



Die leier in skoolbeheer en -bestuur
The leader in school governance and management

"Mini-MBA" in School Management

**Constitutional Court judgements
with reference to the Ermelo,
Rivonia and Pillay cases**

**Jaco Deacon
Maart 2019**



Constitutional Court



Ermelo



IMPLICATIONS OF THE ERMELO JUDGEMENT

- “This case is not, as at first blush appears, about language policy at schools, a highly emotive issue in the South African context, but rather about the principle of legality and the proper exercise of administrative power.”



BACKGROUND

- ✦ Ermelo HS was a single-medium Afrikaans school;
- ✦ The MDE was faced by an alleged space shortage for learners who preferred to be educated in English;
- ✦ The MDE withdrew the SGB's competency to determine the school's language policy;
- ✦ The MDE relied on section 22 (Withdrawal of functions from governing bodies) of SASA



JUDGEMENT

- “Language is a **sensitive issue**. Great care is taken in the Act to establish **a governing body that is representative of the community** served by a school and to allocate to it the function of determining the language policy. The Act authorises **only the governing body to determine the language policy** of an existing school and nobody else. As nobody else is empowered to exercise that function, it is **inconceivable that s 22 was intended to give the head of department the power to withdraw that function**, albeit on reasonable grounds, and appoint somebody else to perform it, without saying so explicitly.”

IMPLICATIONS

- ✦ In the Mikro matter, the SCA concluded that an SGB has the sole authority to determine a school's language policy;
- ✦ That conclusion is upheld by the Ermelo case;
- ✦ No official or politician is therefore able to instruct schools regarding their language policy (Welkom matter);
- ✦ Policy determination by SGBs is a very important function, it must be done responsibly and cautiously;
- ✦ An HOD's right to withdraw an SGB's functions only applies to those functions allocated to the SGB in terms of Section 21;
- ✦ This right to basic education applies as against the State, and not individual schools;



Rivonia

Member of the Executive Council for Education in Gauteng Province and Others v Governing Body of the Rivonia Primary School



Rivonia

- At school level, the SGB determines admissions policy, which may include determining school capacity;
- The admissions policy of a school may be subject to intervention by the provincial authority, but only if the Schools Act or provincial legislation provides for such intervention.



- Where the Schools Act grants an SGB the function to determine policy on a particular matter, **an HOD or another state official may not simply ignore or violate the policy.** This even applies in a case where the relevant official may believe that the policy goes against the Schools Act or the Constitution;
- Even where the official has been authorised to intervene or deviate, **his/her actions must still be reasonable and procedurally fair;**
- The scheme in the Schools Act indicates that the Department has ultimate control over the implementation of admissions policies.



- ❖ Policy serves as a guide for decision-making, and cannot rigidly bind the decision-maker. The general guideline is for admissions policies to be applied in a flexible manner;
- ❖ The setting aside of a principal's decision on admissions may not take place randomly, must be based on reasonable grounds, and must be procedurally fair.
- ❖ When a provincial authority requires a school to admit more learners than what the school's admissions policy provides for, there must be proper
- ❖ interaction between all affected parties.



The parties' duty to work together to try and find an amicable solution is closely entwined with **the best interests of the child.**



The guiding principles for an admissions policy are as follows:

- It must be aimed at **promoting the quality of education** for all learners at the school.
- It must be aimed at **promoting the best interests of all the children involved.**



- Governing body members must make very certain of the requirements for fair administrative action. In this regard, a useful tool is the document “*Administrative justice*”, which is available under “Legal opinions” on the FEDSAS website.
- When applications for admission are unsuccessful, principals must provide **clear reasons for refusal** in the letter that must be given to parents.
- Governing bodies should not expose principals to disputes about admissions. The authority is supposed to consult governing bodies should disputes arise.



Pillay

THE “NOSE STUD CASE”



Background

- DGHS code of conduct contains the following:
“Jewellery: Ear-rings— plain round studs/sleepers may be worn, ONE in each ear lobe at the same level. No other jewellery may be worn, except a wrist watch...”
- A learner claiming to be Hindu had her nose pierced;
- She argued the nose stud formed part of her religious convictions and culture



- The school governing body did not accept the explanation;
- The SGB strongly emphasised the importance of the school's ethos, discipline and the contribution that uniform school clothes and a uniform appearance made to the school's success.
- The SGB informed the learner that the nose stud would have to be;
- When the learner refused, disciplinary steps followed and was interrupted by legal action.



Judgement

- ❖ The code discriminates on the grounds of religion and culture;
- ❖ Considering the importance of the stud to the learner, the question is whether it would impose too great a burden on the school if she were allowed to wear it;
- ❖ **Rules are important to education.** Not only do they promote discipline among children, but they also prepare them for the real world that has even more rules.



- The ultimate finding of the court was that there had been **unfair discrimination against the learner**. Although the evidence showed that **school uniforms serve an important purpose**, it did not prove that that purpose had been significantly promoted by refusing the learner exemption.
- A **reasonable accommodation** would have been achieved by allowing her to wear the nose stud.



Implications

- It does not abolish school uniforms;
- it only requires that, as a general rule, schools make exemptions for sincerely held religious and cultural beliefs and practices”



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School Policies: Language, Admission and Religion

Jaco Deacon
Maart 2019



Governance and management

In the school setting, the governing body is responsible for **determining policy**, which the principal and other educators then need to **implement**.

- Sect 16(1) – governance is vested in the governing body
- Sect 16(2) – stands in a position of trust
- Sect 16(3) – professional management must be undertaken by the school principal



**School governing body
'Board of directors'**



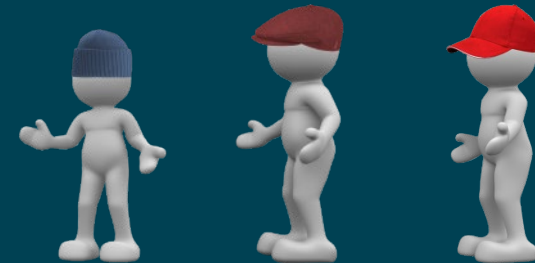
**School principal
'Executive head/CEO'**



Support



School



Legislation, regulation and policy

■ Suprema lex – section 2

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

■ Right to basic education



Legislation

- National Legislation
- Provincial Legislation
- Both national and provincial legislation are “**subordinate legislation**” because both are subject to the Constitution.



Legislation



- The preamble to the South African Schools Act, Act 84 of 1996, states that SASA is necessary to provide for uniform norms and standards for the education of learners at schools, as well as, for the organisation, governance and financing of schools in the entire Republic of South Africa.

Regulations



- Acts usually contain provisions that empowers certain functionaries to issue regulations that relate to certain aspects.
- Regulations are also known as “subordinate legislation”, because regulations are always subject to sanctioning legislation.
- Regulations that are contrary to the Constitution or national or provincial legislation, are *ultra vires*.



Policy



- In terms of both SASA and the National Education Policy Act, Act 87 of 1996 the Minister of Education may promulgate policies relating to certain issues.
- SGB's develop school policy.
- **Policy is a difficult concept!**



What is policy?

- Policy is **not** law.
- The main difference between policy and law is who has the authority to create it and how it can be enforced.
- The implementation of policy must remain **subordinate** to the operation of law.
- The application of policy must remain within the **boundaries set by governing legislation**.
- “Policies should therefore only serve as aspirational statements regarding the direction of government, or provide further detail for the implementation of a legislative scheme where such clarification is expressly allowed for in the governing statutory instrument.”* Drake and Minister for Immigration and Ethnic Affairs (1979)
- Policy outside the legal framework is laundry!**



Policy is a difficult concept!

- ❖ Policy does not create rights and it **does not impose obligations**. Should a functionary require policy to become binding, it should be made binding by way of legislation.
- ❖ Seen in a certain context, policy **may create rights and impose obligations** should the sanctioning statute in terms of which the policy had been promulgated, intended and authorised such powers or obligations. **Eg - South African policy on learner attendance.**
- ❖ In general policy is **only binding on identified parties** within a specific context and does not have any binding effect on outsiders. **Eg - a code of conduct of a specific school.**



Language

- **Need / context**
- **Consultation**
- **Application**
- **Management**
- **Deviation**
- **Appeals**



Admission

- **Need / context / case law**
- **Consultation**
- **Application**
- **Management**
- **Deviation**
- **Appeals**



Language

- **Need / context / case law**
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Language

- **Need / context**
- **Consultation**
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Religion

- Need / context / case law
- Consultation
- Application
- Management
- Deviation
- Appeals



Religion education

- The study of different religions, their holy or sacred texts, special days, beliefs and rituals.
- Part of the **curriculum** – life orientation
- Age appropriate and specific **outcomes**



Religious observances

Constitution S15 Freedom of religion, belief and opinion

(2) Religious observances may be conducted at state or state-aided institutions, provided that-

- (a) those observances follow **rules** made by the appropriate public authorities;*
- (b) they are conducted on an **equitable** basis; and*
- (c) attendance at them is **free and voluntary**.*



Religious observances

SASA s7 Freedom of conscience and religion at public schools

*Subject to the Constitution and any applicable provincial law, **religious observances may be conducted at a public school** under rules issued by the governing body if such observances are conducted on an equitable basis and **attendance at them by learners and members of staff is free and voluntary.***





The background



- Applicant brought an application against 6 schools (4 in Gauteng and 2 in Western Cape) on 14 August 2014.
- The schools all align themselves with a Christian ethos
- The Ministers of BE and Justice were cited as 7th and 8th respondents
- NASGB at a late stage joined as 9th Resp.



About the applicant

- Surfaced in 2009 in a dispute with a single school
- Had pro bono support from legal team
- Initially wanted to have all religion and religious activities banned from schools
- Changed its stance as the matter progressed



The background

- The matter argued from 15-17 May 2017
- ±4 500 pages of paper
- In court 18 advocates representing 13 parties
- The six schools had 4 advocates representing them
- Full bench of 3 judges



The background

- **CASAC, Cause for Justice, Council for the Charter on Religious Rights and Freedoms. AfriForum and Solidarity admitted as amici curiae (friends of the court)**
- **Except for CASAC all the other amici supported the schools**
- **Judgement delivered on 28 June 2017**



The relief sought

■ On ethos (religious orientation):

- Six declaratory orders – based on the National Policy and Constitution
- Only two granted (**but not what the applicant asked for**)

■ On religious observances and practices:

- 71 interdicts
- All of them refused





having, as part of its weekly routine, religious singing, VCSV focused on the Christian religion;

presenting a VSCV group;

creating interest in VCSV camps and excursions;

listing VCSV as part of its cultural or social activities;



The court identified 3 issues

- Whether a public school may hold itself out as a Christian school and if so, to what extent
- Whether a public school itself may conduct religious observances and the extent to which these may be religion-specific
- Whether a learner may be asked to convey whether or not that learner adheres to a particular (religious) faith.



The order

It is declared that it offends section 7 of the Schools Act for a public school

- (i) To promote or allow its staff to promote that it
As a public school, adheres to only one or
predominantly only one religion to the
exclusion of others; and**
- (ii) To hold out that it promotes the interests of any
one religion in favour of others.**



Notable findings

- SA is not a secular state
- The National Policy does not create binding law (and never intended to)
- On subsidiarity: an applicant who contends that religious conduct at a public school is unconstitutional in that it offends s.15 of the Constitution, must either found its case on a contravention of an applicable SGB rule or, if it contends that the conduct is unconstitutional despite being consonant with the SGB rules, it must attack the relevant SGB rules as being unconstitutional.



What does it mean in practical terms?

- In practical terms: *a school can be what it wants to be may just not advertise it as such* (own paraphrasing);

- One important prayer refused:

[It is unconstitutional for any public school to] align or associate itself with any particular religion;



How can we





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Thank you