central level.

Figure 1: The government of the Republic in its relationship of co-operation



What are the principles of co-operative government and inter-governmental relations? Section 41 provides as follows:

41(1) All spheres of government and all organs of state within each sphere must –

(a) preserve the peace, national unity and the indivisibility of the Republic;

(b) secure the well-being of the people of the Republic;

(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;

(d) be loyal to the Constitution, the Republic and its people;

(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

(h) 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.

Co-operative government is the bedrock of governmental relations and underscores the values and ideals of the *Constitution*: it provides the ways and means to achieve democratic, participative, transparent and accountable government. Throughout the *Constitution* various built-in "checks and balances" are provided to promote, evaluate and control this fine relational balance. For example, the National Council of Provinces (s 60-72) forms part of Parliament and acts as a "watchdog" to ensure that provincial interests are taken into account by the national government.

1. 3 The Principle of Concurrent Powers

There are various ways of organizing the power relationships which exist within any state between the national, state or provincial, and local government. The Tenth Amendment to the *Constitution of the*

United States of America, for example, adopted in 1771, states that "the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively or to the people" (NHIL VII:31). This system may be described as highly decentralised. Others are less so, for example France, which is a unitary state.

The *South African Constitution* is somewhat of a hybrid, in that it reserves certain powers for the national sphere, others for the provincial sphere, and assigns competences on yet others to both the national and the provincial spheres (*Constitution:* Sch 4). Where competences are granted to both spheres, the possibility of confusion/conflict can arise and the Constitutional Court (or in certain instances the High Court) has the responsibility to adjudicate in which sphere the competence is to be exercised, and in what fashion (see, for example *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 4 BCLR 518 (CC); also Dufresne *et al.,* 1999:291 *et seq.*).

When a specific legislative function can be performed by both the national and provincial spheres, and when there are both national and provincial political functionaries and departments responsible for the function in question, the competence is said to be a *concurrent* competence – that is, the function is carried out in at least two spheres of jurisdiction.

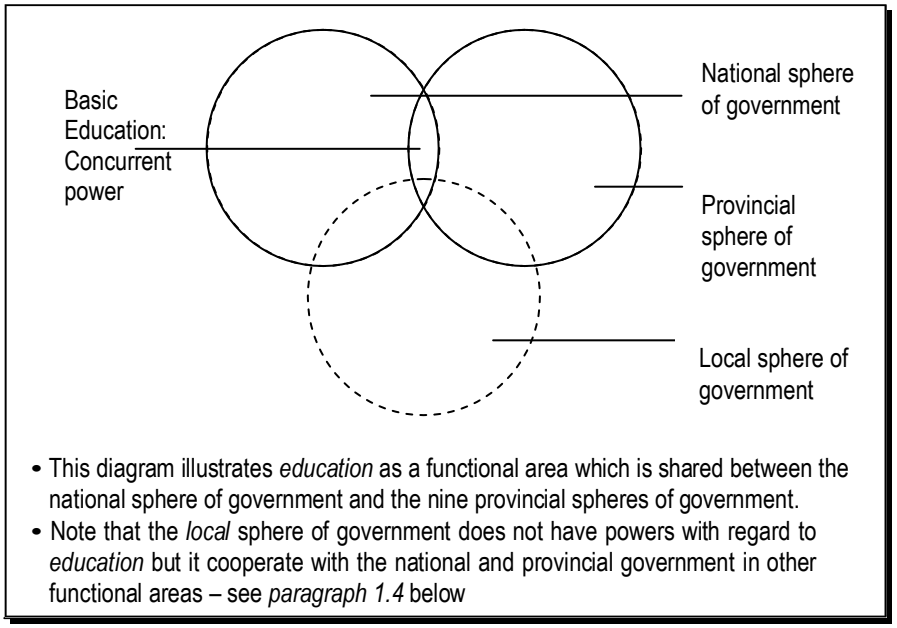
In terms of section 104(1) of the *Constitution* (read with Sch 4 – concurrent legislative competence), public basic education (in effect schooling) is a concurrent com- petence in South Africa, but what is interesting is that only certain aspects of basic education are described as "concurrent" competences. Higher and Further Education and Training, for example, are the sole responsibility of the Minister of Higher Education and Training in the national sphere (*Constitution* Sch 4), while further and general education and training in schools are shared. The provision of schooling is a provincial matter, subject to any norms and standards for the provision of schooling as laid down by the Minister in the

national sphere. Other "concurrent" powers in terms of Schedule 4 of the *Constitution* include: environment, agriculture and housing.

Apart from concurrent legislative powers in the functional area of education, the provinces also have "exclusive" legislative powers in other specific functional areas (e.g. abattoirs, liquor licenses, provincial planning, provincial roads and traffic). These exclusive powers are enumerated in Schedule 5 of the *Constitution.*

It is apparent that provincial government is vested with "concurrent" as well as "exclusive" powers and that education (e.g. school education) is one of the areas where the provinces share power with the national sphere of government. In fact, the concurrent functional area of school education is certainly one of the best areas to illustrate the balance that exists (or should exist) between the "self-rule" principle of co-operative government as discussed in *paragraph 1.2*.

Figure 2: Concurrent powers: Basic Education



- This diagram illustrates *education* as a functional area which is shared between the national sphere of government and the nine provincial spheres of government.
- Note that the *local* sphere of government does not have powers with regard to *education* but it cooperate with the national and provincial government in other functional areas – see *paragraph 1.4* below

1.4 Local Government and Education

In some countries, local – or municipal – government has a major responsibility for education within the boundaries of the municipal authority. In the United State of America, for example, the greater part of the responsibility for schools lies with the local municipality – indeed, it may even lie within a school district which is smaller than the local authority area. This means that in some large cities there can be two or even more school authorities within the same city, doing different things simultaneously.

In South Africa, local government has no direct responsibility for the provision of schooling within its areas. The interested parties are the national and provincial authorities and the structures re- sponsible for the governance of the school internally. The local sphere of government has been to all intents and purposes ex- cluded.

In terms of section 151(1) of the *Constitution,* the local sphere of government consists of municipalities which must be established for the whole country. A municipality has the right to govern on its own initiative the local affairs of its community subject to national and provincial legislation as provided for in the *Constitution.* Na- tional and provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. Section 152(2) sets out the objects of local government which include:

- the provision of democratic and accountable government for local communities;
- the promotion of social and economic development; and
- the encouragement of involvement of communities and community organizations in the matter of local government.

One may conclude that in terms of the *Constitution,* local govern- ment is an "autonomous" sphere of government and therefore plays an important role in cooperative government.

As we have noticed above, municipal authorities are regulated in their interaction with provincial and national authorities by national and provincial legislation. For example, the national R*ating of State Property Act 79 of 1984,* indicates on what basis a municipal au- thority may levy taxes on state property not falling under its own jurisdiction. Taxes levied on public schools are currently defrayed from the budget of the Department of Land Affairs. From time to time there have been suggestions that this arrangement should be discontinued, but thus far there have been no material moves to make schools responsible for the payment of their own land taxes. There has been some dispute about the extent to which state prop- erty and structures erected on these are required to comply with local by-laws. In a case adjudicated in the Transvaal Provincial Di- vision of the High Court between the Ferdinand Postma High School and the City Council of Potchefstroom, the court decided that the school could continue with its business venture (a MacRib restaurant) on the school premises, provided certain conditions are met (*Die Ferdinand Postma Hoërskool v Stadsraad van Potchef- stroom en Andere (1999) – see List of Sources).*

While some local authorities have expressed the view that they should have a direct involvement in the provision of education in their areas, most municipal authorities in South Africa are under such pressure that it is probably a source of relief that they do not also have to shoulder this particular responsibility. Although the local authority of Modimolle in the Limpopo Province in 2006 pub- lished a list of schools in the local authority area and indicated which members of the local municipality would assume authority over the schools in that area, the list later disappeared – correctly so, given that the local authority has no such jurisdiction in the case of public schools.

While it is correct to state that no specific powers with regard to education and schooling have been assigned to local authorities, it would be misleading to convey the impression that there is no

functional level within the administrative hierarchy lower than that of the province. As will be more fully set out in Chapter Four, School Governing Bodies fulfil many important functions at the institutional level. In this regard it is important to note, therefore, that administrative concerns are relevant at the national, the pro- vincial and the institutional (school) level.

An area of relationship between schools and municipal authorities which is becoming increasingly fraught has to do with the provision of services to schools by local authorities. The current funding model for public schooling is of such a nature that provincial education authorities are responsible for the payment of municipal accounts rendered to so-called "no-fee" schools for services – typically water, electricity and sanitation. Where these accounts are not paid by the provincial education authority, municipal authorities are increasingly terminating the provision of services, which has a direct impact on the ability of the schools to function effectively and to meet the needs of their clients.

1.5 Transformation, Equity and Equality as Imperative in Public Administration

It is an imperative of the Government of South Africa that historic imbalances in South African society which came about as a result of the *apartheid* ideology, should be redressed that the inequalities and inequities of the past should be eliminated. In particular, issues related to race and gender remain high on the priority list of the Government, and it is therefore to be expected that the national and provincial administrations in the country continue to place these matters in the forefront of their work. To emphasize this point, section 195 of the *Constitution* (dealing with the public ad- ministration – see *paragraph 1.2* above) provides *inter alia:*

> 195 (I)(i) Public administration 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 9 of the *Bill of Rights* embodies the fundamental right to equality, It provides, *inter alia,* that:

> 9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture language and birth. …

(The nature and content of the right to equality is discussed in another monograph which deals with fundamental human rights.)

National legislation has also been adopted to implement the right to equality in the public service (e.g. the *Labour Relations Act 66 of 1995;* the *Employment Equity Act 55 of 1998;* and the *Public Ser- vice Regulations of 1999*).

The process of transformation has as its principal agenda that per- sons of colour, previously disadvantaged, should now be given the opportunity to attain their rightful place in society and *inter alia* in the public administration. Persons of colour were almost solely responsible for administration in the ten homelands which existed in *apartheid* South Africa and which now, in six of the nine provinces, constitute the bulk of the public administration of the country in the provincial sphere. The process of re-creating the country's public administration services has been on-going since 1994, and it is not at all clear what the final outcome of those processes will be.

The process of re-creation involves two distinguishable but obviously intertwined sets of actions. The first of these relates to the provision of personnel, with the objective of achieving in the public service a distribution of personnel which will reflect the broad demographics within the country. The second is the imperative that there be organisational and structural renewal. In the period since these two processes began, at least in part, however, experienced bureaucrats from the pre-1994 period were for whatever reason eliminated from the system and replaced by persons who initially had less experience, but who over time have had the opportunity to ac- quire the necessary

skills. Even though major strides have been made in this regard, there remains a measure of inefficiency and continued poor service delivery in some areas of the country.

Organisational and structural renewal has been on-going, not without upheaval. The alteration of provincial boundaries in, for example, 2007 was not equally popular in the areas affected by jurisdictional change and in some there was a decidedly negative spin-off in the administration of education. Some education departments re- organised regional or district boundaries on a frequent basis, which have had negative consequences for the effective operation of those schools affected by it.

Given that the system of public administration in South Africa has been constantly evolving since 1910 (when South Africa became a Union) and the Act of Union, and had been well-developed before then, it cannot be expected that the process of transforming public administration in South Africa will be accomplished within a relatively short period.

Issues relating to *equity* within public administration can be said to be two kinds – first, those which refer to inter-provincial equity in the distribution of resources; and secondly, those which relate to establishing some kind of parity or equity within the province.

1.5.1 Inter-provincial equity

The poorest provinces in the country are those which have a preponderance of people who were relegated to the homelands prior to 1994. It is hardly surprising, therefore, that *Limpopo* (which incorporated three former homelands, those of Gazankulu, Lebowa and Venda, and which over a period of years has borne the brunt of the southward migration of refugees from Zimbabwe, a great number of whom are illegal), the *Eastern Cape* (which incorpo- rated the former Transkei and Ciskei), *Mpumalanga* (which incor- porated the former KwaNdebele and KaNgwane, and which has become home to substantial numbers of migrants from Mozam- bique, many of whom may be illegal), and *KwaZulu Natal* (which incorporated the former KwaZulu) are poorer per capita than other provinces. The National Treasury seeks to address this issue in an

attempt to help to redress historic backlogs which are perhaps greater in these provinces than in others.

1.5.2 Intra-provincial equity

Within provinces, there are areas that historically have been better resourced than others. The areas of greatest need are usually located in those areas where, demographically, the most deprived members of South Africa's population were required to live in the *apartheid* years. In the education context, this means that some geographical areas and communities have better and more schools than adjacent geographic areas and communities – a situation which will probably continue for years, until the current inequitable demographic spread within the country is adjusted, and until current economic realities in some of the provinces change. From the administrative point of view, therefore, and within the context of the Government's view on equity, resources are distributed first to the neediest part of the population and thereafter, if there are resources remaining, to the rest of the population. Indeed, the *National Norms and Standards for School Funding*, which were first published in 1998, specifically refer to the *poorest of the poor* and purposefully target historically deprived groups as primary recipients of state funding within the school system. Further reference will be made to the Norms and Standards in Chapter Three.

In response to pressure from activist organisations the Minister of Basic Education has published for comment *Norms and Standards for the Provisioning of Facilities at Public Schools*, which seek to outline the plan for the equalization of the provision of facilities at schools. These *Norms and Standards* refer *inter alia* to classroom size and minimum provisioning per classroom, sanitary facilities, school libraries and the like, and also furnish a time scale for the elimination of mud-brick schools and schools which fall below the standards proposed. There have been objections to the twenty-year time scale proposed for this aspect of the renewal process, and it is within the bounds of contemplation that litigation in this area may be forthcoming, given the responses of activist organisations to the proposals the Minister has made.

1.5.3 Equality

As was mentioned in *paragraph 1.5* above, section 9 of the *Bill of Rights* entrenches the right to equality. Of particular importance here is the provision regarding affirmative action.

> 9(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

This provision is echoed in section 195(1)(i) of the *Constitution,* and legislation and policies have been drafted to implement and enforce affirmative action in the public service. For example, to pursue the ideal of equality in the workplace, the *Employment Eq- uity Act 55 of 1998* was passed by the national legislature. Subject to certain provisions, this Act makes provision for the conscious and deliberate advancement of what the Act as *designated groups* (these are women, the physically disabled and Black persons; the latter group includes African, Coloured and Indian persons). In other words, the principle of *affirmative action* is specifically en- trenched in this national law and is, therefore, also applicable to the institutions of the state (see, for example *Public Servants Associa- tion of South Africa v Minister of Justice* 1997 3 SA 925(T)).

The principles of equity and equality, coupled with transformation seen in the context of affirmative action, constitute an important undergirding principle of the practices within the public service of South Africa at the present time. Needless to say, these principles have also been adopted as points of departure in the public service education sector.

Thabo M Mbeki, Deputy-President of the Republic of South Africa from 1994-1999 and State President from 1999-2008 dwells on this theme in his call for an African Renaissance. However, he makes the point that this is a goal which can be achieved only over time (1998:236-240).

Specifically in the context of public schooling, the above principles combine into an emphasis by the education authorities on what are often referred to as "equity, access and redress", where equity is taken to mean "fairness", "access" the right of admission for all to public schools, and "redress" the rectifying of past wrongs. When these concepts a re applied to practice in schools, their implications

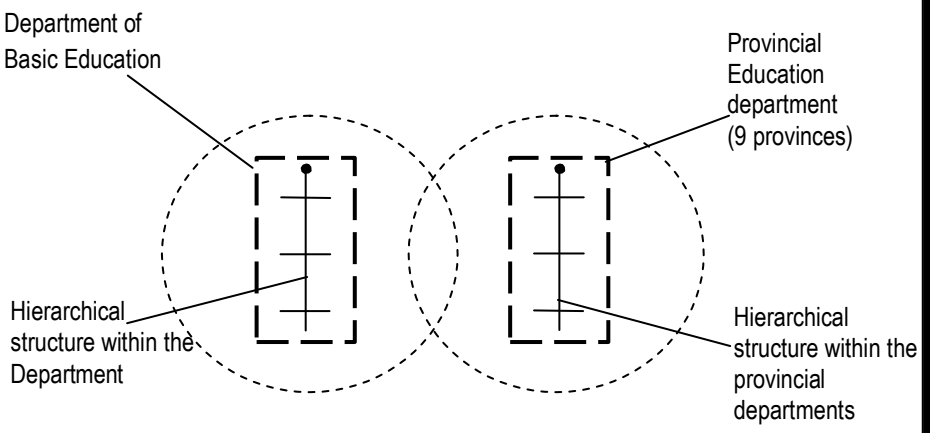
sometimes give rise to contesting viewpoints as to which rights enshrined in the *Constitution* should take priority. Sachs J, a Judge in the Constitutional Court, has stated as a personal viewpoint that equity, access and redress are more important even than the right to life, for example.

1.6 Conclusion

Public administration in South Africa is faced with numerous challenges as the country continues to move away from its past and attempts to establish a free, just and open society. The various laws which have been enacted, including the *Bill of Rights* in the *Consti- tution,* seek to establish a nation built on the principles of peace, justice and democracy.

The reality that all public administration is rooted in current realities within a country is proving to make the task of accomplishing the ideals a very difficult one. The administration of education is a complex matter, made more complex because of the social and other issues which it raises. The constitutional dispensation within the country, together with the structures which have been created or which have yet to be brought into being, have been tested by a measure of political instability, and will, no doubt, be tested in the years which lie ahead. It is therefore important that the structures which come into being support and advance, rather than inhibit or weaken, the cause of a just democracy.

Figure 3: The administration of public basic education within the context of co-operative government



- The diagram indicates the co-operative relationship of the national government (Department of Basic Education) and the provincial government (provincial departments of education) with regard to the functional area of education.
- Note that there are also many other departments functioning in the national and provincial spheres of government but the focus here is on the administration of public education.
- Note that the administration of public education is *hierarchically* structured and *bureaucratically* controlled. The *pyramidal* structures are headed by the national Minister of Basic Education and provincial MECs for Education.
- Various *levels* of seniority exist, with lower-ranking officials reporting to officials of a higher (senior) status.
- The focus of this of this monograph is on the role and functions of the structures involved in the *administration of public schooling.* However, the administration of public education takes place within the context of co-operative government.

Chapter Two

Structures in the National Sphere for the Administration of Education

Outline of this Chapter

In this Chapter you will gain insight into the manner in which some of the general principles of public administration discussed in the Introduction are applied in the education context in the national sphere. The principle of concurrent powers is central to the exposition that is given. You will become acquainted with the most significant structures for the administration of education in the national sphere of government, including advisory and policy -making structures.

2.1 Introduction

The formulation of general education policy in the form of norms and standards and the administration of education in the national sphere, are the responsibility of the Department of Education (*National Education Policy Act 27 of 1996: s 3-7*). Other depart- ments of state also have an important involvement in education, but only in so far as they render service functions to the Depart- ment of Basic Education. In this regard, reference can be made to the Department of Labour, the Department of Finance, which is closely involved in determining the basis of financial resourcing and the nature of the financial controls put into place; the Depart- ment of Health, which has inputs into AIDS programmes related to health and welfare issues, for example; the Department of Works,
which is concerned with the erection and maintenance of public

buildings (which include public schools); and the Public Service Commission, which is directly concerned with matters relating to the structure of public services, levels of emolument and related issues (the *National Education Policy Act* makes provision for inter- action of this kind in s 3(p)).

In considering structures for the administration of education in the national sphere, therefore, it is necessary to take cognizance of some structures which actually at first sight move somewhat be- yond the ambit of educational administration in its pure concep- tion.

It is also important to take note of how the state machinery works. In most western states, there is a separation between the legislature (i.e. bodies that make laws), the administration (i.e. those depart- ments of state which ensure that the laws are carried out) and the judiciary (i.e. courts and tribunals, whose function it is to pass judg- ment on the extent to which the laws are correctly administered, applied or adhered to both by employees of the state and also by the citizenry, including political office-bearers).

A political figure, in South Africa called a "Minister" or a "Minister of State" is charged with the political responsibility for a specific department or departments of state. Sometimes the Minister is as- sisted by a Deputy Minister. It is the duty of the Minister to ensure that the policies of the Government (the dominant political party together with the other parties in cases where there are coalitions) are implemented in the department or departments under the min- ister's control, and for this reason ministers and deputy ministers are almost invariably chosen from the ranks of the dominant politi- cal party. A feature of political life in South Africa has become that, even in instances where Parliament has not considered it necessary to take Ministers of State to task, the dominant political party acting in an extra-parliamentary manner has sought to exercise pressure on Ministers to carry out the will of the party, even where Parlia-
ment has not enacted appropriate legislation.

In South Africa, where there is a constitutional system which makes provision for certain powers to be exercised in the national sphere, others in the provincial sphere, and some in both spheres (so-

called "concurrent powers"), there are ministers not only in the sphere of national government, but also in the sphere of provincial government. The political leaders in the provincial sphere are properly called "Members of the Executive Council" (or MECs), but in general everyday language they like to be called ministers as well. This usage sometimes makes it very difficult to identify who has actually spoken on an issue, especially where the issue con- cerned may be dealt with in both the national and the provincial spheres of government.

A Minister is entrusted with performing a political function relating to some social service or other, and exercises this function through a bureaucracy which is usually known as a "Department", although other names can sometimes be used. Bearing in mind the separa- tion of powers referred to earlier, the Department is administered by a functionary known as a "Head of Department". In respect of the Department of Basic Education, these terms are defined at the beginning of the *National Education Policy Act* (s 1, for example). Frequently a Head of Department in the national sphere is known as a "Director-General" (see the *Public Service Act:* Sch 1 and 2), while in the provincial sphere arrangements are far more complex and fall outside the scope of this introduction. They will be considered in greater detail in the section which deals with provincial matters. Each province has one Director-General, who heads the entire ad- ministration for the province, and within that provincial administration there are functionaries also known as "Heads of Department" within the province. The *Public Finance Management Act 2005* includes both the head of the administration, who is the accounting officer, and the heads of provincial departments within the administration, in this definition. The heads of department within the sphere of a provincial administration are, however, at a lower hierarchical level than heads of department in the national sphere, and not all heads of department within or between provinces are at the same hierarchical level, although it must be stated that disparities which existed in the period immediately after 1994 have largely been eliminated.

Structures are necessary within which (a) Ministers who bear re- sponsibility for education in the national sphere can interact; (b) provincial MECs ("ministers") responsible for education can inter- act with each other, as well as with the Minister of Education in the national sphere; (c) heads of department who have some responsi- bility for

education in the national sphere can interact with each other; and (d) the head of the national Department of Education can interact with the heads of provincial education departments.

Not infrequently, of course, a Head of Department will delegate many of his or her functions to other persons within the department, as some of these departments are very large and their functions are extensive. This delegation of authority is always carried out in terms of the provisions of relevant laws, which indicate which functions may be delegated by a minister, or a head of department, and often to which sphere within the department they may be delegated. For example, section 62 (delegation of powers) of the *South African Schools Act 84 of 1996* states:

> (1) The Member of the Executive Council may, subject to such conditions as he or she may determine, delegate any power conferred upon him or her by or under this Act to the Head of Department or an officer, except the power to publish a notice and the power to decide an appeal lodged with him or her in terms of this Act.

Quite apart from the need for structures within which political functionaries and administrators can interact, there is also a need for them to be able to interact with the clients/stakeholders they are required to serve. In the education sector, this is a highly complex matter, for the education authorities have to interact with educators; with parents, guardians and custodians of learners in educational institutions; with stakeholders in education such as non-governmental organizations or religious bodies involved in education; and with international agencies which have an involvement with education.

In both the national and provincial spheres, therefore, a wide range of structures exists. These do not duplicate each other and may differ from province to province. Generically, however, it can be assumed that the structures are roughly similar from province to province.

2.2 Structures for Interaction between the Minister of Basic Education in the National Sphere and the Provincial MECs ("ministers") Responsible for Education

Because of the concurrent powers which apply in education (see *paragraph 1.3.3* of *Chapter One*), it is necessary that structures exist which enable the Minister of Basic Education to interact with MECs responsible for Education in the provincial sphere.

A common structure which exists in the machinery of the state at large to handle this kind of interaction is generally known as a MIN-MEC (Minister/MEC), and in the education context is officially described as the Committee of Education Ministers (hereafter CEM) (*National Education Policy Act: s 9*) although the term "MINMEC" seems to be widely used colloquially by most education bureaucrats. This structure consists of the Minister of Education (Chairperson), the Deputy Minister of Education at such times as this portfolio is filled, and the nine provincial MECs responsible for Education, as well as their respective advisors. The Chairperson of the Parliamentary Portfolio Committee on Education may also attend the proceedings (*National Education Policy Act: s 9(3)*). In the case of the provincial MECs, the advisors are often – but not exclusively – heads of department of education in the provinces. The functions of this body are indicated in section 9 of the *National Education Policy Act.*

Given that it is the duty of these political functionaries to ensure that the education system works in practice, it is hardly surprising that a national structure within which heads of education depart- ments can liaise with one another, also exists. This body is known as the Heads of Education Departments Committee, or HEDCOM (*National Education Policy Act s 10*). It is chaired by the Director- General of Education, and consists additionally of the Deputy Di- rectors-General of the national department, as well as the nine pro- vincial heads of education departments, who are generally of the rank of Deputy Director-General (usually the title "Superintendent- General" is used). A general description of its functions may be found in section 10 of the *National Education Policy Act.* These functions are advisory in nature, and are mainly of two kinds –

(a) advice to the education department; and

(b) general agreements (usually not mandatory) on how the pro- vinces plan to co-ordinate on the implementation of any ge

neral education policy which is applicable in *all* the provinces.

Both the CEM and HEDCOM are "in-house" committees – that is to say, they do not as a rule involve persons outside of state struc- tures in their activities. HEDCOM can, and does, constitute sub- committees of itself (*National Education Policy Act s 3*) whose func- tion is to advise it on a variety of matters – an example of such a sub-committee is the National School Calendar Committee, which may and does consist of persons drawn from a wide variety of stakeholders in the education process, including teachers' unions (*compulsory* see *National Education Policy Act: s 10(3)(a)*), NGOs and similar bodies.

2.3 Education Structures which Advise the Minister of Basic Education in the National Sphere

Apart from the CEM and HEDCOM, other structures advise the Minister of Education in the national sphere. Some of these are *ad-hoc* structures – that is to say, they come into existence for a specific purpose and normally operate through the HEDCOM structure – while others have a statutory basis (that is, they a r e brought into being as a consequence of the application of a law or a provision in a law).

2.3.1 Broad framework of the South African education system

These structures can be better understood if a broad framework of the national education policy framework is provided.

Provisioning of public education falls within the purview of two Departments of State – the Department of Basic Education and the Department of Higher Education and Training.

In terms of the provisions of the *National Education Policy Act*, the Minister of Basic Education is responsible for the determination of education policy in respect of the following main sub-divisions of the education system (see *National Education Policy Act: 3(4)(a)-(r)* for a detailed exposition of all functions):

- Further Education and Training (FET) in schools, which is both a national and a provincial competence;
- General Education and Training (GET), which is both a national and a provincial competence; and
- Early Childhood Development (ECD), which is both a national and a provincial competence. (It can be noted that in the case of children younger than three years, the Department of Social Development fulfils the primary function of the State).

The Minister of Higher Education and Training is responsible for the determination of policy in respect of higher, further and vocational education. This competence is exercised in terms of the provisions of the *Higher Education and Training Act*.

The Ministers of Basic Education and of Further Education and Training as the case may be, may determine policy by means of three major instruments, namely legislation (Acts of Parliament that have been passed by the National Assembly and where relevant the National Council of Provinces, and assented to and signed by the President of the country); white papers on various aspects of education and training (there have been a number of these on all facets of the education system); and, where appropriate, regulations (subordinate legislation) which have to do with the manner in which certain provisions in legislation (the enabling legislation) are to be implemented.

Over the past decade there has been a growing significance attached to voluntary bodies which also furnish advice to the Minister of Basic Education. These are not statutory bodies, which means that the Minister concerned is not obliged to take the advice proffered, but they do constitute an important nexus at which various interests in society interact on matters relating to public schooling. Among these bodies are the Joint Education Trust (JET) and the National Education Collaboration Trust (NECT).

2.3.2 General education policy

The matters on which the Ministers of Basic Education and of Higher Education and Training may proclaim general education policy are set out respectively in the *National Education Policy Act* and *the Higher Education and Training Act.*. It is important to note that the Minister of Basic Education has legal competence to proclaim national policy only on those issues referred to in the *National Education and Policy Act*, and on no others. Should a dispute arise as to whether a matter can properly be dealt with in the national sphere, sections 146-150 of the *Constitution* are invoked to deal with the matter.

In an important Constitutional Court case, *Ex parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill* (see also paragraph 1.3 of Chapter One), one of the minority parties in the National Assembly argued that the Minister of Education of the time was exceeding his powers by including certain provisions in the *National Education Policy Act.* The Constitutional Court con- cluded that in the instance concerned, the Minister had not ex- ceeded his powers, and the Minister therefore proceeded. This mat- ter is referred to again at the end of this Chapter.

2.3.3Higher education

With regard to higher education and training, the Minister of Higher Education and Training is advised by the Council on Higher Education (CHE), whose composition and functions are set out in the *Higher Education Act 101 of 1997* – the Council on Higher Education is therefore a statutory body. The Minister of Higher Education personally appoints the members of the Council, and must call for nominations by the public, as represented in the organizations listed by the Act. The Minister of Higher Education is

obliged to request advice from this body on the matters listed in the Act, but is not obliged to adhere to that advice. This structure is a highly important one, in that it advises the Minister on all matters related to the provision of education in institutions for higher education as defined by the Act, among other matters. There are no provisions for this Council to establish branches of itself in the provinces, because the competence to deal with higher education issues resides solely in the national sphere.

Higher Education South Africa (HESA) is a body representing 23 HEIs in South Africa on which the leadership of these institutions serves. Established in 2005 within the context of a changing higher education landscape, HESA amalgamated the former South African Universities Vice Chancellors' Association (previously a statutory body) and the Committee of Technikon Principals (CTP) into a single structure which aims, among other matters, "to be the single, credible, authoritative and respected voice of public Higher Education".

2.3.4 Further education and training

Further Education and Training (other than the FET Phase in ordinary public secondary schools i.e. grades 10-12) is increasingly referred to as Technical and Vocational Education and Training. The terms are sometimes used interchangeably, which can be confusing, and careful attention has to be paid to context when "FET" is scrutinised.

Further education and training is defined by the *Further Education and Training Act 27 of 1999* as amended. The Department of Higher Education has statutory responsibility for the functioning of the Sectoral Education and Training Authorities, the Colleges for Further Education and Training, the National Youth Development Agency and a number of other structures which deal with career and vocational preparation. As the footprint of these agencies is generally to be found within the nine provinces, the DHET enters into working arrangements with each of the provinces in order to enable effective functioning of the agencies for which the DHET is responsible. The nature of these arrangements varies from province to province depending on the specific circumstances.

2.3.5 General education and training

General education and training is regulated in the first instance in the national sphere by the *South African Schools Act 84 of 1996*. This Act seeks to provide a uniform basis for the provision of schooling in all the public schools of the nation. Provincial educatiotion departments may, if they wish, pass additional legislation regu- lating the operation of schools within their provinces, but in terms of the principle of concurrence these must be consistent with the law in the national sphere. Some of the provisions of these provin- cial laws will be dealt with in greater detail in *Chapters Three* and *Four*.

In order to be advised in the national sphere by bodies and agen- cies which have an interest in school education and therefore might be affected by formulation of education policy, the Minister has the option to constitute by regulation a National Education and Train- ing Council (*National Education Policy Act: s 11(1)*) which must advise the Minister. Prior to an amendment of the Act in 2007, the Minister was obliged to constitute and consult such a structure, an action which successive Ministers of Education did not take.

2.4 Other Structures in the National Sphere

2.4.1 Interaction with the organized teaching profession

Two structures are the predominant focus of the Minister of Educa- tion when dealing with educators employed *en masse* in public schools.

The first is the South African Council for Educators, more com- monly known as SACE. This body originally came into being by resolution of the Education Labour Relations Council, and was first recognized by law in the *Employment of Educators Act* . Subse- quently SACE was re-established in terms of its own Act, the *South African Council for Educators Act No 31 of* 2000. Its main func- tions are to register educators who teach at public schools by re- cording their names in a register and maintaining it; and to apply a code of conduct and hence disciplinary procedures to educators who violate that code of conduct. SACE has shown a lack of pro-
gress in giving effect to some aspects of its mandate.

SACE is also charged with the professional development of educators, and

since 2013 has established a system whereby educators are required to register

for purposes of Continuing Training and Professional Development (CTPD)

and to undergo professional development by means of a variety of programmes.

The second is the Education Labour Relations Council (hereafter ELRC) which was originally brought into being by the *Education Labour Relations Act of 1993* which was subsequently repealed and replaced by the *Labour Relations Act No 66 of 1995*. The ELRC is that forum within which representatives of the Minister of Education in the national and, on occasion, the provincial spheres interact and negotiate with teachers' unions on matters affecting conditions of service of educators employed by the state. To the extent that FET Colleges now fall within the purview of the Minister of Higher Education and Training it can be expected that at some point representation within the ELRC will have to be afforded to representatives of that Department also.

The work of the ELRC in the sphere of general conditions of ser- vice has in a number of ways been superseded by that of the Public Service Co-ordinating Bargaining Council (hereafter PSCBC), an entity established in terms of section 36(1) and section (2) of Schedule 1 of the *Labour Relations Act*. Within the PSCBC the in- teraction and negotiation take place between the state as an em- ployer and all public servants, including educators. Where occupa- tion-specific issues which have to be resolved within the education sector arise, these are then referred to the ELRC. (Labour relations issues are more fully dealt with in a separate monograph devoted to that subject.)

2.4.2 Interaction with the Department of Finance and the funding of education in the national sphere

The Minister of Basic Education in the national sphere is responsible for providing funds for those aspects of education for which the Ministry is responsible. In effect they are –

(i) the development of national education policy in terms of the provisions of the relevant legislation;

(iii) procuring funds to pay for the running of the Ministry and the Department of Basic Education in the national sphere; and

(iv) identifying and in some instances procuring "earmarked" funds for specific purposes in the provincial education departments .

In recent years it has become the custom for the Department of Basic Education to approach the National Treasury for funding which falls outside the above remit,and which best can be described as "earmarked funding", that is funding for special projects in the nine provinces for which these provinces themselves have not budgeted. Prominent among these projects have been the procurement of funds for the provision of textbook to learners in some of the nine provinces, and for the empowerment of teachers through a project known as the Teacher Union Collaboration Initiative.

The general approach to the financing of state expenditure is set forth in the government's National Development Policy (NDP). Within the context of that policy, an approach known as the Medium Term Expenditure Framework (MTEF) has been established. The Department of Finance has developed a procedure for the making of budget inputs by departments of state in the national sphere which are not the direct concern of this mono- graph. A variety of standing committees of the Departments of Finance and of State Expenditure, which also involve the work of the Fiscal and Financial Commission (FFC) (a statutory body), has been called into existence and in these committees the Department of Basic Education in the national sphere is represented.

Because the Minister of Basic Education has the responsibility to deter- mine norms and standards for the financing of education, and is required to do this in interaction with the Minister of Finance, struc- tures for this purpose also exist.

Because these structures are not directly concerned with the ad- ministration of education, they are not dwelt upon here. An analysis of the *Intergovernmental Fiscal Review, 1999* indicates, how- ever, that the activities of these structures have significant implications for the administration of education.

While the Minister of Higher Education and Training has a remit somewhat similar to that of the Minister of Basic Education when it comes for funding policy initiatives and the work of the Ministry and the Department, the Minister of Higher Education

and Training is also responsible for securing funding for the institutions and agencies which fall under the jurisdiction of the DHET. This includes FET Colleges, HEIs, the National Student Financial Aid Scheme (NSFAS) and various other agencies. Institutional funding therefore constitutes a more significant part of the remit of the Minister of Higher Education than it does of that of the Minister of Basic Education.

2.4.3 Interaction with other departments of state in the national sphere

The education authorities are committed to the development of a single system of education and training for the whole country. Labour issues and certain forms of training, have been the preserve of the Department of Labour. The Departments of Basic Education, Higher Education and Training and Labour therefore need to liaise closely on issues which relate to their stated intention of creating a single system of education and training.A variety of *ad-hoc* committees, task teams and working groups exists whose function it is to deal with joint issues. These structures are not statutory, and are therefore not elaborated upon here. What is important is that it be recognized that such structures exist, and that these can have an impact, albeit indirect, on the way in which education is administered in South Africa. The establishment of the Sectoral Education and Training Authority for Education and Training Development Practices (ETDP SETA) was an important milestone in the efforts of the au- thorities to deal more functionally with a number of education and training issues.

Matters relating to health issues are the preserve of the Department of Health, but some of these impinge upon the work of the schools. In this regard, matters like the *schools feeding scheme* operated by the state, the monitoring of the physical, emotional and dental health of school learners, and instructional programmes especially on endemic health issues such as AIDS and tuberculosis (TB) obviously have to be dealt with in close collaboration with the education authorities. Once again, a variety of *ad-hoc* working groups and committees exist in which are represented appropriate divisions of the education department in the national sphere. The work of these structures, once screened by structures such as HEDCOM and the CEM, can have an important impact on activities in schools.

2.4.4 Interaction with donors of funding from other sources

An important pillar of government policy with regard to the funding of social services relates to partnerships with donors of financial aid. These donors may be governments, foreign aid agencies, or bodies in South Africa. With each of these agencies relationships have to be structured and regulated.

Among the agencies with which the Department of Education liaises are USAID, an important organ of the United States of America; DANIDA, a Danish foreign aid organization; the Joint Education Trust (JET) and Business South Africa (BSA). For each agency a liaison committee is set up, usually between officials on both sides after the principals have reached the keystone agree- ments.

2.4.5 The South African Qualifications Authority

The Minister of Education is required to declare national norms and standards for the curriculum (*National Education Policy Act: s 3(4)(I)*). The principal agency which deals with curriculum issues in South Africa is the South African Qualifications Authority (hereafter SAQA), which was established by the *South African Qualifications Authority Act 58 of 1995*. SAQA has been vigorous in pursuing its mandate, and has made major strides in dealing with the various issues which relate to the implementation of a National Qualifica- tions Framework (hereafter NQF), which forms one of the corner- stones of the policy of the government in regard to curriculum mat- ters. The concerns of SAQA straddle all education and training in South Africa, no matter what its level or content, and the develop- ment of SAQA has been a significant milestone for the Government in its move towards achieving its policy objectives. The Minister of Higher Education in the national sphere is the Minister responsible for SAQA.

Policy declarations by the Minister of Basic Education must be consistent with the NQF, and quality assurance issues relating to the school curriculum are dealt with by the relevant Quality Assurance body to which reference is made hereunder. The same provision applies to the Minister of Higher Education and Training.

2.4.6 The General and Further Education and Training Quality Assurer (GENFETQA)(Umalusi)

The General and Further Education and Training Quality Assurer (GENFETQA) (hereafter Umalusi, which means "The Shepherd") is responsible for monitoring the standards of the school-leaving examinations set by the twelve examination authorities or boards in South Africa, as well as for ensuring that their standards are comparable. Each of the nine provincial education departments has its own examining body, while the Independent Examinations Board (IEB) and the South African Comprehensive Assessment Institute (SACAI) set their own examinations. The Directorate of National Examinations of the Department of Higher Education and Training sets some external examinations on behalf of Colleges for Further Education and Training. Umalusi fulfils an important role in establishing comparability between the examinations set by a variety of examining bodies. The Ministry of Higher Education and Training and the provincial education departments are represented on this body, which can thus be viewed as an important liaison body.

2.5 Conclusion

The system of structures in the national sphere is well-developed, and seeks to make provision for the major elements of the educa- tion system.

Quite apart from its direct responsibility for dealing with educational administration issues, the Department of Basic Education in the national sphere also has responsibilities in regard to liaison with the Department of Sport and Recreation on issues which could effect school sport and with the Department of Culture on issues related to culture. In some of the provinces, the portfolios of Education, of Sport and Recreation; and of Culture are sometimes combined under a single MEC. Those MECs therefore have to become involved in a wider variety of national committees than those who have a single portfolio.

This Chapter has made no reference to international liaison with bodies such as SADEC, the Commonwealth Secretariat, UNESCO, the AU, the ILO, the IIRA, EI and related bodies, as these fall somewhat outside the scope of this monograph. Such structures do exist,

however, and their work advances the cause of the system in the international arena, especially where foreign aid may be obtained to enhance the available budget for education, and more particu- larly the budget for capital works.

This Chapter has also not furnished an exposition of the numerous administrative structures, mainly committees which SAQA has brought into being to assist it with its work in structuring the NQF, nor yet has an account of the various sub-structures of an entity such as Umalusi been given. These are extensions of bodies which play a significant administrative role, and for purposes of this monograph – which deals with broad administrative issues – the specific detail of these sub-structures is considered to be less impor-
tant, although not insignificant.

Chapter Three

Structures in the Provincial Sphere for the Administration of Education

Outline of this Chapter

In this Chapter you will become acquainted with some of the most common administrative and administrative support functions carried out by provincial education departments. Some of the continuing major problem areas which occur in the attempts to amalgamate historically very different provincial education administrations are referred to, while the Gauteng Provincial Education Department is used as an example of the kinds of administrative issues which need to be dealt with by provincial education departments, while other provincial education departments are also referred to where appropriate.

3.1 Introduction

Provincial education departments are responsible for the provision of schooling and some parts of the further education focus in the province concerned. Because their focus includes both the making of education policy for the provincial institutions in those instances where the Minister of Education has not already determined it - and on occasion refining it for provincial application when the Minister has determined such policy - and also the provision of schooling through institutions falling under the jurisdiction of the province, it is to be expected that the structures in provinces will be both similar to, and different from, those in the national sphere of government, among other reasons because numerous operational issues have to be dealt with.

There are nine provinces in South Africa (*Constitution: s 103(1)*), each of them with a unique set of educational circumstances which has to be managed. For purposes of this monograph, a single province is used as an example in the main, always with the provision that other provinces may have more – or fewer – structures, or be differently organised. Generically, however, the administrative functions that have to be fulfilled are the same in all the provincial education departments.

It should be borne in mind that prior to 1994, the administrative structures responsible for education in the country were a direct function of the political system which had applied up to that time, in the same way as they are now a function of the current political system. Although the typology which follows is repugnant in terms of the socio-political development of the country since 1994, it is necessary to recall the following if present provincial educational administrative problems are to be understood.

It should be remembered that separate education administrations and schools for "Black", "Coloured", "Indian" and "White" persons existed in those areas of the country which had not been cut up into smaller homeland areas, and that separate administrations for education existed in the territories at that time described as Bophuthatswana, Ciskei, Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa, QwaQwa, Transkei, and Venda. There were therefore fourteen education administrations, some of which had been further subdivided on a provincial basis, giving as many as eighteen education administrations in addition to the administration at national level, which had to be parcelled out between the nine provinces which were established after the 1994 elections.

In the period after 1994 provincial education departments had to attempt to combine successfully parts of former education administrations which had been responsible for schools and other kinds of educational institutions which fell within the boundaries of the

provinces which were determined after the 1994 elections:

- *Eastern Cape* – Six elements – four former part-administrations and two entire former administrations.
- *Free State* – Six former part-administrations.
- *Gauteng* - Four former part-administrations.
- *KwaZulu Natal* - Six elements – five former part-administrations and one entire former administration.
- *Limpopo*- Seven elements – four former part-administrations and three entire former administrations.
- *Mpumalanga* - Six elements – four former part-administrations and two entire administrations.
- *Northern Cape* - Four former part-administrations.
- *North-West* - Six elements – five former part-administrations and one entire administration.
- *Western Cape* - Four former part-administrations.

(By "part-administration" is meant that part of what had been an education department which had functioned nationally or in a number of provinces; by "administration" is meant an education department which had prior to 1994 operated only in the province to which subsequent to 1994 it was allocated. An example of an "administration" is the KwaZulu Education Department, which af- ter 1994 became the predominant administrative element in the newly-formed KwaZulu-Natal Education Department).

Quite apart from the difficulty inherent in attempting to combine a variety of education administrations – and it must be remembered that previous administrations had to be subdivided to enable them to hand over functions to the newly constituted provincial educa- tion departments, in itself a massive exercise – it is also so that the various administrations were nor equally represented in the new provinces. This meant in the first instance that the likelihood of es- tablishing "best practices" out of each of the constituent administra- tions was limited; and secondly, that the widely varying levels of resourcing, especially in terms of funding, personnel provision and expertise, led to major difficulties in establishing provincial educa- tion administrations on a sound footing in most of the provinces. It also helps to explain why the provincial education administrations in the Eastern Cape and Limpopo have continued to be particu- larly ineffective, for it is in those provinces that the greatest inequi- ties as a result of the *apartheid* system were, and are, to be found. Additionally,

in those provinces the dominant "former" administra- tive systems are those of the former under-resourced homelands and so-called "independent" territories, and where the backlogs of every kind have continued to be very great indeed. (*See, for exam- ple, Republic of South Africa 2008. National Assembly. Internal Question Paper No 27-2008. Question 1561. pmg@mweb.co.za which deals with issues such as sanitation, water, electricity and the like).*

The Eastern Cape, Gauteng, KwaZulu-Natal, Limpopo, Mpuma-langa and North-West Provinces have also since 1994 been af-fected by changes in provincial boundaries, which have resulted in the placing of schools under different provincial administrations – areas such as Matatiele, Carletonville-Khutsong and Bushbuck Ridge gained a measure of public notoriety as a result of ongoing political unrest as local communities resisted these changes, some- times violently, while the incorporation of part of the Bronk- horstspruit district into Gauteng from Mpumalanga has gone by largely unnoticed by the wider public, although of great moment to the communities and schools involved. The levels of public resourc- ing of schools differ from province to province, with the conse- quence that such border amendments have unavoidable repercus- sions also for the schools concerned.

Since 1994, provincial education administrations in various parts of the country have undergone almost continual organisational change as the education authorities have sought to find a suitable formula for constituting the education administration – in the West-
ern Cape, for example, a further re-organisation exercise was completed in 2007/08, some fourteen years after the first of a number of structural plans was implemented. It should also be borne in mind that in addition to trying to establish effective administrations, the education authorities have also had to devote attention to the implementation of new or amended education policies on virtually every front within education – frequently in the absence of ade-quate resources, which has meant that administrative systems have been tested to the limit and sometimes found wanting. The Department of Basic Education has instituted a national debate on the powers/capacities which could be assigned at district and regional levels within provincial departments, principally in an effort to encourage a degree of uniformity in the powers assigned to officials and the capacities assigned to offices at different levels.

Against this background of huge challenges on the administrative front, and in order to simplify the exposition as far as possible, *leg- islative, policy-making, advisory, executive* and *supportive* structures will be dealt

with separately, although in practice their activi- ties tend to be intertwined. Perhaps the most obvious example of their inter-related nature will emerge when reference is made later in this Chapter mainly to the Gauteng province.

3.2 Legislative Structures

Each of the nine provinces has a provincial legislature, which is cre- ated in terms of section 104 of the *Constitution.* The provincial leg- islature is empowered to pass laws on those matters over which the province exercises either complete or concurrent jurisdiction – see *paragraph 1.3* of *Chapter One* above. It is therefore possible for a provincial legislature to adopt a provincial Act or Acts regulating policy for, and the provision of, education within the province in question.

Not all the provinces have an equally comprehensive set of educa- tion laws, some of them preferring to operate within the provisions of national legislation relating to certain facets of the education system. So, for example, the Gauteng Provincial Administration at one stage drafted a provincial bill dealing with colleges of education (since transferred to the Higher Education sector and closed or incorpo- rated into universities, and therefore now a national competence),
while the Eastern Cape decided against such draft legislation.

The Gauteng Department of Education (hereafter GDE) has a robustly developed system of provincial legislation and structures. Not all these structures are encountered in all the provinces, while all provinces have structures which are unique to them.

3.3 Policy-making Structures

The provision of education in the Gauteng Province is regulated principally by the *School Education Act 6 of 1995.*, in addition to the *South African Schools Act of 1996*.

It is clear from this legislation that all final formulation of policy within the province is in the hands of the provincial education au- thorities. It is therefore correct to conclude that *final* policy-making within the GDE takes place in-house, and that whatever structures exist for this purpose, are not accessible to the general public or described in detail to the academic investigator. There is a provin- cial Education

Portfolio Committee which is a part of the provincial legislature, and to which minority political parties and the public can make representations, but at best this is a consultative structure for all agencies other than the ruling political party in the province.

In terms of section 5 of the *School Education Act 6 of 1995* the competence to formulate provincial education policy resides in the office of the provincial MEC for education, and in effect this is what happens.

A word is necessary on the subject of *financial policy* for education in any of the provinces. In the previous chapter, reference was made to the NDP policy of the Government, as well as to the MTEF (see *paragraph 2.4.2 of Chapter Two*). Provinces are bound by these policies. Reference was also made to the relative status of heads of department in the national and the provincial spheres (see *paragraph 2.2 of Chapter Two*). These three elements have a spe- cific significance in the context of the provincial administration of education, which is dealt with at this point.

The provincial administration is headed at the bureaucratic level by a functionary who is appointed at the level of Director-General, and who is responsible for the total administrative activities of the province. This functionary has the responsibility, *inter alia*, to com- pile the provincial budget on the basis of bids made for funds by each of the MECs responsible for specific functions within the pro-
vince. As an outcome of the MTEF process, the Director-General of a province receives a guideline amount in advance of a given financial year. The province is required to provide the services for which it is responsible from this amount. Because the national government does not have the financial resources to meet the financial claims made by each of the provinces, it is safe to assume that the Director-General of a province will be unable to meet the claims of each MEC. In effect, the MECs in the Executive Council bid against one another for their share of the provincial budget. This is one of the reasons why the provinces are not necessarily in a position to fund the provisions of the *National Norms and Standards for School Funding* – even a cursory reading of a provincial *Hansard* will indicate that the MEC for Education for example, will during the debate on his or her budget vote, make the point that funding levels are inadequate. The Minister of Basic Education has attempted to address facets of

this problem by developing a system of "earmarked" or "ring-fenced" funding – that is, funds which are made available direct to a provincial education department in order for particular objectives to be accomplished. These funds may be used for no purpose other than the one for which they have been allocated, or "earmarked". An example of such funds is amounts allocated to each of the provinces for the purchase of text books to ensure that every Grade 12 pupil would be in possession of the textbooks necessary to address the curriculum for the first examina- tion for the new National Senior Certificate (NSC) which replaced the former Senior Certificate at the end of 2008. (*See, for example Republic of South Africa 2007b. National Assembly. Internal Question Paper No 44-2007. Question 446. www.pmg.org.za and also Republic of South Africa 2008. National Assembly. Internal Ques- tion Paper No 27-2008. Question 1558. www.pmg.org.za*).

Although some teachers' unions have argued that they should be an intrinsic part of the budgeting process at the provincial level, provincial education authorities have not created permanent struc- tures which would enable consultation on budgetary matters. The Department of Basic Education in the national sphere is, in this sense, one step ahead of the provinces, in that HEDCOM has a structure within which provision is made for participatory representation of each of the Combined Trade Unions (CTUs) admitted to the ELRC (the CTU SADTU and the CTU SAOU). There are provinces in which the MTEF processes are revealed to the teacher unions and also to the organisations of school governing bodies – the Western Cape is an example of this – and at which, at the very least, the implications of the anticipated available financing are discussed with important stakeholders. There are other provinces, however, where such interaction does not take place.

In each of the nine provinces there is a provincial chamber of the Education Labour Relations Council (hereafter ELRC), brought into being by the Constitution of that Council. There is some de- bate about the status of decisions reached within those chambers. For purposes of this monograph it is simply recorded that these structures exist, and that there may be a case for arguing that at least some of the decisions reached relate to labour policy concern- ing educators. Depending on the perspective adopted there might be an equal case for arguing that the provincial chambers of the ELRC are merely consultative bodies. The debate on the issue is a complex one, and is not appropriate at this point.

3.4 Advisory and Consultative Structures

Reference has already been made to the provincial chamber of the ELRC, which may be considered to have an advisory function specifically with regard to the manner in which certain issues affecting educators (e.g. educator supply and demand, and more particularly, the post provisioning norms for the province) must be dealt with. (It bears mention that in the Eastern Cape teacher unions in 2006 entered into protracted litigation, not concluded at the time of going to press, in an effort to compel the provincial education department in the Eastern Cape to desist from allocating posts to schools in a desultory fashion, and actually to furnish its schools with the norms in accordance with which educator and administra- tive posts are allocated to public schools in the province). Although the post provisioning norms are a matter for negotiation, the reality is that the implementation of any collective agreement is dependent on the available funds, over which the provincial legislature has sovereign authority. (*See, however, Republic of South Africa 2008. National Assembly. Internal Question Paper No 28-2008. Question 1631. www.pmg.org.za).*

A provincial chamber of the ELRC consists usually of representa- tives of the recognised and admitted unions representing educator personnel ("employees"), and of the provincial education authori- ties ("the employer"). It does not represent all role-players and stakeholders in education in the province. In effect, it is a provincial chamber of the equivalent of an industrial council for educators. *(See Education Labour Relations Council 2008. Annual Report 2007/08.)*

A significant consultative/advisory body in Gauteng is the Gauteng Education and Training Council (hereafter GETC), which was established in terms of sections 32-38 of the Gauteng *School Educa- tion Act 6 of 1995*. A wide range of stakeholders in education is represented in the Council. The MEC for Education in the province uses the Council as a sounding board to obtain advice on matters relating to the education policy which is contemplated for the province. Proposed education policy or potential amendments to prac- tice are presented to the Council for comment; suggestions about the way in which various issues of policy should be dealt with, are

solicited; and in general the Council plays a valuable role as a sounding board for the provincial education authorities as they seek to come to conclusions about the final formulation of educa- tion policy.

Within the province, task teams may be and are convened to deal with specific issues, but these lack a statutory basis similar to that of the GETC, for example. Each education department operates an examining body, for example, which is responsible for the school- leaving examination at the end of Grade Twelve. In some pro-
vinces the examining body is advised by an entity such as an Examinations Commission, which exists in Mpumalanga, while in other provinces the arrangements may be very much more *ad hoc*. In each instance the task team may be called upon to offer advice, but the MEC or the Department of Basic Education is not obliged to take it.

The constitution, composition and functioning of these teams are not well-documented, and often the only source of public informa- tion about what they have accomplished is the provincial *Hansard,* usually in the section which deals with answers given to questions put by members of the provincial legislature. Given that *Hansard* is not equally rapidly produced by all provincial legislatures, it is a well-nigh impossible task to develop a comprehensive picture of which task teams are operating on what issues related to education policy in the various provinces at any given time.

3.5 Executive Structures

A highly important function of a provincial education department is that it is responsible for the *provision* of education in provincial education institutions, as well as for the regulation of those institu- tions which are not public institutions, excluding institutions for higher education.

A fairly typical executive structure for the administration of the pro-
vision of education within a province could be as follows.

3.5.1 Head office

All provincial education departments have a Head Office, which is generally located in that city of the province in which the Provincial Legislature meets. (Usually the provincial capital. In KwaZulu-Natal the Head Office of the KZN Department of Education was between 2005 and 2006 relocated from Ulundi to Pietermaritzburg – among the reasons given for this decision were reasons relating to geogra- phy). Such an arrangement enables close contact between the MEC for Education, who sits in the provincial legislature when it is in session, and the head of the department, who reports to the MEC directly and needs to be in close and frequent contact.

Such a Head Office commonly makes provision for the various functions which have to be performed to be arranged administra- tively in such a way that effective administration of the education system in the province can take place. he following is a fairly typical example of the various divisions that may be encountered:

- **Administrative functions**

These include divisions such as a financial section, which deals with issues like payment of salaries, pension issues, and financial transac- tions affecting the system as a whole. It is not unusual to find a divi- sion which concerns itself with matters relating to building and grounds, including the planning of new school buildings and related matters. Some of the administrative functions relating to the Human Resource Development (hereafter HRD) policies of the department usually reside in a separate division, for example the administration of the leave records of personnel, decision-making in connection with the application of the rules relating to leave of various kinds, and general interpretation of the *Personnel Measures* (PAM) which have been agreed upon with the unions, and related issues.

- Human resource development functions

These include most issues relating to personnel matters affecting the work of the provincial education department. The HR division in the department typically deals with issues concerning personnel employed by the department in schools, as well as persons employed by the department as field officers or in departmental offices themselves. Such a division could embrace issues such as training policy, thereby including matters such as the provision and supply of educators, while other departments might create separate divi- sions for this purpose. Close liaison between the HR division and the administrative division is obviously necessary, and where such liaison fails, the consequences for employees of the department can be disastrous – for example, the non-payment of salary, loss of pension or leave records of personnel, and failure to deal timeously with pressing career issues for the personnel member, are the fre- quent result of such inefficiencies.

The Gauteng Provincial Administration from 2003 implemented an entity known as the Gauteng Shared Services Centre (GSSC), a single entity tasked among other matters with dealing with condi- tions of service issues for the entire work force of the provincial administration – matters such as salary adjustments, appointments, retirements, leave issues and the like are dealt with by this entity. A difficulty is that the conditions of service of persons employed by various departments within the provincial administration are not identical, which has as a consequence that functionaries within the GSSC run the risk of confusing the rules with regard to educators, for example, with those relating to personnel employed in other provincial departments.

- Institutional functions

These are typically dealt with in a division identified for this purpose. Such a division deals with issues related to schools and other educational institutions of various types. In some departments these divisions are segmented and are arranged according to institutional type, for example pre-primary schools, primary schools, and secon- dary schools. These segments may deal with issues relating to the

role and functions of governing bodies, financial issues, curriculum development, planning functions and related issues. In other departments, the curriculum development function for a number of institutional types may be grouped in a single unit, while in others it is spread across a number of segments of the division. Various names are employed for these divisions and their segments – some departments may have sufficient personnel to establish the division as a Chief Directorate, with the various segments as Directorates. Other departments may establish a division as a Directorate, with the segments under the control of officials of lower rank.

- **Support services**

These may be dealt with in a separate division, or may be integrated into the structures of existing divisions. These services may include educational support services of a psychological nature to learners and personnel who need this. They may include the provision of field support personnel whose function it is to visit schools in the field and to offer advice on the management of the school, or on the implementation of the curriculum, or support of another kind. Some provincial education departments are able to employ personnel to perform these functions, while others are not. In regard to these functions it may be stated that across the majority of provincial education departments there is no consistent development of education functions at the Head Office level.

3.5.2 Regional offices

Regional offices can be established by a provincial education department, and typically report to the Head Office. These offices are usually established in order to accomplish greater efficiency – the notion is that the closer the office is to the institutions it is required to serve, the more effective that service can be, Such regional offices may carry out some or all of the functions which have been described under the heading *Head Office*, and the degree to which functions are spread from a head office to a regional office will vary

from department to department. In Mpumalanga, for example, the province has been divided into three regions on the basis of geography, Gauteng has been divided into three regions essentially on the basis of school and learner density, as the province is the smallest of the nine provinces in terms of geographical area, and the Free State has no regional offices at all. Limpopo has established six regional offices, largely on the basis of the geographical size of the province and, to a certain extent, on the basis of its previous history (the province includes the former territories of Gazankulu, Lebowa and Venda, and expensive office infrastructure exists which the education authorities have decided to utilise optimally as far as possible).

3.5.3 District offices

District offices have also been established by some of the education departments, Gauteng being an example of such a province. The division of a province into regions may still result in units too difficult to manage in terms of the management span required, and these have to be further reduced in size to enable assistance to be given at the institutional level where required. A district office is typically the first departmental office to which a school will turn, should assistance of whatever nature be required. The name "district" is not used in all the provinces, but generically the term can be taken to mean the sub-unit within an education department to which the school would normally report directly on operational issues, or from which it would as a first recourse seek departmental support.

From the above exposition it should be clear that a provincial education department can also be organically arranged so that it can be hierarchically controlled, the authority sequence in most provinces in descending order being Head Office – Regional Office – District Office. As the methodologies for dealing with the establishment, development, staffing and executive powers of regional and district offices are widely divergent in the nine provinces, the Department of Basic Education has, as indicated above, produced a discussion paper on an ideal template for offices of this kind.

3.6 Support Structures

As it is a departmental responsibility to provide schooling within the province, it is also a departmental responsibility to provide support to the schools. This support can be supplied in various ways, and in practice most frequently emanates from the district level – that is, the office closest to the school in question. The kinds of support service vary from department to department, but should embrace at least the following.

3.6.1 Management support

The principal of the school is in terms of the provisions of the *South African Schools Act* its professional manager, and should be supported and guided by departmental officials in regard to matters such as the interpretation, implementation and execution of depart- mental instructions. In this regard, the education department re- quires certain information from the principal as well as certain le-
vels of professional conduct and skills. Provision must also be made for measures to ensure that the necessary personal and professional development take place.

Most district offices deploy field officers who have a variety of titles and functions, and who enter schools at least in theory with a view to providing management support. (The reason for this qualified view arises from an unusual provision in the *Regulations for safety measures at public schools 2001. (see List of Sources)*. This provi- sion prohibits entry to the school property during school hours of any person who is not a learner or an employee at the school, unless that person has made an appointment in advance. At least one teacher union stations a person at the gate of some schools to deny entry to any visitor, which greatly inhibits departmental offi- cials from performing their functions if they have not made a prior appointment). In general, the District Manager has a responsibility
for the overall levels of education administration within the schools

in his/her district. This may include ensuring that returns are timeously and correctly completed and returned to the District Office; that matters affecting learner enrolment and discipline are attended to in accordance with departmental procedures and instructions; that personnel issues are properly dealt with; that school records in which the department may have an interest are correctly maintained – in short, all aspects of the administration of the school in which the education department has a legitimate interest, are the responsibility of the District Manager, whose job it is to liaise closely with principals in the interests of ensuring effective administration within the school. A particularly important area is that of the proper implementation of the disciplinary code for learners which has been established by the governing body of the school.

3.6.2 Human resource development support

The provisions of the *Labour Relations Act 66 of 1995* apply to departmental personnel at all public educational institutions. Many district officers have labour relations practitioners, sometimes called District Labour Advisors (hereafter DLAs) attached to them. Their function is to seek to resolve difficulties which may arise in the labour field within schools from time to time. These persons intervene and mediate in labour situations which arise in institutions, interact with trade unions where necessary, and constitute a formal presence in a case where formal labour proceedings have to be instituted in terms of the Act. The function of the DLA is highly specific, and is limited to labour issues alone.

3.6.3 Curriculum support

Most education systems employ departmental officials whose function it is to furnish curriculum support to educational institutions. This is especially necessary in instances where modifications to existing curricula are made by the education authorities, or where a new curriculum is introduced. Most provincial education departments have an insufficient number of field officers who provide wide-ranging curriculum support, a serious shortcoming in the light of the proclamation of *Curriculum 2005* as the general norm for curriculum in South African public schools. Even superficial scrutiny of provincial *Hansards* indicates that there is a serious problem with the provision of an adequate number of curriculum experts to meet the existing and anticipated needs.

In Gauteng, as in a number of other provinces, on generic issues there is a tendency to make use of consultancies, or of contracted personnel. Some of the presentations on *Curriculum 2005* and its implementation, for example, were carried out by officials of agen- cies such as USAID. The difficulty with generic presentations, of course, is that these are non-specific. The implementation of a new Senior Certificate Examination in Grade 12 at the end of 2008 highlighted this matter. Curriculum advice on a subject such as Mathematics or Biology must be very specific, and the quality of the advice depends among other matters on the available skills pool within the province. In this regard provincial education de- partments are not yet adequately resourced with curriculum spe- cialists who can furnish the necessary advice to practitioners.

3.6.4 Special educational needs

Provincial schools make an attempt to accommodate learners with special educational needs. The needs include physical factors, such as blindness, deafness, and spasticity, or intellectual or behavioural deficits of various kinds, not all of which can be adequately dealt with in provincial public schools. The Minister of Basic Education in the national sphere has announced a policy which in the longer term will make provision for learners with special needs to be accommo- dated in conventional public schools where the nature of those needs make this possible. Until the necessary planning has been put in place and the training of educators accomplished, however, such schools as do exist for dealing with special educational needs have to be serviced.

Schools dealing with, for example, blindness, are scarce indeed, and the resource allocation to such schools is by the nature of things greater than it would be to an ordinary public school. Staffing allocations tend to be more favorable, while special provision has to be made for learners to be resident at the school, should they be drawn from towns or provinces removed from the locality of the school.

Quite apart from identifying learners who have special needs of this kind, the education authorities also have to identify learners who have perhaps less obvious special needs, whose learning deficits, behavioral difficulties if any, and perceptual world have to be enriched. Developed education systems employ persons such as psychologists, speech and hearing therapists, occupational therapists, nursing personnel and other paramedical staff, and specialist personnel to deal with the deficit in

question. Such persons are in short supply in the present South African provincial education system and those there are, are therefore unable to service the needs of the entire system. Of the nine provinces the Western Cape has been the most advanced in making provision for learners with spe- cial education needs.

Schools for learners with special education needs are more expen- sive than ordinary public schools – the staffing formula for such schools carries a specific weighting to make possible a more gener- ous allocation of staff, and the financial allocation is also more gen- erous than that made to ordinary public schools. In the Eastern Cape, presumably as a cost-cutting measure, some schools for pu- pils with special education needs were declared by the MEC for Education to be ordinary public schools, and the building of a school for pupils who are serious behavioral offenders and have been consigned by the courts to such schools, was not attended to. In both instances relief from the courts had to be sought, which relief was granted.

Administrative systems specifically designed to furnish logistical support to learners with special educational needs have been lack- ing in most provinces, and much planning and implementation re- mains to be done in this area. It is not incorrect to contend that with regard to administrative systems designed to furnish logistical support to learners with special educational needs, the provincial education systems at present leave much to be desired. The effect of this situation is that numbers of learners have little, if any chance of reaching their potential.

3.7 Conclusion

From what has gone before, it can be concluded that the numerous functions to be carried out by provincial education departments are extensive and that the administrative demands made are substan- tial. It is axiomatic that the level of resourcing within a province is a cardinal aspect of the extent to which a province is actually in a position to meet its obligations in this regard. The provincial educa- tion budgets fall outside the scope of this monograph – they never- theless provide important insights into the way in which provincial education departments go about establishing their education ad- ministrations. In Limpopo, for example, some 93% of the total edu- cation budget for the province is spent on personnel costs – clearly under such circumstances, deficits in the field of physical facilities, support services and other

crucial focus points can be expected.

Some provincial education departments are in a position also to discharge what might be described as a *regulatory function*, that is, administering matters such as the registration and monitoring of *independent*, or private, schools and colleges in an effort to ensure a measure of quality control. Other provincial departments do not have the resources to do this, with the result that in some provinces – Limpopo is an example – an independent schooling sector is springing up almost unchecked and therefore unmonitored. This may be one of the reasons why national policy has been declared which makes it obligatory for independent schools which have grade 12 classes to register with Umalusi, which has in effect been given an inspection function at such schools.

The dilemma in which education departments find themselves, is that concerns of administrative effectiveness and efficiency have to be balanced against the needs of the schools for adequate resourcing. Often the provincial education authorities, when faced with the painful choice of refining the administration or allocating resources to schools, take the latter route: this is beneficial to the schools in the immediate term, but may in the longer term contribute to administrative collapse which is in the interests of none of the parties concerned. In Mpumalanga, for example, the number of districts has been reduced. This has released some additional resources for use in the schools. Whether this will be to the long-term benefit of the province remains to be seen.

It is also important to bear in mind that some provinces are compact and densely-populated (Gauteng is the prime example), while others are sparsely-populated and widely spread – the Northern Cape, which stretches from Kimberley in the East to the Atlantic Ocean and the Namibian border in the West, and from De Aar in the South to the Botswana border in the North – is an example. The administrative demands are totally different and the imperatives are divergent – but the generic functions are the same. The manner in which these will be carried out could be totally different from province to province.

The demands facing provincial education administrations are great. The manner in which these challenges are addressed will, however, determine the longer-term success of the education system in South Africa.

Chapter Four

School Governance

Outline of this Chapter

In this chapter you will become acquainted with some definitions, and with some of the key issues related to the governance and administration of education at the institutional level (the public school), with specific reference to the provisions of the South Af- rican Schools Act 84 of 1996 in so far as these relate to the work of school governing bodies.

4.1 Introduction

This chapter will deal with the issue of school governance in the public school sector, but does not refer to this matter in the context of private schools, known in South Africa as *independent* schools. The interests which have to be reconciled within the school are those of the parents, the learners, the local community, other inter- ested parties and stakeholders, educators and other personnel who are in the employ either of the provincial education department or of the school governing body itself, and the management personnel of the school. To a certain extent these interests might be described as *internal* interests.

But there are also what might be described as *external* interests. These include national and provincial educational objectives, especially those described in *Chapter One*, where it is the aim of the Government to attend to issues such as access, equity and redress in the realm of educational provision. While it is possible for external interests and internal interests to match one another exactly, this is more often than not simply not the case – local communities are usually far more concerned about their own interest than about a wider interest.

Provision is made in the national and the provincial spheres of government for political and bureaucratic structures which seek to give effect to Government policy on education matters, but, as we have seen, there are no such structures in the sphere of local (municipal)

government. The school itself is seen as the unit at which local control and administration are to take place. The structure which has been put into place at all public schools is known as a "Governing Body". Before dealing in some detail with aspects of this structure, the following definitions, provided by the *South African Concise Oxford Dictionary 2002* are relevant:

- "**govern** – to conduct the policy and affairs of an organisation";
- "**governance** – the action or manner of governing"; and
- "**governing body** – a group of people who govern an institution in partnership with the managers".

The *South African Schools Act 84 of 1996* makes provision for the establishment of governing bodies at schools, and legislates comprehensively on a great many matters relating to their duties, rights and responsibilities. Other laws which also make reference to governing bodies at public schools include the *Labour Relations Act 66 of 1995*, and the *Employment of Educators Act 76 of 1998*. Since the *South African Schools Act 84 of 1996* came into effect there have also been numerous court judgments relating to aspects of the actions of governing bodies, including their relationships with the national and provincial political and bureaucratic education structures. These are also important in trying to arrive at an understanding of the position of governance in South African public schools, which as we shall see must on the one hand act in the interest of the school, but on the other must reconcile the *internal* interest for which it has a responsibility with the *external* interest of the wider political and bureaucratic education hierarchy.

It is important to emphasise that in South Africa schools other than independent schools are public schools, and not "state schools". The concept "public school" recognises that there are numerous interests which have to be recognised within the school. The concept "state school" in effect assumes that the State is the only party which has a legitimate interest in the school. This distinction is important if certain aspects of governance are to be fully grasped.

This Chapter will in dealing with aspects of school governance and governing bodies, concentrate on the provisions of the *South African Schools Act*.

4.2 The Legal Status of the Public School

Generally speaking, "legal status" refers to the position the law affords to a person or body (entity). For example, the President of South Africa has a particular status in law: he is the Head of State, has special powers and duties and can be removed from office (*Constitution: s 83-90*); the law requires that a minor be assisted by a parent/guide when participating in legal transactions (see: com- mon law; *Constitution: s 28; Children's Status Act 82 of 1987*). The *Children's Act 38 of 2005* as amended by *Children's Amendment Act 41 of 2007* has not yet been fully promulgated. The date of commencement of s17 of the Act was, however, 1 July 2007. Sec- tion 17 determines as follows: *a child, whether male or female, be- comes a major upon reaching the age of 18 years*. Section 32 of the *South African Schools Act* deals with the status of minors on governing bodies of public schools and lists certain limitations on the competence and liability of those minors. The lowering of the age of majority had as a consequence that from 2008 onwards there were learner representative council members on governing bodies with full contractual capacity and who are therefore no longer subject to the exemption from personal liability contemplated in s32(3).

In terms of section 1(xix) of the *South African Schools Act*, a "school" is either a public or an independent school which enrols learners in one or more grades between grade zero and grade twelve. The Act provides for two categories of public school: an ordinary public school and a public school for learners with special education needs. In term of section 15 of this Act, a public school is a "juristic person" with the legal capacity to perform its functions in

terms of the Act. In terms of its legal personality (a juristic person) the school is a legal subject (like a natural person) and has the ca- pacity to be a bearer of rights and obligations. The public school may enter into a contract with another legal subject (e.g. a com- pany) to purchase textbooks or to lease a photocopier, for exam- ple; but it also carries all the responsibilities and liabilities attached to its status (e.g. it would be liable in the case of a proven breach of contract). This last statement sounds a little categorical, but it is based on *Bastian Financial Services v General Hendrik Schoeman Primary School* (see *List of Sources*), the most recent judgment in a fairly long list of judgments on matters of this sort. However, there have in other courts

been judgments to the contrary, as in *Technofin Leasing & Finance (Pty) Ltd v Framesby High School and Another 1 2005 (6) SA 87 (SE).* This lack of clarity is an issue which will be considered at the end of the Chapter when the effec- tiveness of the current legal arrangements is evaluated.

Unlike the natural person, the juristic person has perpetual succes- sion and will continue to exist as an entity despite any change that may take place in its constituent parts. This means that the mem- bers of the governing body may change and parents, educators and learners may come and go, but as a juristic entity the school remains intact until its existence is legally terminated (e.g. by the MEC in terms of s33 of the *South African Schools Act*).

Since the public school functions in the public education system, it operates primarily in the public-law domain and with the public (education) interest in mind. The public school may be regarded as an "organ of state" in terms of section 239 of the *Constitution* and is, therefore, bound by the underlying democratic principles and values prescribed for the public (education) administration in sec- tion 195 of the *Constitution* - see *paragraph 1.1* of *Chapter One.*

(The nature of public law and the public-law relationship are dis- cussed in the monograph on the foundations of law.)

4.3 Governance and Management

The *South African Schools Act* distinguishes between *governance* and *professional management*, assigning the former to the govern- ing body and the latter to the principal of the school (*South African Schools Act: s 16(1)* and *(3)*). This approach is consistent with the definition given earlier that *a governing body is a group of people who govern an institution in partnership with the managers*. It may be concluded that no active management role is foreseen for the governing body of a public school, but it can also be concluded that this distinction may give rise to conflicts between the governing body and the principal as manager of the school, who is required to fulfil the managerial function under the authority of the provin- cial Head of Department (*South African Schools Act: s 16(3)*). The principal of the school is clearly required to implement departmen- tal policy in a public school, and it may be assumed that where the policy of the Department clashes with the views of the governing body, conflict can be expected. Two of the most prominent exam- ples of this occurred at Ermelo High School and Rivonia Primary School, which will be dealt with more fully in a later section of this chapter.

A 2007 amendment to the *South African Schools Act* has not been helpful in clarifying the scope of "governance" on the one hand and "professional management" on the other. The inclusion of s16A requires a principal to report to a governing body on certain professional matters in connection with an academic improvement performance plan (s(1)(c)(ii)(bb) and s(2)(c)). It is not at all certain that this attempt to provide greater clarity about the distinction be- tween governance and professional management of the school will in fact be successful.

4.4 The Legal Status of a Governing Body

It has already been stated that a juristic body (the public school) cannot seek recourse to the law in the same manner and to the same extent as a natural person. It has to act through its duly constituted agent, the governing body. Section 16(1) of the *South Afri- can Schools Act* provides that the governance of a public school is vested in its governing body. Furthermore, the governing body stands in a position of trust (*fidei commissum*) towards the school: this means that a relationship of trust exists between the school and its governing body. The governing body always acts on behalf of the school (and in the name of the school), with the best interests of the school at heart.

A question which often arises is to what extent a governing body has original powers – that is to say, the extent to which it has the right to act on its own outside the provisions of legislation govern- ing its activities. The composition of a governing body is prescribed by law, and is dealt with in a later section of this chapter. The same law makes provision for a governing body to be stripped of its pow- ers. On this basis, there may be grounds for arguing that a govern- ing body is established by law and may be dissolved under pre- scribed circumstances. In the light of the discussion in the preceding paragraphs, one may conclude that since the public school is an "organ of state" the governing body acts as its functionary.

It is axiomatic, however, that a public official or agency in exercis- ing its official functions may do only that which a law allows, for it is from the law that he or she derives the legal capacity to act in that position. This is quite different from the position of the ordi- nary citizen, who is permitted to undertake any action which a law does not prohibit. It is therefore important that a governing body confine itself to those actions and competencies which are allowed it by law – its capacity to act officially can never extend beyond the boundaries set by the appropriate legislation. It is also important to note that in acting in its lawful capacity a governing body is bound by a wider legal framework, unless specifically exempted from the provisions of some part of it. An example of such exemption is to be found in the *Public Finance Management Act 1 of 1999 Sch 4* which specifically exempts a school fund (which is controlled by a governing body) from the provisions of that Act, as follows: *1. SA Schools Act (covering school fees).*

In concluding this section on the legal status of the governing body it can be stated that the governing body acts on behalf of the juris- tic person, the school, and that the actions of the governing body must be lawful. In addition, the undertaking by a governing body of any actions which fall beyond or outside the scope of what the law allows, can be considered at the very least to exceed the powers of the governing body – that is, to be *ultra vires*.

4.5 Who Qualifies to Serve on a Governing Body for an Ordinary Public School?

Section 23(1) of the *South African Schools Act* prescribes three categories of membership – elected members; co-opted members; and the principal of the school, who serves by virtue of holding that position. Four types of members who may be elected are pre- scribed in s23(2) of the *Act* – parents of learners at the school; edu- cators at the school; members of staff who are not educators; and learners in the eighth grade or higher at the school. Section 23(3) to (8) lays down some qualifications or limiting factors, while sec- tion 23(9) contains an important provision, namely that the num- ber of parent members must comprise one more than the com- bined total of other members of a governing body who have voting rights.

This last provision gives an important perspective on the views of the legislators, who are obviously of the view that parental views and inputs are important with regard to the governance of the school. (The *South African Schools Act* defines the term *parent* as the parent or guardian of the learner; the person legally entitled to custody of a learner; or the person who undertakes to fulfil the obli- gations of either of the previous two categories towards the learner's education at school).

4.6 What is a Governing Body Required to Do?

As a governing body usually acts at the institutional level, its func- tions are generally limited to a specific institution, although the *South African Schools Act* (s17) does make provision for excep- tions. The specific duties, rights, obligations and responsibilities of a governing body are set out in the Act.

4.6.1 Determination of the character and ethos of the school

The following provisions in the *South African Schools Act* may be considered relevant to the determination of the character and ethos of the school:

- The right to determine the *admission policy* of the school, subject to the provision of the Act and any applicable provincial law (s5 (5));
- The discretion to determine a *language policy* for the school sub- ject to the *Constitution,* the Act and any applicable provincial law (s6(2));
- The discretion to lay down rules for the conducting of *religious observances* at the school, under the conditions which the Act prescribes (s7);
- The obligation to determine a *code of conduct* for the learners of the school (s8(1));
- The obligation to recommend to the provincial Head of the De- partment the appointment of educators to the subsidised post establishment of the school, subject to limiting provisions (s20(1) (i)); also the recommendation to the Head of Department on the appointment of non-educators to the subsidised post establish- ment of the school, subject to limiting provisions (s20(1)(j);
- The option *inter alia* to maintain the school's grounds and prop- erty, to determine the extramural curriculum and the choice of subject options, subject to limiting provisions, to purchase educa- tional equipment, materials and textbooks for the school, and to pay for services to the school (s21(1)(a)-(e)).

Taken at face value, the above provisions seem to make it clear that the governors of the school have the right to determine the character of the school. If, however, the limiting provisions listed in the various clauses are analysed, and if it is borne in mind that the *Bill of Rights* in the *Constitution* guarantees certain rights for the individual under certain circumstances, it becomes clear that the provision cited above are not nearly as generous as they appear at first glance. An example of the restrictions on, for example, the right to determine the ethos of the school deals with a matter which went before three courts in succession. Sulani Pillay, a pupil at Dur- ban Girls' High School was prevented by the school from wearing a nose stud on the grounds that this was contrary to that part of the dress code of the school which regulated the wearing of items of jewellery. The matter served before the Durban Equality Court, where Ms Pillay's mother on her behalf appealed

against the deci- sion of the school on the grounds that the nose stud had religious and cultural significance and that the action of the school was dis- criminatory. Her appeal was rejected and the decision of the school upheld. Ms Pillay then took the matter to the Natal Provincial Divi- sion of the High Court of South Africa, where an appeal against the decision of the Durban Equality Court was lodged. The appeal was upheld, the judgment of the Durban Equality Court was set aside, and the opinion expressed by the Bench that important religious and cultural rights of Sulani Pillay had been violated by the manner in which the school had applied its dress code. This matter was then taken to the Constitutional Court of South Africa by the MEC for Education in Natal and others against Navaneethum Pillay (Sulani Pillay's mother acting on her behalf) and others. The deci- sion of the Court was a benchmark. With one exception, the Jus- tices of the Constitutional Court concurred with the decision of the Chief Justice that the action of the school had, in fact, been dis- criminatory in character, and with his directive that the school amend its Code of Conduct to provide for *the reasonable accom- modation of deviations from the Code on religious or cultural grounds and a procedure according to which exemptions from the Code can be sought and granted.* (See *List of Sources: Navaneethum Pillay v Kwazulu-Natal MEC of Education, Ina Cronje & Others; MEC for Education & Others v Navaneethum Pillay & Others).* It is therefore clear that governing bodies will need far more sophisticated methods for dealing with cultural di- versity in schools than has hitherto been the case.

Another matter which could affect the right to determine the ethos of a school would relate to a governing body's right to determine the admission policy of the school This right is limited by section 5 (2) of the *South African Schools Act,* which specifically prohibits a governing body from applying any form of admission test to poten- tial entrants. Visser and Zivanovic (1999:307-313) deal with this matter in some detail in the light of a judgement which had then been handed down by the South African judiciary. This limitation in effect also inhibits the right of the governing body to determine a language policy for the school, for by definition a learner must then be admitted irrespective of whether or not that learner is competent in the language of the school. The question of language policy is considered again at the end of the chapter, when the Act as a mechanism for advancing efficient administration and governance at the school is considered.

A further limitation on the right to determine admissions policy was handed down by the Constitutional Court on 3 October 2013 in the matter of *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others (ZACC 34)*, which related to the use of the capacity of a school to accommodate learners as a methodology for restricting or permitting admissions. The Constitutional Court itself summarised a comprehensive judgment as follows:

On appeal to the Constitutional Court, the majority of the Court, in a judgment written by Mhlantla AJ, concluded that the HOD had the power to admit the learner. It held that the school governing body may, in terms of the Schools Act, determine capacity as part of its admissions policy. However, this power is subject to other provisions of the Schools Act, which states that the Department maintains ultimate control over the implementation of the admission decisions. Further, the provincial Regulations afford the HOD the specific power to overturn a principal's rejection of a learner's application for admission. Moreover, the Court held that the capacity determination as set out in the schools admission policy could not inflexibly limit the discretion of the HOD.

The majority further held that the HOD had not exercised his power in a procedurally fair manner. Finally, the Court held that co-operation is the compulsory norm in disputes between school governing bodies and national or provincial government. Such co-operation is rooted in the shared constitutional goal of ensuring that the best interests of learners are furthered and that the right to basic education is realised.

In a minority judgment, Jafta J (Zondo J concurring) agrees with the majority judgment that leave to appeal be granted and that the HOD was empowered to instruct the principal to admit the learner in excess of the limit in the school's admission policy. The minority, however, disagreed with the majority judgment's finding that the power was exercised in a procedurally unfair manner. The minority held that the declaration was not justified because the question of procedural fairness was not before the Court and it was therefore not open to the Court to decide the issue.

This limitation in effect also inhibits the right of the governing body to determine a language policy for the school, for by definition a learner must then be admitted irrespective of whether or not that learner is competent in the language of the school.

The discretion to lay down a framework within which religious observances will take place, is limited to the extent that freedom of conscience will apply, as provided for in the *Bill of Rights* in the *Constitution*.

Insofar as there are still public schools which seek to maintain a specifically sectarian ethos, there are public activist groups which seek the guidance of the courts on this matter. An example in 2014 was that of the *Organisasie vir Godsdienste-onderrig en Demokrasie (Organisation for the Teaching of Religions and Democracy)* which approached the courts on a specifically Christian ethos in six public schools. The contention is that in the schools in question the governing bodies concerned had failed to take congnisance of the *Bill of Rights* and had further failed to create a framework which would recognise freedom of conscience.

Perhaps the most contested area at present concerns the right of a governing body to make recommendations about the appointment of educator staff to the subsidised establishment of the school. There have been instances where provincial education departments have failed to comply with the provisions of this and other relevant sections of applicable legislation. Judgements in respect of the Grove Primary School [Western Cape] (1997) and the High School at Douglas [Northern Cape] (1999) – see *List of Sources* – upheld the rights of governing bodies in this regard, in the face of depart- mental actions which ran contrary to the provisions of both the *South African Schools Act* and the *Employment of Educators Act.*

Since 2013 provincial education authorities have increasingly placed educators at schools in the context of curriculum projects, and in 2014 the first steps towards the forced amalgamation of schools were taken in the Gauteng Province which, in effect, would materially limit the powers of governing bodies in selecting personnel to be appointed to the educator establishment by the Province. A further method which has been adopted to circumvent the provisions of legislation has been to diminish subsidised educator establishments by the number of educators appointed to its own establishment by the Governing Body.

The manner in which a governing body applies its *code of conduct* to the learners of the school (*South African Schools Act: s8(1))* was tested in the Cape Provincial Division in 1998 in *Michiel Josias de Kock v Die Departementshoof van die Onderwysdepartement, Provinsie Wes-Kaap*

– see *List of Sources*).and the process em- ployed by the school concerned, as well as the Department, over- turned by the Court. Quite apart from the landmark judgment given by the Constitutional Court in the Pillay case referred to above, which also overturned an action taken by the school, there have been cases where the actions of the schools have been upheld by the Court. Francois van Biljon, a pupil at Grey Boys' High School in Port Elizabeth was a prefect-elect who was stripped of badge and distinguishing tie after an incident of examination dis- honesty and after due process had been followed. Van Biljon believed that this action had amongst other matters been prejudicial to his dignity and standing in the school and sought relief from the High Court to the effect that the action of the school should be set aside. The South Eastern Cape Local Division of the High Court of South Africa found in favour of the school and dismissed Van Biljon's application with costs (see *List of Sources - Francis Xander van Biljon v Neil R Crawford & Others).*

What is clear is that with regard to its capacity to determine the character and ethos of the school, a governing body is required to adhere closely to relevant legal provisions and that its actions can be taken on review by aggrieved parties to the judicial system. It is also clear that the judiciary does not hesitate to review actions and to set them aside where such actions are unlawful or violate the principles laid down in the Constitution. It is further clear, however, that considerable empowerment of governing bodies is implied in order to ensure that they are able effectively and correctly to carry out their mandate.

4.6.2 The funding of the school and matters related to the management of its finances

Schools established by the MEC for Education in a province are classified in terms of the *South African Schools Act* as *public schools.* The general basis for the funding of public schools in South Africa is the following:

(a) The costs of personnel appointed to the fixed establishment of the school are paid by the provincial education department;

(b) Depending on its quintile ranking, each school is allocated a set amount per child which is annually determined;

(c) If the school has been declared a "no fee" school, additional funds may not be raised by way of school fees; and

(d) If the school has not been declared a "no fee" school the governing body is entitled to raise additional funds by way of school fees and to make use of those in a manner prescribed by the *South African Schools Act 1996*.

The *South African Schools Act* is specific on various matters relat- ing to the manner in which finances are to be managed, raised and disbursed.

- The governing body *must* establish a school fund, and *must* administer it in accordance with guidelines set by the national Department of Education (s 37(1));
- The governing body *must* open a banking account (s 37(3));
- The governing body *must* prepare a budget each year in accor- dance with guidelines set by the MEC in the province concerned (s 38(1));
- The governing body *must* follow prescribed accounting proce- dures in keeping its books, and *must* report on its financial activi- ties on an annual basis to the provincial Head of Department (s 42(a) and (b); s 43(1); s 43(5)); and
- The governing body *must* take all reasonable measures within its means to supplement the resources supplied by the State in or- der to improve the quality of education provided by the school to all learners at the school (s 36).

The last of the above provisions places an obligation on governing bodies in terms of the *South African Schools Act* to augment the resources furnished by the State (s36), and this provision, read together with the reference to *voluntary contributions* in s37(2), as well as the reference to *money, or other goods donated or be- queathed to or received in trust by a public school* in s37(4)), sug- gests that school governing bodies could solicit contributions or gifts, that bequests may be received, and that the governing body is entitled to engage in fundraising activities.

In those schools which raise additional income by way of school fees (i.e. those schools which are not "no fee" schools), the *South African Schools Act* makes the following provisions.

Section 39(1) allows for the determining and charging of school fees, subject to the provision that a majority of parents attending and voting at a meeting at which the budget is presented (s 38(2)) must vote in favour of the proposal tabled. This provision may not, however, be implemented by governing bodies in schools in an unbridled manner.

Section 39(4) prescribes that the Minister of Education, after consultation with the Committee of Education Ministers and the Minister of Finance, must make regulations concerning equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees, while sections 39(2)(a) and (b) require that the parents of the school by resolution decide on the amount of school fees as well as equitable criteria and procedures for exemption of various kinds from payment of school fees. The Minister of Education published the *National Norms and Standards for the Funding of Schools* in 1998 and has revised these on a biennial basis, the most recent being in 2013, which laid down the basic points of departure to be followed by school governing bodies in dealing with exemptions of various kinds, as well as the procedure to be followed (Republic of South Africa, 1998:47,48) and governing bodies are required to adhere to these.

Before dealing with the items on which funds raised may be expended, there is one issue which is not at all clear. This relates to the source and nature of the funds deposited in the school fund, which is held in a banking account with a registered financial institution – as has been seen, all governing bodies are required to establish such a fund. As has also been seen, schools in general are required to augment the resources furnished by the State, the proceeds of which activities are deposited to the credit of the school fund. Similarly, fee income raised by schools allowed to generate fees is also deposited in the school fund. As has further been seen, however, schools have, at least in theory, a further income stream which consists of the amount per pupil allocated by the provincial education department in terms of the quintile into which the school has been placed. In some provinces, this amount is transferred to the school fund. In others and for certain quintiles the funds are not physically transferred, but are held by the provincial education department as a credit against which schools may enter into approved expenditure. The situation therefore arises that it is possible that some schools will have in the school fund sums which they have raised themselves, alongside of sums allocated by the provincial education department. There could be other schools which have in their school fund nothing at all. This contention is based on s 37(7) (c) which indicates that *a governing body of a public school may*

not collect any money or contributions from parents to circumvent or manipulate the payment of school fees ... and the assumption that the governing body at a "no fee" school will not be in a posi- tion to hire out the facilities for gain, as contemplated in s 20(2) of the Act. It is important to note that in the case of money which originates from the quintile system, there is a separate set of pre- scripts to the school, generated by the Head of the provincial edu- cation department, as to how those funds may be spent in those cases where the funds are actually physically transferred. With re- gard to funds raised by its own activities and initiatives, the *South African Schools Act* makes certain provisions. It is only to these funds that the following section refers.

The funds which fall under the jurisdiction of the school governing body and which have been raised by its own initiatives may be ex- pended only upon services or items which are approved by the *South African Schools Act.* Section 37(6) of the Act specifies that the school fund, all proceeds of the fund and any other assets of the school may be used only for:

(a) educational purposes, at or in connection with the school;
(b) educational purposes at or in connection with another public school, subject to certain conditions;
(c) the performance of the functions of the governing body; or
(d) another educational purpose which has to be agreed upon between the school governing body and the Head of Department.

Expenditures which may be incurred are also by implication related to the functions for which school governing bodies may make ap- plication to the Head of Department, as specified in section 21(1) of the Act. In terms of this provision, school governing bodies may apply for functions listed in the Act:

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

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

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

(d) to pay for services to the school;

(dA) to provide an adult basic education and training class or centre subject to any applicable law; and

(e) to be allocated other functions consistent with the Act.

As has been seen, governing bodies are required to keep proper books of account which have annually to be audited in terms of generally accepted accounting practice and submitted to the Head of Department. Provision is made for the MEC to involve the Audi- tor-General in the financial affairs of the school, should this be deemed necessary (*South African Schools Act: s43(4)*). As the Auditor-General has a responsibility in terms of state institutions only, it is clear from this provision that the view of the authorities is that the school governing body acting on behalf of the school fulfils the role of a public entity (or public functionary). There have been instances where the office of the Auditor-General has been re- quested to conduct audits of school funds. These have been ren- dered problematical because the office of the Auditor-General has applied regulations promulgated in terms of the *Public Finance Management Act 2001,* despite the provisions of *Schedule 4* to the Act, which exempts the school fund (which is the subject of our dis- cussion) from its provisions. This issue remains unclear.

The widespread advent of "no-fee" schools has also rendered un- clear the extent to which s36, s37(2) and s37(4) are applicable to them. It is not at all clear either how schools which have no addi- tional sources of income are to meet the audit requirements laid down by the *South African Schools Act*. In a general survey of the current position at the end of this chapter this matter will be raised further.

It needs to be stated that the exposition in this section is applicable only to those schools which are still fee-paying schools. Quintiles 1, 2 and 3 are prohibited from raising funds from school fees (although other methods may be employed), while in some provinces (such as the Western Cape) Quintile 4 schools have been given the option of becoming non-fee-paying schools.

Specifically with regard to s 21(1)(c) of the Act, the education authorities have recently published for comment proposals which, if implemented, would compel schools to select a single text book per subject within a centralised procurement process. There are those who argue that such a step would effectively curtail the powers assigned my law to Governing Bodies in this connection.

4.6.3 Promoting the interests of the school

Section 20 of *South African Schools Act* lists 25 separate items, which all school governing bodies must perform, and some of which have already been dealt with in *paragraph 4.6.1* above. The following functions are among those related to promoting the inter- ests of the school –

(a) promoting the best interests of the school and striving to ensure its development through the provision of quality learning for all learners at the school (s20(1)(a));

(b) adopting a constitution (s 20(1)(b));

(c) developing a mission statement for the school (s 20(1)(c));

(d) adopting a code of conduct for learners at the school (s 20(1) (d));

(e) supporting the principal, educators and other staff of the school in the performance of their professional functions (s 20(1)(e));

(eA) adhering to any actions taken by the head of department in terms of section 16 of the Educators Employment Act to ad dress the incapacity of a principal to carry out his or her duties effectively (s 20(1)(eA));

(f) encouraging parents, learners, educators and other staff at the school to render voluntary services to the school (s 20(1)(h)); and

(g) recommending the appointment of staff (s 20(1)(i) and 20(1)(k).

The governing body must consist of a majority of members who are parents at the school (s 9(1)), while representatives of educator and non-educator personnel as well as representatives of learners (in the case of secondary schools) make up the rest (s 23). It may therefore be argued that it is in the interests of parents, personnel and learners to have a vested interest in the school, and to ensure it is or becomes the kind of place in which they are able to act and interact meaningfully.

The provisions listed above do, however, make the assumption that the governing body is able to carry out some or all of the functions listed. In practice it is quite a complex matter to develop a docu- ment like a

code of conduct, or a constitution, and there are schools where the members of the governing body are unable to do this. Unfortunately, even though some provincial education de- partments and governing body organisations provide training, is- sues of capacity remain a reality in many schools and in these, if the principal and his staff do not generate the documentation, it is simply not done. The injunction that governing bodies must act in the best interest of the school can sometimes lead to a situation in which the *internal* interests within the school and the *external* inter- ests are actually not compatible, and that in the view of the govern- ing body to act in the best interest of the school would be to resist what is viewed as unlawful pressure from the education authorities, the most significant source of the *external* interest. These provisions therefore do carry within them the potential for confrontation or, where a lack of capacity exists, the possibility that they will not be carried out. This situation is not desirable.

4.6.4 Buildings and grounds

Public schools must be provided by the MEC for Education and are the property of the State (*South African Schools Act:* s 12(1); s 52 and 55). Within the philosophy of the State on matters relating to partnership as elaborated in the *First White Paper on Education*, however, it is clear from the Act that school governing bodies have an important role to play with regard to buildings and grounds.

Section 20(1)(g), the Act requires governing bodies to administer and control the school's property, and buildings and grounds occu- pied by the school, including school hostels where applicable, sub- ject to a qualifying condition which came into effect in 2007 which stipulates that *the exercise of this power must not in any manner interfere with or otherwise hamper the implementation of a deci-*
sion made by the Member of the Executive Council or Head of De-
partment in terms of any law or policy.

In section 21(1)(a), the Act makes provision for a governing body to apply for permission to maintain and improve the school's prop- erty, and buildings and grounds occupied by the school, including school hostels where applicable.

Further provisions of the *South African Schools Act* relating to fa- cilities either directly or by implication are the following:

- Section 20(1)(k) requires a school governing body at the request of

the Head of Department to allow the reasonable use under fair conditions of the facilities of the school for educational programmes not conducted by the school.

- Section 20(1)(h) requires a governing body to encourage parents, learners, educators and other staff at the school to render voluntary services to the school.

From these provisions it is clear that the local administration of the building and grounds of the school is a matter for the school governing body; that these bodies may apply for competences which would enable them to maintain or improve the facilities at their own expense; that the Head of Department may request use of the facilities for *educational* programmes be offered to bodies and agencies outside the school subject to certain conditions; and that a school governing body could encourage voluntary service which may be related to the buildings and grounds (improving the grounds, decorating the buildings and dealing with other related issues are presumably covered by this provision in the Act).

It is also clear, however, that a school governing body which wishes to pay for the maintenance of facilities itself is required to apply to the education authorities for the permission to do this, and that such permission must be granted unless the excluding provisions of the Act are applicable. The publication of a notice in the *Provincial Gazette* assigning specific additional functions to school governing bodies (see s 21(6)) indicates that governing bodies can be assigned legal capacity to carry out these additional functions; however, until such a notice has been published, governing bodies which perform these functions are acting *ultra vires*.

At least two important issues arise. The first is that in the case of "no fee" schools the allocations provided per child, even in the case of Quintile 1-3 schools, are far too low to enable any kind of thoroughgoing maintenance and enhancement of the property at the school, and in such schools the governing body does not have the financial resources to deal with these matters. Any argument that the provincial education department will assume this responsibility founders on the reality that budgets for capital and minor works in all the provinces are constrained in the extreme, and even the most favourable analysis indicates that there are daunting backlogs to be addressed. For all practical purposes, therefore, the provision in section 20(1)(g) of the Act could never be applied to the governing bodies of "no fee"

schools. The second is that although governing bodies are required to control the property, and pro- vided the competence to do so has been allocated to them, in the final analysis the control they exercise and the resources they may allocate for this purpose, thereby enhancing the property as re- quired by the Act, *must not in any manner interfere with or other- wise hamper the implementation of a decision made by the Mem- ber of the Executive Council or Head of Department in terms of any law or policy*. It would be understandable were governing bod- ies to be hesitant to utilise the powers allocated to them under con- ditions such as these, given that it is highly unlikely that they would be informed about longer-term planning the provincial education authorities might have for the use of facilities enhanced and main- tained by governing bodies – for example, insistence on converting to office use by the department unused residential facilities in a school hostel converted for other purposes, in order to raise funds, by the governing body.

These matters and related ones suggest that the provisions in the Act in this regard may require some re-consideration.

4.6.5 Conduct of the learners at the school

In terms of section 8 of the *South African Schools Act*, a school governing body is required to establish a code of conduct for the learners at the school, and to build into it certain safeguards in terms of due process. Amendments to this section were adopted in 2002 and in 2007. The insertion of section 8A in 2007, which makes provision for random search and seizure for illegal drugs or dangerous weapons and for drug testing procedures at schools, added to the scope of the areas to be dealt with in any school's dis- ciplinary code. The insertion of section 10A in 2002 prohibited ini- tiation practices at schools, and prescribed the actions to be under- taken in cases where initiation practices were found to have taken place in the school. The whole of section 9 of the Act was amended in 2005. As has been seen from the few judgments cited in prece- ding paragraphs (Pillay, de Kock and Van Biljon – see *List of Sources*) and which were selected from a wide number of judgments relating to similar issues, the Codes of Conduct adopted by governing bodies, the procedures followed by them in applying those codes, the sanctions administered and the consequences of those are all capable of intense scrutiny by the courts. Governing bodies consist, as

has been seen, of a majority of parents, personnel employed in various categories at the school, learners from grade 8 and above, and the principal. There is no requirement that any of these persons have a legal training, although in the governing bodies at some schools there may be parents from a legal back- ground. A question which must be asked is whether it is equitable to expect of governing bodies to deal with disciplinary issues in the manner prescribed by the Act, especially given that there is little evidence that governing bodies receive training in how to deal adequately with these issues, despite the provisions of s19 of the Act. It is clear, furthermore, from the elaborate procedures prescribed in, for example, section 8A on search and seizure and drug testing that
these procedures are personnel- and time-intensive, and given that
the education authorities provide to schools neither the personnel nor the facilities to deal with these questions in the prescribed fash- ion, it is more than probable that in many schools the capacity fur- nished in theory by the Act to carry out the procedures will simply not be acted upon by those schools.

In section 9(1)(1) the Act makes provision for a school governing body to suspend a learner for serious misconduct under certain conditions. Section 9(1)(1A) requires a disciplinary hearing to be held as prescribed within seven school days after the suspension of the learner. Should the findings of the disciplinary hearing compel the governing body to recommend the expulsion of the learner, the Head of Department must consider the recommendation and re- spond to it within 14 days of receipt (s 9(1)(1D)). The suspension of the learner may be extended for a period not longer than 14 days pending receipt of the response of the Head of Department (s
9(1)(1D)). The Act is silent on the procedure to be followed should the Head of Department fail to respond within the prescribed pe- riod. It is clear that the governing body has no discretion further to extend the period of suspension beyond the 14 days during which the response from the Head of Department is awaited. In effect, therefore, a pupil suspended pending expulsion could after 7 school days and an additional 14 calendar days have elapsed, be in a position to demand re-admission, despite the serious miscon- duct which led to the situation in the first place. Departmental de- lays on matters of this kind are familiar to some schools – indeed, Maritzburg College had already sought relief from the High Court in Pietermaritzburg on a matter which had been outstanding for two years when the matter

became moot as the learner in question was no longer obliged to attend school.

Michiel Josias de Kock N.O. v Die Departementshoof van die Onderwysdepartement Provinsie Wes-Kaap 1998 (see *List of Sources*) provides an account of a successful appeal against an expulsion, solely because the principles of due process were found not to have been adhered to by the school governing body when the school came to its conclusions about De Kock's conduct and formulated its recommendations to the Head of the Department. The provisions of the Act in this regard were at that time different from those which now prevail.

The term "serious misconduct" is not defined by the Act, and in cases of this kind it has happened that the definition attached is one applied by the judicial officer hearing an appeal. The nature of the client of the school – the learner – and the nature of the school itself are not always understood by persons not involved in schools, and on occasion misconduct which in the context of the school can be considered serious – attempted rape, distribution of pornogra- phy, abuse of alcohol or other dependence-producing substances and *crimen injuria* would be examples – are sometimes viewed with a leniency on the part of judicial officers which is quite remark- able

Because of the complexities of due process, the absence of legal officers in schools, the personnel implications, and the very real possibility that substantive time spent by the school in investigating a matter to the best of its ability may in the final analysis be over- turned by higher authority, there is a danger that the provisions of the Act may simply be overlooked or other remedies sought, which is highly undesirable.

4.6.6 Consultation, especially of parents

In terms of section 8(1) of the *South African Schools Act,* the governing body of the school is required to consult parents of learners at the school on the issue of the content of a Code of Conduct, on the budget for the school, which also has to be approved by a ma- jority of parents present and voting at a meeting convened for the purpose (s 38(1) and (2)), and on the fees to be charged at the school (s 39(1) to (3)), which also have to be approved by a majority of parents at a meeting convened for this purpose (s 38(2)). In

addition, the governing body is required to report at least annually to parents, learners, educators and other staff on its activities (s 18 (2)(e)). From these provisions it may be concluded that the school governing body is seen as having an important obligation to the parent, as well as a duty to consult on those issues outlined in the legislation.

O'Regan J in a dissenting opinion (See List of Sources: MEC for Education & Others v Navaneethum Pillay & Others) among other matters opined as follows: [184] ..... The amendments to the Code of Conduct should only be adopted after a proper process in terms of section 8 of the Schools Act has taken place. Once they have been adopted the school should provide a place in its curricu- lum for the Code of Conduct to be discussed with all learners in the classroom. That discussion should include a discussion of the prin- ciples on which exemptions are granted and the process whereby that happens. In particular, it seems important to stress that parents and learners need to accept that school rules should ordinarily be observed. Where processes are established for exemptions to be granted, they must be followed. Encouraging the observance of rules is the first step towards establishing civility in an institution.

The purpose of consultation as laid down in the Act is that it should be that – there is a difference between consulting and reporting. Consulting implies seeking the opinions and viewpoints of others, encouraging discussion and debate, and arriving at joint conclu- sions about the matters on which consultation has taken place. It is by no means certain that this provision of the Act is observed by all governing bodies.

4.6.7 Some other matters dealt with in the South African Schools Act 84 of 1996

The Act lays down a number of technical requirements regarding the manner in which elections are to be held and meetings con- ducted, prescribes on issues related to recusal of members under certain circumstances, delimits the contractual capacity of minors who serve on the school governing body (see, however, *section 17* of the *Children's Act 2005* which lowers the age of majority), pre- scribes the nature and form of financial reporting, and prescribes a variety of procedural requirements. The Act also recognises that the composition of the school governing body for a school offering spe- cialised education should be somewhat different of that of a public school providing ordinary education, and makes the necessary pro- vision for this. There

are also provisions relating to public schools on private property.

None of these provisions violates any of the principles dealt with in greater detail above, however. The notion of democratic participa- tion by the school community in the work of the school governing body is sustained throughout the Act.

4.7 Some Areas Requiring Clarification

The stipulations laid down do not address all the issues which re- late to the practical implementation of the provisions of the *South African Schools Act*. Given that the final test of the system of schooling lies at the institutional level, it is important to identify key areas which still need resolution.

4.7.1 Do individual members of a governing body represent specific interest groups?

The often polarised nature of communities in South Africa has as a consequence that school governing bodies – elected structures and therefore in a sense populated as a consequence of a political proc- ess – are sometimes seen as a platform from which specific organi- sations or individuals might wish to drive specific agendas. A ques- tion which must be asked is whether individual members of govern- ing bodies represent specific interest groups or not. A governing body consists of persons elected by educator and non-educator personnel, by parents at the school, and in the case of schools with learners in Grade 8 and higher, by learners of the school. Only the principal serves *ex officio* – the *South African Schools Act* states at s 16A(1)(a) *The principal of a public school represents the Head of Department in the governing body when acting in an official capa- city as contemplated in sections 23(1)(b) and 24(1)(j).* It is clear that in the eyes of the legislator the Principal represents the education authority, and it is important to bear in mind that the Principal is a full member of the governing body, not merely an observer.

Section 16(2) states that *A governing body stands in a position of trust towards the school*, while s 20(1)(a) determines that the gov- erning body must *promote the best interests of the school* .... It is clear that the school governing body acts on behalf of the school, which is the juristic person. Can it in the light of these provisions be argued that individuals elected to the governing body represent their

"constituency", or that the governing body actually represents all these constituents – parents, educator and non-educator staff or learners?

In most schools, educator and non-educator personnel are union- ised, and even though the governing body may be an employer, it cannot seriously be argued that an employer organisation can also represent employees, or that the governing body actually repre- sents a national organisation of governing bodies to which it may belong. Similarly, in many schools, learners belong to national and provincial organisations which would dispute the contention that the school governing body can possibly represent their constituents. In so far as parents appear not to have national parent bodies which represent their interests, it might be speculated that national governing body organisations have this matter at least in mind when they deliberate in their provincial or national structures.

It would seem to be reasonable that the governing body, rather like the board of directors of a company which has to act in the inter- ests of the shareholders, must act on behalf of the school. If this is so, the management of the training of governing body members would seem to be crucial, given that the motivation of many a par- ent in becoming available for election to the governing body is usu- ally based far more on considerations relating to his own child or children than to a wider interest. Given, also, that the governing body has to reconcile both internal and external interests, a meas- ure of objectivity is called for which may not be a natural capacity for any of the constituencies electing to a governing body.

The position of the Principal is unenviable. Of all the members, the Principal is the one who has to represent an interest – that of the Head of Department – which may not be congruent with the more parochial interest of the school. This situation creates the possibility that a Principal could easily be placed in a position of opposition to the remainder of the governing body on any issue where interests cannot be balanced. It is not clear whether principals receive di- rected training in how to deal with these issues, but under the cir- cumstances, such training is clearly called for.

It is clear from King 3 (see list of references) that good corporate governance renders imperative actions by its governance structure which advance the interest of the corporate body, and not of individuals. If it be argued that the governance structure of a school is bound by the same

imperatives as public and private companies, the interests of the school should be paramount and not those of the conmstitutencies elected or co-opted onto the governing body.

There may be grounds for suggesting that the Act should at some future point be made more specific in this regard.

4.7.2 The boundary between "professional management" and "governance".

Managing is by its nature an operational issue. Governing is by its nature an issue of policy and supervision – as was seen earlier, "govern" means to conduct the policy and affairs of an organisa- tion; and "governance" is the action or manner of governing. In a company, the Board of Directors formulates the policy, and the managerial staff implement it. The governing body of a school has latitude to determine a number of policies within a wider frame- work, including supervision of the finances of the school. The Act does not assign a managerial responsibility to governing bodies.

It is, however, a truism that for many it is easier to become in- volved in the practical issues surrounding the doing of something than to become involved in the step once removed – that of gov- erning. It is possibly for this reason that tensions can arise in gov- erning bodies, because, with the possible exception of pupil repre- sentatives, many of the members of the governing body may them- selves in their private capacities be involved in managerial activities of various kinds. It is not beyond contemplation that a parent who is a personnel practitioner in a local enterprise, or who manages a business, will wish to express viewpoints to the point of interference with the manner in which the principal executes his functions.

Although the Act suggests that there is a boundary between gov- ernance and professional management, in practice these two issues are more intertwined than perhaps is recognised by the Act. Some of the capacities assigned to school governing bodies, for example with regard to curricular choices, school hours and related matters, may be considered by some to be very close to issues to be de- cided upon by professional personnel, or negotiated between em- ployers and employee organisations. The last word on this issue has yet to be spoken.

4.7.3 Clarification required about some of the requirements relating to auditing of financial statements

As has been indicated, all schools are required to establish a school fund, open a bank account, and to cause an annual audit of the accounts of the school to be undertaken. It has, however, also been argued that for many schools the advent of the "no fee" system in effect means that some schools might no longer need either a bank account or to have their annual financial statements audited in the manner prescribed by the Act. It must be borne in mind that there is also an issue of capacity here. If every school in the country sub- mits its audited financial statements as required, quite apart from the demands on the auditing profession, the administrative de-
mands on provincial education departments would be substantial in terms of providing people who can analyse all the audited finan- cial statements and comment on them for purposes of the Head of Department or the MEC for Education. Possibly the audit provi- sions need to be reconsidered in the light of unfolding realities so that a more realistic approach can be adopted – one which would possibly differentiate in terms of the actual cash flow through the accounts of the school.

4.7.4 Voluntary work by members of governing bodies

The South African Schools Act gave expression to the policy direc- tions espoused by the Government in the *First White Paper on Education* which appeared in 1994. At that time much emphasis was laid on partnerships, and the conceptualisation of the govern- ing body of the school as a partnership between the state and the school resulted in an approach whereby in exchange for certain governance rights, governors would undertake certain actions on behalf of the State and parents would agree to pay additional fees in order to cover services the State would be unable to provide. Since that time the effect of the numerous amendments to the Act has been to circumscribe ever more closely the capacity of govern- ing bodies to take certain decisions, while at the same time the number of functions to be discharged by governing bodies has in- creased notably. The situation is aggravated by the absence of ad- ditional provisioning for schools to enable them to deal adequately with the demands now made of them. Possibly attention needs once again to be given to the conceptual landscape in which the notion of "partnership" came about, and how that

notion should now be conceptualised, given that a period of well over a decade has passed and the circumstances in the country and in its public schools have in some ways changed materially from what they were when the initial conceptualisation was done.

4.8 Conclusion

In many ways the *South African Schools Act* is an administrative manual for public schools. Its intention when first promulgated was, and manifestly still is, to provide a basis for the management and governance of public schools across the country. The education authorities are clearly of the view that the local manifestation of governance in the school system is to be found at the level of the school, and not in the sphere of municipal government.

The Act creates a framework for dealing with the administrative issues which relate to the functions which are to be performed at the institutional level. The numerous amendments to the Act – in 1997, 1999, 2000, 2001, 2002, 2004, 2005,2007 and 2011 - have undoubtedly had an administratively destabilising effect on schools. Many schools, especially those in remote areas, have no independent access to amended legislation and are dependent on the departmental bureaucracy to furnish them with information about changes. Not infrequently the information that is eventually passed on to schools may be filtered through the mechanisms of the provincial education department, which sometimes has as a consequence that the information furnished constitutes an interpretation by the provincial department of the provisions. Where such interpretations later have to be rectified, they result in a measure of resistance to change.

It has been suggested in the Chapter that local school governing bodies may lack the incentive to perform the functions the Act assigns to them, especially if it is borne in mind that the participation of any person in the work of a school governing body is voluntary.

In the final chapter of the monograph an attempt will be made to evaluate the current position with regard to educational administration and governance.

Chapter Five

Conclusion

5.1 The South African System of Education Administration in a World Context

From the previous chapters, it emerges that the South African education system is administered in three principal spheres – the national, the provincial (which may in some provinces be broken down into regions and districts also), and the local, which in South Africa is the institutional (school) sphere. These three spheres ("levels" in many countries) are to be found in most mature systems world-wide.

It is important to recognise which sphere is vested with original powers and which sphere with derived powers, as this enables a better understanding of some of the administrative arrangements which apply in the local context.

From the sections of the *Constitution* which were considered, it is clear that original powers vest in both the national and the provincial spheres, that the issue of *concurrence,* while sometimes problematic, can be dealt with by the Courts. From the sections of the *South African Schools Act* that were dealt with, it is clear that the governing bodies of schools do *not* have original functions – these are derived only, and may under certain conditions be taken away. It also emerges that governance in the local school sphere is bound by the provisions of national and/or provincial policy.

The provisions of the *South African Schools Act* should therefore be viewed as making their major contribution not so much in what governing bodies may do or in what they are required to do, as in the manner of their operation, where a high degree of representivity is sought with as great a degree of consensus as possible on issues which are of direct relevance to the local school community. Even this, however, is not a simple matter – the reality is that if a local community does not perceive national or provincial policy as being in its interests, the possibility of conflict within the school becomes a very real one, even though the democratic principles underlying the Act are presumably intended to avoid this. Laudable though this objective is, the reality is that it is conceivable that even after the desired consensus on many matters has been obtained it will still be difficult to advance efficiency and optimum output in the school.

5.2 The Degree of Development of Administrative Organs for Education

The necessary administrative organs for dealing with educational issues have been established in the nine provinces and in the national sphere, and it may be suggested that the system is adequately provided for in terms of structures.

There is a question about the capacity of the various provinces to furnish the necessary human and financial resources to enable some of those structures to operate effectively, which question is dealt with on a continuous basis by the relevant authorities. Time will tell whether current efforts in the regard are destined to be successful or not. Insofar as administrative organs external to the school are crucial for providing an administrative external environment in which the school can flourish, it is obviously in the interests of schools and of the system as a whole that these issues be speedily resolved.

5.3 The Role of the Courts in the Interpretation and Implementation of Education Policy

The provision made for the courts to test decisions made by administrators takes the form of independent review by the judiciary of administrative processes. An implication is that to a certain degree the formulation, or refinement, of education policy then becomes a mat- ter for the courts. This has already emerged from decided cases, such as those in the case of the Grove Primary School and the Douglas High School, or in the case of MEC for Kwazulu-Natal v Pillay.

Such a development is to be welcomed in a constitutional state based on a *Bill of Rights* and the notion of an independent judici- ary. The assumption is both that the possibility of judicial review of administrative decisions will ensure effective and correct admini- stration, and that judicial review, once carried out, will lead to a refinement of administrative practices and processes. A disturbing feature over an extended period, however, has been that even when officials are ordered by the courts to carry out certain actions, it is often necessary for the plaintiffs concerned to return to the courts to obtain further relief compelling those concerned to carry out the initial court orders.

5.4 Policy multiplication

Public schools are subject to changes in the education laws made at both the national level and in the province concerned, as well as to court judgments which relate to the school, the province or the country as a whole. In addition they are affected by education pol- icy emanating from both the national and the provincial levels.

In instances where policy is not clear or is capable of multiple interpretations, this obviously has the potential to make it not only diffi- cult to run schools but also the potential to permit various interpretations of the same policies. Langa CJ (See List of Sources: MEC for Education & Others v Navaneethum Pillay & Others) in a comment on the policy guidelines for a code of conduct expressed the follow- ing opinion: [34] The guidelines are not mandatory, but are exactly what they purport to be – a guide. The following features all demon- strate the non-binding nature of the guidelines: section 8(3) of the South African Schools Act which empowers the Minister to make the guidelines states that they are for the "consideration" of schools; while some of the

regulations are couched in mandatory language, the vast majority – including those relating to religious and cultural diversity – use the suggestive word "should"; the section on religious and cultural diversity is solely to "assist" schools in determining their uniform policy; when a governing body adopts a new code, the only requirement is that it "should make [its] decision in terms of these guidelines"; and the strongest obligation that exists on governing bodies is that they must "consider" the guidelines.

In the context, the guidelines concerned could not have been anything else. However, there are other policies which have emerged over the years which have similar characteristics. The operational consequences of these sometimes place a heavy burden on schools.

5.5 A Review of Administrative and Governance Arrangements in Public Schooling

It does not fall within the scope of this monograph to deal with the outcomes of the education system in South Africa. It is important to note, however, that research conducted by the departments of education at the national and the provincial levels, by agencies such as the Human Sciences Research Council, the Joint Education Trust and IDASA, and by researchers like Christie, Jansen, Muller, Taylor, Van den Berg and Vinjevold, as well as some international reviews all point in the same direction – that is, that the schooling system in South Africa is not yet managing to yield an output of quality which is consistent with the inputs, financial and otherwise, being made into it.

It does fall within the scope of this monograph to consider whether aspects of the organisation, administration and governance of the schooling system in South African might be amended or revised to make greater efficiencies possible.

5.5.1 Organisation and administration in the national and provincial spheres

As has been seen in earlier chapters, robust structures at national and provincial level have been created. These, within the limitations imposed by shortages of resources of various kinds, seek to establish as far as possible a framework within which schools can operate successfully. Policies on a wide variety of matters have been promulgated. Structures have been created which seek to deal with

the constitutional dispensation of concurrent powers within which the national and provincial departments of education have to function. Overarching legislation has been put in place. Increasingly national policies on examinations, on funding and on many other matters are being promulgated in an effort to make the system as equitable as possible across the nine provinces.

The only matter which might bear scrutiny and re-visiting is the ex- tent to which the allocation of concurrent powers enhances, or de- tracts from, the creation of an administrative and organisational environment in which schools can flourish.

5.5.2 Administration and governance in the institutional sphere

If there are suggestions that the public schools are failing, it is imperative to ask whether and if so to what extent the present system of administration and governance is able to address this. The inser- tion of sections 16A and 58B into the Act in 2007 represents a laudable attempt to address the problem of underperforming schools. This may be adequate. However, J D Jansen, Principal and Vice-Chancellor of the University of the Free State suggested in an unpublished address given to researchers and policy makers in September 2008 (see *List of Sources*) that, in fact, the implementation of research findings and the development of fur- ther policies are an exercise in futility if schools cannot be made more functionally effective than many of them are.

It is a truism to state that for the average parent and the average learner, the test of what the quality of schooling is lies in the extent to which the school with which learner and parent are associated, is able to deliver on their expectations. While issues such as the struc- ture of the education system, its financing and related matters are of immediate interest to those who operate in the systems arena, the reality is that for most people "the education system" is synony- mous with "the school", and more specifically the school or schools they know. If their experience of the school is positive, their view of the education system is usually positive. The converse is also more often than not the case. In this monograph, which deals with the administration of the education system and school governance, it is not inappropriate to take stock of the point which the current sys- tem of administration and governance of public schools has reached, and to make some observations about its current state.

The *South African Schools Act 1996* came into being as an expres- sion of the principles which the Government had laid down in its first White Paper on Education which was published in 1995. Schools were conceptualized as juristic persons which would be governed by a group of persons who were closely related to the specific school in which they functioned, who would form the gov- erning body. A great many organizational and functional duties which would otherwise have had to be carried out by the State were assigned to governing bodies. In exchange for their assump- tion of additional duties and responsibilities, those governing bod- ies which applied for them could be assigned additional functions by the MEC for Education. In effect, at that time, it was accepted that the organization of schools, their financing and their govern-
ance were inter-linked. It was accepted that there would be public schools. It was accepted that they would be funded by the State. It was accepted that they would have governors who, it was hoped, would be drawn from the community having an immediate interest in that school. But as part of this set of understandings there was the further understanding that those governing bodies which ac- cepted further responsibilities, thereby discharging the State at least in part from its duty to fulfil them, would have the right to levy school fees in order to defray the costs of providing those services on behalf of the State. It can therefore be stated that a two-tier sys- tem was accepted at the period when the *Act* was formulated, and that such a two-tier system was in fact built into it.

It is appropriate to consider to what extent this approach is consis- tent with the three pillars upon which the transformation policies of the Government, and indeed, the *Constitution* of the country are founded – that is, access, equity and redress. These will be exam- ined in turn.

• Access

The *Freedom Charter* includes the slogan "The gates of learning shall be open to all". In the *Constitution* this objective was trans- lated into terms which maintain that every person has the right to basic education. Both the *Charter* and the *Constitution* do not elaborate further on whether or not the person seeking access should in some way qualify for the right to admission.

The *South African Schools Act* does stipulate who may have access to public schools by indicating the minimum age for first admission and

the minimum age at which the learner is no longer obliged to attend school. It is silent on matters such as the capacity of the learner to benefit from the form of schooling offered, the curricu- lum taught, the language in which it is offered, and so on – all of which are in subtle ways barriers to access, which in the context of schooling is not simply physical access to the school. Governing
bodies which sought to identify these some of these barriers – pos-
sibly not so much to offer remedial assistance as to deny access - by means, for example, of readiness tests or tests to assess the com- petence of the aspirant learner to operate in the language of the school, were speedily prohibited from doing this by means of an amendment to the original *Act*. Clearly the language of instruction in a school, for example, could constitute a barrier for anyone not able to learn in that language.

In its original form the *Act* empowered governing bodies to deter- mine the language medium of the school, based on the right en- trenched in the *Constitution (s 29(2))* that every person has a right to receive education in the official language or languages of their choice in public educational institutions where that education was reasonably practicable. Those schools which insisted on a language other than English as the medium of instruction came under pres- sure from the State to amend those policies, and on a number of occasions the outcome of this was litigation in which governing bodies sought relief from the courts in an effort to uphold what they believed was their right to determine language policy. In this re- gard, various courts have handed down divergent judgments. In one judgment (*See List of Sources* for *Minister of Education, West- ern Cape, & Others v Governing Body, Mikro Primary School & Another*) where the Minister of Education in the Western Cape had sought to compel the governing body of the Mikro Primary School to amend its language policy from single-medium Afrikaans to parallel- or even dual-medium Afrikaans and English, the Su- preme Court of Appeal ruled that in the circumstances prevailing at the school the right of the governing body to determine language policy overrode other considerations. In two other judgments, how- ever, one delivered in the Northern Cape Division of the High Court and the other in the Transvaal Provincial Division of the High Court (See *List of Sources* for *High School Ermelo & Others v The Head of Department Mpumalanga Department of Education*
& Others, and Seodin Primary School & Others v MEC of Educa- tion

in the Northern Cape & Others) the Bench decided the con-trary on the basis of the facts before them, nevertheless taking cog- nisance of the same provision in the *Constitution*.

A further barrier to access is, of course, any form of financial con-straint in any schooling environment where school fees are pay- able. The right of school governors to determine school fees began to be inhibited in 2005 when the *Regulations for the exemption of parents from the payment of school fees* were published. The effect of the exemption regulations is that those who are in a position to pay fees are required in effect to carry the costs generated by those who cannot do so, with no compensation by the State. This ar- rangement is an unusual one, in that it effectively signals that al- though the State provides schools which are free or virtually so, those who do not wish to attend them and cannot afford fees at other schools may nevertheless attend those schools free of user- charge. In 2006 the *National Norms and Standards for School Funding* were published, and, in the same year, revised. The norms and standards saw the division of schools in each of the provinces into quintiles which range from schools which are classified as re- quiring maximum financial assistance from the State (Quintile 1) to those which are classified as requiring very little (Quintile 5), and this was the starting point for a subsequent development – the dec- laration of entire quintiles as "no-fee" schools. In effect the determi- nation of schools as "no-fee" schools by the Minister of Education has as a consequence that the legal competence of governing bod- ies affected by such decisions has been inhibited. Towards the end of 2008 the Minister of Educa- tion made a determination in effect declaring Quintile 3 schools to be "no-fee" schools. Those schools are in general be worse off than they would have been had they remained fee-charging schools.

There are grounds for suggesting that both funding and language, among other issues which affect access as an imperative, have not been adequately dealt with by the current *South African Schools Act.*

- **Equity**

The term "equity" means "fairness". South African society at large is one in which major inequalities existed prior to 1994 and at least in part the application of the principle of "fairness" must include moves towards equality also. The State has made strides in certain areas – the expansion of the social security system, the widening of the net in

respect of health care, equality before the law and many other developments all testify at the macro level to a directed effort to create an environment in which equality can be achieved. At the level of the school, however, the question arises as to what "fairness" might be, and what might be the duty of any governing body to ensure that equity is a guiding principle in the activities for which the governing body is responsible. It is common cause that schools cannot rectify the problems in the wider society around them – the best they can hope to do is to release learners into soci- ety who will be able to pursue with intentionality the goals of the Bill of Rights in the *Constitution.* The education authorities have sought to address some issues – for example, prescriptions with regard to religious activities at schools, conduct of disciplinary hear- ings and a methodology for dealing with educator labour issues have been issued to schools. In a profoundly unequal society, which is what South Africa is, it is easy to confuse "fairness" with "sameness". Sometimes it is highly unfair to treat an individual in the same way as another person, because there may be specific

elements in the person's capacity, life experience or situation which militate against this. Quite apart from asking whether the two-tier education system in the country is inherently fair, it needs to be asked whether the pursuit of "sameness" in many aspects of the administration of schools is not in itself inherently unfair.

If the *Act* is read critically with a view to establishing to what extent it seeks to promote fairness at the institutional level, it may be con- cluded that there are some elements in the *Act* which do little, if anything, to promote inherent fairness, while some actions of the education bureaucracy possibly contribute to this difficult situation.

• Redress

The schools in South Africa are characterized by massive differen- tials. These arise in part from the exceptional social needs in our country, and also from the moral and social imperative to rectify the injustices of the past. The pressing question is how this might be done. Specifically in the context of the school there is a mesh of interests – those of the learners, the educators, the interested par- ties, the provincial and national education administrations. Human resources are not evenly spread between schools, nor yet financial resources; the same can be said of the spread of resources between the provinces.

One of the competences of governing bodies is that of making recommendations to the Head of Department as to which teachers should be appointed to permanent posts on the establishment of the school. Here the imperatives are very different. The education authority seeks to deploy resources to best advantage across an entire system. The more parochial community has its own interest as a primary concern – each school would like to see the best quali- fied, most motivated, most inspiring personnel working with the learners. There are schools in which little or no learning and little or no teaching takes place. The authorities take seriously their responsibility to address the situation in those schools also – how is that to be done in an environment of personnel shortages, as well as a very real absence of didactic and other professional skills at the op- erational level? Amendments to the *Act* and various amendments to regulations have sought to enhance the competence of a Head of Department to move more freely when it comes to assigning per- sonnel in schools. Some of those efforts have been tested in the courts. In the judgment in respect of Point High School, the Head of Department lost the case. In the case of Kimberley Junior School the school lost the case (see *List of Sources*).

Is redress related only to personnel issues? Are there other matters also? Can issues of redress be separated from issues of equity? These and other questions all arise from the implementation of the South African Schools Act, and not infrequently the work of schools can be greatly inhibited as a consequence of the internal and external debates which arise on these issues.

5.5.3 The need for a re-appraisal of the South African Schools Act

There is too much evidence to suggest that many schools are not as functional as they should be, simply to ignore it. The Act was based on a set of assumptions about the relationship between school type, funding model and governance approaches. Since that time almost two decades have elapsed, the Act has been regularly amended, and the consequence is a patchwork of provisions, some of which are difficult to reconcile with others. If part of the problem of school functionality lies within the way in which the Act is structured or the way in which it is made operational, those issues should be addressed. The Government of South Africa has since 1994 had numerous terms in office. Possibly the time has come to review very

fully the current approaches to and points of view about the administration and governance of education, with a view to encouraging improved output, greater efficiencies and improved development of learner potential.

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