**ORAL PRESENTATION TO PARLIAMENT ON THE BASIC EDUCATION LAWS AMENDMENT BILL [B2-2022]**

**SOLIDARITY TRADE UNION**

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1. It is important to note that our presentation and commentary is not an attempt to attack government but rather a sincere attempt to assist parliament to reach a decision which is advantageous to the South African citizenry.

2. As such, it is important that the Department of Basic Education realise that the current deficiencies within the education system are not the result of inadequate policies or laws, but rather inadequate application and performance of duties by government as such.

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

4. The aforementioned was all but admitted by the Minister of Basic Education, Angie Motshekga in parliament on 7 September 2022, being the goal of government, specifically pertaining to Afrikaans schools. Minister Motshekga stated that “law is necessary to allow government to step in and change schools' language policy and educational culture.”

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

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

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

8. We wish to highlight two relevant policy documents:

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

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

1. White Paper 1 and White Paper 2 reflect the policy considerations that informed the drafting and ultimate promulgation of the South African Schools Act, also known as SASA. These considerations are of importance in appreciating the very unique distribution of powers in the SASA, particularly the vesting of powers in Governing Bodies, instead of in education departments or bodies or persons which are unaccountable and/or not democratically elected.
2. The basic point of departure is the responsibility of parents for the education of their children, with the State providing a facilitating role in terms of the provision of infrastructure, educators (to an extent) and operational costs (to an extent). In summary, White Paper 1 proposed the following principles as the basis of the policy framework for school ownership and governance which underlie the SASA:
   1. Parents have the most at stake in the education of their children, and this should be reflected in the composition of Governing Bodies.
   2. State involvement in school governance should be at the minimum required for legal accountability and should be based on participative management.

10.3 The decision-making powers of Governing Bodies should reflect their capacity to render effective service.

11. White Paper 2 gives further insight into the policy underlying the scheme of the SASA, and provides in relevant part:

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

* 1. The decision-making authority of schools in the public sector would be shared among parents, teachers, the community (government and civil society) and the learners, in ways that would support the core values of democracy.
  2. The sphere of Governing Bodies would be governance, by which is meant policy determination, in which the democratic participation of the schools’ stakeholders is essential. The primary sphere of the school leadership would be management, by which is meant the day-to-day organisation of teaching and learning, and the activities which support teaching and learning, for which teachers and the school principal are responsible. These spheres overlap, and the distinctions in roles needed to be agreed with the provincial education departments. This would permit considerable diversity in governance and management roles, depending on the circumstances of each school, within national and provincial policies.
  3. The implementation of these proposals would mark a major advance in the decentralisation of educational control.
  4. Public school governance was to be a genuine partnership between a local community and the provincial education department, with the education department’s role being restricted to the minimum required for legal accountability. Because communities have such varied experience of school governance, it is inevitable that the department’s role in ensuring accountability would differ considerably from one school to another. The balance of decision-making would rest with the school governing body in accordance with its capacity.
  5. Each public-school governing body would be responsible for a set of basic functions (“*basic powers*”) which would be agreed between the province and the governing body in accordance with the governing body’s experience and capacity. Any governing body would be entitled to negotiate with its provincial education department to take responsibility for additional functions (“negotiated powers”) as and when it is willing and believes it is able to do so.

**PRINCIPLES CONCERNING THE GOVERNANCE OF SCHOOLS FROM THE CASE LAW, IE. JUDGEMENTS BY THE CONSTITUTIONAL COURT**

12. The preamble to the SASA postulates the existence of the “*partnership model*” as the mechanism through which education will be conducted and achieved.

13. Various judgments have grappled with the co-operative powers concerning the governance of schools. We set out below the key principles from the seminal judgments that have engaged with these powers.

13.1 First principle - partnership

*“State, parents of learners and members of the community in which the school is located.”* As per the Constitutional Court judgement in the Welkom case.

13.2 Second principle – delineation of the different roles and functions of the stakeholders.

* At the national level, the Minister must determine norms and standards for school funding.
* At provincial level, it is the responsibility of the MEC to establish and provide enough schools in the provinces to accommodate all children who are subject to compulsory attendance.
* At school level, parents and governing bodies *“ have an immediate interest in the quality of children’s education. And they play an important role in improving that quality by supplementing state resources with school fees.”*
* The SGB has an overall responsibility for the governance of the public school and has general fiduciary obligations to ensure that the school environment appropriately accommodates learners’ needs.
* An SGB’s *“primary function is to look after the interest of the school and its learners. It is meant to be a beacon of grassroots democracy in the local affairs of the school.*
* The Court has held that professional management of a public school *“consists largely of the running of the daily affairs of a school by directing teachers, support staff and the use of learning materials, as well as the implementation of relevant programmes, policies and laws.”*
* The Court has described the difference in the SGB’s and principal’s roles as follows:

*“To my mind, therefore, a governing body is akin to a legislative authority within the public-school setting, being responsible for the formulation of certain policies and regulations, in order to guide the daily management of the school and to ensure an appropriate environment for the realisation of the right to education. By contrast, a principal’s authority is more executive and administrative in nature, being responsible (under the authority of the HOD) for the implementation of applicable policies (whether promulgated by governing bodies or the Minister, as the case may be) and the running of the school on a day-to-day basis.”*

* In the ***Mikro judgment***, the SCA confirmed that the Minister is not authorised to determine the language policy for a particular school as that is a function for the SGB.

13.3 Third principle – delineation of the different roles and functions of the stakeholders.

* In the ***Rivonia Primary judgment***, the Constitutional Court held that co-operation between SGBs and national or provincial government is *“rooted in the shared goal of ensuring that the best interests of learners are furthered and the right to basic education is realised.”*
* The ***Welkom judgment*** held that in order to achieve this partnership, the provisions in SASA are *“carefully crafted to strike a balance between the duties of these various partners in ensuring an effective education system.”* The *“interactions between the partners – the checks, balances and accountability mechanisms – are closely regulated by [the SASA]. Parliament has elected to legislate on this issue in a fair amount of detail in order to ensure the democratic and equitable realisation of the right to education.”* One must balance *“the importance of the accountability checks imposed by the [SASA] with considerations of legality and respect for the sensitivity of the partnership between the Minister, Provincial Education Department, public schools and school governing bodies.”*
* The Constitutional Court went on to hold that:

“[123] The importance of cooperative governance cannot be underestimated. It is a fundamentally important norm of our democratic dispensation, one that underlies the constitutional framework generally and thus has been categorised in the [SASA] as an organizing principle for the provision of access to education. ….

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

* There is a *“constitutional obligation on the partners in education to engage in good faith with each other on matters of education before turning to Courts.”*
  + *Of particular relevance to the present case, however, is that the principles of co-operative government and inter-governmental relations are also extended to all organs of State within each sphere of government in section 41.”*
* *“The school governing bodies and HOD are organs of State. In terms of section 41(1)(h) they have an unequivocal obligation to co-operate with each other in mutual trust and good faith by assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest, co-ordinating their actions, and avoiding legal proceedings against one another.”*
* Cooperative governance requires proper engagement. In the ***Rivonia Primary judgment****,* the Court emphasised the need for proper engagement between all parties affected, as the planning and coordination in partnership with the provincial government and with the SGBs *“is crucial”*.

13.4 Fourth principle – the powers of the SGB’s are not unqualified.

* In the ***FEDSAS judgement*** the Court held that the power to determine the admission policy of a school is subject to two internal qualifiers – first it is subject to the provisions of the SASA and any applicable provincial law; and second, it must conform to all applicable law as that is what the rule of law requires.
* In the ***Ermelo judgement***, the Court held that the SGB’s powers to determine the school’s language policy are qualified by the following:
* It is subject to the Constitution, the SASA, and any applicable provincial laws.
* The Minister may, subject to the Constitution, by notice, determine norms and standards for language policy in public schools, which the Minister has done. They are *“by definition general – they cannot relate to any particular school’s language policy.”*
* No form of racial discrimination may be practiced in implementing a language policy.
  + A language policy must comply with the norms and standards for the provision of school facilities described by the Minister.
  + In the ***Mikro*** judgment, went on to hold that the HOD may not summarily instruct the principal to admit learners in disregard for the SGB’s language policy.

13.5 Fifth principle – HOD and MEC’s oversight functions must be exercised reasonably and proportionately, and with due regard to procedural fairness as per the ***Rivonia Primary judgement***.

* In the ***Ermelo judgment***, the Court held that the HOD may withdraw a function from the SGB, including withdrawing a school’s language policy, provided it is done *“on reasonable grounds and in order to pursue a legitimate purpose.*” The Court furthermore articulated that *“reasonable grounds”* will have to be determined on a case-by-case basis.
* The Court went on to hold that in addition to the reasonableness requirement, procedural fairness must be followed. The requirements of procedural fairness must be determined flexibly, having regard to the facts of the particular case. The SGB must have adequate notice of the HOD’s intention to dissolve it so that the SGB can exercise its right to be heard prior to the HOD taking a decision.
* Where an HOD forms the view that a policy adopted by the SGB fails to give effect to the relevant Constitutional rights and objectives of the SASA, the HOD’s recourse is two-fold: (i) the SASA obliges the HOD to engage in a comprehensive consultation process with the relevant SGB regarding the particular policies, and then, if there are *“reasonable grounds”* for doing so, to take over the performance of the particular governance or policy-formulation function in terms of section 22 (the section 22 intervention process); and (ii) the HOD may approach the court for appropriate relief, for example to obtain an interdict in respect of the application of the policies or to have the policies reviewed and set aside.

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

* 1. The national government, represented by the Minister, who prescribes national minimum norms and standards for a range of matters relating to public schools, subject to the restrictions and requirements of SASA itself.
  2. The provincial governments, represented by the MEC, the HODs and the school principals, who exercise executive control over public schools, and must perform their powers and functions subject to the restrictions and requirements of SASA itself, and the Minister's minimum norms and standards. Importantly, the MEC has a duty to establish new public schools and must ensure that there are enough public school places for every child in the province.
  3. The school communities, represented by their SGBs, who have limited autonomy over the governance of some of their public schools’ domestic affairs. They must do so subject to the restrictions and requirements of SASA, the Minister's national minimum norms and standards and the executive powers of the MECs, the HODs and the principals in the exercise of their powers and functions.

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

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

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

**18. In conclusion, it would seem that the governments’ DBE has steered itself into a detrimental position of failure to adhere to the provisions contained in the SASA by not building much needed schools within the borders of South Africa. In an attempt by government to shift the blame, BELA is a clear move towards an authoritarian (at best) and/or dictatorial (at worst) style of governance. The proposed amendment bill clearly is an attempt by government and the DBE to centralise the educational system and move towards a pre-1994 education-style regime. The last regime that enforced an education system was known to be the Apartheid and we would strongly advise parliament and government to properly consider all the facts.**