

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)**

CASE NO: 2568/06

DATE HEARD: 26/4/07

DATE DELIVERED: 4/6/07

REPORTABLE

In the matter between:

STUTTERHEIM HIGH SCHOOL

APPLICANT

and

**THE MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF EDUCATION,
EASTERN CAPE PROVINCE**

1ST RESPONDENT

**THE HEAD OF DEPARTMENT,
DEPARTMENT OF EDUCATION,
EASTERN CAPE PROVINCE**

2ND RESPONDENT

**THE SGB ELECTORAL OFFICER
FOR STUTTERHEIM HIGH SCHOOL**

3RD RESPONDENT

**THE DISTRICT ELECTORAL OFFICER (STUTTERHEIM)
DEPARTMENT OF EDUCATION,
EASTERN CAPE PROVINCE**

4TH RESPONDENT

**THE EDUCATION DEVELOPMENT OFFICER,
FOR STUTTERHEIM HIGH SCHOOL
DEPARTMENT OF EDUCATION,
EASTERN CAPE PROVINCE**

5TH RESPONDENT

In an application to compel the third respondent, in his capacity as electoral officer, to complete the election for the parent component of a school governing body, the respondents challenged the standing of the deponent to the founding affidavit to initiate the proceedings in the name of the school. The basis of the challenge was that his term of office as a member, as well as the terms of office of all other members of the school governing body, had lapsed. The court held that the deponent to the founding affidavit had no authority to initiate the litigation because the term of office of the governing body of which he claimed to be chairperson had indeed lapsed but that he had standing on the basis of s 38(a), (b) and (d) of the Constitution. It was held that the third respondent's action and inaction constituted administrative action for purposes of the Promotion of Administrative Justice Act 3 of 2000 and that the failure to complete the election by the third respondent was an irregularity, and reviewable, on three grounds: he had been materially influenced by an error of law, he had failed to act in circumstances in which he had a duty to do so and he had abdicated his power by 'passing the buck' to the fifth respondent. An order was made substituting the deponent to the founding affidavit for the school, as the applicant, directing the third respondent to re-convene the election meeting within two weeks of the date of the order and directing the respondents to pay the applicant's costs.

JUDGMENT

PLASKET J

[1] Mr Ian Andrews deposed to the founding affidavit in this, an application for orders to declare the school governing body (SGB) of which he served as chairperson to still be in existence and to compel the third respondent or alternatively the fourth respondent to complete the election of a new SGB for the Stutterheim High School (the school).

[2] He claimed to bring the application on behalf of the SGB. When his standing was challenged in the respondents' answering affidavits, he also claimed to have standing on various other bases. These were: in his own interest in terms of s 38(a) of the Constitution, as a parent of a child who attends the school and as a candidate for election to the SGB; on behalf of the school, which cannot litigate on its own behalf, in terms of s 38(b) of the Constitution; as a member of, and on behalf of, a class of similarly placed people, in terms of s 38(c) of the Constitution; and in the public interest in terms of s 38(d) of the Constitution. In his replying affidavit he gave notice of an intention to apply to amend the Notice of Motion to include a declarator to the effect that he has standing on those bases.

[A] LEGISLATIVE BACKGROUND

[3] In terms of s 16(1) of the South African Schools Act 84 of 1996 (the Act) 'the governance of every public school is vested in its governing body and it may perform only such functions and obligations and exercise only such rights as prescribed by the Act'. Section 16(2) provides that a SGB 'stands in a position of trust towards the school'. Section 16(3) provides that generally speaking 'the professional management of a public school must be undertaken by the principal under the authority of the Head of Department'.

[4] The functions of SGB's include: 'promoting the best interests of the school' and ensuring the development of the school concerned 'through the provision of quality education for all learners at the school';¹ supporting the professional and other staff, including the principal, in the performance of their functions;² determining 'times of the school day';³ administering and controlling 'the school's property and buildings and grounds' including its hostels;⁴ recommending professional and non-professional

¹ Section 20(1)(a).

² Section 20(1)(e).

³ Section 20(1)(f).

⁴ Section 20(1)(g).

appointments to the Head of Department;⁵ and discharging 'all other functions' imposed upon them 'by or under this Act'.⁶

[5] The membership of SGB's of what are termed 'ordinary public schools' (as opposed to public schools for learners with special education needs) comprises of elected members, the principal as an *ex officio* member and co-opted members.⁷ Members are elected from four constituencies, namely '[p]arents 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'.⁸ Section 23(9) 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'. (In terms of s 23(8) co-opted members generally do not have the right to vote.)

[6] Section 28 of the Act vests in provincial MEC's for Education the power, *inter alia*, to determine 'the term of office of members and office bearers of a governing body'⁹ and the 'designation of an officer to conduct the process for the nomination and election of members of the governing body'.¹⁰ Acting in terms of s 28, the MEC for Education in the Eastern Cape Provincial Government determined, in 2003, that the term of office of elected members of SGB's would end on 31 August 2006.¹¹

[7] Section 31 regulates further the term of office of SGB's. It provides:

- (1) The term of office of a member of a governing body other than a learner may not exceed three years.
- (2) The term of office of a member of a governing body who is a learner may not exceed one year.
- (3) The term of office of an office-bearer of a governing body may not exceed one year.

⁵ Section 20(1)(i) and (j).

⁶ Section 20(1)(i).

⁷ Section 23(1).

⁸ Section 23(2).

⁹ Section 28(a).

¹⁰ Section 28(b).

¹¹ *Provincial Gazette* 29 April 2003, Provincial Notice No.22.

- (4) A member or office-bearer of a governing body may be re-elected or co-opted, as the case may be, after the expiry of his or her term of office.'

[8] Acting in terms of s 28 of the Act, the MEC for Education determined that the National Guidelines for School Governing Body Elections would apply in the Eastern Cape Province.¹² (I shall refer to these as the national guidelines.) It is not in dispute that the third respondent was duly appointed as the School Electoral Officer for the SGB elections at the school which were to take place on 27 July 2006. It is not in dispute that he was required to conduct those elections in accordance with the national guidelines. This application concerns his failure to complete the election of the parent component of the school's SGB.

[9] In the national guidelines, the duties of the various parties with an interest in SGB elections are set out. In terms of s 4.4 each school has certain responsibilities, which include having in place an electoral officer who, like the third respondent, must be a principal or senior manager of another school,¹³ setting up an election team of educators who teach at the school, preparing and making available a voters roll, giving eligible voters notice of not less than 21 days of the date of the election meeting as well as its time and venue, ensuring that the election is 'well advertised', providing an adequate venue for the election and providing staff to assist the electoral officer if needs be. Parents of learners have the responsibility to familiarise themselves with the election regulations, publicise the election in their community, identify and nominate candidates, attend election meetings and elect SGB members. A note to s 4 states that principals, being *ex officio* members of SGB's may not be electoral officers for their own schools and, having an interest in the outcome of SGB elections, their 'direct involvement' in an election at their own school 'would be counter to free and fair election practices'.

[10] Section 5 of the national regulations specifies duties for various electoral officers. The district electoral officer, for instance, must co-ordinate elections in the district, ensure that 'each school has an electoral officer ... and that the school

¹² Provincial Gazette 3 July 2006, Provincial Notice No. 27.

¹³ The third respondent is the principal of the Stutterheim Primary School.

election teams are established' and ensure that election officials at schools are 'adequately trained' and that each is 'aware of what his/her role entails'.¹⁴

[11] The school electoral officer has obligations to take certain steps both 'in advance of the election' and 'during the election meeting'. Before the election meeting, the school electoral officer 'shall' prepare the notices of the time, date and venue of the election meeting, ensure that voters receive timely notice, ensure that nomination forms are available at the principal's office and during the election meeting, ensure that there is a suitable venue for the election meeting, ensure that there is a voters roll and that it is accurate and ensure that 'the election team know what process will be followed' and that the resources that are needed, such as a box for votes, are available. During the election meeting, the school election officer is required to:

- 'Explain the procedure for nominations and elections to the voters;
- Let the nominees introduce themselves in accordance with the national guidelines ...;
- Manage the electoral process;
- Intervene and resolve any disputes on the election day;
- Submit election results and voters rolls to the district office;
- Submit the SGB data to the district office within 30 days for districts to issue letters of recognition of election to new SGB members within 90 days of the poll.'

[12] Section 9.4 of the national guidelines sets out the process for the actual casting of votes at an election meeting, from the point when the school electoral officer explains the procedure that will be followed to the counting of votes and the declaration of the result of the election. This section requires the school electoral officer to count the votes in the presence of those candidates who wish to be present, announce to the meeting the name of each candidate and the number of votes cast for him or her and declare which candidates have been elected.

¹⁴ Section 5.1.

[13] Section 9.5 regulates the resolution of disputes. It provides that the school electoral officer 'shall decide all matters connected with the nomination of candidates and the poll', that he or she 'is mandated to resolve all disputes in order to declare elections undisputed' and that '[h]is or her decision during the election is final'. The section further provides that even if there is a dispute that cannot be resolved, the 'election should be completed' and that an appeal process can be used after the completion of the elections.

[14] Section 9.6 places a number of obligations on the school electoral officer after the election. He or she must place all documents used in the election in sealed envelopes; keep them in safe custody for at least three months; notify each person elected of his or her election in writing; notify the school principal in writing of the date of the elections and of who was elected to the SGB, and that he or she must notify the parents of the result within 14 days of the election meeting; ensure that the local district manager is informed of the result; and '[i]nclude an undisputed election declaration where it was the case, or a declaration detailing any disputes'.

[B] THE FACTS

[15] It is not necessary for me to resolve the many conflicts of fact on the papers because they are, by and large, not material to the dispute: the essential facts are common cause. I do not intend to involve myself in the recriminations and accusations of bad faith that characterise the affidavits of the main protagonists save to offer the advice that, for the good of the children who attend the school, the adults, who should be leading by example, should begin to do so.

[16] The final part of the election of a new SGB at the school – the election of the parent members -- was due to take place on 27 July 2006. The election meeting was to be presided over by the third respondent. About 200 parents attended the election meeting. It quickly degenerated into chaos when disputes as to procedure arose. The third respondent postponed the meeting to 1 August 2006. On that day, 21 parents were nominated for the nine vacant positions. One of the candidates was Mr Andrews. Votes were cast and counted but the result of the election was never declared.

[17] The reason given for the failure of the third respondent to declare the results differ: Mr Andrews simply stated that 'no results were made known, and none of the nominees was notified by the electoral officer as to his or her election'. He stated further that the third respondent 'took the decision not to disclose the outcome of the election' and, in so doing, had 'abdicated his responsibilities' and allowed the fifth respondent – an education development officer, employed by the provincial Department of Education (and who had no lawful powers or functions in the running of the election) – 'to subordinate his own role as electoral officer, and to dictate the events of the election'. The fifth respondent, on the other hand stated that when the third respondent wanted to declare the result, everyone had left the venue.

[18] Certain disputes were declared after the election meeting. The first was lodged by the South African Democratic Teachers Union (SADTU) on 4 August 2006 and the second was lodged by two parents, NP Ngcaku and Mr SP Vara. The third respondent and the school election team dealt with these disputes. In addition, they could not have had an impact on the election for two reasons: first, the disputes were lodged after the event and secondly, in terms of the national guidelines, disputes cannot interfere with the completion of the election. In addition, I cannot see what standing SADTU had to lodge a dispute in an election for the parent members of a SGB: It simply has no interest in such an election, being a trade union that represents educators. In any event, the third respondent and his election team drawn from educators at the school dealt with the disputes.

[19] Despite this, the third respondent wrote a letter to the principal of the school, dated 15 August 2006, in which he stated that 'due to the dispute declared by some parents and the complaints submitted by some, I am unable to disclose the results of the SGB election to you'. He proceeded to say that the electoral team's response to the dispute was not accepted by parents 'in quite a positive manner' and that he had 'no option but to refer the matter to the district office to intervene in this matter'.

[20] This letter must be taken together with a letter written by the fifth respondent to the principal of the school, also on 15 August 2006. In it he stated the following:

'This serves to formally inform you of the results of the nomination and election processes that took place on the 01 August 2006 at 13h00 until 17h30 could not be released to you after election due to disputes that were submitted to the Electoral Officer. After the Election Team considered the contents and nature of the disputes, they referred the disputes to the District Office for Intervention. In the said referral, the Election Team is recommending that the nomination and election processes be re-conducted and [an] Independent Electoral Team be appointed.

On interacting with the matter, consulting other members of the District Electoral Office, and considering the nature of the disputes lodged, I strongly support the recommendation of the Electoral Team that the whole process be re-conducted within 7 working days from the day of receipt of this correspondence, and the Independent Electoral Team be appointed. Any other information regarding the matter will be communicated to you in due course.'

[21] The following day, the members of the school election team, apart from the third respondent, wrote to the fourth respondent¹⁵ to repudiate the contents of the fifth respondent's letter insofar as it related to them. They stated that it was not true that the election team had recommended that the nomination and election process be conducted again. They pointed out that, in fact, the election team had dealt with the disputes and that the disputes had never been referred to the department. They stated further that if there had been such a recommendation, it must have been made by the third respondent without their knowledge or consent. They pointed out that the third respondent was party to the response to the disputes. They concluded by saying: 'The National Guidelines for the Elections have been twisted and often ignored and we cannot accept that. Can you?'

[22] The disputes were dealt with in a document dated August 2006 and headed 'Response of Electoral Team to points on which disputes have been raised'. The document was signed by the third respondent and the three other members of the

¹⁵ The fourth respondent was described by Mr Andrews as the district electoral officer. This is denied by the fifth respondent who claimed to be the district electoral officer. The fourth respondent, he said, was the Eastern Cape Provincial School Governing Body Election Co-ordinator. Nothing turns on any of this.

school election team. It appears, however, that soon after he signed this document, the third respondent had a change of heart. He wrote a letter on 10 August 2006 to the fourth respondent in which he said that 'I have received written notice from this parent component to which they did not respond positively of our explanation of the process'. He also said that he had been approached by the principal of the school who demanded, by way of a letter drafted by the school's attorneys, that he disclose the result of the election. He then stated that he felt 'intimidated by this and refused to sign acknowledgement, as I have explained the reason for not disclosing the information requested by her'. He concluded the letter by saying:

'Since we could not resolve the dispute and the complainant[s] are not satisfied, I refer this matter to you to intervene according to 9.5 of the National Guidelines for Governing Body Elections.

I would also hereby wish to recommend an Independent Electoral Commission to investigate this matter. I also feel at this stage that the election process be re-conducted so that both parties could be satisfied, and I know it will be in the interest of education.'

[23] The documents that I have referred to are inconsistent with, and destructive of any intention on the part of the third respondent to declare the result of the election. Even though he and the fifth respondent claim that they wished to convene a meeting of parents, it would appear that this was for a purpose other than the declaring of the result of the election. It is also clear that both laboured under significant misapprehensions as to what the national guidelines empowered them to do in the election. As a result they departed from the prescriptions of the national guidelines and assumed powers and functions that they did not have.

[24] For instance, the third respondent, once he and his election team had dealt with the disputes, had no power, whether with his team and, much less, unilaterally, to change his mind and assume the view that the disputes had not been dealt with. They had been, and he and his team were, in respect of those disputes, *functus officio*. In any event, s 9.5 of the national guidelines makes it clear that disputes should be dealt with during the election meeting but, in the event of the electoral officer being unable to resolve a dispute, 'the election should be completed'. To the extent that the respondents seek to justify a refusal to declare the result of the

election on account of the disputes that were lodged, they have misinterpreted and misapplied the national guidelines.

[25] The third respondent has committed a further irregularity, which was compounded by the fifth respondent. The third respondent had a set of clearly defined duties to fulfil. He was required to manage the election from start to finish. He, and he alone, was given the power to do this, and the way in which he was to do it was set out in the national guidelines. He abdicated his duties by purporting to refer the unfinished election to the fifth respondent with a recommendation that the incomplete process be ignored and a new election be held. He had no power to do this and the fifth respondent had no power to set in motion such a course of action.

[26] It appears to me that the third respondent's misapprehension concerning his powers stemmed from a misunderstanding on his part of s 9.5 of the national guidelines. He thought that because the people who lodged the disputes were not satisfied with the response of the election team, and in this sense the dispute was not resolved, he could refer the whole incomplete process to the district electoral officer, with a recommendation that the election be conducted again. A reading of s 9.5 shows this to be a patently erroneous understanding. The electoral officer must resolve disputes during the election, and those he or she cannot resolve may not impinge on the completion of the election. If a dispute has not been resolved during the election, 'an appeal process should be followed after the elections have been completed' and then, if the complainant who lodged the dispute is still not satisfied, that dispute (referred to as 'the matter' in the national guidelines) 'can be referred to the district electoral officer within 7 days after the election'. In this case no appeal process – a necessary precondition for a referral of a dispute – has taken place.

[27] Furthermore, the third and fifth respondents appear to have taken the view that if someone is dissatisfied with the election, at any stage, the entire process can be referred to the fifth respondent for him to take whatever action he deems appropriate. This is also evident from his letter to the principal of the school dated 15 August 2006 in which he announced that he strongly supported the 'recommendation of the Electoral Team that the whole process be re-conducted within 7 working days from the day of receipt of this correspondence, and the Independent Electoral Team

be appointed'. In effect, he had decided, without affording anyone a hearing and without the result of the election being declared that the election was a nullity. He had no lawful authority to act in this way.

[28] I have concluded that the third respondent abdicated his duties by surrendering the election process that he alone was empowered and required to complete to the fifth respondent, and that he did so on the basis of an erroneous interpretation of his powers as contained in the national guidelines. There can be no doubt that his error of law was material, in the sense that it induced him to take an action that he was not lawfully empowered to take. The irregularity can also be categorised as a failure to take action in circumstances in which the empowering provision placed a duty on the third respondent to act – to take the steps necessary, and prescribed in the national guidelines, to complete the election. Thirdly, his 'passing of the buck' to the fifth respondent is an irregularity.

[29] I turn now to whether the irregularities I have identified are reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). That requires me to enquire into whether the third respondent's action or lack of action constitutes administrative action as defined in s 1 of the PAJA.

[30] Section 1(i) of the PAJA defines administrative action (when taken by a State functionary) as 'any decision taken, or any failure to take a decision' in the exercise of a public power or the performance of a public function 'in terms of any legislation' which 'adversely affects the rights of any person and which has a direct, external legal effect'. (I have not included in the definition the list of specific exclusions because none are of application.) A decision is defined by s 1(v) to mean 'any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision' and includes the 'doing or refusing to do any other act or thing of an administrative nature'. A 'reference to a failure to take a decision must be construed accordingly'.

[31] As the purpose of the PAJA is to give effect to the fundamental right to just administrative action, it must be construed consistently with s 33(1) of the

Constitution.¹⁶ Furthermore, the common law also plays a role in the interpretation of the PAJA. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others*¹⁷ O'Regan J held that the common law 'informs the provisions of PAJA and the Constitution' while in *Manong and Associates v Director-General: Department of Public Works and others*¹⁸ Davis J held that an even a superficial consideration of the PAJA 'reveals that the body of common law which had been developed prior to the introduction of PAJA remains relevant to the interpretation and development of PAJA'.

[32] Working from the above perspectives -- constitutional compatibility and consistency with the developed common law -- the first issue that must be addressed is whether the third respondent, in conducting the election of the SGB at the school and then failing to complete this function, was acting administratively. The proper approach to this issue was set out as follows by Nugent JA in *Grey's Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others*:¹⁹

'Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of "an administrative nature") that have emerged from the construction that has been placed on s 33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as head of State. Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.'

¹⁶ *Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others (Treatment Action Campaign and another as amici curiae)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC), para 100

¹⁷ 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC), para 22.

¹⁸ 2005 (10) BCLR 1017 (C), 1026H-1027A.

¹⁹ 2005 (6) SA 313 (SCA), para 24.

[33] The third respondent, a State employee, was appointed to conduct an election at a public school. That appointment was made in terms of, and the administration of the election was governed by, statute. He did not act legislatively, judicially or executively in the performance of that part of his functions that he completed and nor was he required to act in any of these capacities in relation to the functions that he did not complete. His function was, from start to finish, administrative in nature. It would have been regarded as an administrative function prior to 27 April 1994, in terms of the common law, thereafter for purposes of the Interim Constitution's fundamental right to administrative justice and also for purposes of s 33 of the final Constitution: a contrary conclusion would fly in the face of the requirements of consistency with both the Constitution and the common law that informs it.

[34] In order to fall within the definition of administrative action, a decision of an administrative nature must involve the exercise of a public power or the performance of a public function. In *Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others*²⁰ I held that 'what makes the power involved a public power is the fact that it has been vested in a public functionary who is required to exercise it in the public interest, and not in his or her own private interest or at his or her own whim'. Precisely the same criteria apply to determining whether a function is a public function.

[35] In this case, the third respondent was appointed to perform the statutory function of conducting an election for a SGB. That election process was part of national elections for SGB's throughout the country. It is a central pillar of the democratic governance of public schools provided for by the Act and SGB's are the core institutions for the furtherance of the policy of the Act.²¹ That policy is expressed in the preamble of the Act, which states, *inter alia*, that it is intended to create 'a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so

²⁰ 2006 (8) BCLR 971 (E), para 53.

²¹ *Barry Schools and the Law* Cape Town, Juta and Co: 2006, 65 says: 'SASA [the Act] decentralises the governance of public schools to governing bodies and provides for the participation of parents, learners and school staff on these representative bodies. This statutory arrangement reflects historical demands for the participation of parents, teachers and students in the running of public schools in South Africa and the international trend towards decentralisation and participation in public school management.'

doing law a strong foundation for the development of all our people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State'.

[36] Finally, it must be determined whether the administrative action in which the third respondent was engaged adversely affected the rights 'of any person' and had a 'direct, external legal effect'. If it had these effects, it is administrative action that is reviewable in terms of the PAJA. These requirements of administrative action as defined in the PAJA were discussed by Nugent JA in the *Gray's Marine* case. He held:²²

'While PAJA's definition purports to restrict administrative action to decisions that, as a fact, "adversely affect the rights of any person", I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be in consonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a "direct and external legal effect", was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.'

[37] In this case, it is apparent that the third respondent's administrative action of abandoning, and thereby failing to complete, the statutory function that was vested in him has adversely affected rights in the sense that it has stripped the school, a juristic person, and thus the bearer of rights, of its organ of governance. It has also

²² Supra (note 19), para 23

affected the rights of the 21 parents, who like Mr Andrews, were nominated for positions on the SGB and who are entitled to know whether they have been elected to the SGB. Finally, the failure of the third respondent to complete the task allocated to him certainly has the potential to adversely affect the rights to education of all of the learners at the school because he has placed the administration of the school at risk.

[38] I conclude, therefore, that the performance of the third respondent's functions constituted the performance of administrative action as defined in the PAJA and that, in the performance of those functions, the third respondent committed reviewable irregularities. It is now necessary to decide whether Mr Andrews has standing to seek judicial redress for the third respondent's failure to comply with his duties.

[C] THE QUESTION OF STANDING

[39] As stated above, the standing of Mr Andrews to bring these proceedings is challenged by the respondents. That challenge requires me to determine whether the SGB of which Mr Andrews claims to be chairperson, and in whose name he claims to be litigating, in fact exists. If I decide that the SGB does not exist and therefore has no powers, it will then be necessary to determine whether Mr Andrews has standing on an alternative basis.

(a) Standing as Chairperson of the SGB

[40] The MEC for Education determined in terms of s 28 of the Act that the term of office of members of SGB's elected in 2003 would end on 31 August 2006. This is in conformity with s 31 of the Act which provides that the 'term of office of a member of a governing body other than a learner may not exceed three years'.

[41] Mr Andrews and those who purport to exercise the powers and functions of a SGB at the school were elected in 2003 and are thus struck by the notice issued by the MEC for Education and the statutory limit to their term of office. It would appear, however, that despite this, they have continued to function as the school's SGB with the knowledge and, up to now, apparent approval of the Department of Education. (It

must be stressed, however, that the Department's acquiescence in the SGB continuing to function cannot vest power in it which it does not, as a matter of law, have: estoppel is no substitute for the principle of legality.²³⁾

[42] Mr Brooks, who appeared for the applicant, argued that despite the terms of the legislation, the duties of the members of the SGB as trustees continued until a new SGB had been elected to replace them. He relied on the exception to the principle that loss of a trustee's office ends his or her ownership of trust assets, namely that 'when the last-surviving or sole trustee loses office', in order to ensure that trust property is not rendered ownerless until a new trustee is appointed, 'the trust property nominally remains an asset in the outgoing trustee's estate'.²⁴

[43] In my view, this exception has no application in the present matter. In this case, the relationship of trust is created and regulated by statute. Whether the duties of SGB members can outlast their terms of office is, in the first place, a matter of statutory construction. The common law exception contended for by Mr Brooks can only apply if it has not been supplanted by the statutory provisions and is not inconsistent with them. This requires a consideration of the provisions of the Act.

[44] While it is so that s 16(2) creates a relationship of trust between the SGB and the school, that relationship is limited by s 16(1) in the sense that the SGB may only do what it is empowered to do by the Act. In other words, the SGB is a creature of the Act and its powers and functions, as well as the limitations on its powers and functions are to be found in the Act.

[45] SGB's are created as democratic institutions. Members, with the exception of school principals and co-opted members (who generally do not have the power to vote), are all elected. Section 28 of the Act regulates the election of SGB members.

²³ Baxter *Administrative Law* Cape Town, Juta and Co: 1984, 401 stated: 'Public authorities could never acquire lawful powers through the operation of estoppel because to allow this would undermine the principle of legality.' See too Hoexter *Administrative Law in South Africa* Cape Town, Juta and Co: 2007, 39. In *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA), para 11, Marais JA held that it is 'settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance on the doctrine of estoppel'.

²⁴ Cameron, De Waal and Wunsh *Honoré's South African Law of Trusts* (5 ed) Cape Town, Juta and Co: 2002, para 172.

It does so by allowing for: terms of office to be set; the designation of electoral officers for SGB elections; the procedure for the disqualification or removal of members or the dissolution of SGB's; the procedure for the filling of vacancies; guidelines for the achievement of representivity on SGB's; formulae for determining the number of members from each constituency; and 'any other matters necessary for the election, appointment or assumption of office of members of the governing body'. It is in this context of periodic, democratic elections that s 31 sets limits to the terms of office, subject to re-election or co-option of members, 'after the expiry of his or her term of office'.²⁵

[46] Section 25 of the Act concerns the governance of public schools in cases in which the Head of Department has, 'on reasonable grounds', determined that a SGB 'has ceased to perform functions allocated to it in terms of this Act or has failed to perform one or more of such functions'. In such an instance, he or she may appoint a team to perform the functions of the dysfunctional SGB and extend the period of appointment of the team. In the event of the SGB having collapsed entirely, the Head of Department must ensure that an election is held within a year of the appointment of the team, while if the SGB is merely unable to perform certain of its functions, the team 'must build the necessary capacity' so as to ensure that the governing body is able to perform its functions properly.

[47] From this scheme it is apparent that the intention of the legislature was to create a system in which SGB's acquired a 'perpetual succession' through regular, scheduled elections that ensure continuity from one SGB to the next. This too is why the national guidelines specify that disputes that may arise during an election may not stop an election. The need for one SGB to dovetail with its successor was considered so important that disputes in the election process should not be allowed to interfere with it. It is also noteworthy that the national guidelines do not end with the declaration of the result of an election: they also deal with the handover from an outgoing SGB to the incoming SGB, and do so in a formal and structured way.²⁶ In this scheme, s 25 serves as the 'long stop': If the system breaks down, the Head of

²⁵ Section 31(4). It will be recalled that s 31(1), (2) and (3) limit the terms of office of members other than learners to three years, of learners to one year and of office bearers to one year.

²⁶ Section 9.8 of the national guidelines provides for the principal, as the link between the outgoing and incoming SGB's, to co-ordinate the hand-over.

Department may step in to ensure that a school that does not have a functioning SGB has an interim, appointed, structure in place that can manage it in terms of the Act until elections for a new SGB may be held.

[48] Within this scheme, I can see no place for residual, common law powers derived from the law of trusts. Indeed, they are incompatible with the structure of the Act and its clear intention. To read such powers into the Act would disturb its scheme and undermine the legislature's chosen method of governance for public schools. The result is that the SGB at the school that was elected in August 2003 ceased to enjoy any lawful power when the term of office of its members ended on 31 August 2006. For all intents and purposes, that SGB ceased to exist. All powers that it purported to exercise and all functions that it purported to perform as a SGB are accordingly a nullity. That includes the resolution it took, purportedly as a SGB, to initiate these proceedings and to authorise Mr Andrews to do so. That, in turn, means that Mr Andrews has no standing, as chairperson of the SGB, to seek the relief that he has. It also means that the application for a declarator to the effect that the old SGB has power in terms of the Act to govern the school until the new SGB assumes office, cannot be granted.

(b) Standing in terms of s 38 of the Constitution

[49] Section 38 of the Constitution reads:

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interests; and
- (e) an association acting in the interest of its members.'

[50] Before turning to whether the factual allegations have been met to establish one of the forms of standing set out in s 38, it is necessary to record that the threshold requirement -- an infringement of or threat to a fundamental right -- has been established. The fundamental right that has been infringed or threatened is the right to just administrative action.

[51] Section 38 has broadened the common law rules of standing to include forms of representative standing unknown to the common law. It must be applied in accordance with its generous spirit and purport. This was recognised by the Constitutional Court at an early stage of the development of the new South African constitutional jurisprudence. It did so in *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others*²⁷ in which Chaskalson P said of s 7(4)(b) of the Interim Constitution -- the predecessor of s 38 -- that, while it was important that courts deployed their resources to deal with concrete disputes, there was no reason for adopting a narrow approach to standing in constitutional litigation: a broad approach would be 'consistent with the mandate given to this court to uphold the Constitution and which serves to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled'. O'Regan J linked the standing provisions to the enhanced role of the judiciary in a constitutional state, holding that s 7(4) was a recognition 'of the particular role played by the courts in a constitutional democracy. As the arm of government which is entrusted primarily with the interpretation and enforcement of constitutional rights, it carries a particular democratic responsibility to ensure that those rights are honoured in our society. The role requires that access to the courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated'.²⁸

[52] The same idea has been stressed by other judges. For instance, Southwood J, in *Gerber v Voorsitter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening*,²⁹ held that the aim of s 38 was to make provision for virtually unlimited standing so that as little interference as possible would occur in respect of the means

²⁷ 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC), para 165. See too *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape and another* 2001 (2) SA 609 (E), 618J-619B.

²⁸ Para 230.

²⁹ 1998 (2) SA 559 (T), 569D-F.

of approaching courts, the nature of the enquiry and the remedy to be granted. The purpose of the section was to ensure that fundamental rights were upheld. In much the same vein, in *Fose v Minister of Safety and Security*,³⁰ Ackermann J, although dealing with remedies for constitutional infringements rather than standing, stated that '[p]articularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that the infringement of an entrenched right has occurred, it be effectively vindicated'.

[53] The claim of Mr Andrews to standing in terms of s 38 is to be determined against the backdrop that I have sketched. It is to his founding affidavit that I now turn.

[54] Mr Andrews stated that he was one of 21 nominees for election of the parent component of the SGB. In his answering affidavit, Mr Myeki simply stated in answer to the paragraph in which Mr Andrews said this that he agreed that 'the elections were for the parent component of the school governing body'. The allegation that Mr Andrews was a nominee and, implicit in this, that he was the parent of a learner at the school, were not denied. It is, furthermore, common cause, that the result of the election has not been declared.

[55] Mr Andrews has outlined the problem created by the third respondent's failure to declare the result of the election by saying that, had he done his duty, the new SGB would have been in place and functioning, the fact that this has not happened has prejudiced the school and it has brought the school into disrepute in Stutterheim in that it is perceived to be a school in crisis. These factual averments are not challenged and, it seems to me, they could not be. He then stated that the conduct of certain of the respondents amounted to a 'unilateral decision to set aside the process of the elections by suggesting that the entire process somehow be ignored and that the election process be repeated'. He concluded that the respondents had acted unlawfully.

³⁰ 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC), para 67.

[56] He furthermore made the point that the third, fourth and fifth respondents had suggested that the SGB of which he was chairperson no longer had any power – a conclusion I have endorsed as correct. While he failed to draw a conclusion concerning this, that conclusion, is in my view patent: the school is now bereft of a governing structure and unable to conclude juristic acts or fulfil the functions imposed on it by the Act which require the exercise of power of the SGB.

[57] These facts are sufficient to establish that Mr Andrews has standing in his own interest in terms of s 38(a) of the Constitution, as a parent of a learner at the school and as a nominee in the incomplete SGB election. The facts also establish that the school, having no SGB, is unable to litigate in its own name and that Mr Andrews, albeit under the mistaken belief that he was the chairperson of a lawfully empowered SGB, brought the application to protect the interests of the school. It is implicit in this that, had it been possible, the school would have litigated in its own name, as it tried to do. He has, accordingly established that he has standing in terms of s 38(b) of the Constitution.³¹ Finally, the fact that a public school has been left with no lawfully empowered governing structure and that this has happened as a result of unlawful conduct on the part of certain of the respondents is self evidently a matter of grave public interest, involving as it does an infringement of the rule of law and affecting, potentially at the very least, the rights and interests of every learner at the school, as well as their educators. It is a live, on-going crisis. On this basis, I am of the view that Mr Andrews has also established that he has standing to act in the public interest, in terms of s 38(d) of the Constitution.³²

[58] The factual bases from which the conclusion has been drawn that Mr Andrews has standing in terms of s 38(a), (b) and (d) of the Constitution are to be found, as I have shown, in the founding affidavit. It cannot be said, therefore, that he made out his case for standing in the replying affidavit: it merely summarised the grounds already embedded in the founding affidavit and drew the legal conclusion that he had

³¹ *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape and another* supra (note 27), 622J-623B; 625C-D; *Wood and others v Ondongwa Tribal Authority and another* 1975 (2) SA 294 (A), 311F-G.

³² *Port Elizabeth Municipality v Prut NO and another* 1996 (4) SA 318 (E), 325J-326B; *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape and another* supra (note 27), 625E-G; *Nomala v Permanent Secretary, Department of Welfare and another* 2001 (8) BCLR 844 (E), 853D.

standing. It is unnecessary to consider the application for the amendment to the Notice of Motion because I see no reason why a declarator should be issued to the effect that Mr Andrews has standing. It seems to me, however, that it is necessary to grant alternative relief, which the amendment may have been intending to achieve by a circuitous route, and that is to substitute Mr Andrews as the applicant for the school.

[D] CONCLUSION

[59] I have found that the third respondent committed an error of law when he misinterpreted the national guidelines to mean that he could refer the incomplete SGB election to the fifth respondent with the suggestion that it be ignored and a new election held. He had no power to refer the matter to the fifth respondent in this way. The abdication of his duties in terms of the national guidelines was materially influenced by this error of law.³³ It is reviewable in terms of s 6(2)(d) of the PAJA. In addition, his failure to complete his task by declaring the result of the election is reviewable as a 'failure to take a decision' as envisaged by s 6(2)(g), read with s 6(3), of the PAJA.³⁴ Thirdly, his unlawful abdication of power – in the form of him 'passing the buck' to the fifth respondent – is reviewable on the basis of it being 'otherwise unconstitutional or unlawful' as envisaged by s 6(2)(i) of the PAJA.³⁵

[60] The third respondent must complete his task of administering the SGB election at the school. In order to do so, he must follow the steps set out in the national guidelines. This means that he must reconvene the incomplete election meeting and then, in terms of s 9.4 of the national guidelines, announce to the meeting 'the name of each candidate and the number of votes cast for each', complete the 'counted ballot papers form', declare who has been elected, inform those who were not elected of this fact, thank them and excuse them, and resolve any situations in which

³³ *Hira and another v Booysen and another* 1992 (4) SA 69 (A).

³⁴ *Julius v Lord Bishop of Oxford* (1880) 5 AC 214 (HC), 225; *Cape Furniture Workers' Union v McGregor* NO 1930 TPD 682, 686; *Mahambehlala v MEC for Welfare, Eastern Cape and another* 2002 (1) SA 342 (SE), 352H-353D; *Mbanga v MEC for Welfare, Eastern Cape and another* 2002 (1) SA 359 (SE), 368E-H; *Ntame v MEC for Social Development, Eastern Cape and two similar cases* 2005 (6) SA 248 (SE), para 36.

³⁵ *Baxter Administrative Law* Cape Town, Juta and Co: 1984, 434, 443-444. For reasons unknown, this form of abuse of discretion has not been codified as a ground of review in s 6(2) of the PAJA, hence resort being had to the catch-all clause, s 6(2)(i).

two or more candidates have received the same number of votes, where this will affect the result. Then, in terms of s 9.6 of the national guidelines, he must: place all documents used in the election in sealed envelopes; keep them in safe custody for at least three months; notify each person elected of his or her election in writing; notify the school principal in writing of the date of the elections and of who was elected to the SGB, and that she must notify the parents of the result within 14 days of the election meeting; ensure that the local district manager is informed of the result; and '[i]nclude an undisputed election declaration where it was the case, or a declaration detailing any disputes'. Once the third respondent has completed these tasks, he will have discharged his mandate and he will then be *functus officio*.

[61] The logistics of reconvening the meeting are simple and should be easy to arrange. I therefore intend to stipulate in the order that I shall make that the meeting be held within two weeks of the date of the order. I would expect that the principal of the school will give her full co-operation to the third respondent and will do everything in her power to facilitate the completion of the process.

[62] As stated above, I intend to make an order that substitutes Mr Andrews as applicant for the school, to bring the papers into line with the reality of the situation. Despite the rather messy way in which the case for the applicant was presented – in the sense that Mr Andrews had to utilise a belt and braces approach on the issue of his standing – I take the view that the applicant has achieved substantial success. I shall accordingly make a costs order that follows the result.

[63] I make the following order:

- (a) Mr Ian Andrews is substituted as the applicant for the Stutterheim High School.
- (b) The third respondent is directed to complete the election for the parent component of the governing body of the Stutterheim High School which commenced on 1 August 2006 by:
 - (i) reconvening the election meeting;
 - (ii) at that reconvened meeting, declaring the result of the election;
 - (iii) doing so within two weeks of the date of this order; and

(iv) taking all other necessary steps in accordance with s 9.4 and s 9.6 of the National Guidelines for School Governing Body Elections (annexure 'B' to the founding affidavit) to complete the election.

(c) The respondents are directed to pay the applicant's costs jointly and severally, the one paying the others to be absolved.



J. PLASKET

JUDGE OF THE HIGH COURT