NATIONAL ASSEMBLY

ORAL REPLY

QUESTION 438.

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438. . Mr B B Nodada (DA) to ask the Minister of Basic Education: to ask the Minister of Basic Education:

Whether she has commissioned any studies and/or investigations to determine the impact of her department's proposal to remove the powers of all school governing bodies (SGBs), especially in relation to its impact on the quality of education offered at schools with well-functioning SGBs; if not, why not; if so, what are the relevant details?

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Response

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Relevant case law and international instruments were scrutinised and researched in amending the provisions of the South African Schools Act, 1996 (Act No. 84 of 1996). The said research was conducted with objective of enhancing the quality of education.

There is a perception that the BELA Bill seeks to remove the powers of the Governing Bodies. However, amendments to section 5 (admission policy) and section 6 (language policy) of the South African Schools Act, 1996 (Act No. 84 of 1996) has been necessitated by some school governing bodies determining the school admission policy and language policy which are inconsistent with the Constitution of the Republic of South Africa, 1996 as they discriminate against learners on language, cultural or religious grounds. Governing Body Associations were opposed to the amendments of section 5 and 6 of the SASA. The proposed amendments in subsection 5(b) and 6(2) confers power on a Head of Department (HOD) to approve the Admissions Policy and Language Policy respectively. The Department researched many judgements one of them being the Ermelo judgement. The Constitutional Court in the Ermelo judgement made it clear that even though the function of determining a school's language policy is a devolved function (or responsibility), in terms of section 6(2) of the SASA, it is not the exclusive preserve of a SGB. The devolution of power does not mean that the SGB's right to decide the language policy is absolute. It would however be wrong to construe the devolution of power as absolute and impervious to executive intervention when the governing body exercises that power unreasonably and at odds with the constitutional warranties to receive basic education and to be taught in a language of choice.[1] The Constitution itself enjoins the state to ensure effective access to the right to receive education in a medium of instruction of choice. The measures the state is required to take must evaluate what is reasonably achievable and must keep in mind the obvious need for historical redress.[2] This power is subject to the Constitution, the SASA and any applicable provincial law. The Constitutional Court in the Ermelo judgment further held that the SGB's extensive powers and duties do not mean that the HoD is precluded from intervening, on reasonable

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[1] In *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 29, Yacoob J, writing for the majority held that "[t]he exercise of public power is always subject to constitutional control and to the rule of law or, to put it more specifically, the legality requirement of our Constitution." See further *Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 20; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 132.

[2] See section 29(2) of the Constitution. For the full text see [51] above.

grounds, to ensure that the admission and language policies of a school pay adequate heed to section 29(2) of the Constitution. Hence we amended the provision giving the HOD the power to approve the said policies as a safety net to prevent discrimination and transgression of the values espoused in the Constitution. The said clauses also have a deeming provision which states that should a policy not be approved within 60 days of receipt by the HOD it is automatically approved. There is nothing sinister about these amendments.

Clause 7 amends section 8 to provide that the code of conduct of a public school must also take into account the diverse cultural beliefs, religious observances and medical circumstances of the learners at the school.

The clause makes provision for an exemption clause, making it possible to exempt learners, upon application and on just cause shown, from complying with certain provisions of the code of conduct. If an application for exemption is refused, the learner or the parent of the learner may appeal to the HoD against the decision of the SGB and time periods within which these actions must take place are provided for. The intention of the amendment is to ensure that the school learner code of conduct respect the rights enshrined in the Bill of Rights. The proposed amendment also intends to empower the governing body to exempt the learner, based on cultural or religious grounds, to comply with the code of conduct. This amendment is informed by the United Nations Convention on the Rights of the Child, 1989 and the latest jurisprudence on this issue, as expressed in the Constitutional Court judgment of MEC for Education: Kwazulu-Natal and Others v Pillay [CCT 51/06 [2007] ZACC 21] case and other cases. The amendment seeks to bring the SASA in line with such jurisprudence

Clause 17 seeks to amend section 22 of the SASA to empower the HoD to withdraw, on reasonable grounds and after complying with prescribed requirements, "one or more functions" of an SGB. A lacuna was identified in this provision as the current provision only applies to the withdrawal of one function and fails to provide clarity on the process to withdraw functions of the governing body by the HOD. The amendment seeks to clarify who performs the function once it is withdrawn from the SGB and enhances the Promotion of Administrative Justice Act processes.