

# The effectiveness of legal remedies in education: A school governing body perspective

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## OPSOMMING

### Die Doeltreffendheid van Regsmiddele in Onderwys: 'n Skoolbeheerliggaam se Perspektief

Na bykans 'n dekade van grondwetlike regsontwikkeling, word howe steeds versoek om geskille tussen skoolbeheerliggame en hul onderskeie provinsiale onderwysdepartemente by te lê. Alhoewel verskeie redes hiervoor uitgelig kan word, fokus hierdie artikel op aangeleenthede wat betref die Staat en skoolbeheerliggame se besorgdheid aangaande die voorsiening van gehalte-onderwys in die taal van keuse ingevolge artikel 29(2) van die Grondwet. Die doeltreffendheid van regsmiddele in hierdie verband, word aan die hand van drie prominente hofsake, naamlik *Laerskool Middelburg*, *Laerskool Mikro* en *Hoërskool Ermelo* ondersoek. Vir die doeleindes hiervan, is 'n dokumentêre navorsingsontwerp en hermeneutiese benadering binne 'n kwalitatiewe dimensie in die klein gevolg om die ervaring van minstens twee persone wat verbonde is aan elk van die skole en betrokke was by elke hofsak, te bekom. Die resultate van die studie dui daarop dat taal oor die algemeen 'n polities-gedrewe aangeleentheid is, dat regsmiddele inderdaad – met verloop van tyd – verligting en sekerheid bring en dat howe wél die korrekte forum is vir geskilbeslegting wat betref onderwysaangeleenthede.

Congratulations! The court has just ruled in your favour. The easy part was winning the case. Now for the tricky part – getting the other party to pay up.

## 1 Introduction

After more than a decade of constitutional jurisprudence, courts are constantly requested to intervene between schools' governing bodies (SGBs) and their respective provincial departments of education (PDoEs) in order to remedy issues of conflict between them. Although various reasons for such education litigation can be outlined, this article contemplates only those issues pertaining to the State's and SGBs' concern regarding the provision of quality education to all learners in the language of choice in accordance with section 29(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

The medium of instruction is selected since litigation in this regard seems to be fruitless. Malan,<sup>1</sup> Malherbe<sup>2</sup> and the *Federasie van Afrikaanse Kultuurvereniginge* (Federation of Afrikaans Cultural Associations),<sup>3</sup> for example, show that courts' verdicts only bring relief in the short run. They do not stop PDoEs to continuously pressurise schools to change their language policies. Despite their theoretical value, legal remedies have, thus, proved to be inadequate in practice.<sup>4</sup> This led to, as pointed out by Malan,<sup>5</sup> the realisation that the previously devoted confidence of SGBs in the capability of the law and courts to guard their position, in determining their own language policies, is unjustified.

In view hereof, this article attempts to answer the following question: Are legal remedies provided by courts effective in remedying the battle between SGBs and PDoEs over, specifically, the language policies of schools?

In providing an answer, a brief background is provided, the right to education in the language of choice is analysed, the legal status of SGBs and PDoEs in South Africa is discussed, and the legal remedies available to them, are addressed. To illustrate this, three prominent court cases namely *Middelburg*,<sup>6</sup> *Mikro*<sup>7</sup> and *Ermelo*<sup>8</sup> concerning the right of SGBs to establish the language policy of schools in terms of section 6(2) of the South African Schools Act<sup>9</sup> (the Schools Act), in which courts were requested to remedy the situation, is scrutinised throughout. In order to establish the effectiveness of the three court verdicts, we added a small qualitative research dimension to obtain the perspectives of the three SGBs involved, regarding the relief obtained. The article ends with significant recommendations.

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1 "Die Grondwet, onderwysowerhede en die pad vorentoe vir Afrikaanse skole" 2010 *T vir Geesteswetenskappe* 262.

2 "Taalregte in Suid-Afrikaanse skole (tydelike verligting van onverpoosde druk)" 2006 *TSAR* 197.

3 "The Federation of Afrikaans Cultural Associations welcomes the *Mikro* Judgement" 2005 <http://vryeafrikaan.co.za/lees.php?id=272> (accessed 2013-02-15).

4 The Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) par 65, 81-2 outlined that constitutional remedies are, especially with regard to socio-economic rights ineffective as they often amount to sheer declarations.

5 2010 *T vir Geesteswetenskappe* 262 260.

6 *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T).

7 *Western Cape Minister of Education v Governing Body of Mikro Primary School* 2005 10 BCLR 973 (HHA).

8 *Hoërskool Ermelo v Head, Department of Education, Mpumalanga* 2009 JOL 23349 (SCA).

9 84 of 1996.

## 2 Research Angle of Incidence

First and foremost, this article follows a documentary research design,<sup>10</sup> since the authors drew on documentary resources and took an investigative stance while cross-examining the particular texts.<sup>11</sup> Moreover, we did not only attend to *what is written and how a particular concept is expanded*, but also to *what is implied and/or not written*.<sup>12</sup>

Lastly, we underpin the article by following an hermeneutical approach.<sup>13</sup> Such an approach refers to reading written text or content for the sake of an interpretive appreciation while considering context and original purpose meticulously. The concept *text* is broadened to incorporate, among others, in-depth interviews.<sup>14</sup> Therefore, we added a small qualitative dimension to our investigation in order to obtain the current perspectives of the three SGBs involved,<sup>15</sup> regarding the relief obtained.

The small qualitative dimension comprised of conducting telephone interviews with at least two people who were involved in each school's court case, whether part of the SGB or of the legal advice.<sup>16</sup> The rationale for choosing telephone interviews lies in the fact that the authors of this article were interested in using a cost-effective way of gaining a fresh perspective on each of the selected cases by reporting on the outcomes of the remedies and court orders.<sup>17</sup> The interviewer guarded against causing the schools any harm or anguish by (1) explaining to each participant what the research entailed; (2) inviting each participant to take part; and (3) acknowledging each participant's consent or refusal.<sup>18</sup> The possible disadvantage of open-ended questions that form part of telephone interviews<sup>19</sup> was negated by the fact that the participants were all familiar with the relevant court case.

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10 Green & Browne *Research design* 38 in *Principles of social research* (2005) (eds Green and Browne).

11 Rapley *Doing conversation, discourse and document analysis* (2007) 111.

12 *Ibid.*

13 Babbie & Mouton *The practice of social research* (2001) 30-31. Merriam *Qualitative research. A guide to design and implementation* (2009) 32-33. Neuman *Social research methods. Qualitative and quantitative approaches* (2011) 101. The theory dates back to the 19th Century.

14 Merriam 33.

15 Middelburg, Mikro & Ermelo.

16 In the end, we interviewed eight persons. The interviews took 42-75 minutes each. One of the three schools was hesitant in the beginning; the other two grabbed the opportunity.

17 Rapley *Doing conversation, discourse and document analysis* (2007) 20. In general, written documentation of a school's perspective on the extent to which a court order, for example, was executed, is not readily available.

18 Rapley 24.

19 Neuman 338.

### 3 Background

The language of instruction in multilingual countries remains a problem. In South Africa, specifically, Malherbe<sup>20</sup> opines that the constitutional protection of languages seems not to be worth much as government is neglecting its duty to uplift the status<sup>21</sup> of the nine official indigenous languages in particular, while mother-tongue education remains only to be ideal words.

### 4 The Right to Education in a Language of Choice

The right to education is globally recognised as a fundamental, socio-economic human right<sup>22</sup> as it provides a means to human empowerment, political participation, quality of life and equal access to public services.

Because of its social value, the right to education, together with the right to education in a language of choice, is guaranteed and protected by the Constitution<sup>23</sup> through section 29. With regard to section 29(2), Visser<sup>24</sup> accentuates that the right to education in the language of a learner's choice is a qualified right. He accordingly cautions that, although this right creates specific expectations with learners, they must always bear in mind that its nature and scope may be bespoke by internal qualifiers and its application limited,<sup>25</sup> when applicable.<sup>26</sup> They must, moreover remember that it does not extend to each and every public school where reasonably practicable.<sup>27</sup> Learners must also recognise that it does not present them with a right to a single-medium

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20 "Taal in skole veroorsaak nog 'n slag hoofbrekens: Regspraak" 2010 *TSAR* 610.

21 S 6(2).

22 Bray "Macro issues of Mikro Primary School" 2007 *Potchefstroom Electronic LJ 2*; Roach "Crafting remedies for violations of economic, social and cultural rights" in *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) (ed Squires) 111-126.

23 Various other sections provide for language and language rights: ss 6, 30, 31, 35(3)(k), 185, 186 and 235 Constitution.

24 "Legality and legal reform in the public sector" 2006 *TSAR* 360.

25 *Reasonably practicable* – the Constitution requires education authorities to provide education in the language of choice in public schools *where this is reasonably practicable*. Given the range of official languages (11 – s 6), the Constitution provides this internal limitation to the right. Whether or not it is reasonable practicable, a consideration of various factors is needed, such as language usage, practicality, expense, regional circumstances and balancing the needs and preferences of the population (s 6(3)(a)).

26 Bray 2.

27 *Mikro* par 31.

public school albeit the fact that it may have momentous potential for the realisation of such schools.<sup>28</sup>

Fleisch and Woolman,<sup>29</sup> concurrently, offer the opinion that single-medium public schools may exclude learners from schools if they have access to another school offering adequate instruction in their chosen language. Where this right is, however, denied, Barry<sup>30</sup> points out that the State *via* its responsible education authority, carries the onus of providing a reasonable and objective justification for its denial. This is essential as (a) the Norms and Standards in Public Schools<sup>31</sup> place significant constraints on the ability of single-medium schools to turn down learners, who prefer and will benefit from, instruction in another language<sup>32</sup> and (b) no language should be forced upon learners nor should they unreasonably be deprived of the opportunity to use their language(s) of choice.<sup>33</sup> These Norms and Standards make explicit what is meant by the phrase *where reasonably practicable* as a qualifier in terms of section 29(2) of the Constitution as it determines that it is reasonably practicable to provide education in a particular language of learning and training if at least forty learners in a particular grade within Grades 1-6 or thirty-five learners in a particular grade within Grades 7-12 request instruction in a specific language at a particular school.

## 5 The State's Obligation to give effect to the Right of Education in a Language of Choice

Bray<sup>34</sup> highlights that section 29(2) endows learners with a right against the State; bestowed with the enormous responsibility of realising it in practice, *per se*. This is due to the fact that significant authority over public schools is vested in national and provincial spheres of government.<sup>35</sup> As such, the State is primarily responsible for all public schools and thus obliged to afford the best feasible outcome by utilising the various educational alternatives<sup>36</sup> accessible to them in a *bona fide*

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28 "Language rights in education: the international framework" 9-22 in *Multilingualism, Education and Social Integration* (2003) (eds Cuvelier, Du Plessis and Teck); *Laerskool Middelburg* 173B, 173F; Kriegler J in *Ex parte Gauteng Provincial Legislature*, moreover, suggested that the State will no longer support public institutions that privilege one way in the world over another. For those who insist on education in their language of choice, the Constitution, through s 29(3) provides the right to form independent schools out of their own resources.

29 "On the constitutionality of single-medium public schools" 2007 *SAJHR* 66.

30 *Schools and the law: A participant's guide* (2006) 48.

31 GN 1701 in GG 18546 of 1997 as promulgated by SASA and the National Education Act.

32 Fareed & Waghid "In defence of deliberative democracy: challenging less democratic school governing practices" 2005 *SA Jof Ed* 27.

33 Malherbe 191.

34 Bray 9.

35 "Democracy, social capital and school governing bodies in South Africa" 2008 *Ed and the Law* 55; Barry 23.

36 S 29(2) Constitution.

manner. Seeing that the State can be held accountable by the community for the outcomes<sup>37</sup> of its actions, Malherbe<sup>38</sup> urges government to reconsider what may be judged to be educationally feasible while, as outlined by Cheadle *et al.*<sup>39</sup> paying attention to the important factors of reasonableness, equal education opportunities and the necessity of redressing past imbalances. PDoEs, must also, as outlined by Bray,<sup>40</sup> explore ways of sharing scarce resources and providing alternative language maintenance programmes at schools and/or in school districts which cannot be provided with and/or offer additional languages of instruction.

The responsibility of the State to consider all reasonable educational alternatives was coupled by the court in the *Mikro* case<sup>41</sup> with its obligation to transform the whole education system and develop a uniform system in line with constitutional principles and the needs of a newly democratic South African nation.<sup>42</sup> Barry,<sup>43</sup> however, contends that the State alone cannot carry these responsibilities since only the education system as a whole can reasonably be expected to provide education in all official languages.<sup>44</sup>

The important role of all citizens in protecting and giving effect to individual rights was highlighted by the Constitutional Court in *S v Manamela*<sup>45</sup> by showing that it does not only depend on State action, but also on the conduct of all fellow citizens. Honoré,<sup>46</sup> similarly, argues that everyone is incited to treat others as responsible agents as it promotes individual and social well-being by preserving social order, encouraging good behaviour and creating a sense of personal character and identity that is valuable for its own sake.

Visser<sup>47</sup> demonstrates that there are at least four key role-players involved in exercising direct control over education, namely PDoEs, principals and educators, as well as SGBs. SGBs were, accordingly, created within the parameter of the principles regarding the decentralisation of power, to govern schools in partnership with the State.<sup>48</sup> As such, the Schools Act aims at upholding the rights of all learners, parents/caregivers and educators and promoting their

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37 Visser & Loubser 28.

38 Malherbe 192.

39 *South African Constitutional Law: The Bill of Rights* (2002) 540.

40 Bray 15.

41 Parr 3-4.

42 Bray 15.

43 Barry 49.

44 This is particularly so when the implications these rights have for educational planning, the provision of sufficient resources and the availability of qualified educators are taken into account.

45 2000 3 SA 1 (CC) par 100.

46 Quoted by Visser & Loubser *Thinking about law: Essays for Tony Honoré* (2011) 26.

47 Visser 360.

48 Preamble SASA.

acceptance of responsibility for the organisation, governance and funding of schools as equal educational partners.

The creation of SGBs is regarded by Woolman and Fleisch<sup>49</sup> as a lineation of a fourth level of democratic government as a unique political institution. Bray,<sup>50</sup> to the contrary, opines that SGBs do not form part of the spheres of government or state organs working within the sphere of public education. Because of this disagreement, the position of the State and SGBs needs further clarification.

## 6 The Status of PDoEs and SGBs

SGBs were created by the Schools Act, stipulating their functions while also providing a useful framework in terms of which school education must function and be managed in obtaining the objectives of the Constitution.<sup>51</sup> As juristic persons, schools via their SGBs are, moreover, obliged to exercise their statutory functions<sup>52</sup> in the best interests<sup>53</sup> of their schools and learners.

SGBs are, *inter alia*, considered to be sites of representative (a first step towards self-governance, according to Woolman and Fleisch),<sup>54</sup> participatory and direct democracy. As such, SGBs possess the authority to take community-based decisions<sup>55</sup> on, for example, the developing of school language policies. As a result, SGBs can be seen as popular means for political participation as they in many respects reflect the most important interactions that citizens may have with the State and possess the potential to be the foundation of social cohesion<sup>56</sup> among South Africa's diverse population.

In granting parents/caregivers and learners who live together and know schools and their surrounding environment best, the opportunity to make decisions regarding the education of the youth, participatory democracy is enhanced. Woolman and Fleisch,<sup>57</sup> accordingly, regard the Schools Act to represent the ideal for the creation and maintenance of social capital. They base their finding on the fact that such decisions have the potential of creating trust, loyalty, friendship, kinship and commitment to shared objectives.

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49 47.

50 16.

51 In *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC) par 44 the court found: "There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law ... derives its force from the Constitution and is subject to constitutional control".

52 Ss 20, 21 SASA.

53 S 20(1)(a) SASA.

54 59.

55 Visser 360; Fareed & Waghid 25.

56 The cornerstone of economic stability – Chipkin & Ngqulunga "Friends and family: social cohesion in South Africa" 2008 *J SA Studies* 65.

57 59.

In itself, SGBs should thus be allowed to operate with a considerable degree<sup>58</sup> of independence from PDoEs – they have a legal status and capacity of an unchallenged nature separate from State departments.<sup>59</sup> This viewpoint was underscored by the Supreme Court of Appeal<sup>60</sup> in stating that SGBs, although subject to the Constitution,<sup>61</sup> the Schools Act<sup>62</sup> and any other provincial law, are not part of the governmental hierarchy and are not, in relation to their functions, subject to any executive control by the national, provincial or local spheres of government. It was, correspondingly, found that the PDoE had no power, without any justification, to infringe the SGB's right to adopt its own language policy.<sup>63</sup> Adding to this, Woolman and Fleisch<sup>64</sup> state that SGBs are not mere extensions of PDoEs. They are rather unique establishments governing public schools as self-governing institutions without undue influence by government, in contrast with the duty of principals to manage schools as a direct delegate of the various heads of department.<sup>65</sup>

However, since SGBs were created by the Schools Act, they are not constitutionally mandated establishments. As a result, their functions can be altered and even eliminated<sup>66</sup> by the State through the promulgation of legislation.<sup>67</sup> This must, conversely, be done with great care as the court indicated in the *Mikro* case<sup>68</sup> that the State must be able to justify its actions in each case. In the absence of the latter, courts will regard its actions as arbitrary and in violation of constitutional and statutory provisions.<sup>69</sup> In protecting the community from arbitrary state actions, Grote,<sup>70</sup> however, emphasises the practical importance of independent courts being able to apply the ideal of rule of law,<sup>71</sup> thus controlling administrative matters by way of judicial review.<sup>72</sup> Altering the functions

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58 Schools remain subject to overall control (management and governance) by the national education government in the sense that they must comply with national and provincial norms and standards (Bray 17).

59 Bray "Autonomy in school education in South Africa: a legal perspective" 256 in *Autonomy in education* (2000) (eds Berka *et al*).

60 *Mikro supra* par 20, 22.

61 Ss 2, 8, 33, 39, 195, 237.

62 Ss 5, 6.

63 *Mikro* par 43.

64 49.

65 S 16 SASA.

66 S 22(1) SASA; Woolman & Fleisch 55.

67 Thus, changing the balance of power between SGBs and National Government.

68 *Mikro* par 33, 34.

69 Woolman & Fleisch 66.

70 "Public law in transformation" 2004 *SA Public Law* 514.

71 The ideal of rule of law constitutes one of the core principles of contemporary constitutionalism.

72 The review of administrative actions is inherent in the jurisdiction of courts. Since it has also been constitutionalised by s 33 Constitution, the enforcement of administrative law in courts has largely become a constitutional matter (Hoexter *Administrative law in South Africa* (2008) 463).



of SGBs through legislation is considered by Bray<sup>73</sup> as a way to counteract the self-governance of public schools,<sup>74</sup> thus not only infringing upon their legal personality, but also opposing the constitutional ideal of transforming education and allowing for democratic participation in this sphere.

Visser,<sup>75</sup> moreover, shows that because of the close link between PDoEs and SGBs in providing public education, any decrease in the functions of SGBs will automatically lead to an increase in the functions of PDoEs. The same author, however, cautions that more powers cannot merely be allocated to PDoEs in light of numerous existing illegal and irregular actions by education officials. Visser<sup>76</sup> rather calls on PDoEs to develop a culture of respecting the legal powers and functions of SGBs in order to serve everybody in South Africa fairly.<sup>77</sup>

Looking at the other side of the coin, Fareed and Waghid,<sup>78</sup> cautions that the State, primarily responsible for public education, cannot be expected to be merely an onlooker. It has to guard against SGBs misusing their statutory powers to, for example, unfairly discriminate against learners by way of their language policies.<sup>79</sup> The same authors,<sup>80</sup> nevertheless, point out that, although the Constitution does not provide a guaranteed right to single-medium schools, it does not prohibit the existence of such schools. It rather recognises a multiplicity of school language policies. The aim is, thus, not to bring about uniformity or create a homogeneous society, but to ensure that language is not used for purposes of exploitation, oppression, abuse or exclusion.<sup>81</sup>

In view of this, it is essential to take note of the Constitution providing for principles of cooperative government and intergovernmental relations.

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73 18.

74 Eg s 20 – changing SGBs' powers to recommend and appoint educators; Education Law Amendment Act causing confusion and alarm about the role of the SGB and the HOD in learner suspension and expulsion.

75 360.

76 363.

77 S 195(1) Constitution.

78 65.

79 *Laerskool Middelburg; Ermelo*; s 9 Constitution.

80 66.

81 Sachs "A Bill of Rights for South Africa: areas of agreement and disagreement" 1989 *Columbia HR LR* 27.

## 7 Cooperative Governance and Intergovernmental Relations

Public schools, along with PDoEs<sup>82</sup> act as institutions/functionaries performing a public function<sup>83</sup> as they are responsible for providing public education in an impartial, fair, equitable, transparent, competitive and cost-effective manner<sup>84</sup> in terms of legislation.

As organs of State,<sup>85</sup> PDoEs and public schools via their SGBs must adhere to the basic democratic values and principles governing the public administration<sup>86</sup> as they are, as emphasised in the *Ermelo* case<sup>87</sup> always required to act within the confines of the law. They are, moreover, bound to the constitutional principles of cooperative governance and intergovernmental relations,<sup>88</sup> which have, as referred to by Barry,<sup>89</sup> considerable consequences for the conduct of public schools and for their relations with one another.

In this regard, the Constitution, section 41(1)(e) and (h), makes provision for respect towards the status, powers and functions of government in all spheres, as well as for cooperation in mutual trust and good faith. Section 41(1)(h)(ii) and (iii), moreover, require of government agencies to assist, support, inform and consult one another on matters of common interest. It is, accordingly, important that SGBs and PDoEs fully understand one another's different legal powers and levels of responsibility, inspire confidence in one another's ability to make sound, objective and timeous decisions, consult with one another and detain themselves from infringing on one another's terrain.<sup>90</sup>

Practice, in stark contrast, unfortunately does not mirror effective cooperation. This could be ascribed to the close link between SGBs and the State leading to the distinction between their functions being blurred, resulting in extensive tension at school level. Various authors attribute

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82 Provincial education departments (organs of State) form part of the executive authority of government, bestowed with the power to apply national policy on a provincial level (Hoexter 6).

83 S 239 Constitution comprehensively defines a state organ as "any institution exercising public power or performing a public function in terms of any legislation is an organ of state".

84 Barry 29.

85 *Mikro* par 20.

86 SGBs perform typical administrative actions in the management and governance of public schools.

87 *Hoërskool Ermelo v Head, Department of Education, Mpumalanga* 2009 JOL 23349 (SCA).

88 Ss 41, 195 Constitution.

89 29.

90 Visser 365.

this to the State not respecting SGBs,<sup>91</sup> thus illegally intruding in SGB-functions<sup>92</sup> while disrespecting the law, as well as the rights of SGBs and learners<sup>93</sup> to legislation providing little scope for decisions by SGBs,<sup>94</sup> and to attempts aimed at merely pursuing parents/caregivers to accept financial responsibility for education. It is in view of these discrepancies that SGBs and PDoEs are obliged to consider carefully whether existing legal remedies can effectively combat existing conflict between them.

## 8 Legal Remedies in Education

The *ubi ius ibi remedium*-principle in South African law entails a legal remedy existing for every right.<sup>95</sup> This involves that the existence of a legal right implies the existence of an authority (judiciary, acting as the *natural guardian* of individual rights<sup>96</sup> and as *administrators of justice*)<sup>97</sup> with the power to grant a remedy whenever a right is infringed.<sup>98</sup> As such, legal remedies<sup>99</sup> protect rights by providing legal subjects the opportunity to enforce their rights.

Pertaining to the right to receive education in a language of choice, Bray<sup>100</sup> stresses that, when this right has been infringed upon, it grants not only administrators of public education the powers to implement this right, but also the judiciary to administer justice impartially and without fear, favour or prejudice in line with section 165 of the Constitution. With regard to the rights of SGBs to compile language policies, courts therefore have the authority to reprimand PDoEs when opting to act in a bureaucratic and heartless fashion against SGBs.<sup>101</sup>

Since establishing an appropriate and effective remedy for the breach of a right remains a challenge,<sup>102</sup> South African courts have been allocated wide remedial powers to grant remedies in, especially, socio-economic rights cases to which the right to education belongs. Courts

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91 Malherbe.

92 Beckmann "The emergence of self-managing schools in South Africa: devolution of authority or disguised centralisation of power" *J of Ed and the Law* 154.

93 Malan 263.

94 Woolman & Fleisch 47.

95 Kleyne & Viljoen *Beginner's guide for law students* (2007) 120; Labuschagne *Trilingual student law lexicon* (2004) 597.

96 Sachs 28; Grote 531.

97 S 165 Constitution.

98 Currie & De Waal *The new constitutional and administrative law* (2007) 196.

99 See Currie & De Waal 192: Legal remedies are about what can be done if an unjustifiable infringement of rights has transpired.

100 11.

101 De Vos "Constitutional Court cleverly "solves" eviction dilemma – or not?" 2010 <http://www.constitutionallyspeaking.co.za/constitutional-court-cleverly-solves-evictionsdilemma> (accessed 2010-03-02).

102 Budlender "The role of the courts in achieving the transformative potential of socio-economic rights" 2007 *ESR Review*.

may, *inter alia*, grant *appropriate relief*,<sup>103</sup> including a *declaration of rights*<sup>104</sup> and may make any order that they deem *just and equitable*.<sup>105</sup> They may even develop new, effective and innovative remedies if needed when constitutional rights are infringed.<sup>106</sup> To be effective, Chenwi<sup>107</sup> proposes that remedies must be capable of promoting social transformation and of enhancing participatory democracy, transparency and accountability. To obtain this, the Constitutional Court<sup>108</sup> shows that courts need to consider the interests of all who may be affected by their orders (a wider public facet) and not only that of the parties to the litigation.

According to section 34 of the Constitution,<sup>109</sup> everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing in a court or, where appropriate, in another independent and impartial forum. By referring to *disputes that can be resolved by the application of law*, this section provides for administrative actions of a judicial nature.<sup>110</sup>

It is, however, important to take cognisance of the fact that disputes between organs of state are subject to the constitutional principles of cooperative governance. As a result, state organs are obliged to settle intergovernmental disputes between them by means of procedures provided for that purpose, and to exhaust all other remedies (thus

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103 With regard to what *appropriate relief* entails, in the absence of a clear description in the Constitution, the Constitutional Court in *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) par 98-99 concluded that it is left to the courts to decide in any particular case. This implies that the Constitution permits a flexible approach to remedies.

104 Roach 113.

105 S 38 Constitution.

106 *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC) par 69.

107 "A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia road and others v City of Johannesburg and others*" 2009 *Constitutional Court R* 371.

108 *Hoffmann v South African Airways* 2001 1 SA 1 (CC).

109 In *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) par 21, this right was interpreted as the corollary of the first aspect of rule of law, which is the State's obligation to provide mechanisms allowing citizens to resolve their disputes. In *Chief Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC) par 22, it was viewed "as the right of access to a court as foundational to the stability of an orderly society as it ensures peaceful, regulated and institutionalised mechanisms to resolve disputes. As such, the right of access to court is a bulwark against vigilantism and the chaos and anarchy which it causes". In *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) par 61, as an express constitutional recognition of the importance of resolving social conflict by means of impartial and independent institutions. It was also stated that the sharper the potential of a social conflict, the more important it is that disputes are resolved by courts.

110 *Kollabatschenko v King* NO2001 4 SA 336 (C); *Baramoto v Minister of Home Affairs* 1998 5 BCLR 562 (W).

avoiding legal proceedings)<sup>111</sup> before approaching a court to resolve such a dispute.<sup>112</sup> In debating the applicability hereof on disputes between PDoEs and SGBs regarding the determination of language policies for public schools, the Supreme Court of Appeal in the case of *Mikro*, found such a dispute not to be of an intergovernmental nature and, consequently, not limited. The reason held for this finding was that SGBs are not subject to the executive control of national or provincial education authorities. In support, Barry<sup>113</sup> contends that public schools cannot be barred from instigating legal proceedings against a PDoE under circumstances involving unlawful State conduct, while SGBs conform to statutory requirements.

While discussing constitutional remedies, Currie and De Waal,<sup>114</sup> moreover, point to the general rule when applying the Constitution that constitutional relief must be sought as a last resort. Despite the fact that most cases in administrative law do not engage the Constitution, Hoexter<sup>115</sup> maintains that the three cases under discussion<sup>116</sup> were indeed of a constitutional nature in view of the fact that they involved the violation and/or threatening of the constitutional right of being taught in a language of choice. As such, it gave the respective SGBs, having specific interests in the matter, a standing in court.<sup>117</sup>

It was, accordingly, found in the matter of *Laerskool Gaffie Maree*<sup>118</sup> that the PDoE, as an administrator, can be required by courts to comply with its expressed or implied duties. By subjecting State action with regard to education to judicial control, Grote<sup>119</sup> shows that it, *inter alia*, contributes to a higher acceptance of legitimacy concerning their actions by state organs, as well as to a broader acceptance of their decisions by the public. The principle of legality and the suitable exercise of administrative powers by a PDoE was also a concern in the matter of *Hoërskool Ermelo*. The court, accordingly, condemned the illegal actions of the PDoE by suspending the principal, withdrawing the functions of the SGB and determining the school's language policy against the wishes of the SGB. It was, equally held in the matter of *Laerskool Middelburg* that the PDoE acted unlawfully in changing the school's language policy, contrary to the best interests of the learners involved.

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111 *National Gambling Board v Premier of KwaZulu-Natal* 2002 2 BCLR 156 (CC);  
*MEC for Health v Treatment Action Campaign* 2002 10 BCLR 1028 (CC).

112 S 41(1)(h)(vi), (3), (4) Constitution.

113 31.

114 191.

115 463.

116 *Middelburg, Mikro & Ermelo*.

117 Currie & De Waal 191.

118 *Laerskool Gaffie Maree v MEC for Education, Training Arts and Culture, Northern Cape* 2003 5 SA 367 (NC) par 13.

119 531.

By applying section 33 of the Constitution and specifically section 6(2)(d) of the Promotion of Administrative Justice Act,<sup>120</sup> the High Court in *Mikro*<sup>121</sup> found that an error of law indeed existed as the PDoE was not entitled to oblige the SGB unilaterally to accept a new language policy for their school. Since courts are reluctant to enter the sphere of the executive authority when administrators act in good faith,<sup>122</sup> the court did not make an order regarding costs. In support of this, Currie and De Waal<sup>123</sup> stress the fact that constitutional remedies should be progressive, in the best interests of the community and aimed at building capacity, which an award for damages is not. Awards are, hence, only made against officials whose actions were grossly irregular or blameworthy.

## 9 The Qualitative Dimension of the Article

Since the main aim of providing remedies is to justify the Constitution and to prevent further infringements of rights,<sup>124</sup> as pointed out in the beginning of the article, we obtained the perspectives of the three SGBs<sup>125</sup> in order to establish whether the remedies the courts provided indeed met this aim. In this regard, we conducted telephone interviews with those participants from the respective school who consented to taking part in the qualitative research phase of the article.<sup>126</sup>

We authors drew up a question matrix that consisted of four main questions:

- (1) The first question reflected on the court orders/remedies and had five sub-questions.
- (2) The second question reflected on looking back on the case and had nine sub-questions.
- (3) The third question reflected on the current situation and had nine sub-questions.
- (4) The final question reflected on whether the trouble and effort had been worth the school's while.

During the eight telephone interviews, the interviewer asked the same questions to all the participants.

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120 3 of 2000. Ss 6-9 PAJA focus on the scope of, the procedures for and the remedies in judicial review proceedings.

121 *Governing Body, Mikro Primary School v Minister of Education, Western Cape* 2005 3 SA 504 (C). This reasoning was upheld in the SCA.

122 Hoexter 508, 466 – Judicial review is mainly designed for setting aside unlawful action.

123 196.

124 *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC) par 27.

125 *Middelburg, Mikro & Ermelo*.

126 Eight participants from the three schools took part in the interviews. No recordings were made; the transcripts of these telephone interviews are available from the second author of this article.

**Table 1: Participant responses to five questions concerning legal remedies**

	<i>Middelburg</i>	<i>Mikro</i>	<i>Ermelo</i>
Do courts still have influence?	A qualified yes: wheels of justice take too long for the good of public education.	The dragging of feet could indicate that strikes are more effective.	Unsure.
	Yes, I believe in the rule of law.	Yes, we function by the rule of law.	Yes, the rule of law is the only way.
Was the court order effective?	Yes, after nine years.	Yes, but not immediately.	Yes, it provided certainty.
Did the PDoE offer support through textbooks and/or sources?	They sent some textbooks at a late stage, but no sources.	They did an unrealistic assessment of learners' needs.	They promised educators and textbooks. Nothing materialised.
Was it worth all the trouble and effort?	Undoubtedly, yes.	Yes, absolutely.	A profound "yes".
What is your current relationship with the PDoE?	Good.	Mutual respect.	Good.

## 10 Middelburg Primary School – Report on Telephone Interviews

Originally, although it was clearly a politically-driven matter, in 2002 the school was encouraged that the court rejected the PDoEs allegations and accepted their *bona fides*. However, one participant reported feeling much like an empty shell, since after the court had pronounced its verdict, the matter simply dragged on for *too long* – it took nine years before the finances were resolved (2002 to 2011). It appeared as if the PDoE did not take note of the court order in the least: they did not adhere to any of the delivery dates. In order to carry on the school's education in the best interests of also the new learners who needed schooling in English, the Afrikaans-speaking parents/caregivers who were paying school funds had to carry the cost of R2 million in order to appoint the necessary educators until the end of 2009: the SGB appointed one in 2003; two in 2004; three in 2005; four in 2006; five in 2007; and so on. In the middle of 2005, the PDoE promised back pay for seven educators. Yet, they only started remunerating the school in October 2009 when they paid R1 million. They paid the balance of R985,000 in October 2011. Moreover, nothing came of the large numbers of isiZulu/Sesotho learners who would, according to the PDoE, need English tuition in the Middelburg area.

Half of the original English learners who enrolled in Grade 1 completed their Grade 7 year at Middelburg Primary School. Even though the principal and staff members went to much trouble to make sure that all learners felt secure and at ease, true integrated learner engagement still takes place only on the soccer field when they train and play matches, since these primary school isiZulu/Sesotho and Afrikaans/English learners clearly prefer home language conversations.

Middelburg Primary School is a parallel-medium school, with a tendency of more and more English home language parents/caregivers now sending their children to the school. Growing numbers of Afrikaans-speaking learners who enroll at this school have necessitated the building of a new classroom for their Grade Rs.

Although the school feels the court order itself was effective, they are convinced that public schools should be wary of trusting their and PDoE and even the national Department of Education's promises.

## **11 Mikro Primary School – Report on Telephone Interviews**

This SGB was fully prepared when the case went to court, although it did everything in its power not to take the legal route. Even the day before the case actually commenced, they requested and got a discussion with the Member of the Executive Council (MEC), hoping to come to some kind of workable agreement. However, during the discussion it was clear that the MEC preferred taking the matter to court. When the verdict came in favour of the school, it was evident that the court underlined the seriousness of the matter.

Towards the end of the school year, after having inquired about the department's late delivery on the court order, the PDoE fulfilled their promises concerning the English learners who joined the Afrikaans as medium of instruction school. They appointed and paid one educator; delivered school tables/chairs towards the middle of the year; and sent a number of textbooks just before the end of the year. The SGB had to use Afrikaans-speaking parents/caregivers' paid school funds to ensure instruction in the best interests of also the new learners who required English instruction. This led to a cash flow problem which the SGB counteracted by planning functions to make money. In addition, perhaps with the exception of classroom space that was available, the school did everything possible to ensure that the new learners fitted in well.

According to all the responses from the telephone interview that one of the authors held with Mikro Primary School participants, this was unmistakably a politically driven issue. Moreover, the noise made by the ANC supporters at the court unnerved the school representatives.



Mikro Primary School is convinced that the court case was not a waste of time for the following reasons: (1) the school and its parents/caregivers must set an example to their learners and the learners would question the example if it appeared that the school and its community were not willing to stand up for what they said they believed in; (2) the school had gained recognition for being principled; and (3) schools *can* make a difference as long as the principle is uncompromised and the process followed is 100% correct.

## 12 Ermelo High School – Report on Telephone Interviews

One of the participants in the telephone interviews held the opinion that the court order provided guidance as to how SGB's should proceed. A legal opinion of a participant was that the court did not justify sufficiently what it meant with the phrase that the SGB needed to *show a greater responsibility towards the community*. Likewise, the court did not define the concept *community*. In this regard, the school community lost, since, according to the Schools Act,<sup>127</sup> an SGB firstly stands in a trusting relationship towards *the school* – not the community. Secondly, the SGB needs to act in the best interests of *the school* – not the community. Therefore: what was the point of politicising a case for the sake of a handful of learners when the bigger dilemma lay with 1300 other places unavailable to learners who needed to enrol at high school level in that area?

The school gave effect to the court order within the specified six weeks of the court order, by (1) holding a meeting with the community as they saw it; (2) holding a meeting with the parent/caregiver community; and (3) adjusting the language policy – maintaining Afrikaans as medium of instruction, while accommodating English learners in order to support their PDoE. The PDoE made the affidavit at the court concerning how they plan to handle the increasing demand for education in English as medium of instruction.

The SGB not only made some of their own teaching posts available to appointing educators for the learners who needed teaching in English as medium of instruction, but also used Afrikaans-speaking parents/caregivers' paid school funds to ensure instruction in the best interests of all the learners at their school. A few of the English learners who joined Ermelo High School in 2007 are finishing off Grade 12 at the end of 2011.

## 13 Conclusion

The article does not concur with the opinion that the faith that SGBs had concerning the court's capability to guard their function to determine

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<sup>127</sup> Ss 16(2), 20(1)(a).

public schools' language policies has diminished. SGBs' faith in courts is rather supported by empowering and even broadening the execution of their functions by providing guidance and surety for future accomplishments.

Although *Mikro* was sceptic at first about having the matter litigated in court, all eight participants reported their confidence that courts were eventually the proper forum to effectively remedy issues of conflict between them and their PDoEs. Reasons for the latter can be found in the fact that all the participants realised the court's affirmation of the seriousness of each school's battle. The schools' trust in the legal system and rule of law was furthermore confirmed by appreciating courts' inclination to litigate public school education matters objectively.

All three court cases confirmed the autonomy of an SGB as a functionary by respecting their significant role in the governance of public schools. Thus, SGBs need not be afraid of litigation although, for court remedies to be effective in practice, careful preparation combined with perseverance (nine years in the case of *Middelburg*) is essential.

Although the literature review indicated that court verdicts only bring relief in the *short run*, the qualitative research pointed out the opposite. While the three schools experienced immediate relief after the courts' orders, they soon realised that they needed the loyalty towards the school and determination of their Afrikaans-speaking parents/caregivers to carry them especially financially through the painstaking time. This had to be in place until the respective PDoE complied with the court sanctions.

Flowing from *Ermelo*, the most recent court case in this regard, that placed emphasis on the role of SGBs to take the needs of their broader community into account when considering their school's language policy; it has become obvious that the playing field has changed:

- (1) SGBs must seriously consider parallel language as medium of instruction at their schools.
- (2) Section 16(2) – which refers to an SGB to *stand in a position of trust towards the school* – and section 20(1)(a) – which obliges a public school to *promote the best interests of the school* – must be revisited in order to extend the SGBs responsibilities towards also taking into account the needs of the broader community.
- (3) Courts must define terminology they read into statutes: for example, the term *community* and the phrase *needs of the community* in the *Ermelo* case, as these aspects were left dangling in the air.
- (4) Alternatively, courts must show extreme caution when interpreting education statutes while deciding on matters that fall within the function of SGBs, as this may contribute to again creating tension by blurring the distinction between their functions and that of the State.

In sum, the legal remedies provided by courts are indeed effective in remedying the battle between SGBs and PDoEs concerning the language policies at public schools.