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TO: **MRS BP MBINQO-GIGABA, CHAIRPERSON: PARLIAMENTARY PORTFOLIO COMMITTEE ON BASIC EDUCATION**

PER EMAIL: **lbrown@parliament.gov.za**

ATTENTION: **MR LLEWELLYN BROWN, COMMITTEE SECRETARY**

15 June 2022

Dear Madam,

RE: COMMENTARY ON THE BASIC EDUCATION LAWS AMENDMENT BILL [B2-2022]

SOLIDARITY WOULD LIKE TO MAKE ORAL SUBMISSIONS TO THE PROPOSED AMENDMENT BILL

Anton van der Bijl

Head: Legal Affairs

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INTRODUCTION AND EXECUTIVE SUMMARY

1 In terms of the request for comments as published by the Portfolio Committee on Basic Education, Solidarity hereby submits its combined comments on the Basic Education Laws Amendment Bill (BELA Bill).

2 Solidarity currently offers a dependable service to approximately 213 000 members in all occupational fields, including the public education sector.

3 This letter constitutes the comments of Trade Union Solidarity, being a "*stakeholder and interested individual*" as contemplated in the invitation.

4 Solidarity has been provided with a legal opinion on the Basic Education Laws Amendment Bill on the proposed amendments to the South African Schools Act (No. 84 of 1996) (the SASA), specifically the amendments that concern (i) the governance of public schools; and (ii) the powers and functions of school governing bodies (SGBs or Governing Bodies). These comments are based on this legal opinion.

5 These comments are structured as follows:

5.1 A discussion of certain principles on the governance of schools as they emanate from policy documents;

5.2 the key principles concerning the governance of schools as distilled from the case law, has been set out;

5.3 a summary of the functions and powers of SGBs as legislated in the current scheme of the SASA; and

5.4 key areas in which the BELA Bill proposes to amend the functions and powers of the SGBs has been highlighted, and we address the irrationality of each of the amendments in light of the principles distilled from the judgments and having regard to the scheme and remaining provisions in the SASA.

6 We have included, at the end of this opinion, a brief section on the meaning that the term "*basic education*" has been given in the case law, and we compare this to the definition of "*basic education*" that is proposed in the BELA Bill which, in our view, appears to be a missed opportunity to give full recognition to the right to basic education through the SASA.

7 We have included a draft of section 21A, which provision seeks to enhance the independence of well-functioning public schools.

8 In this document the term “community” refers to “school community”. This is the community served by the public school, and foremost includes the children currently receiving their education at the school as well as the parents of that school and the educators currently employed at the particular school.

MOTIVATION FOR COMMENTS

Solidarity’s concern is the motivation and reason of the Department of Basic Education (DBE) and its provincial departments to amend current legislation.

A lack of comprehension for the role of the DBE within the education system as well as the intent and purpose of the SASA seems to be at the forefront of the proposed changes contained within the BELA Bill. Instead of assuming responsibility for the tasks they are obliged to perform and acting accordingly, the DBE would rather infringe upon the rights of communities by usurping the rights of SGBs and centralise the public education system.

It is important that the DBE realise that the current deficiencies within the education system are not the result of inadequate policies or laws, but rather inadequate application and performance of duties by the government as such.

The role of the state within the education system is to provide infrastructure, support, financial support, the development of curriculum and languages for academic purposes as well as building schools to satisfy the need of an ever-growing population.

It is also the responsibility of the government to protect the rights of communities and cultures and to enable them to exercise and preserve their languages and traditions within their schools, without discrimination.

Solidarity is of the opinion that the amendments as proposed in the BELA Bill is an attack on functional schools, especially schools within the Afrikaans community, which have been successfully governed by SGBs. Since the various provincial departments of education have not been able to provide in the needs of the many different communities or in the needs of children seeking education, it would seem as though their solution for their own inadequacy is not to start performing their duties as set out in the SASA, but rather to decentralise schools and to usurp the rights of communities with functional schools.

The answer to this “problem” within the education system would not be to amend policy and legislation, but for the DBE to start performing its duties.

Accepting the BELA Bill would greatly threaten the balance of governance between the state and communities. Communities are responsible for their structures and should be granted more autonomy. This amendment bill is in direct conflict with this value and undermines the authority of all parents with regards to the education of their children.

The question arises as to why the power of the state has to be altered to such an extent where parents and the community are denied their right to govern their schools and make decisions about the admission of learners and the language of instruction that would serve the best interest of the child.

The passing of the BELA Bill would in practice revert much of the framework concerning the governance of a public school back to resemble the bureaucratic system in which state schools were governed pre-1992. The parents and community who are the main stakeholders concerning the education of their children will only be granted limited rights in this regard. This would not serve the intention as set out in the Constitution of democratic South Africa.

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Furthermore, Solidarity is of strong opinion that more autonomy is be granted to public schools and that channels for independence be investigated and granted. Schools that are financially able and academically strong, with the active involvement of their community, may relieve the DBE of a burden by becoming independent, which will allow the various departments of education to focus their resources on schools that may need more guidance and assistance.

Solidarity requests a meeting with the minister and department for such discussions to take place and models to be orally submitted, which may then be included within the amendment bill.

PRINCIPLES ARTICULATED IN THE POLICY DOCUMENTS WHICH LEAD TO THE DRAFTING AND PROMULGATION OF THE SASA

9 At the outset, we highlight two relevant policy documents:

9.1 the *White Paper on Education and Training Notice 196 of 1995* (White Paper 1); and

9.2 *The Organisation, Governance and Funding of Schools (Education White Paper 2) General Notice 130 of 1996* (White Paper 2).

10 White Paper 1 and White Paper 2 reflect the policy considerations that informed the drafting and ultimate promulgation of the SASA. These considerations are of importance in appreciating the very unique distribution of powers in the SASA, particularly the vesting of powers in Governing Bodies, instead of in education departments or bodies or persons which are unaccountable and/or not democratically elected.

11 The basic point of departure is the responsibility of parents for the education of their children, with the State providing a facilitating role in terms of the provision of infrastructure, educators (to an extent) and operational costs (to an extent). In summary, White Paper 1 proposed the following principles as the basis of the policy framework for school ownership and governance which underlie the SASA (the relevant extracts from White Paper 1 are attached at **Annexure A1**):

11.1 Parents have the most at stake in the education of their children, and this should be reflected in the composition of Governing Bodies.

11.2 State involvement in school governance should be at the minimum required for legal accountability, and should be based on participative management.

11.3 The decision-making powers of Governing Bodies should reflect their capacity to render effective service.[1]

12 White Paper 2 gives further insight into the policy underlying the scheme of the SASA, and provides in relevant part (the relevant extracts from White Paper 2 are attached as **Annexure A2**):

12.1 Governing bodies would have substantial decision-making powers, selected from a menu of powers according to their capacity.[2]

12.2 The decision-making authority of schools in the public sector would be shared among parents, teachers, the community (government and civil society) and the learners, in ways that would support the core values of democracy.[3]

1 Chapter 12, para 29(2)(c), (g) to (i) and para 30.
2 At para 3.1.
3 At para 3.6.

12.3 The sphere of Governing Bodies would be governance, by which is meant policy determination, in which the democratic participation of the schools' stakeholders is essential. The primary sphere of the school leadership would be management, by which is meant the day-to-day organisation of teaching and learning, and the activities which support teaching and learning, for which teachers and the school principal are responsible. These spheres overlap, and the distinctions in roles needed to be agreed with the provincial education departments. This would permit considerable diversity in governance and management roles, depending on the circumstances of each school, within national and provincial policies.[4]

12.4 The implementation of these proposals would mark a major advance in the decentralisation of educational control.[5]

12.5 Public school governance was to be a genuine partnership between a local community and the provincial education department, with the education department's role being restricted to the minimum

4 At para 3.7.
5 At para 3.12.

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required for legal accountability. Because communities have such varied experience of school governance, it is inevitable that the department's role in ensuring accountability would differ considerably from one school to another. The balance of decision-making would rest with the school governing body in accordance with its capacity.[6]

12.6 Each public school governing body would be responsible for a set of basic functions ("*basic powers*") which would be agreed between the province and the governing body in accordance with the governing body's experience and capacity. Any governing body would be entitled to negotiate with its provincial education department to take responsibility for additional functions ("negotiated powers") as and when it is willing and believes it is able to do so.[7]

12.7 The provincial departments of education would wish to be assured that governing bodies had the necessary capacity to take on important functions and run them well. The delegation of such

6 At para 3.17.
7 At para 3.18.

powers would need to be conditional, and subject to regulation. The governing body would be required to satisfy the provincial education department that it had the capacity to manage its functions according to the standards of provision specified by the province. The province would need to reserve the right to intervene to ensure that law and policy were being upheld, and in particular that funds were properly administered and accounted for. There would need to be provision for the provincial authority to withdraw certain responsibilities from a governing body at its own request, or in the event of seriously unsatisfactory performance.[8]

13 These principles underly the structure and scheme of the powers and functions allocated to the national and provincial governments, and to the SGBs, in the SASA.

PRINCIPLES CONCERNING THE GOVERNANCE OF SCHOOLS FROM THE CASE LAW

8 At para 3.20.

14 The preamble to the SASA postulates the existence of the "*partnership model*" as the mechanism through which education will be conducted and achieved. In the relevant part, the preamble provides:

> *"WHEREAS this country requires a new national system for schools which will … uphold the rights of all learners, parents and educators, and promote their [all learners, parents and educators] acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State".*[9]

15 The BELA Bill does not seek to amend this key aspect of the functioning of South Africa's basic education system. Put differently, there is no indication that the foundational concept of a partnership model is to be altered. Contextually, this means that the partnership model must remain a central and determining principle in the governance of public schools even if the BELA Bill is passed into legislation.

16 Various judgments have grappled with the co-operative powers concerning the governance of schools. Key extracts from the judgments are provided at **Annexure A3**. We set out below the key principles from the seminal judgments that have engaged with these powers.

[9] Underlining added.

17 The first principle is that the SASA contemplates a *"partnership"* between the four major stakeholders: the State, the parents, educators and learners.[10] In the ***Ermelo judgment*** and ***Rivonia Primary judgment***, the Court recognised that the overall design of the SASA is that public schools are run by three crucial partners.[11]

17.1 The national government is represented by the Minister of Basic Education ("**Minister**").

17.2 The provincial governments act through the respective MECs for Education ("**MECs**"), together with the Heads of the Provincial Departments of Education ("**HODs**").

~~17.3~~ Parents of the learners and members of the community in which the school is located are represented in the SGB. An SGB is *"democratically composed and is intended to function in a democratic manner."*[12] The SGB has been described by the Court

10 ***Schoonbee judgment*** At 883E-G; ***FEDSAS judgment*** at para 1 where the Court held that education is a collective enterprise.
11 ***Ermelo judgment*** at para 56, footnotes omitted; ***Rivonia Primary judgment*** at para 36.
12 ***Ermelo judgment*** at para 57.

as a *"vital lifeblood to the proper and fulsome learning and teaching"*.[13]

18 Similarly, the Constitutional Court in the ***Welkom judgment*** emphasised the principle that a public school is governed by a partnership. The SASA *"makes it 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."*[14] It is therefore a partnership involving *"State, parents of learners and members of the community in which the school is located."*[15]

19 The second principle concerns the delineation of the different roles and functions of the stakeholders. Each partner represents a particular set of relevant interests and bears corresponding rights and obligations in the provision of education services to learners.[16]

19.1 At the national level, the Minister must determine norms and standards for school funding,[17] and may prescribe minimum uniform

13 ***FEDSAS judgment*** at para 47.
14 ***Welkom judgment*** at para 36.
15 ***Welkom judgment*** at para 49.
16 ***Welkom judgment*** at para 49.
17 SASA s 35.

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norms and standards[18] including for safety measures at schools; national curriculum;[19] and *"the "capacity of a school in respect of the number of learners a school can admit", including norms and standards relating to class size, the number of teachers, and utilisation of available classrooms".*[20] The Minister's power to promulgate regulations is broad, covering *"any matter which may be necessary or expedient to prescribe in order to achieve the objectives of this Act."*[21]

19.2 At a provincial level, it is the responsibility of the MECs to establish and provide enough schools in the provinces to accommodate all children who are subject to compulsory attendance. It is the responsibility of the relevant HODs to exercise executive control over public schools through school principals, and to monitor, regulate and enforce compulsory attendance, compliance with the minimum norms and standards, and the minimum outcomes and standards of the curriculum.[22]

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18 SASA s 61.
19 SASA s 61.
20 ***Rivonia Primary judgment*** at para 38. Footnotes omitted.
21 SASA s 61(i).
22 ***Welkom Judgment*** at para 42; ***Rivonia Primary judgment*** at para 39; SASA s 58C.

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19.3 At school level, parents and governing bodies *"have an immediate interest in the quality of children's education. And they play an important role in improving that quality by supplementing state resources with school fees."*[23]

19.4 Thus, the governance of every public school is vested in its SGB.[24] Although "*governance*" is not defined in the SASA, section 20(1) lists specific governance functions of the SGB. In the ***Welkom judgment,*** the Court relied on the definition of "*governance*" in the *Oxford English Dictionary*, which defines it as (amongst other things) *"'[t]he action or manner of governing', '[c]controlling, directing or regulating influence' and '[t]he manner in which something is governed or regulated; method of management, system of regulations.'"*[25] The SGB'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 the school, adopting a code of conduct for learners and administering school property (subject to*

23 ***Rivonia Primary judgment*** at para 70.
24 ***Mikro judgment***at para 5; SASA s16(1).
25 ***Welkom Judgment*** at para. 60.

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certain constraints).” The SGB has an overall responsibility for the governance of the public school, and has general fiduciary obligations to ensure that the school environment appropriately accommodates learners’ needs.[26]

19.5 An SGB’s *“primary function is to look after the interest of the school and its learners. It is meant to be a beacon of grassroots democracy in the local affairs of the school. Ordinarily, the representatives of parents of learners and of the local community are better qualified to determine the medium best suited to impart education and all the formative, utilitarian and cultural goodness that comes with it.”*[27] The SGB, amongst other things, is *“responsible for determining the admission policy of that school”*[28] which includes determining the capacity of the school. It is *“significant that [SGBs] are afforded this role”* as the SGB *“is in a position to have regard, in an admission policy, to a range of interconnected factors relating to the planning and governance of the school as a whole.”*[29]

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26 ***Welkom Judgment*** at para 59.
27 ***Ermelo judgment*** at para 57. Emphasis supplied.
28 ***Rivonia Primary judgment*** at para 40.
29 ***Rivonia Primary judgment*** at para 40. Emphasis supplied.

19.6 While governance vests with the SGB, the professional management of a public school is vested in the principal under the authority of the HOD.[30] "*Professional management*" is not defined in the SASA, but section 16A lists certain functions and responsibilities of public-school principals. The Court has held that 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."*[31] A principle *"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."*

19.7 The Court has described the difference in the SGB's and principal's roles as follows:

> *"To my mind, therefore, a governing body is akin to a legislative authority within the public-school setting, being*

30 ***Mikro judgment*** at para 5; ***Rivonia Primary judgment*** at para 43; SASA s16(3).
31 ***Welkom Judgment*** at para 62.

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> *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."*[32]

20 In the ***Mikro judgment***, the SCA confirmed that while the Minister is empowered by the SASA to determine the norms and standards for language policy in public schools, the Minister is not authorised to determine the language policy for a particular school as that is a function for the SGB.[33]

21 The third principle is *"cooperative governance"*, which underlies the functioning of the partnership governing public schools.[34] Given the partnership model envisaged by the SASA, as well as the co-operative governance scheme set out in the Constitution, the relevant functionaries and the SGBs are under a duty to engage with each other in good faith on any disputes, including disputes over policies adopted by the Governing

32 ***Welkom judgment*** para 63.
33 At para 33.
34 ***FEDSAS judgment*** at paras 26-27, 47.

Bodies. The engagement must be directed towards furthering the interests of learners.[35]

22 In the ***Rivonia Primary judgment***, the Constitutional Court held that co-operation between SGBs and national or provincial government is *"rooted in the shared goal of ensuring that the best interests of learners are furthered and the right to basic education is realised."*[36]

23 The ***Welkom judgment*** held that in order to achieve this partnership, the provisions in SASA are *"carefully crafted to strike a balance between the duties of these various partners in ensuring an effective education system."*[37] The *"interactions between the partners – the checks, balances and accountability mechanisms – are closely regulated by [the SASA]. 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."*[38] One must balance *"the importance of the accountability checks imposed by the [SASA] with considerations of legality and respect*

35 ***Rivonia Primary judgment*** at para 49.
36 At para 69. Emphasis supplied.
37 ***Welkom Judgment*** at para 36.
38 ***Welkom Judgment*** at para 49.

for the sensitivity of the partnership between the Minister, Provincial Education Department, public schools and school governing bodies."[39]

24 The Constitutional Court went on to hold that:

> *"[123] The importance of cooperative governance cannot be underestimated. It is a fundamentally important norm of our democratic dispensation, one that underlies the constitutional framework generally and thus has been categorised in the [SASA] as an organizing principle for the provision of access to education. ….*
>
> *[124] Given the nature of the partnership that the [SASA] has created, the relationship between public school governing bodies and the State should be informed by close cooperation, a cooperation which recognizes the partners' distinct but inter-related 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 capabilities are connected to the organization 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 [SASA]."*[40]

25 In a minority concurring judgment by Froneman and Skweyiya JJ, they emphasised the importance of cooperative governance, elucidating on what was required:

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39 ***Welkom Judgment*** at para 76.
40 ***Welkom judgment*** at paras 123-124. Emphasis supplied.

25.1 There is a *"constitutional obligation on the partners in education to engage in good faith with each other on matters of education before turning to Courts."*[41]

25.2 The emphasis on participation and engagement finds particular recognition in the Constitution's provisions on co-operative government. *"Section 40(1) establishes the principle that in the Republic of South Africa, government is constituted as national, provincial and local spheres of government which are "distinctive, interdependent and interrelated". Of particular relevance to the present case, however, is that the principles of co-operative government and inter-governmental relations are also extended to all organs of State within each sphere of government in section 41."*

25.3 *"The school governing bodies and HOD are organs of State. In terms of section 41(1)(h) they have an unequivocal obligation to co-operate with each other in mutual trust and good faith by assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest, co-*

41 At para 135.

ordinating their actions, and avoiding legal proceedings against one another."[42]

25.4 The provisions in SASA *"reinforce the provisions of the Constitution that engagement, participation and co-operation is the required general norm and that co-operative governance requires recognition of the distinctiveness, interdependence and interrelation of the different functionaries involved in the co-operative effort."*[43]

25.5 The explicit provisions of section 41(1)(h)(vi) of the Constitution appear to require a form of exhaustion of internal remedies before organs of State within a sphere of government should turn to the Courts.[44]

26 Cooperative governance requires proper engagement. In the ***Rivonia Primary judgment***, the Court emphasised the need for proper engagement between all parties affected,[45] as the planning and coordination in partnership with the provincial government and with the SGBs *"is crucial"*.[46]

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42 At para 141. Footnotes omitted. Emphasis supplied.
43 At para 147.
44 At para 162.
45 At para 72.
46 At para 71

There is a strong emphasis on the relevant stakeholders' constitutional and statutory obligation to engage in good faith before turning to the courts,[47] and the Court held that *"one organ of state cannot use its entrusted powers to strong-arm others."*[48]

27 The fourth principle is that the powers of SGBs are not unqualified:

27.1 There are important textual qualifiers in section 5(5) of the SASA which subject the SGB's powers to other provisions in the SASA (as well as to provincial law). The effect of this is that *"the determination of admissions may be subject to provincial government's intervention in terms of the SASA, or applicable provincial law if the intervention is provided for in those instruments."* The powers of the SGBs are also subject to the broader Constitutional scheme.[49]

28 The Court held in the ***FEDSAS judgment*** that the SGB's power to formulate an admission policy is not unfettered, it is *"subject to limitations in sections 5(1) to (3) of the [SASA] as commanded by section 5(5) of the [SASA]."* [50] The power to determine the admission policy of a school is thus

47 At para 73.
48 At para 78
49 ***Rivonia Primary judgment*** at para 41.
50 At pars 29.

subject to two internal qualifiers – first it is subject to the provisions of the SASA and any applicable provincial law; and second, it must conform to all applicable law as that is what the rule of law requires.[51]

29 In the ***MEC Northwest v FEDSAS judgment***, the Court confirmed that the scope of the SGBs' authority over the governance of schools is not exclusive:

> *"SGBs do not have exclusive authority over the governance of schools and by extension, school hostels and accordingly do not have unfettered powers to administer school hostels."*[52]

30 In the ***Ermelo judgment***, the Court held that the SGB's powers to determine the school's language policy are qualified by the following:[53]

30.1 It is subject to the Constitution, the SASA, and any applicable provincial laws.[54]

30.2 The Minister may, subject to the Constitution, by notice, determine norms and standards for language policy in public schools, which

51 At paras 43-44
52 At para 22.
53 At paras 59-60 and 99.
54 At para 59.

the Minister has done. They are *"by definition general – they cannot relate to any particular school's language policy."*[55]

30.3 No form of racial discrimination may be practiced in implementing a language policy.[56]

30.4 A language policy must comply with the norms and standards for the provision of school facilities described by the Minister.[57]

30.5 "*It is, therefore, clear that the determination of language policy in a public school is a power that in the first instance must be exercised by the governing body. The power must be exercised subject to the limitations that the Constitution and the Schools Act or any provincial law laid down. Even more importantly it must be understood within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress*."[58]

55 At para 60.
56 At para 60.
57 At para 60.
58 At para 61.

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31 In the ***Mikro*** judgment, the SCA confirmed that the SGB's exercise of power in formulating the language policy constitutes administrative action, which is reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**).[59] Thus, the HOD may review and set aside an SGB's language policy if it is unreasonable; the HOD may also in terms of section 22 of the SASA, on reasonable grounds, withdraw the function of an SGB to determine the language policy.[60]

32 However, the SCA went on to hold that the HOD may not summarily instruct the principal to admit learners in disregard for the SGB's language policy:[61]

> *"[43] The first and second appellants did not avail themselves of any of these remedies, but simply instructed and assisted the principal of the second respond to admit learners to the second respondent for instruction in English. They were not entitled to do so. Although the department admits learners to a public school (s 5(7)), the admission policy of the school is determined by the governing body of the school. By admitting learners or instructing the principal to admit learners contrary to the admission policy of the school the department was substituting its own admission policy for that of the school. In so doing it was acting unlawfully, as it did not have the power to determine an admission policy for the school. Even if the language and admission policy determined by the first respondent was invalid, the department or the first and second appellants did not, in terms of the Act, have the power to determine a language policy for the second respondent."*

59 At para 36.
60 At paras 36-37 and 42.
61 At para 43.

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33 This leads us to the fifth principle, which is that the HOD and MEC's oversight functions must be exercised reasonably and proportionately, and with due regard to procedural fairness.[62] The main principles in this regard are as follows:

33.1 Where the SASA empowers a governing body to determine policy in relation to a particular aspect of school functioning, a head of department or other governmental functionary cannot simply override the policy adopted or act contrary to it. This is so even where the functionary is of the view that the policies offend the SASA or the Constitution. [63]

33.2 A functionary may intervene in the SGB's policy-making role or depart from a school governing body's policy, but only where that functionary is entitled to do so in terms of powers afforded to it by the SASA or other relevant legislation. This is an essential element of the rule of law. [64]

62 ***Schoonbee judgment*** at 885C-E; ***Rivonia Primary judgment*** at para 58.
63 ***Rivonia Primary judgment*** at para 49.
64 ***Rivonia Primary judgment*** at para 49.

33.3 Where it is necessary for a properly empowered functionary to intervene in a policy-making function of the Governing Body (or to depart from an SGB's policy), then the functionary must act reasonably and procedurally fairly. [65]

34 In the ***Ermelo judgment***, the Court held that the HOD may withdraw a function from the SGB, including withdrawing a school's language policy, provided it is done *"on reasonable grounds and in order to pursue a legitimate purpose."*[66] What constitutes *"reasonable grounds"* was articulated as follows will have to be determined on a case by case basis:[67]

> *"In this regard, a reviewing court will have to consider carefully the nature of the function, the purpose for which it is revoked in the light of the best interests of actual and potential learners, the views of the governing body and the nature of the power sought to be withdrawn as well as the likely impact of the withdrawal on the well-being of the school, its learners, parents and educators. And all these factors would have to be weighed within the broad contextual framework of the Constitution.*
>
> *In the case of language policy, which affects the functioning of all aspects of a school, the procedural safeguards, and due time for their implementation, will be the more essential. It goes without saying that excellent institutional functioning requires proper opportunity for planning and implementation."*

65 ***Rivonia Primary judgment*** at para 49.
66 At para 68 and 71.
67 At paras 74-75 and 78. Footnotes omitted.

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35 The Court went on to hold that in addition to the reasonableness requirement, procedural fairness must be followed.[68] The requirements of procedural fairness must be determined flexibly, having regard to the facts of the particular case.[69] The SGB must have adequate notice of the HOD's intention to dissolve it so that the SGB can exercise its right to be heard prior to the HOD taking a decision:

> *"the SGB was not afforded even the slightest opportunity to deal with the intentions of the second respondent to dissolve it. … The intended administrative action has to be disclosed timeously to the affected party to allow him or her to make such representations as he or she may find to be appropriate. Failure to do so by an official acting within the ambit of a statute, wielding power entrusted to him in advancement of one or other public purpose, is fatal to that administrative act. These statutory injunctions must be observed and failure to do so of necessity leads to abortive administrative action."*[70]

36 Where an HOD forms the view that a policy adopted by the SGB fails to give effect to the relevant Constitutional rights and objectives of the SASA, the HOD's recourse is two-fold: (i) the SASA obliges the HOD to engage in a comprehensive consultation process with the relevant SGB regarding the particular policies, and then, if there are *"reasonable grounds"* for doing so, to take over the performance of the particular governance or policy-

68 ***Ermelo judgment*** at para 73.
69 ***Rivonia Primary judgment*** at para 62.
70 ***Schoonbee judgment*** at 885F-H

formulation function in terms of section 22 (the section 22 intervention process); and (ii) the HOD may approach the court for appropriate relief, for example to obtain an interdict in respect of the application of the policies or to have the policies reviewed and set aside.[71]

FUNCTIONS AND POWERS OF SGBs AS LEGISLATED IN THE CURRENT SCHEME OF SASA

37 The golden thread that runs through the SASA (which stems from the White Paper 1 and White Paper 2, and which has been highlighted by the courts) is that public schools are run by a partnership involving:[72]

37.1 The national government, represented by the Minister, who prescribes national minimum norms and standards for a range of matters relating to public schools, subject to the restrictions and requirements of SASA itself.[73]

37.2 The provincial governments, represented by the MEC, the HODs and the school principals, who exercise executive control over

71 ***Welkom judgment*** at para 72.
72 ***Welkom judgment*** para 36.
73 SASA s 3(2), s 5(4)(*c*), s 5A(1) and 5A(2), s 6(1), s 6A(1), s 8(3), s 14(6), s 16A(1)(*b*)(i), s 20(11), s 35, s 39(4), s 39(7), s 39(8) and s 39(10).

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public schools, and must perform their powers and functions subject to the restrictions and requirements of SASA itself, and the Minister's minimum norms and standards. Importantly, the MEC has a duty to establish new public schools,[74] and must ensure that there are enough public school places for every child in the province.[75]

37.3 The school communities, represented by their SGBs, who have limited autonomy over the governance of some of their public schools' domestic affairs.[76] They must do so subject to the restrictions and requirements of SASA, the Minister's national minimum norms and standards and the executive powers of the MECs, the HODs and the principals in the exercise of their powers and functions.

38 The provisions in the SASA are carefully crafted to strike a fine balance between the duties of these various partners in ensuring an effective education system.[77]

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74 SASA s 12(1)
75 SASA s 3(3) and 3(4).
76 SASA s 16.
77 ***Welkom judgment*** at para 36.

39 Section 23 of the SASA underscores the importance of parent responsibility in the governance of public schools, by ensuring that there is a minimum number of parents serving the SGB,[78] and this has been recognised by the Constitutional Court:

39.1 In ***MEC for Education, KwaZulu-Natal And Others v Pillay***,[79] the Constitutional Court held that it needs to be emphasised that the strength of public schools will be enhanced only if parents, learners and teachers accept that all South Africans own our public schools and that we should take responsibility for their continued growth and success.[80]

39.2 In the ***FEDSAS judgment*** it was stated that *"school governing bodies are a vital lifeblood to proper and fulsome learning and teaching. Parents must be meaningfully engaged in the teaching and learning of their children. The Schools Act carves out an important role for parents and other stakeholders in the governance of public schools. School governing bodies are made up in a*

78 SASA s23(9) which provides that the *"number of parent members must comprise one more than the combined total of other members of a governing body who have voting rights"*.
79 2008 (1) SA 474 (CC) ("***Pillay judgment***").
80 ***Pillay judgment*** at para 185.

democratic and participatory manner and ordinarily would advance the legitimate interests of learners at a school. The Constitution and the Schools Act also entrust vital tasks related to the education of our children to the MEC and HOD. In the past, this Court has correctly cautioned against undue dominance of school governing bodies by the provincial Executive. We have called for cooperative governance between statutory creatures – school governing bodies and the MEC and HOD – entrusted with effective and universal access to basic education".[81]

40 This structure creates a tension between the provincial government, on the one hand, and the SGBs of public schools, on the other:

40.1 The duties of the provincial government are to society at large. It must ensure that there are enough public school places for every child in the province[82] and that all public schools have the infrastructure, capacity and materials required by the Minister's minimum norms and standards.[83] The provincial government's interest and inclination are accordingly to employ the resources of

81 At para 47. Emphasis supplied.
82 SASA s 12(1), read with s 3(3) and s 3(4).
83 SASA s 5A(1) and s 5A(2), read with s 58C.

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all public schools to the best advantage of society at large, whether or not it serves the best interests of any particular school.

40.2 An SGB, on the other hand, must serve the best interests of its particular school. Section 16(2) of the SASA provides that an SGB "*stands in a position of trust towards the school*". Section 20(1)(*a*) of the SASA goes on to say that an SGB must *"promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at the school"*. Its duty is to exercise and perform its powers and functions in the best interests of the school and the education of its learners. It may not exercise its powers or perform its functions for any other purpose (subject to the consideration only that it must take into account the interests of prospective learners in the community).[84]

41 The SASA intends for both the societal interests and the narrower interests of SGBs to be served. It strikes a balance between them by a nuanced distribution of powers, and makes plain that the control of the domestic affairs of schools must occur in accordance with the statute.

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84 ***Ermelo judgment*** at para 99

42 It is against that backdrop that the governance of a public school is placed in the hands of the SGB[85] elected in accordance with the provisions of the statute,[86] so that the "*effective power to run schools is …placed in the hands of parents and guardians of learners"*.[87] The duty of the SGB is to promote the best interests of the school and to ensure its development through the provision of quality education for all learners at the school.[88]

43 It is apparent from the SASA that the powers and duties of an SGB are wide-ranging and onerous.

43.1 They include the determination of times of the school day,[89] administration of the school's property (including buildings and grounds occupied by the school, such as school hostels),[90] and making recommendations to the HOD on the appointment of staff.[91]

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85 SASA s 16(1).
86 SASA s 28. The stakeholders to be represented on an SGB are prescribed in the SASA s 24(1), as are the office bearers in SASA s 29(1). The Chairperson must be a parent member – SASA s 29(2).
87 ***Ermelo judgment*** *at* para *79.*
88 SASA s 20(1)(*a*).
89 SASA s 20(1)(*f*).
90 SASA s 20(1)(*g*).
91 SASA s 20(1)(*i*) and (*j*).

43.2 The discipline of learners is placed squarely within the ambit of the SGB's competencies. Section 8(1) of the SASA obliges an SGB to adopt a code of conduct for learners enrolled at the school which it governs. The conduct of disciplinary proceedings and even suspension of learners is the duty of the SGB, in accordance with section 9 of the SASA, and subject only to the defined role of the HOD in this regard. The proposed amendments to sections 8(1) and 9(1) in the BELA Bill elucidate these powers, but the powers remain with the SGB.

43.3 Moreover, an SGB must take all reasonable measures within its means to supplement the resources supplied by the State to improve the quality of education provided by the school to all learners at the school.[92] The SGB must establish a school fund and administer it in accordance with directions issued by the HOD.[93] It is the responsibility of the SGB to prepare a budget each year[94] and to present it to a general meeting of parents, as prescribed.[95] The SGB may also apply to the Department of Education to make

92 SASA s 36(1).
93 SASA s 37(1).
94 SASA s 38(1).
95 SASA s 38(2).

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payment of additional benefits or remuneration of personnel employed by the Department.[96] It is the duty of the SGB to implement a resolution of parents concerning the levying of school fees.[97] The SGB must keep financial records and have financial statements drawn up and submitted to the MEC, which financial statements (according to the amendments proposed in the BELA Bill) must be presented to the parents at a general meeting of parents.[98] The SGB is also responsible for appointing an auditor to audit the financial statements of the school.[99]

43.4 Moreover, in accordance with section 21, the HOD may allocate to the SGB the functions *inter alia* of maintaining and improving the school's property, and buildings and grounds occupied by the school, including school hostels;[100] determining the extra-mural curriculum of the school and the choice of subject options in terms of provincial curriculum policy;[101] purchasing of textbooks,

96 SASA s 38A(2).
97 SASA s 39(3).
98 SASA s 42.
99 SASA s 43.
100 SASA s 21 (1)(*a*).
101 SASA s 21(1)(*b*)

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educational materials or equipment for the school;[102] and paying for services to the school.[103] The BELA Bill proposes changing the procurement requirements by centralising this function with the HOD.

43.5 In the view of the Constitutional Court, the SGB exercises *"defined autonomy over some of the domestic affairs of the school"*[104] and enjoys implied powers *"in light of [its] overall responsibility for the governance of the school and its general fiduciary obligation to ensure that the school environment appropriately accommodates learners' needs"*.[105]

44 That the SGB cannot be stripped of its powers without leaving the school in disarray, is self-evident. As the Constitutional Court recognised in the ***Welkom judgment***,[106] *"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*

102 SASA s 21(1)(*c*).
103 SASA s 21(1)(*d*).
104 ***Ermelo judgment*** at para 56.
105 ***Welkom judgment*** at para 59.
106 ***Welkom judgment*** at para 59.

the school and to ensure an appropriate environment for the realisation of the right to education."

45 The BELA Bill proposes amending the aforesaid powers of SGBs in key respects, which we address below.

AMENDMENTS TO THE SASA THAT AFFECT THE FUNCTIONS AND POWERS OF THE SGB

(i) The SGB's powers concerning the admission policy

46 The power to determine a school's admission policy vests in its SGB in terms of section 5(5). Currently, the only limitations on this power are the following:

46.1 The broader Constitutional scheme.[107]

46.2 A school must admit learners without unfairly discriminating in any way.[108]

107 ***Rivonia Primary judgment*** at para 41.
108 SASA s 5(1).

46.3 A school may not administer any test related to the admission of a learner to a public school.[109]

46.4 A school may not refuse to admit a learner merely because his or her parent is unable to pay the school fees, or does not subscribe to the mission statement of the school, or has refused to enter into a contract in terms of which the parent waives any claim for damages arising out of the education of the learner.[110]

46.5 The school's admission policy must comply with the Minister's norms and standards.[111] The MEC must ensure that it complies with these norms and standards.[112] The principal, acting under the authority of the HOD, is responsible for implanting the admission policy.[113]

46.6 While the SGB determines the admission policy, individual decisions on admission are taken only provisionally at school level, by the principal acting under the authority of the HOD. Where the

109 SASA s 5(2).
110 SASA s 5(3).
111 SASA s 5A(3).
112 SASA s 58C(2).
113 ***Rivonia Primary judgment*** at para 43.

need arises, section 5(9) provides a safety valve, which allows the MEC to consider admission refusals and overturn an admission decision taken at school level.[114]

47 Section 4(d) of the BELA Bill proposes amending section 5(5) of the SASA by introducing a proviso, which seeks to limit the SGB's power to determine the school's admission policy. The first substantive change, introduced pursuant to the proviso, is that the proposed section 5(5)(a) of the SASA states that the HOD, after consultation with the governing body, has the *"final authority"* to admit a learner to a public school

47.1 This proposed amendment is irrational and unnecessary for the following reasons:

47.1.1 The delineation of *"final authority"* conflicts with the scheme of the SASA which, notwithstanding all of the proposed amendments in the BELA Bill, envisions a cooperative partnership between the SGB, the HOD and the Minister. The notion of a cooperative partnership between the Minister, the provincial department and the

114 ***Rivonia Primary judgment*** at para 44.

SGBs, as envisioned and prescribed in section 41(h) of the Constitution (and elucidated upon by the courts), is undermined by giving the HOD the *"final authority"*.

47.1.2 Pursuant to section 58C(2) of SASA, the MEC *"must ensure that the policy determined by the governing body in terms of section 5(5) and 6(2) complies with the norms and standards."* By giving the HOD (which is normally an administrative role) the *"final authority"*, the MEC's powers are reduced and rendered somewhat meaningless, thereby undermining the careful balance of powers in the SASA to ensure a partnership with the different stakeholders.

47.1.3 In addition, by giving the HOD the *"final authority"*, the Minister's proposed new powers will also be reduced and rendered hollow. In this respect, section 41 of the BELA Bill proposes amending section 61 of the SASA by including in the Minister's powers the power to promulgate regulations *"on the admission of learners to public schools"*. If *"final authority"* rests with the HOD, then this

careful balance of power between the national and provincial spheres of government is denuded.

47.1.4 The Constitutional Court stated that the provincial government and SGBs should not focus on which organ of state has the final authority to determine a school's admission policy, but should rather be focused on cooperative governance and on the best interests of the child.[115] The notion of cooperative governance is undermined by giving one organ of state the *"final authority"*, particularly in light of the Constitutional Court having held that *"one organ of state cannot use its entrusted powers to strong-arm others*".[116]

47.1.5 The SGB is the most appropriate stakeholder to determine the school's admission policy, including whether a learner meets the requirements for admission. This is because the SGB is able to take into account a range of interconnected factors relating to the planning and

115 ***Welkom judgment*** (concurring minority judgment) at para 132.
116 ***Rivonia Primary judgment*** at para 78.

governance of the school as a whole.[117] By giving the HOD the "*final authority*" to determine a learner's admission, the SGB's role in the partnership, and its accountability to the school community it serves, is substantively diminished. Although the provision does require consultation with the SGB, it places the *"final authority"* with the HOD, reducing the notion of cooperative governance to "*consultation*" rather than giving it its full meaning as prescribed in section 41(1)(h) of the Constitution.

48 The second substantive change introduced, is the requirement that the SGB submit the admission policy, and any amendments thereto, to the HOD for *"approval"*. This is introduced in sections 5(5)(b), 5(5)(c), and 5(5A) to 5(5D).

48.1 The proposed amendment is irrational and the execution thereof impossible. We state the following reasons:

117 ***Rivonia Primary judgment*** at para 40.

48.1.1 The requirement of the HOD's *"approval"* of the school's admission policy conflicts with the scheme of the SASA which envisages a cooperative partnership between the SGB and HOD. The requirement of the HOD's *"approval"* creates the same difficulties as the HOD having the *"final authority"* – in both instances, the delicate balance of power giving effect to cooperative governance is disturbed in favour of granting power to the HOD and denuding the SGB of its powers.

48.1.2 We accordingly reiterate the concerns raised in paragraph 47.1 above.

48.1.3 In addition, the requirement of the HOD's *"approval"* creates a substantial administrative burden for the HOD. In particular, there are thousands of public schools falling under the jurisdiction of each HOD, with each school (and community it serves) having different financial means and resources affecting its admission policy. The HOD is unlikely to have sufficient resources to review each and every policy such that the HOD will be in a position to

meaningfully engage with the policies. Many policies are therefore likely to be *"approved"* by default, rendering the provision meaningless.

48.1.4 Although the amendments make provision for the current admission policy to be *"regarded as the valid admission policy of the school during the 60 day period referred to in subsection (5B)"*, the proposed amendments are silent on the status of the policy in the event that the HOD makes recommendations concerning certain of its provisions. This raises numerous questions – will those provisions be deemed valid until amended and approved, or will they be deemed invalid in which event there is a *lacuna* in the school's admission policy which may substantively affect the admission of learners.

48.1.5 The proposed amendments are also silent as to whether the HOD becomes *functus officio* in respect of a policy that is deemed approved, and what recourse the HOD may have to re-visit a policy that has been deemed approved or erroneously approved.

48.2 We propose revisions as follows:

48.2.1 **Proposed section 5(5)(b) and 5(5)(c)** not to be amended as proposed in the BELA Bill. Since no void nor problem has been identified that would justify the insertion or amendment of this section, the inclusion thereof would be unreasonable.

48.2.2 **Section 5(5)(d):** Solidarity questions the reasoning behind the amendment. It is irrational to undermine the authority and rights of the democratically elected SGB and subject it to the HOD who has no insight into the functionality of the specific public school. With this limited knowledge and insight, it is unlikely that the HOD would be able to make decisions in the best interest of child or the school community. We therefore deem the amendment to the current subsection, as proposed in the BELA Bill, unnecessary.

48.2.3 **Proposed deletion of sections 5(5B), 5(5C), and 5(5D):** These provisions are onerous, increasing the

administrative burden on the HOD in particular but also on public schools. The HOD will receive thousands of admission policies, and is unlikely to have the resources or capacity to meaningfully engage with each policy. By not amending the "*approval*" requirement (as proposed above) the administrative burden on HODs is relieved.

(ii) The SGB's powers concerning the language policy

49 The power to determine a school's language policy vests in the SGB, in terms of section 6(2) of the SASA, and for good reason: the language policy will substantively affect *"the functioning of all aspects of a school"*.[118] The language policy may well have financial implications given the potential impact on the required staff complement, infrastructure and running costs of a school. We reiterate that the SGB's powers and duties include administration of the school's property,[119] and the Governing Body must take all reasonable measures within its means to supplement the resources supplied by the state to improve the quality of education provided by the school to all learners at the school.[120] The SGB must establish a school

118 ***Ermelo judgment*** at para 75
119 SASA s 20(1)(*g*).
120 SASA s 36(1).

fund and administer it.[121] It is also the responsibility of the SGB to prepare a budget each year[122] In accordance with section 21, the HOD may allocate to the SGB the functions *inter alia* of maintaining and improving the school's property, and buildings and grounds occupied by the school;[123] determining the choice of subject options in terms of provincial curriculum policy;[124] purchasing of textbooks, educational materials or equipment for the school;[125] and paying for services to the school.[126] We argue that it is for this reason that the Constitutional Court has recognised:

> *"The legislation devolves the decision on the language of instruction onto the representatives of parents and the community in the governing body. It accords well with the design of the legislation that, in partnership with the State, parents and educators assume the responsibility for the governance of schooling institutions ... Ordinarily, the representatives of parents of learners and of the local community are better qualified to determine the medium best suited to impart education and all the formative, utilitarian and cultural goodness that comes with it".*[127]

50 This power is of course subject to the following limitations:

121 SASA s 37(1).
122 SASA s 38(1).
123 SASA s 21 (1)(*a*).
124 SASA s 21(1)(*b*)
125 SASA s 21(1)(*c*).
126 SASA s 21(1)(*d*).
127 ***Ermelo judgment*** para 57, relying on SASA s 6(2).

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50.1 The *requirements* of the Constitution must inform the exercise of power, as must the provisions of the SASA and any applicable provincial laws.[128]

50.2 In terms of section 6(1) of the SASA, the Minister may determine norms and standards for language policy in public schools. The Minister has done so by Government Notice 1701 of 19 December 1997. A school's language policy determined in terms of s 6(2) must comply with these norms and standards.

50.3 Sections 5A(3) and 5A(4) of the SASA also provide that a school's language policy must comply with the norms and standards for the provision of school facilities prescribed by the Minister in terms of sections 5A(1) and 5A(2).

50.4 The Minister is obliged in terms of section 58C(2) to ensure that a school's language policy complies with both these sets of norms and standards.

128 ***Ermelo judgment*** at para 59.

50.5 No form of racial discrimination may be practiced in implementing a language policy.[129]

51 Under the current statutory framework:

51.1 Subject to the aforesaid requirements, a school's language policy is left to the discretion of its SGB. The power must be exercised *"in the first instance"* by the SGBs.[130]

51.2 The SGB must exercise this discretion in terms of sections 16(2) and 20(1)(*a*) in the interests of the school and the quality of education of its learners (subject to some consideration of the greater societal interest, in the form of prospective learners in the community).[131]

51.3 Where an HOD instructs a school principal to act contrary to a policy devised and adopted by that school's SGB, the HOD is usurping the power of the SGBs to formulate the policies.[132]

129 ***Ermelo judgment*** at para 60.
130 ***Ermelo judgment*** at para 61.
131 ***Ermelo judgment*** at paras 58 - 61.
132 ***Welkom judgment*** at para 80.

51.4 The SGB's policy-making function may be withdrawn,[133] but this extraordinary step may be taken only on reasonable grounds and in the pursuit of a legitimate purpose:[134]

> *"[this] does not entail that the HOD enjoys untrammelled power to rescind a function conferred on a governing body ... The power to revoke will have to be exercised on reasonable grounds."*[135]
>
> *"What would constitute reasonable grounds will have to be determined on a case by case basis. This will require full and due regard to all the circumstances that actuated the HOD to bypass the governing body in relation to the specific power withdrawn."*[136]

52 Section 5(c) of the BELA Bill proposes amending section 6 of the SASA by adding subsections (5) to (20), which seek to limit the SGB's power to determine the school's language policy. The first substantive change introduced is the requirement that the SGB submit the admission policy, and any amendments thereto, to the HOD for *"approval"*.

52.1 We deem the proposed amendment irrational and without consideration of the rights of the children currently receiving their education, as well as the community:

133 ***Ermelo judgment*** at paras 64 and 71.
134 ***Ermelo judgment*** at paras 68, 71 - 72, 81 and 88.
135 ***Ermelo judgment*** at para 73.
136 ***Ermelo judgment*** at para 74.

52.1.1 The requirement of the HOD's *"approval"* of a school's language policy conflicts with the scheme of the SASA which envisages a cooperative partnership between the SGB and HOD. The requirement of the HOD's *"approval"* of the language policy creates the same difficulties as the proposed change to section 5(5) requiring the HOD's *"approval"* of the admission policy – in both instances, the delicate balance of power giving effect to cooperative governance is disturbed in favour of granting power to the HOD.

52.1.2 We reiterate the concerns raised in paragraphs 47.1 and 48.1 above.

52.2 We propose that sections 6(5), (6), (7), (8), (9), (10), (11) and (12) not be amended as proposed in the BELA Bill. Since no problem has been identified that justifies why such amendments are necessary, Solidarity is of the opinion that such a transfer of powers through the proposes amendments are not just and should therefore not be included. Such a change would infringe on the right communities have to govern their schools and to provide education

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in a language of choice for the members of that community. The role of the HOD is to protect that right, not violate it with amendments such as proposed in the BELA Bill.

53 The second substantive change introduced concerns the HOD's power to direct a public school to adopt more than one language of instruction in the proposed section 6(13).

53.1 The proposed amendment is problematic for the following reasons:

53.1.1 The HOD's power to *"direct a public school to adopt more than one language of instruction"* conflicts with the scheme of the SASA which envisages a cooperative partnership between the SGB, the HOD and the Minster. The power granted to the HOD to *"direct"* the SGB with regard to the language policy, creates the same difficulties as the HOD having the *"final authority"* to *"approve"* the admission policy – the delicate balance of power giving effect to cooperative governance is disturbed in favour of granting power to the HOD, denuding the SGB of its

powers despite it being better placed to determine the school's policies.

53.1.2 We accordingly reiterate the concerns raised in paragraph 47.1 above.

53.2 Our proposal is to delete the amendments as currently represented in the BELA Bill. The decision on what the language of instruction at a school should be, is not to be transferred from the democratically elected SGB, which represents the community of that school, to an HOD, which is a political appointment. Such a transfer of power and decision making contradicts with the intent of the SASA as well as the Constitution where the responsibility of school governance and the language of instruction resides with the community. The amendment of this section is without any grounds and therefore unjust and irrational.

54 The third substantive change introduced concerns the appeal process in the proposed sections 6(18), (19) and (20).

54.1 The proposed amendment is problematic for the following reasons:

54.1.1 The appeal process is unnecessary in light of the changes proposed in paragraph 53.2 above. In the event that the HOD and SGB are unable to reach agreement on the language policy pursuant to the principles of cooperative governance articulated in section 41 of the Constitution, then section 22 prescribes the procedure which the HOD may follow, alternatively the HOD may apply to the court to review and set aside the decision of the SGB.

54.1.2 The proposed section 6(20) provides that the provisions of the language policy which are subject to appeal before the MEC *"shall be suspended pending the finalisation of the appeal process".* The effect of this provision is that the status quo is *not* maintained pending the appeal. This is extremely disruptive to the functioning of the school

54.2 Proposed revision to the provisions concerning the appeal process:

54.2.1 **Proposed deletion of sections 6(18), (19) and (20):** These provisions have become redundant in light of the

proposed amendments in paragraph 53.2 above and can therefore be deleted.

(iii)The SGB's powers concerning procurement

55 Section 21(3A) of the BELA Bill proposes amending section 21 of the SASA by introducing a provision which enables the HOD to *"centrally procure identified learning and teaching support material for public schools",* notwithstanding that this function may have been allocated to an SGB pursuant to section 21 of the SASA, and without section 22 (which addresses the procedure for withdrawing a function from an SGB) applying.

56 The proposed amendment is problematic for the following reasons:

56.1 It appears to provide a means for summarily circumventing the carefully balanced allocation of functions between the SGBs and HODs for the purpose of procurement. This is because, in the event that the HOD considers it efficient, economic and an effective use of resources to procure textbooks, educational materials or equipment for schools through central procurement, it may exercise its powers pursuant to section 22 of the SASA to withdraw this function from the SGB. Thus, subsection (3A) is either redundant

in light of section 22, or it seeks to enable the HOD to summarily withdraw this function form the SGB without due process.

56.2 Having regard to the careful planning required in advance of each academic year,[137] the proposed new subsection (3A) introduces uncertainty and unpredictability in the procurement process, as the function may have been allocated to the SGB.

56.3 The language used in section 21(1)(c) of SASA differs from the language used in the proposed new subsection (3A), which we anticipate will lead to disputes regarding the scope of the HODs powers. In particular, subsection (1)(c) of the SASA refers to *"textbooks, educational materials or equipment*", while the proposed new subsection (3A) refers to *"learning and teaching support material"*. The lack of consistency in the language is confusing and likely to lead to disputes.

56.4 In addition, in light of the Limpopo textbooks saga[138] which occurred between 2012 and 2015, where there was a total failure in the

[137] In the ***Ermelo judgment*** at para 75 the Constitutional Court held that *"excellent institutional functioning requires proper opportunity for planning and implementation."*

[138] The details of which are set out in the SCA's judgment in ***Minister of Basic Education v Basic Education for All*** [2015] ZASCA 198 (the "***Limpopo textbooks judgment***").

procurement of textbooks in the Limpopo Province, we are concerned that this proposed amendment may result in similar procurement failures. In this respect, we highlight that the SCA found (in the ***Limpopo textbooks judgment***)[139] that:

> *"[43] The truth is that the [Department of Basic Education's] management plan was inadequate and its logistical ability woeful. One would have expected proper planning before the implementation of the new curriculum. This does not appear to have occurred. The DBE also had a three-year implementation period during which it could have conducted proper budgetary planning, perfected its database, and ensured accuracy in procurement and efficiency in delivery. It achieved exactly the opposite and blamed all and sundry. It lacked introspection and diligence."*

56.5 Importantly, the SCA held that *"[w]e must guard against failing those who are most vulnerable. In this case we are dealing with the rural poor and with children."*[140] The same applies in the present context, where the proposed amendment seeking to introduce centralised procurement may fail those most in need, as it did in the Limpopo Province between 2012 and 2015.

139 ***Limpopo textbooks judgment*** at para 43.
140 At para 50.

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56.6 **Proposed deletion of section 21(3A):** The new subsection should be deleted.

(iv)The HOD's powers to remove a function from the SGB

57 Section 22 of the SASA makes provision for the HOD to withdraw functions from the SGB.

58 Solidarity questions the reason for the amendments in this section of the BELA Bill. There are no grounds to amend current policy or legislation, thus making such a change unnecessary.

59 The substantive amendment concerning the power granted to the temporary or interim SGB in section 22(8), is irrational and should not be included in the amendment bill for the following reasons:

59.1 The power granted to the temporary or interim SGB appears to be more extensive than intended, as it grants the temporary or interim SGB *"exclusive voting rights and decision-making powers on any function that they have been appointed to perform."* (underlining added).

59.2 The granting of *"exclusive"* decision making powers arguable ousts the powers of the HOD and Minister, thereby undermining the carefully crafted checks, balances and accountability mechanisms in the SASA.[141]

59.3 There does not appear to be any reason for, or benefit to, giving the temporary or interim SGB more powers than the permanent SGB, particularly since the temporary or interim SGB is appointed by the HOD and is not democratically elected as is the case for the permanent SGB.

(v) The HOD's powers to dissolve the SGB

60 Section 25 of the SASA makes provision for the HOD to dissolve the SGB where the SGB has *"ceased to perform functions allocated to it in terms of [the SASA]"* or *"has failed to perform one or more of such functions"*.

61 The High Court has held that the action of dissolving an SGB must be proportionate to the acts or conduct of the SGB. In addition, the SGB must

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141 ***Welkom judgment*** at para 49 which provides that *"the interactions between the partners – the checks, balances and accountability mechanisms – are closely regulated by the [SASA]. 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."*

be afforded the opportunity to make representations before it is dissolved.[142]

62 The second substantive amendment in section 25(2), is that the HOD must appoint *"suitably qualified persons"* and not just *"sufficient persons*" as currently provided for in section 25(2). Solidarity is of the view that it would be the right and function of the community to democratically choose new and qualified persons for these positions and not the right of the HOD to do such.

63 The third substantive amendment concerns the power granted to the temporary or interim SGB in section 25(4).

63.1 This is problematic for the reasons articulated in paragraph 59 above.

63.2 In addition, the proposed amendment limits the powers of the temporary or interim SGB to a period *"not exceeding three months"*, in circumstances where subsection (3) grants the HOD the power to extend the appointment of the temporary or interim SGB. This

142 ***Schoonbee judgment*** at 885C-H

may create some uncertainty regarding the duration of the powers of the temporary or interim SGB, and whether they continue in circumstances where the temporary or interim SGB's appointment is extended.

63.3 **Proposed subsection (4):** "The persons appointed pursuant to subsection (2) shall have the voting rights and decision making powers on all the functions of the *governing body* for such period of their appointment."

(vi)Dispute resolution

64 Section 39 of the BELA Bill proposes adding a new section to address dispute resolution (section 59A).

65 Dispute resolution should be clearly defined. Solidarity is of the opinion that these dispute resolution provisions should be aligned with the Constitutional Court's jurisprudence. Once again absolute power and decision making cannot reside with an HOD or MEC without the participation of and in consultation with school governance and the community.

PRINCIPLES CONCERNING THE RIGHT TO BASIC EDUCATION

66 The right to basic education is enshrined in section 29 of the Constitution. It is regarded as an "*empowerment right*" in that, if fulfilled, it can lay the foundation for the enjoyment of other rights in the Bill of Rights.[143]

67 In ***Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995***[144] the Constitutional Court confirmed that there is an obligation on the state to take positive steps to respect, protect and fulfil the right to basic education. In ***Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others***,[145] the Constitutional Court held that *"Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be*

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143 In ***Head of Mpumalanga Department of Education and Another v Hoerskool Ermelo and Others*** 2010 (3) BCLR 177 (CC) at para 2, the Constitutional Court held that *"It is trite that education is the engine of any society. And, therefore, an unequal access to education entrenches historical inequality as it perpetuates socio-economic disadvantage"*. In Article 13 of the International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, adopted 16 December 2066, entered into force 23 March 1976, provides that "education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms" and "education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups". Although South Africa signed the Covenant in 1994, it was only ratified in 2015. See also C McConnachie & S Brener *Litigating the Right to Basic Education* in J Brickhill *Public Interest Litigation in South Africa* (2018) p 284.

144 [1996] ZACC 4.

145 [2011] ZACC 13 at para 37.

'progressively realised' within 'available resources' subject to 'reasonable legislative measures'."

68 Subsequent cases have given meaning to the term "basic education":

68.1 In ***Minister of Basic Education v Basic Education for All***,[146] the SCA ordered that:

> *"It is declared that it is the duty of the State, in terms of s 7(2) of the Constitution, to fulfil the s 29(1)(a) right of every learner by providing him or ger with every textbook prescribed for his or her grade before commencement of the teaching of the course for which the textbook is prescribed."*

68.2 In the ***MEC Northwest v FEDSAS judgment***[147] the SCA held that the provisions in section 29 of the Constitution *"envisage that the right to education goes substantially further than the provision of classrooms*".

The definition of "basic education"

69 Section 1 of the BELA Bill proposes to introduce a definition of the term *"basic education"* into the SASA. However, despite the *Explanatory*

146 [2015] ZASCA 198.
147 At para 21.

Summary of Basic Education Laws Amendment Bill, 2021 stating that *"the amendments are a response to court judgments that protect and give effect to the Bill of Rights"*, the definition of *"basic education"* wholly fails to do that.

70 The proposed definition is: *"grade R to grade 12, as evidenced in the National Curriculum Statement"*.

71 The term *"basic education"* is used in only three places in the BELA Bill, namely:

71.1 It is defined in section 1 of the BELA Bill.

71.2 It is referred to in the definition of "Department of Basic Education" in the BELA Bill, which is defined as meaning *"the national department established in terms of section 7(2), read with Schedule 1, of the Public Service Act, 1994 (Proclamation No. 103 of 1994), responsible for basic education*".[148]

71.3 It is referred to in the proposed amended pre-able in the BELA Bill, which proposes inserting the following words into the pre-amble:

148 Underlining supplied.

"facilitate the education of children through the promotion and protection of the right to basic education".[149]

72 The term *"basic education"* is not used in the SASA.

73 In the Employment of Educators Act 76 of 1998, it is only used in the definition of *"Department of basic Education"* which is defined as meaning *"the department established in terms of section 7 (2), read with Schedule 1, of the Public Service Act, 1994 (Proclamation 103 of 1994), responsible for basic education at national level"*.[150]

74 Thus, providing a substantive definition for the term "*basic education*" will not have a consequential effect on other provisions in the SASA or Employment of Educators Act, but will at the same time give greater content and meaning to the right to basic education from a legislative perspective (in circumstances where it has been the Courts that are developing jurisprudence to give the right substantive content).

75 We note that the White Paper states at Chapter 7 para 12:

149 Underlining supplied.
150 Underlining supplied.

> *"Since the term "basic education" is not defined in the Constitution, it must be settled by policy in such a way that the intention of the constitution is affirmed. An important question is whether basic education should be defined in terms of learning needs and outcomes, or qualification levels, or school grades, and whether the content of basic education needs to be the same for children, youth and adults."*

76 Regrettably, the BELA Bill only seeks to give content to the term *"basic education"* by defining it with reference to school grades. We submit that this is a missed opportunity to capture the jurisprudence from Courts which have given meaning to the term with reference to certain norms and standards.

77 The current definition of the term *"basic education"* is a missed opportunity for the legislature to *"promote and fulfil"* the right to basic education as it is constitutionally mandated to do in terms of section 7(2) of the Constitution.[151] There is no reason not to provide a definition for *"basic education"* which fully recognises and gives substantive meaning to the right to basic education.

78 We therefore propose that "basic education" be defined as follows:

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151 Section 7(2) of the Constitution provides that "The State must respect, protect, promote and fulfil the rights in the Bill of Rights."

" 'basic education' means grade R to grade 12, as evidenced in the National Curriculum Statement, and includes the norms and standards contemplated in section 5A".

PROPOSED DRAFT SECTION 21A

79 The draft of "Section 21A: Application by school for self management status", which Solidarity will seek to have included in the proposed amendments to the SASA.

80 In considering the proposed amendment, we take cognisance of the utility of leaving functioning schools to be run by the SGB, and leaving the Department of Education to focus its attention on the schools that do not function well or optimally. That said, a number of the concerns may be addressed by proposals that we have made in respect of the wording of selected provisions of the BELA Bill hereinabove.

81 In the proposed amendments to section 21A as provided to us, we have adopted the following approach:

81.1 we have removed the reference to "*proven track record*", because we consider that this is not a legal standard, and that it will simply become the subject of debate and potentially litigation;

81.2 given he cooperative nature of the governance of schools, it is not consistent to exclude the HODs altogether;

81.3 what we propose is that the section 22 and 25 powers of the HOD be removed for self-managed schools, so that the HOD would have to bring a PAJA review of impugnable decisions of the SGB of a self-managed school, on the basis that the retention of the section 22 powers for self-managed schools would defeat the purpose of the provision;

81.4 we have removed also the reference to the *usus fructus* because we do not fully understand what is intended to be achieved by this provision;

81.5 further provisions that appear to us to be redundant have also been struck, particularly in light of our proposed amendments to other provisions of the BELA Bill.

82 The draft provision, with our proposed amendments, is as follows:

SECTION 21A: APPLICATION BY SCHOOL FOR SELF MANAGEMENT STATUS

(1) Subject to this Act, a governing body of a public school may apply to the Head of Department in writing for self managed status on the basis of having satisfactorily: ~~a proven success record in terms of~~:

(a) ~~T~~performed the functions referred to in Section 21(1) for the preceding five years;

~~(b) The fit and proper governance of the school;~~

(c) ~~A~~obtained a clean audit record in regard to the financial management of the public school for the preceding five years;

(d) ~~The compliance~~ complied with the minimum criteria determined by the Minister in regard to academic performance; and

(e) ~~A proven record of service in the broader community~~.

(f) maintained the minimum requirements in regard to academic performance.

(2) A public school with self managed status will, for a period of ten years:

(a) have the following powers and functions:

(i) The functions referred to in sections 5(5), 6(2), 8(1), 9(1), 20, 21(1);

(ii) The self managed school will be entitled to determine the curriculum and assessment programme, provided that the ~~CAPS~~ minimum national norms and standards with regard to the curriculum and assessment programme is complied with;

(b) be exempt from:

(i) the provisions in sections 22 and 25;

(ii) ~~T~~the attendance of departmental meetings by the educator staff and the non-educator staff of a self managed school will be on a voluntary basis, provided that the principal shall attend the departmental meetings held for principals of self managed schools;

~~(2)In the event that the school qualifies for self managed status, the school will be entitled to:~~

~~(c) That a *usu fructus* will be granted to the school for a period of 10 years;~~

~~(d) The governing body of a self managed school may determine the following policies subject to the Constitution:~~

~~(i) Language policy;~~
~~(ii) Admissions policy; and~~
~~(iii) Religious observances.~~

~~(e) The governing body of a self managed school may, subject to the Constitution, determine the code of conduct;~~
~~(f) The self managed school will be entitled to determine the curriculum and assessment programme, provided that the CAPS is complied with;~~
~~(g) The attendance of departmental meetings by the educator staff and the non-educator staff of a self managed school will be on a voluntary basis, provided that the principal shall attend the departmental meetings held for principals of self managed schools;~~
~~(h) The chairperson of the governing body of a self managed school shall attend the annual meeting for chairpersons of the governing bodies of self managed schools;~~
~~(i) The self managed school will qualify for financial assistance; and~~
~~(j) That educators remain in the employment of the Department as contemplated in the Employment of Educators Act, Nr. 76 of 1998.~~

(3) During the period referred to in sub-section (2): ~~the self managed school must comply with the following:~~
(a) the self managed school must comply with the following:
(i) the annual submission of unqualified audited financial statements to the Head of Department;
~~(ii) The principles of fit and proper governance of the school;~~
(iii) the minimum requirements in regard to academic performance;
(iv) ~~The minimum requirements for service in the broader community~~; and
(v) the chairperson of the governing body of a self managed school shall attend the annual meeting for chairpersons of the governing bodies of self managed schools; and
(vi) such other reasonable requirements determined by the Head of Department;
(b) the self managed school will qualify for financial assistance; and
(c) that educators remain in the employment of the Department as contemplated in the Employment of Educators Act, No. 76 of 1998.

(4) The Head of Department may refuse an application contemplated in sub-section (1) only if the governing body does not comply with the requirements as stated in sub-section (1).

(5) The Head of Department may approve such application unconditionally or subject to conditions.

(6) The decision of the Head of Department on such application must be conveyed in writing ~~in terms of the principles of administrative justice~~ to the governing body concerned.

~~(7) The relevant requirements contemplated in this Act apply *mutatis mutandis* to a self managed school.~~

~~(8) The Head of Department may withdraw the self managed status of a school on reasonable grounds and in terms of the principles of administrative justice in the manner contemplated in Section 22.~~

(9) Any person aggrieved by the decision of the Head of Department, in terms of this section, may appeal to the Member of the Executive Council.

83 We advise accordingly.

ANNEXURE A1 – EXTRACTS FROM WHITE PAPER 1

"Parents or guardians have the primary responsibility for the education of their children, and have the right to be consulted by the state authorities with respect to the form that education should take and to take part in its governance. … The parents' right to choose includes choice of the language, cultural or religious basis of the child's education, with due regard for the rights of others and the rights of choice of the growing child." [152]

"The years of turmoil have taken a heavy toll on the infrastructure of our education and training system. The relationship between schools and many of the communities they are expected to serve has been disrupted and distorted by the crisis of legitimacy. The rehabilitation of the schools and colleges must go hand in hand with the restoration of the ownership of these institutions to their communities through the establishment and empowerment of legitimate, representative governance bodies."[153]

"The complexity of the provisions [in the interim Constitution] relating to school ownership, governance and finance indicates the sensitivity of the interests which the Constitution has accommodated. Both the governments and the governing bodies of the schools concerned, are required to act with a high degree of responsibility in fulfilling their obligations in these matters."[154]

"The Ministry of Education proposes the following principles as the basis of the new policy framework for school ownership, governance and finance:

…

(c) School governing bodies should be representative of the main stakeholders in the school. Parents have the most at stake in the education of their children, and this should be reflected in the composition of governing bodies, where this is practicably possible.

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152 Chapter 4, para 3.
153 Chapter 4, para 10.
154 Chapter 12, para 10.

The heads or principle of a school should be a member of the governing body ex officio.

…

(g) State involvement in school governance should be at the minimum required for legal accountability, and should in any case be based on participative management.

(h) The decision-making powers of governing bodies should reflect their capacity to render effective service.

(i) A capacity-building programme should go hand-in-hand with the assignment for principals and inspectors, to ensure a smooth transition to the new school governance system.

These principles involve extremely complex legal, financial, administrative, educational and political issues. With the advice and support of the Council of Education Ministers, and in consultation with the National Education and Training Forum and national organisations of teachers, students, parents and school governing bodies, the Minister of Education will without delay appoint a Committee to Review School Organisation, Governance and Funding."[155]

155 Chapter 12, para 29(2)(c), (g) to (i) and para 30.

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ANNEXURE A2 – EXTRACTS FROM WHITE PAPER 2

"3.1 Governance policy for public schools is based on the core values of democracy. It is envisaged that representative governing bodies will be established in all public schools following negotiations prescribed in section 247 of the [Interim] Constitution, and the enactment of the [SASA]. Governing bodies will have substantial decision-making powers, selected from a menu of powers according to their capacity. …

…

3.4 The Ministry of Education bases its approach to school governance policy on the Constitution and on Education White Paper 1.

3.5 The Constitution establishes a democratic national, provincial and local government order, and binds all governments and public schools to observe fundamental rights and protect fundamental freedoms, many of which have direct implications for decisions made by school governors and management's. The Constitution also obliges governments to negotiate with school governing bodies before changing their rights, powers and functions, and to fund all public schools on an equitable basis in order to achieve an acceptable level of education.

3.6 In Education White Paper 1, the Ministry of Education announced that the decision-making authority of schools in the public sector would be shared among parents, teachers, the community (government and civil society) and the learners, in ways that would support the core values of democracy. A school governance structure should involve all stakeholder groups in active and responsible roles, encourage tolerance, rational discussion and collective decision-making. …

3.7 … The sphere of governing bodies is governance, by which is meant policy determination, in which the democratic participation of the schools' stakeholders is essential. The primary sphere of the school leadership is management, by which is meant the day-to-day organization of teaching and learning, and the activities which support teaching and learning, for which teachers and the school principal are responsible. These spheres overlap, and the distinctions in roles between principals and their staff, district education authorities, and school governing bodies, need to be agreed with the provincial education departments. This would permit considerable

diversity in governance and management roles, depending on the circumstances of each school, within national and provincial policies.

…

3.12 The implementation of these proposals will mark a major advance in the decentralization of educational control, and the fulfilment of a goal for tens of thousands of parents, teachers, students, former students and community workers who have campaigned to secure the achievement of democracy in schools. …

…

3.17 Public school governance is part of the country's new structure of democratic governance. It must be a genuine partnership between a local community and the provincial education department, with the education department's role being restricted to the minimum required for legal accountability. Because communities have such varied experience of school governance, it is inevitable that the department's role in ensuring accountability will differ considerably from one school to another. The balance of decision-making would rest with the school governing body in accordance with its capacity.

3.18 The model of public school governance supported by the Ministry of Education is therefore evolutionary. Each public school governing body will be responsible for a set of basic functions ("basic powers") which will be agreed between the province and the governing body in accordance with the governing body's experience and capacity. Any governing body will be entitled to negotiate with its provincial education department to take responsibility for additional functions ("negotiated powers") as and when it is willing and believes it is able to do so.

…

3.20 The provincial departments of education, which are accountable for the funding and the performance of schools, will wish to be assured that governing bodies have the necessary capacity to take on important functions and run them well. The delegation of such powers would need to be conditional, and subject to regulation. The governing body would be required to satisfy the provincial education department that it had the capacity to manage its functions according to the standards of provision specified by the province, and that the school community had the will to sustain this responsibility. … The province would need to reserve the right to intervene

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to ensure that law and policy were being upheld, and in particular that funds were properly administered and accounted for. There would need to be provision for the provincial authority to withdraw certain responsibilities from a governing body at its own request, or in the event of seriously unsatisfactory performance."

ANNEXURE A3 – CASE LAW

Schoonbee and Others v MEC for Education, Mpumalanga and Another 2002 (4) SA 877 (T) ("Schoonbee judgment")

84 The ***Schoonbee judgment*** concerns the HOD's decision to dissolve the SGB.

85 There are three key principles emanating from this judgment.

86 The first is that the SASA contemplates a partnership between stakeholders:

> *"Having read the [SASA] again it seems to me that the new education regime introduced by the [SASA], which came into operation on 1 January 1996, contemplates an education system in which all the stakeholders, and there are four major stakeholders – the State, the parents, educators and learners – enter into a partnership in order to advance specified objectives around schooling and education. It was intended, it appears, to be a migration from a system where schools are entirely dependent on the largesse of the State to a system where a greater responsibility and accountability is assumed, not just by the learners and teachers, but also by parents."*[156]

87 The second principle is that the action of dissolving the SGB must be proportionate to the SGB's conduct:

156 At 883E-G

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> *"I hold the view that at this stage it is not necessary to dissolve the entire school governing body in order to be able to raise and deal with, as the second respondent [the HOD] wanted to, the matters or accounting concerns raised by the report of the auditor-general. Put otherwise, I find that there is no proportionality between the acts or conduct of the SGB which in the view of the second respondent compelled him to take certain administrative action on the one side and the administrative action which was actually taken; the action of the wielder of power in dissolving the SGB is disproportionate to the conduct which was intended to be corrected or the result aimed at."*[157]

88 The third principle stems from procedural fairness, and requires the SGB to have adequate notice of the HOD's intention to dissolve it so that the SGB can exercise its right to be heard prior to the HOD taking a decision:

> *"Moreover, the SGB was not afforded even the slightest opportunity to deal with the intentions of the second respondent to dissolve it. … The intended administrative action has to be disclosed timeously to the affected party to allow him or her to make such representations as he or she may find to be appropriate. Failure to do so by an official acting within the ambit of a statute, wielding power entrusted to him in advancement of one or other public purpose, is fatal to that administrative act. These statutory injunctions must be observed and failure to do so of necessity leads to abortive administrative action."*[158]

157 At 885C-E
158 At 885F-H

***Destinata Skool and another v Die Departementshoof: Department van Onderwys Gauteng and others* case no. 23675/03 (2004-03-03) per Mynhardt J ("*Destinata judgment*")**

89 The ***Destinata judgment*** concerns allegations of financial mismanagement and irregularities at the school, as a result of which documents were seized by the Department.

90 The Court confirmed that the SGB is charged with the administration and control of the school's property, and that the seized documents were within the SGB's control.

Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another 2006 (1) SA 1 (SCA) ("Mikro judgment")

91 The ***Mikro* judgment** concerns an SGB's refusal to accede to a request (and subsequent directive) from the HOD to change the language policy of the school to a parallel-medium school.

92 In describing the functions and composition of the SGB, the SCA confirmed that the governance of public schools vests in the SGB, whose membership is representative of the relevant school's community as it is comprised of

parents of learners at the school, educators at the school, members of staff at the school, and learners in the eighth grade or higher at the school:

> *"[5] … The governance of every such public school is vested, subject to the [SASA], in its governing body, which may perform only such functions and obligations and exercise only such rights as are prescribed by the [SASA] (s 16(1)). The professional management of such a public school, on the other hand, must be undertaken, subject to the provisions of the [SASA], by the principal of the school under the authority of the head of the education department concerned. It is therefore clear that, subject to the limitations contained in the [SASA], the governance of a public school, as opposed to the professional management of such a school, is the responsibility of the governing body of the school.*
>
> *[6] The statutorily prescribed composition of the governing body of ordinary public schools reflects the aim of the [SASA]; namely, to advance the democratic transformation of society. It includes, subject to the provisions of the [SASA], elected members, the principal in his or her official capacity, and co-opted members. Elected members comprise a member or members of each of the following categories: parents of learners at the school, educators at the school, members of staff at the school who are not educators, and learners in the eighth grade or higher at the school (s 23(1)). The number of parent members must comprise one more than the combined total of other members of the governing body who have voting rights. Certain co-opted members do not have voting rights (s 23(8) and (12)).*"

93 The SCA confirmed that while the Minister is empowered by the SASA to determine the norms and standards for language policy in public schools,

the Minister is not authorised to determine the language policy for a particular school as that is a function for the SGB.[159]

94 The SGB's exercise of power in formulating the langue policy constitutes administrative action, which is reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**").[160] Thus, the HOD may review and set aside an SGB's language policy if it is unreasonable; the HOD may also in terms of section 22 of the SASA, on reasonable grounds, withdraw the function of an SGB to determine the language policy.[161] The HOD may not, however, summarily instruct the principal to admit learners in disregard for the SGB's language policy:[162]

> *"[43] The first and second appellants did not avail themselves of any of these remedies, but simply instructed and assisted the principal of the second respond to admit learners to the second respondent for instruction in English. They were not entitled to do so. Although the department admits learners to a public school (s 5(7)), the admission policy of the school is determined by the governing body of the school. By admitting learners or instructing the principal to admit learners contrary to the admission policy of the school the department was substituting its own admission policy for that of the school. In so doing it was acting unlawfully, as it did not have the power to determine an admission policy for the school. Even if the language and admission policy determined by the first respondent was invalid, the department*

159 At para 33.
160 St para 36.
161 At paras 36-37 and 42.
162 At para 43.

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or the first and second appellants did not, in terms of the Act, have the power to determine a language policy for the second respondent."

Head of Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others 2010 (3) BCLR 177 (CC) ("Ermelo judgment")

95 The ***Ermelo judgment*** concerns the powers of the Minister, the HOD and the SGB in the context of a school's language policy.

96 The SASA gives content to the constitutional guarantees in section 29 of the Constitution, including the right to receive education in the official language of one's choice in a public educational institution where it is reasonably practical.[163]

97 The Court recognised that the overall design of the SASA is that public schools are run by three crucial partners.[164]

97.1 The preamble to the SASA *"makes plan that the statute aims at making parents and educators accept responsibility for the*

163 Section 29(2) of the Constitution. At para 42 of the ***Ermelo judgment***.
164 At para 56. Footnotes omitted.

organisation, governance and funding of schools in partnership with the State."[165]

97.2 The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools.

97.3 The provincial government acts through the MEC for education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals.

97.4 Parents of the learners and members of the community in which the school is located are represented in the SGB which exercises defined autonomy over some of the domestic affairs of the school. An SGB is *"democratically composed and is intended to function in a democratic manner. Its primary function is to look after the interest of the school and its learners. It is meant to be a beacon of grassroots democracy in the local affairs of the school. Ordinarily, the representatives of parents of learners and of the local*

165 At para 55.

community are better qualified to determine the medium best suited to impart education and all the formative, utilitarian and cultural goodness that comes with it."[166] The Court held that:[167]

> *"School governing bodies are a vital part of the democratic governance envisioned by the [SASA]. The effective power to run schools is indeed placed in the hands of the parents and guardians of learners through the school governing body. For that reason, the starting point of our understanding of the role of the governing body and of the State in relation to language rights in public education is section 29 of the Constitution. Section 6(2) must be construed in line with this constitutional warranty."*

98 The right to receive education in a language of one's choice is not unqualified – it is internally modified because the choice is available only when it is "reasonably practicable". Thus, an SGB cannot adopt a language policy without regard to the circumstances in which the school operates. In this regard, the Court set out the key principle for determining a language policy as follows:

> *"When it is reasonably practicable to receive tuition in a language of one's choice will depend on all the relevant circumstances of each particular case. They would include the availability of and accessibility to public schools, their enrolment levels, the medium of instruction of the school its governing body has adopted, the language choices learners and their parents make and the curriculum options offered.*

166 At para 57.
167 At para 79. Footnotes omitted.

> *In short, the reasonableness standard built into section 29(1)(a) imposes a context-sensitive understanding of each claim for education in a language of choice. An important consideration will always be whether the State has taken reasonable and positive measures to make the right to basic education increasingly available and accessible to everyone in a language of choice. It must follow that when a learner already enjoys the benefit of being taught in an official language of choice the State bears the negative duty not to take away or diminish the right without appropriate justification."*[168]

99 The SGB's powers to determine the school's language policy are qualified by the following:[169]

99.1 It is subject to the Constitution, the SASA, and any applicable provincial laws.[170]

99.2 The Minister may, subject to the Constitution, by notice, determine norms and standards for language policy in public schools, which the Minister has done. They are *"by definition general – they cannot relate to any particular school's language policy."*[171]

99.3 No form of racial discrimination may be practiced in implementing a language policy.[172]

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168 At para 52. Footnotes omitted.
169 At paras 59-60 and 99.
170 At para 59.
171 At para 60.
172 At para 60.

99.4 A language policy must comply with the norms and standards for the provision of school facilities described by the Minister.[173]

99.5 *"It is, therefore, clear that the determination of language policy in a public school is a power that in the first instance must be exercised by the governing body. The power must be exercised subject to the limitations that the Constitution and the Schools Act or any provincial law laid down. Even more importantly it must be understood within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress."*[174]

100 The HOD may withdraw a function from the SGB, including withdrawing a school's language policy, provided it is done *"on reasonable grounds and in order to pursue a legitimate purpose."*[175] In addition, the standard of

173 At para 60.
174 At para 61.
175 At para 68 and 71.

procedural fairness required by section 22 of the SASA must be followed.[176]

What constitutes *"reasonable grounds"* was articulated as follows:[177]

> *"What would constitute reasonable grounds will have to be determined on a case by case basis. This will require full and due regard to all the circumstances that actuated the HoD to by-pass the governing body in relation to the specific power withdrawn. In this regard, a reviewing court will have to consider carefully the nature of the function, the purpose for which it is revoked in the light of the best interests of actual and potential learners, the views of the governing body and the nature of the power sought to be withdrawn as well as the likely impact of the withdrawal on the well-being of the school, its learners, parents and educators. And all these factors would have to be weighed within the broad contextual framework of the Constitution.*
>
> *In the case of language policy, which affects the functioning of all aspects of a school, the procedural safeguards, and due time for their implementation, will be the more essential. It goes without saying that excellent institutional functioning requires proper opportunity for planning and implementation.*
>
> *…*
>
> *Put otherwise, the statute devolves power and decision-making on the school's medium of instruction to a school governing body. It would, however, be wrong to construe the devolution of power as absolute and impervious to executive intervention when the governing body exercises that power unreasonably and at odds with the constitutional warranties to receive basic education and to be taught in a language of choice. The Constitution itself enjoins the State to ensure effective access to the right to receive education in a medium of instruction of choice. The measures the State is required to take must evaluate what is reasonably achievable and must keep in mind the obvious need for historical redress."*

176 At para 73.
177 At paras 74-75 and 78. Footnotes omitted.

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Head of Department, Department of Education, Free State Province v Welkom High School and another; Head of Department, Department of Education, Free State Province v Harmony High School and another 2013 (9) BCLR 989 (CC) ("Welkom judgment")

101 The ***Welkom judgment*** concerns the powers of the Minister, the HOD and the SGB in the context of a school's pregnancy policy.

102 The main principle articulated in the Welkom judgment is the principle that a public school is governed by a partnership. SASA *"makes it 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."*[178] It is therefore a partnership involving *"State, parents of learners and members of the community in which the school is located."*[179] Each partner represents a particular set of relevant interests and bears corresponding rights and obligations in the provision of education services to learners.[180]

178 At para 36.
179 At para 49.
180 At para 49.

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103 In order to achieve this partnership, the provisions in SASA are *"carefully crafted to strike a balance between the duties of these various partners in ensuring an effective education system."*[181] The *"interactions between the partners – the checks, balances and accountability mechanisms – are closely regulated by [the SASA]. 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."*[182] One must balance *"the importance of the accountability checks imposed by the [SASA] with considerations of legality and respect for the sensitivity of the partnership between the Minister, Provincial Education Department, public schools and school governing bodies."*[183]

104 The different roles played by the different partners is delineated in section 16 the SASA:[184]

104.1 The governance of every public school is vested in its SGB. Although "governance" is not defined in the SASA, section 20(1) lists specific governance functions of the SGB. The Court relies on

181 At para 36.
182 At para 49.
183 At para 76.
184 At para 37-39. Footnotes omitted.

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the definition of "governance" in the *Oxford English Dictionary*, which defines it as (amongst other things) *"'[t]he action or manner of governing', '[c]controlling, directing or regulating influence' and '[t]he manner in which something is governed or regulated; method of management, system of regulations.'"*[185] The SGB'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 the school, adopting a code of conduct for learners and administering school property (subject to certain constraints)."* The SGB has an overall responsibility for the governance of the public school, and has general fiduciary obligations to ensure that the school environment appropriately accommodates learners' needs.[186] The role played by the SGB is important - The Court emphasised that one cannot *"ignore the vital role played by school governing bodies, which function as a "beacon of grassroots democracy" in ensuring a*

185 At para. 60.
186 At para 59.

democratically run school and allowing for input from all interested parties."[187]

104.2 The professional management of a public school is vested in the principal under the authority of the HOD. "Professional management" is not defined in the SASA, but section 16A lists certain functions and responsibilities of public-school principals. The Court held that 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."*[188] A principle *"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."*

187 At para 123. Footnotes omitted.
188 At para 62.

104.3 It is the responsibility of the MEC in the province to ensure that there are enough schools in the province to accommodate all children who are subject to compulsory attendance, and the responsibility of the relevant HOD to monitor, regulate and enforce compulsory attendance.[189]

105 The Court therefore described the difference in the SGB's and principal's roles as follows:

> *"[63] 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 realization 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."*

106 The ***Welkom judgment*** acknowledges the dual role played by the SGB and the HOD with regard to the school's admission policy, stating that *"Section 5 of the Schools Act empowers a school governing body to determine a public school's admission policy, subject to certain express stipulations aimed at preventing the imposition of unfair admission requirements and*

189 At para 42

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further subject to regulations prescribed by the Minister. An HOD, in turn, is empowered to administer the admissions process, with appeals against admission refusals lying to the MEC in the province."[190]

107 With regard to the language policy and the school's code of conduct, the ***Welkom judgment*** acknowledges that the SASA empowers the SGB to determine these policies.[191] The power to formulate such policies is not unfettered, and must be done in accordance with the prescripts of the Constitution and the SASA, and is subject to departmental supervision *"in ensuring that the [SGB] observe[s] the requirements of the law"*.[192]

108 The SASA does, however, grant HODs supervisory authority in relation to the exercise of certain governance and policy-making functions of SGBs.[193] In this respect, section 7(2) of the Constitution places an obligation on an HOD, as an organ of state, to protect the rights of learners subject to the rule of law.[194] The HOD thus cannot ignore the SGB's policies or undertake the policy-formulation and governance functions for a public school without

190 At para 43. Footnotes omitted.
191 At paras 44-45. This includes adopting pregnancy policies for public schools (para 57).
192 At para 73 and 149.
193 At para 81.
194 At para 85.

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having gone through a process in terms of section 22 or section 25 of the SASA.[195]

109 With regard to the *actual content of policies* for a public school, the main principle stemming from the ***Welkom judgment*** is that whilst the Minister may set guidelines regarding the content of codes of conduct, they will necessarily be broad as neither the Minister nor the HOD is ideally suited to develop school-specific policies, and it is therefore for the SGB to provide the relevant detail in the policy for the context of that specific school:[196]

> *"[67] Any policy promulgated by the Minister could only be general in nature and would have to be particularized by school governing bodies in order to provide a systematic set of rules and norms that are accommodating of a particular school's circumstances. For example, girls-only and co-educational schools may have different requirements with regard to pregnancy policies. Well-resourced public schools would be able to provide more extensive counselling and medical services for pregnant learners such that it would be unfair, unreasonable and impractical for a national policy to expect all schools to adhere to exactly the same standards and provide exactly the same forms of assistance. Particularisation with due regard to considerations of this sort could only fall within a school governing body's governance function.*
>
> *…*
>
> *[70] To my mind it is, therefore, clear that neither the Minister nor the Provincial Department is empowered or ideally suited to adopt a pregnancy policy for a particular public school."*

195 At para 82.
196 At paras 67-70.

110 Emphasising the role of an SGB, the Court held that *"[a]s a democratically constituted body representative of the interests of the school community, the school governing bodies are in the best position to fashion policies that take into account the needs of their particular schools."*[197]

111 Where an HOD forms the view that the policy fails to give effect to the relevant Constitutional rights and objectives of the SASA, the HOD's recourse is two-fold: (i) the SASA obliges the HOD to engage in a comprehensive consultation process with the relevant SGB regarding the particular policies, and then, if there are *"reasonable grounds"* for doing so, to take over the performance of the particular governance or policy-formulation function in terms of section 22 (the section 22 intervention process); and (ii) the HOD may approach the court for appropriate relief, for example to obtain an interdict in respect of the application of the policies or to have the policies reviewed and set aside.[198]

197 At para 125.
198 At para 72.

112 A further key principle articulated in the judgment concerns the importance of cooperative governance in resolving disputes regarding the exercise of powers:

> *"[123] The importance of cooperative governance cannot be underestimated. It is a fundamentally important norm of our democratic dispensation, one that underlies the constitutional framework generally and thus has been categorized in the [SASA] as an organizing principle for the provision of access to education. ….*
>
> *[124] Given the nature of the partnership that the [SASA] has created, the relationship between public school governing bodies and the State should be informed by close cooperation, a cooperation which recognizes the partners' distinct but inter-related 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 capabilities are connected to the organization 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 [SASA]."*

113 In a minority concurring judgment by Froneman and Skweyiya JJ, they emphasised the importance of cooperative governance, elucidating on what was required:

113.1 There is *"constitutional obligation on the partners in education to engage in good faith with each other on matters of education before turning to Courts."*[199]

113.2 The emphasis on participation and engagement finds particular recognition in the Constitution's provisions on co-operative government. *"Section 40(1) establishes the principle that in the Republic of South Africa, government is constituted as national, provincial and local spheres of government which are "distinctive, interdependent and interrelated". Of particular relevance to the present case, however, is that the principles of co-operative government and inter-governmental relations are also extended to all organs of State within each sphere of government in section 41."*

113.3 *"The school governing bodies and HOD are organs of State. In terms of section 41(1)(h) they have an unequivocal obligation to co-operate with each other in mutual trust and good faith by assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest, co-*

199 At para 135.

ordinating their actions, and avoiding legal proceedings against one another."[200]

113.4 The provisions in SASA *"reinforce the provisions of the Constitution that engagement, participation and co-operation is the required general norm and that co-operative governance requires recognition of the distinctiveness, interdependence and interrelation of the different functionaries involved in the co-operative effort."*[201]

113.5 The explicit provisions of section 41(1)(h)(vi) of the Constitution appears to require a form of exhaustion of internal remedies before organs of State within a sphere of government should turn to the Courts.[202]

200 At para 141. Footnotes omitted.
201 At para 147.
202 At para 162.

Member of the Executive Council for Education in Gauteng Province and Others v Governing Body of the Rivonia Primary School and Others [2013] ZACC 34 ("Rivonia Primary judgment")

114 The ***Rivonia Primary judgment*** concerns the powers of the Minister, the HOD and the SGB in the context of a school's admissions policy.

115 The Court re-iterates that the SASA *"envisages that public schools are run by a three-tier partnership consisting of: (i) national government; (ii) provincial government; and (iii) the parents of the learners and the members of the community in which the school is located."*[203]

115.1 At a national level, the Minister *"may prescribe minimum uniform norms and standards for the "capacity of a school in respect of the number of learners a school can admit", including norms and standards relating to class size, the number of teachers, and utilisation of available classrooms."*[204]

115.2 At a provincial level:

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203 At para 36.
204 At para 38. Footnotes omitted.

> *"section 3(3) of the [SASA] places an obligation on the relevant provincial MEC to ensure that "there are enough school places so that every child who lives in his or her province can attend school". If the MEC cannot comply with this obligation because of a lack of capacity existing at the commencement of the Schools Act, then, in terms of section 3(4), "he or she must take steps to remedy such lack of capacity as soon as possible and must make an annual report to the Minister on the process achieved in doing so." Further, section 58C of the [SASA] contemplates that the MEC and the head of department will play a role in ensuring that the admission policy determined by the school governing body complies with the national norms and standards, where prescribed. In terms of section 58C(6), the head of department is under an obligation to determine the minimum and maximum capacity of a public school in accordance with the national norms and standards contemplated in section 5A, and to communicate the determination to the school governing body and the principal."*[205]

115.3 The principal, acting under the authority of the HOD, is responsible for the implementation of the admission's policy, as it is part of the professional management of a school.[206]

115.4 At school level, the SGB *"is responsible for determining the admission policy of that school"*[207] which includes determining the capacity of the school. It is *"significant that [SGBs] are afforded this role"* as the SGB *"is in a position to have regard, in an admission*

205 At para 39.
206 At para 43.
207 At para 40.

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policy, to a range of interconnected factors relating to the planning and governance of the school as a whole."[208] At school level, parents and governing bodies *"have an immediate interest in the quality of children's education. And they play an important role in improving that quality by supplementing state resources with school fees."*[209]

116 Co-operation between SGBs and national or provincial government is *"rooted in the shared goal of ensuring that the best interests of learners are furthered and the right to basic education is realised."*[210]

117 There are important textual qualifiers in section 5(5) of the SASA which subject the SGB's powers to other provisions in the SASA (as well as to provincial law). The effect of this is that *"the determination of admissions may be subject to provincial government's intervention in terms of the SASA, or applicable provincial law if the intervention is provided for in those instruments."* The SBG's powers are also subject to the broader Constitutional scheme.[211]

208 At para 40.
209 At para 70.
210 At para 69.
211 At para 41.

118 The Court summarised the principles which have emerged from the ***Ermelo judgment*** and the ***Welkom judgment*** as follows:[212]

> *"(a) Where the [SASA] empowers a governing body to determine policy in relation to a particular aspect of school functioning, a head of department or other governmental functionary cannot simply override the policy adopted or act contrary to it. This is so even where the functionary is of the view that the policies offend the [SASA] or the Constitution. But this does not mean that the [SGB's] powers are unfettered, that the relevant policy is immune to intervention, or that the policy inflexibly binds other decision-makers in all circumstances.*
>
> *(b) Rather, a functionary may intervene in a [SGB's] policy-making role or depart from a school governing body's policy, but only where that functionary is entitled to do so in terms of powers afforded to it by the [SASA] or other relevant legislation. This is an essential element of the rule of law.*
>
> *(c) Where it is necessary for a properly empowered functionary to intervene in a policy-making function of the governing body (or to depart from a school governing body's policy), then the functionary must act reasonably and procedurally fairly.*
>
> *(d) Further, given the partnership model envisaged by the [SASA], as well as the co-operative governance scheme set out in the Constitution, the relevant functionary and the [SGB] are under a duty to engage with each other in good faith on any disputes, including disputes over policies adopted by the governing body. The engagement must be directed towards furthering the interests of learners."*

119 The Court held that *"the general position is that admission policies must be applied in a flexible manner."*[213] The determination *"of capacity is a*

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212 At para 49. Footnotes omitted.
213 At para 56.

complex process that applies not only to the school as an entity, but also to each and every grade and class within the school. It involves a consideration of a range of interwoven factors relating to the planning and governance of the school as a whole."[214]

120 A decision to *"overturn an admission decision of a principle, or depart from a school admission policy, must be exercised reasonably and in a procedurally fair manner."*[215] The requirements of procedural fairness must be determined flexibly, having regard to the facts of the particular case.[216]

121 The Court emphasised the need for proper engagement between all parties affected,[217] as the planning and coordination in partnership with the provincial government and with the SGBs *"is crucial"*.[218] There is a strong emphasis on the relevant stakeholders' constitutional and statutory obligation to engage in good faith before turning to the courts.[219] The Court

214 At para 71.
215 At para 58.
216 At para 62.
217 At para 72.
218 At para 71
219 At para 73.

held that *"one organ of state cannot use its entrusted powers to strong-arm others."*[220]

MEC: Department of Education Northwest Province v FEDSAS [2016] ZASCA 192 (the "MEC Northwest v FEDSAS judgment")

122 The ***MEC Northwest v FEDSAS judgment*** concerns the HOD's powers to make regulations relating to hostels.

123 There are two principles articulated in the judgment which we highlight. The first concerns the scope of the right to education:

> *"The Constitutional right to education in s 29(1) and the best interests of the child learner provided for in s 28(2) of the Constitution must be promoted and protected. These provisions envisage that the right to education goes substantially further than the provision of classrooms."*[221]

124 The second principle concerns the scope of the SGBs' authority over the governance over schools, confirming that it is not exclusive:

> *"SGBs do not have exclusive authority over the governance of schools and by extension, school hostels and accordingly do not have unfettered powers to administer school hostels."*[222]

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220 At para 78
221 At para 21.
222 At para 22.

Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another [2016] ZACC 14 ("FEDSAS judgment")

125 The ***FEDSAS judgment*** concerns a challenge to the validity of amendments to regulations relating to the Admission of Learners to Public Schools.

126 In recognition of the partnership between stakeholders involved in education, the Constitutional Court held that *"The indigenous and ancient African wisdom teaches that* "thuto ke Lesedi la Sechaba"; "imfundo yisibani" *(education is the light of the nation) and recognises that education is a collective enterprise by observing that it takes a village to bring up a child."*[223]

127 Recognising the concurrent role of the national and provincial legislatures, the Court held:

> *"[26] … Education is a functional area of concurrent national and provincial legislative competence. Parliament may legislate on education and a province too. In turn, the Premier and MECs in a province exercise authority by implementing provincial legislation. The legislative competence of a province cannot be snuffed out by*

223 At para 1.

national legislation without more. The Constitution anticipates the possibility of overlapping and conflicting national and provincial legislation on concurrent provincial and national legislative competences. …

[27] … The conflict resolution scheme of sections 146, 149 and 150 of the Constitution departs from the conventional hierarchy that provincial legislation may not be in conflict with national legislation. … Under the scheme, provincial legislation prevails over national legislation except if the national legislation applies uniformly countrywide or the matter cannot be regulated effectively by respective provinces or the matter is one listed in the Constitution as requiring uniformity across the nation." [224]

128 The important role played by SGBs was also recognised in the judgment:

"[47] It remains important to recognise that school governing bodies are a vital lifeblood to proper and fulsome learning and teaching. Parents must be meaningfully engaged in the teaching and learning of their children. The [SASA] carves our an important role for parents and other stakeholders in the governance of public schools. School governing bodies are made up in a democratic and participatory manner and ordinarily would advance the legitimate interest of learners at a school. The Constitution and the Schools Act also entrust vital tasks related to the education of our children to the MEC and HOD. In the past, this Court has correctly cautioned against undue dominance of school governing bodies by the provincial Executive. We have called for cooperative governance between statutory creatures – school governing bodies and the MEC and HOD – entrusted with effective and universal access to basic education."[225]

129 The Court held that the SGB's power to formulate an admission policy is not unfettered, it is *"subject to limitations in sections 5(1) to (3) of the [SASA]*

224 At paras 26-27. Footnotes omitted.
225 At para 47.

as commanded by section 5(5) of the [SASA].” [226] The power to determine the admission policy of a school is thus subject to two internal qualifiers – first it is subject to the provisions of the SASA and any applicable provincial law; and second, it must conform to all applicable law as that is what the rule of law requires.[227]

226 At pars 29.
227 At paras 43-44