



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 506/19

In the matter between:

THE SCHOOL GOVERNING BODY GREY COLLEGE,
BLOEMFONTEIN

APPELLANT

and

DEON SCHEEPERS
SOUTH AFRICAN TEACHERS' UNION
FEDERATION OF GOVERNING BODIES OF
SOUTH AFRICAN SCHOOLS

FIRST RESPONDENT
SECOND RESPONDENT
AMICUS CURIAE

Neutral citation: *The School Governing Body Grey College, Bloemfontein v Scheepers and Another* (Case no 506/19) [2020] ZASCA 82 (03 July 2020)

Coram: Navsa, Schippers and Nicholls JJA and Koen and Eksteen AJJA

Heard: 18 May 2020

Delivered: This judgment was handed down electronically via e-mail to the parties' legal representatives on 03 July 2020. It has been published on the Supreme Court of Appeal website.

Summary: Education South African Schools Act 84 of 1996 (the Act) – Employment of Educators Act 76 of 1998 (the EEA) – professional management of school – what it

entails – role of principal contrasted with role of governing body – principal executing functions and duties under provisions of the Act and not in terms of delegation by governing body – in withdrawing principal’s functions governing body acting beyond its statutory authority.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Musi AJP and Van Zyl J, sitting as court of first instance): judgment reported *sub nom Scheepers v School Governing Body, Grey College Bloemfontein and Others (Suid-Afrikaanse Onderwys-Unie Intervening)* [2018] ZAFSHC 210

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Navsa JA (Schippers and Nicholls JJA and Koen and Eksteen AJJA concurring):

[1] From the perspective of the first respondent, Mr Deon Scheepers, the question to be addressed in this appeal, expressed sardonically, would be the following: Is a school principal still a school principal when he or she is no longer to perform the key functions attached to that role? The question appears rhetorical because the answer seems self-evident. Not so, would be the instant retort from the appellant, the School Governing Body of Grey College, Bloemfontein (the SGB), for that would be a mischaracterisation of their dispute with Mr Scheepers, who was employed as the school principal. All it did, said the SGB, in a decision it made, which is at the centre of this appeal, was to withdraw some of the powers and functions it had delegated to Mr Scheepers as principal. He was still free to continue conducting teaching and learning activities at the school.

[2] Technically, the question to be addressed in this appeal is whether the SGB, established in terms of the provisions of the South African Schools Act 84 of 1996 (the Act),¹ acted within its powers when, at a special meeting held on 15 May 2018, it purported to recall all delegated SGB powers from the then principal, the first respondent, and simultaneously appointed Mr Jurie Geldenhuys as interim school manager to manage, on behalf of the SGB, all school activities, with the exception of teaching and learning activities. The second respondent, the South African Teachers' Union (the SAOU), a registered trade union in the education sector, representing some 36 000 members, including Mr Scheepers, had sought and was granted leave to intervene by the court below, the Free State Division of the High Court, Bloemfontein (Musi AJP and Van Zyl J, sitting as court of first instance). It also sought a declaratory order. More about that later. The Federation of Governing Bodies of South African Schools (FEDSAS), a national representative organisation of public schools' school governing bodies, was admitted as *amicus curiae* in relation to this appeal.

[3] I shall, in due course, deal with the detailed background and the full reasoning of the court below when it adjudicated an application brought by Mr Scheepers to review and set aside the SGB's aforesaid decisions. For the moment, it suffices to set out its essential conclusions in relation to the application:

'It is clear that the SGB was not entitled to take the decision that it took because the Act and other policy instruments which covers the role, responsibilities and functions of the principal does not sanction it. The SGB therefore did not have the necessary authority to do what it did. The SGB was not authorised by the Act to take the decision that it did.

Furthermore it is clear that the decision was not preceded by a procedurally fair process. [Mr Scheepers] was for all intents and purposes ambushed. When he requested time to prepare himself that was refused. ...

... The decision effectively stripped the principal of powers, duties and functions which are entrusted to him by legislation and official policy.

...

In summary, a [school governing body] is an organ of State. [The Promotion of Administrative Justice Act 3 of 2000 (PAJA)] is applicable to its decisions. [A school governing body] may delegate some, not all, of its functions. It may delegate some of its functions to a principal. The SGB *in casu* did not delegate any functions to [Mr Scheepers]; it abdicated its functions

¹ See ss 16 and 23 of the Act.

and allowed [Mr Scheepers] to perform them. The Act does not allow the SGB to denude the principal of functions entrusted to him by legislation, policy or the [Head of Department of the Free State Department of Education (HOD)]. The SGB *in casu* stripped the principal of functions that he must perform in terms of the Act and policies of the Department of Basic Education. The SGB's decision fell afoul of s 6(2)(a)(i) of the PAJA.²

[4] The court below went on to grant the application with costs, including those occasioned by the costs of two counsel. It also issued a declaratory order sought by the SAOU, the details of which will be dealt with in due course. The court below also dismissed the SGB's conditional counter-application³ with costs, including the costs of two counsel. In addition, the SGB was ordered to pay the SAOU's costs. It is against the conclusions referred to above and the resultant order that the present appeal is directed. The detailed background is set out hereafter.

[5] Grey College in Bloemfontein (Grey) is a public school for boys. Mr Scheepers had matriculated at Grey. It is one of the oldest and most well-known schools in South Africa. After obtaining his education degree at the University of Stellenbosch, Mr Scheepers taught at Grey for six years. He subsequently taught at Michaelhouse, in KwaZulu-Natal, and in 2000 took up a post in the same province at Hilton College. In 2012 Mr Scheepers was head-hunted by Grey. The SGB recommended his appointment as principal of Grey to the Head of the Free State Department of Education (the HOD), in terms of s 20(1) of the Act, and he was appointed by the Department as principal of the secondary school at Grey from 1 January 2013. He took up his appointment and had served in that position until May 2018.

[6] On 3 May 2018 Mr Scheepers was invited by email to attend a special meeting of the SGB, scheduled to take place on 15 May 2018. The email indicated that the only item on the agenda was the withdrawal of 'rights' and 'duties' that the SGB had

² See paras 87-88, 90 and 94 of the judgment of the court below: *Scheepers v School Governing Body, Grey College Bloemfontein and Others (Suid-Afrikaanse Onderwys-Unie Intervening)* [2018] ZAFSHC 210.

³ The counter-application was conditional upon the court below finding that a school governing body has no express or implied authority to delegate any of its functions to a school principal. In that event the SGB sought an order declaring that its decision to delegate any of its functions in terms of the Act to Mr Scheepers was unlawful and invalid, alternatively, that such decision be reviewed and set aside in terms of s 6(2) of the PAJA.

delegated to him. Mr Scheepers, via email, enquired of the chairperson of the SGB, Mr Büchner, which rights and duties were being withdrawn. The response, by email, was a terse statement that no delegated rights and duties had been withdrawn.

[7] Mr Scheepers persisted, and by way of a further email enquired, once again, which rights and duties were in contemplation. The response from the chairperson bears repetition:

'Beste Deon

Dankie vir jou e-pos van 11 deser. As skoolhoof in diens van die Vrystaatse Departement van Onderwys het jy sekere regte en verpligtinge wat uit hoofde van die Skolewet aan jou toegedig is. Ek is nie van voorneme om al daardie regte en verpligtinge hierin uiteen te sit nie aangesien jy op hoogte is van die bepalings van die Skolewet.

Soos jy weet is alle ander regte, verpligtinge, funksies en bevoegdhede wat jy tans uitoefen en wat nie uit hoofde van die Skolewet voortspruit nie, deur die Beheerliggaam, hetsy uitdruklik en/of stilswyend, aan jou gedelegeer.

Die doel van die spesiale Beheerliggaam vergadering en die enigste punt op die agenda is duidelik, naamlik die terugtrekking van die Beheerliggaam se regte en verpligtinge wat aan jou gedelegeer is.

Vriendelike groete...'⁴

[8] To this Mr Scheepers responded by stating, in an email, that as far as he was concerned he was executing all of his duties in terms of the Act and that he required clarity on the specific functions the SGB had in mind to withdraw.

[9] The chairperson did not respond to the last-mentioned email and Mr Scheepers attended the meeting to which he had been invited, still in the dark. He had no idea of what the SGB required of him. At the meeting the chairperson commenced by

⁴ 'Dear Deon

Thank you for your email of the eleventh instant. As school principal in the service of the Free State Department of Education, you have certain rights and obligations that flow from the Schools Act. I do not intend to set out all of those rights and obligations here, as you are aware of the provisions of the Schools Act.

As you know, all of the other rights, obligations, functions and powers that you presently exercise, and that do not flow from the Schools Act, have been either expressly and/or tacitly delegated to you.

The purpose of the special SGB meeting and the only point on the agenda is clear, namely, the withdrawal of the SGB's rights and obligations that have been delegated to you.

Kind regards' [translation my own].

informing those in attendance that the SGB's executive had identified certain issues which potentially impacted on the trust relationship between Mr Scheepers, as principal, and the SGB. He went on to state that the Act conferred distinct functions on the principal and the SGB, respectively, and that the functions assigned to the principal were limited to managing the academic activities of the school, while all other functions had been delegated to the principal by the SGB. Mr Büchner went on to indicate that the purpose of the meeting was to determine whether the SGB was 'comfortable' with the manner in which Mr Scheepers had discharged those delegated functions and duties.

[10] Mr Scheepers placed it on record that he had received no prior clarification on the rights and duties that were in contemplation for withdrawal by the SGB. He sought a postponement to enable him to deal with what was put to him at the special meeting. He adopted the attitude that all his functions were being executed in accordance with the provisions of the Act and his contract of employment with the Department.

[11] The SGB debated the matter and adopted the position that Mr Scheepers simply had to look at the applicable provisions of the Act to appreciate the distinction between his professional duties and those that were within the preserve of the SGB. The SGB urged him to accept that all of the functions and responsibilities that s 20 of the Act assigned to a school governing body were at least tacitly delegated to him by the SGB.

[12] Mr Scheepers' request for a postponement of the meeting was refused. Instead, he was confronted with a list of complaints to which he was invited to respond. To his mind the complaints that were listed were as follows:

'[T]hat [Mr Scheepers] treated staff harshly and aggressively pursuant to a meeting that the Chairman and Mr Grobbelaar, also a SGB member, had with educators of Grey College on 22 November 2016. In that meeting staff members of Grey College aired certain grievances which [he] did not – or was unwilling to resolve;
that [he] victimized educators and bullied them;
that there was a lack of visible discipline at Grey College, Grey College's code of conduct was not an effective tool to manage discipline and there was an increase in disciplinary issues which impacted on the academic part of Grey College;

that [he] was not equipped to handle complex racial issues;
that [he] sought to manipulate the outcome of the appointment of the SGB's annual office bearers in the run-up to the March 2018 elections;
that [his] wife had canvassed the voting roll for the 2017 annual office bearers with third parties before the voting roll was announced;
that [he] broke [his] trust and contractual obligations with the Department by prematurely informing certain candidates that they were unsuccessful in their bid to become deputy principal of Grey College;
that [he] was unable to instil the Grey College values and traditions to learners;
that [he does] not enjoy the respect of learners because [he is] not emotionally connected to them;
that [he is] not approachable to parents and parents are concerned about Grey College's academics.'

[13] Mr Scheepers was aggrieved that he had not been given any prior notice of any of these complaints and was not provided with an opportunity to adequately prepare to meet them. Towards the end of the meeting Mr Scheepers was asked how he viewed the relationship of trust he was supposed to enjoy with the SGB. He responded by stating that he did not have a strong trust relationship with the chairperson and ascribed this to personal grievances being entertained by the chairperson behind his back. Mr Scheepers acknowledged that this breakdown had occurred a long time ago.

[14] The SGB then proceeded to vote by secret ballot on whether the functions and responsibilities delegated to Mr Scheepers by the SGB should be withdrawn. Fourteen of the seventeen SGB members present at the special meeting voted in favour of the motion. The following resolution was subsequently adopted:

'[T]hat the Federation of Governing Bodies of South African Schools and [Mr Scheepers] representative engage in a process to manage the relationship between the parties in the best interest of Grey College;

that, pending the finalisation of said process, the functions, responsibilities and duties of the SGB that were either expressly or tacitly delegated to [Mr Scheepers] be withdrawn with immediate effect;

that the SGB appoint Mr Geldenhuys as interim school manager to execute the delegated functions of the SGB until a long-term solution could be implemented;

that Mr Geldenhuys would manage all school activities, with the exception of teaching and learning, on behalf of the SGB, which, according to the SGB, entail the following:

- (i) the management of school finances to the extent that those powers do not specifically vest in [Mr Scheepers] in terms of the provisions of the Act;
- (ii) the management of the extra-curricular activities, such as sport and culture;
- (iii) the management of the school campus and assets, including the hostels;
- (iv) the management of the personnel, where they are not performing academic functions;
- (v) communication and liaison internally and externally;
- (vi) representing Grey College at all non-academic forums;
- (vii) internal and external liaising;
- (viii) management of Grey College's ethos mission, values and spirit within the school context;
- (ix) the management of discipline;
- (x) that [Mr Scheepers], as an employee of the Department, would continue with [his] professional duty as school principal, limited to only those powers as assigned to [him] in terms of [the Act].'

[15] Thereafter, the resolution was publicised by way of a memorandum addressed to the Grey community, namely, learners, parents and personnel, under the heading '*Drastic management decision following breakdown of trust between Grey College Governing Body and School Principal*'. (Emphasis added).

[16] Mr Scheepers was aggrieved at what he considered to be a process that was procedurally unfair, that is, that he was given inadequate notice and information concerning the contemplated action by the SGB and thereby deprived of a reasonable opportunity to make representations in relation thereto. Furthermore, as far as he was concerned, he was not provided with adequate or clear reasons for the decision made by the SGB. The SGB's belated reliance on the breakdown of trust, according to Mr Scheepers, did not avail it because that had not been foreshadowed as a ground upon which the decision was going to be based. He was not informed that he was going to be confronted with the litany of complaints presented at the meeting. Some of the complaints referred to at the meeting were related to incidents that dated back to 2016.

[17] Mr Scheepers contended that if, in effect, what was being contemplated by the SGB was a disciplinary enquiry based on misconduct, then it ought to have followed the disciplinary procedures in Grey's code of conduct. The following are the pertinent parts:

'[A] determination by the Deputy Chairperson of the SGB that there is a prima facie case to take action;
the appointment of an investigative committee consisting of at least three (3) individuals to investigate allegations against a member;
furnishing the member with written description of the charges of misconduct against [them];
an opportunity to direct written representations;
the making of representations by the investigative committee to the SGB whether to impose a reprimand or recommend to the HOD to either suspend the member or to terminate his or her membership of the SGB.'

That process was clearly not followed.

[18] According to Mr Scheepers, insofar as any part of the public was to be affected by the contemplated decision, a public enquiry ought to have been held, or a notice and comment procedure resorted to, or some other fair procedure adopted. None of these measures was taken. Those members of the public that the decision would affect were not consulted.

[19] Mr Scheepers was adamant that there was no substantive basis for the decision of the SGB. He insisted that the SGB could not deprive him of his statutory role, as provided for by the Act, more particularly by s 16(3). In taking the decision under discussion, he submitted, the SGB acted contrary to the principle of legality. Mr Scheepers did not contest that he was obliged to execute lawful instructions of the SGB. However, according to him, the decision in question fell outside the scope of the SGB's powers.

[20] The aforementioned formed the basis of Mr Scheepers' approach to court. Given the apparent hostility between the chairperson and Mr Scheepers, and the manner in which events unfolded, including written exchanges between the contesting parties' legal representatives prior to the commencement of litigation, it was

predictable that the application launched by Mr Scheepers would be vigorously opposed. It is to the basis of that opposition that I now turn.

[21] In its opposition, the SGB raised a number of procedural points that did not find favour with the court below and which, advisedly, were not persisted with on appeal. Before us, the SGB criticised the court below for finding that its decision to 'denude' the principal of his powers was administrative action, as defined in s 1 of the PAJA. It submitted that the court below should have held, in the light of Mr Scheepers' assertions that it had acted unlawfully in revoking his powers, functions and duties, that it was faced with a 'legality' review. Thus, so it contended, procedural irregularities did not arise.

[22] The SGB, in opposing the application by Mr Scheepers, adopted the position it had adopted prior to the litigation, namely, that the powers, functions and duties that the principal had exercised before its impugned decision had been delegated to him by the SGB. It was adamant that, as the repository of the original power and functions, it could revoke them at will. In this regard it relied on s 16(1), read with ss 5, 7, 8, 9, 12A, and 20 of the Act. Paragraph 58.3 of Grey's founding affidavit reads as follows: 'I have been advised that there is nothing wrong, if the SGB no longer requires professional staff to act on its behalf, to simply say so and get somebody else to act on its behalf.' That, so it was contended, was made clear at the commencement of the meeting at which the impugned decision had been taken.

[23] In the view of the SGB, any complaints Mr Scheepers might have had in relation to the infringement of his labour law rights were to be taken up with his employer, the Department. It reiterated that all it did, in revoking Mr Scheepers' powers and functions, was to retake the control that vested in it in terms of the provisions of the Act. There was thus no unlawful withdrawal of Mr Scheepers' powers, functions or duties.

[24] In support of its fundamental premise, set out in the immediately preceding paragraphs, the SGB pointed to the ultimate responsibility it held, in terms of the provisions of the Act, for managing and controlling the finances of the school. Furthermore, it was contended that in terms of the Personnel Administrative Measures

(PAM),⁵ gazetted by the Minister of Education, the principal's role in relation to managing the school's accounts and records is one in terms of which he is required to act in consultation with the governing body. This meant that Mr Scheepers could continue to fulfil these functions, despite the decision by the SGB. The SGB contended that the decision did not impact on the exercise of Mr Scheepers' statutorily conferred powers and functions.

[25] Before us it was submitted, on behalf of the SGB, that the court below had erred in rejecting its core submissions, set out above, by reliance, inter alia, on provisions such as s 8A of the Act, which conferred on the principal the power to conduct random searches of learners or their property during school hours. It was asserted that this defined power did not confer an entitlement to manage school activities in the general sense. It was notable, so counsel for the SGB asserted, that there was no power to be found in the provisions of the Act conferring a general power to manage school activities. Instead, so it was argued, the Act provides only for the 'professional management of the school', and this relates to the implementation of educational programmes and curriculum activities, in respect of which a principal is required to report to the Department.

[26] Before us, in support of the essence of its case, it was submitted that the provisions of PAM, which envisages the principal having an active role in promoting the extra-curricular activities and encouraging learners' voluntary participation in sporting activities, do not militate against the lawfulness of the decision to revoke the delegated powers. In short, so the argument went, although the power to manage such activities vests in the SGB, the principal is not precluded from promoting or encouraging extra-curricular activities. All that was revoked was the management function, which, in any event, resides in the governing body.

[27] The same applied, so the SGB submitted, in relation to the provisions of PAM, which enable a principal to conduct regular inspections of a school to ensure that the school premises and equipment were being used properly and that good discipline

⁵ As determined by the Minister in terms of s 4 of the Employment of Educators Act 76 of 1998. See GN 170 in GG 39684 of 12-02-2016.

was being maintained and, in addition, to be responsible for the hostel and all related activities. The court below was criticised for relying on these provisions in holding against the SGB. The SGB took the view that the PAM and the Act vested the management of the school in respect of those aspects in the SGB.

[28] Similarly, so it was contended on behalf of the SGB, the provisions of PAM, in terms of which the principal was responsible for communication and liaison on behalf of the school and for representing the school at non-academic fora, have to be seen in the light that they concern delegated powers which the SGB could withdraw at any time. In respect of the assistance that a principal provides to the governing body in handling disciplinary matters, it was submitted that the obligation only exists if a principal is called upon to fulfil it. This, it submitted, supported the position adopted by the SGB, namely, that a school principal exercises all these functions at the behest of the governing body and that all such functions entrusted to the principal could be withdrawn at the instance of the governing body.

[29] It was accepted on behalf of the SGB that a principal has a duty to manage educators and support staff. However, it was submitted that this must be seen in the light of the obligation that a principal undertakes, namely the professional management of a school, which relates to the exercise of academic and support functions. I pause to record that a letter from the Head of Department, dated 4 July 2018 and addressed to the SGB, makes it clear that the Department did not side with it in the conflict with Mr Scheepers. Furthermore, it considered the SGB to be mistaken about its view of the provisions of the Act and considered Mr Scheepers to be the principal of Grey. It is also clear from that letter that it considered FEDSAS to be on the wrong side of the conflict. For completeness, it is also necessary to note that the litany of complaints, presented to Mr Scheepers at the meeting at which the impugned decision was taken, was repeated in the SGB's answering affidavit, with specific incidents referred to in some detail. We are not called upon to decide on the correctness of those allegations by the SGB. I now turn to deal with the judgment of the court below.

[30] Musi AJP (as he then was), at the outset, had regard to the judgment of the Constitutional Court in *Head of Department, Department of Education, Free State*

*Province v Welkom High School and Others; Head of Department, Department of Education, Free State Province v Harmony High School and Another*⁶ at para 124, where the following appears:

'Given the nature of the partnership [the Act] has created, the relationship between public school governing bodies and the state should be informed by close cooperation, a cooperation which recognises the partners' distinct but interrelated functions. The relationship should therefore be characterised by consultation, cooperation in mutual trust, and good faith. The goals of providing high-quality education to all learners and developing their talents and capacities are connected to the organisation and governance of education. It is therefore essential for the effective functioning of a public school that the stakeholders respect the separation between governance and professional management, as enshrined in [the Act].'

[31] The court below recorded that the SAOU had sought and been granted leave to intervene in support of Mr Scheepers. The position of the SAOU was uncomplicated and direct. It had intervened in support of its members, amongst whom there were school principals and people aspiring to that position, and it contended that the SGB had no power to retract, as it purported to do, the principal's statutory powers, functions and duties, which were statutorily mandated. The court below had rejected the SGB's submission that the SAOU had no standing.

[32] The court below had regard to the relevant provisions of the Act. It commenced by noting that in terms of s 15 every public school is a juristic person with legal capacity to perform its functions in terms of the Act. Musi ADP went on to consider s 16 and s 23, which make it clear that the governance of public schools is vested in governing bodies.⁷ He also had regard to ss 6, 20, 36 and 38, in terms of which governing bodies performed a number of functions, such as policy making, the setting, implementation and control of budgets, the sourcing of finance and the administration and control of school property.

⁶ *Head of Department, Department of Education, Free State Province v Welkom High School and Others; Head of Department, Department of Education, Free State Province v Harmony High School and Another* [2013] ZACC 25; 2014 (2) SA 228 (CC).

⁷ Section 16(1) of the Act states: 'Subject to this Act, the *governance* of every public school is vested in its governing body and may perform only such functions and obligations and exercise only such rights as prescribed by the Act.' (Emphasis added).

[33] In the view of the court below, a governing body, by its very nature and setting, is unable to perform all of its functions by itself and that in the ordinary course it would delegate some of its functions. This, it was held, is countenanced by the Act. The court took into account that in terms of s 30, a governing body may establish committees to perform some of its functions. With reference to *Schoonbee and Others v MEC for Education, Mpumalanga and Another* 2002 (4) SA 877 (T), it held that in appropriate circumstances and within the statutory framework, a governing body could delegate some of its functions to a principal.

[34] Musi ADP recognised that delegation 'postulates a revocable transmission of subsidiary authority'.⁸ In other words, if a delegator is able to delegate some of its functions it has a corresponding right to revoke such delegation. If the revocation has to be preceded by a formal requirement, in terms of a statute or policy, then that has to be complied with before the revocation can take place. Where no such requirement has to be fulfilled, the delegator can revoke the delegation without more. The court below looked to see whether the principal had in any form usurped any of the SGB's functions, duties or powers. In that exercise it considered whether there were statutory provisions or a policy that enabled a principal to co-exercise functions, duties or powers with a governing body. If the answer was in the affirmative, so it reasoned, there could be no talk of an unlawful exercise of powers, functions or duties on the part of the principal.

[35] The court below considered s 16A of the Act and took into account what the Constitutional Court, in *Welkom*, had said in relation thereto:

'A principal must, in discharging his or her professional management duties, amongst other things, implement educational programmes and curriculum activities, manage educators and support staff, perform functions that are delegated to him or her by the HOD under whose authority he falls and implement policy and legislation. In contrast, a school governing body's governance functions include promoting the school's best interests and striving to ensure the provision of quality education to all learners at the school, developing a mission statement for

⁸ See in this regard *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) para 173.

the school, adopting a code of conduct for learners and administering school property (subject to certain constraints).⁹

[36] Against the SGB's assertion that it had delegated to the principal the administration of school funds, the court below had regard to the provisions of s 37 of the Act, which reads as follows:

'(1) The governing body of a public school must establish a school fund and administer it in accordance with directions issued by the Head of Department.

(2) Subject to subsection (3), all money received by a public school including school fees and voluntary contributions must be paid into the school fund.

(3) The governing body of a public school must open and maintain one banking account, but a governing body of a public school may, with the approval of the Member of the Executive Council, invest surplus money in another account.

(4) Money or other goods donated or bequeathed to or received in trust by a public school must be applied in accordance with the conditions of such donation, bequest or trust.

(5) All assets acquired by a public school on or after the commencement of this Act are the property of the school.

(6) The school fund, all proceeds thereof and any other assets of the public school must be used only for—

(a) educational purposes, at or in connection with such school;

(b) educational purposes, at or in connection with another public school, by agreement with such other public school and with the consent of the Head of Department;

(c) the performance of the functions of the governing body; or

(d) another educational purpose agreed between the governing body and the Head of Department.

(7)(a) Money from the school fund of a public school may not be paid into a trust or be used to establish a trust.

(b) if a trust was established from a school fund of a public school or if such money was paid into a trust prior to 1 January 2002, such trust or payment is invalid and the money must be paid back into the school fund.

(c) A governing body of a public school may not collect any money or contributions from parents to circumvent or manipulate the payment of compulsory school fees and to use such money or contributions to establish or fund a trust, and if such money or contributions of

⁹ *Welkom* op cit fn 3 para 39. (Citations omitted.)

parents were paid into a trust prior to 1 January 2002, the trust must pay such money or contributions into the school fund.'

[37] Alongside ss 16A and 37 the court below considered s 42 of the Act, which reads as follows:

'The governing body of a public school must—

(a) keep records of funds received and spent by the public school and of its assets, liabilities and financial transactions; and

(b) as soon as practicable, but not later than three months after the end of each financial year, draw up annual financial statements in accordance with the guidelines determined by the Member of the Executive Council.'

[38] Completing its conspectus of provisions of the Act relating to the administration of school funds, the court took into account that, in terms of s 16A(2)(h), the principal of a school has a duty to assist a governing body with the management of school funds. That subsection provides:

'The principal must—

...

(h) assist the governing body with the management of the school's funds, which assistance must include —

(i) the provision of information relating to any conditions imposed or directions issued by the Minister, the Member of the Executive Council or the Head of Department in respect of all financial matters of the school contemplated in Chapter 4; and

(ii) the giving of advice to the governing body on the financial implications of decisions relating to the financial matters of the school...'

The court below held that was unclear how these functions were to be executed while the newly appointed school manager, Mr Geldenhuys, was in charge. This becomes all the more glaring, so the court below reasoned, when regard is had to the PAM, in terms of which a school principal's professional management of a school includes the keeping of various kinds of accounts and records in relation to the use of school funds.

[39] Musi ADP went on to explore other provisions of PAM, including those that authorise school principals, in relation to school activities, to prohibit drugs and dangerous objects from being brought onto school premises. PAM provides for a school principal to play an active role in promoting extra and co-curricular activities.

The court below held that the Act does not permit the SGB to strip the principal of these functions and duties.

[40] The court below took into account that PAM also provides for a school principal to ensure that school premises and equipment are properly utilised and that discipline is maintained. So, too, a school principal is tasked with managing educators and support staff. In doing so he/she is not restricted to managing only in relation to academic functions. PAM also imposes a duty on school principals to represent the school in communications with stakeholders. The court below asked the following question:

'How can a principal professionally manage a school and not at the same time manage the vision, mission and values of the school as espoused by the SGB?'¹⁰

It went on to hold that the SGB overreached in stripping Mr Scheepers of these management functions.

[41] The court below, having regard to what is set out in the preceding paragraphs, reached the conclusions set out in para 3 above. It went on to add the following:

'The unlawfulness of the act did not end there. The SGB summarily and unlawfully appointed Mr Geldenhuys as the school manager of Grey College Secondary School. There is no evidence that there is such a post on the establishment of the school. Mr Geldenhuys was the principal of Grey College Primary School. His transfer or temporary secondment to Grey College Secondary School was done without the intervention or authorisation of the HOD.'¹¹

[42] It is against the conclusions set out in para 3 above and the resultant order that the present appeal, with the leave of this court, is directed. To consider whether the SGB acted within its powers, it is necessary to consider the applicable legislative framework and then to decide whether the conclusions reached by the court below are justified.

[43] There can be no doubt that the Act is transformative. It says so in the preamble, which records that the achievement of democracy has consigned to history the past system of education, based as it was on racial inequality and segregation. It notes that

¹⁰ See the high court's judgment in *Scheepers*, op cit fn 1, para 85.

¹¹ Ibid para 91.

a new national system for schools is required that will redress past injustices and provide a progressively high-quality education for the nurturing and ultimate realisation of the talents and capabilities of all our people. The long title indicates that its purpose is to provide a 'uniform' system for the 'organisation, governance and funding of schools'.

[44] As referred to above, every public school, in terms of s 15 of the Act, is recognised as a juristic person with legal capacity. Section 16(1) states that 'subject to this Act, the governance of every public school is vested in its governing body' (emphasis added). Significantly, the remainder of the section states that a governing body 'may perform only such functions and obligations and exercise only such rights as prescribed by the Act'.

[45] Section 16(2) provides that a governing body stands in a position of trust towards the school. In terms of s 18, a governing body is obliged to function in terms of a constitution, which must comply with minimum requirements set by the MEC of the applicable province. Such a constitution is required to provide for a meeting of a governing body 'at least once every school term'.¹² Furthermore, a governing body is required, in terms of 18(2)(b), to meet with parents, learners, educators and other staff at least once every year. Section 18(2)(c) and (d) also obliges a governing body to keep minutes of its meetings, which it must make available for inspection by the HOD. Finally on this score, a governing body is required at least once a year to render a report on its activities to parents, learners, educators and other staff of the school.

[46] In terms of s 18A(1) the MEC 'must', by notice in the Provincial Gazette, 'determine a code of conduct for the members of the governing body of a public school', which must be 'aimed at establishing a disciplined and purposeful school environment dedicated to the improvement and maintenance of a quality governance structure at a public school'.¹³ The code of conduct must be observed by all members of a governing body, contravention of which may lead to a member's suspension or even termination by the relevant HOD.¹⁴

¹² See s 18(2)(a).

¹³ See s 18A(2)

¹⁴ See s 18A(4) and (5).

[47] Section 20 is extensive. It sets out the functions of a governing body. The relevant parts are set out hereafter:

'(1) Subject to this Act, the governing body of a public school must—

(a) promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners in the school;

(b) adopt a constitution;

(c) develop the mission statement of the school;

(d) adopt a code of conduct for the learners of the school;

(e) support the principal, educators and other staff of the school in the performance of their professional functions;

(eA) adhere to any action taken by the Head of Department in terms of section 16 of the Employment of Educators Act [76 of 1998 (the EEA)], to address the incapacity of a principal or educator to carry out his or her duties effectively;

(f) determine times of the school day consistent with any applicable conditions of employment of staff at the school;

(g) administer and control the school's property, and buildings and grounds occupied by the school, including school hostels, but the exercise of this power must not in any manner interfere with or otherwise hamper the implementation of a decision made by the Member of the Executive Council or Head of Department in terms of any law or policy;

(h) encourage parents, learners, educators and other staff at the school to render voluntary services to the school;

(i) recommend to the Head of Department the appointment of educators at the school, subject to the Employment of Educators Act, 1998, and the Labour Relations Act, 1995;

(j) ...

(k) at the request of the Head of Department, allow the reasonable use ... of the facilities of the school for educational programmes not conducted by the school;

...'

Subject to certain conditions a governing body may, in terms of the provisions of s 20, establish posts for educators and non-educators.¹⁵ Section 20(8), in turn, provides that the employment of these educators and non-educators must be in compliance with the values and principles enshrined in s 195 of the Constitution and, when making

¹⁵ See ss 20(4), 20(5), 20(6) and 20(7).

appointments, a candidate's ability, the principle of equity, the need to redress past imbalances and representivity are all factors which must be taken into account.¹⁶

[48] Section 23 of the Act deals with membership of governing bodies of ordinary public schools. It comprises elected members, the principal and co-opted members. Elected members are comprised of parents of learners, both educators and non-educators at the school, and school learners in the eighth grade or higher. Section 11 of the Act provides for the establishment of a representative council of learners at every public school, while s 23(4) provides that the learner on the governing body is to be elected by that council.

[49] Section 29 provides for office bearers of a governing body, which include at the least a chairperson, a secretary and a treasurer. Section 30 permits a governing body to establish committees, including an executive committee, and it may appoint persons who are not members of the governing body to serve on such committees, provided that each committee is chaired by a member of the governing body.

[50] In terms of s 34 of the Act the state is obliged to fund public schools from public revenue. The responsible Minister, in terms of s 35, is responsible for setting norms and standards for school funding. In terms of s 36 a governing body is required to take reasonable measures within its means to supplement the resources supplied by the state. In terms of s 37, set out in para 36 above, a governing body must establish a school fund and administer it in accordance with directives from the HOD. In terms of s 42, as referred to above, the governing body is required to keep records of funds received and spent by the school and of its assets, liabilities and financial transactions. It must draw up annual financial statements in accordance with directions of the MEC.

[51] What, then, of the role of the principal? In terms of s 16(3) the 'professional management' of a public school *must* be undertaken by the principal *under the authority* of the Head of Department' (emphasis added). Section 16A(1)(a) and (b), under the title 'Functions and responsibilities of principal of public school', read as follows:

¹⁶ Listed in paras (a)-(d) of s 20(8).

'1(a) The principal of a public school represents the Head of Department in the governing body when acting in an official capacity as contemplated in sections 23(1)(b) and 24(1)(j).

(b) The *principal* must prepare and submit to the Head of Department an annual report in respect of—

(i) the academic performance of that *school* in relation to minimum outcomes and standards and procedures for assessment determined by the Minister in terms of section 6A; and

(ii) the effective use of available resources.'

[52] The Act has more in mind for a principal. Section 16A(2) provides:

'The principal must—

(a) in undertaking the professional management of a public school as contemplated in section 16(3), carry out duties which include, but are not limited to—

(i) the implementation of all the educational programmes and curriculum activities;

(ii) the management of all educators and support staff;

(iii) the management of the use of learning support material and other equipment;

(iv) the performance of functions delegated to him or her by the *Head of Department* in terms of this Act;

(v) the safekeeping of all school records; and

(vi) the implementation of policy and legislation;

(b) attend and participate in all meetings of the governing body;

(c) provide the governing body with a report about the professional management relating to the public school;

(d) assist the *governing body* in handling disciplinary matters pertaining to *learners*;

(e) assist the *Head of Department* in handling disciplinary matters pertaining to *educators* and support staff employed by the *Head of Department*;

(f) inform the governing body about policy and legislation;

(g) provide accurate data to the *Head of Department* when requested to do so;

(h) assist the governing body with the management of the school's funds, which assistance must include—

(i) the provision of information relating to any conditions imposed or directions issued by the Minister, the Member of the Executive Council or the Head of Department in respect of all financial matters of the school contemplated in Chapter 4;¹⁷ and

(ii) the giving of advice to the governing body on the financial implications of decisions relating to the financial matters of the school;

¹⁷ Sections 34, 35, 36, 37 and 42, referred to in para 48 above, are located within Chapter 4 of the Act.

- (i) take all reasonable steps to prevent any financial maladministration or mismanagement by any staff member or by the governing body of the school;
- (j) be a member of a finance committee or delegation of the governing body in order to manage any matter that has financial implications for the school; and
- (k) report any maladministration or mismanagement of financial matters to the governing body of the school and to the Head of Department.'

[53] Section 16A(3) provides:

'The principal must assist the governing body in the performance of its functions and responsibilities, but such assistance or participation may not be in conflict with—

- (a) instructions of the Head of Department;
- (b) legislation or policy;
- (c) an obligation he or she has towards the Head of Department, the Member of the Executive Council or the Minister; or
- (d) a provision of the Employment Educators Act, 1998, and the Personnel Administration Measure determined in terms thereof.'

[54] Section 8A(1) reads as follows:

'Unless authorised by the principal for legitimate educational purposes, no person may bring a dangerous object or illegal drug onto *school* premises or have such object or drug in his or her possession on school premises or during any *school activity*.'

The relevant part of s 8A(2) provides:

'Subject to subsection (3), the *principal* or his or her delegate may, at random, search any group of *learners* or the property of a group of *learners*, for any *dangerous object* or *illegal drug*, if a fair and reasonable suspicion has been established ...'

Subsection 3 sets out factors that must be taken into account when such a search is being contemplated.

[55] The EEA deals with the employment of educators by the State, the regulation of their conditions of service, disciplinary matters, the retirement of educators and matters connected therewith. 'Educator' is defined in section 1 as follows:

'[A]ny person who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at any public school, departmental office or adult basic education centre and who is appointed in a post on any educator establishment under this Act ...'

[56] Section 3 of the EEA provides that the Director-General: Basic Education is the employer of educators in the service of the national department and that the Head of Department is the employer of educators in the service of the provincial department of education in posts on the educator establishment of that department for all purposes of employment. Section 4 provides for conditions of service to be determined by the Minister, subject to the Labour Relations Act 66 of 1995 and collective agreements. Different salaries and conditions may be determined by the Minister in respect of different ranks and grades of educators. Section 7, consonant with the provisions of the Act, provides that, in making appointments, regard must be had to the values and principles enshrined in s 195 of the Constitution, and that the factors of candidate ability, the need to redress the imbalances of the past and achieve broad representation, shall be taken into account. Section 6 states that any appointment may only be made on the recommendation of the governing body of a public school. In the present case the SGB had recommended the appointment of Mr Scheepers who was then appointed by the provincial Head of Department.¹⁸

[57] The provisions of PAM elaborate on the role of a school principal in a public school, consonant with the provisions of the Act and the EEA. Under the title 'AIM OF THE JOB', the following appears:

'2.1 To ensure that the school is managed satisfactorily and in compliance with applicable legislation, regulations and personnel administration measures as prescribed.

2.2 To ensure that the education of the learners is promoted in a proper manner and in accordance with approved policies.'

The provisions of PAM then proceed to reiterate the functions of a principal as encapsulated in the Act, the specific provisions of which are referred to above. The clause dealing with 'Personnel' reads as follows, in relevant part:

'3.2.1 To provide professional leadership within the school.

3.2.2 To guide, supervise and offer professional advice on the work and performance of all staff in the school and, where necessary, to discuss and write or countersign reports on teaching, support, non-teaching and other staff.

¹⁸ The letter of appointment states that Mr Scheepers has been appointed 'in the post of Principal (Post Level 4) – Salary Level 11 at Grey College Secondary School. The contract subsequently signed confirms that. On the duties to be performed in terms of that contract, clause 7 records the following: "The employee shall be expected to satisfactorily carry out all the tasks and duties normally associated with the position...'

3.2.3 To ensure that workloads are equitably distributed amongst the staff.

3.2.4 To be responsible for the development of staff training programmes, both school-based, school-focused and externally directed, and to assist educators, particularly new and inexperienced educators, in developing and achieving educational objectives in accordance with the needs of the school. ...'

Other provisions of PAM deal with a principal's role in relation to the academic performance of the school, and in teaching. Clause 3.6 is entitled 'Interaction with stakeholders. The relevant parts read as follows:

'3.6.1 ...

3.6.2 To participate in community activities in connection with educational matters and community building.'

Para 3.7 bears the title 'Communication'. The relevant clauses appear hereunder:

'3.7.4 To meet parents concerning learners' progress and conduct.

...

3.7.8 To participate in departmental and professional committees, seminars and courses in order to contribute to and/ or update professional views/standards.

3.7.9 To maintain contacts with sports, social, cultural and community organisations.'

[58] Chapter 5 of the EEA deals with incapacity and misconduct of educators. Section 17 deals with categories of so-called serious misconduct, none of which is applicable here, in respect of which dismissal is mandatory. The relevant parts of s 18(1) read as follows:

'(1) Misconduct refers to a breakdown in the employment relationship and an educator commits misconduct if he or she—

...

(f) unjustifiably prejudices the administration, discipline or efficiency of the Department of Basic Education, an office of the State or a school or adult learning centre;

(g) misuses his or her position in ... a school ... to promote or to prejudice the interests of any person;

...

(l) performs poorly or inadequately for reasons other than incapacity;

...

(q) while on duty, conducts himself or herself in an improper, disgraceful or unacceptable manner;

...

(t) displays disrespect towards others in the workplace or demonstrates abusive or insolent behaviour;

(u) intimidates or victimises fellow employees, learners or students...

[59] Section 18(2) provides that '[i]f it is alleged that an educator committed misconduct as contemplated in subsection (1), the employer must institute disciplinary proceedings in accordance with the disciplinary code and procedures contained in Schedule 2'.

[60] What is apparent is that the statutory architecture is to ensure symmetry and to provide a platform for synergies between the different role players. In *Welkom*¹⁹ Khampepe J, referring to the Act, said the following (at para 36):

'[T]he state's obligations to ensure that the right to education is meaningfully realised for the people of South Africa are great indeed. The primary statute setting out these obligations is [the Act]. That Act contains various provisions governing the relationships between the Minister, members of provincial executive councils responsible for education (MECs), HODs, principals and the governing bodies of public schools. It makes clear that public schools are run by a partnership involving school governing bodies (which represent the interests of parents and learners), principals, the relevant HOD and MEC, and the Minister. Its provisions are carefully crafted to strike a balance between the duties of these various partners in ensuring an effective education system.'

[61] *Welkom* noted that the Act did not define 'governance', even though it placed the responsibility for governance in the hands of governing bodies. It considered the essential governance functions to be those listed in s 20(1), set out in para 47 above, and although the Act placed 'professional management' of a public school in the hands of the principal, it did not define that either.²⁰ The Constitutional Court had regard to the provisions of s 16A(2)(a), set out in para 52 above, which lists the functions and responsibilities of a public-school principal. These were an essential part of his or her professional management duties.²¹ It took the view that although the principal is a member of the governing body, he or she occupies that position as a representative of the HOD.

¹⁹ Op cit fn 3.

²⁰ Ibid paras 37 and 38.

²¹ See para 39.

[62] In para 41 of *Welkom* Khampepe J said the following:

'In addition to s 16A's general delineation of a principal's duties, each provision of [the Act] dealing with a specific aspect of a school governance or administration provides further guidance on the roles and responsibilities of the relevant actors.'

[63] In *Welkom* the Constitutional Court recognised a governing body's authority to determine a public school's admission policy, subject to express stipulations aimed at preventing the imposition of unfair admission requirements and further subject to regulation prescribed by the Minister. A Head of Department, on the other hand, is empowered to administer admissions. The Constitutional Court also appreciated that governing bodies are entitled to set a language policy, again subject to certain prescripts. So, too, is a governing body entitled to adopt a code of conduct, subject to guidelines that might be determined by the Minister. In certain instances a governing body may, as a precautionary measure, suspend a learner for up to seven days.²² The court had regard to the power of a HOD, under certain circumstances, to intervene directly in the affairs of the school.²³ It will be recalled that a principal's duties in relation to the relevant HOD was dealt with earlier in the judgment.

[64] In para 49 of *Welkom*, the Constitutional Court returned to the theme of the manner in which public schools are meant to function as a partnership. It said the following:

'Under [the Act], two things are perspicuous. First, public schools are run by a partnership involving the state, parents of learners and members of the community in which the school is located. Each partner represents a particular set of relevant interests and bears corresponding rights and obligations in the provision of education services to learners. Second, the interactions between the partners – the checks, balances and accountability mechanisms – are closely regulated by [the Act]. Parliament has elected to legislate on this issue in a fair amount of detail in order to ensure the democratic and equitable realisation of the right to education. The detail must be respected by the executive and the judiciary.'²⁴

²² See paras 43-46.

²³ See paras 47-48 and the provisions of the Act there referred to.

²⁴ See also, in this regard, *Head of Department, Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC) para 56.

The Constitutional Court also stated that the Act must be read in conjunction with other applicable legislation, in this context the EEA, which provides that an HOD is the employer of public-school educators who are appointed to provincial departmental posts, including principals.

[65] The Constitutional Court had regard to the *Oxford English Dictionary* which defines 'governance' as, amongst other things, '(t)he action or manner of governing', '(c)ontrolling, directing or regulating influence' and '(t)he manner in which something is governed or regulated; method of management, system of regulations'.²⁵ In *Ermelo* the Constitutional Court stated that a governing body's primary function is to serve the interest of the school and its learners.²⁶ In *Welkom* the distinction was noted between the 'governance' and the 'professional management' of a school. It said the following: 'As is evident from s 16A(2)(a), the professional management of a public school consists largely of the running of the daily affairs of a school by directing teachers, support staff and the use of learning materials, as well as the implementation of relevant programmes, policies and laws.'²⁷

[66] Continuing, the court returned to the role of a governing body and contrasted it with the role of the principal. The court said the following:

'To my mind, therefore, a governing body is akin to a legislative authority within the public school setting, being responsible for the formulation of certain policies and regulations, in order to guide the daily management of the school and to ensure an appropriate environment for the realisation of the right to education. By contrast, a principal's authority is more executive and administrative in nature, being responsible (under the authority of the HOD) for the implementation of applicable policies (whether promulgated by governing bodies or the Minister, as the case may be) and the running of the school on a day-to-day basis. It is this understanding of a governing body's governance obligations which must inform our interpretation of [the Act].'²⁸

²⁵ *Welkom* op cit fn 3 para 60.

²⁶ See para 57 of *Ermelo*, op cit fn 21.

²⁷ *Welkom* op cit fn 3 para 62. (Citations omitted.)

²⁸ *Ibid* para 63. The definition of 'management' in the *Oxford English Dictionary* (2008), applicable in the present context, is also useful: 'Organisation, supervision, or direction; the application of skill or care in the manipulation, use, treatment, or control (of a thing or person), or in the conduct of something'.

[68] As presaged by the question posed at the commencement of this judgment, the SGB's case is built on a house of cards. The SGB ignores the statutory architecture and does not distinguish between the different roles played by the governing body and the principal. It does not appreciate the distinction between its governance/legislative function and the managerial/executive function of the principal. It is clear from its answering affidavit that it sees the principal as having no original authority and adopts the position that all his functions and duties derive from it. Paragraph 58.3 of the answering affidavit, quoted in para 21 above, makes it clear that the SGB holds the view that it can dispense with the principal's professional role if and when it chooses. The foundation of the SGB's case is that s 20 of the Act is extensive in relation to its role, that that section puts it in overall charge of the school, and that in performing his task as principal, Mr Scheepers is merely acting on delegated authority. The SGB is unjustifiably dismissive of the provisions of the Act, the EEA and the PAM that deal with the role of the principal. It contended that the provisions of the Act restrict the principal's role to academic functions. That is palpably fallacious.

[69] Section 16 (3), in express terms, bestows a professional management authority in relation to a public school on the principal. In that capacity he or she is not restricted to managing only the academic programme of the school. Section 16A(2)(a) reaffirms the professional management function of a principal and, far from restricting it, says that what is listed thereunder as the duties of a principal is not exhaustive. In terms of s 16(2)(a) the principal is required to manage all academic *and* support staff. Furthermore, he is required to 'manage' the use of learning support material and other equipment. These are functions that exist not because of the SGB's delegation, but by virtue of the provisions of the Act. The principal's role in terms of s 8A(1), in controlling what is brought onto school premises, is yet another aspect of his management function and it does not derive from the SGB but from the provisions of the Act. When the SGB recommended Mr Scheepers to be appointed principal it was obliged, both in terms of the provisions of the Act and the EEA, to consider his ability to perform *that* function which, by its nature, is managerial. It is, as indicated in the provisions of PAM referred to above, and as one would expect, a position with a specific ranking within the post of educators.

[70] Moreover, the resolution of the SGB, set out in para 14 above, in terms, confers 'management' functions on Mr Geldenhuys. These functions are encompassed within the 'professional management' of the school, as envisaged in the Act, the EEA and the PAM. This is what Mr Scheepers' letter of appointment envisaged he would do. The functions and duties assigned to Mr Geldenhuys are those within the remit of a school principal. It is that list of functions that the SAOU sought to have declared as part of a principal's management functions and that relief was granted by the court below. One need not be a lawyer or be versed in the specifics of the applicable legislation to understand the role that a school principal plays. He or she is the day-to-day face of the school; the first port of call for parents, learners, educators, other staff and the community. Given the express terms of the applicable statutes and the incisive and clear guidance from the Constitutional Court in *Welkom*, the attitude of the SGB, with which FEDSAS aligned itself, is baffling. The SGB's case is premised on a fundamentally contorted view of the functions of a principal and a school governing body. Sections 5, 6, 7 and 8 of the Act, on which the SGB relied for its view that the principal exercised delegated powers, are of no assistance to it. Those sections deal with the governing body's authority in relation to admission to schools, the setting of its language policy, religious observances and the adoption of a code of conduct. This is in accordance with its 'legislative' and governance function. It was never the SGB's case that, in relation to that function, the principal impinged on its jurisdictional territory. The SGB, on the other hand, sought to restrict the role of the principal to strictly academic functions, despite the clear wording of the relevant provisions of the Act and in the face of clear guidance from the Constitutional Court in *Welkom*.

[71] More accurately, the fundamental premise on which the impugned decision is based is not only false but also contrived. It is clear that the relationship between the chairperson of the SGB and Mr Scheepers has soured. It is equally clear from the documents filed of record that there is tension between camps on either side. The principal might be the victim of unjustified criticism by those opposed to him or he might be conducting himself as described by them. The accusations by each camp are serious. If there is a basis for a disciplinary case to be pursued against Mr Scheepers by the SGB then that should be the route that is followed, rather than the stratagem adopted here. It is disingenuous to suggest that whatever labour law complaints Mr Scheepers might have he must take up with his employer, the HOD. In

taking the impugned decision the SGB not only acted beyond its statutory authority, but also negated Mr Scheepers' labour law rights. Wherever lies the fault for the breakdown in the relationship, it cannot be in the school's best interests that it continues. What is required is sober reflection by all concerned. More often than not, in situations such as the present it is difficult to persuade parties to retreat from entrenched positions. The school's interests are not best served by protracted litigation, with attendant financial implications for all, and continuing tensions and uncertainty. There should be a sustained effort to arrive at a solution that best serves the school and any attempt at mediation should involve parties without a leg in either camp. This ongoing tension might also be part of a greater turf war, including organisations. In this instance the interest of FEDSAS and the SAOU diverge. The legislation is there as a beacon. We must, all of us, get down to the real and urgent business of realising the right to education, which is the pathway to the development of the full potential of our learners and communities. This will only occur if every role player understands its role and fulfils it. Put differently, the message to all the role players is simply this: Put the learners first.

[72] The conclusion of the court below that the SGB lacked the statutory authority to act in the manner complained of, by effectively preventing the principal from fulfilling his statutory functions and duties, is correct. The assertion that the court below erred in holding that the decision by the SGB constituted administrative action is also unfounded. In *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* [2005] ZASCA 66; 2006 (1) SA 1 (SCA) 3 All SA 436 (SCA) para 20 this court held that a public school, along with its governing body, is an organ of state.²⁹ In *Minister of Defence and Military Veterans v Motau and Others*³⁰ the Constitutional Court, referring with approval to the decision of this court in *Grey's Marine*,³¹ divided the definition of 'administrative action' in s 1 of PAJA into seven elements to be used as a practical guideline:

'[T]here must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of

²⁹ See also *Welkom* op cit fn 3 para 141.

³⁰ *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (5) SA 69 (CC) para 33. (Citations omitted.)

³¹ *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA).

any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.'

[73] The decision in question is quite clearly administrative action. But in this case that issue is a red herring. All parties accepted that if it were to be held that the SGB did not have the statutory authority to make the decision, that would be dispositive of the appeal, irrespective of whether the decision constituted administrative action or not.³² The challenge by the SGB on this point might have been motivated by the need to avoid having to deal with procedural fairness issues. This appears to be premised on the view that a legality challenge necessarily avoids questions related to procedural impropriety. Even in that regard the SGB appears to be mistaken.³³ However, having regard to the conclusion reached above we need not entertain any of these issues any further.

[74] A further issue raised on behalf of the SGB concerned the right of the SAOU to intervene. It was contended on its behalf that the SAOU did not have a direct and substantial interest but that in reality it only had a contingent interest and that none of its rights were potentially adversely affected by the SGB's decision. In short, it submitted that the court below should not have allowed the intervention by the Union and should not have ordered the SGB to pay its costs. It was contended on behalf of the SGB that the present application did not implicate labour issues, which was all the more reason not to permit the intervention. I disagree. The SAOU was clear about its motivation. It has membership of tens of thousands, which includes principals and deputy principals, and people who aspire to those positions and educators in general. The SAOU exists to serve the interests of its members. For them it must be important that there be clarity on the rights and statutory authority of important role players within the public education sector. It also seeks to make a contribution to the development of education legislation and policy. The declaratory order sought by the union falls within the jurisdiction of the high court in terms of s 21(1)(c) of the Superior Courts Act 10 of 2013, which states that the court, at the instance of any interested party, can enquire into and determine any existing, future or contingent right. In *Cordiant Trading*

³² See *Minister of Education, Western Cape and Another v Beauvallon Secondary School and Others* [2014] ZASCA 218; 2015 (2) SA 154 (SCA) para 16

³³ See *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24; 2013 (1) SA 248 (CC) paras 33-37.

*CC v Daimler Chrysler Financial Services (Pty) Ltd*³⁴ this court, in referring to that subsection's predecessor, said the following:

'Put differently, the two-stage approach under the subsection, consists of the following. During the first leg of the enquiry the Court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the Court's discretion exist. If the Court is satisfied that the existence of such conditions has been proved, it has to exercise the exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry.'

[75] It is of course so that an applicant for leave to intervene must satisfy the direct and substantial interest test. In *SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others*³⁵ the Constitutional Court said:

'This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.'

[76] In this case it must be borne in mind that the SGB sought relief in a conditional counter-application and sought to resist relief that implicated the rights of the SAOU's membership. In my view there can be no doubt that the declaratory order sought by the SAOU and granted by the court below will lead to greater certainty for all concerned. The court below was also correct in having regard to s 38 of the Constitution, which deals with the right to approach a court for the enforcement of rights. It recognises the rights, inter alia, of anyone acting as a member, or in the interest of a group or class of persons, anyone acting in the public interest and an association acting in the interests of its members. Thus, the court below cannot be faulted for allowing the intervention by the Union, granting it relief and costs.

[77] Finally, in my view, FEDSAS contributed very little to the proceedings before us. It will be recalled that the resolution adopted by the SGB sought to involve FEDSAS

³⁴ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; 2005 (6) SA 205 (SCA) para 18.

³⁵ *SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others* [2017] ZACC 4; 2017 (5) SA 1 (CC) para 9. (Citations omitted.)

as a facilitator/mediator, even though it is an organisation for school governing bodies. The contemplated mediation exercise was predictably doomed to fail. FEDSAS successfully sought to be admitted as amicus in this appeal. In its heads of argument it was emphatic that it did not seek to take sides in the present dispute. Much of its heads of argument was devoted to repeating the applicable provisions of the Act. Despite disavowing partisanship it echoed the delegation argument made by the SGB. It is very difficult to discern a different coherent thread to the submissions on behalf of FEDSAS.

[78] For all the reasons set out above the following order is made:

The appeal is dismissed with costs, including the costs of two counsel.



M S NAVSA
JUDGE OF APPEAL

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